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W. Barton Patterson

DEFINING THE REACH OF THE SECURITIES EXCHANGE ACT: EXTRATERRITORIAL APPLICATION OF THE ANTIFRAUD PROVISIONS

*W. Barton Patterson**

INTRODUCTION

As cross-border securities transactions become increasingly important and common in global markets, it is no surprise that questions arise over which nation's securities laws apply to a given transaction. Hypothetically, in a given transaction, up to four different nations may assert jurisdiction and application of their laws—the nations of the purchaser(s),[1] seller(s),[2] company,[3] and stock exchange[4]—which complicates the issue.[5] The United States may unquestionably regulate securities transactions occurring within its own borders,[6] but federal courts differ over when it is appropriate to extend those regulations to largely foreign transactions.[7]

The question of when American securities laws apply extraterritorially has divided courts and scholars for decades.[8] Recently, in June 2004, the

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* J.D. Candidate, 2006, Fordham University School of Law.

1. *See* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 989 (2d Cir. 1975).

2. *See id.*

3. *See, e.g.*, Cont'l Grain (Austl.) Pty. Ltd. v. Pac. Oilseeds, Inc., 592 F.2d 409, 420 (8th Cir. 1979) (finding jurisdiction where both corporate defendants were incorporated in the United States).

4. *See, e.g.*, Straub v. Vaisman & Co., 540 F.2d 591, 595 (3d Cir. 1976) (finding jurisdiction where securities were traded on an over-the-counter exchange within the United States); James D. Cox, *Regulatory Duopoly in U.S. Securities Markets*, 99 Colum. L. Rev. 1200, 1230 (1999) (discussing how this is the approach in most other Western jurisdictions).

5. *See* Stephen J. Choi, *Channeling Competition in the Global Securities Market*, 16 Transnat'l Law. 111, 114-15 (2002) (discussing how this leads to uncertainty for corporations).

6. *See* Restatement (Third) of Foreign Relations Law § 416(1) (1987).

7. *See* discussion *infra* Part I.B.1 (describing the tests the courts employ). For the purposes of this Note, largely foreign transactions are those in which foreign investors have invested in corporations traded on foreign exchanges, and complain of fraudulent conduct that took place largely in a foreign country. These investors have been referred to as "foreign cubed." Stuart M. Grant et al., *The Role of Foreign Investors in Federal Securities Class Actions*, *in* Securities Litigation & Enforcement Institute 2004, at 91, 96 (PLI Corporate Law and Practice, Course Handbook Series No. B-1442, 2004).

8. *See, e.g.*, Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 667 (7th Cir. 1998) (conduct must be substantial and material); Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 31 (D.C. Cir. 1987) (all elements of liability must be within the United States for jurisdiction to be exercised); Grunenthal GmbH v. Hotz, 712 F.2d 421, 425 (9th Cir. 1983) (conduct must be significant and further the fraudulent scheme); SEC v. Kasser, 548 F.2d 109, 114

U.S. District Court for the Eastern District of Virginia became the first court in the Fourth Circuit to confront this issue.[9] In 1999, a British telecommunications company, Cable & Wireless ("C&W"), made allegedly false and misleading statements in the sale of a subsidiary to a German company.[10] The statements allegedly inflated C&W's earnings.[11] A Canadian pension fund that had invested in C&W brought a class action in the Eastern District of Virginia on behalf of a class of investors.[12] Jurisdiction became an issue because a Canadian plaintiff was suing a British company, traded on the London Stock Exchange, over actions and statements related to its sale of a British subsidiary to a German company.[13] Although the only connection to the United States was a series of alleged "sham capacity swap transactions," part of which occurred in Virginia, and which also inflated earnings, the plaintiffs argued that United States securities laws should apply.[14] C&W countered that any United States-based conduct was "minor and insignificant" compared to the vast majority of the conduct alleged in the complaint.[15] The district court agreed with the plaintiff and found subject matter jurisdiction[16] but finally dismissed the complaint for inadequacy of pleadings under the Securities Exchange Act of 1934 ("the Act").[17]

The district court adopted a rule under which conduct in the United States must be "(1) significant and (2) substantial or material to the larger scheme" in order to trigger application of the Act.[18] The court believed that this formula would do justice to the underlying purposes of the Act without creating an overly broad jurisdictional net.[19] The court labeled this rule the "middle ground" between the various circuits,[20] although there is

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(3d Cir. 1977) (any conduct designed to further a fraudulent scheme will support jurisdiction); Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 992-93 (2d Cir. 1975) (preparatory activities do not suffice to establish jurisdiction, and conduct within the United States must directly cause the harm); Travis v. Anthes Imperial Ltd., 473 F.2d 515, 524 (8th Cir. 1973) (conduct must be significant); *In re* Cable & Wireless, PLC, Sec. Litig., 321 F. Supp. 2d 749, 757-58 (E.D. Va. 2004); *see also* discussion *infra* Part I.B.1 (describing the tests the courts employ).

9. *In re Cable & Wireless*, 321 F. Supp. 2d at 757-59.

10. *Id.* at 753-54.

11. *Id.* at 754.

12. *Id.* at 755. Although the facts do not resolve whether any of these investors were American, the court's ruling on subject matter jurisdiction was confined exclusively to foreign investors. *Id.* at 757.

13. *Id.* at 754-55.

14. *Id.* at 755, 764. Defendants argued that the plaintiff had not shown that there were any adverse effects on American purchasers or sellers of securities. *Id.* at 755.

15. *Id.*

16. *Id.* at 762.

17. *Id.* at 766.

18. *Id.* at 763.

19. *Id.* at 762-63.

20. *Id.* at 762.

considerable disagreement and confusion over how to classify the rules announced by the various circuits.[21]

This Note explains the arguments supporting the many sides of this debate, as well the problems inherent in each of these positions, and identifies a more efficient approach that relies on the purposes and principles underlying these various positions. Part I of this Note examines the Act and its underlying purposes, the relevant principles of international assertion of jurisdiction, and the tests the courts use to determine such jurisdiction. Part II examines the justifications and arguments behind both assertion and denial of jurisdiction, the problems attendant on the current approaches, and recommendations by commentators to make global securities regulation competitive. Part III argues that corporations should be allowed, with some limitations, to choose for themselves which nation's securities laws will regulate them.

I. PRINCIPLES AND TESTS

In order to understand the debate regarding the extraterritoriality of the Act, it is helpful to have some basic knowledge of the Act itself, the relevant principles of international law and statutory interpretation, and the circuit split on this issue. Accordingly, Part I.A will discuss the Act, its underlying purposes, and the lack of congressional guidance as to its extraterritorial application. Part I.A will then address The Restatement (Third) of Foreign Relations Law ("the Restatement"), which contains relevant sections describing the United States's authority and ability, under international law, to regulate international conduct. Lastly, Part I.A examines a canon of statutory interpretation that, unless Congress explicitly provides otherwise, a statute is normally presumed to apply only domestically. Part I.B takes a closer look at the tests that the federal courts have developed to determine when they may exercise jurisdiction over foreign securities transactions, and the circuit split regarding one of those tests. Part I.B then examines the problems attendant on the current formulations of those tests. One of these problems, the uncertainty resulting from the lack of a predetermined jurisdiction, is examined more closely in Part I.B, along with a proposal to eliminate this problem, and the fears some commentators have expressed regarding that proposal.

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21. *See infra* notes 85-89 and accompanying text (discussing the disagreement between courts and scholars over how to classify the various rules). For example, Judge Gerald Bruce Lee described the U.S. Courts of Appeals for the Second, Fifth, and D.C. Circuits as comprising the "most restrictive" group, the Seventh, Eighth, and Ninth Circuits as comprising the intermediate group, and the Third Circuit as having a liberal standard. *In re Cable & Wireless*, 321 F. Supp. 2d at 758. The Seventh Circuit, on the other hand, classifies the D.C. Circuit as the only member of the restrictive group, the Second and Fifth Circuits, and itself, as constituting the intermediate group, and the Third, Eighth, and Ninth Circuits as being the most relaxed group. Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 665-67 (7th Cir. 1998).

A. *Background and Relevant Principles*

1. The Securities Exchange Act of 1934[22]

One purpose of enacting the Act was to prevent misrepresentation and fraud in the securities industry in order to protect American investors and the United States securities markets.[23] Because of this purpose, the antifraud provisions of the Act are among the most important and most litigated.[24] Among them, section 10(b) is particularly important, especially in the context of transnational securities transactions.[25] Although nothing in the statute expressly provides for a private right of action,[26] the federal courts have accepted that such an action is implied.[27]

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22. While there are also important antifraud and disclosure provisions in the Securities Act of 1933, the question of extraterritorial jurisdiction under that Act has largely been answered by Regulation S. *See* 17 C.F.R. §§ 230.901-.905 (2005).

23. *See, e.g.*, 15 U.S.C. § 78b (2000) (stating that securities must be regulated "in order to protect interstate commerce, the national credit, and the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions"); SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963) ("[a] fundamental purpose" behind the securities legislation was to ensure full disclosure); Robinson v. TCI/US W. Cable Commc'ns Inc., 117 F.3d 900, 906 (5th Cir. 1997) ("What little guidance we can glean from the securities statutes indicates that they are designed to protect American investors and markets . . . ."); Restatement (Third) of Foreign Relations Law § 416 cmt. a (1987) (stating that "the principal purpose" of the securities legislation is to protect American investors and markets); *see also* Kaveh Kashef, *Securities Law: Understanding Foreign Subject Matter Jurisdiction Under Section 10(b) of the Exchange Act of 1934*, 8 Tul. J. Int'l & Comp. L. 533, 534-35 (2000) (describing the history of and motivations behind the federal securities laws).

24. *See generally* William T. Allen & Reinier Kraakman, Commentaries and Cases on the Law of Business Organization § 14.4.1 (2003).

25. *See* 15 U.S.C. § 78j(b). Rule 10b-5, promulgated under this section, provides:

> It 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,
> (a) To employ any device, scheme, or artifice to defraud,
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5; *see also* Kun Young Chang, *Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction*, 9 Fordham J. Corp. & Fin. L. 89, 94 (2003) (describing the relative importance of the antifraud provisions in foreign transactions).

26. *See, e.g.*, Kardon v. Nat'l Gypsum Co., 69 F. Supp. 512, 514 (E.D. Pa. 1946) (stating that the express provision for private remedies under certain other sections of the Act does not indicate that Congress wished to deny such remedies under section 10(b)).

27. *See, e.g., id.* (holding that a private right of action is implied, given the broad purposes of the Act). *Kardon* was the first case to imply a private right of action. Allen &

The U.S. Supreme Court has traditionally construed section 10(b) rather broadly to give effect to the remedial purposes behind the Act.[28] Thus, it is not surprising that federal courts often give extraterritorial application to the Act, although the statute itself does not provide for this.[29]

While up to four countries may theoretically assert jurisdiction in any case,[30] Congress has provided no guidance on the subject.[31] The statute neither includes nor excludes suits based upon securities transactions occurring in foreign jurisdictions, or with foreign companies, exchanges, or investors.[32] When establishing tests for when American securities laws may apply to largely foreign securities fraud cases, courts have often complained of this lack of guidance.[33] Unfortunately, as the Court of Appeals for the District of Columbia stated, "[i]f the text of the 1934 Act is relatively barren, even more so is the legislative history. . . . [O]ur inquiry becomes the dubious but apparently unavoidable task of discerning a purely hypothetical legislative intent."[34] However, given the complete lack of statutory provisions granting jurisdiction, even the Second Circuit, often said to employ a "restrictive" test when determining jurisdiction,[35] has said that it is "elementary" that American securities laws must apply to many foreign transactions, even if they are exempt from registration requirements and do not take place on American exchanges.[36] As securities markets have become increasingly international due to the phenomenon of globalization, the free flow of capital across jurisdictional lines in staggering amounts makes the issue more important than ever.[37]

Kraakman, *supra* note 24, § 14.4.1. *But see* Alexander v. Sandoval, 532 U.S. 275 (2001) (limiting the implication of private rights of action to statutes under which Congress intended a private right of action, regardless of whether such an action would otherwise be compatible with the statute).

28. Tcherepnin v. Knight, 389 U.S. 332, 336 (1967). Some have argued that this broad reading of the Act, along with its stringent requirements, have placed United States corporations at a competitive disadvantage. *See* Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. Cal. L. Rev. 903, 924 (1998) (noting that this disadvantage stems from having to "comply with one of the most rigorous and expensive regimes in the world").

29. *See, e.g.*, Itoba Ltd. v. Lep Group PLC, 54 F.3d 118 (2d Cir. 1995); Grunenthal GmbH v. Hotz, 712 F.2d 421 (9th Cir. 1983); SEC v. Kasser, 548 F.2d 109 (3d Cir. 1977).

30. *See supra* note 5 and accompanying text.

31. *See infra* notes 32-34 and accompanying text.

32. *See* George K. Chamberlain, Annotation, *Subject Matter Jurisdiction of Securities Fraud Action Based on Foreign Transactions, Under Securities Exchange Act of 1934*, 56 A.L.R. Fed. 288, 291-92 (1982 & Supp. 2004).

33. *See, e.g.*, Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir. 1975) ("We freely acknowledge that if we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions, we would be unable to respond.").

34. Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 30 (D.C. Cir. 1987).

35. *See, e.g.*, *In re* Cable & Wireless, PLC, Sec. Litig., 321 F. Supp. 2d 749, 758 (E.D. Va. 2004) (referring to the group containing the Second Circuit as the "most restrictive").

36. *Bersch*, 519 F.2d at 986.

37. *See* Chang, *supra* note 25, at 90; *see also* Merritt B. Fox, *Securities Disclosure in a Globalizing Market: Who Should Regulate Whom*, 95 Mich. L. Rev. 2498, 2502 (1997) (arguing that resolution of who should regulate international transactions "is of growing importance for the proper functioning of the global economy").

2. The Restatement (Third) of Foreign Relations Law

In a securities transaction which is almost completely foreign in nature, there must be some justification to assert jurisdiction. The Restatement contains several important provisions in this regard, listing the various reasons why a nation may regulate extraterritorial conduct in a given instance. The Restatement is especially important as courts presume that a statute does not "exceed what is permitted under international law," unless Congress inserts explicit language to the contrary.[38] Sections 402 and 403 of the Restatement generally describe when assertion of jurisdiction extraterritorially is allowable and reasonable, while section 416 concerns jurisdiction over securities claims specifically.[39]

Section 402, "Bases of Jurisdiction to Prescribe," is a very general provision, but one which is particularly relevant to the tests federal courts have adopted. Subsections (1)(a)[40] and (1)(c)[41] are by far the most important in the context of transnational securities litigation. These sections recognize that a nation may prescribe "conduct that, wholly or in substantial part, takes place within its territory," and "conduct outside its territory that has or is intended to have substantial effect within its territory."[42] These two justifications of jurisdiction seem to form the core of the two tests that federal courts have used in determining the extraterritoriality of American securities laws.[43]

Section 416 is entitled "Jurisdiction to Regulate Activities Related to Securities."[44] Subsection (1)[45] mainly deals with instances in which

38. Merritt B. Fox, *The Political Economy of Statutory Reach: U.S. Disclosure Rules in a Globalizing Market for Securities*, 97 Mich. L. Rev. 696, 722 (1998) (describing various presumptions used in statutory interpretation that are important to the securities laws).

39. Restatement (Third) of Foreign Relations Law §§ 402, 403, 416 (1987).

40. This subsection provides that, subject to qualifications contained in section 403, a state may prescribe law with respect to "conduct that, wholly or in substantial part, takes place within its territory." *Id.* § 402(1)(a).

41. This subsection provides that, subject to qualifications contained in section 403, a state may prescribe law with respect to "conduct outside its territory that has or is intended to have substantial effect within its territory." *Id.* § 402(1)(c).

42. *Id.* § 402(1)(a), (c).

43. *See infra* Part I.B.1. The "effects" test finds jurisdiction when foreign conduct has produced substantial domestic effects. *See* Schoenbaum v. Firstbrook, 405 F.2d 200, 206-09 (2d Cir. 1968). The "conduct" test finds jurisdiction when domestic conduct has produced effects in foreign jurisdictions. *See* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1333-35 (2d Cir. 1972). For an example of a court relying on subsection (1)(c) when applying the effects test, see *Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 262 (2d Cir. 1989).

44. Restatement (Third) of Foreign Relations Law § 416 (1987).

45. This subsection provides:

> (1) The United States may generally exercise jurisdiction to prescribe with respect to
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> (a) (i) any transaction in securities carried out in the United States to which a national or resident of the United States is a party, or

assertion of jurisdiction appears obvious and uncontroversial, such as when the transaction occurs in the United States (as well as conduct in foreign countries significantly related to such a transaction which has a "substantial effect in the United States"), or when the transaction occurs elsewhere but the conduct involved takes place "predominantly in the United States."[46] Subsection (2),[47] however, allows assertion of jurisdiction in other instances, if "such exercise of jurisdiction is reasonable in the light of section 403."[48] In particular, the Restatement is concerned with three factors: whether the transaction or conduct has (or reasonably could have) a "substantial effect" on securities markets or investors within the United States,[49] "whether representations are made or negotiations are conducted in the United States,"[50] and whether the parties involved are United States nationals or residents.[51]

> (ii) any offer to enter into a securities transaction, made in the United States by or to a national or resident of the United States;
>
> (b) any transaction in securities
>
> (i) carried out, or intended to be carried out, on an organized securities market in the United States, or
>
> (ii) carried out, or intended to be carried out, predominantly in the United States, although not on an organized securities market;
>
> (c) conduct, regardless of where it occurs, significantly related to a transaction described in Subsection (1)(b), if the conduct has, or is intended to have, a substantial effect in the United States;
>
> (d) conduct occurring predominantly in the United States that is related to a transaction in securities, even if the transaction takes place outside the United States; or
>
> (e) investment advice or solicitation of proxies or of consents with respect to securities, carried out predominantly in the United States.

Id. § 416(1).

46. *Id.*

47. This subsection provides:

> (2) Whether the United States may exercise jurisdiction to prescribe with respect to transactions or conduct other than those addressed in Subsection (1) depends on whether such exercise of jurisdiction is reasonable in the light of § 403, in particular
>
> (a) whether the transaction or conduct has, or can reasonably be expected to have, a substantial effect on a securities market in the United States for securities of the same issuer or on holdings in such securities by United States nationals or residents;
>
> (b) whether representations are made or negotiations are conducted in the United States;
>
> (c) whether the party sought to be subjected to the jurisdiction of the United States is a United States national or resident, or the persons sought to be protected are United States nationals or residents.

Id. § 416(2).

48. *Id.*; *see also infra* notes 52-54 and accompanying text (discussing section 403).

49. Restatement (Third) of Foreign Relations Law § 416(2)(a) (1987).

50. *Id.* § 416(2)(b).

51. *Id.* § 416(2)(c). For an example of a court relying on section 416 when determining subject matter jurisdiction under the securities laws, see *Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 128 n.12, 129 & n.15 (2d Cir. 1998).

Section 403, to which section 416(2) refers, is entitled "Limitations on Jurisdiction to Prescribe."[52] It states that a nation may not exercise jurisdiction when doing so would be "unreasonable," which is "determined by evaluating all relevant factors."[53] It lists many such factors, including "the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory," as well as the importance of regulating the activity compared to the importance and reasonableness of another jurisdiction applying its own laws.[54]

It is important to remember that these are simply definitions of when jurisdiction is allowable. It is generally the role of a statute to determine when jurisdiction shall be exercised; the Restatement just purports to set

52. This section provides:

(1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

(a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, including those set out in Subsection

(2); a state should defer to the other state if that state's interest is clearly greater.

Restatement (Third) of Foreign Relations Law § 403 (1987 & Supp. 2004). *But see* Mark W. Janis, An Introduction to International Law 337 (4th ed. 2003) (criticizing this section as "unsupported by precedent").

53. Restatement (Third) of Foreign Relations Law § 403 (1987 & Supp. 2004).

54. *Id.* § 403(2). For an example of a court relying on section 403 when determining subject matter jurisdiction under the securities laws, see *AVC Nederland B.V. v. Atrium Investment Partnership*, 740 F.2d 148, 154-55 (2d Cir. 1984).

limits on jurisdiction granted by such statutes.[55] Thus, while these provisions are certainly helpful in determining when jurisdiction should be exercised, they hardly make up for congressional silence on the matter.

3. Canon of Interpretation Against Extraterritorial Application

When Congress is silent as to extraterritorial application of a law, under an accepted canon of statutory interpretation, the law should not be applied extraterritorially.[56] This is "a longstanding principle of American law."[57] Its classic formulation is "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[58] However, the Supreme Court has held that this canon of interpretation can be overcome.[59] The two exceptions are where a statute must be applied extraterritorially in order to effectuate its basic purpose, or where the foreign conduct "is intended to, and has, significant effects in the United States."[60] As the Act's language and legislative history are silent as to extraterritorial application,[61] this canon creates a strong presumption that it should only be applied domestically. However, the courts have often found this presumption to be overcome, and have developed tests to determine when the Act should be applied extraterritorially.

B. *The "Effects" and "Conduct" Tests in Determining Subject Matter Jurisdiction*

This section examines the two tests the federal courts developed to deal with the question of extraterritorial application of the Act. It first describes

55. *See* SEC v. Kasser, 548 F.2d 109, 113 & n.12 (3d Cir. 1977) (referring to the Restatement as setting "permissible limits of an exercise of jurisdiction by this country").

56. *See* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 158-59 (1993) (section 243 of the Immigration and Nationality Act of 1952 does not apply extraterritorially); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 246-47 (1991) (employment discrimination laws do not apply extraterritorially); Foley Bros., Inc. v. Filardo, 336 U.S. 281, 284-85 (1949) (federal labor laws do not apply extraterritorially).

57. *Arabian Am. Oil*, 499 U.S. at 248.

58. *Foley Bros.*, 336 U.S. at 285; *see also* Fox, *supra* note 38, at 721-22.

59. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 794-99 (1993) (the Sherman Antitrust Act, although silent as to extraterritorial jurisdiction, applies extraterritorially); United States v. Bowman, 260 U.S. 94, 99 (1922) (a criminal law making it an offense to present a false claim to the government applies extraterritorially when a crime is committed on a vessel flying a United States flag, although such extraterritorial jurisdiction is not provided for); United States v. Corey, 232 F.3d 1166, 1171 (9th Cir. 2000) (a criminal statute expressly applying to "special maritime and territorial jurisdiction of the United States" applies extraterritorially). *But see* F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (holding that while the Sherman Act may be applied extraterritorially, a federal court does not have subject matter jurisdiction over the claims of foreign plaintiffs if those claims are independent of any effects felt within the United States).

60. Fox, *supra* note 38, at 722; *accord* Michael J. Calhoun, Comment, *Tension on the High Seas of Transnational Securities Fraud: Broadening the Scope of United States Jurisdiction*, 30 Loy. U. Chi. L.J. 679, 688 (1999) (describing how this canon of construction can be overcome).

61. *See supra* notes 32-34 and accompanying text.

the tests themselves, as well as the sharp division in the courts as to the precise nature of the "conduct test."[62] This part then discusses the problems inherent in the nature of these tests.[63] Lastly, this part examines a radically different proposal, as well as what may be the biggest challenge to this alternative.[64]

1. The Nature of the Tests

Despite the lack of any statutory language or legislative history indicating whether the Act applies extraterritorially,[65] federal courts have applied it to many extraterritorial securities transactions. To determine when it should so apply, two tests have been fashioned. These are the "effects test" and the "conduct test."[66]

Schoenbaum v. Firstbrook was the first case to apply the effects test to the securities laws.[67] The test seeks to determine whether any conduct in a foreign state has produced a "substantial adverse effect on American investors or securities markets."[68] It has also been formulated as whether actions that took place in foreign countries foreseeably and substantially harmed United States interests.[69] General effects on United States markets are insufficient; specific investors within the United States must be harmed.[70] This test seems to be supported by sections 402(1)(c) and 416(2)(a) of the Restatement, which justify a nation's regulation of "conduct outside its territory that has or is intended to have substantial effect within its territory," and "transaction[s] or conduct [which] has, or can reasonably be expected to have, a substantial effect on a securities market in the United States for securities of the same issuer or on holdings in such securities by United States nationals or residents."[71] However, the

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62. *See* discussion *infra* Part I.B.1.
63. *See* discussion *infra* Part I.B.2.
64. *See* discussion *infra* Part I.B.3.
65. *See supra* notes 32-34 and accompanying text (discussing the lack of legislative history or command).
66. *See, e.g.*, *In re* Cable & Wireless, PLC, Sec. Litig., 321 F. Supp. 2d 749, 757 (E.D. Va. 2004) (discussing the basics of these tests).
67. Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968).
68. Robinson v. TCI/US W. Cable Commc'ns Inc., 117 F.3d 900, 905 (5th Cir. 1997).
69. Mak v. Wocom Commodities Ltd., 112 F.3d 287, 289 (7th Cir. 1997) (quoting Tamari v. Bache & Co. (Lebanon) S.A.L., 730 F.2d 1103, 1108 (7th Cir. 1984)).
70. Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 988 (2d Cir. 1975) ("[W]e do not doubt that the collapse of [the company] after the offering had an unfortunate financial effect in the United States. Nevertheless we conclude that the generalized effects described by [expert witnesses] would not be sufficient to confer subject matter jurisdiction . . . ."); *In re Cable & Wireless*, 321 F. Supp. 2d at 757.
71. Restatement (Third) of Foreign Relations Law §§ 402(1)(c), 416(2)(a) (1987); *see also supra* notes 42, 49 and accompanying text (discussing these provisions of the Restatement).

true scope of the effects test has never been adequately defined, and it has the potential to be extremely broad.[72]

Another Second Circuit case, *Leasco Data Processing Equipment Corp. v. Maxwell*, established the conduct test under the securities laws.[73] While the courts are divided over how to define this test,[74] all would recognize that it seeks to determine "whether the fraudulent conduct that forms the alleged violation occurred in the United States."[75] This is the test used to determine when jurisdiction may be asserted over claims between foreign parties, often justified on the grounds that Congress did not intend corporations to use the United States as a base for fraudulent securities schemes, even if the victims of these schemes are foreigners.[76] The Third Circuit has found further support for the concept of a conduct test by stating that the Act seems to be particularly concerned with fraudulent conduct, "having no requirement that accomplishment of the attempted fraud be a precondition to statutory liability."[77] The Third Circuit interpreted this to mean that, if conduct in furtherance of the fraud occurs within the borders of the United States, it does not matter where (or even whether) the fraud is accomplished.[78]

A court will have jurisdiction over a claim if it satisfies either test.[79] The effects test is easily passed by plaintiffs who are citizens or residents of the United States, but the conduct test has proven troublesome, unwieldy, and unpredictable.[80] Federal courts differ over how much the United States-based conduct must be causally related to the fraud and to the harm.[81] This difference has led to as many as six various tests[82] (excluding the Fourth

72. *See infra* notes 104-05 and accompanying text.

73. Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972).

74. *See, e.g.*, Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 665-66 (7th Cir. 1998) (noting that although the courts agree that the Act must be applied extraterritorially in certain instances, "agreement appears to end at that point"); *Cable & Wireless*, 321 F. Supp. 2d at 758, 762-63 (discussing the different positions); Calhoun, *supra* note 60, at 681 (noting this "sharp disagreement"); Chang, *supra* note 25, at 96-98 (briefly discussing this split).

75. Robinson v. TCI/US W. Cable Commc'ns Inc., 117 F.3d 900, 905 (5th Cir. 1997).

76. IIT v. Vencap, Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975); *In re Cable & Wireless*, 321 F. Supp. 2d at 757.

77. SEC v. Kasser, 548 F.2d 109, 114 (3d Cir. 1977).

78. *Id.*

79. *In re Cable & Wireless*, 321 F. Supp. 2d at 758-59. At least one court has held that, if neither test is met in a strict sense, a court may look at both tests, aggregate the factors, and find jurisdiction. Itoba Ltd. v. Lep Group PLC, 54 F.3d 118, 122 (2d Cir. 1995). *But see* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 989-90 (2d Cir. 1975) (declining to allow intermixing of the two tests); *In re Cable & Wireless*, 321 F. Supp. 2d at 764 (ruling that the unusual facts of *Itoba* warrant restriction of its holding to extreme cases).

80. *See infra* notes 81-87 and accompanying text (describing the division and confusion regarding the conduct test).

81. Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 665 (7th Cir. 1998).

82. *See id.* at 667 (conduct must be substantial and material); Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 31 (D.C. Cir. 1987) (all elements of liability must be within the United States); Grunenthal GmbH v. Hotz, 712 F.2d 421, 425 (9th Cir. 1983) (conduct must be significant and further the fraudulent scheme); SEC v. Kasser, 548 F.2d 109, 114 (3d Cir. 1977) (only "some" conduct is required); *Bersch*, 519 F.2d at 992-93 (preparatory

Circuit, as the Court of Appeals there has yet to address the issue),[83] all of which are difficult to define in relation to one another.[84]

Courts and scholars have recognized three general categories in which to place the various holdings of the circuit courts on the conduct test: the broad approach, the intermediate (or "balancing" approach), and the restrictive approach.[85] Unfortunately, they disagree over which court belongs in which category.[86] The problem is compounded by the fact that almost every circuit seems to believe it is adopting the Second Circuit's rule.[87] While it thus appears that any classification of jurisprudence into categories is misleading, this Note adopts the classifications recognized by the Eastern District of Virginia in *Cable & Wireless*[88] (as one of the most recent cases to analyze the jurisprudence), with the reservation that the D.C. Circuit's standard is more restrictive than either the Second or Fifth's and perhaps belongs in its own category.[89]

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activities are insufficient, and conduct must directly cause the harm); Travis v. Anthes Imperial Ltd., 473 F.2d 515, 524 (8th Cir. 1973) (conduct must be significant); *see also infra* notes 90-99 and accompanying text (discussing these approaches in more detail).

83. *See In re* Royal Ahold N.V. Sec. & ERISA Litig., 351 F. Supp. 2d 334, 356 (D. Md. 2004); *see also supra* notes 18-21 and accompanying text (discussing the approach the district court adopted).

84. *See infra* notes 85-87 and accompanying text (discussing the problems with trying to classify the various rules).

85. *See, e.g., Kauthar*, 149 F.3d at 665-66; *In re* Cable & Wireless, PLC, Sec. Litig., 321 F. Supp. 2d 749, 758, 762-63 (E.D. Va. 2004); Calhoun, *supra* note 60, at 681-82.

86. For example, *In re Cable & Wireless* described the Second, Fifth, and D.C. Circuits as comprising the "most restrictive" group, the Seventh, Eighth, and Ninth Circuits as comprising the intermediate group, and the Third Circuit as having the "most relaxed standard." 321 F. Supp. 2d at 758. The Seventh Circuit, on the other hand, classifies the D.C. Circuit as the sole member of the most restrictive group, the Second and Fifth Circuits, as well as itself, as constituting the intermediate, balancing group, and the Third, Eighth, and Ninth Circuits as being the most liberal group. *Kauthar*, 149 F.3d at 665-67. Another court in the Fourth Circuit found just two groups; the Second, Fifth, Seventh and D.C. Circuits constitute the restrictive group, while the Third, Eighth, and Ninth form the relaxed group. *Royal Ahold*, 351 F. Supp. 2d at 358-60.

87. *See, e.g., Kauthar*, 149 F.3d at 667 ("The Second and Fifth Circuit's iterations of the test embody a satisfactory balance of these competing considerations."); Robinson v. TCI/US W. Cable Commc'ns Inc., 117 F.3d 900, 906 (5th Cir. 1997) ("We adopt the Second Circuit's test as the better reasoned of the competing positions."); *Zoelsch*, 824 F.2d at 32 ("[We] adopt the Second Circuit's approach."); *Grunenthal*, 712 F.2d at 425-26 (explaining why the district court misinterpreted the Second Circuit's rule); *Kasser*, 548 F.2d at 115 (agreeing with the "Second Circuit, a court with especial expertise in matters pertaining to securities"); *Travis*, 473 F.2d at 523 (relying heavily on Second Circuit jurisprudence in making its own ruling).

88. *See supra* note 86 (explaining the classification used in *In re Cable & Wireless*).

89. *Kauthar*, 149 F.3d at 665-66; *see also infra* notes 95-97 (describing the D.C. Circuit's rule).

The more restrictive approach was developed by the Second Circuit, to which the other circuits often defer in matters of securities litigation.[90] This approach requires the conduct that occurs in the United States to include "the perpetration of fraudulent acts themselves,"[91] not merely related or "preparatory" activities.[92] Additionally, the conduct must directly cause the harm.[93] The Fifth Circuit uses the same test.[94] The D.C. Circuit purports to do the same,[95] but may also require all elements of liability to be met before jurisdiction will be exercised.[96] The D.C. Circuit has indicated that it only begrudgingly exercises any jurisdiction.[97] The Seventh, Eighth, and Ninth Circuits, while employing slightly different language, require only some substantial or significant conduct to occur within the United States.[98] The Third Circuit will exercise jurisdiction "where at least some activity designed to further a fraudulent scheme occurs within this country," a very liberal test.[99]

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90. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting) (referring to the Second Circuit as "the 'Mother Court' in this area of the law").

91. IIT v. Vencap, Ltd., 519 F.2d 1001, 1018 (2d Cir. 1975) (holding that jurisdiction may be exercised over foreign plaintiffs' claims against a Bahamian corporation if the United States was used to manufacture fraudulent security devices for export).

92. Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 987 (2d Cir. 1975) (dismissing the claims of foreign investors in a Canadian corporation).

93. *Id.* If those who are harmed are Americans living abroad, a less rigorous approach applies. *Id.* at 992-93.

94. *See* Robinson v. TCI/US W. Cable Commc'ns Inc., 117 F.3d 900, 906 (5th Cir. 1997) (holding that the court had jurisdiction over a claim a by minority shareholder in an English corporation against the controlling group).

95. *See* Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 33 (D.C. Cir. 1987) (holding that the court had no jurisdiction over the claims by the West German plaintiffs against an American accounting firm).

96. *See id.* at 30-31.

97. *See id.* at 32.

98. *See* Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 667 (7th Cir. 1998) (finding jurisdiction over foreign plaintiffs' securities claims against numerous defendants); Butte Mining PLC v. Smith, 76 F.3d 287, 291 (9th Cir. 1996) (no jurisdiction over claims against British company just because its assets are located in the United States); Grunenthal GmbH v. Hotz, 712 F.2d 421, 426 (9th Cir. 1983) (finding jurisdiction over claims between foreign plaintiffs and foreign defendants of numerous nationalities); Cont'l Grain (Austl.) Pty. Ltd. v. Pac. Oilseeds, Inc., 592 F.2d 409, 421 (8th Cir. 1979) (finding jurisdiction over claims that domestic conduct caused harm in Australia); Travis v. Anthes Imperial Ltd., 473 F.2d 515, 524 (8th Cir. 1973) (finding jurisdiction over claims by residents of the United States against a Canadian corporation's tender offer for another Canadian corporation's shares); Zurich Capital Mkts. Inc. v. Coglianese, 332 F. Supp. 2d 1087, 1113 (N.D. Ill. 2004) (finding jurisdiction over claims by investors in a Bahamian corporation against an accountant).

99. SEC v. Kasser, 548 F.2d 109, 114 (3d Cir. 1977) (finding that the Securities and Exchange Commission ("SEC") could bring an action against a defendant even though the only victim of the fraudulent act was a Canadian corporation).

2. Problems Inherent in the Current Use of the Conduct and Effects Tests

Jurisprudence on the extraterritoriality of federal securities laws has produced numerous problems. Most of these problems concern the general exercise of jurisdiction.[100] Some, however, concern the specific elements of the two tests.[101] The conduct test's primary problem is that "conduct" itself is often difficult to define in the context of a global financial community.[102] The Internet further complicates matters; if it is used to perpetrate securities fraud, then it may be that no acts causing harm have actually been committed within the United States.[103] A problem with the effects test is that it broadens with every technological advance that makes United States investors and markets more accessible to the world.[104] This is especially true as the extent and scope of the effects test have never been adequately defined.[105]

A more general problem is the confusion resulting from the difficulty of defining the tests,[106] the important role of policy and specific facts in many determinations,[107] and the inability to clearly determine which standard each court applies.[108] As one author has written, "[c]onsidering the number of variables and interpretations involved in determining foreign subject matter jurisdiction, error by any court is not unfathomable. The conflict between the circuits and lack of clear statutory language leads to this problem."[109] The result is that it is extraordinarily difficult for corporations to be placed on notice of when and how they may be subject to United States securities laws and regulations.[110] Aside from concerns of equity, this leads to inefficiency:

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100. *See infra* notes 106-20 and accompanying text (describing these problems).

101. *See infra* notes 102-05 and accompanying text (discussing the nebulous nature of these tests).

102. Chang, *supra* note 25, at 109 (citing Choi & Guzman, *supra* note 28, at 913).

103. *Id.*; Choi & Guzman, *supra* note 28, at 915 & n.52; *see also* Michael A. Collora & David M. Osborne, *Extraterritorial Jurisdiction in Cyberspace*, *in* Cybercrime and Corporate Fraud: Rights and Remedies (2000), *available at* http://dwyercollora.com/article.cfm?cmf_id=392.

104. *See* Chang, *supra* note 25, at 109-10.

105. *See id.* at 110; *see also* Choi & Guzman, *supra* note 28, at 914-15 (describing how potentially broad the current tests are).

106. *See supra* notes 102-05 and accompanying text (describing this difficulty); *see also* discussion *supra* Part I.B.1 (describing the nature of the tests and the confusion surrounding them).

107. *See infra* notes 158-60 and accompanying text (explaining the role of policy in decisions to exercise jurisdiction, and criticisms of that role).

108. *See supra* notes 85-87 and accompanying text (describing the problems with attempting to classify the various standards).

109. Kashef, *supra* note 23, at 554.

110. *See, e.g.*, Chang, *supra* note 25, at 108-09 ("[P]arties involved in transnational transactions cannot reasonably predict the jurisdictional consequences of their actions."); Choi, *supra* note 5, at 115 ("[I]nvestors and issuers face uncertainty as to what regulations will apply to their transactions."); Louise Corso, Note, *Section 10(b) and Transnational*

> [T]ransactions involving U.S. investors could trigger U.S. securities rules even in cases where the issuer involved is already complying with some other country's regulatory regime. These U.S. approaches would accordingly produce undesirable results such as redundant and unnecessarily costly systems of overlapping regulation, and would thereby impede the free flow of capital across borders.[111]

Another problem is that there is no general international agreement on what constitutes a fraudulent transaction.[112] Insider trading presents a good example: "[W]hile some commentators argue for the continued prohibition of insider trading, the case for prohibition is no longer overwhelming and is at best on a par with the case for deregulating it."[113] While the United States and many other countries make insider trading illegal, this is not a universal rule; in Switzerland such conduct was merely "considered dishonorable" as late as 1982.[114]

International conflict over unwanted extraterritorial application of United States securities laws, while practically nonexistent to date,[115] presents another potential problem. When exercising jurisdiction over largely foreign transactions, the United States interferes with the "regulatory systems of other countries and compel[s] foreign banks and other institutions to reveal information that is otherwise protected under the laws of their countries."[116] Such conflicts, as well as general resentment over breaches of international comity, may "catalyze international discord and injury to U.S. markets."[117]

Securities Fraud: A Legislative Proposal to Establish a Standard for Extraterritorial Subject Matter Jurisdiction, 23 Geo. Wash. J. Int'l L. & Econ. 573, 601 (1989) (noting that these decisions are "highly discretionary rulings of particular judges"). Corporations are not the only ones who suffer from this confusion, as judges must also wade through the mire of jurisprudence, and their uncertainty often leads them to apply the federal securities laws too broadly. *See* Chang, *supra* note 25, at 108-09.

111. Chang, *supra* note 25, at 102.

112. *Id.* at 102, 117-18; George C. Nnona, *International Insider Trading: Reassessing the Propriety and Feasibility of the U.S. Regulatory Approach*, 27 N.C. J. Int'l L. & Com. Reg. 185, 214-15 (2001) (criticizing the unilateral approach the United States has taken to regulate global insider trading, considering that it is not universally condemned); Kellye Y. Testy, *Comity and Cooperation: Securities Regulation in a Global Marketplace*, 45 Ala. L. Rev. 927, 957 (1994) ("[N]ations have often widely divergent views on what constitutes the entire panoply of actionable securities fraud."). Countries also disagree over what needs to be disclosed, and in how much detail. *See, e.g.*, Cox, *supra* note 4, at 1200 (noting the divergence between the securities laws of different countries).

113. Chang, *supra* note 25, at 102.

114. Memorandum of Understanding to Establish Mutually Acceptable Means for Improving International Law Enforcement Cooperation in the Field of Insider Trading, U.S.-Switz., Aug. 31, 1982, 22 I.L.M. 1, 2. While more than one hundred countries prohibited insider trading by the end of 1998, only thirty-eight of them had ever enforced those prohibitions. Choi, *supra* note 5, at 116 n.25.

115. *See* Restatement (Third) of Foreign Relations Law § 416 cmt. b (1987).

116. Chang, *supra* note 25, at 101.

117. *Id.* at 109. Professor Kun Young Chang argues:

> [T]he current U.S. approach to the extraterritoriality of antifraud rules seems to have failed to adapt to the needs of international commerce and international harmony. Even though fraud is widely recognized as a tort, most industrialized

Aside from these concerns, there is also the uncertainty of whether a suit adjudicated in the United States will even be enforced in foreign jurisdictions.[118] This problem would seem to be heightened where broad jurisdiction is exercised, as there is less justification for the case to be heard in an American court in the first place.[119] Especially where securities laws differ, a foreign jurisdiction where a majority of the fraudulent conduct occurred may be more inclined to deny res judicata effect in such a case, instead applying its own securities laws.[120]

3. Possibility of Several Jurisdictions, an Alternative, and the "Race to the Bottom"

A basic assumption behind the approach embodied in the conduct and effects tests is that, while up to four jurisdictions may theoretically litigate a claim,[121] a permanent decision need not be made between them. Instead of predetermining which forum shall hear any claims arising from a transaction, the United States may assert jurisdiction in any instance in which either the conduct or effects tests is satisfied.[122] It does not matter whether the United States is the nation of the investor(s), corporation, exchange on which the securities are listed, or simply the location of the transaction (or some of the conduct related thereto).[123] This lack of a predetermined jurisdiction generates uncertainty, which is the principal reason why it is so difficult for corporations and investors to know which securities regime applies to any given transaction.[124]

> countries have significant differences in their views of what constitutes fraudulent transactions and market practices. Moreover, attempts to unilaterally police ever greater portions of international markets would destroy the good will toward cooperation as well as respect for the rules, customs, and practices of foreign markets, which are essential to the growth of an international legal and financial community.

Id. at 117-18 (citations omitted); *see also* Choi & Guzman, *supra* note 28, at 914 (arguing that countries upon whose jurisdiction the United States infringes may retaliate and impose regulations on and exercise jurisdiction over United States corporations and investors).

118. *See* Chang, *supra* note 25, at 101 ("[E]ven if U.S. regulators are able to obtain judgments against foreign-based parties, they may run into problems enforcing such judgments outside the United States."). For an example of defendants arguing this in a case, see *In re Cable & Wireless, PLC, Sec. Litig.*, 321 F. Supp. 2d 749, 755, 765 (E.D. Va. 2004).

119. *See infra* notes 179-83 and accompanying text (describing concerns of international comity).

120. *See supra* notes 112-14 and accompanying text (noting the lack of international consensus on what constitutes securities fraud); *cf.* Choi & Guzman, *supra* note 28, at 914, 927-28.

121. *See supra* notes 1-4 and accompanying text (listing these jurisdictions).

122. *See* discussion *supra* Part I.B.1 (describing these tests).

123. *See supra* notes 1-4 and accompanying text (noting the possibility of multiple jurisdictions).

124. *See* Choi, *supra* note 5, at 114-15; *see also supra* notes 109-10 and accompanying text (discussing generally the difficulties that uncertainty and confusion cause).

Some commentators have argued that a jurisdiction should be determined before the transaction even takes place.[125] Under at least one proposal, the jurisdiction may even be determined at the time of the transaction itself.[126] These approaches would generate varying degrees of competition as nations seek to attract corporations by virtue of their securities laws.[127]

Some, however, fear that such competition will lead to a "race to the bottom."[128] These commentators believe that, left unrestrained, regulatory competition will cause nations to draft progressively weaker securities laws in an attempt to attract corporations, creating a downward spiral.[129] A basic assumption behind this theory is that corporations, if given a choice, will always prefer weaker investor protections.[130] However, other commentators believe that the market will value securities lower when they are subject to minimal investor protections, so corporations will not select weak securities regimes.[131] Of course, in the wake of the Enron scandals, it is difficult to argue that corporations should be allowed more choices which could be abused, especially when the Sarbanes-Oxley Act was designed to combat the possibility of abuse.[132]

II. JUSTIFICATIONS FOR ASSERTION OR DENIAL OF JURISDICTION, AND ALTERNATIVES

This part takes a closer examination of the debate regarding the extraterritoriality of the Act. Part II.A discusses the arguments that have been presented supporting the exercise of jurisdiction over foreign transactions. First, Part II.A presents arguments that courts have the ability to assert jurisdiction. It then looks at arguments why courts should take advantage of that ability.[133] Part II.B discusses the opposing arguments. It first examines the contention by some courts and commentators that federal courts do not have the power to exercise jurisdiction over foreign securities transactions.[134] Part II.B.2 presents policy arguments that would oppose jurisdiction even if the courts could exercise it. Changing focus slightly, Part II.C examines proposals intended to make global securities regulation competitive. This is done by predetermining which jurisdiction's laws shall

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125. *See* discussion *infra* Part II.C (discussing how this would be accomplished).

126. *See infra* note 228 and accompanying text (discussing the possibility of forum selection clauses in securities transactions).

127. *See* discussion *infra* Part II.C (describing how this competition would result).

128. *See infra* notes 212-15 and accompanying text (describing the origins of this theory and its use in the context of global securities regulation).

129. *See* Choi & Guzman, *supra* note 28, at 948-49; Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 Yale L.J. 2359, 2426-27 (1998) (criticizing the race to the bottom theory).

130. *See* Fox, *supra* note 38, at 747.

131. Romano, *supra* note 129, at 2418.

132. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (to be codified in scattered sections of 11, 15, 18, 28, 29 U.S.C.); *see also* Choi, *supra* note 5, at 111-12.

133. *See* discussion *infra* Part II.A.2.

134. *See* discussion *infra* Part II.B.1.

apply to any claims arising from a securities transaction.[135] These proposals are designed, in part, to eliminate the uncertainty faced by corporations over what securities laws they must comply with.[136] Although addressing the debate over the extraterritorial application of the Act is not the primary goal of these proposals, they would provide their own solution to that debate.[137]

A. *Arguments in Favor of Jurisdiction*

1. Arguments that the Courts Have the Power to Assert Jurisdiction

Some courts and scholars have found support for expansive jurisdiction in the statutes themselves. As Michael J. Calhoun has argued, section 10(b) of the Act "is broad and is meant to cover all sales and purchases of securities, regardless of whether the transactions transpire on an organized United States market or not. Section 10(b) does not exempt fraudulent acts in the United States simply because their effects are 'exported' to another country."[138] The Third Circuit has found an implication of broad extraterritorial application in the express application of the Act to "foreign commerce" and "interstate commerce."[139] Because of this, Calhoun argues, both the "balancing" and "restrictive" approaches "violate the will of Congress."[140]

Supporters of broad jurisdiction have also argued that such jurisdiction is perfectly acceptable under applicable principles of international law. According to the Restatement, Congress can regulate activity that occurs within the United States, even if its only effect is extraterritorial.[141] Therefore, federal courts may have the power to apply the Act to foreign transactions in which some conduct occurred within the United States.[142]

2. Policy Reasons Why the Courts Should Assert Jurisdiction

Some argue that broad jurisdiction best serves the remedial purposes of the Act.[143] A fundamental purpose behind Congress's passage of the Act

135. *See* discussion *infra* Part II.C.

136. *See* discussion *infra* Part II.C.

137. *See* discussion *infra* Part II.C.

138. Calhoun, *supra* note 60, at 704 (citations omitted).

139. SEC v. Kasser, 548 F.2d 109, 114 & n.21 (3d Cir. 1977); *see also* Cont'l Grain (Austl.) Pty. Ltd. v. Pac. Oilseeds, Inc., 592 F.2d 409, 421 (8th Cir. 1979) (citing *Kasser* on this point); Calhoun, *supra* note 60, at 704-05.

140. Calhoun, *supra* note 60, at 721.

141. *Id.* at 720; *see* discussion *supra* Part I.A.2 (discussing relevant provisions of the Restatement).

142. *See generally* Calhoun, *supra* note 60, at 720.

143. *Id.* at 724; *see also id.* at 719 ("The broader conduct approach . . . best complies with the letter and spirit of the federal securities laws.").

was to prevent fraud,[144] and as such, the Supreme Court has called for broad interpretation of the law itself; jurisdiction should not be interpreted any less liberally.[145] Additionally, some have pointed to the Supreme Court's holding in *SEC v. Capital Gains Research Bureau, Inc.* that "[a] fundamental purpose, common to [the federal securities laws], was . . . to achieve a high standard of business ethics in the securities industry."[146] The Ninth Circuit even went so far as to state that an important reason to assert jurisdiction is that this "may encourage Americans—such as lawyers, accountants and underwriters—involved in transnational securities sales to behave responsibly and thus may prevent the development of relaxed standards that could 'spill over into work on American securities transactions.'"[147] Therefore, asserting jurisdiction indirectly protects American investors and markets.[148]

The classic argument for extension of jurisdiction is that Congress would not have intended fraudulent activity within the United States to go unpunished.[149] The Third Circuit voiced the fear that a more restrictive test would "immunize, for strictly jurisdictional reasons, defendants who unleash from this country a pervasive scheme to defraud a foreign corporation."[150] This would encourage corporations to defraud, creating a "'Barbary Coast,' as it were, harboring international securities 'pirates.'"[151] This concern has been heightened by globalization as investments become increasingly unaware of national borders.[152] Advances in telecommunications have made both financial markets and investors across the world more accessible to corporations.[153]

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144. *See supra* notes 23-25 and accompanying text (describing the important role of fraud in the Act).

145. *See* Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (holding that the Act, as "remedial legislation should be construed broadly to effectuate its purposes"); Calhoun, *supra* note 60, at 719 (discussing the broader approaches formulated by the Third, Eighth, and Ninth Circuits); *see also supra* notes 23-28 and accompanying text (describing the broad scope and remedial purposes of the Act).

146. SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963); Grunenthal GmbH v. Hotz, 712 F.2d 421, 425 (9th Cir. 1983) (quoting *Capital Gains*); *see also* SEC v. Kasser, 548 F.2d 109, 116 (3d Cir. 1977) (stating that "the antifraud provisions of the 1933 and 1934 Acts were designed to insure high standards of conduct in securities transactions"); Calhoun, *supra* note 60, at 706-07 (Congress passed the Act to "encourage high ethical standards of conduct in securities transactions").

147. *Grunenthal*, 712 F.2d at 425 (quoting Note, *American Adjudication of Transnational Sec. Fraud*, 89 Harv. L. Rev. 553, 571 (1976)).

148. *See id.* at 424-25.

149. *See, e.g.*, IIT v. Vencap, Ltd., 519 F.2d 1001, 1017-18 (2d Cir. 1975) ("We do not think Congress intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners."). This passage is often quoted. *See, e.g.*, Cont'l Grain (Austl.) Pty. Ltd. v. Pac. Oilseeds, Inc., 592 F.2d 409, 420 (8th Cir. 1979); *Kasser*, 548 F.2d at 114; Tri Star Farms Ltd. v. Marconi, PLC, 225 F. Supp. 2d 567, 574 (W.D. Pa. 2002); Calhoun, *supra* note 60, at 704 & n.178.

150. *Kasser*, 548 F.2d at 114.

151. *Id.* at 116.

152. Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 667 (7th Cir. 1998).

153. Calhoun, *supra* note 60, at 722.

Some supporters of broad jurisdiction argue that extending jurisdiction has positive, reciprocal effects for Americans in foreign courts.[154] It "prevents the likelihood" that such courts would refuse to act when conduct within their jurisdictions has defrauded American investors.[155] If federal courts do not exercise jurisdiction in such cases, then "[s]ome countries might decline to act against individuals and corporations seeking to transport securities frauds to the United States.... [This] would enable defrauders beyond the reach of our courts to escape with impunity."[156] Again, then, exercise of jurisdiction would indirectly benefit American investors.[157]

The liberal exercise of jurisdiction in any given case is often based largely on general policy reasons.[158] The court in *Kauthar SDN BHD v. Sternberg* seemed surprised that "some courts have admitted candidly that, in fashioning an approach to the issue of extraterritorial application of the securities laws, policy considerations and the courts' best judgment" played key roles in determining how far the federal securities laws reach.[159] One court has even stated that, in lieu of adopting a test, "the question may simply be whether, on policy grounds, we should apply the securities legislation."[160]

B. *Arguments in Favor of Denying Jurisdiction*

This section examines the converse of the assertions presented in Part II.A. This section first discusses the arguments why federal courts do not possess the power to assert jurisdiction over most foreign securities transactions.[161] It then presents the arguments why, even if courts were

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154. *Kasser*, 548 F.2d at 116.

155. Calhoun, *supra* note 60, at 704; *see also id.* at 706 ("[R]efusing jurisdiction raises the risk that other nations might refuse to enforce their securities laws when conduct in those countries leads to detrimental effects in the United States.").

156. *Kasser*, 548 F.2d at 116; *accord* Cont'l Grain (Austl.) Pty. Ltd. v. Pac. Oilseeds, Inc., 592 F.2d 409, 421 (8th Cir. 1979).

157. *Kasser*, 548 F.2d at 116.

158. *See, e.g.*, *Cont'l Grain*, 592 F.2d at 416 (recognizing that its holding "in favor of finding subject matter jurisdiction is largely based upon policy considerations"); *id.* at 421 ("We frankly admit that the finding of subject matter jurisdiction in the present case is largely a policy decision."); *Kasser*, 548 F.2d at 116 (stating that "it should be recognized that this case in a large measure calls for a policy decision").

159. Kauthr SDN BHD v. Sternberg, 149 F.3d 659, 664 (7th Cir. 1998).

160. Straub v. Vaisman & Co., 540 F.2d 591, 595 (3d Cir. 1976). This view has been criticized by other courts, as many decisions "are based more on policy considerations than on the language of the securities statutes or the Supreme Court's teachings on extraterritoriality." Robinson v. TCI/US W. Cable Commc'ns Inc., 117 F.3d 900, 906 (5th Cir. 1997); *accord* Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 32-33 (D.C. Cir. 1987). Policy should not enable a court to exercise jurisdiction where it is allowed neither by statutory language nor canons of construction. *See Robinson*, 117 F.3d at 906.

161. *See* discussion *infra* Part II.B.1.

able to assert such jurisdiction, they should decline to do so for policy reasons.[162]

1. Arguments that the Courts Do Not Have the Power to Assert Jurisdiction

Opponents of broad jurisdiction, much like its supporters, often draw support from the language of the Act itself. Section 30(b) is sometimes said to support limited jurisdiction.[163] Although that section applies only to those who transact a business in securities, the D.C. Circuit has stated that it "rather clearly implies that Congress was concerned with extraterritorial transactions only if they were part of a plan to harm American investors or markets."[164] Citing section 30(b), the Ninth Circuit has held that the Act, and the Securities Act of 1933, "are designed to protect American investors and markets, as opposed to the victims of any fraud that somehow touches the United States."[165]

Courts and commentators have also argued against construing the applicable sections of the Restatement as granting courts broad authority to apply the Act to foreign transactions.[166] As one court stated, "it would be . . . erroneous to assume that the legislature always means to go to the full extent permitted."[167] The Restatement just sets the "permissible limits of an exercise of jurisdiction by this country."[168] A statute does not always extend to these limits; congressional intent, not the Restatement, controls a court's jurisdiction under a statute.[169]

Supporters of restrictive jurisdiction also point to the canon of construction that a statute, unless Congress explicitly indicates otherwise, is presumed not to apply extraterritorially.[170] This canon stems from the

162. *See* discussion *infra* Part II.B.2.

163. This section provides:

> The provisions of this chapter or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this chapter.

15 U.S.C. § 78dd(b) (2000).

164. *Zoelsch*, 824 F.2d at 30, 31-32.

165. *Robinson*, 117 F.3d at 906; *see also supra* note 163 (providing the text of this section).

166. *See* discussion *supra* Part I.A.2.

167. Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972); *accord* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir. 1975); *see also* Calhoun, *supra* note 60, at 696 ("A court cannot assume, however, that Congress always intends laws to be applicable to the fullest extent allowed by the Constitution.").

168. SEC v. Kasser, 548 F.2d 109, 113 n.12 (3d Cir. 1977).

169. *See Bersch*, 519 F.2d at 985; *Leasco*, 468 F.2d at 1334.

170. *See* SEC v. Banner Fund Int'l, 211 F.3d 602, 608 (D.C. Cir. 2000); Eur. & Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118, 131 (2d Cir. 1998); *Robinson*, 117 F.3d at 906; Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 31 (D.C. Cir. 1987); Fox, *supra* note 38, at 721-22; *see also* discussion *supra* Part I.A.3 (discussing this canon).

assumption that Congress is principally concerned with domestic affairs.[171] The fact that federal courts, by nature, have limited jurisdiction bolsters this argument, as even in domestic affairs, federal courts lack jurisdiction unless the Constitution or a statute provides otherwise.[172]

As Congress has not granted federal courts subject matter jurisdiction over foreign securities transactions, for the courts to grant it to themselves is highly improper. While the D.C. Circuit, like courts that have adopted more liberal tests, was wary of allowing fraudulent activities to go unpunished, and indicated that perhaps Congress should address this issue, it was even more wary of courts taking it upon themselves to "amend" the Act.[173] The court in *Robinson* stated that "[t]o broaden our jurisdiction beyond the minimum necessary to achieve these goals seems unwarranted in the absence of an express legislative command."[174] Extension of jurisdiction in the absence of Congressional direction is seen as "improper judicial activism."[175]

2. Policy Reasons why the Courts Should Not Assert Jurisdiction

Such judicial activism is often said to intrude on the functions of Congress. As the Supreme Court has stated, "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'"[176] While some courts and commentators consider such activism problematic in any context, opponents of broad jurisdiction view the dangers to be greater when federal courts enter the international community.[177] This alarm exists because ruling on largely foreign matters should take into account considerations of diplomacy and international comity, which the judicial branch is ill equipped to do.[178]

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171. *See, e.g.*, Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949) (referring to the intention to regulate only domestic affairs as "the normal one"); *Zoelsch*, 824 F.2d at 31; *see also Robinson*, 117 F.3d at 906.

172. *See Robinson*, 117 F.3d at 906.

173. *Zoelsch*, 824 F.2d at 33; *see also Robinson*, 117 F.3d at 906-07 (applauding this language in *Zoelsch*).

174. *Robinson*, 117 F.3d at 906.

175. Kashef, *supra* note 23, at 555.

176. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 (1978)); *see also* Calhoun, *supra* note 60, at 700 (stating that "policy decisions are the proper domain of the legislative branch, not the judicial branch").

177. *See Zoelsch*, 824 F.2d at 33.

178. *Id.*; *see also id.* at 33 n.3 (stating that "foreign policy concerns" should not be left to "the court's untutored evaluation"); Chang, *supra* note 25, at 118-20; Testy, *supra* note 112, at 929 (arguing that courts are not prepared to analyze the necessary political and market concerns involved in foreign securities transaction cases); *id.* at 958 (stating that over-burdened dockets, limited access to complex market information, and the judicial bias

Courts and commentators also cite principles of international comity to support a narrow test. International comity has been defined in many ways, but simply stated, it is the practice of courtesy and goodwill that nations show to each other, although perhaps not as discretionary as such a definition would imply.[179] It "discourage[s] the application of one nation's laws if they conflict with the laws of another nation and have an adverse effect on the other nation's ability to enforce its own laws."[180] The Supreme Court has cited principles of international comity in discouraging the extension of the laws of the United States to foreign parties engaged in foreign commerce.[181] Thus, if another nation has a stronger interest in adjudicating a securities suit, or in applying its own law, then principles of international comity dictate that American jurisdiction should not be exercised, in order to avoid infringing on that nation's jurisdiction.[182] More lenient tests, such as a balancing approach, violate these principles, "for in practice they tend to deemphasize foreign sovereign interests and almost never lead a court to decline jurisdiction."[183] Thus, a restrictive test better guards the interests of the other nations interested in a suit.[184]

Judicial economy also plays a role in supporting limited jurisdiction. Courts often point out limited judicial resources and overcrowded dockets as reasons for denying jurisdiction.[185] Courts need to be "concerned to preserve American judicial resources for the adjudication of domestic disputes and the enforcement of domestic law."[186] As the Second Circuit stated, "[w]hen . . . a court is confronted with transactions that on any view are predominantly foreign, it must seek to determine whether Congress

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toward investor protection leave "courts ill-equipped to resolve the overlapping legal, economic, and political concerns involved in transnational securities transactions."); *cf. In re* Uranium Antitrust Litig., 480 F. Supp. 1138, 1148 (N.D. Ill. 1979) ("[T]he judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country . . . .").

179. *See* Hilton v. Guyot, 159 U.S. 113, 163-64 (1895) (stating comity is "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other," but instead something in between); Calhoun, *supra* note 60, at 688. Black's Law Dictionary defines "comity" as "[a] practice among political entities (as nations, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts." Black's Law Dictionary 284 (8th ed. 2004).

180. Calhoun, *supra* note 60, at 688.

181. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 255 (1991) (holding that employment discrimination laws do not apply extraterritorially).

182. Calhoun, *supra* note 60, at 699.

183. Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 32 n.2 (D.C. Cir. 1987); *see also* Chang, *supra* note 25, at 100-01 ("[T]he extraterritorial application of U.S. securities laws may give rise to a breach of international comity as well as cause frequent conflicts with the sovereignty of other countries." (citations omitted)); *id.* at 101 n.56 (stating that "every assertion of U.S. jurisdiction abroad encroaches upon the sovereignty of another national government").

184. *See Zoelsch*, 824 F.2d at 32 n.2.

185. *See, e.g.*, *id.* at 32.

186. *Id.* The *Zoelsch* court further stated that "[i]t is far from clear that these resources would be well spent on all the potential disputes in which domestic conduct makes a relatively small contribution to securities fraud that occurs elsewhere." *Id.*

would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries."[187] Thus, the interests of the United States in the case must be weighed before expending judicial resources to adjudicate foreign claims.[188]

Some courts and commentators also tout a restrictive test[189] as decreasing litigation costs for parties. When tests are too fact specific (such as the intermediate approach)[190] or based largely on policy arguments (such as the liberal approach),[191] the difficulty and unpredictable nature of the tests simply increase the amount of time and money spent on litigation.[192] This creates incentives for increased litigation on jurisdiction, worsening the problem of limited judicial resources.[193] Even opponents of a restrictive approach acknowledge that "it avoids creating numerous cumbersome jurisdictional tests,"[194] as it "provide[s] a clear standard."[195]

An argument used less often is that the more liberal tests may discourage foreigners from even transacting business within the United States.[196] Not only would foreigners not be on notice as to when stringent federal securities laws may apply, but broad jurisdictional tests may deter some corporations from conducting any business in America, whether fraudulent or not, for fear of the application of strict United States securities laws;[197] the resulting disparity in the stringency of regulatory requirements would leave American corporations at a competitive disadvantage.[198] The fact that some foreign companies removed themselves from American

187. Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir. 1975); *see also* Calhoun, *supra* note 60, at 699 (stating that "courts should be leery of allowing the litigation, especially when the conduct occurring in the United States does not significantly contribute to securities fraud occurring beyond United States borders"). Supporters of more expansive jurisdiction criticize this argument. They contend that the fact that judicial resources are "precious" should not bar legitimate claims. *Id.* at 724. The argument for limited jurisdiction is said to be based "on a confusing mix of procedural and substantive law under the auspices of judicial economy." *Id.* at 720.

188. *See* Calhoun, *supra* note 60, at 719-20.

189. *See supra* notes 90-97 and accompanying text.

190. *See supra* note 98 and accompanying text.

191. *See supra* note 99 and accompanying text.

192. *See* Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 32 n.2. (D.C. Cir. 1987).

193. *Id.*

194. Calhoun, *supra* note 60, at 700.

195. *Id.* at 723.

196. *See id.* at 719-20.

197. *See* Franklin A. Gevurtz, *The Globalization of Corporate and Securities Law: An Introduction to a Symposium, and an Essay on the Need for a Little Humility When Exporting One's Corporate Law*, 16 Transnat'l Law. 1, 8 (2002) (stating that until recently the United States securities laws were "held up as probably the most demanding in the world").

198. Testy, *supra* note 112, at 935; *see also* Calhoun, *supra* note 60, at 720; *cf.* Corso, *supra* note 110, at 601 (noting that the unpredictability of the tests themselves could also deter foreign corporations from conducting business in the United States).

exchanges after the passage of the Sarbanes-Oxley Act to escape its strict provisions lends some support to this theory.[199]

C. *Proposals to Make Securities Regulation Regimes Competitive*

This section discusses a possible solution to the jurisdictional question by determining which securities laws should apply to a transaction in advance. It first describes proposals to make such application dependent on territoriality, either of the exchange or of the corporation.[200] This section then presents existing proposals to allow corporations to choose their own securities regime free from territorial concerns, which may be termed "free market approaches."[201] This section concludes by discussing some criticisms of these free-market approaches.

1. Territorial-Market Approaches

A solution to the jurisdictional problem can be found in a larger debate among commentators over which nation's securities laws should govern a corporation.[202] Under these commentators' proposals, even if a United States court were to assert jurisdiction, it may have to apply the securities laws of another nation. This framework would create "multiple disclosure standards" within the United States.[203] Some have argued for various solutions which, while different, have been collectively referred to as "market approaches."[204] One such approach is the established practice in most other Western countries, which apply the disclosure laws of the nation of the exchange on which the securities are listed; at least one scholar has argued that the United States should adopt a similar system.[205] This method, along with one advocated by Professor Merritt Fox, may be termed "territorial" market approaches.

Professor Fox argues that the disclosure laws of a corporation's actual domicile should control, no matter where the securities transaction takes place.[206] He terms this "the issuer-nationality approach."[207] This would result in some competition among nations, as a corporation can form in or move to another country to take advantage of its laws no matter where it

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199. *See* Roberta S. Karmel, *The Securities and Exchange Commission Goes Abroad to Regulate Corporate Governance*, 33 Stetson L. Rev. 849, 856-57, 886 (2004) (discussing the Sarbanes-Oxley Act's impact on foreign companies).

200. *See* discussion *infra* Part II.C.1.

201. *See* discussion *infra* Part II.C.2.

202. *See infra* notes 203-36 and accompanying text.

203. Cox, *supra* note 4, at 1229.

204. *Id.* at 1229-31; Gevurtz, *supra* note 197, at 7 (describing Professor Choi's market approach to global regulation).

205. *See* Paul G. Mahoney, *The Exchange as Regulator*, 83 Va. L. Rev. 1453 (1997) (arguing for the adoption of an exchange-based system); *see also* Cox, *supra* note 4, at 1230.

206. Fox, *supra* note 37, at 2582.

207. *Id.* at 2618.

engages in securities transactions.[208] However, competition would be limited, as there are many factors which influence a corporation when it decides to incorporate under the laws of a particular country or move its base of operations there.[209] Territorial approaches, such as issuer-nationality, would bind the choice of securities regime to the choices based on these other factors.[210] Similarly, and also acting to limit regulatory competition, these other considerations (and also the cost of relocating) may work to keep a corporation from selecting a more satisfactory securities regime, as it would have to relocate to another nation.[211]

Issuer-nationality is based on the idea that competition would be useful, but to avoid a race to the bottom competition must be limited.[212] Advocates of this theory fear is that countries will compete to make their regime the most lenient until investor protection is minimal.[213] The basic premise is that where corporations have a choice, that choice will be abused.[214] This theory is not new to the law; a debate between race to the bottom and race to the top theorists emerged in the domestic context over the choice corporations have over which state's corporate governance laws apply.[215]

Adopting a version of this race to the bottom theory, Professor Fox argues that issuers will choose the regime where the benefits of disclosure come closest to equaling its costs, a point which he terms a corporation's "privately optimal level of disclosure."[216] This level will always be below the "socially optimal level of disclosure."[217] As political pressure mounts for a country to lower its levels of investor protection, other countries will

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208. *See* Cox, *supra* note 4, at 1230-32; *see also* Fox, *supra* note 38, at 730-65 (arguing the superiority of the issuer-nationality approach over other approaches).

209. *See* Choi & Guzman, *supra* note 28, at 918 (noting the capital located in a country as one factor); *see also infra* notes 301-03 and accompanying text (noting other reasons why issuer-nationality would not result in pure competition).

210. *See* Choi & Guzman, *supra* note 28, at 918.

211. *See id.*

212. *See* Fox, *supra* note 38, at 747-54, 768-82; Fox, *supra* note 37, at 2503 n.5. This theory suggests that, given unhindered regulatory competition, corporations will choose to be governed by the securities regime with the weakest investor protections. *See* Gevurtz, *supra* note 197, at 7; *see also supra* notes 128-30 and accompanying text (discussing this theory and its assumptions).

213. *See* Romano, *supra* note 129, at 2426-27.

214. *See* Choi, *supra* note 5, at 111.

215. For a brief discussion of the history of these competing theories in this corporate governance context, see Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 Harv. L. Rev. 1435, 1444-46 (1992). For the classic formulation of the race to the bottom theory in this context, see William Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 Yale L.J. 663 (1974). For a response, arguing a race to the top theory, see Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. Legal Stud. 251 (1977).

216. Fox, *supra* note 38, at 747.

217. *Id.* For a discussion of how this will harm the interests of the United States, see *id.* at 753-54.

scramble to do the same in what Fox sees as a perfect example of the old "prisoner's dilemma" problem; a country "loses" by weakening its rules, but stands to lose more if it does not.[218]

2. Free-Market Approaches

The other two market approaches, free-market approaches, are based on the domestic policy that a corporation may choose to incorporate under the laws of any state, even if it has no other connection with that state, and be regulated by that state's corporate governance laws.[219] Professor Roberta Romano's approach is primarily intended to apply within the United States, and would allow each state to develop its own securities laws to compete with each other; a corporation would be subject to the securities laws of the state in which it has been incorporated.[220] Foreign corporations trading in the United States would be able to choose their own "securities domicile" and be subject to its disclosure requirements.[221] The underlying premise is that investors will require higher returns when a corporation is governed by securities laws which protect their interests less, inducing firms to choose more protective securities regimes, in order to reduce the cost of capital.[222]

The other free-market approach is strikingly similar, and is advocated by two influential securities law scholars, Professors Stephen Choi and Andrew Guzman.[223] Choi and Guzman have variously termed this approach "portable reciprocity"[224] and the "issuer choice" system.[225] Under portable reciprocity, as under Romano's approach,[226] a corporation may choose which securities laws would govern all aspects of both the issuance and trading of its securities.[227] A corporation may even choose to have its disclosure and other obligations governed by private contract, avoiding regulation by any nation's securities laws.[228]

There are only two major practical differences between Romano's approach and portable reciprocity.[229] First, while Romano mainly focuses on domestic concerns and argues that each state should develop its own

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218. *Id.* at 784-85.

219. Gevurtz, *supra* note 197, at 7. This principle only encompasses corporate governance laws, not disclosure obligations under the securities laws, although one approach would remove this distinction even within the United States. *See infra* notes 220-22 and accompanying text (detailing this approach).

220. Romano, *supra* note 129 (arguing for regulatory competition between the fifty states).

221. *Id.* at 2420.

222. *Id.* at 2418.

223. Gevurtz, *supra* note 197, at 7.

224. Choi & Guzman, *supra* note 28, at 907.

225. Choi, *supra* note 5, at 113. This Note will adhere to the original "portable reciprocity" phraseology.

226. *See supra* notes 220-22 and accompanying text (describing Romano's approach).

227. Choi & Guzman, *supra* note 28, at 918, 922.

228. *Id.* at 907.

229. *See id.* at 947-48.

securities laws,[230] Choi and Guzman have a more global concern and seem content to allow domestic securities regulation to be left primarily to the Securities and Exchange Commission ("SEC").[231] Second, under Romano's approach, a corporation is governed by the securities laws of its state of incorporation, even though there are many other factors a corporation must weigh when choosing where to incorporate; Choi and Guzman completely separate the choice of a securities regime from any other consideration.[232]

In addition to these practical differences, Choi and Guzman disagree with Romano over the ramifications of a free-market system. Romano seems to believe that, in order to reduce the cost of obtaining capital, corporations will prefer regimes under which investors are highly protected.[233] Choi and Guzman believe that portable reciprocity will simply bring more diversification:

> Some countries may cater to high quality issuers, supplying strong antifraud protections and requiring significant disclosure. Other countries may cater to lower quality issuers, providing a quick and relatively inexpensive means to raise capital. As countries seek to establish a niche for themselves in the international competition for securities issues, a spectrum of regulations may emerge. Investors, in turn, will discount the price they are willing to pay for securities based on the regime under which the securities are issued or traded.[234]

Some investors, fearful of fraud, will choose to pay higher prices for protection, while other investors may prefer less stringent requirements, in order to see a higher rate of return (not only from the lower price of the securities, but also from the decreased administration costs of a corporation not subject to strict disclosure requirements).[235] Investors and issuers are not all identical, so having diverse regulatory regimes will help meet their diverse needs.[236]

Stringent securities regulation could benefit corporations, as investors will be willing to pay more for protection from fraud, raising the price of a corporation's securities.[237] As Professor James Cox has stated, "Weak

230. *See supra* notes 220-21 and accompanying text.

231. Choi & Guzman, *supra* note 28, at 944-45.

232. *Id.* at 948. Under Choi and Guzman's approach, this decision can also be changed more easily, without having to go through the process of reincorporating in another state. *Id.*

233. *See supra* note 222 and accompanying text (explaining why this will be so).

234. Choi & Guzman, *supra* note 28, at 906.

235. *Id.* at 916-17.

236. *Id.* This would also give American corporations the ability to no longer be at a competitive disadvantage due to the stringent nature of the United States securities laws, if their interests would be better served under another nation's laws. *Id.* at 924; *see also supra* note 197 (describing how, until recently, the United States securities laws were seen as the most demanding in the world).

237. Choi & Guzman, *supra* note 28, at 916.

regulation heightens the riskiness of investing with the effect that both high-quality companies and investors will steer their activities away from the shoals of any Barbary Coast and toward markets where they can more reliably and economically chart their courses to raise funds or invest."[238] Thus, no "self-respecting country" will want to establish weak regulations.[239]

Evidence exists to support these claims. Some studies have shown that a portion of foreign companies do, in fact, choose to conduct business in United States markets because of the high levels of protection for investors.[240] Some firms may even choose to reveal more than required under their selected securities regime.[241] For example, there is evidence that many firms trading on the London Stock Exchange already voluntarily disclose more information than the law requires to reduce the cost of raising capital.[242]

However, greater disclosure is not always desirable, not only for corporations but also for investors and economies.[243] Anything that harms a corporation indirectly harms its investors, and greater disclosure entails greater operational costs.[244] There are also "interfirm" costs, such as the use of the disclosed information "by competitors, major suppliers, or major customers" to the detriment of the corporation.[245] The economy as a whole is harmed by greater operational costs to corporations, and also by the reduction of "the rewards for developing knowledge that identifies new markets and new products in any area unprotected by patents or copyrights. [Greater disclosure] in essence reduces the scope of what is considered proprietary information."[246]

3. Criticisms of Free-Market Approaches

Advocates of free-market approaches have endured criticism from proponents of the race to the bottom theory.[247] In response, the free market scholars argue that this theory does not take accurate account of the incentives competition would create.[248] In the domestic context, competition among states in corporate law has, "for the most part, maximize[d] share value," benefiting corporations and investors alike.[249] Proponents of a free-market approach to global securities regulation argue that there will be a "replay of the market force arguments which have

238. Cox, *supra* note 4, at 1200.
239. *Id.*
240. Choi, *supra* note 5, at 118 & n.34; *see also* Romano, *supra* note 129, at 2419-20.
241. Romano, *supra* note 129, at 2421.
242. *Id.* at 2426-27.
243. *See* Fox, *supra* note 37, at 2550-52.
244. *Id.* at 2550.
245. *Id.* at 2550-51.
246. *Id.* at 2551-52.
247. *See supra* notes 212-18 and accompanying text.
248. *See* Choi & Guzman, *supra* note 28, at 949-50; Romano, *supra* note 129, at 2426-27.
249. Romano, *supra* note 129, at 2361.

triumphed in dealing with corporate governance laws—specifically, that investors will discount the price of stock to take into account less legal protections, thereby deterring the selection of inefficient regulatory regimes."[250] It is hoped that shareholder value will be maximized, as seems to have occurred domestically in the corporate governance context.[251]

The fact that some regulatory competition already exists also harms the argument that a race to the bottom would develop.[252] By transacting business within a nation, a corporation can often obtain the benefit of its securities laws.[253] However, in the current system, as jurisdiction is tied to territoriality instead of choice, this competition has resulted in the waste of resources.[254] Self-interested regulators concerned with the size of their agency, the scope of their authority, and the resulting prestige battle each other over jurisdiction, reaching across borders, and may even block corporations and investors from leaving their jurisdiction.[255]

Perhaps the biggest challenge facing the free-market approaches is the increased wariness of corporate choice in general in the post-Enron world.[256] If corporations such as Enron, WorldCom, and Tyco have abused the choices already given them, with disastrous consequences, it becomes more difficult to argue that they should be given choice over which disclosure and antifraud rules should be applied to them.[257] However, it may be that Enron has actually strengthened the argument that the free market should take a larger role in securities regulation.[258]

The recent scandals may have helped the argument for regulatory competition by showing the "fallibility of the U.S. securities laws—which, until recently, have been held up as probably the most demanding in the world."[259] By 2001, the corporate and securities laws of the United States "seemed triumphant."[260] Enron and the other scandals quickly deflated this

250. Gevurtz, *supra* note 197, at 7.

251. *See supra* note 249 and accompanying text (stating that this occurred in the domestic context).

252. Choi, *supra* note 5, at 112-13.

253. *Id.* at 112.

254. *Id.* at 112-13.

255. *Id.*

256. *Id.* at 111-12.

257. *Id.*; Gevurtz, *supra* note 197, at 7.

258. In this context, it is important to note that, as egregious as the Enron-related abuses were, the market acted to correct these problems somewhat, such as by reducing the value and business of Arthur Anderson. Gevurtz, *supra* note 197, at 7 n.35.

259. *Id.* at 8.

260. *Id.* at 6; *see also* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 Geo. L.J. 439 (2001) (arguing the inevitability of the corporate law of the United States being copied by the global community).

view.[261] Forcing the American securities laws to become competitive, however, could remedy these deficiencies.[262]

While there are, of course, existing incentives for the SEC to improve its regulations, there are also "a number of perverse incentives" to regulate without regard to investors or corporations.[263] As Professor Choi argues, "Leaving regulators with monopoly jurisdiction over issuers and investors may simply give regulators large latitude to expropriate value for themselves at the expense of investors."[264] For instance, regulators may act with an eye toward increasing their size and importance (and possibly their salaries); Choi finds evidence for this in the growing number and complexity of SEC regulations.[265] Choi also argues that "regulators may tailor regulations to favor particular industry groups at the expense of dispersed investors out of a hope of obtaining a job within the industry once they leave the SEC."[266] Competition would alleviate these problems, as regulators would be forced to craft rules designed to maximize the wealth of corporations and shareholders.[267]

These same incentives lead regulators to waste resources in attempts to assert and expand their authority and jurisdiction.[268] Thus, current regulatory competition is over regulatory agencies seizing authority from one another, not over better investor protection.[269] A system styled after portable reciprocity would eliminate these jurisdictional disputes, as jurisdiction would be a settled issue before a transaction even occurs.[270]

Choi has also pointed to a number of "behavioral biases" clouding the judgment of well-meaning regulators, problems which could be alleviated with competition.[271] These include the overconfidence of regulators in their own expertise, "tunnel vision-like view[s]" leading to application of the same solution to multiple problems, systemic misinterpretation, and overreaction.[272] These biases are perpetuated by the fact that the SEC does not have to compete with other regulators, so problems go unnoticed and unfixed.[273]

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261. Gevurtz, *supra* note 197, at 6-7; *see also id.* at 2 (noting the need for restraint in making the assumption that one's corporate and securities laws are superior and must be exported).

262. Choi, *supra* note 5, at 111-12.

263. *See id.* at 112.

264. *Id.*

265. *Id.* at 112-13. Increased regulation does not automatically equal increased investor protection. *See* Choi & Guzman, *supra* note 28, at 942.

266. Choi, *supra* note 5, at 113.

267. *Id.* at 113-14.

268. *Id.* at 112-13.

269. *Id.* at 116.

270. *See supra* note 227 and accompanying text (noting this aspect of portable reciprocity).

271. Choi, *supra* note 5, at 117-18.

272. *Id.*

273. *See id.*

III. ADOPTING A LIMITED FORM OF COMPETITIVE REGULATION WILL SOLVE THE JURISDICTIONAL ISSUE

The current formulations that courts use to determine jurisdiction[274] are too problematic to remain unchanged. A circuit split with ambiguous standards[275] makes it very difficult for foreign corporations to be placed on notice of when they may be subject to the antifraud provisions of the Act.[276] Inefficiency also results, as corporations are forced to comply with multiple securities regimes and disclosure standards.[277]

To a certain extent, any assertion of jurisdiction over a foreign transaction may be undesirable. Congress has not explicitly provided for extraterritorial application of the Act.[278] Many courts and commentators have thus seen any assertion of jurisdiction as improper judicial activism.[279] Furthermore, concerns of international comity are implicated whenever a court applies the securities laws of the United States to a foreign transaction.[280] Besides, the bulky jurisdictional issue wastes the resources of the parties.[281] Many corporations may even forego doing business in the United States to avoid any possibility of having to comply with the strict federal securities laws.[282]

However, it is also true that, even with all of the attendant problems, at least some exercise of jurisdiction meets important policy needs; even the more restrictive courts have called this notion elementary.[283] Extension of jurisdiction often serves the broad scope and remedial purposes of the

274. *See* discussion *supra* Part I.B (describing the tests the courts employ, the difficulty of defining and classifying those tests, and the many problems inherent in those tests).

275. *See supra* notes 81-89 and accompanying text (describing the basic circuit split and the difficulty of defining the various rules in relation to one another).

276. *See supra* notes 106-10 and accompanying text.

277. *See supra* note 111 and accompanying text.

278. *See supra* notes 28-34 and accompanying text. The ordinary canon of construction provides that, unless Congress has explicitly indicated otherwise, an act is only meant to apply domestically. *See* discussion *supra* Part I.A.3; *see also supra* notes 170-72 and accompanying text (describing how some courts have relied on this canon when denying jurisdiction).

279. *See supra* notes 173-75 and accompanying text.

280. *See supra* notes 179-83 and accompanying text.

281. *See supra* notes 185-95 and accompanying text.

282. *See* Romano, *supra* note 129, at 2419 ("The principal reason that the vast majority of non-U.S. firms who could qualify for exchange trading do not list in the United States is that their disclosure costs would significantly increase, particularly with respect to accounting data, as they would have to comply with the SEC's regime."); *supra* notes 196-99 and accompanying text (noting this argument and supporting evidence); *see also* Choi & Guzman, *supra* note 28, at 924 & n.75 (stating that the extensive disclosure mandated by the United States securities laws puts firms complying with those laws at a disadvantage).

283. *See supra* notes 35-36 and accompanying text (noting how even the Second Circuit recognizes that at least some extraterritorial application is required); *see also supra* notes 158-60 and accompanying text (describing the important role of policy).

Act.[284] Perhaps the best argument for jurisdiction is that fraudulent conduct occurring within the United States should not go unpunished.[285]

While it is elementary that exercising jurisdiction is an effective way to meet these needs, it is not the only way to do so. Adopting a more competitive global securities regime, with some limitations, will address many of the concerns of those who support jurisdiction,[286] alleviate many of the fears of those who argue against such jurisdiction,[287] and eliminate the problems associated with the current formulations of when extraterritorial jurisdiction is allowable.[288] At the same time, this market approach will stimulate competition among nations to craft securities laws that better serve the interests of both corporations and investors.[289]

This part addresses how this solution will work, and how it should be styled. Part III.A begins by arguing that a free-market approach should be adopted, as a territorial-market approach would result in less competition. Specifically, a "portable reciprocity" free-market approach is advocated over Professor Romano's free-market approach.[290] Part III.A.3 criticizes the race to the bottom, a theory used to support limitations on competition. Lastly, Part III.A.4 draws support for this system from the failures of Enron and similar scandals. Part III.B then examines how that system should be designed.[291] The remainder of Part III explains how this system will resolve many of the difficulties inherent in the current judicial tests while addressing most of the concerns on both sides of the debate.[292]

A. *A Free-Market Approach, Styled After Portable Reciprocity, Is Superior to a Territorial-Market Approach*

1. Territorial-Market Approaches Limit Potential Competition

Both free-market[293] and territorial-market[294] approaches have much to commend them, but a free-market approach would stimulate more

284. *See supra* notes 138-40, 143-48 and accompanying text.

285. *See supra* notes 149-53 and accompanying text (detailing this argument and its widespread support).

286. *See* discussion *supra* Part II.A (describing such concerns).

287. *See* discussion *supra* Part II.B (describing such fears).

288. *See* discussion *supra* Part I.B.2 (detailing many of these problems).

289. *See* discussion *infra* Part III.A.

290. *See* discussion *infra* Part III.A.2.

291. Perhaps the most important feature of this system would be the limitation of its operation to certain countries, designed to prevent corporations from choosing relatively weak securities laws. *See infra* notes 339-40 and accompanying text.

292. *See* discussion *infra* Part III.C.

293. *See supra* notes 219-36 and accompanying text (describing portable reciprocity and Professor Romano's approach).

294. *See supra* notes 205-08 and accompanying text (describing issuer-nationality and exchange-based systems).

competition.[295] While the exchange-based approach used in most other Western countries would give greater incentives for stock exchanges to craft better regulations concerning disclosure, there are far too many other considerations affecting a corporation's choice of exchange, such as its location and rules, as well as the capital market this would allow the corporation to access.[296] Furthermore, competition among exchanges across national boundaries is minimal; exchanges do not regulate investors, and exchanges cannot provide for criminal (and even some civil) enforcement.[297]

The other territorial approach, the issuer-nationality system, relies on the actual domicile of a corporation to provide for its securities regulation.[298] While this method would stimulate some competition among nations, it suffers from some of the same problems of an exchange-based system.[299] There are many reasons why a corporation may have its economic center of gravity in any given country, so concerns over securities laws would be inseparably bound to these many other concerns.[300] This reduced competition would result in fewer incentives for countries to develop securities laws, and Professors Choi and Guzman believe it will also lead to overregulation.[301] Issuer-nationality may hinder capital mobility across borders, and would prevent a corporation with high-quality securities located in a country with low-quality protection from choosing to be regulated by a securities regime more appropriate to its circumstances; this would also hinder efficient pricing of that security.[302] A territorial approach would thus "fail to maximize the potential benefits from regulatory competition."[303] A theory based on territoriality is also becoming "increasingly anachronistic given the fluid international nature of most capital markets."[304] A new approach, designed to accommodate the modern nature of international capital mobility, should not be fashioned off of national borders, given their dwindling importance in the financial community.[305]

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295. *See* Choi & Guzman, *supra* note 28, at 946 (noting the difficulties regarding effective competition between exchanges).

296. *See supra* note 205 and accompanying text (explaining the exchange-based system).

297. *See* Choi & Guzman, *supra* note 28, at 946-47.

298. *See supra* notes 206-08 and accompanying text (explaining the issuer-nationality approach).

299. *See supra* notes 295-97 and accompanying text (describing these exchange-based problems).

300. *See* Choi & Guzman, *supra* note 28, at 918 (noting the capital located in a country as one factor); *cf. supra* note 296 and accompanying text (discussing how the same would be true in an exchange-based system).

301. Choi & Guzman, *supra* note 28, at 949-50.

302. *See id.* at 949.

303. *Id.* at 914.

304. *Id.* at 918.

305. *See id.*

2. Portable Reciprocity Would Stimulate Greater Competition than Professor Romano's Approach

Portable reciprocity[306] and Professor Romano's approach[307] are strikingly similar, but portable reciprocity would create greater competition.[308] This results because under Romano's approach, United States corporations would be subject to the securities laws of their state of incorporation.[309] Portable reciprocity, on the other hand, separates the choice of securities regime from any other consideration, such as the capital located within a jurisdiction.[310] Some corporations may choose to issue their securities within a country in order to gain access to that country's capital, even if the securities laws of that country are "suboptimal."[311] This also creates less incentive for larger markets, such as the United States, to develop their securities laws, as their capital is too important to many corporations.[312]

3. Critique of the Race to the Bottom Theory

The race to the bottom theory is often used to justify the issuer-nationality approach and its inherent limitations on competition,[313] but this theory fails to account for the evidence[314] and has not produced real results. Domestically, the competition which the original proponents of the race to the bottom theory feared actually raised shareholder value, benefiting both corporations and their constituents.[315] There are strong arguments that the same would occur in an international context.[316] Furthermore, the limited global competition that already exists has not produced a race to the bottom, but wasteful jurisdictional battles instead.[317] The binding of jurisdiction to territory instead of choice has led to regulators attempting to reach across borders and prevent the flight of investors.[318] If corporations were allowed choice of securities regime with no other considerations which regulators could use as leverage against them, then the productive forces of

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306. *See supra* notes 223-28 and accompanying text (describing portable reciprocity).
307. *See supra* notes 220-22 and accompanying text (describing Romano's system).
308. *See supra* note 232 and accompanying text (explaining how portable reciprocity, unlike Romano's approach, completely isolates the choice of securities regime from other concerns).
309. *See supra* note 220 and accompanying text (noting this aspect of Romano's approach). So, corporations will not make the choice of which securities regime to adopt by itself, but in conjunction with the many other choices a corporation must make when deciding where to be incorporated. *See* Choi & Guzman, *supra* note 28, at 918.
310. Choi & Guzman, *supra* note 28, at 918.
311. *Id.* at 919.
312. *Id.*
313. *See supra* notes 212-18 and accompanying text.
314. Romano, *supra* note 129, at 2383-84.
315. *See supra* note 249 and accompanying text.
316. *See supra* note 250 and accompanying text.
317. *See supra* notes 252-55 and accompanying text.
318. *See supra* notes 254-55 and accompanying text.

competition could be harnessed as regulators could vie for jurisdiction solely through the offering of more efficient regulations.

It is not necessary for a race to the top to exist to discredit the race to the bottom theory. It may be true that competition merely creates diversity.[319] In the global securities regulation context, some nations may offer weak regulations, while others may offer strong ones, and investors will value the price of stock accordingly.[320] The market should be able to efficiently value the various securities regimes, especially considering that unsophisticated investors are being diluted proportionally by institutional investors.[321] Many corporations will choose to be governed by stricter securities laws, in order to instill investor confidence and reduce the cost of raising capital.[322] Other corporations may choose laxer securities regimes to avoid excessive operational and interfirm costs.[323] Many corporations are currently harmed by securities regimes not tailored to their particular needs, as are their investors, and so corporations should be given some choice in the matter.

4. The Challenge of Enron

The fallibility of the United States securities regime that Enron demonstrated[324] leads to two important conclusions. The first is that courts should be more wary when determining that United States securities laws must be asserted extraterritorially to better protect foreign investors and punish fraudulent conduct.[325] Post-Enron, it is more difficult to claim that United States law can accomplish investor protection better than the law of the jurisdiction with a greater interest in and connection to the underlying claims.[326] The second conclusion is that the securities regime of the United States could benefit from the incentives to improve that competition would bring.[327]

Instead of detracting from the argument for a free-market approach, the Enron scandals serve to highlight its need. "[S]ecurities regulations . . . are often flawed because of the inevitable foibles of those who promulgate and

319. *See supra* notes 234-36 and accompanying text (explaining the argument that regulatory competition will create neither a race to the bottom or the top, just diverse regimes to meet diverse needs).

320. *See* Cox, *supra* note 4, at 1201; Romano, *supra* note 129, at 2421.

321. *See* Choi & Guzman, *supra* note 28, at 926 n.80, 942.

322. *See supra* notes 237-42 and accompanying text.

323. *See supra* notes 243-46 and accompanying text.

324. *See supra* notes 256-73 and accompanying text.

325. *See* discussion *supra* Part II.A (presenting arguments courts and commentators use to support the exercise of jurisdiction).

326. *See* Gevurtz, *supra* note 197, at 8.

327. *See supra* note 233 and accompanying text (describing Romano's belief that corporations will choose the securities regimes that best serve investors).

enforce them,"[328] and currently, those regulators face no competition and so lack the incentives for constant improvement that such competition would bring. If these scandals have shown that United States securities laws are not perfect, then they have also shown the need for restraint when forcing them upon completely foreign transactions.[329]

B. *How a Competitive Global Securities Regime Should be Structured*

In order to generate meaningful competition while still ensuring investor protection, many basic needs must be met. The first is that the choice between securities regimes should be unhindered by other considerations, so that larger markets, which corporations need for access to capital, will still face strong incentives to craft better securities laws.[330] Corporations must thus possess the ability to choose any securities regime they wish,[331] subject to important limitations discussed below.[332]

Of course, for this system to work, corporations must be required to clearly disclose which regime they have chosen.[333] Otherwise, the securities will not be valued efficiently, and one of the major premises of portable reciprocity—that investors will discount the price of stock in corporations shielded by weaker investor protection—will vanish.[334] This would, in fact, lead to a race to the bottom, as securities will not be valued lower if a corporation chooses weaker investor protections, so corporations would have little reason to avoid weaker regimes.[335]

The application of a global competitive regime should be limited to disclosure requirements, antifraud rules, and other aspects of the laws directly relevant thereto.[336] Many aspects of the Act, as well as the Securities Act of 1933 and other federal securities laws, overlap with corporate governance laws and even bankruptcy laws.[337] Thus, including many other provisions of securities laws in a competitive regime would unnecessarily complicate matters and cause considerable international confusion. When defining "securities laws" for the purpose of such a

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328. Gevurtz, *supra* note 197, at 8.

329. *Id.*

330. *See supra* notes 298-303, 310-12 and accompanying text (describing why isolation of this choice from other concerns maximizes competition).

331. *See* Choi & Guzman, *supra* note 28, at 917.

332. *See infra* notes 339-45 and accompanying text (describing how this regime should be limited to countries with sufficient investor protections).

333. *See* Choi & Guzman, *supra* note 28, at 926 (detailing how regulators may fashion such disclosure requirements).

334. *See supra* notes 222, 233-36 and accompanying text (describing this assumption and its possible implications).

335. *See supra* notes 212-15 and accompanying text (describing the race to the bottom theory).

336. *See* Choi & Guzman, *supra* note 28, at 935-36.

337. *See, e.g.*, *id.* (discussing these overlapping regulations).

global regime, it would therefore be best to avoid this problem by only including disclosure requirements, antifraud rules, and related provisions.[338]

One of the most important features of such a global regime would be the limitation of its application to countries with securities laws that contain at least a moderate level of investor protection. These protections need not be extraordinary, as some difference between protections offered by various countries is desirable,[339] but they should be of a level sufficient to ensure that corporations do not choose a regime in order to purposefully defraud investors. Portable reciprocity does not provide for such a limited application,[340] but it is necessary to curb possible abuse.

Even Choi and Guzman readily admit that those who choose laxer regimes may be doing so purely to engage in activities prohibited by other securities regimes.[341] Furthermore, the discounting process is not perfect and cannot accurately value every small difference from one securities regime to another.[342] Thus, not only would limitation of a global regime's application to countries with at least moderate levels of investor protection reduce the dangers that errors in the valuation process would produce, but the overall market will have a smaller spectrum to evaluate. In addition, allowing a corporation to choose a nation with extremely weak investor protection seems to disregard the prophylactic purpose of disclosure laws—to deter fraud.[343] For all of these reasons, private contract should not be allowed to substitute for the choice of an actual nation's securities laws, as Choi and Guzman recommend.[344] Private contract suffers from the additional problem that it would be difficult to foresee how courts would interpret the contracts' language.[345]

A claim arising from a securities transaction should be adjudicated in the forum which has promulgated the chosen securities regime. This jurisdictional question is a complex problem with no easy solution, but using, as a default forum, the nation whose laws are at issue is an efficient solution for a number of reasons.[346] Instead of numerous jurisdictions across the world interpreting and applying the laws of another jurisdiction in equally numerous ways, the regime's own courts would have sole control

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338. *See id.*

339. *See supra* notes 234-36 and accompanying text (noting how different companies may choose securities regimes suited to their various needs, and investors may choose different levels of protection, all valued accordingly).

340. *See supra* notes 224-36 and accompanying text.

341. Choi & Guzman, *supra* note 28, at 916-17.

342. *See* Cox, *supra* note 4, at 1233-34. Professor Cox also notes the harmful impact this could have on portfolios that are insufficiently diversified among various levels of investor protection. *Id.* at 1235.

343. *Id.* at 1235-36.

344. *See supra* note 228 and accompanying text (briefly noting how Choi and Guzman would allow such contractual provisions).

345. *See* Choi & Guzman, *supra* note 28, at 940.

346. *Id.* at 931.

over the proper interpretation of its jurisdiction's laws.[347] Further, this framework would enable claims to be adjudicated by experts on that particular nation's law, who also have greater incentives to vigorously enforce that law.[348] Furthermore, if different jurisdictions are applying another country's securities laws in divergent ways, then the country of each investor would presumably play a role in the valuation of securities.[349] This would be undesirable; not only would it make the valuation process much more complicated and inefficient,[350] but it could deter some corporations from offering securities to citizens of countries whose courts interpret the chosen law in ways adverse to the corporation.[351]

Although some may argue that this solution poses difficulties for investors who can pursue their claims only in courts in remote jurisdictions,[352] this problem is minimized for several reasons. First, this is not a new problem, given the increasingly international nature of the financial community, and that rapidly improving transportation and communication have been ameliorating this dilemma.[353] Additionally, the fact that some investors will have to pursue their claims in remote jurisdictions will play a role in the valuation of the securities, so investors will be, in essence, receiving the protection they purchase.[354] However, because of these potential problems, courts should uphold forum selection clauses in securities transactions that purport to select more convenient forums; the market for securities will take account of these clauses and value securities accordingly.[355]

Enforcement is a further issue that must be addressed. All nations involved in the competitive global regime should agree to enforce the securities claim judgments of other countries within their own jurisdictions. This way, a corporation may not easily avoid enforcement of any judgments by picking a regime in which it has no assets.[356]

There must also be sufficient incentives for nations to compete with each other. If the choice of securities regime is completely separate from any territorial concerns, then a nation would not be competing to attract actual

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347. *Id.* at 930.

348. *Id.*

349. *Id.* at 929.

350. *Id.*

351. *Cf. id.* at 922-23 (discussing how many companies purposefully exclude investors from the United States in order to avoid the federal securities laws); Testy, *supra* note 112, at 957-58 (noting the potential for such exclusion).

352. *See* Romano, *supra* note 129, at 2422-23 (noting how this would compound the collective action problem).

353. *See* Choi & Guzman, *supra* note 28, at 931; *cf.* Choi, *supra* note 5, at 113 (noting that "the growing integration of world financial markets reduces the cost of implementing such a system of issuer choice").

354. Choi & Guzman, *supra* note 28, at 931-32.

355. *Id.* at 928, 931.

356. *Id.* at 931.

business and capital to its markets.[357] One possible way to create a competitive incentive would be to create fees for choosing to operate under a nation's securities laws. In addition, the same incentives that currently exist for regulators to assert jurisdiction would work in favor of this system.[358] Furthermore, a corporation which has chosen a particular nation's regime is more likely to issue securities within that nation's borders.[359]

In the event that a corporation has not chosen an allowable securities regime, or is a corporation of a nation not party to the agreement establishing this global competitive regime, the old conduct and effects tests should apply.[360] If a foreign corporation operating in the United States is not from a country included in the global securities regime, it is most likely because that nation's securities laws offer weak protections for investors.[361] These weak laws would implicate many of the concerns of the courts currently exercising broad jurisdiction over foreign securities transactions.[362] Thus, a less restrictive form of the conduct test is appropriate. However, an approach as broad as the Third Circuit's, finding jurisdiction if any conduct took place within the United States, is judicial overreaching.[363] Therefore, an intermediate test is appropriate. This test could be formulated in many ways, such as whether substantial conduct occurred within the United States, but the most important thing is that it is clearly formulated. This would help reduce the amount of discretion left to the judge[364] and give these corporations better notice of what actions will subject them to the provisions of the Act.[365]

C. *Advantages of the Proposed System*

The limited form of global securities competition outlined in Part III.B would resolve many current problems and bring new benefits. One advantage is that such a system would give regulators incentives "to fashion

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357. *See supra* notes 330-32 and accompanying text (explaining why, in this proposal, the choice of securities regime must be isolated). *But see* Choi & Guzman, *supra* note 28, at 931-32 (discussing some practical reasons why corporations may choose the securities regime of their own countries, as they would have "home field advantage").

358. *See supra* notes 263-70 and accompanying text (describing how regulators may currently assert jurisdiction for self-interested reasons, such as to increase prestige).

359. Choi & Guzman, *supra* note 28, at 923 (giving reasons why a corporation is more likely to do so).

360. *See* discussion *supra* Part I.B.1 (describing the nature of these tests and how they have been employed).

361. *See supra* notes 339-45 and accompanying text (describing how, in this proposal, weaker regimes would be excluded from the larger global regime).

362. *See* discussion *supra* Part II.A (discussing many of these concerns).

363. *See supra* note 99 and accompanying text (describing this liberal test).

364. *See supra* note 59 (noting how, currently, judges enjoy considerable discretion).

365. *See supra* notes 106-10 and accompanying text (noting how difficult it is for corporations to know when they may be subject to United States securities laws).

regimes designed to maximize the welfare of securities market participants."[366] This may result in a race to the top as nations compete to fashion laws more beneficial to investors and corporations alike.[367] At the very least, it will cause nations to craft a diverse set of regulations to better meet the diverse needs of corporations.[368] Limiting its application to countries with some heightened investor protection would not only seem to increase the possibility of a race to the top, but would provide incentives for the excluded nations to better develop their own securities laws, so that they may be admitted into the global regime.[369]

The resulting competition would bring many advantages. The Enron, WorldCom, Tyco, and other corporate scandals have highlighted the need for the securities laws of the United States to be improved through competition.[370] This competition will be heightened by the severance of the choice of a securities regime from any other consideration.[371] The limited amount of competition that already exists largely focuses on aggressive assertion of jurisdiction, and, thus, wastes resources.[372] Competition will also help bring the incentives of regulators into line with those of investors and corporations.[373] Similarly, behavioral biases of regulators will be kept under better control.[374]

There are other new benefits that this system would bring. For instance, United States corporations, which have to disclose much more than their foreign rivals, will no longer have to be at a competitive disadvantage.[375] Securities will also be priced more efficiently, as a corporation's chosen regime will act as a "signal" as to the quality of an offering.[376] Another benefit would be that United States markets would open up to foreign issuers currently avoiding the United States purposefully because of stringent federal securities laws;[377] this result would enable United States investors to purchase these securities without having to go through a foreign

366. Choi & Guzman, *supra* note 28, at 923.

367. *See supra* notes 222, 233, 237-42, 321-22 and accompanying text (describing the race to the top and reasons why it may occur).

368. *See supra* notes 234-36, 319-21 and accompanying text (describing this diversification and reasons why it may occur).

369. *See supra* notes 339-45 and accompanying text (explaining how this proposal would exclude nations with weak investor protections).

370. *See* discussion *supra* Part III.A.4 (explaining why these scandals necessitate this conclusion).

371. *See supra* notes 308-12 and accompanying text.

372. *See supra* notes 252-55 and accompanying text.

373. *See supra* notes 263-70 and accompanying text (describing how, currently, regulators may act to the detriment of corporations and shareholders).

374. *See supra* notes 271-73 and accompanying text.

375. Choi & Guzman, *supra* note 28, at 924; *see also supra* notes 28, 236 and accompanying text.

376. Choi & Guzman, *supra* note 28, at 924; Romano, *supra* note 129, at 2421.

377. *See* Choi & Guzman, *supra* note 28, at 945; *see also supra* notes 196-99, 282 and accompanying text (presenting arguments that some foreign corporations currently purposefully avoid the United States for fear of its federal securities laws).

exchange.[378] Investors would gain not only from competitive regimes, but also because such competition would reduce systematic risk (risk inherent to a particular corporation or its industry) in proportion to unsystematic risk (risk inherent in the entire market, which cannot be protected against through diversification), allowing greater reduction of a portfolio's risk through further diversification.[379]

Problems inherent in the current jurisprudence would also be solved. For example, a competitive global securities regime would eliminate the current inefficiency due to a corporation being forced to comply with multiple securities regimes.[380] The problem with multi-compliance is not simply that a corporation is always forced to comply with the most stringent of the regimes that applies to it; even the regimes that are generally more lenient may make demands that the most stringent one does not, so a corporation is, in essence, complying with something more strict than the strictest of regimes to which it is subject.[381] Furthermore, the confusing circuit split regarding a conduct test would be eliminated.[382] Of course, corporations that have chosen an allowable securities regime will always be on notice of which laws to abide by, no matter where in the world they transact business.[383] While there will still be no international consensus on what constitutes fraudulent conduct, this will be much less of a problem, as there will no longer be improper extraterritorial application of securities laws.[384] International conflict over extensions of jurisdiction will cease to be an issue.[385] Furthermore, as long as the international agreement or other implementing device so provides, there will be no problem of enforcing a judgment in other jurisdictions subject to the global regime.[386]

Although the United States will still have jurisdiction over many foreign transactions under this system, the problems pointed out by those who argue against courts asserting such jurisdiction will be ameliorated. Courts

378. Romano, *supra* note 129, at 2420. Currently, many companies purposefully exclude investors from the United States in order to avoid the application of federal securities laws. Choi & Guzman, *supra* note 28, at 922-23.

379. Fox, *supra* note 37, at 2509-12.

380. *See supra* note 111 and accompanying text.

381. Fox, *supra* note 37, at 2583-84.

382. *See supra* notes 80-89 and accompanying text (describing the division surrounding the conduct test and the chaos this has caused).

383. *See supra* notes 106-10 and accompanying text (describing how, currently, it is exceedingly difficult for many corporations to know when they are subject to the United States's securities laws).

384. *See supra* notes 112-14 and accompanying text (describing this lack of an international consensus, and how it currently makes extraterritorial application of the Act problematic).

385. *See generally supra* notes 115-17 and accompanying text.

386. *See supra* notes 118-20 and accompanying text (describing difficulties enforcing judgments).

would be given explicit authority to assert such jurisdiction.[387] There should thus be no more concern over improper judicial activism.[388] Policy determinations, such as those involved in the question of whether a jurisdiction has sufficient investor protection to be party to the agreement, would be made by diplomatic and legislative bodies much better suited to such determinations than courts.[389] Similarly, international comity concerns will no longer be implicated.[390] Additionally, as jurisdiction will cease to be a major issue for litigation when a corporation has chosen an allowable securities regime, judicial economy will be served and the parties will not waste resources on jurisdictional battles.[391]

Many of the interests pointed out by supporters of federal jurisdiction will also be addressed. The remedial purposes of the Act will be served where the Act is implicated.[392] Where a corporation has not chosen to be governed by the Act, investors can still be assured that they are receiving at least a moderate level of protection,[393] whatever level of protection for which they pay.[394] As countries with weaker investor protections would not be part of the regime, fraud would not go unpunished.[395] It can also be assured that foreign courts will reciprocate and protect American investors.[396] Corporations from countries with minimal levels of protection would be subject to a more relaxed version of the conduct test, as well as the effects test, allowing courts fairly broad discretion with which to protect investors and deter fraud.[397] This should ensure that, where the policy concerns of supporters of expansive jurisdiction are implicated, they will be addressed.[398]

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387. *See supra* notes 28-34, 167-72 and accompanying text (explaining the lack of congressional guidance, and how this is used in arguments that jurisdiction should be limited); *see also* discussion *supra* Part I.A.3 (describing the canon of statutory construction requiring that, unless otherwise provided, a statute only applies domestically).

388. *See supra* notes 173-75 and accompanying text (describing how some courts have characterized broad jurisdiction as improper judicial activism).

389. *See supra* notes 176-78 and accompanying text (detailing the concerns of allowing a court to make such policy determinations).

390. *See supra* notes 179-83 and accompanying text.

391. *See supra* notes 185-95 and accompanying text.

392. *See supra* notes 138-40, 143-48 and accompanying text (describing how supporters of liberal jurisdiction have relied on the broad scope and remedial purposes of the Act).

393. *See supra* notes 339-45 and accompanying text (explaining how this proposal excludes nations with weak investor protections).

394. *See supra* notes 234-36 and accompanying text (noting how investors would value various securities regimes differently).

395. *See supra* notes 149-53 and accompanying text (noting how many have argued that jurisdiction should be exercised to prevent corporations from engaging in fraudulent activities within the United States).

396. *See supra* notes 154-57 and accompanying text.

397. *See supra* notes 360-65 and accompanying text (explaining how, if this were the case, courts should employ fairly liberal forms of the conduct and effects tests).

398. *See supra* notes 158-60 and accompanying text (noting the general policy concerns of those who support broad jurisdiction).

CONCLUSION

The jurisprudence regarding jurisdiction over largely foreign securities transactions is highly problematic.[399] The confusion it has produced has ensured that corporations often cannot reasonably know when they may have to comply with strict federal securities laws.[400] This has led to inefficiency and chaos.[401] Introducing regulatory competition on a global scale, while it will not be easy to implement, has a number of advantages over any other possible solution.[402] Not only will it solve the jurisdictional problem, but it will do so while addressing the concerns of courts and commentators on both sides of the debate.[403] Additionally, it will bring new benefits to the global market.[404] It will certainly bring greater efficiency and diversity, and it may even produce a desirable race to the top.[405]

399. *See* discussion *supra* Part I.B.2.
400. *See* discussion *supra* Part I.B.2.
401. *See* discussion *supra* Part I.B.2.
402. *See* discussion *supra* Part III.A-B.
403. *See* discussion *supra* Parts II.A-B, III.C.
404. *See* discussion *supra* Part III.A, C.
405. *See* discussion *supra* Part III.A, C.