THE LIMITS OF FEDERAL JURISDICTION AND THE F-CUBED CASE: ADJUDICATING TRANSNATIONAL SECURITIES DISPUTES IN FEDERAL COURTS

*DANIELLE KANTOR**

INTRODUCTION

While corporate malfeasance has long been prosecuted criminally, the United States also has a tradition of using private actors and civil lawsuits to encourage compliance with securities regulations. Indeed, the aggressive stance of the federal government toward white-collar crime is frequently coupled with an equally aggressive civil litigation strategy, in which massive class actions work to recapture potentially massive pecuniary losses for a potentially massive number of plaintiffs.

It is largely unquestioned that securities fraud perpetrated by American companies and American executives should be prosecuted and litigated in United States courts. Yet the increasing relevance of an integrated, global economy virtually assures the opacity of formerly clear jurisdictional boundaries. The globalized market has and will continue to drive an increasing number of lawsuits with transnational characteristics—foreign classes, foreign defendants, or securities traded on foreign markets—into United States federal courts, long perceived as the most friendly toward plaintiffs. Especially as the global class action comes to play a prominent role in resolving transnational disputes, the question of how to allocate jurisdictional authority among nations becomes increasingly urgent.

If domiciled in France, would it be proper for the United States federal courts to exert jurisdictional authority over Bernie Madoff and his fund? Would the answer change if most of the plaintiffs were French investors? If the securities traded and fraudulently reported were traded on the London exchanges, rather than an American exchange, could litigation to recover losses properly take place in an American federal court? Would it be relevant

* J.D. Candidate, May 2010, New York University School of Law; A.M., Brown University; A.B. Brown University. Thank you to the editors of the *New York University Annual Survey of American Law* for their tremendous efforts, and to Professors Arthur R. Miller and Stephen Choi for comments and advice.

if Madoff himself had come to New York City to plan the fraud with the aid of lawyers, accountants, and bankers?

Currently, there exists no coherent policy that can predictably provide potential litigants with a meaningful ex ante answer to any of these questions.[1] Such uncertainty has potentially profound ramifications on economic policy and international relations. In particular, class actions litigated in United States courts, featuring claims against foreign defendants, by a foreign class, involving fraud with respect to securities trading on foreign markets—so-called "f-cubed" cases—raise important questions about the extraterritorial scope of the antifraud provisions of United States securities laws. In the f-cubed context, the unpredictability of procedural law engenders two major problems: first, it presents challenges to international policy and comity among nations; second, it raises concerns regarding international economic policy in general and the health of the American economy in particular.

This Note will examine the proper scope of subject matter jurisdiction over f-cubed securities class actions. Part I examines the nature of f-cubed securities class actions and situates the particular problems this type of lawsuit presents within the larger context of aggregate litigation. Part II analyzes the serious policy challenges posed by f-cubed class actions. Part III describes the discord that exists among the federal courts. Finally, Part IV considers possible resolutions to the jurisdictional problems facing f-cubed securities class actions, taking note of the implications engendered by the unpredictable extraterritorial application of securities laws in the lower federal courts—concerns relating to comity and to economic policy.

This Note posits a potential two-tiered solution to the problem: first, sharp differentiation between wholly foreign plaintiff classes and those comprised of both domestic and foreign plaintiffs; second, permitting de novo, interlocutory review when subject matter jurisdiction is asserted over f-cubed class actions, similar to the manner in which courts review class certification determinations.

1. This is particularly important because courts can dismiss cases sua sponte for lack of subject matter jurisdiction. *See* FED. R. CIV. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

I.
THE F-CUBED ACTION AS A CLASS ACTION

Questions surrounding the extraterritorial application of American securities laws have existed for at least a century.[2] Yet, the dramatic qualitative and quantitative expansion of transnational litigation and an increasingly international corporate environment over the past few decades have brought this issue to the fore.[3] The changes wrought by globalization have raised increasingly novel questions about the scope and limits of the extraterritorial application of United States securities laws.[4]

One of the most interesting issues in this area is raised by the f-cubed class action. These lawsuits feature a putative class comprised partly or wholly of foreign plaintiffs, a foreign defendant, and claims relating to securities bought and traded on foreign markets. The increased rate at which multinational class actions are being filed suggests that the issues brought about by f-cubed class

2. *See, e.g.*, Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

3. *See, e.g.*, Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 30 (D.C. Cir. 1987) ("The web of international connections in the securities market was then not nearly as extensive or complex as it has become."); Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 41 (2007) ("The consolidation of financial markets, the exponential increase in cross-border financial activity, and the effect of technology on the speed with which information is transmitted have all contributed to . . . interpenetration among securities markets . . . .").

4. This paper deals with "prescriptive jurisdiction" or "legislative jurisdiction," described as a nation's ability "to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court," insofar as the law governing the extraterritorial application of securities laws is supposedly circumscribed by congressional intent. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401(a) (1986). Article III of the Constitution circumscribes the federal courts' relatively limited ability to assert subject matter jurisdiction. *See* Lehigh Mining & Mfg. Co. v. Kelly, 160 U.S. 327, 337 (1895); 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3522 (2008) ("It is a principle of first importance that the federal courts are tribunals of limited subject matter jurisdiction . . . . They are empowered to hear only those cases that (1) are within the judicial power of the United States, as defined in the Constitution, and (2) that have been entrusted to them by a jurisdictional grant by Congress . . . there is a presumption that a federal court lacks subject matter jurisdiction . . . .") (internal citations omitted). However, this paper also deals with the concept of judicial jurisdiction, a nation's authority to "subject persons or things to the process of its courts or administrative tribunals." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401(b) (1986). In addition, enforcement jurisdiction is defined as a state's power to "induce or compel compliance . . . with its laws or regulations." *Id.* § 401(c).

actions will become ever more important, and ever more in need of clear resolution.[5]

A. The F-Cubed Action and Congressional Silence

Though Congress has the authority to prescribe the extraterritorial enforcement of United States securities laws, whether it has actually chosen to exercise that authority is by no means clear.[6] Section 10(b) of the Securities Exchange Act of 1934[7] (1934 Act) and Securities and Exchange Commission (SEC) Rule 10b-5[8]—the primary antifraud mechanisms—are silent as to the matter of extraterritorial application.[9] The legislative history of the 1934 Act pro-

5. *See* Buxbaum, *supra* note 3, at 41 ("First, the rate at which such actions are filed is increasing, and one must assume that U.S. courts will face the 'foreign cubed' problem more frequently in the future. Second, a substantial percentage of multinational class claims are clearing the jurisdictional obstacle.") (internal citations omitted).

6. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 249–57 (1991) (noting that the extraterritorial application of the securities laws is within the proper scope of congressional power, but that Congress has not unambiguously asserted that power).

7. Section 10(b) states:

> 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 . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b) (2006).

8. Rule 10b-5 states:

> 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 (2007).

9. *See, e.g.*, SEC v. Banner Fund Int'l, 211 F.3d 602, 608 (D.C. Cir. 2000) ("The Congress has not indicated clearly whether section 10 of the Securities Exchange Act of 1934 is applicable to cases involving predominantly foreign securities transactions effected to some degree from outside the United States."); Kauthar SDN

vides little in the way of clarification,[10] and guidance on the subject is largely lacking from the SEC as well.[11]

Without any guidance from Congress, the SEC, or the Supreme Court regarding the transnational scope of the 1934 Act, the lower federal courts have offered conflicting interpretations.[12] Though the lower courts uniformly utilize two tests—the conduct test and the effects test—to determine whether to exercise jurisdiction over transnational securities fraud in 10b-5 actions, the way in which they apply these tests to f-cubed actions is by no means consistent.[13] Complicating the inquiry is the fact that courts consider policy ramifications that go well beyond the mechanical application of the tests when evaluating subject matter jurisdiction. These include comity,[14] interests in finality,[15] and whether extending juris-

BHD v. Sternberg, 149 F.3d 659, 663–64 (7th Cir. 1998) (stating that Congress provided "little meaningful guidance on the issue" of extraterritorial application of federal securities laws).

10. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 729 (1975) ("Section 10(b) of the 1934 Act does not by its terms provide an express civil remedy for its violation. Nor does the history of this provision provide any indication that Congress considered the problem of private suits under it at the time of its passage."); Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 30 (D.C. Cir. 1987) ("If the text of the 1934 Act is relatively barren, even more so is the legislative history. Fifty years ago, Congress did not consider how far American courts should have jurisdiction to decide cases involving predominantly foreign securities transactions with some link to the United States.").

11. *See Blue Chip Stamps*, 421 U.S. at 730 ("[T]here is no indication that the Commission in adopting Rule 10b-5 considered the question of private civil remedies under this provision."). Some securities laws provisions have been found to not apply extraterritorially. *See, e.g.*, 17 C.F.R. §§ 230.901–.905 (2009). However, the SEC has also noted, in an amicus brief, that it supports expansive extraterritorial application of the securities laws in the f-cubed context. The SEC amicus brief is discussed further *infra* pp. 137–38 and accompanying notes.

12. The Supreme Court only accepted its first f-cubed case for review in late 2009. *See* Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 174 (2d Cir. 2008), *cert. granted*, 2009 U.S.L.W. 8694 (U.S. Nov. 30, 2009).

13. *See, e.g.*, Robinson v. TCI/US W. Cable Commc'n Inc., 117 F.3d 900, 905 (5th Cir. 1997) (describing conduct and effects tests for determining subject matter jurisdiction in securities fraud cases); Itoba Ltd. v. Lep Group PLC, 54 F.3d 118, 121–22 (2d Cir. 1995) (noting that two jurisdictional tests—known as the conduct test and the effects test—have emerged in interpreting the Securities Exchange Act of 1934).

14. *See In re* Vivendi Universal, S.A., 242 F.R.D. 76, 84–90 (S.D.N.Y. 2007) (discussing "international public policy").

15. *See id.*, 242 F.R.D. at 106–07 (discussing class certification issues, remedies abroad, and interests in finality); *see also* FED. R. CIV. P. 23(b)(3)(C); 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1780 (2009) (noting that Rule 23(b)(3)(C) allows a court to "evaluate whether allowing

diction would be reasonable,[16] efficient,[17] or in the interests of public policy.[18] The lack of any clear mandate with regard to the extraterritorial application of securities laws coupled with an emphasis on policy analysis thus further obfuscates the jurisdictional inquiry.

B. The Problems of Class

Current class action law in the United States provides a useful analog for analyzing some of the problems posed by f-cubed securities class actions. At heart, class actions in general, and securities class actions in particular, present a tension between two imperatives. The current law, specifically Rule 23 of the Federal Rules of Civil Procedure, on the one hand encourages the aggregation, and thus vindication, of smaller claims.[19] On the other hand, some courts have attempted to temper the ease with which claims are aggregated in order to guard against unwarranted settlement pressure and potential abuses by overzealous litigants and lawyers.[20]

The core justification for American-style permissive aggregation is to enable individuals to bring negative value claims, in which "the costs of enforcement in an individual action would exceed the expected individual recovery."[21] Securities fraud presents the classic case for the reasonable justification of the class action mecha-

a Rule 23(b)(3) action to proceed will prevent the duplication of effort and the possibility of inconsistent results").

16. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402, 403, 416 (1986).

17. *See* Merritt B. Fox, *Securities Disclosure in a Globalizing Market: Who Should Regulate Whom*, 95 MICH. L. REV. 2498 (1997) (arguing that regulatory expertise and corresponding efficiency is the critical factor in determining authority to regulate securities laws).

18. *See, e.g.*, Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1335 (2d Cir. 1972). The f-cubed action also implicates such issues as *forum non conveniens*, *see* Gulf Oil Co. v. Gilbert, 330 U.S. 501, 502 (1947), and lead plaintiff selection, *see In re* Royal Ahold N.V. Sec. & ERISA Litig., 219 F.R.D. 343, 351–53 (D. Md. 2003), which are beyond the scope of this paper.

19. *See* FED. R. CIV. P. 23.

20. *See, e.g.*, *In re* Matter of Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1299 (7th Cir. 1995) (Posner, J.) ("We do not want to be misunderstood as saying that class actions are bad because they place pressure on defendants to settle. That pressure is a reality, but it must be balanced against the undoubted benefits of the class action that have made it an authorized procedure for employment by federal courts.").

21. *In re* Inter-Op Hip Prosthesis Liab. Litig., 204 F.R.D. 330, 348 (N.D. Ohio 2001); *see* Castano v. Am. Tobacco Co., 84 F.3d 734, 748 (5th Cir. 1996) ("The most compelling rationale for finding superiority in a class action [is] the existence of a negative value suit.")

nism. In virtually every individual case, the stakes are incredibly low and simply would not merit the time, energy, or expense of an attorney. As a result of the negative value of the claim, the myriad individuals harmed by real corporate malfeasance would go uncompensated, and the corporation itself would have little or perhaps no incentive to abandon illegitimate practices.

However, the very mechanism that enables negative value claims to exist for social and individual good can also potentially be used as a means to extort unwarranted settlements from wary defendants.[22] Aggregation can exert serious pressure on defendants to settle in two major ways. First, certification of a class itself oftentimes leads to an increase in the absolute number of claims.[23] Since the very purpose of a class action is to enable negative value claims, unmarketable claims will be potentially roped into the class, raising the stakes, and increasing the probability that defendants will settle.[24] Given the large size of securities fraud classes—necessarily large in order to counter the negative value of their individual claims—truly meritless claims may never be separated from credible claims. Second, certification of a class results in a variance of outcomes.[25] With an increase in variance, risk-averse defendants

22. Predictably, the debate as to whether "settlement pressure"—improper or not—actually exists splits largely along the plaintiff/defendant division. *See generally* Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1872–73 nn.1–2 (2006); *see also* Lance P. McMillan, *The Nuisance Settlement "Problem": The Elusive Truth and a Clarifying Proposal*, 31 AM. J. TRIAL ADVOC. 221, 222–23 (2007) (noting that definitional and empirical challenges make it difficult to determine whether so-called strike suits and blackmail settlements pose an actual problem for the legal system). Some scholars, arguing on behalf of plaintiffs, note that "blackmail settlements" are empirically unsubstantiated. *See, e.g.*, Charles Silver, *"We're Scared to Death": Does Class Certification Subject Defendants to Blackmail*, 78 N.Y.U. L. REV. 1357 (2003) (criticizing theory that class action certification results in massive settlement pressure and that defendants are coerced into settlements). On the other hand, proponents of the defendant's view note that certification of a class greatly increases the chance of settlement irrespective of the merits and should thus be curtailed or controlled. *See, e.g.*, Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1285–86 n.129 (2002) (citing sources).

23. *See Rhone-Poulenc*, 51 F.3d at 1299; *see also* Nagareda, *supra* note 22, at 1880–81 (2006) (noting the "addition" effect of class certification).

24. *See Rhone-Poulenc*, 51 F.3d at 1298 ("[Defendants] may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.").

25. Nagareda, *supra* note 22, at 1882. Variance essentially refers to the range of possibility and presence of risk, which increases more or less alongside the number of class members.

will pay more money in settlement to avoid a potentially destructive judgment, even given a low probability of plaintiffs' success.[26]

The class action game has increasingly reoriented itself toward settlement rather than trial, though many of the procedural mechanisms governing the class action are based on actually bringing a case to trial.[27] As a result, surviving the minimal standards associated with the motion to dismiss (or even summary judgment) can result in a large, sometimes undeserved, settlement—the "*in terrorem* increment of the settlement value."[28]

As a result, the Supreme Court has addressed the problems engendered by a low pleading standard for fraud, rendering that standard more stringent.[29] Moreover, the addition of subsection (f) to Rule 23 of the Federal Rules of Civil Procedure in 1998[30] also constituted an attempt to respond to serious concerns about improper settlement pressure. With the introduction of Rule 23(f), class certification was determined to be final enough to warrant interlocutory review by an appellate court.[31] By allowing appeal at this stage, rather than waiting for immense costs to accrue and only subse-

26. *See id.*

27. For example, manageability at trial is considered in the 23(b)(2) class action certification, though most cases settle and never make it to trial. *See* FED. R. CIV. P. 23; *see, e.g.*, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUDIES 459, 462 (2004) (showing that the number of suits filed in federal courts increased exponentially in the last four decades of the twentieth century, yet the number of bench trials and jury trials declined); Michael Moffit, *Pleadings in an Age of Settlement*, 80 IND. L.J. 727, 728 ("Most legal disputes end with a settlement.") (2005).

28. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 558 (2007).

29. *See* Ashcroft v. Iqbal, 129 S. Ct 1937, 1954 (2009) (imposing stricter pleading standards in civil cases); Tellabs v. Makor Issues & Rights, Ltd., 551 U.S. 308, 314 (2007) (holding that a securities fraud complaint must allege facts adequate to establish an inference of fraudulent intent that is "cogent and at least as compelling as any opposing inference of nonfraudulent intent."); *Twombly*, 550 U.S. at 558; *see also* text accompanying note 40 *infra* (discussing *Twombly*).

30. *See* FED. R. CIV. P. 23(f). Subsequently restyled in 2007, Rule 23(f) provides that:

> A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 10 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Id.

31. *See id.*

quently allowing appeal, improper settlement pressure could be somewhat ameliorated.[32]

C. *Congressional Intent and the PSLRA*

Securities class actions brought in federal courts were deeply affected by the enactment of the Private Securities Litigation Reform Act (PSLRA) in 1995.[33] Primary among the aims of the PSLRA was a desire to diminish the frequency of non-meritorious securities class actions—those filed "whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action."[34]

One of the central concerns prompting the passage of the PSLRA was that securities class actions were driven by entrepreneurial attorneys, rather than by injured plaintiffs.[35] The PSLRA attempted to remedy this problem by imposing heightened pleading requirements and eliminating some forms of derivative liability.[36] More important to the f-cubed problem, however, the PSLRA reformed the procedures governing securities class actions.

32. *See, e.g.*, 28 U.S.C. § 1292(a)(1) (2006) (enacted by Congress enabling appellate review over certain interlocutory orders via a certification procedure); 28 U.S.C. § 2072(c) (2006) (authorizing the Supreme Court to announce rules to "define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title").

33. Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in sections of 15 U.S.C. and 18 U.S.C.) (1995).

34. H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.) (discussing "abusive practices committed in private securities litigation").

35. Indeed, Congress explicitly endorsed this view in the legislative history accompanying the PSLRA, stating that the PSLRA was intended to terminate the "routine filing of lawsuits against issuers of securities and others" without respect to the merits of the claim. H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.); *see* James Bohn & Stephen Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. PA. L. REV. 903, 979 (1996) ("Empirical results show that most securities-fraud class actions are, in fact, frivolous."); Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 VAND. L. REV. 1465, 1469 (2004) (reviewing studies suggesting that many securities class actions have been frivolous). This is still hotly debated. Some commentators have argued that the premises of the PSLRA were inadequate or faulty, *see, e.g.*, Joel Seligman, C*ommentary, The Merits Do Matter: A Comment on Professor Grundfest's "Disimpiflying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority,"* 108 HARV. L. REV. 438, 439 (1994), and some have noted its possible chilling effect on meritorious claims, *see, e.g.*, Lynn A. Stout, *Commentary, Type I Error, Type II Error, and the Private Securities Litigation Reform Act*, 38 ARIZ. L. REV. 711, 714–15 (1996).

36. *See* 15 U.S.C. § 78u-4(b)(1) (2006); *see also* § 78u-4(b)(2) (imposing heightened scienter requirement); Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 318–22 (2007).

For example, while leaving intact Rule 23 of the Federal Rules of Civil Procedure, the requirements for selecting lead plaintiffs in securities class actions changed substantially.[37] Thus, the perception of increased filing of frivolous securities class action lawsuits is clearly a matter of public policy important enough to be addressed by Congress.

D. The Supreme Court

The Supreme Court has of late largely agreed with Congress, noting that "[p]rivate securities fraud actions . . . if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law."[38] This is due to the fact that pleading standards, governed in the past by notice pleading, have traditionally been quite lenient.[39]

The seminal 2007 case, *Bell Atlantic Corp. v. Twombly*, although not a securities fraud case, addressed the nature of pleading fraud, which is easy to allege, but quite difficult to prove.[40] This relationship is exacerbated by "blackmail settlements" or "strike suits,"[41] where the "threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [trial]."[42] In establishing more rigorous standards in the class action context, the Court has echoed Congress in acknowledging the problem of frivo-

37. *See* FED. R. CIV. P. 23(a). Plaintiffs must establish numerosity, commonality, typicality, and superiority. They must also fall within one of the categories determined by FED. R. CIV. P. 23(b). The passage of the PSLRA eliminated the first-to-file rule, ending the "race to the courthouse" that existed before the PSLRA's enactment, and requires the court instead to appoint whomever adequately represents the interests of the class—presumptively, whomever has the largest financial interest in the litigation.

38. *Tellabs*, 551 U.S. at 313.

39. *See* Conley v. Gibson, 355 U.S. 41, 48 (1957), *overruled by* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 559 (2007).

40. *Twombly*, 550 U.S. at 559. The vast discrepancy between ease of allegation and ease of proof in the context of pleading fraud is exacerbated by the fact that most judges deny interlocutory review. *See* 28 U.S.C. § 1292(b) (2006).

41. "Strike suits" are "meritless suits brought by class action plaintiffs' lawyers to extort settlement and attorneys' fees." Amanda M. Rose, *Life After SLUSA: What Is the Fate of Holding Claims?*, 69 DEF. COUNS. J. 455, 455 (2002).

42. *Twombly*, 550 U.S. at 559. Indeed, *Blue Chip Stamps v. Manor Drug Stores, Inc.*, 421 U.S. 723 (1975), a decision by the Supreme Court holding that non-purchasers and non-sellers of securities lack standing, was explicitly motivated by a concern about so-called "strike suits." *Blue Chip Stamps*, 421 U.S. at 740; *see also* Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1320 (2008).

lous lawsuits and their potentially detrimental effects on the American economy.

E. Economic Policy Fears—The Bloomberg-Schumer Report

The potential for massive and devastating awards is embedded in the psyche of foreign investors, many of whom perceive the American legal system as arbitrary, punitive, and jurisdictionally expansionist.[43] Indeed, the settlement sums yielded from class actions can be staggeringly large. In 2005, class action settlements yielded a record $9.6 billion, excluding the partial settlement of $7.1 billion in Enron litigation.[44] Moreover, three of the top ten securities class action settlements as of December 2006 involved foreign companies and all for over $1 billion.[45]

Confirming these fears, a report authored by McKinsey & Co. and the New York City Economic Development Corporation, sponsored by New York City Mayor Michael Bloomberg and New York Senator Charles Schumer, discussed the negative effects of frivolous litigation on investment in the United States. The report noted that "the prevalence of meritless securities lawsuits and settlements in the United States has driven up the apparent and actual cost of business and driven away potential investors."[46] Further, the report noted that "[t]he propensity toward litigation, a significant issue for society as a whole, is of particular importance to the securities industry, which in recent years has borne a disproportionate share of the overall cost."[47] This share of the cost measures in the billions of dollars and has been growing steadily in recent years.[48]

Not only is America perceived as a place where enormous sums may be spent on litigation, it is also disfavored in the estimation of corporate executives due to the wide breadth of personal and entity

43. *See* MICHAEL R. BLOOMBERG & CHARLES E. SCHUMER, SUSTAINING NEW YORK'S AND THE US' GLOBAL FINANCIAL SERVICES LEADERSHIP ii (2007) [hereinafter BLOOMBERG-SCHUMER REPORT].

44. John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1536 n.7 (2006).

45. Two settlements involved Nortel Networks (Canada), and one involved Royal Ahold, N.V. (the Netherlands). *See* Todd Foster et al., NERA ECON. CONSULTING, RECENT TRENDS IN SHAREHOLDER CLASS ACTION LITIGATION: FILINGS PLUMMET, SETTLEMENTS SOAR 5 (2007), *available at* http://www.nera.com/image/BRO_Recent%20Trends_%201288_FINAL_online.pdf.

46. BLOOMBERG-SCHUMER REPORT, *supra* note 43, at ii.

47. *Id.* at 74.

48. *Id.* ("The total bill for securities settlements in 2005 was 3.5 billion (omitting WorldCom-related settlements of approximately 6.2 Billion), up more than 15 percent over 2004 and nearly 70 percent over 2003.").

liability engendering serious civil and criminal penalties.[49] America's legal system is perceived as punitive and unpredictable, and its reach is seen as dramatic and expansive.[50] A recent capital markets regulatory report, for example, noted that "[f]oreign companies commonly cite the US class action enforcement mechanism as the most important reason why they do not want to list on the US market."[51]

II.
THE POLICY PERSPECTIVE

The circuit split with regard to f-cubed class actions, discussed *infra*, indicates that there is, at a fundamental level, a lack of a standard metric to analyze truly global class actions. This means that the dual problems engendered by jurisdictional unpredictability—comity concerns and the problem of crafting uniform national economic policy—will persist. Thus, in a real sense, uniformity itself is the most critical aim of any policy governing jurisdiction over f-cubed actions and will hopefully be resolved by the Supreme Court's ruling on the issue in 2010, or by congresssional action. However, the myriad policy implications of dealing with comity as well as economic concerns suggest several different alternatives available to Congress or the Supreme Court, some much more palatable than others.

A. The Function and Aims of Securities Regulation

The securities laws address the "core policy of protecting U.S. investors and markets."[52] Indeed, the Supreme Court has articu-

49. America is seen as being at a competitive disadvantage with respect to London in particular. *See id.* at 75–77 ("The recent extraterritorial application of other US statutes has made even clearer the personal threat that US laws can present.").

50. *Id.* at ii (describing perception that the "highly complex and fragmented nature of our [American] legal system has led to a perception that penalties are arbitrary and unfair").

51. LUIGI ZINGALES ET AL., INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION 11 (2006), *available at* www.capmktsreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf.

52. Buxbaum, *supra* note 3, at 24; *see also* Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968) ("We believe that Congress intended the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities."); H.R. REP. No. 73-1383, at 1 (1934) (stating that the purpose of legislation was to protect investors); Jill E. Fisch, *Imprudent Power: Reconsidering United States Regulation of Foreign Tender Offers*, 87 NW. U. L. REV. 523, 547–48 (1993) (not-

lated the central importance of the 1934 Act as protecting the American markets, noting:

> The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated. In response to the sudden and disastrous collapse in prices of listed stocks in 1929, and the Great Depression that followed, Congress enacted the Securities Act of 1933, and the Securities Exchange Act of 1934. Since their enactment, these two statutes have anchored federal regulation of vital elements of our economy.[53]

Protecting American investors is also critical. For example, the Second Circuit has noted that the federal courts may exercise jurisdiction pursuant to Section 10(b) of the 1934 Act given injury to an American citizen, even if that injury occurred in the purchase or sale of a security abroad.[54] Indeed, one federal court noted that "[t]he New Yorker who is the object of fraudulent misrepresentations in New York is as much injured if the securities are of a mine in Saskatchewan as in Nevada."[55] Yet there must be an actual American interest involved: "What little guidance we can glean from the securities statutes indicates that they are designed to protect American investors and markets, as opposed to the victims of any fraud that somehow touches the United States."[56]

However, the centrality of domestic markets and investors to securities law must also be balanced with a second concern: "the subsidiary policy of preventing the United States from becoming a 'launching pad' for fraudulent behavior directed elsewhere."[57] The United States has a legitimate interest in encouraging reciprocity in policing fraud abroad.[58] Just as the United States would not want an independent sovereign to countenance the manufacture of securities fraud on its soil, so it should not allow its own territory to be

---

ing that Congress was primarily concerned with domestic markets when drafting the federal securities laws).

53. Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 78 (2006) (internal citations omitted).

54. Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1336 (2d Cir. 1972).

55. *Id.*

56. Robinson v. TCI/US W. Cable Commc'n Inc., 117 F.3d 900, 906 (5th Cir. 1997).

57. Buxbaum, *supra* note 3, at 24; *see also* IIT v. Vencap Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975) (noting that Congress would not have wanted the United States to be used as a "base" for securities fraud).

58. *See* SEC v. Kasser, 548 F.2d 109, 116 (3d Cir. 1977) (noting reciprocity possibility in exercising extraterritorial jurisdiction).

used as a locus for the creation of fraud which would be difficult to litigate in virtually any jurisdiction—a "Barbary coast" for securities fraud, in the Third Circuit's imagination.[59]

B. Transnational Concerns Underlying the "Presumption Against Extraterritoriality": The Principle of Comity

There is a thin line between offering litigants meaningful access to remedies in the United States and the imposition of legal hegemony. Concerns of comity and international policy are thus inherent in determining the scope of the extraterritorial application of American laws.[60]

The principle of comity is essential to defining the proper boundaries of United States law. Comity in the legal context is understood as:

> [N]either a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.[61]

One commentator has described comity as "an amorphous never-never land whose borders are marked by fuzzy lines of politics, courtesy, and good faith."[62] The "fuzziness" of comity is complicated by the ire raised when it is ignored: "[M]any foreign states view any effort to apply American laws beyond its borders as a violation of the foreign state's sovereignty and as an improper attempt to export American economic, social and judicial values."[63] It is especially worrisome when decisions relating to global economic policy are made by judges, a practice which raises legitimate concerns regarding the relative institutional competence of the judiciary.[64]

59. *Id.*

60. *See* Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972).

61. BLACK'S LAW DICTIONARY 303–04 (9th ed. 2009) (quoting Hilton v. Guyot, 159 U.S. 113, 163–64 (1895)).

62. Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 281 (1982).

63. Philip R. Wolf, *International Securities Fraud: Extraterritorial Subject Matter Jurisdiction*, 8 N.Y. INT'L L. REV. 1, 13 (1995) (quoting F. Russell Du Puy, III, *International Cooperation in Securities Enforcement*, 46 WASH. & LEE L. REV. 713, 720 (1989)).

64. One commentator has noted that "assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function

These concerns are quite stark in the context of extraterritorial application of the securities laws. This is largely due to the fact that the American regime of securities enforcement is generally aggressive as compared to other nations.[65] It favors a robust amalgam of private and public enforcement mechanisms, which features a particularly expansive private right of action.[66] By contrast, many nations severely limit the ability of litigants to bring private rights of action.[67] Others proscribe public enforcement and limit redress to private litigants entirely.[68] These systems reflect deliberate policy decisions made by the authorities of each nation.[69]

---

that should not be committed to courts in a democracy." Joel P. Trachtman, *Economic Analysis of Prescriptive Jurisdiction*, 42 VA. J. INT'L L. 1, 1 n.153 (2001) (citing BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 183 (1963)). This idea to some extent mirrors the concerns of the Supreme Court in articulating the "political question doctrine." As the Supreme Court held in *Baker v. Carr*:

> There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views. *Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.*

369 U.S. 186, 211 (1962) (footnotes omitted, emphasis added). *But see* Asahi Metal Indus. Co. v. Super. Ct., 480 U.S. 102, 115–16 (1987) (noting that asserting personal jurisdiction in the United States over a foreign defendant could disrupt foreign relations).

65. *See* Gerhard Walter, *Mass Tort Litigation in Germany and Switzerland*, 11 DUKE J. COMP. & INT'L L. 369, 372 (2001) ("[C]lass actions do not exist in Germany, Switzerland, and most other countries of the civil law system."). For an analysis of developments in Europe, see Laurel J. Harbour & Marc E. Shelley, *The Emerging European Class Action: Expanding Multi-Party Litigation to a Shrinking World*, 18 PRAC. LITIGATOR 23 (2007) (describing European trends in aggregation).

66. *See* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 313 (2005) (noting that the Supreme Court has "long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC)"); *see also* J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) (noting that private securities fraud actions provide "a most effective weapon in the enforcement" of securities laws and are "a necessary supplement to Commission action").

67. *See* Debra Lyn Bassett, *Implied "Consent" to Personal Jurisdiction in Transnational Class Litigation*, 2004 MICH. ST. L. REV. 619, 624–25 (2004).

68. *See* Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 174 (2d Cir. 2008) ("For instance, in Switzerland, no comprehensive federal legislation governs securities fraud, and private remedies are the only ones available.")

69. *See* John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229, 256 (2007) (describing three models of securities regulation: (1) the "Government-Led Model" of France, Germany, and Japan; (2) a "Flexibility

The choice to permit private securities actions in the first instance implicates a host of secondary considerations and policy choices. For example, the American class action itself is a relatively exceptional procedural mechanism.[70] The question of whether aggregation should be permitted at all is an increasingly pervasive issue abroad.[71] Of great concern to American courts is the possibility that foreign courts will refuse to recognize United States judgments made via findings of expansive jurisdiction.[72] This would seriously threaten the central concepts of United States class action procedure: finality and fairness.[73]

The very features of the American system that have proven to be so attractive for plaintiffs world-wide are the same procedural elements of the American class action that bring it into conflict with

Model," utilized by the United Kingdom, Hong Kong, and Australia; and (3) a "Cooperation Model," used by the United States and Canada).

70. *See* Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401, 401 (2002) ("The class action is a uniquely American procedural device."). While Australia, Canada, and England have some form of aggregation, most group action abroad is in the incipient stage. *Id.* at 422–32 (describing the Australian, Canadian and English systems). Richard Nagareda has noted that "the legal regime for civil litigation in this country is exceptional by comparison to European systems." Richard Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 2 (2009). However, Nagareda also points to the nascent aggregation movement in Europe:

> Dutch collective settlement actions, English group litigation orders, German model cases in securities litigation, and Italian class actions, among other procedures. Additional moves in the offing suggest a similar openness to possible reforms in the direction of more rather than less aggregate litigation. These include major studies by the European Commission of new measures for aggregate redress in antitrust and consumer litigation and by the Civil Justice Council of England and Wales on reform of collective redress.

Id. at 4–5 (internal citations omitted).

71. *See, e.g.*, Harbour & Shelley, *supra* note 65 (describing historical paucity of group action in Europe and its current expansion); Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregation Come to Europe?*, 62 VAND. L. REV. 179 (2009) (discussing whether group actions are feasible in Europe on a large scale); Richard Nagareda, *supra* note 70.

72. *See, e.g.*, Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 996–97 (2d Cir. 1975) (noting the significance of the submission of affidavits on behalf of England, Germany, Switzerland, Italy, and France to the effect that they would not recognize a United States judgment).

73. *See In re* Vivendi Universal, S.A., 242 F.R.D. 76, 106–07 (S.D.N.Y. 2007) ("The likelihood of nonrecognition in Germany and Austria raise weightier issues of fairness and lessen, albeit in limited realistic situations, the promise of economy, consistency, and finality made possible when class members are bound to a final judgment or settlement.").

the policies of other nations.[74] The opt-out feature[75] of the 23(b)(3) "damages" class action, for example, is both critical and virtually unique to the American class action; it is eschewed even in those European nations where collective actions exist.[76] The contingency fee, "one of the defining characteristics of civil litigation in the United States," is completely proscribed by other nations.[77] Intensive pre-trial discovery and motion practice, prominent features of American securities class action litigation, are rejected and even vilified by foreign attorneys.[78] The extensive use of civil juries, and the attendant potential for massive rewards, is nearly exclusive to the American system, especially in complex securities fraud cases.[79] As Lord Denning, English Master of the Rolls, recounted:

> As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself; and at no risk of having to pay anything to the other side. The lawyers there will

74. *See* Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 473 (2001) ("US courts are a magnet for international litigation, given the country's high damage awards, liberal personal jurisdiction rules, broad discovery standards, and allowance of class actions and contingency fee arrangements.").

75. Class membership is presumed for individual members under Rule 23(b)(3), absent actual opting out by individual members. Instead of asking to join, class members must ask to be excluded, at least in the case of "damages" class actions. *See* Fed. R. Civ. P. 23(c)(3).

76. *See* FED. R. CIV. P. 23(c)(2)(A) (mandatory opt-out procedure in class actions); Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1531 (2004) (describing the opt-out as "a fundamental part of class action practice"); *see also* Issacharoff & Miller, *supra* note 71, at 202–08 (discussing the near impossibility of reconciling opt-in and opt-out systems).

77. Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 267 & n.1 (1998) ("While a number of countries have some form of contingency fee, the American contingency fee is relatively unique, both in its form and its dominance as a means of funding litigation. What sets the American contingency fee apart from contingency arrangements in most other countries is that it is based on a percentage of recovery."). *But see* Issacharoff & Miller, *supra* note 71, at 198 (discussing the rise of contingency fee use in Germany, England, and Wales).

78. *See* Gerald Walpin, *America's Failing Civil Justice System: Can We Learn From Other Countries?*, 41 N.Y.L. SCH. L. REV. 647, 649 (1997) ("The United States is unique in allowing broad pre-trial discovery that includes not only document production but also extensive interrogatories and pre-trial depositions, practices which are, for the most part, not permitted in civil law countries and are rather restricted in other common-law systems.").

79. *See id.* at 652–53 (noting that, even in common law countries, the civil jury trial is virtually never used outside of America).

> conduct the case "on spec" as we say, or on a "contingency fee" as they say. The lawyers will charge the litigant nothing for their services but instead they will take 40 per cent. of the damages, if they win the case in court, or out of court on a settlement. If they lose, the litigant will have nothing to pay to the other side. The courts in the United States have no such costs deterrent as we have. There is also in the United States a right to trial by jury. These are prone to award fabulous damages. They are notoriously sympathetic and know that the lawyers will take their 40 per cent. before the plaintiff gets anything. All this means that the defendant can be readily forced into a settlement. The plaintiff holds all the cards.[80]

Beyond general procedural difficulties, the substantive law of securities fraud poses additional challenges to the notion of transnational enforcement. Central to the litigation of securities fraud is the determination of such basic concepts as scienter, materiality, and causation.[81] Concepts such as fraud on the market, central to American securities class actions, are not accepted in all countries.[82] This variation being the case, the potential for massive international forum shopping—which may arise given the assertion of expansive subject matter jurisdiction by the federal courts—is especially troubling.[83] Such a practice could engender a great deal of direct controversy with the approaches to securities regulation of distinct nations. This, in turn, could constitute an affront to principles of comity and have extremely negative economic consequences.[84]

80. Smith Kline & French Labs, Ltd. v Bloch, (1983) 1 W.L.R. 730, 733–34 (Eng. Ct. App.).

81. *See, e.g.*, Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 & n.12 (noting that to establish liability under § 10(b) and Rule 10b-5, a plaintiff must prove that the defendant acted with scienter, "a mental state embracing intent to deceive, manipulate, or defraud.").

82. *See* Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 174 (2d Cir. 2008) ("In Canada, securities class actions are recognized, but most provinces do not recognize the fraud on the market doctrine."). The Supreme Court has defined the fraud on the market theory in the following terms:

> An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action.

Basic Inc. v. Levinson, 485 U.S. 224, 247 (1988).

83. *See* Buxbaum, *supra* note 3, at 67.

84. For example, the burdens to the court system could be potentially massive.

The reticence of the Supreme Court and Congress has meant that it is largely up to the lower federal courts to make decisions with the potential to affect international relations and trade. International actors therefore find it difficult, if not impossible, to structure their dealings in reliance on such a variable and unclear area of the securities laws.[85] It also means that lower federal judges will be forced to make decisions more properly made by Congress or the Supreme Court, which would at least have the benefit of uniformity. With a decision by either actor looking increasingly imminent,[86] limited access to the courts in the case of true f-cubed class actions in the name of comity and economic interests seems the best course of action.

C. The Presumption Against Extraterritoriality

The "presumption against extraterritoriality" essentially holds that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[87] The Supreme Court has consistently held that congressional law is "primarily concerned with domestic conditions."[88]

85. Indeed, the Supreme Court has recognized this concern in *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972), noting that "[t]he expansion of American business and industry will hardly be encouraged if . . . we insist on a parochial concept that all disputes must be resolved under our laws and in our courts." Chief Justice Burger thus recognized that international business requires stability and predictability in order to function effectively.

86. *See* Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 7216 (2009); *Morrison*, 547 F.3d at 174, *cert. granted*, 130 S. Ct. 783 (2009).

87. Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949).

88. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (quoting *Foley Bros.*, 336 U.S. at 285). The definition of domestic conditions has generally been informed by historical reliance on the concept of territoriality. Indeed, the modern conduct test is still, essentially, a territorial rule of jurisdiction. *See, e.g.*, Stephen J. Choi & Andrew T. Guzman, *National Laws, International Money: Regulation in a Global Capital Market*, 65 FORDHAM L. REV. 1855, 1885 (1997) (describing modern conduct test as a territorial rule). This emphasis on territoriality implied a reluctance to legislate outside of American territory—a hesitancy that led directly to the statutory canon of construction declared by John Marshall in the 1804 case *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."). That canon embodied a presumption that Congress would not casually intend to violate the "law of nations." *Id.* By the twentieth century, the *Charming Betsy* canon had came to stand for the proposition that, absent clear proof of congressional intent, American legislation should not apply abroad. *See* Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 455 (2007) (agreeing with the government's argument that "[f]oreign conduct is generally the domain

This presumption has been used extensively in a variety of legal contexts,[89] including such varied fields as admiralty,[90] labor law,[91] civil rights,[92] sovereign immunity,[93] torts,[94] and criminal law.[95] Most recently, the presumption has been reiterated in the fields of antitrust[96] and patent law.[97]

Though never addressed explicitly by the Supreme Court, securities law arguably offers greater justification for the application of the presumption against extraterritoriality than other legal fields.[98] Section 10(b) is silent even on the availability of the pri-

of foreign law, . . . law may embody different policy judgments about the relative rights of inventors, competitors, and the public.").

89. However, some have argued that this presumption has outlived its usefulness and should be reassessed. "[T]erritorial sovereignty has been eroded by" the development of the United Nations, the importance of international law domestically, international criminal law imperatives, "technological advances" that mandate international cooperation to prevent international calamity, the rise of the global media, and the increasingly global world economy. Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1, 10, 61–63 (1992).

90. *See Murray*, 6 U.S. (2 Cranch) at 118.

91. *See Foley Bros.*, 336 U.S. at 285.

92. *See Arabian*, 499 U.S. at 248.

93. *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 440–41 (1989).

94. *See* Smith v. United States, 507 U.S. 197, 204 (1993).

95. *See* United States v. Bowman, 260 U.S. 94, 98 (1922) (noting that certain criminal laws should be applied extraterritorially when the nature of the offense is not dependent on their "locality" regardless of where the conduct took place).

96. *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004). However, the Supreme Court approved the exercise of jurisdiction in the antitrust context in *Hartford Fire Ins. Co v. California*, 509 U.S. 764 (1993). In that case, the Court relied on the Restatement (Third) of Foreign Relations Law requirement of reasonableness and found that a finding of significant effects in the United States was warranted. *Id.* at 796.

97. *See* Microsoft Corp. v. AT&T Corp., 550 U.S. 437 (2007).

98. It is possible that the distinction between antitrust, criminal, patent, tort, and other areas of law on the one hand, and securities regulation on the other, necessitates substantially different jurisdictional tests. *See, e.g.*, *In re* Royal Ahold N.V. Sec. & ERISA Litig., 351 F. Supp. 2d 334, 356 n.10 (2004) (noting the distinction between securities laws and antitrust laws). One argument, of course, is that securities law in general is too amorphous to be susceptible to the presumption against extraterritorial application. Globalization has only made the character of the securities markets more international, interconnected, and has rendered harms more indivisible than ever before. Moreover, the at times subconscious American commitment to our permissive, expansive model of civil litigation is difficult to quash even when injustice is relatively foreign to national interests. Indeed, the analogy of the Third Circuit to piracy allowed to occur blatantly on American soil without the dispensing of old-fashioned, *American* justice—jury trial and all—is particularly compelling.

vate right of action for *domestic* conduct, to say nothing of *foreign* conduct. Rather than being created by Congress, the private right of action under Section 10(b) has been inferred by the courts.[99] Indeed, the private right of action under Section 10(b) has been famously called "a judicial oak which has grown from little more than a legislative acorn."[100] Since the growth of that "judicial oak," the Court has refused to extend implied rights further.[101] The fact that the private right of action for domestic conduct is itself so tenuously rooted in congressional intent provides further evidence that Congress did not intend to bring foreign conduct within the ambit of United States securities law.[102]

As a matter of fact, two recent cases in which the Supreme Court declined to assert jurisdiction both featured plaintiffs who based their arguments on statutes explicitly sanctioning the extraterritorial application of the substantive law in question—the Sherman Act[103] and patent laws,[104] respectively. The absolute silence of

99. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 739 (1975).

100. *Id.* at 737 (discussing the lack of congressional intent regarding private actions under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78ll (2009)).

101. *See* Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, 128 S. Ct. 761, 772 (2008) (noting that to extend implied rights "runs contrary to the established principle that '[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation . . . and conflicts with the authority of Congress under Art. III to set the limits of federal jurisdiction'") (internal citations omitted); *see also Blue Chip Stamps*, 421 U.S. at 737.

102. Since the writing of this paper, the House of Representatives has passed a bill that in part addresses the extraterritorial application of the antifraud provisions of the securities laws, providing for jurisdiction when there is either "conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors" or when there is "conduct occurring outside the United States that has a foreseeable substantial effect within the United States." Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 7216 (2009). However, a companion bill remains stalled in Senate committee, and omits completely any jurisdictional prescription. Thus this Note does not consider the bills to be any substantial step toward discerning congressional intent. Indeed, that the Supreme Court was willing to grant certiorari is testimony to the inconclusive nature of this bill.

103. *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 161–62 (2004). The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) covers conduct with "a direct, substantial, and reasonably foreseeable effect" on United States commerce and "such effect gives rise to a [Sherman Act] claim." 15 U.S.C. § 6a(1)–(2) (2006).

104. *See* Microsoft Corp. v. AT&T Corp., 550 U.S. 437 (2007). Under consideration was the specific question of whether a Windows "master disc"—solely used to make copies of software for later installation in computers abroad—should be

Section 10(b) of the 1934 Act, on the other hand, buttresses the presumption against extraterritoriality in securities fraud cases.[105]

Justice Breyer, writing for the Court in declining to apply the Sherman Act extraterritorially, noted a potentially useful distinction between domestic and foreign injury. He found that domestic injury calls for the extraterritorial application of American law, despite possible "interfere[nce] with a foreign nation's ability independently to regulate its own commercial affairs."[106] In the case of foreign injury, however, it was simply not reasonable "to apply [American] laws to foreign conduct insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim."[107] Ultimately, he concluded, greater uniformity[108] will itself help ensure that the lower courts will not disrupt the balance between rights and remedies as constructed by independent nations, or the decisions made by Congress, in determining the permissible extent of American interference in the affairs of sovereign nations.[109]

considered a "component" for purposes of patent infringement liability. *See id.* at 442. The Supreme Court unanimously rejected the plaintiffs' argument for extraterritorial application of United States antitrust laws in a class action featuring a putative class comprised of foreign and domestic plaintiffs. *See id.* The provision at issue in *Microsoft* expressly provided for extraterritorial application. It stated that anyone who "supplied in or from the United States all or a substantial portion of the components of a patented invention," and "actively induce[d] the combination of such components outside of the United States," would be "liable as an infringer" if the combination would have "infringe[d] the patent [had it] occurred within the United States." *Id.* at 445 (quoting 35 U.S.C. § 271(f)(1) (2003)).

105. *See* Margaret Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 COLUM. J. TRANSNAT'L L. 677, 681–82 (1990). Sachs makes a case for the position that the legislative history argues against the extraterritorial application of the securities laws.

106. *F. Hoffman-La Roche*, 542 U.S. at 169.

107. *Id.* at 165–66.

108. The idea that courts should weigh "comity considerations case by case" was "too complex to prove workable." *Id.* 168. "The legally and economically technical nature of that enterprise means lengthier proceedings, appeals, and more proceedings—to the point where procedural costs and delays could themselves threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system." *Id.* at 169.

109. *Id.* at 167.

III.
JUDGE FRIENDLY'S FORMULATION AND THE CIRCUIT SPLIT

In the earliest case to use the conduct test, *Leasco Data Processing Equipment Corp. v. Maxwell*,[110] Judge Henry Friendly developed the concept of an "essential link" between the domestic conduct and the harm in question to describe whether jurisdiction would be consistent with foreign relations, United States policy, and accepted jurisprudence.[111] Yet, as this Note explores below, what exactly constitutes an "essential link" has been variably interpreted by the courts.[112]

A. Testing Jurisdiction

The "effects" test[113] measures the total domestic effect of the alleged fraud, allowing a court to exercise jurisdiction solely over foreign conduct exerting a "substantial effect" on United States investors or markets.[114] In practice, it is nearly impossible for a United States court to assert jurisdiction over an f-cubed case via the effects test. The putative class of investors involved in an f-cubed securities class action is made up, at least in substantial part, of foreign defendants. Even when American investors suffer losses the effects test will seldom be satisfied, as foreign litigants are prohibited from "bootstrap[ping] their losses to . . . independent American losses."[115] Moreover, injury must be alleged with sufficient specificity, which generally precludes the use of the effects test as it

110. 468 F.2d 1326 (2d Cir. 1972).

111. In *Leasco*, an American corporation engaged in misrepresentations made in the United States. The case featured an American plaintiff. The Court's inquiry centered on whether "if Congress had thought about the point, it would not have wished to protect an American investor if a foreigner comes to the United States and fraudulently induces him to purchase foreign securities abroad—a purpose which its words can fairly be held to embrace." *Id.* at 1337. Since an American was harmed in the transaction, the court exercised jurisdiction.

112. *See e.g.*, Robinson v. TCI/US W. Cable Commc'ns Inc., 117 F.3d 900, 909 (5th Cir. 1997) ("The circuits are divided as to precisely what sort of activities are needed to satisfy the conduct test.").

113. The effects test was borrowed from the field of antitrust. *See* United States v. Aluminum Co. of Am., 377 U.S. 271, 280 (1964) (proscribing mergers with "a probable anticompetitive effect").

114. Alfadda v. Fenn, 935 F.2d 475, 478 (2d Cir. 1991) ("A federal court also has jurisdiction under the 'effects' test where illegal activity abroad causes a 'substantial effect' within the United States.") (quoting Consol. Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 261–62 (2d Cir. 1989)).

115. Tri-Star Farms Ltd. v. Marconi, PLC, 225 F. Supp. 2d 567, 573 n.7 (W.D. Pa. 2002).

pertains to American markets. For example, fraud affecting the prices on the New York Stock Exchange, with an attendant effect on an investor's "faith in the market," is insufficient to merit the attention of United States courts—"an adverse effect on this country's general economic interests or on American security prices" does not merit jurisdiction in the federal system.[116]

As a result of these difficulties, the conduct test generally controls subject matter jurisdiction over f-cubed cases.[117] It is usually satisfied if a defendant's domestic conduct was more than "merely preparatory" to the fraud,[118] and "directly caused" foreign losses.[119] Yet courts have not uniformly defined many of the key terms, including what constitutes an "essential link."[120]

Even a recent bill passed by the House of Representatives on the subject is simply too equivocal to provide meaningful guidance.[121] On December 11, 2009, the House of Representatives passed a bill which would provide some degree of extraterritorial application of the antifraud provisions of the securities laws. The bill contemplates jurisdiction when there is "conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors" or "conduct occurring outside the United States that has a foreseeable substantial effect within the United States."[122]

Thus, the first jurisdictional aspect of the bill, essentially a conduct test, simply calls for "significant steps in furtherance of the

116. Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 987–89 (2d Cir. 1975).

117. Courts allow either conjunctive or disjunctive use of the tests in determining the breadth of the antifraud provisions of the 1934 Act; for example, the Second Circuit has allowed disjunctive use of the conduct and effects tests while explicitly noting that "an admixture or combination of the two often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court." Itoba Ltd. v. Lep Group, 54 F.3d 118, 122 (2d Cir. 1995).

118. *Bersch*, 519 F.2d at 992.

119. SEC v. Berger, 322 F.3d 187, 193 (2d Cir. 2003).

120. *See e.g.*, Robinson v. TCI/US W. Cable Commc'ns Inc., 117 F.3d 900, 909 (5th Cir. 1997) (noting that the conduct test's requirements vary among the circuit courts and describing the circuit split that exists).

121. Indeed, as a result of this bill, Solicitor General Kagan argued that it would be improper for the Supreme Court to grant the petition for certiorari. *See* Brief for the U.S. as Amicus Curiae, Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 174 (2d. Cir. 2008), *cert. granted*, 2009 U.S.L.W. 8694 (U.S. Nov. 30, 2009).

122. Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 7216 (2009).

violation."[123] Yet the problems with regard to unpredictability would remain even if this bill were passed as written. As will be shown below, just how "significant" the steps would have to be for jurisdiction to be properly asserted is precisely the problem with which the courts have struggled for decades.

B. *Friendly's Formulation: Intellectual Antecedents of the Conduct Test*

As a consequence of New York City's significance in the world of global commerce, the Second Circuit has traditionally played an important role in adjudicating complex cases at the junction of law and finance.[124] The jurisdictional analysis pioneered by the Second Circuit continues to provide the framework for determining the jurisdictional parameters of complex transnational litigation.

Bersch v. Drexel Firestone, Inc.[125] was the first case to deal with the question of exercising subject matter jurisdiction over foreign plaintiffs in the context of a class action.[126] The case involved fraud allegedly perpetrated by a company headquartered in Europe and incorporated in Canada.[127] The plaintiff class was almost exclusively comprised of foreign individuals who had purchased shares issued and, for the most part, traded abroad.[128] The plaintiffs argued that, because the offering documents were substantially prepared by professional firms in New York, their claims merited adjudication under Section 10(b) of the 1934 Act and under the antifraud provisions of the 1933 Securities Act.[129]

The district court found that the combined assistance of New York-based law firms, investment banks, and accounting firms in preparing the offering documents constituted a legitimate basis for asserting subject matter jurisdiction over the defendants.[130] Juris-

123. *Id.*

124. *See* Coffee, *supra* note 44, at 1541 n.18 (2006) ("The Second Circuit and the Ninth Circuit have long been the principal circuits in which securities class actions are filed. In 2005, when the number of securities class actions fell to 176, forty-four were filed in the Second Circuit, thirty-eight in the Ninth Circuit, and only eighteen in the Third Circuit, which had the next highest number.").

125. 519 F.2d 974 (2d Cir. 1975).

126. *See id.*

127. *See id.* at 978.

128. *See id.* at 977–78.

129. *See* Bersch v. Drexel Firestone, Inc., 389 F. Supp. 446, 457 (S.D.N.Y. 1974), *aff'd in part, rev'd in part*, 519 F.2d 974 (2d Cir. 1975).

130. *See id.* at 453 ("It is clear that the provisions of the American securities laws may cover transactions in the securities of foreign issuers . . . . Ultimately, the concern is that domestic law be applied only to transactions with which the United States has a significant connection or interest.").

diction was not defeated by the fact that a large portion of the plaintiff class was made up of foreign investors or by the fact that many of the plaintiff class members had purchased the securities on foreign exchanges.[131] In essence, the district court found that absent the preparatory activity in the United States the fraud would not have been perpetrated and considered this causal link sufficient to support jurisdiction.[132]

The Second Circuit Court of Appeals reversed, rejecting the potentially expansive "but for" causation test in favor of the "conduct" test.[133] Instead, by focusing on the nexus between the fraudulent activity, which actually took place in the United States, and the alleged fraud, the court found that the domestic activity could not support jurisdiction.[134] Writing for the court, Judge Friendly noted:

> [W]e do not even have the oft-cited case of the shooting of a bullet across a state line where the state of the shooting as well as of the state of the hitting may have an interest in imposing its law. At most the acts in the United States helped to make the gun whence the bullet was fired from places abroad.[135]

Thus, while an American plaintiff must show that a defendant's conduct "significantly contributed" to his loss in order to support jurisdiction by United States courts, a foreign plaintiff must show that the defendant's conduct "directly caused" the loss.[136] Significantly, Judge Friendly found that jurisdiction existed as to the twenty-two American citizens in the class, but dismissed the claims brought by the foreigners.[137]

However, Judge Friendly did not completely reject the extraterritorial application of the United States securities laws, which might have created a simple, bright-line rule for the courts to apply.[138] Indeed, in the same year as *Bersch*, Judge Friendly also authored *IIT*

131. *See id.* at 457–58.

132. *See id.* at 458 ("Finally, the domestic conduct was, although less direct than that in *Leasco*, an 'essential link' in inducing the ultimate purchases.").

133. *See Bersch*, 519 F.2d at 987.

134. *See id.*

135. *Id.*

136. *Id.* at 993.

137. *See id.* at 987, 991, 1001.

138. Though, at least one commentator has argued that correct application of the *Bersch* test would lead to the dismissal of most f-cubed or related claims. *See* George T. Conway, III, *The Rise and (Coming) Fall of "F-Cubed" Securities Litigation*, 9 ENGAGE 1, 34 (2008) (noting that the *Bersch* conduct test is a "clean, bright-line rule").

v. Vencap,[139] which provided an oft-cited analysis for allowing prescriptive jurisdiction over transnational securities fraud.[140] In that case, the court held that a foreign corporation was entitled to sue another foreign corporation because the planning of the fraud and the preparation of legal documents took place within the United States.[141]

Conceding the lack of any textual or historical mandate regarding the extraterritorial application of the 1934 Act, Judge Friendly in *Bersch* argued that the court should use its "best judgment as to what Congress would have wished if these problems occurred to it."[142] In his view, Congress could not have wanted the "United States to be used as a base for manufacturing fraudulent securities devices for export, even when these are peddled only to foreigners."[143] This approach has been labeled as the "good neighbor" approach; it holds that the United States should enforce antifraud laws when they are breached to any degree within its borders.[144] Otherwise, some American defendants might be beyond the reach of any jurisdiction, and some American plaintiffs might not be able to vindicate their claims.

The burdens imposed by extraterritorial application of securities laws also proved to be of concern to Judge Friendly, especially in the class action context. He observed that the "United States courts have no reason to become involved, and compelling reason not to become involved, in the burdens of enforcement and the delicate problems of foreign relations and international economic policy that extraterritorial application may entail."[145] Indeed, he noted that the class action mechanism itself posed "tremendous burdens" on American courts, and that class actions in general demanded special considerations relating to international policy, comity, and duplicative recovery.[146] To that end, the case for exer-

139. 519 F.2d 1001 (2d Cir. 1975).

140. *See, e.g.*, SEC v. Kasser, 548 F.2d 109, 116 (3d Cir. 1977).

141. *See Vencap*, 519 F.2d at 1018. That case involved a suit alleging fraud against a Bahamian corporation, established by a New York citizen residing in the Bahamas. The plaintiff was an international investment trust organized under the laws of Luxembourg.

142. *Bersch*, 519 F.2d at 993.

143. *Vencap*, 519 F.2d at 1017.

144. *See, e.g.*, John C. Coffee, Jr., *Foreign Issuers Fear Global Class Actions*, NAT'L L.J. (June 14, 2007) (criticizing Friendly's notion of being a "good neighbor" as overly invasive and arguing for a limited extraterritorial application of securities laws).

145. *Bersch*, 519 F.2d at 993–98.

146. *Id.*

cising prescriptive jurisdiction in the class action context should present especially persuasive justification.[147]

C. A "Friendly" Disagreement: The Circuit Split

Neither Judge Friendly's analysis in *Bersch* or *Vencap*, nor any other decision, has produced agreement among the circuit courts on the issue of the extraterritorial application of securities laws.[148] Though the Supreme Court recently granted certiorari on the issue, it is exceedingly unclear how they will interpret congressional silence as to the scope of the 1934 Act's antifraud provisions.

It is reasonably probable, however, that the Supreme Court will adopt some version of Judge Friendly's conduct test. Indeed, Judge Friendly's general description of the conduct test and his analysis of the jurisdictional problems posed by foreign aspects of lawsuits in the federal court system have been adopted by virtually every circuit court. However, even given this agreement at a general level,

> [t]he circuits are divided as to precisely what sort of activities are needed to satisfy the conduct test, although all agree that it is based on the idea that Congress did not want "the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners."[149]

Thus, the Supreme Court will have to resolve precisely what sort of conduct will satisfy the requirements of the classic test. It is also quite notable at the outset that the House of Representatives bill, even if passed in its current incarnation, is flexible and vague enough to encompass any of the analyses utilized by the various circuit courts.

The D.C. Circuit hews closest, and most rigorously, to Friendly's analysis in *Bersch*. The analysis employed by that circuit requires that the domestic conduct, standing alone, must constitute a violation of the antifraud provisions of the securities laws.[150] This means that fraudulent statements or misrepresentations must originate in the U.S., must be made with the requisite scienter, must be made in connection with the sale or purchase of securities, and

147. *See id.* at 993 ("If what was before us was a single action with only named plaintiffs of the three sorts above described or three separate actions on behalf of the respective classes, we could promptly proceed to decision. Unhappily that is not the case.").

148. *See, e.g.*, Robinson v. TCI/US W. Cable Commc'ns Inc., 117 F.3d 900, 906 (5th Cir. 1997).

149. *Id.* at 905 (citations omitted).

150. *See* Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 31 (D.C. Cir. 1987).

must cause injury to the claimants.[151] Nearly determinative value is assigned to the actual location from which the misrepresentation or fraud originated.[152]

Contrary to the D.C. Circuit's narrow test, the approaches adopted by the Third, Eighth, and Ninth Circuits focus on a rather more expansive baseline requirement: that "at least some activity designed to further a fraudulent scheme occurs within [the United States]."[153] The Third Circuit, for example, eschews the *Bersch* analysis and cleaves more closely to Friendly's "good neighbor" analogy, though perhaps in more colorful terms. That court reasons that congressional intent could not have included turning the United States into "a Barbary Coast, as it were, harboring international securities pirates . . . ."[154] This analysis merely requires "at least some" domestic conduct in furtherance of the fraud.[155] It legitimizes subject matter jurisdiction based on "the acts [which] helped to make the gun" rather than the place from "whence the bullet was fired,"[156] concentrating on causation rather than on the territorial aspect of analysis. The analyses employed by the Eighth and Ninth Circuits, marginally more stringent than the Third Circuit, require some relevant, significant conduct to occur within the U.S.[157]

More stringent still are the approaches of the Fifth and Seventh Circuits, which require a "higher quantum of domestic conduct."[158] The Fifth Circuit has explicitly allied itself with the Second Circuit's approach, noting that "the presumption against extraterritorial application informs our choice between the Second Circuit's restrictive test and the more expansive standard applied by

151. *See id.*

152. *See* Conway, *supra* note 138, at 34.

153. SEC v. Kasser, 548 F.2d 109, 114 (3d Cir. 1977); *see also* Grunenthal GmbH v. Hotz, 712 F.2d 421, 425 (9th Cir. 1983) (adopting the *Continental Grain* test); Cont'l Grain (Australia) Pty. Ltd. v. Pac. Oilseeds, Inc., 592 F.2d 409, 421 (8th Cir. 1979) (holding that jurisdiction is proper when the defendant's "conduct in the United States was in furtherance of a fraudulent scheme and was significant with respect to its accomplishment").

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

155. *Id.* at 114.

156. Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 987 (2d Cir. 1975).

157. *See* Butte Mining PLC v. Smith, 76 F.3d 287, 291 (9th Cir. 1996); *Cont'l Grain*, 592 F.2d at 421 (holding that jurisdiction applies when defendant's "conduct in the United States was in furtherance of a fraudulent scheme and was significant with respect to its accomplishment").

158. *See* Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 667 (7th Cir. 1998); Robinson v. TCI/US W. Cable Commc'ns Inc., 117 F.3d 900, 906 (5th Cir. 1997).

the Third, Eighth, and Ninth Circuits."[159] Though the Fifth Circuit states that its test should be interpreted identically to that of the Second Circuit, the two do not neatly converge.[160] In fact, the Fifth Circuit has erroneously equated the Second and D.C. Circuit approaches. As this Note will demonstrate in the next section, however, the D.C. Circuit approach virtually eliminates the f-cubed action from the federal courts, while the Second Circuit would explicitly allow the f-cubed action in some circumstances. Yet, as discussed below, the Second Circuit itself was, until recently, plagued by extreme uncertainty regarding the proper extraterritorial application of the antifraud provisions of the securities laws.[161]

D. The Second Circuit Approach

In the case of *In re Alstom SA Securities Litigation*,[162] a New York federal district court noted the serious problem with the jurisprudence concerning the extraterritorial application of securities laws:

> [A]ny notion that a single precedent or cohesive doctrine may be found which may apply to dispose of all jurisdictional controversies in this sphere is bound to prove as elusive as the quest for a unified field theory explaining the whole of the physical universe. Even on a surface reading, the variegated standards . . . coupled with the latitude accorded by Second Circuit guidance that no particular consideration may be decisive, rather than offering a explicit counsel and a clear path towards the resolution of a jurisdictional challenge in a complex case . . . serve only to confirm that the determination is by no means an easy task.[163]

Recently though, the Second Circuit decided *Morrison v. National Australia Bank*,[164] its first true f-cubed case. That circuit has

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

160. *See id.* at 905 n.10 (noting, incorrectly, that the Second and D.C. Circuit approaches were the same).

161. *Compare, e.g.*, Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 174 (2d. Cir. 2008) (declining to exercise subject matter jurisdiction), *cert. granted*, 130 S. Ct. 783 (2009), *with In re* Alstom SA Sec. Litig., 406 F. Supp. 2d 346 (S.D.N.Y. 2005) (finding subject matter jurisdiction in matter featuring a class of foreign plaintiffs alleging accounting fraud at the United States subsidiary of a French corporation, when the alleged misstatements were distributed abroad), *and In re* Gaming Lottery Sec. Litig., 58 F. Supp. 2d 62, 74–76 (S.D.N.Y. 1999) (finding subject matter jurisdiction proper in a case featuring a foreign plaintiff class, a Canadian defendant, and a United States subsidiary).

162. 406 F. Supp. 2d 346 (S.D.N.Y. 2005).

163. *Id.* at 375.

164. 547 F.3d 167 (2d Cir. 2008).

again proved to be a leader in formulating the optimal approach to the exercise of jurisdiction in cases of transnational securities fraud. In *Morrison*, National Australia Bank (NAB) allegedly made false statements in periodic reports, which were filed with Australian securities regulators and distributed to its shareholders.[165] The false statements related to the accounting and reporting activities of NAB's wholly-owned American mortgage service company, HomeSide.[166] The question in the case was whether this conduct could be properly categorized as "substantial" rather than "merely preparatory."[167]

Morrison elucidates how fact-dependent jurisdictional determinations can be in f-cubed cases. The fraudulent data in question had been prepared by an American mortgage subsidiary, which sent reports to NAB in Australia.[168] NAB then incorporated those numbers into statements provided to NAB shareholders.[169] The NAB shareholders were nearly universally located outside the United States, though an extremely small percent of the plaintiff class was made up of American investors who had purchased American Depository Receipts (ADRs) on the New York Stock Exchange.[170] The vast majority of the class was made up of foreign investors whose shares were purchased on foreign exchanges.[171]

The district court opinion relied on both the conduct test and the effects test to dismiss the complaint for lack of subject matter jurisdiction.[172] Judge Jones noted that the domestic conduct in this case was only a very weak "link in the chain" of foreign securities fraud.[173] The Second Circuit affirmed, holding that the domestic conduct must be "more than merely preparatory to the fraud" and that such acts must have "directly caused losses to foreign investors abroad."[174]

As to the central question—what constitutes "direct" causation—the Second Circuit found that such a determination depends "on what and how much was done in the United States and on what

165. *Id.* at 169.
166. *Id.*
167. *Id.* at 171.
168. *Id.* at 169.
169. *Id.*
170. *See In re* Nat'l Austl. Bank Sec. Litig., 2006 WL 3844465, at *15 (S.D.N.Y. 2006) ("[T]he aggregate value of the ADRs represented a mere 1.1% of NAB's nearly one-and-a-half billion ordinary shares . . . .").
171. *See id.*
172. *See id.* at *4–5.
173. *Id.* at *8.
174. Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 171 (2d Cir. 2008).

and how much was done abroad."[175] In applying this analysis to the alleged fraud at issue, the court found that, compared to the conduct in the U.S., the Australian conduct was "significantly more central to the fraud and more directly responsible for the harm to investors."[176] Moreover, the Australian parent company, not the Florida subsidiary, was responsible for ensuring the accuracy of releases and statements.[177] Thus the locus of the fraud—the heart of the fraud—was determined to be Australia, and jurisdiction would not lie in the United States.[178]

IV. POSSIBLE SOLUTIONS

A. *The D.C. Circuit's Bright-Line Approach*

The D.C. Circuit's approach is unique in the demanding test it sets forth for determining jurisdiction. Following a literal reading of *Bersch*, it endorses a version of the conduct test that turns on the location of the fraud.[179] The domestic conduct in question must constitute in itself a violation of the antifraud provisions of the securities laws to merit the application of subject matter jurisdiction.[180] Every other circuit eschews this analysis in favor of something much more similar to a direct causation test.[181]

This clear rejection of expansive prescriptive jurisdiction in f-cubed securities class actions defers to the need for judicial restraint in matters of international policy. Indeed, the D.C. Circuit's decision in *Zoelsch* reads like a critique of the relationship between being a "good neighbor" and the extraterritorial policing of securities fraud. It rejects the notion that courts must interpret congressional intent had it considered the contemporary issue. Judge Bork

175. *Id.*

176. *Id.* at 176.

177. *Id.*

178. *See id.*

179. *See* Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 31 (D.C. Cir. 1987). Fraudulent statements or misrepresentations must originate in the United States, must be made with scienter, must be made in connection with the sale or purchase of securities, and must cause injury to the claimants. *Id.* at 33.

180. *See Zoelsch*, 824 F.2d at 31.

181. The Second Circuit in *Morrison* noted that its test did not require "the domestic conduct to comprise all the elements necessary to establish a violation of Rule 10b-5." *Morrison*, 547 F.3d at 172 n.6 (2d. Cir. 2008). Indeed, one commentator—the attorney who argued on behalf of NAB—has argued that the D.C. Circuit's approach is the correct approach. Read correctly, the *Bersch* conduct test should be properly understood as a "clean, bright-line rule." Conway, *supra* note 138, at 34.

insists: "[I]t is somewhat odd to say . . . that courts must determine their jurisdiction by divining what Congress would have wished if it had addressed the problem. A more material inquiry might be what jurisdiction Congress in fact thought about and conferred."[182] Thus Judge Bork highlights a serious problem with this type of dynamic interpretation: If Congress had wanted, at any time or contemporaneously, to expand the antifraud provisions of the securities laws to extraterritorial conduct, it could have done so with relative ease. According to Bork's analysis, the 1934 legislature's silence could be easily surmounted, and it follows that implying intent where it is perfectly clear that none existed is unnecessary and normatively improper.[183]

Judge Bork's analysis also points to the fundamental problem with balancing tests. He argues in *Zoelsch* that such approaches are by definition "difficult to apply and are inherently unpredictable."[184] Further, their very unpredictability "present powerful incentives for increased litigation."[185]

The D.C. Circuit approach avoids the unpredictability of the more flexible approaches used by other circuits by adhering to a bright-line rule that essentially rejects virtually any extraterritorial application of the antifraud provisions of the 1934 Act. It also recognizes the relative inability of the judiciary to formulate transnational securities policy and the specter of American legal imperialism.

Along these lines, Professor Coffee has noted that:

> [T]he obligation to be a "good neighbor" sometimes requires prudence and restraint, not hyperactive zeal. Although a good neighbor may properly be concerned that its borders not be used to shelter a fraud against its neighbor's citizens, it should also be cautious in not interfering unduly or obtrusively in a domestic dispute that is simply none of its business.[186]

Professor Coffee has distinguished the Second Circuit's decision in *Vencap* as abandoning jurisdictional restraint out of concern that the SEC be able to pursue an f-squared case in the United States (since the primary defendant was American) where other jurisdictions would be powerless to do so.[187] In his view, subsequent decisions have co-opted and essentially corrupted the originally lim-

182. *Zoelsch*, 824 F.2d at 32.
183. *See id.* at 33.
184. *Id.* at 32 n.2.
185. *Id.* at 32; *see also* Conway, *supra* note 138, at 34.
186. Coffee, *supra* note 144.
187. *Id.*

ited "good neighbor" and "base for fraud" approaches, expanding them beyond all recognition.[188] This has been, in his opinion, detrimental to sound legal and political policy.[189]

Judicial restraint can be taken too far. The problem with the D.C. Circuit's approach is that it starts from the premise that extraterritorial application of United States law should be avoided at absolutely all costs. Indeed, the court conceded that "[w]ere it not for the Second Circuit's preeminence in the field of securities law and our desire to avoid a multiplicity of jurisdictional tests, we might be inclined to doubt that an American court should ever assert jurisdiction over domestic conduct that causes loss to foreign investors."[190]

However, there are times when American law does and should apply extraterritorially. This is especially true when United States plaintiffs are involved. The United States has a legitimate concern in protecting its own investors and markets.[191] The D.C. Circuit approach does not address the traditional concerns with restricting the extraterritorial application of the antifraud provisions of the securities laws, namely that the United States securities markets will become a "base" for foreign, fraudulent securities transactions.[192] Neither does it address, even to dismiss, the legitimate desire of the United States to encourage reciprocity with foreign nations regarding vigorous and just enforcement of the securities laws.[193] Yet American investors' reliance upon the protections offered by foreign nations must be dependent to some extent on the protections American law offers to foreign investors.

The D.C. Circuit approach also puts the cart before the horse in terms of pleading requirements. Essentially, to prove that subject matter jurisdiction can be legitimately exercised, plaintiffs must prove that all the elements of the securities fraud claim occurred

---

188. *Id.*

189. *See id.*

190. *Zoelsch*, 824 F.2d at 32.

191. *See* Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968) ("We believe that Congress intended the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities."); Fisch, *supra* note 52, at 547–48 (noting that Congress was primarily concerned with domestic markets when drafting the federal securities laws).

192. *See* IIT v. Vencap Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975) (noting that Congress would not have wanted the United States to be used as a "base" for securities fraud).

193. *See* Buxbaum, *supra* note 3, at 24.

domestically.[194] Proper analysis should divorce the two examinations. The jurisdictional analysis should precede the analysis of the merits of the fraud claim. Moreover, the jurisdictional analysis should be relatively less rigorous in order to allow non-frivolous claims to proceed to the merits without requiring plaintiffs to plead so extensively at the jurisdictional stage.

B. Balancing Tests: Measuring the Immeasurable?

Absent a usable, objective metric by which to weigh the relative merits of arguments, it is difficult for judges to make principled, predictable decisions. The relative freedom of the federal judge, in turn, runs the risk of undermining the interests of international relations and international commerce.[195] The need for a usable metric for lower federal courts to employ is imperative to avoid inter-circuit as well as intra-circuit discord.

1. *Morrison's* Balancing Approach

The discretion left to federal judges via the Second Circuit's *Morrison* balancing approach cannot truly alleviate the unpredictability that currently plagues f-cubed cases. After all, on closer scrutiny it is quite possible that, a different judge presiding, the *Morrison* case itself might have come out the other way.[196] The reality of intra-circuit splits in addition to inter-circuit splits thus seems to demand a more forceful approach.

It may be that *Morrison* will be interpreted by the Supreme Court as standing for the proposition that foreign plaintiffs will have a difficult time satisfying the "conduct" test against foreign corporations if the challenged statements were made outside of the United States based on information that was evaluated (though not produced) abroad. Notably absent from the plaintiff's complaint, for example, were allegations of negative effects on United States investors. Thus, in a way, *Morrison* returns to a territorial-like approach to subject matter jurisdiction.

194. *See Zoelsch*, 824 F.2d at 31.

195. Transnational disputes generally feature assessments that are foreign and challenging. *See* Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 589–90 (1983).

196. *Compare* Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167 (2d Cir. 2008) (ruling against jurisdiction), *with In re* Alstom SA Sec. Litig., 406 F.Supp. 2d 346 (S.D.N.Y. 2005), both dealing with foreign class actions alleging that accounting errors perpetrated by a United States subsidiary were incorporated into financial statements distributed outside America by a foreign defendant corporation.

If the Supreme Court were to take up the Second Circuit's test, it could promulgate more precise definitions regarding the specific elements: How close must the nexus be for "direct action" and how substantial must an act be to overcome the presumption that it is "merely preparatory"? With the continued changes wrought by globalization, it is likely that litigation over definitional aspects of Friendly's formula will persist and possibly intensify. Thus, it is important for Congress, as well as the Supreme Court, to assess the arguments for and against f-cubed jurisdiction and fashion standards that take into account the policy implications, which the courts now balance in an ad hoc fashion.

2. The SEC's Modified Conduct Test

The SEC, in an amicus brief submitted in *Morrison*, proposed an alternative formulation of the conduct test for determining the reach of the United States securities laws. The proposed test was rejected by the court in *Morrison*, but it merits consideration as a possible alternative approach for the Supreme Court or Congress to espouse.

Noting the diversity of approaches among the circuits, the SEC proposed that courts exercise jurisdiction over transnational securities fraud in the f-cubed context when the domestic conduct "is material to the fraud's success and forms a substantial component of the fraudulent scheme."[197] The jurisprudence in this area, however, is fundamentally complicated by the question as to what exactly constitutes materiality and substantiality. Regarding the former, the SEC insisted that the conduct should constitute "an integral—not incidental or ancillary—link in the chain of events in the transnational fraud."[198] Substantiality would depend on the "quantum of conduct" in the United States or whether conduct was "highly significant" to the fraudulent enterprise.[199] The SEC also noted with approval the Second Circuit's concern that prescriptive jurisdiction over class actions should be exercised only with extra justification, given the onerous burdens imposed by the mechanism on the district courts.[200]

197. Brief of the Securities and Exchange Commission as Amicus Curiae at 2, Morrison v. Nat'l Austl. Bank Ltd., 547 F.2d 167 (2d Cir. 2008) [hereinafter SEC Amicus Brief], *available at* http://www.sec.gov/litigation/briefs/2008/nationalaustralianbank.pdf.

198. *Id.* at 23.

199. *Id.* at 24.

200. *Id.* at 4 & n.1.

Though *Morrison* featured a foreign entity making alleged misstatements to largely foreign investors, the SEC amicus brief argued in favor of exercising jurisdiction.[201] Applying its own formulation of the conduct test, the SEC argued that the domestic conduct of the Florida subsidiary was a "substantial" part of the alleged fraud and "material" to the fraud's success.[202] The Second Circuit rejected the SEC's argument because of its potential to lead to a more expansive assertion of jurisdiction over cases more properly litigated elsewhere.

The SEC's proposed test comes closer than the current conduct test to guaranteeing a predictable way of determining jurisdiction in f-cubed cases. Were the Supreme Court to adopt the SEC recommendation, however, they would have to be quite explicit about the necessary requirements of the test, in order to avoid running afoul of comity or economic concerns. What constitutes an adequate "quantum" of domestic conduct, if not properly defined, would otherwise be decided by federal judges on a case-by-case basis, which would provide no predictability and raise concerns about comity and international economic policy. This approach also runs into the potential problem of institutional competence, which cannot be altogether overcome even by a pronouncement of sufficient specificity by the Supreme Court.

3. Reasonability and the Restatement Approach

Sections 402 and 403 of the Restatement (Third) of Foreign Relations Law promulgate principles of international law dealing specifically with legislative jurisdiction. Section 403 allows prescriptive jurisdiction with respect to: (a) conduct that takes place within the nation's territory (at least "in substantial part"),[203] (b) conduct outside its territory "that has or is intended to have substantial effect within its territory,"[204] (c) the activities and interests of its citizens,[205] and (d) activities implicating national security.[206]

Even when these requirements are satisfied, Section 403 imposes an overarching requirement of reasonableness.[207] Essentially

201. *See id.* at 32.
202. *Id.* at 35.
203. Restatement (Third) of Foreign Relations Law § 402(1)(a) (1986).
204. *Id.* § 402(1)(c).
205. *Id.* § 402(2).
206. *Id.* § 402(3).
207. *See id.* § 403(1). One commentator has compared the reasonableness requirement to the imposition of "minimum contacts" and "reasonableness" by the Due Process Clause on judicial jurisdiction. *See* Born, *supra* note 89, at 38 & n.173

a balancing test, the inquiry considers several different, non-exclusive factors. These include the "location of the challenged conduct, the effects within the regulating state, the nationalities of the parties, the 'importance of the regulation' to the regulating state, the likelihood of conflict with another state's laws, and the extent to which the regulation is consistent with, and important to, the 'international system.'"[208]

Thus the "reasonableness" test of the Restatement could be used either with the litany of requirements laid out by the Restatement itself or in conjunction with the "conduct" test currently used by the circuit courts in defining the scope of extraterritorial application of the securities laws. For example, the Second Circuit has noted that the focus of the inquiry in determining the scope of extraterritorial application of the securities laws often considers and turns on the concept of "reasonableness:"

> As more fully detailed below, insofar as the Second Circuit's subject matter jurisdiction doctrine viewed as a whole suggests an overlying principle to which the court's articulated considerations and precedents point, it is one that, in the final analysis, is grounded on congressional policy as bounded by a standard of reasonableness. As expressed in *Bersch*, the ultimate question is whether Congress contemplated that American resources would be allocated to adjudicate predominantly foreign disputes and whether the United States has a relevant interest in the litigation.[209]

The flexibility of a Restatement-based approach could be sensitive and responsive to the myriad interests presented by f-cubed cases: comity, economic policy and the welfare of the United States, fairness, and the compatibility of foreign legal systems with that of the United States. Yet the very strength of the test—its flexibility—is also its greatest weakness. Functionally, it will be remarkably difficult for the Supreme Court to promulgate a test specific enough to take into account the different problems posed by f-cubed class actions while also maintaining the flexibility that is the hallmark of the Restatement approach. The problems of judicial discretion and

(citing Asahi Metal Indus. v. Super. Court, 480 U.S. 102 (1987)); *see also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291–92 (1980).

208. Born, *supra* note 89, at 38 & n.173 (citing RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 403(2) (1986)).

209. *In re* Alstom SA, 406 F. Supp. 2d 346, 375 (S.D.N.Y. 2005) (citing Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir. 1975)); *see also* Eur. and Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118, 129 (2d Cir. 1998); IIT v. Vencap Ltd., 519 F.2d 1001, 1016 (2d Cir. 1975).

predictability in judgments would still remain. Thus, though the "reasonableness" inquiry might be incorporated into the analysis at some point, it likely cannot adequately serve the need for uniformity even given a Supreme Court ruling.

C. Exchange and Listing Requirements: The Waiver Paradigm

Some have argued that a jurisdictional rule based predominantly on the exchange on which the transaction takes place would ensure greater predictability while maintaining the welfare of United States investors and the integrity of United States markets.[210] Professors Choi and Silberman, in a recent article,[211] argue that an exchange-based rule would address the dominant concerns of critics of the current approach to the question of extraterritorial application of the securities laws.[212]

An exchange-based law could be achieved in several ways. For example, judges could apply a rebuttable presumption against jurisdiction for transactions based on foreign exchanges.[213] Or, corporate charters could contain forum selection clauses describing the intent of the corporation to abide by the jurisdictional demands set forth in the listing requirements of national exchanges.

Buttressing the concept of an exchange-based rule is the fact that investors can reasonably expect that securities purchased on a national exchange would be regulated by that country's regulatory agency and its laws. For example, by listing on the New York Stock Exchange, corporations have signaled that they have submitted to the protections afforded consumers by United States laws. This alternative has the benefit of practicality and common sense, and requires no formal agreement to insert jurisdictional consent into corporate charters or listing requirements. Despite the international membership of modern exchanges, each is regulated by a specific nation, which has a particular right to exert control over these mechanisms.

The exchange-based rule suffers from some infirmities as well. First, by basing jurisdiction largely on exchanges, it cannot effectively deal with fraud perpetrated by private companies trading in private securities offerings. Second, its utility rests in large part on the ability of the SEC to fashion a precise enough listing test against which courts could predictably gauge whether the jurisdictional

210. *See* Stephen Choi & Linda Silberman, *Transnational Litigation and Global Securities Class Actions*, 2009 WIS. L. REV. 465, 502 (2009).

211. *See id.*

212. *See id.* at 493.

213. *See id.* at 503.

presumption has been rebutted. As the SEC amicus brief in *Morrison* shows, this test would likely be fairly expansive and vague. Third, the exchange-based rule might discourage litigation-averse companies from listing on United States exchanges, further undermining the vitality of the United States as a world financial center.

The key element of this proposal is that it effectively turns an f-cubed class action into an "f-squared" class action. Instead of a foreign class, foreign defendant, and foreign exchange, the f-cubed action would feature a foreign class, foreign defendant, and, most likely, a domestic exchange. For the true f-cubed cases, however, which would be forced to rebut a presumption against territoriality, this test takes us back to the Second Circuit balancing test. Thus, though the proposal goes much further than the other extant tests, it might not fully resolve the problem.

D. Alleviating Settlement Pressure Via Intra- and Inter-Circuit Reforms

To fully resolve intra- and inter-circuit discrepancies, heighten predictability and uniformity, and get to the real heart of the f-cubed problem—respect for the rule of law in other nations and economic concerns engendered by settlement pressure—this Note proposes two reforms. First, the courts should distinguish between classes comprised solely of foreign plaintiffs and those comprised of both domestic and foreign plaintiffs. Second, f-cubed actions that pass jurisdictional muster at the trial level should be subject to interlocutory, de novo review upon the motion of the defendant.

The first proposal is to distinguish between classes comprised of solely foreign plaintiffs, subject to extremely rigorous analysis, and those comprised of both foreign and domestic plaintiffs, subject to slightly lesser scrutiny. This proposed distinction is rooted in the notion that, by using the traditional conduct test to determine jurisdiction regarding securities fraud, the real concern is with catching frauds planned to some or to a great extent in the United States that would elude the possibility of litigation elsewhere. Fundamentally, it is based on Judge Friendly's key distinction between domestic and foreign plaintiffs, fashioning different tests for each group in deciding whether United States jurisdiction would apply. In *Bersch*, the test for the American plaintiffs was whether the defendant's conduct "significantly contributed" to the plaintiffs' loss.[214] However, the test for foreign plaintiffs was stricter: whether the defendant's conduct "directly caused" the injury at issue.[215] Signifi-

214. Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir. 1975).
215. *Id.*

cantly, in *Bersch* the domestic plaintiffs' claims of jurisdiction were accepted, while the foreign plaintiffs' were not.[216]

The jurisdictional inquiry should thus separate class members by nationality, as is done later in the class certification process, in order to determine whether subject matter jurisdiction should be properly exercised.[217] The aim is to balance the significant interests in the ability of United States citizens to vindicate their claims in United States courts against the need for relatively narrow jurisdictional breadth over truly foreign claims, in the interests of comity and economic policy. This test would follow both *Bersch* and *Empagran*'s distinction between the strong interest in allowing vindication of American injuries and the lesser interest in allowing plaintiffs to vindicate harms functionally alien to the United States in any meaningful sense.[218]

With respect to a putative class comprised of both domestic and foreign plaintiffs, the courts should perform a distinct and separate jurisdictional analysis to domestic and foreign plaintiffs. This analysis would not involve the creation of subclasses. Rather, if either or both groups meet their respective jurisdictional tests, they can be re-aggregated back together into the putative class for class certification consideration.

Courts should apply a strong presumption in favor of jurisdiction to domestic plaintiffs. Using the traditional jurisdictional inquiry used in civil cases in general, corporations should be able to reasonably expect that their "products" be released into the "stream of commerce" of the American securities markets.[219] As a result, American plaintiffs would be able to take advantage of the expansive antifraud laws without any real surprise to corporations—who have full awareness of their stockholders' nationalities. In this case, the effects test, and not the conduct test, could govern.

On the other hand, the federal courts should apply a strong presumption against extraterritoriality when a putative class is comprised solely of foreign plaintiffs. In such a case, plaintiffs cannot reasonably expect to avail themselves of United States remedies unless a truly significant amount of conduct occurred domestically.[220]

216. *Id.* at 1001.

217. *See, e.g.*, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 161–62 (2004). *But cf. In re* Vivendi Universal, S.A. Sec. Litig., 381 F. Supp. 2d 158, 169–70 (S.D.N.Y. 2003) (dividing plaintiff class by nation).

218. *See Bersch*, 519 F.2d at 993.

219. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980).

220. Moreover, when jurisdiction seems unclear at the trial level, as the jurisdictional inquiry is liable to be confused with the merits, or when jurisdiction is

Second, interlocutory, de novo appellate review should be available upon the motion of a defendant in an f-cubed action. Such review could be combined with either a general presumption against finding for jurisdiction in true all-foreign-class f-cubed cases, or with the listing requirement paradigm previously described. Not only would this promote a higher level of uniformity, but it would also quash any potential international forum shopping which would almost inevitably occur given a weaker presumption against jurisdiction. Interlocutory review has been exceptionally successful in combating domestic forum shopping and should perform similarly in an international context.

This Note has already shown, *infra*, that all three branches of government have recognized the problem of "strike suits" and their concomitant negative effects on the economic posture of the United States in the world.[221] Thus a major problem with the current case law governing f-cubed cases is that it simply does not recognize that the core problem presented by such suits is the potential, in the eyes of foreign nations and corporations, of seriously exaggerated settlement values stemming from relatively meritless suits that manipulate jurisdictional requirements. By allowing, or even mandating, interlocutory, de novo review of any favorable jurisdictional ruling in an f-cubed case, the uncertainty surrounding this issue can be reduced and settlement pressure greatly ameliorated through the timely conclusion of needless litigation.

Though the private remedy has been inferred by the courts in interpreting the antifraud provisions of Section 10(b) of the 1934 Act, the international relations and economic policy concerns raised by extraterritorial application merits caution by the courts. Congress should consider these issues and render a decision offering a normative concept of the international reach of the United States securities laws; indeed, to some extent it has already started to take up this enterprise.

found to exist over f-cubed claims, the courts should utilize the expertise of the SEC by asking it to submit an opinion as to whether the "heart of the fraud" occurred in the United States. This would not only allow the question to be resolved by a true expert in the field, resolving issues of institutional competence, but it would also increase uniformity. In turn, the economic interests of the United States in protecting the courts from seeming arbitrary and overly punitive would be preserved.

221. *See infra* Part I.C–D.

CONCLUSION

The law's unpredictability in the f-cubed context has the potential to seriously undermine foreign investment in the United States and threaten the principle of comity. Both Congress and the Supreme Court have begun to recognize the reality of the problem and have taken steps to ameliorate the problems engendered by the current jurisprudence. The most important goal in this determination is the creation of a more predictable jurisdictional regime that will promote sound economic policy and respect foreign imperatives.

Distinguishing between generally permissible plaintiff classes of American citizens and generally impermissible classes of foreign citizens uniquely accommodates both the specific Second Circuit approach cautioning against too narrow a jurisdictional test and counseling courts to act as a "good neighbor" to other countries in policing international securities fraud. It also respects the more general "presumption against extraterritoriality" espoused by the Supreme Court in virtually every other legal context. A rule modeled after Rule 23(f) would diminish unwarranted settlement pressure and its attendant effects on investment in the United States.

With these reforms, f-cubed securities class actions can be properly addressed by the courts. Jurisdiction can be exercised when there exists a legitimate American interest in the case—for example, when there are a significant number of American plaintiffs involved in the suit—or when no other jurisdiction could be properly asserted. However, when American interests are lacking, jurisdiction should not be exercised, and restraint should be exercised in the name of economic uniformity, international policy, and comity.