Such Stuff as Laws Are Made On: Interpreting the Exchange Act to Reach Transnational Fraud

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Securities fraud is often transnational in nature, implicating parties and markets far beyond the territorial boundaries of the United States. Entities routinely look abroad to raise and invest capital, and transacting parties do not confine their preparatory activities within national borders. The antifraud provisions of the Securities Exchange Act of 1934 ("Exchange Act") have force in what is now a fundamentally global marketplace.

Recognizing the "national public interest" entwined with the securities markets of the United States, Congress enacted the Exchange Act to address the problems then plaguing the domestic economy. Congress made this legislative move without explicitly mentioning how the Act was to apply extraterritorially. In-
ernational securities transactions are now commonplace, and foreign investors alleging securities fraud find the applicable laws of the United States attractive. As Congress has not amended the Exchange Act to address its transnational scope, American courts must make these jurisdictional decisions without the benefit of clear legislative guidance.

When deciding whether to exercise subject matter jurisdiction over a claim brought by a foreign plaintiff alleging securities fraud, a court applies the “effects” test, the “conduct” test, or a combination of the two. To satisfy the effects test, federal circuit courts generally agree that the fraudulent activity must have harmed a United States market or investor. Courts do not apply the conduct test with the same level of uniformity. Some grant subject matter jurisdiction narrowly under the test, while others

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1 See Steinberg, *International Securities Law* at 1 (cited in note 1) (discussing the internationalization of the securities markets and noting that “[t]he 1980s and 1990s have witnessed the advent of a truly global marketplace”).

2 See Paige Keenan Willison, Note, *Europe and Overseas Commodity Traders v Banque Paribas London: Zero Steps Forward and Two Steps Back*, 33 Vand J Transnatl L 469, 471 (2000) (explaining that “foreign victims of securities violations are tempted to seek recovery in the United States, rather than in their own countries”). As Keenan Willison notes, American securities laws offer foreign plaintiffs the benefits of comprehensive liability standards, a competent judiciary, and the ability to enforce judgments. Id at 471. See also Joel Seligman, *The Internationalization of the Securities Markets: Preface to a Symposium*, 9 Mich YB Intl Legal Stud 1, 13 (1988) (comparing the United States to Canada and the United Kingdom and concluding that, among the three, “the United States has the most comprehensive liability provision concerning the sale of securities”); *Internationalization of the Securities Markets at I-2* (cited in note 2) (“[T]here are significant differences among the regulations in different nations, in terms of nature, purpose, and degree of protection.”). These differences suggest that the securities laws of the United States are not attractive to all foreigners. See Steinberg, *International Securities Laws* at 35 (cited in note 1) (“The perceived complexity of the U.S. regulatory system, coupled with concerns about the level of disclosure required, have made the U.S. securities markets somewhat less attractive to foreign issuers.”).

10 See Part II B.

11 See Part II C.

12 See Part II D.

13 See, for example, *Robinson v TCI/US West Cable Communications, Inc*, 117 F3d 900, 905 (5th Cir 1997) (“The courts that have previously addressed this problem have created two basic tests for subject matter jurisdiction,” the conduct test and the effects test, the latter of which “asks whether conduct outside the United States has had a substantial adverse effect on American investors or securities markets.”).

14 See id (“The circuits are divided as to precisely what sort of activities are needed to satisfy the conduct test.”).

15 See *Zoelsch v Arthur Andersen & Co*, 824 F2d 27, 31 (DC Cir 1987) (“[A] more restrictive test, such as the Second Circuit’s, provides the better approach to determining when American courts should assert jurisdiction in a case such as this.”); *Europe and
The Second Circuit recently added confusion to this already unsettled area of the law in *Europe and Overseas Commodities Traders, SA v Banque Paribas London* ("EOC"). There, the court held that a transient foreign investor could not establish subject matter jurisdiction under the conduct test absent additional “tipping factors.”

Securities cases laced with foreign elements pose an interpretive dilemma for courts applying the antifraud provisions of the Exchange Act. Courts have traditionally used the analytical framework of intentionalism or purposivism, relying on the supposed wishes of the enacting Congress to determine the extraterritorial application of the Exchange Act.

*Overseas Commodities Traders, SA v Banque Paribas London, 147 F3d 118, 129 (2d Cir 1998), cert denied, 52 US 1139 (1999) (holding that “activity in the United States that is ‘merely preparatory’ to a securities fraud elsewhere will not implicate our antifraud laws” under the conduct test and introducing the additional requirement of tipping factors when both parties are foreign, on the view that Congress did not intend to enact securities laws with such a “broad reach”), quoting *Itoha Ltd v LEP Group PLC, 54 F3d 118, 122 (2d Cir 1995); Kauthar SDN BHD v Sternberg, 149 F3d 659, 667 (7th Cir 1998) (“Federal courts have jurisdiction over an alleged violation of the antifraud provisions of the securities laws when the conduct occurring in the United States directly causes the plaintiff’s alleged loss in that the conduct forms a substantial part of the alleged fraud and is material to its success.”), cert denied, 525 US 1114 (1999); MCG, 896 F2d at 175 (same).*

16 See *Continental Grain (Australia) Pty Ltd v Pacific Oilseeds, Inc, 592 F2d 409, 420 (8th Cir 1979) (finding jurisdiction under the conduct test when the conduct “was in furtherance of a fraudulent scheme and was significant with respect to its accomplishment”). See also SEC v Kasser, 548 F2d 109, 114 (3d Cir 1977) (holding that the conduct test is satisfied “where at least some activity designed to further a fraudulent scheme occurs within this country”); *Grunenthal GmbH v Hotz, 712 F2d 421, 425 (9th Cir 1983) (adopting the Continental Grain test).*

17 147 F3d 118 (2d Cir 1998).

18 Id at 129 (noting that although the domestic conduct “ordinarily would be sufficient to support jurisdiction,” the court would not find it where “the surrounding circumstances show that no relevant interest of the United States was implicated”).


20 This Comment uses “intentionalism” to refer to the school that “acknowledges that legal language often does not ‘speak for itself’ and holds that a court should act as the legislature’s faithful agent, interpreting a statute in light of what the drafters intended.” Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 Am U L Rev 1717, 1741 (1995). For a more detailed discussion of intentionalism, see Part II A 1.

21 This Comment uses “purposivism” to refer to the school “in which the court first reviews the statute, its context, and history to discern the statute’s original purpose, then applies the statute in light of that underlying purpose.” Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal-System Values*, 21 Seton Hall Leg J 233, 283 (1997). For a more detailed discussion of purposivism, see Part II A 2.

22 See *Bersch v Drexel Firestone, Inc, 519 F2d 974, 993 (2d Cir 1975).* It was Judge Henry J. Friendly who first articulated this inquiry in the context of the extraterritorial
The Congress that courts look to for guidance under originalist methods was concerned with the depressed state of what was a predominantly localized domestic economy. Nevertheless, courts continue to seek the counsel of legislative ghosts on problems arising in a markedly global marketplace. This approach has yielded confusingly disparate interpretations of congressional motive and incoherent rules regarding the application of the Exchange Act.

Because both the text and legislative history of the Exchange Act are indeterminate, some courts compliment these sources with overt considerations of policy. Courts that explicitly weigh such factors have granted jurisdiction under the conduct test liberally. In contrast, those courts ostensibly refusing to take policy concerns into account construe that test narrowly.

This Comment maintains that a dynamic reading of the antifraud provisions of the Exchange Act should supplant interpretive methods that consider only remote congressional motive without explicitly weighing evolutive policy factors. A broad application of the conduct test is an approach better suited to the transnational state of the current economic landscape. Part I discusses the historical background and relevant text of the Securities Exchange Act. Beginning with a discussion of the originalist theories courts have used to construe the antifraud provisions of the Exchange Act, Part II then explores the consequences of the jurisdictional tests courts have created through those methods.

application of the Exchange Act. Judge Friendly is widely regarded as “one of the leading interpreters of the federal securities laws.” Adena Exploration v Sylvan, 860 F2d 1242, 1252 (5th Cir 1988). See also Kasser, 548 F2d at 113 (noting that the Second Circuit’s docket offered Friendly the opportunity to author “the leading opinions which have delved into the problem of jurisdiction in transnational securities fraud cases . . . IIT v Vencap, Ltd and Bersch v Drexel Firestone, Inc”) (internal citations omitted); Margaret V. Sachs, Judge Friendly and the Law of Securities Regulation: The Creation of a Judicial Reputation, 50 SMU L Rev 777, 782 (1997) (explaining that the Second Circuit during Friendly’s era “provided a securities docket that was quantitatively large and qualitatively meaty”).

23 See Bersch, 519 F2d at 993 (“The Congress that passed these extraordinary pieces of legislation in the midst of the depression could hardly have been expected to foresee the development of off-shore funds thirty years later.”).

24 See Part III B.

25 See Kasser, 548 F2d at 116 (“From a policy perspective, and it should be recognized that this case in a large measure calls for a policy decision, we believe that there are sound rationales for asserting jurisdiction.”); Continental Grain, 592 F2d at 421 (noting that “the range of significant conduct” sufficient to satisfy jurisdiction ought to “be fairly inclusive”).

26 See Zoelsch, 824 F2d at 32 (“Were 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.”).
Part III maintains that dynamic interpretation is better suited to this inquiry than is originalism. Finally, Part IV interprets the antifraud provisions dynamically in the context of their transnational application, arguing for the adoption of the broad conduct test in light of pertinent policy factors.

I. THE LEGISLATIVE SOURCE: THE EXCHANGE ACT OF 1934

Legislating in the midst of a Great Depression, Congress implemented both the Exchange Act and its predecessor, the Securities Act of 1933, to address the collapse of the American economy. The antifraud provisions of the Exchange Act were silent as to their extraterritorial application when Congress enacted them in 1934. Their continued silence has created a daunting interpretive challenge for both the bench and bar.

A. Historical Context and Legislative Impetus

The Congress that enacted the Securities Exchange Act did so gasping for economic relief, having just passed through what scholars would later identify as the worst period of the Great Depression. By 1934, after five years of assurances that an economic turnaround was on its way, Americans had come to view

27 15 USC §§ 77a et seq (1994).

28 The House of Representatives received what became the Exchange Act from the Committee on Interstate and Foreign Commerce, noting that "[t]he bill . . . attempts to change the practices of exchanges and the relationships between listed corporations and the investing public to fit modern conditions . . . [because] the lesson of 1921-30 is that without changes they cannot endure." Report of the Committee on Interstate and Foreign Commerce, HR Rep No 1383, 73d Cong, 2d Sess 2, in 78 Cong Rec H 7702 (Apr 30, 1934). See also Steve Thel, The Original Conception of Section 10(b) of the Securities Exchange Act, 42 Stan L Rev 385, 408-09 (1990) ("[T]he central inspiration for the [Exchange] Act was the combination of the bull market of the 1920s and the dramatic collapse that ended it.").

29 See Bruce Angiolillo, The Power of the Federal Courts to Hear Securities Fraud Claims Arising From International Transactions, in Securities Litigation 1999, at 469, 474 (PLI Corp Law & Practice Course Handbook Series No B-1136, 1999) ("One of the challenges for the federal courts and the securities bar today is to adapt and apply this now 65-year-old statute to contemporary fraud claims brought by foreign investors or alleging fraudulent conduct committed abroad.").

30 See Vincent P. Carosso, Investment Banking in America: A History 307 (Harvard 1970) ("[F]rom July 1931 to March 1933, the depression was at its worst. All the economic indexes plunged to unprecedented lows, and extraordinary suffering, misery, and humiliation were brought to millions and millions of Americans.").

31 See id at 306 (discussing the excessive optimism that existed even though "[a]fter Tuesday's crash [in 1929] the stock market coasted slowly downward for two and a half years, with occasional brief rises that were not maintained").
financial experts as "fools or liars." Both Congress and the newly-elected President understood that restoring faith in the domestic economy required changing the way Wall Street conducted itself.

The legislative history of the Exchange Act reflects underlying concerns with both modernizing and restoring confidence in the beleaguered domestic economy. The Committee on Interstate and Foreign Commerce, the House Committee that reported out the bill that became the Exchange Act, perceived the Act as an "attempt[ ] to change the practices of exchanges and the relationships between listed corporations and the investing public to fit modern conditions." The House Committee Report accompanying the bill states that "[t]he out-of-date unsuitability to post-war conditions of a whole series of economic interrelationships of which the stock exchanges are the nerve center has uncontrollably accentuated natural moderate fluctuations of our economic system into mad booms and terrible depressions." As many believed that securities fraud caused the crashes, restoring popular faith in market integrity was a significant legislative prior-

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32 See id ("Public confidence in financiers generally and in Wall Street bankers, particularly was shattered entirely as the stock market belied their every statement.").
33 See Thel, 42 Stan L Rev at 408–09 (cited in note 28) (noting that "stock exchange legislation was inevitable once the public blamed the stock market crash for the Depression," for "by the time Franklin Roosevelt was elected president, most interested parties recognized that the issue was not whether there would be stock exchange legislation, but rather what form the legislation would take").
34 See id at 424–461 (examining the legislative history of § 10(b) and concluding that "[a]ls understood by the Exchange Act's contemporaries, including its drafters, sponsors, and, in a sense, Congress itself, the Act declared a fundamental change in the relationship between the public and the market"). See also Sidney G. Wigfall, Subject Matter Jurisdiction in Transnational Securities Fraud Cases: The Second Circuit's Extraterritorial Application of the 1934 Exchange Act and Congressional Intent, 5 Touro Intl L Rev 233, 234 (1994) ("Congress evidenced, by its passage of the antifraud provisions, the United States' broad national interest in maintaining the integrity of the country's securities markets.").
35 Report of the Committee on Interstate and Foreign Commerce, HR Rep No 1383, 73d Cong, 2d Sess 2, in 78 Cong Rec H 7702 (Apr 30, 1934).
36 Id.
37 See 73d Cong, 2d Sess, in 78 Cong Rec S 8387 (May 9, 1934) (statement of Senator Long) ("There is many a little man today who has lost his bank account because his money was gambled on margin at the stock exchange [and does] ... not even have a chance to make a gain" because financiers "are gambling with little people's money."). See also James D. Cox, Robert W. Hillman, and Donald C. Langevoort, Securities Regulation: Cases and Materials 6 (Aspen 3d ed 2001) ("Much of the hearings leading up to Congress' enactment of the securities laws was devoted to accounts of trading practices by unscrupulous market manipulators. The hearings produced reports that the bull market of the 1920s was the heyday of the crooked stock pools."). But see id ("More recent examination of market practices in the 1920s suggests that the congressional hearings greatly exaggerated the effect and existence of such abusive schemes, perhaps doing so for political purposes.").
Congress ultimately concluded that bringing the markets into the modern era required their comprehensive regulation. 39

B. The Character of Cross-Border Transactions in 1934

With the tattered state of the domestic economy as its impetus, the Exchange Act is predictably silent on its application to transnational securities transactions. 40 The Congress of 1934 could not have foreseen the thoroughly interconnected global marketplace 41 that the Act would come to regulate. While transnational trading and investment did exist when Congress drafted the Exchange Act, 42 the Great Depression seriously impeded such advances. 43 In an era when transnational securities transactions were present but far from commonplace, 44 the legislative silence

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38 See Cox, Hillman, and Langevoort, Securities Regulation at 6 (cited in note 37) (“Investor interest and confidence in markets evaporated overnight, and for many stocks, trading halted completely.”).

39 See Schoenbaum v Firstbrook, 405 F2d 200, 206 (2d Cir 1968) (“The Act seeks to regulate the stock exchanges and the relationships of the investing public to corporations which invite public investment by listing on such exchanges.”), revd on other grounds, 405 F2d 215 (2d Cir 1968) (en banc); Carosso, Investment Banking at 368 (cited in note 30) (“The Securities Act was the first of a group of laws aimed at reforming Wall Street. Its intent was to force corporations and investment firms seeking funds from the public to adopt higher standards of social responsibility.”).

40 See Alfadda v Fenn, 935 F2d 475, 478 (2d Cir 1991) (“The Securities Exchange Act is silent as to its extraterritorial application.”).

41 See Keenan Willison, Note, 33 Vand J Transnatl L at 469 (cited in note 9) (“[I]nternational securities transactions have become the norm in today's globalized economy.”). See also Aulana L. Peters and Andrew E. Feldman, The Changing Structure of the Securities Markets and the Securities Industry: Implications for International Securities Regulation, 9 Mich YB Intl Legal Stud 19, 20 (1988) (stating that “the U.S. securities markets of today are as radically different from those of the 1960s, as those of the 1960s were from those of the 1930s,” and crediting the change to the fact that “the U.S. securities markets and their counterparts around the world have become unequivocally international”).

42 See Internationalization of the Securities Markets at II-5 (cited in note 2) (“By the close of the nineteenth century, technological advancements in cross-border communications had also led to transnational investment.”); Margaret V. Sachs, The International Reach of Rule 10b-5, 28 Colum J Transnatl L 677, 693 (1990) (“The 1920's also witnessed substantial purchases of United States securities by foreign investors, following a pattern that originated in the nineteenth century when European investors financed United States railroads.”).

43 See Internationalization of the Securities Markets at II-5 (cited in note 2) (stating that the Depression, as well as World War II, “greatly reduced opportunities for further integration of international capital markets”).

44 See id (“[W]hile internationalization of securities markets is not new, the rapidity of its growth in the 1980's is unique.”). See also Keenan Willison, Note, 33 Vand J Transnatl L at 471 (cited in note 9) (“While transnational flows of capital are not an entirely new phenomenon, at the time that the United States enacted its securities laws in the early 1930s securities transactions were primarily domestic.”) (footnote omitted).
on the issue of the extraterritorial reach of the Act is hardly surprising.46

C. Modern Economic Internationalization

Because Congress drafted the Exchange Act with an eye toward repairing the domestic economy,47 its framework is poorly suited for cases arising out of a global marketplace.48 The internationalization of the economy49 means that a disparate assortment of national laws and regulations may surround any given transaction.50 The trend of market globalization, which began in the 1950s and 1960s,51 has picked up notable speed since 1980.52 Investors routinely look abroad to raise capital and conduct trans-

46 But see Matson, Note & Comment, 79 Georgetown L J at 141 (cited in note 7) (referring to the silence of the Exchange Act on its extraterritorial application as “curious”).
47 See Paul Hamilton, The Extraterritorial Reach of the United States Securities Laws Towards Initial Public Offerings Conducted Over the Internet 13 St John’s J Legal Commen 343, 343 (1998) (“The United States securities laws were originally enacted in 1933 and 1934 to preserve and protect domestic markets.”) (footnotes omitted).
48 See Zoelsch v Arthur Andersen & Co, 824 F2d 23, 33 (DC Cir 1987) (recognizing that in 1934 “[t]he web of international connections in the securities market was then not nearly as extensive or complex as it has become”).
49 See Internationalization of the Securities Markets at II-I (cited in note 2) (“The world's securities markets play a much larger role in international capital formation than they did just a few years ago.”).
50 See Keenan Willison, Note, 33 Vand J Transnatl L at 469 (cited in note 9) (noting that transnational securities transactions “necessarily implicate the laws of more than one nation, thereby creating both conflict and confusion”); Seligman, 9 Mich YB Intl Legal Stud at 10–13 (cited in note 9) (outlining the “substantial differences” among the securities regulations of Canada, the United Kingdom, and the United States).
51 See SEC, Request for Comments on Issues Concerning Internationalization of the World Securities Markets, 50 Fed Reg 16302, 16302 (1985) (“There has been an increasing tendency for securities to become traded internationally. The emergence of the Eurobond market in 1963 was the vanguard of this internationalization process.”). See also J. Michael Finger and Thomas D. Willett, Preface, Annals 9, 9 (1982) (“[T]he boom of world output and trade that began in the 1950s and built its momentum through the 1960s was, in large measure, the result of these American-led efforts to reduce restrictions on international trade and capital movements and to reestablish a basically liberal, market-oriented international economy.”).
52 See SEC, 50 Fed Reg at 16302 (cited in note 51) (“In recent years there has been an increasing tendency for major securities to be traded not only in the capital market of their country of origin, but also in other financial centers around the world.”). See also Peters and Feldman, 9 Mich YB Intl Legal Stud at 21 (cited in note 41) (“Approximately twenty years ago, for economic reasons, issuers, investors and market professionals started to look beyond their borders for business and investment opportunities. . . . These desires resulted in occasional international securities transactions. . . . The continuing advance of telecommunications and data processing technology provided accessible and relatively inexpensive links between geographically separated issuers and investors.”).
When these transactions sour, courts must apply the Exchange Act to an economic setting its drafters never envisioned.

D. The Indeterminacy of the Antifraud Provisions of the Exchange Act

Most plaintiffs seeking extraterritorial application of the Exchange Act do so under the antifraud provisions of § 10, a section that makes no overt mention of securities violations involving foreigners. Section 10 applies to “any person” who uses interstate commerce, defining interstate commerce to include trade “between any foreign country and any State.” One commits fraud by, inter alia, using “any manipulative or deceptive device” in relation to a securities purchase, regardless of whether that security is registered on a national exchange. Under the statute, the Securities Exchange Commission (“SEC”) prescribes antifraud laws in accordance with what is “necessary or appropriate in the public interest or for the protection of investors.”

The text of the Exchange Act does not provide a clear answer to the question of its extraterritorial application. What language does exist can serve as the basis for two notably different jurisdictional determinations. One conclusion opposes the transnational reach of the statute, while the other supports it.

The first interpretation observes that nothing in the statutory language of § 10 explicitly states that courts are to give the

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53 See Internationalization of the Securities Markets at II-3 (cited in note 2) (“The global character of the securities markets is ... reflected in the rapid growth of transactions by U.S. and foreign investors in markets outside the investor's home country.”).
54 See Keenan Willison, Note, 33 Vand J Transnatl L at 471 (cited in note 9) (“The intense trend toward globalization in the past decade and the sharp upswing in transnational securities transactions may require reconsideration of those laws.”) (footnote omitted).
56 See Angiolillo, The Power of Federal Courts at 476 (cited in note 29) (“As the courts repeatedly have observed, with one minor exception, Congress did not expressly authorize the courts to hear securities fraud cases arising abroad.”).
59 15 USC § 78j(b).
60 Id.
Act extraterritorial force. This becomes relevant when coupled with the presumption against extraterritoriality, a canon of construction that assumes a statute applies only within the territorial jurisdiction of the United States. When determining whether a statute overcomes this presumption, courts look to the existence of anything in the statute or its legislative history “which would lead to the belief that Congress entertained any intention other than the normal one.” With nothing in the language of the Act to justify a departure from the norm, this interpretation of the Exchange Act suggests that the statute should not have extraterritorial effect.

Conversely, one could read the text of the Exchange Act to authorize extremely broad extraterritorial application. As articulated in § 10(b), fraud involves the use of interstate commerce. Section 3(a)(17) of the Exchange Act defines “interstate commerce” as including trade and communication not only “among the several States,” but also “between any foreign country and any State.” This reference to “foreign country,” the argument runs, establishes congressional intent sufficient to rebut the presumption against extraterritoriality. By implication, the

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61 § 10(b) states that “[i]t shall be unlawful for any person . . . by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange,” to, inter alia, use any deceptive devices to defraud when buying or selling securities. 15 USC § 78j (1994 & Supp 2000).

62 See Foley Brothers v Filardo, 336 US 281, 285 (1949) (noting that the canon “teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States”).


64 Argentine Republic, 488 US at 440.

65 This argument is outlined in Murano, 2 Intl Tax & Bus Law at 299 (cited in note 55).

66 See 15 USC § 78j(b):

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 [t]o 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, 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.


68 See SEC v Kasser, 548 F2d 109, 114 (3d Cir 1977) (“The securities acts expressly apply to ‘foreign commerce,’ thereby evincing a Congressional intent for a broad jurisdictional scope for the 1933 and 1934 Acts.”).
mere use of interstate commerce will trigger jurisdiction, regardless of the centrality of that medium to the resulting fraud.\textsuperscript{69} Courts have not taken the jurisdictional implications of either text-based argument to their logical extreme.\textsuperscript{70} The text of the Exchange Act is ultimately ambiguous as to its extraterritorial application, forcing judicial interpreters to look beyond its language to define the statute’s jurisdictional scope.

\textsuperscript{69} See Murano, 2 Intl Tax & Bus Law at 399 (cited in note 55) (“[I]t is reasonable to conclude that where fraud in extraterritorial transactions is at issue, the 1934 Act confers subject-matter [sic] jurisdiction on the federal courts.”).

\textsuperscript{70} Both text-based interpretations would sharply depart from the jurisdictional grants all circuits have, to some degree, made.

First, courts do not apply the presumption against extraterritoriality absolutely. See, for example, Schoenbaum v Firstbrook, 405 F2d 200, 206 (2d Cir 1968) (holding that the presumption against extraterritoriality loses its strength “when extraterritorial application of the Act is necessary to protect American investors”). Courts have, however, found the presumption relevant when deciding which brand of conduct test to adopt. See, for example, Robinson v TCI/US West Cable Communications Inc, 117 F3d 900, 906 (5th Cir 1997) (“The presumption against extraterritorial application informs our choice between the Second Circuit’s restrictive test and the more expansive standards applied by the Third, Eighth, and Ninth Circuits.”). The D.C. Circuit flirted with the idea of using the canon to bar all suits that would require extraterritorial application of the Act, but ultimately deferred to the primacy of the Second Circuit in construing the statute. See Zoelsch v Arthur Andersen & Co, 824 F2d 27, 32 (DC Cir 1987).

The refusal to use the canonical presumption to bar these suits is likely due to the fact that, under the jurisdictional tests, application of American securities laws is rarely wholly extraterritorial. In the context of the modern, transnational securities markets, the line between “domestic” and “foreign” is difficult, if not impossible, to draw. See Matson, Note & Comment, 79 Georgetown L J at 148 (cited in note 7) (“A ‘domestic application’ in the transnational fraud context is unworkable [] because there is no clear line between domestic and foreign situations. By definition, transnational securities fraud presents a hybrid of United States and foreign activities.”).

As for the broad text-based interpretation, the fact that all circuits confronting the issue have used some form of jurisdictional test suggests that the mere use of interstate commerce, however unrelated to the resulting fraud, will be insufficient. For example, the Third Circuit noted that “when the actual locus of the harm is outside the territorial limits of the United States,” then the Act suggests that its application is appropriate based on its reference to foreign commerce. Kasser, 548 F2d at 114. The court warned that there may not be jurisdiction if the conduct was “nonexistent or was so minimal as to be immaterial” to the resulting fraud. See id at 116.

The Second Circuit has also rejected the idea that Congress would have wanted the Exchange Act to confer the unbounded extraterritorial jurisdiction implicated by this textualist reading of the statute. The court found the language of § 10(b) to be “much too inconclusive” to reflect a congressional intent “to impose rules governing conduct throughout the world in every instance where an American company bought or sold a security.” Leasco Data Processing Equipment Corp v Maxwell, 468 F2d 1326, 1334 (2d Cir 1972). See also International Investment Trust v Vencap, Ltd, 519 F2d 1001, 1018 (2d Cir 1975) (“[T]he line has to be drawn somewhere if the securities laws are not to apply in every instance where something has happened in the United States, however large the gap between the something and a consummated fraud and however negligible the effect in the United States or on its citizens.”).
II. THE JURISDICTIONAL TESTS: INTENTIONALISM AND PURPOSIVISM APPLIED

Faced with insurmountable textual ambiguity, courts have looked for decades to the supposed wishes of the enacting legislature when deciding whether to hear a securities fraud case involving the extraterritorial application of the Exchange Act.\(^7\) Attempting to perpetuate the aims of the Congress of 1934, the Second Circuit has employed a series of jurisdictional tests: a court may exercise jurisdiction under the effects test,\(^7\) the conduct test,\(^7\) or a combination of the two.\(^7\) Other circuits have adopted these tests as well, due in no small part to the preeminence of the Second Circuit in the realm of securities regulation.\(^7\) Due to disparate readings of legislative aims, however, application of the conduct test varies among the circuits.

A. The Originalist Rubrics

Courts applying originalist theories of interpretation draw on the intent or general purpose\(^7\) of the legislature that enacted the particular statute.\(^7\) The ambiguities of original intent and purpose frustrate interpretive attempts to discover them.

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\(^7\) See, for example, \(Bersch v Drexel Firestone, Inc, 519 F2d 974, 985 (2d Cir 1975)\).

\(^7\) See Part II B.

\(^7\) See Part II C.

\(^7\) See Part II D.

\(^7\) See \(Blue Chip Stamps v Manor Drug Stores, 421 US 723, 762 (1975)\) (Blackmun dissenting) (referring to a “justifiably esteemed” panel of the Second Circuit—a court regarded as the “Mother Court” in the area of securities law). See also Roberta S. Karmel, \(The Second Circuit’s Role in Expanding the SEC’s Jurisdiction Abroad, 65 St John’s L Rev 743, 743 (1991)\) (“In an economy which is increasingly international, New York City has become a center of international, as well as national finance, and the Second Circuit’s securities law cases reflect this development.”).

\(^7\) To say that originalist courts look to intent or purpose is somewhat misleading; a blurred line divides the concepts, and courts interpreting the Exchange Act tend to tangle them, further confusing the jurisdictional inquiry. See, for example, \(MCG Inc v Great Western Energy Corp, 896 F2d 170, 174, 176 (5th Cir 1990)\) (interchanging congressional “intent” with “purpose”). See also R. Dickerson, \(The Interpretation and Application of Statutes (1975)\), excerpted in William D. Popkin, ed, \(Materials on Legislation: Political Language and the Political Process 219 (Foundation 2d ed 1997)\) (distinguishing between the oft-confused concepts of purpose and intent by explaining that “in general legal usage the word ‘intent’ coincides with the particular immediate purpose that the statute is intended to directly express and immediately accomplish, whereas the word ‘purpose’ refers primarily to an ulterior purpose that the legislature intends the statute to accomplish or help to accomplish”).

\(^7\) See William S. Blatt, \(Interpretive Communities: The Missing Element in Statutory Interpretation, 95 Nw U L Rev 629, 632–33 (2001)\).
1. Intentionalism.

An intentionalist attempts to find synergy between a particular interpretation and the aims of the legislature that crafted the statute. This method of interpretation begins from the premise that a coherent legislative intent is available for a persistent interpreter to unearth.

When faced with the issue of the extraterritorial application of the Exchange Act, courts have traditionally relied on an intentionalist inquiry. In making its jurisdictional determination, a court is to use its "best judgment as to what Congress would have wished if these problems [of extraterritorial application] had occurred to it."

2. Purposivism.

A second originalist theory of statutory interpretation, purposivism, attempts to apply statutes in a way that aligns with the

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78 See Charles B. Nutting and Reed Dickerson, *Cases and Materials on Legislation* 452 (West 5th ed 1978) ("The court must decide for itself what the legislature must have meant, or would have meant had it been confronted with the issue presented for judicial decision."). See also William N. Eskridge, Jr. and Philip P. Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 628 (West 2d ed 1995).


80 For a more acerbic characterization of the basic premise of intentionalism, see Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 Harv J L & Pub Pol 59, 60 (1988) ("The common uses of legislative history assume that intent matters. The judge rooting about in the history of the statute assumes, in other words, that the written word is but an imperfect reflection of the real law.").

81 See *SEC v Banner Fund International*, 211 F3d 602, 608 (DC Cir 2000) ("Whether a federal district court has subject matter jurisdiction over an action arising under the securities laws of the United States is a question of congressional intent."); *Zoelsch v Arthur Andersen & Co*, 824 F2d 27, 30 (DC Cir 1987) ("In this state of affairs, our inquiry becomes the dubious but apparently unavoidable task of discerning a purely hypothetical legislative intent."); *International Investment Trust v Vencap, Ltd*, 519 F2d 1001, 1017 (2d Cir 1975) ("We do not think Congress intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners."); *SEC v Kasser*, 548 F2d 109, 114 (3d Cir 1977) (analyzing the Exchange Act and finding "a Congressional intent for a broad jurisdictional scope"); *Kau-thar SDN BHD v Sternberg*, 149 F3d 659, 663–64 (7th Cir 1998), cert denied, 526 US 1114 (1999) ("The courts that have addressed the issue have noted that the question is a difficult one because Congress has given little meaningful guidance on the issue. In addition, resort to the legislative history of the securities acts does little to illuminate Congress' intent in this area.").

82 *Bersch*, 519 F2d at 993.
broader legislative impetus behind the law. This inquiry first identifies the statutory objective and then determines the interpretation that most accurately realizes that goal. Courts generally identify the purpose of the antifraud provisions of the Exchange Act as providing a remedy to manipulative securities transactions that may threaten the interests of the investing public.

Courts have found the allocation of judicial resources fundamental to determining jurisdiction in securities fraud cases. Judge Friendly held that courts should decide whether Congress would have wanted the "precious resources" of the United States to go toward determining and enforcing the matter. While Friendly's analysis was not explicitly purposivist, the Second Circuit recently characterized it as such.

As the analysis of the various jurisdictional tests will show, circuits sharply disagree on the supposed intents and purposes underlying the Exchange Act. This disparity suggests that inconsistent results are a hallmark of the originalist inquiries.

B. The Effects Test

The Second Circuit created the effects test believing that Congress enacted the Exchange Act to protect domestic investors

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83 See Eskridge and Frickey, Legislation at 628 (cited in note 78) (characterizing the purposivist quest as finding meaning "consistent with general reasons why the enacting legislature believed the statute should be adopted").
84 See Eskridge, Dynamic Statutory Interpretation at 25 (cited in note 63). See also Summers, Statutory Interpretation at 415 (cited in note 79) (noting that "[t]he ultimate purpose of a statute may be explicit or it may be implicit from a reading of the statute as a whole," and "[a]rguments that favour one choice of meaning over another because the one better serves the ultimate purposes are 'evaluative' in an important though attenuated sense," meaning that "they provide a basis for the comparative evaluation of alternative readings of the statute as more or less suitable means to statutory ends").
85 See, for example, EOC, 147 F3d at 125 (discussing Second Circuit precedent and noting that "[t]he antifraud provisions are designed to remedy deceptive and manipulative conduct with the potential to harm the public interest or the interests of investors").
86 See Bersch v Drexel Firestone, Inc, 519 F2d 974, 985 (2d Cir 1975). See also Alfadda v Fenn, 935 F2d 475, 478 (2d Cir 1991) (noting that courts "must" use Judge Friendly's test for judicial resource allocation when faced with a case involving transnational fraud).
87 Bersch, 519 F2d at 985.
88 Friendly's inquiry turned on whether the original Congress would have wanted judicial resources to be spent on a particular case, not on whether the broad "purposes" of the Exchange Act would be met by granting jurisdiction. See id.
89 See EOC, 147 F3d at 125 (holding that "the underlying purpose" of the statutory provision is critical to answering the question of proper resource allocation).
90 See Part II C.
and national markets from fraudulent securities transactions. The central inquiry of the effects test is whether fraudulent extraterritorial conduct had a substantial impact on the investors or markets of the United States. The effects must be more than "remote and indirect" to qualify as "substantial." In the case that gave rise to the effects test, Schoenbaum v Firstbrook, the Second Circuit first recognized the extraterritorial force of the Exchange Act. In Schoenbaum, an American shareholder of a Canadian corporation traded on both the American and Toronto Stock Exchanges alleged fraud on the part of the defendant corporations and directors. Reversing the district court's conclusion that the Exchange Act applied only within the United States, the Second Circuit held that Congress intended the Act to protect both domestic investors and markets from fraudulent foreign transactions. While finding that the plaintiff in the instant case had not sufficiently alleged a cause of action under § 10(b), the court made it clear that the reach of the Act could extend beyond the geographical territory of the United States.

In cases where both parties are foreign citizens or entities, courts have refused to find subject matter jurisdiction under the effects test. No jurisdiction lies under the effects test without a

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91 See Schoenbaum v Firstbrook, 405 F2d 200, 206 (2d Cir 1968), revd on other grounds, 405 F2d 215 (2d Cir 1968) (en banc).
92 See Robinson v TCI/US West Cable Communications, Inc, 117 F3d 900, 905 (5th Cir 1997).
93 Consolidated Gold Fields PLC v Minorco, SA, 871 F2d 252, 262 (2d Cir 1989).
94 405 F2d 200 (2d Cir 1968), revd on other grounds, 405 F2d 215 (2d Cir 1968) (en banc).
95 Id at 207.
96 Id at 204.
97 See id at 206 ("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.").
98 Schoenbaum, 405 F2d at 213.
99 See id at 208 ("We hold that the district court has subject matter jurisdiction over violations of the Securities Exchange Act although the transactions which are alleged to violate the Act take place outside the United States, at least when the transactions involve stock registered and listed on a national securities exchange, and are detrimental to the interests of American investors.").
100 See EOC, 147 F3d at 128 ("[T]he effects test concerns the impact of overseas activity on U.S. investors and securities traded on U.S. securities exchanges."). See also Leasco Data Processing Equipment Corp v Maxwell, 468 F2d 1326, 1334 (2d Cir 1972):

If all the misrepresentations here alleged had occurred in England, we would entertain most serious doubt whether [under the effects test] . . . §10(b) would be applicable simply because of the adverse effect of the
“U.S. entity that Congress could have wished to protect from the machinations of swindlers.” Therefore, most extraterritorial applications of the Exchange Act find their jurisdictional basis in the conduct test.

C. The Conduct Test

While the effects test considers the impact of extraterritorial behavior on domestic entities, the conduct test focuses on actions taking place within the United States. To find jurisdiction under the conduct test, courts agree that the activity must somehow "relate[ ] to the alleged scheme to defraud." The circuits differ as to the required strength of the relationship between the domestic conduct and the resulting fraud.

1. The narrow conduct-based tests.

The D.C. Circuit imposes the most stringent standard for satisfying the conduct test, requiring that the conduct occurring within the United States amount to fraud under the Act. Zoelsch v Arthur Andersen & Co is the archetypal example of this approach, a case in which the D.C. Circuit refused to find jurisdiction where West German investors alleged that an American accounting firm made fraudulent statements in an audit report distributed to them in West Germany. Even though the investors allegedly relied on the report to their detriment, the court fraudulently induced purchase in England of securities of an English corporation, not traded in an organized American securities market, upon an American corporation whose stock is listed on the New York Stock Exchange and its shareholders.

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101 EOC, 147 F3d at 128. See also Vencap, 519 F2d at 1017 (rejecting jurisdiction under the effects test where a British investment trust purchased foreign securities in an allegedly fraudulent sale and only 0.2% of the fundholders were Americans).
102 See, for example, MCG, Inc v Western Energy Corp, 896 F2d 170, 174–75 (5th Cir 1990) (explaining that "[b]ecause [the stock at issue] was not registered on any American exchange, and because no American individual or corporate entity can be said to have invested in the London offering, the Schoenbaum 'effects' test is not applicable" and noting that "the cases in which jurisdiction was exercised to protect innocent foreign investors have underscored the alleged conduct of the defendants in the United States").
103 Tamari v Bache & Co (Lebanon) SAL, 730 F2d 1103, 1107 (7th Cir 1984).
104 See Kauthar SDN BHD v Sternberg, 149 F3d 649, 665 (7th Cir 1998), cert denied, 525 US 1114 (1999) ("The predominant difference among the circuits, it appears, is the degree to which the American-based conduct must be related causally to the fraud and the resultant harm to justify the application of American securities law.").
105 See id.
106 824 F2d 27 (DC Cir 1987).
107 See id at 28.
refused to hear the case. Adopting language used by the Second Circuit, the court found that the alleged misrepresentations were “merely preparatory” to and did not “directly cause” the fraud.

But for its deference to the Second Circuit and a desire to “avoid a multiplicity of jurisdictional tests,” the D.C. Circuit suggested that it would never find jurisdiction over a claim involving domestic conduct that resulted in foreign loss. In settling for its “more restrictive test,” the court concluded that the Exchange Act reflects congressional concern with foreign transactions only when they adversely impact the investors or markets of the United States.

The Second, Fifth, and Seventh Circuits also use a narrow conduct test, although a version slightly less stringent than that of the D.C. Circuit. These courts assert jurisdiction when the domestic conduct is substantial and directly causes the resulting harm. Courts in this camp interpret the Exchange Act to apply “whether or not acts (or culpable failures to act) of material importance took place in the United States.”

When the transaction is predominantly foreign, however, these circuits will not confer subject matter jurisdiction on the sole basis of significant domestic conduct. Instead, this variant of the conduct test rests on the belief that Congress enacted the securities laws “to protect American investors and markets, as opposed to the victims of any fraud that somehow touches the United States.” Broadening subject matter jurisdiction beyond what the statute minimally requires is, in the words of the Fifth Circuit, “unwarranted.”

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108 See id at 29.
110 Zoelsch, 824 F2d at 32.
111 Id. The D.C. Circuit has since held that courts have jurisdiction when a United States resident “is allegedly defrauded in the United States in connection with the sale of securities.” SEC v Banner Fund International, 211 F3d 602, 609 (DC Cir 2000).
112 See Bersch v Drexel Firestone, Inc, 519 F2d 974, 993 (2d Cir 1975) (holding that the antifraud provisions of the Exchange Act “[a]pply to losses from sales of securities to Americans resident abroad if, but only if, acts (or culpable failures to act) of material importance in the United States have significantly contributed thereto”). See also Robinson v TCI/US West Cable Communications, Inc, 117 F3d 900, 906 (5th Cir 1997) (adopting the test of the Second Circuit); Kauthar, 149 F3d at 666–67 (adopting the test of the Second Circuit and noting that the approach “requires a higher quantum of domestic conduct than do the Third, Eighth, and Ninth Circuits”).
113 Bersch, 519 F2d at 993.
114 See Angiolillo, The Power of Federal Courts at 480 (cited in note 29) (noting that the Second Circuit standard “requires that the defendants’ substantial acts in the United States must have directly caused the plaintiffs’ alleged losses abroad” in contrast with “[t]he more lenient version of the test, adopted by the Third, Eighth, and the Ninth Circuits, [which] requires U.S. conduct that is significant to the fraud”).
115 Robinson, 117 F3d at 906.
Circuit, "unwarranted in the absence of an express legislative command." Thus the Second Circuit has found jurisdiction over transactions predominantly foreign in nature when harm to a domestic market or investor accompanies meetings or communications involving the United States.

Applying this standard, the Second Circuit has created a "balancing test" under which the availability of jurisdiction turns on the proportion of conduct occurring within the United States as compared to the proportion that took place abroad. Accordingly, "merely preparatory" activity is insufficient for extraterritorial application of the Act.

Robinson v TCI/US West Communications, Inc provides a recent illustration of this version of the conduct test. In Robinson, the Fifth Circuit found jurisdiction when an English minority shareholder brought a securities claim against a controlling group of American and predominantly British corporations. The defendants allegedly used a valuation letter sent from the United States to induce the plaintiff to sell his stock. The court found that the instruction letter directly caused the plaintiff's loss, and thus provided an adequate basis for jurisdiction.

2. The broad conduct-based tests.

At the more liberal end of the spectrum, the Third, Eighth, and Ninth Circuits grant jurisdiction when domestic conduct bears a "significant" relationship to the alleged fraud. Addi-
tionally, as with the more stringent versions of the test, the conduct must be a direct cause of the loss, and cannot be "merely preparatory."  These circuits base their interpretation of the conduct test on the notion that Congress intended the Exchange Act to promote high standards of business conduct and deter would-be defrauders from using the United States as a base for their activities.  

In *Grunenthal GmbH v Hotz*, the Ninth Circuit asserted jurisdiction over a securities fraud claim involving the sale of foreign securities between a West German corporation and a Mexican corporation controlled by Bahamian holding companies and owned by citizens of Switzerland and Mexico. Although most of the activity occurred abroad, the parties executed the fraudulent agreement in the United States after a meeting in Los Angeles that, according to the court, "further[ed] the fraudulent scheme." While the proportion of activity that took place in the United States might not have been adequate to satisfy a narrower version of the conduct test, the Ninth Circuit found it jurisdictionally sufficient.

D. The Combined Conduct and Effects Test

While courts conventionally apply either the conduct or the effects test when deciding whether to confer jurisdiction, the Second Circuit has held that these inquiries are not mutually exclusive. An "admixture" of the tests may better signal a domestic interest that sufficiently justifies the assertion of subject matter jurisdiction under the Exchange Act.  

*enthal GmbH v Hotz*, 712 F2d 421, 425 (9th Cir 1983) (adopting the *Continental Grain* standard).

125 See *Continental Grain*, 592 F2d at 420, quoting *International Investment Trust v Venceap, Ltd.*, 519 F2d 1001, 1018 (2d Cir 1975).

126 See *Grunenthal*, 712 F2d at 425 ("[T]he view adopted by the Third and Eighth Circuits is consistent with the intent of Congress, as expressed in the antifraud provisions of the federal securities laws, to elevate the standard of conduct in securities transactions within this country.") (internal quotations and footnotes omitted).

127 712 F2d 421 (9th Cir 1983).

128 See id at 421–22.

129 Id at 425.

130 See id at 426 ("Because defendants utilizing instrumentalities of interstate commerce made misrepresentations in the United States that were significant with respect to the securities laws violations and furthered the fraudulent scheme, and because those misrepresentations were material and not merely preparatory, jurisdiction exists over plaintiff's cause of action.").

131 See *Itoba Ltd v LEP Group PLC*, 54 F3d 118, 122 (2d Cir 1995).

132 See id at 121–22 ("There is no requirement that these two tests be applied separately and distinctly from each other. Indeed, an admixture or combination of the two
The Second Circuit announced the efficacy of such a combination in *Itoba Ltd v LEP Group PLC*.[133] There, the district court dismissed a suit brought by a Bermuda-based subsidiary of an American corporation against a British-based issuer for lack of subject matter jurisdiction.[134] Holding that "a sufficient combination of ingredients" of both tests existed,[135] the Second Circuit remanded the case on the merits to further explore the jurisdictional issues.[136]

The plaintiff in *Itoba* was a wholly-owned subsidiary of a Bermuda-based transnational holding company listed on the New York Stock Exchange; approximately half of the shareholders in the parent company were residents of the United States.[137] The plaintiff purchased shares in a transnational holding company based in London and traded primarily on the International Stock Exchange of the United Kingdom and the Republic of Ireland.[138] Central to the plaintiff's investment decision was a report that a London investment bank created on the basis of a form that the British holding company filed with the SEC.[139] The plaintiff alleged that the company failed to disclose material facts in its SEC filing.[140] When those facts became public, the value of the shares depreciated considerably.[141] The shares in the British holding company were issued and purchased in England,[142] where the company also prepared its SEC filing.[143] Nonetheless, the Second Circuit found a sufficient combination of harmful domestic effects

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133 54 F3d 118 (2d Cir 1995).
134 See id at 120.
135 Id.
136 See id at 125 (noting that the defendant's "failure to disclose material, nonpublic information prior to selling his [ ] shares is the type of behavior that falls under this Rule 10b-5 rubric," for "[b]ecause antifraud provisions are designed to prevent corporate insiders from taking unfair advantage of uninformed outsiders, [the defendant's] alleged nondisclosure during a sales transaction executed by two parties within the United States—[the defendant] and his broker—is the type of conduct that should trigger jurisdiction") (footnotes omitted).
137 See *Itoba*, 54 F3d at 120.
138 See id.
139 See id at 121. The British holding company filed Form 20-F with the SEC when depositing shares in an American depository for trade on NASDAQ as American Depository Shares. See id at 120.
140 See *Itoba*, 54 F3d at 124.
141 See id.
142 See id at 123.
143 See id at 124.
and significant local conduct for purposes of subject matter jurisdiction.\textsuperscript{144}

E. The Additional "Tipping Factors"

In 1998, the Second Circuit grafted an additional requirement for transient foreign investors onto its already narrow version of the conduct test. When the parties are not American citizens or entities, and the securities are not traded on a United States exchange, the court held that there must be "some additional factor tipping the scales in favor of [American] jurisdiction."\textsuperscript{145} Possible factors include "a transaction on a U.S. exchange, economic activity in the U.S., harm to a U.S. party, or activity by a U.S. person or entity meriting redress."\textsuperscript{146}

In \textit{EOC}, the defendants allegedly defrauded a transient foreigner through investments made by phone calls and faxes placed between the plaintiff's vacation home in Florida and the defendants' offices in London.\textsuperscript{147} Had the investor been an American, these communications would have satisfied even a narrow version of the conduct test.\textsuperscript{148} Because the foreign plaintiff could not point to any additional conduct implicating a domestic interest, however, the Second Circuit declined to confer jurisdiction.\textsuperscript{149}

Thus far, the tipping factor requirement is unique to the Second Circuit.\textsuperscript{150} Nonetheless, the court's considerable influence in the realm of securities jurisprudence makes it likely that this additional impediment will influence the jurisdictional decisions of other circuits.\textsuperscript{151} Basing \textit{EOC} on the supposed wishes of the enacting Congress, the Second Circuit has succeeded in compounding the uncertainty associated with the conduct tests. The tipping factor requirement underscores the problems associated with bas-

\textsuperscript{144} See \textit{Itoba}, 54 F3d at 124.
\textsuperscript{145} \textit{EOC}, 147 F3d at 129–30.
\textsuperscript{146} Id at 130.
\textsuperscript{147} There was a dispute as to whether the first transaction occurred exclusively in London, but the court notes that at least six orders were placed from Florida. See 147 F3d at 121–22.
\textsuperscript{148} See id at 129–30.
\textsuperscript{149} See id.
\textsuperscript{150} The only courts to have mentioned the tipping factors since \textit{EOC} have been district courts within the Second Circuit. See, for example, \textit{In re Gaming Lottery Securities Litigation}, 58 F Supp 2d 62, 74 (S D NY 1999) (finding that tipping factors may now "sometimes" be required); \textit{Interbrew SA v Edperbrascan Corp}, 23 F Supp 2d 425, 432 (S D NY 1998).
\textsuperscript{151} As noted earlier, the Second Circuit is preeminent in the area of securities law. See \textit{Blue Chip Stamps v Manor Drug Stores}, 421 US 723, 762 (1975) (Blackmun dissenting).
ing jurisdictional decisions on shaky divinations of congressional intent and purpose.

III. CHANGING THE INTERPRETIVE FRAMEWORK: DYNAMIC STATUTORY INTERPRETATION IN THE ABSTRACT

If the intentions and purposes underlying the Exchange Act were readily available to interpreters, those concepts would appropriately be central to the judicial query surrounding the statute’s extraterritorial reach. Unfortunately, originalist methods cannot contend with an Act that is silent on its extraterritorial application in a global marketplace. Considering policy factors in addition to text and history enables courts to pay due deference to statutory context while acknowledging the current state of the economic world. A dynamic reading of the antifraud provisions of the Exchange Act will not lead to the abandonment of the jurisdictional tests courts have developed under originalist inquiries. Rather, it will force courts to reconsider the narrow application of the conduct test that many have implemented.

A. The Indeterminacy of Originalist Methods

By pursuing the original intent and purpose of the enacting Congress, courts produce arbitrarily indeterminate conclusions of the aims of the Exchange Act. Problematically, “none of the originalist schools . . . is able to generate a theory of what the process or coalition ‘would want’ over time, after circumstances have changed.” Judge Friendly himself recognized that “[t]he Congress that passed these extraordinary pieces of legislation in the midst of the depression could hardly have been expected to foresee the development” of an economy so complicated with international transactions. Rather than relying on vague conceptions of intent or purpose, courts should openly recognize and adopt an interpretive method that allows them to react to the economic transformations that have taken place since 1934.

152 See Eskridge and Frickey, Legislation at 629 (cited in note 78).
153 For a discussion of the narrow versions of the conduct test, see Part II C 1.
154 See Matson, Note & Comment, 79 Georgetown L J at 148 (cited in note 7) (“The circuit courts have engaged in concededly arbitrary linedrawing to extend the jurisdictional boundaries of the antifraud provisions to cover transnational fraud.”). See also Part II C.
155 Eskridge, Dynamic Statutory Interpretation at 14 (cited in note 63).
156 Bersch v Drexel Firestone Inc, 519 F2d 974, 993 (2d Cir 1975).
1. The ambiguity of original legislative motive.

It is impossible to determine with any kind of objective accuracy how the Congress of 1934 might have responded to the modern global economy.\textsuperscript{157} As a theoretical matter, it may be appealing for a court to interpret a statute by hypothetically acquainting the Congress of 1934 with the internationalized economy, asking that body how it would like the Exchange Act to apply, and then documenting the answer in a judicial opinion. Practically, it is impossible to record such an exchange with secretarial objectivity.\textsuperscript{158} Due to the unavoidable infiltration of policy considerations, judicial determinations of congressional intent cannot be impartial transcriptions.\textsuperscript{159}

The disparate judicial inquiries surrounding the extraterritorial application of the Exchange Act highlight the tendency toward authorial and interpretive disharmony. The pursuit of original intent and purpose has led to competing views of the

\textsuperscript{157} Although Judge Easterbrook argues that text rather than evolutive policy factors should be determinative in statutory interpretation, his discussion of the originalist inquiry is useful in highlighting its flaws as a method purporting to produce objective results:

This method incorporates a principle of original intent—intent of the subjective variety. Its fundamental assumption is that whatever Congress thinks, is law. The role of the judge is to figure out the mental pattern of the legislature. This usually appears through the words of the statute. . . . [and] when the words leave doubt, we turn to the legislative history. . . . [t]he import of the statutory language may be left behind, may be replaced by this subjective vision. . . . Original intent controls, if only we can find it.

Easterbrook, 11 Harv J L & Pub Pol at 60 (cited in note 80).

\textsuperscript{158} Zechariah Chafee has highlighted the problem arising when a reader probes a written document to extract the aim of its original author. See The Disorderly Conduct of Words, 41 Colum L Rev 383, 398 (1941) (asking “what part does the user’s intention play in the determination of the legal effect of words?”). Chafee maintains that “legal interpretation is a passing from the word to the object through somebody’s mind”—not the mind of the author, but the mind of the judge. Id at 398. While the judge “may be influenced by what he believes the [author] . . . to have thought, the mental operations of the two men cannot fully correspond.” Id.

\textsuperscript{159} See William N. Eskridge Jr. and Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan L Rev 321, 330 (1990):

Facts about the past are without meaning until they are woven together into a narrative by the historian (or judge). . . . And in choosing and interpreting facts, even the most scrupulous historian will be influenced by her own biases, meta-theories, and desired conclusions. . . . And the greater the distance between the current and historical contexts of the statute the more implausible will be the claims of intentionalist interpretation.
aims and intentions underlying the statute. That the same congressional intent or purpose could lead to such incongruous extensions of jurisdiction suggests that these concepts are neither readily discoverable nor uniformly understood.

Ultimately, "[o]ther important factors beside the supposed intention of the [author] . . . contribute to the thought which the judge ultimately frames before applying the words to the outside world." A method of interpretation that openly acknowledges and considers such factors is preferable to one that professes to ignore the part they play in the ultimate determination. Judges should forgo the rituals of originalism and instead interpret the Exchange Act in a way that permits explicit discussion of the policy factors relevant to a jurisdictional decision.

2. Judicial dissatisfaction with originalism.

Some circuits blatantly acknowledge the significance of policy considerations to the jurisdictional inquiry, refusing to stay within the confines of the originalist analyses courts traditionally employ in this context. In holding that the securities laws should apply to a conduct-based claim centering on the use of telephones and the mail, the Eighth Circuit "frankly admit[ted]" that its jurisdictional grant was "largely a policy decision." Similarly, the Third Circuit grounded its broad jurisdictional grant on the idea that the case "call[ed] for a policy decision." The circuits that apply narrow versions of the conduct test have rejected the move to include policy considerations in their analyses. The D.C. Circuit has stated that the expansive view

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160 See Kauthar SDN BHD v Sternberg, 149 F3d 649, 665 (7th Cir 1998), cert denied, 525 US 1114 (1999) ("Although the circuits that have confronted the matter seem to agree that there are some transnational situations to which the antifraud provisions of the securities laws are applicable, agreement appears to end at that point.") (footnote omitted).
161 See Chafee, 41 Colum L Rev at 398-99 (cited in note 158) ("[W]hat the judge would have intended in the circumstances of the writer or what a reasonable man would have intended or what the normal speaker of English would have intended may also be helpful, but they have even less to do with the mind of the man who used the words.").
162 Id at 399.
163 See T. Alexander Aleinikoff, Updating Statutory Interpretation, 87 Mich L Rev 20, 31 (1988) ("All interpretive theories must ultimately be grounded in a political theory and a theory of law, even if the interpreter is unwilling to recognize or state the underlying premises.").
164 See Continental Grain (Australia) Pty Ltd v Pacific Oilseeds, Inc, 592 F2d 409, 421 (8th Cir 1979).
166 See Zoelsch, 824 F2d at 32-33 (noting that it was "not persuaded by the reasoning of those circuits that have broadened federal court jurisdiction for reasons that are essentially legislative," for "Congress is available to make any policy decisions that are re-
of subject matter jurisdiction "may provide very good reasons why Congress should amend the statute but are less adequate as reasons why courts should do so."\textsuperscript{167}

Significantly, the D.C. Circuit's condemnation of those circuits that consider policy factors was not unanimous. The Chief Judge, while concurring in the judgment, noted that the text and legislative history of the Exchange Act "provide little guidance" on the issue of its extraterritorial application.\textsuperscript{168} The Chief Judge went on to maintain that "[t]he decisions cited by the majority as examples of judicial lawmaking clearly indicate that the policies adopted are those the court perceives as most consistent with the intent of Congress in enacting federal securities laws."\textsuperscript{169} Although originalist inquiries do not formally allow for considerations of policy,\textsuperscript{170} judicial citation of such considerations indicates their analytical pervasiveness.

B. Dynamic Interpretation Mitigates the Inadequacies of Text and History

As cases decided under originalist frameworks suggest, some degree of subjectivity inheres in the extraterritorial inquiry.\textsuperscript{171} The dynamic model attempts to respond to the fact that policy considerations invariably bleed into originalist methods, advancing a more pragmatic approach to statutory interpretation.\textsuperscript{172}

\textsuperscript{167} Zoelsch, 824 F2d at 33.
\textsuperscript{168} Id at 36 (Wald concurring).
\textsuperscript{169} Id at 37 (Wald concurring).
\textsuperscript{170} See Part II A.
\textsuperscript{171} See Michael P. Van Alstine, Dynamic Treaty Interpretation, 146 U Pa L Rev 687, 702 (1998) ("Some degree of indeterminacy is thus inherent in all legal standards, however carefully defined, and certain essential equitable values of their nature are not susceptible to precise articulation in any event."); Summers, Statutory Interpretation at 415–16 (cited in note 79) (noting that while the argument from legislative intention can be objective, "[m]ost often it purports to be subjective," and purposivism is similarly imprecise, as "[t]he ultimate purpose may not be clear, or may rest on dubious evidence"). See also Matson, Note & Comment, 79 Georgetown L J at 160 (cited in note 7) (noting that, under the current interpretive methodology, "[c]ourts set forth an elastic test and then determine jurisdiction based on the inarticulable philosophies or predilections of the presiding judges").
\textsuperscript{172} See Van Alstine, 146 U Pa L Rev at 713 (cited in note 171) ("Continuing realist skepticism about the capacity of any one interpretive theory to produce determinate results, either descriptively or normatively, has given rise in recent years to a more pragmatic approach to statutory interpretation.").
1. An outline of the dynamic model.

As forwarded by William Eskridge and Philip Frickey, dynamic interpretation recognizes that "statutory interpretation involves creative policymaking by judges and is not just the Court's figuring out the answer that was put 'in' the statute by the enacting legislature."\(^{173}\) The fact that an interpreter works within a social context, not a vacuum, unavoidably influences the statutory analysis.\(^{174}\) While the text, legislative history, and circumstances of a particular case all confine the scope of a judicial decision, statutory interpretation is not devoid of all considerations of policy.\(^{175}\)

Dynamic interpretation recognizes that legislative interpretation is a creative process involving not only text, but also historical and evolutive considerations.\(^{176}\) Statutory language that does not clearly mandate a particular application forces a court to consider other sources.\(^{177}\) "When successive applications of the statute occur in contexts not anticipated by its authors," the dynamic model acknowledges that "the statute's meaning evolves beyond original expectations."\(^{178}\) The approach of the interpreter changes along with underlying societal assumptions.\(^{179}\)

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\(^{173}\) See Eskridge and Frickey, 42 Stan L Rev at 345 (cited in note 159).

\(^{174}\) See id at 347 ("Hermeneutics suggests that as the interpreter's own background context—her 'tradition'—changes, so too will her interpretive choice.").

\(^{175}\) See id ("Although the interpreter's range of choices is somewhat constrained by the text, the statute's history, and the circumstances of its application, the actual choice will not be 'objectively' determinable; interpretation will often depend upon political and other assumptions held by judges.").

\(^{176}\) See William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U Pa L Rev 1479, 1498 (1987). See also id at 1483 (noting that "statutory interpretation involves the present-day interpreter's understanding and reconciliation of three different perspectives, no one of which will always control," perspectives of statutory text; "the original legislative expectations surrounding the statute's creation"; and "the subsequent evolution of the statute and its present context"); Eskridge and Frickey, 42 Stan L Rev at 352 (cited in note 159) (describing the dynamic process and noting that the "model holds that an interpreter will look at a broad range of evidence—text, historical evidence, and the text's evolution—and thus form a preliminary view of the statute").

\(^{177}\) Even textualists concede this point. See Frank H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 Harv J L & Pub Pol 61, 68 (1994) ("Let us not pretend that texts answer every question. Instead we must admit that there are gaps in statutes, as in the law in general."). See alsoAleinikoff, 87 Mich L Rev at 30 (cited in note 163) (noting that Justice Scalia "recognizes that much statutory language cannot fairly be characterized as clear," and when it cannot be, "he will search for other sources of meaning").

\(^{178}\) Eskridge, Dynamic Statutory Interpretation at 49 (cited in note 63).

\(^{179}\) See id at 53. See also Daniel A. Farber, Do Theories of Statutory Interpretation Matter? A Case Study, 94 Nw U L Rev 1409, 1415 (2000) ("At the most abstract level, Eskridge argues that all interpretation necessarily involves an effort to align the world of
Under the dynamic theory, the statutory text controls when it is both recent and directly relevant to the interpretive issue.\textsuperscript{180} When the text is inconclusive and societal changes have overtaken the expectations of the enacting legislature, however, the dynamic model encourages the consideration of evolutive policy factors.\textsuperscript{181} Rather than purporting to ignore them, a dynamic interpreter may openly give relevant policy factors a role in the analysis.\textsuperscript{182}

In the jurisdictional inquiry surrounding extraterritorial securities fraud claims, the text, historical backdrop, and subsequent economic changes point to the value of dynamic interpretation. Both the language of the Exchange Act and the legislative history of its antifraud provisions prove inconclusive as to their extraterritorial application.\textsuperscript{183} Judge Friendly "freely acknowledge[d]" that if asked "to point to language in the statutes, or even in the legislative history, that compelled [the jurisdictional grant], [h]e would be unable to respond."\textsuperscript{184} The absence of clear guidance in the text or legislative history of the Exchange Act underscores the use of an interpretive model that candidly looks to policy considerations when making a jurisdictional determination.

\begin{footnotes}
\footnote{\textit{See Eskridge, 135 U Pa L Rev at 1496 (cited in note 176) ("[W]e should trust our reading of the text primarily when the statute is recent and the context of the enactment represents considered legislative deliberation and decision on the interpretive issue.").}}
\footnote{\textit{See id at 1484. See also Blatt, 95 Nw U L Rev at 639 (cited in note 77) (noting that, for those who view the legislative process as a forum for deliberation—a theory which supports dynamic interpretation—"[l]egislation is part of an ongoing debate over public values," and maintaining that "[c]ourts participate in this ongoing discussion and are not limited to materials emanating from the legislative process") (footnote omitted).}}
\footnote{\textit{See Blatt, 95 Nw U L Rev at 633 (cited in note 77) ("Dynamic interpreters, notably Professors Eskridge, Sunstein, and Aleinikoff, broaden the inquiry by considering the best answer, the result a court would reach if unconstrained by original intentions."). See also Cass R. Sunstein, \textit{Beyond the Republican Revival}, 97 Yale L J 1539, 1584 n 242 (1988) (citing Eskridge for the assertion that "[c]ourts have also employed clear statement principles of statutory construction so as to help bring about consistency and coordination in the law" and noting Eskridge's argument that "courts should interpret statutes so as to allow for changing social conditions"); Aleinikoff, 87 Mich L Rev at 62–63 (cited in note 163) (discussing a "nautical model" of statutory interpretation, a model that "sees interpreters as supplying important direction to the development of law in a complex, changing society" where "[t]ogether, drafters and interpreters create a legal system").}}
\footnote{\textit{See Parts I D and III A.}}
\footnote{\textit{Bersch v Drexel Firestone, Inc, 519 F2d 974, 993 (2d Cir 1975).}}
\end{footnotes}
2. Dynamic interpretation does not undermine majoritarian principles.

Even conceding that evolutive factors are useful in escaping the jurisdictional quagmire, critics argue that, under the Constitution, it falls to the legislature to make such policy determinations. Congress is not only capable of amending a statute to answer jurisdictional uncertainty, but democratic principles grant the legislature the exclusive province to do so. A court should not usurp the function of Congress by injecting policy considerations into its interpretation of a statute.

The response to the concern regarding the democratic legitimacy of dynamic interpretation is threefold. First, policy considerations arise under any interpretive model. "Legislative supremacy does not require the Court to ignore evolutive considerations in its decisions," and arguing the possibility of doing so ignores the inevitable presence of context in statutory interpretation. Judicial efforts to the contrary, "current values cannot easily be excluded from statutory interpretation." Policy considerations often wield unavoidable influence when decisions follow recent statutory pronouncements. This suggests that the influence of such considerations is even stronger when a court attempts to apply a statute enacted sixty-seven years ago.

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185 See Farber, 94 Nw U L Rev at 1416 (cited in note 179) ("The textualist response to all this is predictable but powerful: it is up to the legislature and the executive to make policy judgments and adapt legal rules to changing times. It is up to unelected judges to follow the rules laid down for them.").

186 For a more general discussion of this argument, see Easterbrook, 17 Harv J L & Pub Pol at 66 (cited in note 177):

Any theory of meaning must be jurisprudential. What does the Constitution require legislatures to do to produce a law? What is the proper relation between tenured judges and evolving legislatures? To the extent the constitutional rules permit this inquiry, what are the relative costs of error from expansive versus beady-eyed readings? These are the right questions, and I believe the answer lies in a relatively unimaginative, mechanical process of interpretation.

187 See id at 64 (advocating the textualist approach as "sticking to lower levels of generality, preferring the language and structure of the law whenever possible over its legislative history and imputed values"). See also id at 63 (noting that society wants the legal system to "empower Congress," and so courts should "let [Congress] make rules" by "using whatever approach Congress picks, adhering rather than shifting").

188 See Eskridge and Frickey, 42 Stan L Rev at 381 (cited in note 159).

189 Id at 341.

190 See id ("Where current values and historical context strongly support an interpretation, a determinate text will not stand in the way.").

191 See Part III B.
Second, originalist and textualist methods themselves enjoy a tenuous link to "majoritarian political preferences."\footnote{See Eskridge and Frickey, 42 Stan L Rev at 380 (cited in note 159) ("[T]he link between foundationalist theories of interpretation and majoritarian political preference is tenuous, because the assumptions linking each method to majoritarianism are questionable.").} While judges may rely on statutory text or legislative intent to avoid claims of thwarting the will of the majority,\footnote{For purposes of this analysis, the "majoritarian will" in question is that of the populace that elected the Congress that passed the Exchange Act in 1934.} such foundations are hardly invulnerable.\footnote{See Eskridge and Frickey, 42 Stan L Rev at 378 (cited in note 159):}

Regarding originalism, it is misleading to speak of a single legislative intent or purpose when potentially innumerable intents and purposes contribute to the enactment of a statute.\footnote{This "counter-majoritarian anxiety" arises from the view that statutory law derives its legitimacy from its enactment by Congress, which is elected by and accountable to the people. Hence, when the Court interprets statutes, it must somehow link its interpretation with the expectations of the democratically-elected body. The Court does this by relying upon "objective" evidence that ties its interpretation to the text of the statute, the original expectations of Congress, or both.} In the same way, when statutory text does not offer a "reasonably determinate source of meaning,"\footnote{See id at 329 (discussing the oversimplification of the idea of a legislative "intent": "Whatever inferences one draws about the intent of the House must somehow be matched to the intent of the Senate"). See also id at 335 (noting a similar problem with discussion of a legislative purpose: even if it were possible to aggregate all of the interest groups that contribute to the enactment of a particular statute, "supporters of legislation will usually appeal to more than one public purpose in order to maximize political support").} a court must go beyond the legislative pronouncement to determine the outcome of the case at hand.

Third, the fact that indeterminacy often accompanies originalist theories of interpretation suggests that these methods will not always lead courts to objective results.\footnote{See id at 341.} Courts have already demonstrated the impossibility of unearthing a legislative intent or purpose regarding the extraterritorial application of the Exchange Act.\footnote{See Eskridge and Frickey, 42 Stan L Rev at 379 (cited in note 159) ("[T]he indeterminacy of each of these theories in the hard cases suggests that none of the theories can by itself 'objectively' predict what a reasonable Court will do. And the indeterminacy of each theory subverts its claim to constrain the Court.").} Statutory text, the first resort of the interpreter, is similarly inconclusive in this context.\footnote{See Part III A 1.}

Despite judicial at-
tempts to objectively legitimate the interpretive process, imprecision pervades interpretive analysis.

All sides must concede that statutory text is not always an adequate basis for legislative interpretation. In such circumstances, interpreters may prefer to consult "other sources of rules," congressional intent, or policy factors. Disagreement centers on the sources courts should use when text is unclear, not whether judges will ever need to venture beyond the words of a statute.

IV. REINTERPRETING SUBJECT MATTER JURISDICTION UNDER THE EXCHANGE ACT: DYNAMIC INTERPRETATION APPLIED

When interpreting the Exchange Act, some courts performing originalist analyses have recognized that policy concerns underlying the statute require adoption of the broad version of conduct test. Dynamic interpretation legitimates this approach as one that best acknowledges both the concerns of the enacting Congress and the ways in which the economic climate has changed since 1934. The analysis applies the three elements of dynamic interpretation—text, history, and policy considerations—to the question of the Exchange Act's jurisdictional scope.

A. The Textual Perspective

As already established, the text of the Exchange Act does not definitively answer the question of its extraterritorial scope. In the framework of dynamic interpretation, when statutory lan-

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200 See Eskridge and Frickey, 42 Stan L Rev at 378 (cited in note 159) ("The Court sometimes makes quite a show of preventing its 'subjective' preferences from influencing statutory interpretation.").

201 See Easterbrook, 17 Harv J L & Pub Pol at 68 (cited in note 177) ("When the text has no answer, a court should not put one there on the basis of legislative reports or moral philosophy—or economics! Instead the interpreter should go to some other source of rules, including administrative agencies, common law, and private decision.").

202 See Part II A.

203 See Part III B.

204 See, for example, SEC v Kasser, 548 F2d 109, 114 (3d Cir 1977) (noting that "from a policy perspective, and it should be recognized that this case in a large measure calls for a policy decision, we believe that there are sound rationales for asserting jurisdiction" broadly); Continental Grain (Australia) Pty Ltd v Pacific Oilseds, 592 F2d 409, 420 (8th Cir 1979) (finding jurisdiction under a broad conduct test and conceding the large role that policy played in that determination); Grunenthal GmbH v Hotz, 712 F2d 421, 425 (9th Cir 1983) (adopting the broad conduct test of the Third and Eighth Circuits on the ground that it "advances the policies underlying federal securities laws"). See also Part II C 2.

205 See Part I D.
guage is ambiguous, the words of the Act alone cannot guide its interpretation.206

B. The Historical Perspective

Although the enacting Congress left few clues as to whether the Exchange Act should apply extraterritorially,207 the congressional record contains multiple references to the need for a legislative response to the growth and change of the economy.206 The House Committee's report reflects a recognition that the existing system could not adequately respond to the needs of a changing economic landscape.208 Given this, it is anomalous for a court to interpret the Act without considering the effect its decision will have in a global economy.

C. The Evolutionary Perspective

Contemporary societal conditions and policies are critical to statutory interpretation when, as in this instance, both the text and legislative history are inconclusive.210 When deciding whether to assert subject matter jurisdiction over a primarily foreign securities transaction, courts have acknowledged three central policy considerations: (1) the desire to avoid turning the United

206 See Eskridge, 135 U Pa L Rev at 1483 (cited in note 176) ("When the statutory text clearly answers the interpretive question ... it normally will be the most important consideration.").

207 The legislative history surrounding the Act reflects general congressional concern with the state of the domestic economy. See Part I A.

208 In its report accompanying the Bill, the House Committee on Interstate and Foreign Commerce determined that the "significant growth in size and importance of the exchanges and the business they do with the public has necessitated a real difference in kind in the treatment of that public by the law and by business ethics." Report of the Committee on Interstate and Foreign Commerce, HR Rep No 1383, 73d Cong, 2d Sess 2, in 78 Cong Rec H 7703 (Apr 30, 1934). Discussing its prohibition of securities fraud, the Committee stated that "[t]o insure to the multitude of investors the maintenance of fair and honest markets, manipulative practices of all kinds on national exchanges are banned." Id at 7704. See also Part I A.

209 See Report of the Committee on Interstate and Foreign Commerce, HR Rep No 1383, 73d Cong, 2d Sess 2, in 78 Cong Rec H 7702 (Apr 30, 1934) (noting the need for changes in the way the market is regulated to keep pace with market conditions and avoid market failure).

210 See Eskridge, 135 U Pa L Rev at 1484 (cited in note 176) ("The dynamic model, however, views the evolutive perspective as most important when the statutory text is not clear and the original legislative expectations have been overtaken by subsequent changes in society and law."). See also Farber, 94 Nw U L Rev at 1415–16 (cited in note 179) (noting the warning of William Eskridge that "[i]ntolerable anomalies would develop without some way to keep [statutory] provisions in tune with the changing times").
States into a haven for defrauders;\textsuperscript{211} (2) international reciprocity,\textsuperscript{212} and (3) encouraging a high standard of conduct in securities transactions.\textsuperscript{213} Those circuits that narrowly apply the conduct test ignore the policy-based ramifications of their jurisdictional stinginess. Hazy determinations of congressional motive should not preclude considerations of policy.

1. Preventing the creation of a haven for defrauders.

One relevant policy consideration courts should consider in this context is discouraging would-be defrauders from establishing operations in the United States. This rationale grows out of a concern that denying jurisdiction through a strict conduct test would embolden potential defrauders, encouraging them to engage in illegal operations from the United States.\textsuperscript{214} Courts have been “reluctant to conclude that Congress intended to allow the United States to become a ‘Barbary Coast,’ . . . harboring international securities ‘pirates.’”\textsuperscript{215}

Under the narrow applications of the conduct test, defrauders could use the United States in the course of their operations as long as they did not implicate the effects test.\textsuperscript{216} Rather than deterring would-be defrauders from conducting their activities in

\textsuperscript{211} See SEC \textit{v} Kasser, 548 F2d 109, 116 (3d Cir 1977) (“[T]o deny such jurisdiction may embolden those who wish to defraud foreign securities purchasers or sellers to use the United States as a base of operations.”).

\textsuperscript{212} See id (“By finding jurisdiction here, we may encourage other nations to take appropriate steps against parties who seek to perpetrate frauds in the United States. Accordingly, our inclination towards finding jurisdiction is bolstered by the prospect of reciprocal action against fraudulent schemes aimed at the United States from foreign sources.”).

\textsuperscript{213} See id (“[T]he antifraud provisions of the 1933 and 1934 Acts were designed to insure high standards of conduct in securities transactions within this country in addition to protecting domestic markets and investors from the effects of fraud. By reviving the complaint in this case, this Court will enhance the ability of the SEC to police vigorously the conduct of securities dealings within the United States.”). See also Grunenthal, 712 F2d at 425 (“Assertion of jurisdiction may encourage Americans—such as lawyers, accountants, and underwriters—involved in transnational securities sales to behave responsibly and thus may prevent the development of relaxed standards that could spill over into work on American securities transactions.”) (internal quotations and footnote omitted).

\textsuperscript{214} See Kasser, 548 F2d at 116.

\textsuperscript{215} Id (internal quotations and footnote omitted). See also Kauthar SDN BHD \textit{v} Sternberg, 149 F3d 659, 666 (7th Cir 1998) (“[W]e would do serious violence to the policies of [the antifraud] statutes if we did not recognize our Country’s manifest interest in ensuring that the United States is not used as a base of operations from which to defraud foreign securities purchasers or sellers.”) (internal quotations and footnote omitted).

\textsuperscript{216} This is at least the implication of \textit{EOC}, which suggests that the court will only find jurisdiction under the conduct test in cases involving a transaction on a domestic exchange, domestic economic activity, or harm to a domestic party. See 147 F3d at 130.
the United States, these courts are only demonstrating how to avoid the sting of American securities laws.

After EOC, for example, a foreign party who conducts fraudulent securities transactions over domestic telephone lines may escape the antifraud provisions of the Exchange Act. In EOC, the activity conducted within the United States directly caused the harm to a foreign investor. The court conceded that the activity would have provided a sufficient basis for jurisdiction had it involved an American citizen or market. Under the EOC rationale, then, as long as a foreign defrauder does not activate a tipping factor, it can completely evade American securities laws.

To be sure, the United States does not want to become a haven for the world's securities plaintiffs any more than for its defrauders. The broader conduct test guards against this outcome by requiring that "at least some" fraudulent activity take place within the United States. Plaintiffs will not be able to satisfy the requirements of the conduct test unless some illegal activity occurred in the United States. This expansive view of jurisdiction makes the host of such activity appropriately inhospitable, a policy that the narrow conduct tests essentially ignore.

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217 Although EOC is the chosen example, the narrow conduct tests that do not require tipping factors also undermine a policy that seeks to guard against the creation of safe-zones for defrauders. The D.C. Circuit, for example, would not find jurisdiction unless domestic activity amounted to a fraud. See Zoelsch, 824 F2d at 33. A would-be defrauder could carry out most of the acts material to the fraud in this country, commit the final act elsewhere, and then escape the securities laws of the United States.

218 See EOC, 147 F3d at 129.

219 See id at 129–30:

Although phone calls (or any other communications into the United States) soliciting or conveying an offer to sell securities ordinarily would be sufficient to support jurisdiction, it would be inconsistent with the law of this circuit to accept jurisdiction over this dispute, because the surrounding circumstances show that no relevant interest of the United States was implicated.

220 Those circuits applying the narrow version of the conduct test may argue that the Second Circuit should take no action if nothing in the case would implicate a United States interest. This argument, however, ignores the point of this policy objective: the United States has an interest in deterring would-be defrauders from conducting their activities within its borders. The point of contention is over the definition of "interest"; this policy consideration understands it broadly.

221 See Kasser, 549 F2d at 114.
2. Encouraging international reciprocity.

A second policy concern pertinent to the jurisdictional inquiry is that limiting jurisdiction over these disputes may induce other nations to jealously guard their securities laws when their application would serve the interests of the United States.\textsuperscript{222} The Third Circuit has pointed out that there may be situations in which other countries would not act when individuals are planning fraudulent activities that they intend to perpetuate in the United States.\textsuperscript{223} Such a scenario would “enable defrauders beyond the reach of our courts to escape with impunity.”\textsuperscript{224}

The regulatory-related aftermath of the September 11 terrorist attacks has underscored the need for international cooperation in cross-border transactions. The SEC is currently leading the investigation into the unusually high number of put options purchased in airline, insurance, and brokerage stocks in the days before the attacks.\textsuperscript{225} In the course of its investigation, the SEC is relying on cooperation from regulators of other national markets.\textsuperscript{226} The magnitude of the terrorist attacks makes it highly improbable that the assertion of jurisdiction over any terrorist-related transactions would turn on a federal court’s construction

\textsuperscript{222} See id at 116.
\textsuperscript{223} See id.
\textsuperscript{224} Id.
\textsuperscript{225} See U.S. Securities and Insurance Industries: Keeping the Promise, Hearing of the House Financial Services Committee, 107th Cong, 1st Sess (Sept 26, 2001) (statement of SEC Chairman Harvey L. Pitt) (noting the “detailed, investigative techniques” required to trace those who purchased puts on airline stock before the terrorist attacks, and postulating that “with enough time and enough resources, [the SEC] could track down the purchasers of these securities”). See also Ann R. Weiler and Sara D. White, For the Record, Crain’s Chi Bus 74 (Sept 24, 2001) (noting the investigation by federal regulators into “the unusually high volume of put options on stocks involving airline companies and insurers in the days before the attacks); Chris Blackhurst, Attack on Afghanistan: The Mystery of Terror “Insider Dealers”, Markets Windfall, Independent on Sunday (London) 8 (Oct 14, 2001) (stating that “investigators now wonder whether there is a more sinister explanation” for the fact that “[s]hare speculators have failed to collect $2.5m [ ] in profits made from the fall in the share price of United Airlines after the 11 September World Trade Centre attacks” and noting the unusual number of put options also purchased in shares of brokerage firms resident in the World Trade Center).
\textsuperscript{226} See Linda Leatherdale, Uncertainty Rules, Toronto Sun 42 (Sept 19, 2001) (“Regulators in the U.S., Germany and Japan are now sifting through trading records to pinpoint any unusual trades.”); Michael Schroeder, SEC Asks Canada to Assist in its Probe of Illegal Profiteering from the Attacks, Wall St J C14 (Oct 4, 2001); Paul Blustein, New Task Forces Target Terrorist Funding; Money Laundering Studied; Groups May Have Tried to Profit from Attacks, Wash Post A6 (Sept 20, 2001) (“A European regulatory source said officials from 12 countries held a conference call Monday about high volumes of transactions in early September of stocks and options of companies that included Munich Re Group, a reinsurance firm, and AMR Corp., the parent of American Airlines.”).
of the conduct test. Regardless, the cross-border nature of the investigation, as well as the centrality of international cooperation to its successful continuation, both point to the significance of this policy consideration. A broad jurisdictional view becomes critical to encouraging international reciprocity, which may in turn promote domestic interests.

Conversely, one could argue that haphazardly extending the reach of American securities laws could prove a potent irritant to other countries. An expansive jurisdictional policy may only encourage jurisprudential imperialism on the part of the United States. Since the 1970s, the international community has responded with "furor" to expansive United States jurisdiction. Under this view, evolutive policy considerations should discourage, not promote, expansive jurisdiction.

This counterargument fails to acknowledge the fact that, to satisfy any jurisdictional conduct test, some nexus must exist between the activity and the United States. The broad version of the conduct test permits jurisdiction only when conduct significant to the fraud takes place within the territorial jurisdiction of the United States. As a general matter, Judge Friendly has recognized that intra-territorial conduct stands as a permissible basis for jurisdiction in this context. The United States does not offend notions of comity by adjudicating a matter in which it has a pronounced interest.

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227 See Gary E. Davidson, Congressional Extraterritorial Investigative Powers: Real or Illusory?, 8 Emory Intl L Rev 99, 103 (Spring 1994) (noting the "recognition of the sometimes delicate and sensitive nature of international relations that might forestall expansive congressional attempts to assert extraterritorial jurisdiction"). See also Keenan Willison, Note, 33 Vand J Transnatl L at 471–72 (cited in note 9).
228 See Keenan Willison, Note, 33 Vand J Transnatl L at 471–72 (cited in note 9).
229 See Warren Pengilley, Extraterritorial Effects of United States Commercial and Antitrust Legislation: A View from "Down Under," 16 Vand J Transnatl L 833, 835–36 (1983) ("The United States' perspective [regarding extraterritorial jurisdiction] was accorded a somewhat uneasy acceptance until the early 1970s. By the mid-1970s, however, this acceptance evaporated.").
230 See, for example, Continental Grain (Australia) Pty Ltd v Pacific Oilsseeds, Inc, 592 F2d 409, 420 (8th Cir 1979) (finding jurisdiction appropriate where material conduct within the United States furthers a fraudulent scheme).
231 See Part II C 2.
232 See Leasco Data Processing Equipment Corp v Maxwell, 468 F2d 1326, 1334 (2d Cir 1972) ("Conduct within the territory alone would seem sufficient from the standpoint of jurisdiction to prescribe a rule.").
233 The D.C. Circuit itself recognizes this point. See SEC v Banner Fund International, 211 F3d 602, 613 (DC Cir 2000) ("[C]onduct by a litigant designed to frustrate a significant policy of the United States is not a ground for abstention on the basis of comity.").
Additionally, comity concerns in fraud cases are not as potentially destructive as some commentators suggest. The economic regulations of the United States in some areas differ markedly from those of other countries. The underlying policies prohibiting fraud are, however, similar enough among nations that the exercise of jurisdiction is not as potentially offensive here as in other contexts, such as antitrust regulation.

As the interconnectedness of the financial markets increases, so does the importance of stopping fraud before it results in significant damage or, more problematically, moves beyond the reach of judicial redress. The heightened interconnectedness of the economic markets has complicated the enforcement of securities laws, and “[b]arriers based on rigid concepts of jurisdiction and law enforcement are not effective in meeting this challenge.” Commentators advocating that the United States restrict its extraterritorial jurisdiction in securities cases overlook the fact that, in a global marketplace, exercising jurisdiction to punish and deter fraud benefits the greater economic community.

234 See, for example, Karmel, 65 St John’s L Rev at 743 (cited in note 75) (“The greater potential for conflict between U.S. securities laws and foreign securities laws requires a greater concern for comity in decision making.”); Hamilton, 13 St John’s J Legal Commen at 349 (cited in note 47) (advocating “restrictions on the broad reach of United States securities laws in the interest of both fairness and international comity”).

235 See, for example, Steinberg, International Securities Law at 35 (cited in note 1) (“[I]t has become increasingly clear to foreign issuers that United States disclosure requirements are more onerous than the requirements of their home countries.”).


Decisions about subject matter jurisdiction under the U.S. securities laws have not been particularly controversial, since the policies of the securities laws of the U.S. generally do not conflict with policies of foreign states. In other areas, most particularly antitrust law, the courts have frequently struggled with the doctrine of comity in the face of a direct policy conflict with foreign law.

237 See id at 209 (“As the securities markets become more international, law enforcement problems will become more severe and more complex.”).

238 Id.

239 See, for example, Matson, Note & Comment, 79 Georgetown L J at 161–62 (cited in note 7) (critiquing the “broad, indeterminate and unrestrained reach of the [jurisdictional] tests,” especially the liberal version). See also id at 171 (“Little is gained and much is sacrificed as courts attempt to extend the reach of United States securities laws to cover actors and transactions that are increasingly international.”); Murano, 2 Intl Tax & Bus Law at 315 (cited in note 55) (“Despite the tendency in some courts to enlarge the scope of extraterritorial jurisdiction, the federal courts should remain within the limits established in Leasco and in Bersch/Vencap so as to avoid any conflict with established standards of international law.”). For a general discussion of the narrow conduct tests, see Part II C 1.
3. Encouraging high standards of conduct.

Finally, it is appropriate for a court making a jurisdictional decision to consider the general aim of encouraging ethical securities transactions.\(^{240}\) A broad reading of the conduct test reinforces the integrity of the markets, an aim that the Act sought to encourage.\(^{241}\) The unprecedented globalization of the markets has increased both the potential for and seriousness of securities fraud.\(^{242}\) If United States courts assert jurisdiction narrowly when transnational securities transactions are so common, they may inadvertently undermine the trust in markets that the Congress of 1934 sought to rebuild through the enactment of the Exchange Act.\(^{243}\)

The objection critics would likely raise to this argument is that “promoting high standards of conduct”\(^{244}\) is such an unbridled, subjective concept that courts will enlist it to assert jurisdiction over any case involving extraterritorial fraud. A court could readily manipulate the fact pattern of a case before it to find that a jurisdictional grant would encourage high behavioral standards, regardless of the connection between the transaction and United States. This consideration, then, involves nothing more than a powerful discretionary tool disguised as a policy factor that judges might use to reach a desired outcome.

As with the comity argument, this contention overlooks the fact that policy considerations do not supplant jurisdictional tests. Although the dynamic reading points to a broad version of the conduct test, it does not eliminate the need for such a test

\(^{240}\) See SEC v Kasser, 548 F2d 109, 116 (3d Cir 1977) (discussing the “high standards of conduct” policy factor in the context of transactions, investors, and markets within the United States).

\(^{241}\) See Part I A.

\(^{242}\) See Kauthar SDN BHD v Sternberg, 149 F3d 659, 667 (7th Cir 1998) (acknowledging the importance of the policy factors considered by Kasser and noting that “we would do serious violence to the policies of these statutes if we did not recognize our Country’s manifest interest in ensuring that the United States is not used as a ‘base of operations’ from which to ‘defraud foreign securities purchasers or sellers,’” an interest “amplified by the fact that we live in an increasingly global financial community”) (internal citation omitted).

\(^{243}\) See Murano, 2 Intl Tax & Bus Law at 300 (cited in note 55):

[I]n light of the substantial increase in the number of securities transactions involving persons or events linked with foreign countries, the extraterritorial application of the antifraud provisions of the 1934 Act has become essential to protect domestic markets and domestic investors. Without such extraterritorial application, the remedial goals that the securities laws were designed to effectuate would be undermined.

\(^{244}\) Kasser, 548 F2d at 116.
altogether. While the aim of promoting the integrity of securities-related conduct may appear overly broad, the jurisdictional tests appropriately constrain it by requiring some connection between domestic conduct and the resulting fraud.²⁴⁵

CONCLUSION

If the Congress of 1934 could have foreseen the emergence of transnational securities dealings, it might have explicitly discussed the extraterritorial application of the antifraud provisions within the Exchange Act. That legislature was more concerned with the state of the domestic economy than with predicting the future, making judicial reliance on its aims anachronistic. Because both the statutory text and its legislative history are inconclusive, dynamic interpretation allows courts to openly consider a third element: the context in which the Exchange Act currently operates. In the wake of economic globalization, sound policy favors giving courts the flexibility to grant jurisdiction liberally under the conduct test.

²⁴⁵ See Part II C 2.