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Unintended Consequences: The Link Between Judge Friendly's *Texas Gulf Sulphur* Concurrence and Recent Supreme Court Decisions Misconstruing Rule 10b-5

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UNINTENDED CONSEQUENCES: THE LINK BETWEEN JUDGE FRIENDLY'S *TEXAS GULF SULPHUR* CONCURRENCE AND RECENT SUPREME COURT DECISIONS MISCONSTRUING RULE 10b-5

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ABSTRACT

In his Texas Gulf Sulphur *concurrence, Judge Henry J. Friendly counseled the federal district courts concerning the numerous pending satellite class actions that had been filed under Section 10(b) of the Securities Exchange Act and Rule 10b-5. In the course of so doing, he argued forcefully that private Rule 10b-5 litigation should be curtailed. Finding his argument convincing, the Supreme Court issued four major decisions restricting the Rule between 1975 and 1994, while nonetheless expanding it in* Basic Inc. v. Levinson*. Congress responded by blessing both aspects of the Court's jurisprudence – imposing its own set of restrictions in the Private Securities Litigation Reform Act of 1995 (the PSLRA) and the Securities Litigation Uniform Standards Act of 1998 as well as deciding to leave* Basic *intact after contemplating an override.*

Emboldened by Congress's double ratification, the Court has since restricted private Rule 10b-5 litigation on three separate occasions with monumental consequences. Judge Friendly would not have approved of these restrictions, since they rest on misreadings that ought to have been discerned. In Morrison v. National Australia Bank Ltd.*, for example, the Court extracted from Section 10(b) a "transactional test" designed to curb the Section's extraterritorial reach. The test assumes that Section 10(b) extends to over the counter transactions due to the unavailability of exchange venues for the transactions in unregistered securities to which the Section refers. But that analysis ignores the reality that exchanges could serve as hosts for such transactions when Section 10(b) was enacted, as the face of the original Exchange Act makes apparent.*

Thereafter, in Janus Capital Group, Inc. v. First Derivative Traders*, the Court imposed an "ultimate authority test" to determine who can "make" a materially misleading misstatement or omission that violates Rule 10b-5(b)*

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and Section 10(b). The test typically attributes "ultimate authority" to a single maker, thereby conflicting with the PSLRA's proportionate liability provision. That provision assumes that many cases will involve multiple violators by deeming each violator liable only for the percentage of damage that the jury found it to have caused.

Finally, in California Public Employees' Retirement System v. ANZ Securities, Inc.*, the Court denied securities class action plaintiffs access to an equitable tolling doctrine available to their antitrust counterparts. That denial assumed that when drafting the antitrust limitation provision, Congress knew that a "statute of repose" bars equitable tolling but that a "statute of limitation" does not. That assumption is flawed. Although Congress enacted the antitrust limitation provision in 1955, it did not become aware of the statute of repose/statute of limitation distinction until 1982, according to a Supreme Court decision issued three years prior to* ANZ*.*

Any prospect of a course correction may turn on whether securities law academics become more vigilant overseers of the Court's Rule 10b-5 restrictions. There is also the possibility that Justice Sonia Sotomayor, the only current Justice with experience on securities regulation's "Mother Court," will put that experience to use by guiding her fellow Justices through the securities law thicket.

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TO commemorate the fiftieth anniversary of *SEC v. Texas Gulf Sulphur Co.*,[1] I have chosen to focus on Judge Henry J. Friendly's concurrence.[2] One of the most celebrated jurists of the twentieth

1. 401 F.2d 833 (2d Cir. 1968) (en banc).
2. *Id*. at 864–68 (Friendly, J., concurring).

century,[3] Judge Friendly achieved special renown in the area of securities law.[4] Thirteen securities opinions of the U.S. Supreme Court mention him by name.[5]

In his concurrence, Judge Friendly warned of the dangers of unbridled private litigation under Section 10(b) of the Securities Exchange Act of 1934 (the Exchange Act)[6] and Rule 10b-5,[7] thereby setting in motion a remarkable chain of events. His warning led the Supreme Court to uphold numerous Rule 10b-5 restrictions, an approach that Congress emulated in the Private Securities Litigation Reform Act of 1995 (the PSLRA)[8] and the Securities Litigation Uniform Standards Act of 1998 (the SLUSA).[9] Congress's emulation, coupled with its failure to override the expansion of Rule 10b-5 authorized by *Basic Inc. v. Levinson*, em-

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3. *See, e.g.*, DAVID M. DORSEN, HENRY FRIENDLY, GREATEST JUDGE OF HIS ERA 1 (2012).

4. *See* Margaret V. Sachs, *Judge Friendly and the Law of Securities Regulation: The Creation of a Judicial Reputation*, 50 SMU L. REV. 777 (1997).

5. *See, e.g.*, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 259 n.4 (2010); Stoneridge Inv. Partners, LLC v. Sci.–Atlanta, Inc., 552 U.S. 148, 177–78 (2008); Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 320 (2007); Basic Inc. v. Levinson, 485 U.S. 224, 238 (1988); Aaron v. SEC, 446 U.S. 680, 701 (1980); Burks v. Lasker, 441 U.S. 471, 485 n.16 (1979) (citing Judge Friendly's observation concerning a Federal Rule of Civil Procedure); Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 n.27 (1978); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 42 (1977); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197, 211, 214 (1976); Blue Chips Stamps v. Manor Drug Stores, 421 U.S. 723, 739 (1975); Kern Cty. Land Co. v. Occidental Petroleum Corp., 411 U.S. 582, 604 n.31 (1973); Caplin v. Marine Midland Grace Tr. Co., 406 U.S. 416, 430 (1972). *See also Morrison*, 561 U.S. at 275, 281, 282 (Stevens, J., concurring); Reves v. Ernst & Young, 494 U.S. 56, 74 (1990) (Stevens, J., concurring); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 373, 387 n.86, 390 (1982) (pertaining to the Commodities Exchange Act); Radzanower v. Touche Ross & Co., 426 U.S. 148, 163 n.10, 166 (1966) (Stevens, J., dissenting).

6. Exchange Act § 10(b), 15 U.S.C. § 78j(b) (2012). Section 10 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—. . . . (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, 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.

7. Rule 10b-5, promulgated by the Securities and Exchange Commission (SEC) in 1942, provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Rule 10b-5, 17 C.F.R. § 240.10b-5 (2017).

8. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

9. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified in scattered subsections of 15 U.S.C. §§ 77, 78, 80).

boldened the Court in its quest to curtail the Rule. Indeed, three times so far in the twenty-first century, it has imposed significant restrictions anchored in misinterpretations of the statutory text—misinterpretations it almost certainly would have discovered had it fully examined the relevant materials.

This essay proceeds in five parts. After describing Judge Friendly's warning (Part I), the Supreme Court's twentieth-century Rule 10b-5 restrictions (Part II), and the additional restrictions supplied at century's end by the PLSRA and the SLUSA (Part III), Part IV shifts the focus to the twenty-first century and the misreadings underlying the restrictions imposed in *Morrison v. National Australia Bank Ltd.*,[10] *Janus Capital Group, Inc. v. First Derivative Traders*,[11] and *California Employees' Retirement System v. ANZ Securities, Inc.*[12] Part V considers why these misreadings have been ignored by securities-law academics and highlights dimensions of these decisions that warrant particular attention.

I. JUDGE FRIENDLY'S WARNING

In its action in *Texas Gulf Sulphur*, the SEC sought to enjoin a corporation and several individuals for disseminating a misleading press release while engaging in insider trading in violation of Section 10(b) and Rule 10b-5(b).[13] The press release had also given rise to private Rule 10b-5 actions against the same defendants. As the federal district judge noted, approximately forty-nine such actions, most of them of the class-action variety, were pending in the Southern District of New York when the trial of the SEC action concluded in 1966.[14] The Second Circuit had upheld the existence of an implied private Rule 10b-5 action more than a decade earlier,[15] although the Supreme Court had not yet done so.[16]

Writing for the majority of the Second Circuit en banc in 1968, Judge Sterry R. Waterman held that to obtain an injunction, the SEC need only show that the defendants acted negligently.[17] He did not address whether the same would hold true for a private plaintiff seeking damages.[18]

In his concurrence, Judge Friendly parted company with the majority over its deferral of the scienter question.[19] In his view, the pendency of the district court cases, coupled with the importance attached to the *Texas Gulf Sulphur* litigation by the legal community, obliged the circuit

10. 561 U.S. 247 (2010).
11. 564 U.S. 135 (2011).
12. 137 S. Ct. 2042 (2017).
13. *See* SEC v. Texas Gulf Sulphur Co., 258 F. Supp. 262 (S.D.N.Y. 1966), *aff'd in part, rev'd in part*, 401 F.2d 833 (2d Cir. 1968) (en banc).
14. *Texas Gulf Sulphur*, 258 F. Supp. at 267 n.1.
15. *See* Fischman v. Raytheon Mfg. Co., 188 F.2d 783, 787 & n.4 (2d Cir. 1951).
16. The Supreme Court recognized the action in Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971).
17. *See Texas Gulf Sulphur*, 401 F.2d at 863.
18. *Id.*
19. *See id.* at 866–67 (Friendly, J., concurring).

court to "give the district courts . . . as much guidance as we can."[20]

Seeking to provide that guidance, he described the case for requiring scienter as being not altogether free from doubt, at least from the standpoint of the Rule. He blamed the uncertainty on Rule 10b-5's drafters, who "turned their backs" on the intentionality implicit in Section 10(b)[21] by modeling the Rule on Section 17(a) of the Securities Act of 1933 (the Securities Act),[22] the second subsection of which does not require scienter.[23] Thus, at least on its face, Section 17(a)(2)'s progeny, Rule 10b-5(b), does not require scienter either, unless, as he thought likely, Section 10(b)'s countervailing mandate were to carry the day.[24]

This textual uncertainty notwithstanding, he regarded the case for scienter as indisputable once policy considerations were taken into account. In his view, the failure to cabin Rule 10b-5 damages actions with a scienter requirement would lead to vexatious litigation, the costs of which would ultimately be borne by shareholders themselves:

> If the only choices open to a corporation are either to remain silent and let false rumors do their work, or to make a communication, not legally required, at the risk that a slip of the pen or failure properly to amass or weigh the facts—all judged in the bright gleam of hindsight—will lead to large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers, most corporations would opt for the former.[25]

II. JUDGE FRIENDLY'S WARNING RESONATES WITH THE SUPREME COURT

Within four years of *Texas Gulf Sulphur*, private Rule 10b-5 litigation made its Supreme Court debut. The debut came during the 1972 term, when the activism that had begun in the 1960s still held sway.[26] Not surprisingly, that activism engulfed Rule 10b-5 as well. Thus, in *Superintendent of Insurance v. Bankers Life & Casualty Company*, the Court recognized the existence of an implied private action under the Rule without providing a rationale.[27] Moreover, later in the term in *Affiliated Ute Citizens v. United States*, it granted a presumption of reliance in "pure omission" cases, but offered no justification for so doing.[28]

20. *Id.* at 866.
21. *Id.* at 867.
22. Securities Act § 17(a), 15 U.S.C. §77q(a) (2012).
23. *See Texas Gulf Sulphur*, 401 F.2d at 867 (Friendly, J., concurring).
24. *See id.* at 868 (noting that "I am *not* convinced that imposition of liability for damages under Rule 10b-5(2), absent a scienter requirement . . . would *not* go beyond the authority vested in the Commission by § 10(b)") (emphasis added).
25. *Id.* at 867.
26. *See* Archibald Cox, *The Role of the Supreme Court: Judicial Activism or Self-Restraint?*, 47 MD. L. REV. 118, 127–29 (1987).
27. *See* 404 U.S. 6, 13 n.9 (1971).
28. *See* 406 U.S. 128, 153–54 (1972). While *Affiliated Ute* does not refer to a presumption as such, the decision is understood to have created one. *See* DONNA M. NAGY, RICHARD W. PAINTER & MARGARET V. SACHS, SECURITIES LITIGATION AND ENFORCEMENT: CASES AND MATERIALS 146 (4th ed. 2017).

By the mid-1970s, however, activism had given way to constraint.[29] Aiding and abetting this transformation with reference to securities law was Justice Lewis F. Powell, an experienced corporate litigator who joined the Court in 1972.[30] Justice Powell had an unfavorable view of implied private actions in general and the Rule 10b-5 private action in particular.[31]

Having awakened to the perils of unconstrained Rule 10b-5 litigation, the Court issued four decisions restricting the Rule between 1975 and 1994.[32] First came *Blue Chip Stamps v. Manor Drug Stores*, which requires Rule 10b-5 plaintiffs to have bought or sold the security in question in order to have standing to sue.[33] Because standing is a subject unique to private actions,[34] the Court did not anchor its holding in the text of Section 10(b).[35] Instead, it focused mainly on "the danger of vexatious litigation,"[36] a danger which, it observed, Judge Friendly had identified in his *Texas Gulf Sulphur* concurrence and several other federal appellate judges had noted thereafter.[37]

Next came *Ernst & Ernst v. Hochfelder*, which requires Rule 10b-5 plaintiffs to establish scienter.[38] Drawing on Judge Friendly's contrast between the intentionality implicit in Section 10(b) and the lack of a scienter requirement in Rule 10b-5(b),[39] the Court adopted the position to which Friendly himself had been inclined—that the statute trumps the Rule.[40]

Then came *Santa Fe Industries, Inc. v. Green*, which held that Rule 10b-5 requires deception, thereby rendering it inapplicable to mere breaches of fiduciary duty.[41] The Court premised its holding largely on Section 10(b)'s requirement of "deception" or "manipulation,"[42] deeming the lat-

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29. *See* Alfred E. Conard, *Securities Regulation in the Burger Court*, 56 U. Colo. L. Rev. 193, 193–94 (1985); Lewis D. Lowenfels, *Recent Supreme Court Decisions Under the Federal Securities Laws: The Pendulum Swings*, 65 Geo. L.J. 891 (1977).

30. *See* A.C. Pritchard, *Lewis F. Powell, Jr., and the Counterrevolution in the Federal Securities Laws*, 52 Duke L.J. 841 (2003).

31. *See, e.g.*, Cannon v. Univ. of Chicago, 441 U.S. 677, 730 (1979) (Powell, J., dissenting).

32. *See* Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994); Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).

33. 421 U.S. at 754–55.

34. *Cf.* SEC v. Nat'l Secs., Inc., 393 U.S. 453, 467 n.9 (1969) (deeming issues of standing to be inapposite to SEC actions).

35. The Court briefly referred to Section 10(b)'s requirement of a "connection with" a purchase or sale. *See Blue Chip Stamps*, 421 U.S. at 733–34. But it rested primarily on policy considerations, *see id.* at 737, an interpretation confirmed by Merrill Lynch Pierce Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 81 (2006).

36. *Blue Chip Stamps*, 421 U.S. at 740.

37. *See id.* at 739–40.

38. 425 U.S. 185 (1976).

39. *See id.* at 214.

40. *See id.*

41. 430 U.S. 462, 478–80 (1977).

42. *See id.* at 473.

ter to encompass specialized forms of deceptive behavior.[43] Moreover, the Court observed, even if Rule 10b-5 standing alone could accommodate mere fiduciary breaches, the Rule must give way to the statute.[44] The Court also offered another reason for its holding: To allow Section 10(b) to encompass mere fiduciary breaches would bring within Rule 10b-5 "a wide variety of corporate conduct traditionally subject to state regulation,"[45] thereby presenting a "danger of vexatious litigation" of the sort envisioned by *Blue Chip Stamps*.[46]

Finally, there was *Central Bank of Denver, N.A. v. First Interstate Bank, N.A.*, which found no authorization for aiding and abetting liability in either Section 10(b) or in the express private actions, which were analogous, in the Court's view, to the private Rule 10b-5 action.[47] The Court also underscored the "costs" of allowing aiding and abetting liability, such as "requir[ing] secondary actors to expend large sums even for pretrial defense and the negotiation of settlements."[48] Elaborating in language reminiscent of Judge Friendly, the Court observed that those sums "may be passed on to the client companies, and in turn incurred by the company's investors."[49]

By rejecting aiding and abetting liability, the Court spurned a long-standing lower-court consensus.[50] Possibly for this reason, it tempered its holding by depicting expansively the wide range of actors who may face liability as primary violators.[51]

To be sure, the Court's approach to private Rule 10b-5 litigation during this period was not uniformly restrictive. The most noteworthy contrary example was *Basic Inc. v. Levinson*,[52] a 4–2 decision in which the three then-most-conservative Justices did not participate.[53] Writing for the majority, Justice Harry R. Blackmun upheld a presumption of reliance based in part on the efficient capital markets hypothesis[54] that has served as the *sine qua non* for virtually every Rule 10b-5 class action brought since

43. *See id.* at 476.
44. *Id.* at 472–73.
45. *Id.* at 478.
46. *Id.* at 479.
47. 511 U.S. 164 (1994). By focusing on the text of Section 10(b), as well as that of the private actions, the Court created uncertainty about whether the decision carried implications for the SEC. *See generally Symposium on the* Central Bank *Decision: The Demise of Aiding and Abetting?*, 49 BUS. LAW. 1429 (1994). Congress intervened the following year to restore the SEC's right to proceed against aiders and abettors. *See infra* notes 65–66 and accompanying text.
48. *Cent. Bank of Denver*, 511 U.S. at 189.
49. *See id.*
50. *See id.* at 169.
51. For the precise language used by the Court, see *id.* at 191. *See infra* text accompanying note 104.
52. 485 U.S. 224 (1988), *aff'd*, Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014). For another non-restrictive decision issued during this period, *see* Herman & MacLean v. Huddleston, 459 U.S. 375, 387 (1983) (upholding the cumulativeness of the private Rule 10b-5 remedy and the remedy authorized by Section 11 of the Securities Act).
53. The Justices not participating in the *Basic* decision were Chief Justice Rehnquist and Justices Scalia and Kennedy. *See Basic*, 485 U.S. at 225.
54. *See id.* at 246 n.24.

then.[55] While Justice Blackmun did not mention the threat of vexatious litigation, that threat received attention from Justice Byron R. White in a dissenting opinion joined by Justice Sandra Day O'Connor.[56] After asking "who will pay the judgments won in . . . actions" fueled by the newly-recognized presumption of reliance,[57] Justice White drew directly on Judge Friendly in lamenting that "all too often the majority's rule will 'lead to large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers.'"[58]

III. THE SUPREME COURT'S APPROACH RESONATES WITH CONGRESS

In 1995, Congress enacted the PSLRA, a comprehensive effort to curtail private securities litigation that had the enthusiastic support of the accounting and high-tech industries.[59] Three years later, Congress supplemented the PSLRA with the SLUSA, which prevents plaintiffs from avoiding the PLSRA's requirements by filing securities fraud class actions based on state law.[60]

The concerns that gave rise to the PSLRA strongly resembled those articulated by the Supreme Court in *Blue Chip Stamps* and by Judge Friendly's concurrence in *Texas Gulf Sulphur*.[61] Indeed, the Conference Report described the PSLRA as aimed at "abusive and meritless" securities actions that lead to "extortionate 'settlements,'" render investors "the ultimate losers," and "affect[ ] the willingness of corporate managers to disclose information to the marketplace."[62]

To address these concerns, the PSLRA imposed multiple restrictions on Rule 10b-5 and other private securities actions, including a safe harbor for forward-looking statements, a loss-causation requirement, heightened pleading requirements, an adjustment to the calculation of damages, a proportionate liability system, and mandatory stays of discovery pending resolution of motions to dismiss.[63] Various other provisions were directed at class actions specifically.[64]

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55. *See* NAGY, PAINTER & SACHS, *supra* note 28, at 151.
56. *See Basic*, 485 U.S. at 250–63 (White, J., dissenting).
57. *Id.* at 262.
58. *Id.*
59. *See generally* John W. Avery, *Securities Litigation Reform: The Long and Winding Road to the Private Securities Litigation Reform Act of 1995*, 51 BUS. LAW. 335 (1996); John C. Coffee, Jr., *The Future of the Private Securities Litigation Reform Act: Or, Why the Fat Lady Has Not Yet Sung*, 51 BUS. LAW. 975 (1996).
60. *See generally* Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 CORNELL L. REV. 1 (1998); Michael A. Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 STAN. L. REV. 273 (1998).
61. The Supreme Court has noted the similarity between the policies underlying *Blue Chip Stamps* and those of the PSLRA. *See* Merrill Lynch Pierce Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 81 (2006).
62. H.R. Rep. No. 104-369 (1995) (Conf. Rep.), *as reprinted in* 1995 U.S.C.C.A.N. 730 [hereinafter Conference Report].
63. *See* NAGY, PAINTER & SACHS, *supra* note 28, at 10.
64. *See id.* at 10–11.

Moreover, the PSLRA left intact all of the restrictions on private Rule 10b-5 litigation that the Court had previously imposed.[65] The only aspect of the Court's jurisprudence that was overridden involved restoring to the SEC the right to sue aiders and abettors—a right that the Commission had arguably lost as the result of *Central Bank of Denver, N.A. v. First Interstate Bank, N.A*.[66]

In addition, Congress let stand the presumption of reliance upheld by *Basic Inc. v. Levinson* after contemplating its nullification during the enactment process.[67] Perhaps Congress's inaction reflected an unwillingness to deal a mortal blow to private securities enforcement, which the Conference Report described as "an essential tool."[68] Alternatively, or in addition, it may have reflected trust in the Court's Rule 10b-5 stewardship.

IV. CONGRESS'S RATIFICATION EMBOLDENS THE COURT

In the twenty-first century, the Supreme Court has so far issued twelve decisions directly implicating the scope of private Rule 10b-5 litigation.[69] Some have construed provisions of the PSLRA[70] or the SLUSA,[71] while others have addressed the presumption of reliance upheld by *Basic Inc. v. Levinson.*[72] Still others have imposed new restrictions.[73] Each of the decisions in this last group—by far the strangest of the lot—rests its restriction on a misreading of the statutory text that the Court ought to have recognized.

A. CURBING EXTRATERRITORIALITY—*MORRISON V. NATIONAL AUSTRALIA BANK LTD.*

In *Morrison v. National Australia Bank Ltd*., the Supreme Court rejected the tests that had long governed Rule 10b-5's transnational reach and substituted a far more restrictive test in their place.[74] The Court extracted the new test from the text of Section 10(b), apparently oblivious to the fact that the test did not fit the text as its drafters would have

65. For discussion of these restrictions, see Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).

66. *See* Cent. Bank of Denver, N.A. v. First Interstate Bank, N.A., 511 U.S. 164, 195–96 (1994) (Stevens, J., dissenting).

67. *See* Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 481–82 (2013).

68. *See* Conference Report, *supra* note 62.

69. *See infra* notes 70–73.

70. *See* Tellabs, Inc v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007); Dura Pharm., Inc. v. Broudo, 544 U.S. 336 (2005).

71. *See* Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund, 138 S.Ct. 1061 (2018); Chadbourne & Parke LLP v. Troice, 571 U.S. 377 (2014); Kircher v. Putnam Funds Tr., 547 U.S. 633 (2006); Merrill Lynch Pierce Fenner & Smith, Inc. v. Dabit, 547 U.S. 71 (2006).

72. *See* Halliburton Co. v Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014); Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455 (2013); Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804 (2011).

73. *See* Calif. Publ. Emps. Ret. Sys. v. ANZ Secs., Inc., 137 S. Ct. 2042 (2017); Janus Capital Grp., Inc. v. First Derivative Traders, 564 U.S. 135 (2011); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010).

74. *See Morrison*, 561 U.S. at 269–70.

understood it. Thereafter, in the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), Congress brought the former tests back to life, but only for actions filed by the SEC and the Department of Justice (DOJ).[75]

Before *Morrison*, the lower courts resolved questions of Rule 10b-5's transnational reach by applying the conduct and effects tests, both developed in significant measure by Judge Friendly.[76] The effects test focused on whether the transaction led to immediate and substantial domestic effects,[77] while the conduct test looked to whether domestic conduct comprised the bulk of the fraud.[78] These tests offered relatively few bright lines,[79] but they tended to give plaintiffs wide latitude to challenge transactions with significant foreign elements.

The *Morrison* plaintiffs were Australians who bought shares of an Australian company (National Australia Bank or NAB) on an Australian exchange. Seeking to satisfy the conduct test, the plaintiffs tried unsuccessfully to persuade the lower courts that NAB's subsidiary had concocted the fraud in Florida.[80]

The Court that adjudicated *Morrison* consisted of eight members.[81] While all eight agreed that the dismissal of the plaintiffs' action should be affirmed, they otherwise parted company. Writing on behalf of himself and four of his colleagues, Justice Antonin Scalia upheld the Court's new transactional test, which, he showed, the plaintiffs did not satisfy. Two opinions concurred in the judgment. One, written by Justice Stephen Breyer, took the position that a new test was warranted but that the lower courts should have been tasked with developing it.[82] The other, written by Justice John Paul Stevens and joined by Justice Ruth Bader Ginsburg, argued that the transactional test was inferior to the conduct and effects tests for reasons of policy.[83]

Justice Scalia began his opinion by castigating the conduct and effects tests for their breadth, their unpredictability, their lack of textual grounding, and their failure to defer to the presumption against extraterritorial-

75. *See* Dodd-Frank Act, § 929P(b), Pub. L. No. 111-203, 124 Stat. 136 (2010) (codified at 15 U.S.C. § 78aa). *But cf.* text accompanying note 133 *infra* (referencing argument that the Dodd-Frank Act did not achieve this goal).

76. *See Morrison*, 561 U.S. at 275 n.1 (Stevens, J., concurring in the judgment).

77. *See id.* at 257.

78. *See id.*

79. *See, e.g.*, IIT v. Cornfeld, 619 F.2d 909, 918 (2d Cir. 1980) (noting that a given factor may be important in one case but not in another). *See also* Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118, 129 (2d Cir. 1998) (noting that court may be entitled to hear a Rule 10b-5 because of the presence of one or more factors that "tip[ ] the scales").

80. Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 176 (2d Cir. 2008), *aff'd on other grounds*, 561 U.S. 274 (2010).

81. Justice Sotomayor did not participate in the consideration of the case or its decision. *See Morrison*, 561 U.S. at 273. Presumably, the reason was that she served on the Second Circuit when it issued the decision under review.

82. *Id.* at 273–74 (Breyer, J., concurring in part and concurring in the judgment).

83. *Id*. at 274, 281–84 (Stevens, J., concurring in the judgment).

ity.[84] Upon concluding that Section 10(b) had no extraterritorial reach, he noted that this conclusion did not end the inquiry, since some securities transactions with foreign elements might still be domestic enough to satisfy Section 10(b).[85] To ascertain what would constitute a sufficient domestic nexus, he sought the "focus" of Section 10(b), which makes it illegal for anyone "[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."[86] He divided the italicized portion into the following two prongs to accommodate transactions on exchanges as well as those conducted over the counter: (i) "transactions in securities listed [registered] on a domestic [national] exchange;" and (ii) "domestic transactions in other securities."[87] Only if the plaintiffs satisfied one of these prongs, he held, would Rule 10b-5 be available.[88] Applying the prongs to the facts of *Morrison,* he concluded that the plaintiffs met neither, since they made their purchases on an exchange located in Australia.[89]

In Justice Scalia's view, the two-pronged transactional test offered the advantages of restrictiveness, predictability, and fidelity to the text. These advantages, however, are more apparent than real. Consider the actual restrictiveness of the first prong—"transactions in securities listed on a domestic exchange." Read literally, this prong encompasses a transaction *occurring* on a foreign exchange that involves a security *listed* on a domestic exchange. So understood, this prong would allow Rule 10b-5 to reach transactions happening anywhere in the world, as long as the security is cross-listed in the United States. The lower courts have thus far resisted this reading by deeming it to violate *Morrison* "read as a whole,"[90] a tacit acknowledgment that the transactional test is not truly rooted in the text after all.

Consider next whether the second prong—domestic over the counter transactions—truly offers predictability. When parties are located in different countries, how can one know whether their transaction occurs here? Not surprisingly, the lower courts have had a difficult time drawing workable lines.[91]

Consider finally, and most fundamentally, whether it is feasible to read

84. *See id.* at 255–61 (majority opinion).
85. *Id.* at 266.
86. *Id.* at 262, 266–67 (emphasis added).
87. *Id.* at 267.
88. *Id.*
89. *Id.* at 273.
90. *See, e.g.*, City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG, 752 F.3d 173, 180 (2d Cir. 2014).
91. *See, e.g.*, Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings SE, 763 F.3d 198, 217–18 (2d Cir. 2014); Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 67–69 (2d Cir. 2012). *See also* Christopher Calfee, *Can't See the Forest for the Trees: Where Does a Purchase or Sale Occur?*, 2 AM. U. BUS. L. REV. 154 (2012); Jacob True, Note, *What Counts as a Domestic Transaction Anymore: The Second Circuit and Other Lower Courts' Struggles in Interpreting the Supreme Court's Intent in* Morrison v. Australia National Bank *When Dealing with Derivative Securities Transactions*, 10 HASTINGS BUS. L.J. 513 (2014).

Section 10(b) embraces over the counter transactions in the first place.[92] The unfeasibility of that reading emerges upon examining Section 10(b) in the context of the Exchange Act as originally enacted.[93] A perusal of that Act reveals that domestic exchanges then served as venues for transactions in unlisted securities as well as listed ones.[94] That historical reality provides a new perspective on Section 10(b), which was likely meant to embrace all transactions on domestic exchanges, regardless of whether the security being bought or sold was listed or unlisted. This interpretation tracks Section 10(b)'s reference to "purchase[s] or sale[s] of any securit[ies] registered [listed] on [an] exchange *or* any security not so registered [listed]."[95]

The alternative interpretation is more compelling than the one offered by Justice Scalia precisely because it allows Section 10(b) to reach all transactions occurring on domestic exchanges at the time of its enactment. Justice Scalia acknowledged the emphasis given to exchanges by the Exchange Act's drafters.[96] It seems inconceivable that those drafters would have designed Section 10(b) to apply to only a fraction of the transactions then occurring at those locations.

To be sure, even if Justice Scalia had identified the alternative interpretation, he might have resisted it or been unable to persuade others to adopt it. The reason is as follows: limiting Section 10(b) to domestic exchanges would have prevented the SEC and the DOJ from using it to combat fraud on the domestic over-the-counter markets. Even assuming that Congress would have intervened to restore that right to the government, there would have been the risk of chaotic short-term consequences. But those difficulties, however serious, do not justify the imposition of the transactional test.

B. WHO "MAKES" A MISSTATEMENT—*JANUS CAPITAL GROUP, INC. V. FIRST DERIVATIVE TRADERS*

In *Janus Capital Group, Inc. v. First Derivative Traders*, the Court upheld a restrictive test for ascertaining who qualifies as a "maker" of a materially misleading misstatement or omission that violates Section 10(b) and Rule 10b-5(b).[97] The Court apparently failed to appreciate that its new test clashes with a provision in the PSLRA. The test appears to be

92. This question was not posed either by the majority opinion or by the opinions concurring in the judgment. *See supra* notes 81–83 and accompanying text.

93. The legislative history of the Exchange Act is assembled in 4–11 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934 (J.S. Ellenberger & Ellen P. Mahar eds., 2001) [hereinafter LEGISLATIVE HISTORY].

94. Section 12(f) provided as follows: "The Commission is directed to make a study of *trading in unlisted securities upon exchanges* and to report the results of its study and its recommendations to Congress on or before January 3, 1936." *See* LEGISLATIVE HISTORY, *supra* note 93, at 894 (emphasis added).

95. For the text of Section 10(b), see *supra* note 6.

96. *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 267 (2010).

97. 564 U.S. 135, 142–46 (2011).

limited to private actions, but that limitation is not free from doubt.[98]

The underlying lawsuit involved three separate, albeit connected, entities—Janus Capital Group (JCG), a publicly held financial services company; Janus Investment Fund (JIF), a family of mutual funds created by JCG; and Janus Capital Management (JCM), a subsidiary of JCG that served as JIF's investment adviser. The lawsuit was filed by JCG's shareholders, who alleged that statements appearing in JIF's prospectuses, drafted by JCM, had inflated the stock price of JCG. Named as defendants were JCM and JCG, sued as JCM's controlling person. The prospectuses did not identify JCM as the drafter, but the shareholders contended that the market would have known that JCM played that role. Not named as a defendant was JIF, presumably because it lacked scienter.

A sharply divided Court concluded that JCM was not liable. With no defendant primarily liable, the prospect of holding JCG liable as a controlling person evaporated.

Justice Clarence Thomas wrote on behalf of the majority. He focused his attention on the word "make" in Rule 10b-5(b), which deems it illegal for anyone "[t]o *make* any untrue statement of a material fact."[99] In his view, there were two reasons to give "make" a narrow reading. First, the private action was implied rather than express.[100] Moreover, if uncircumscribed, primary liability might embrace mere aiding and abetting, and thereby nullify *Central Bank*.[101] Taking into account these considerations and culling definitions of "make" selectively from two 1933 dictionaries, he announced the following test:

> For purposes of Rule 10b–5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it . . . . One who prepares or publishes a statement on behalf of another is not its maker. And in the ordinary case, attribution within a statement or implicit from surrounding circumstances is strong evidence that a statement was made by—*and only by*—the party to whom it is attributed.[102]

Applying this test, he concluded that JIF was the entity with "ultimate authority" over the contents of the prospectus and thereby the sole maker of its alleged misstatements.[103] That the latter were largely, if not entirely, the creation of JCM carried no significance.

The ultimate authority test conflicts with *Central Bank*'s observation concerning the applicability of primary liability to "secondary actors." As *Central Bank* explained:

98. *See* NAGY, PAINTER & SACHS, *supra* note 28, at 217–18.
99. *Janus*, 564 U.S. at 141 (emphasis added).
100. *Id.* at 144.
101. *Id.* at 143 n.6.
102. *Id.* at 142–43 (emphasis added).
103. *Id.* at 147–48.

> Any person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b–5, assuming *all* of the requirements for primary liability under Rule 10b–5 are met. In any complex securities fraud, moreover, there are likely to be multiple violators.[104]

To be sure, the Court is entitled to override its own precedents. But by doing so in this instance, it ran roughshod over the PSLRA's proportionate liability provision.[105] Enacted the year after *Central Bank* and aligned with *Central Bank* in assuming the typicality of multiple primary violators, that provision deems each defendant liable only for the percentage of the damage that the jury found her to have caused:

> In any private action, the court shall instruct the jury to answer special interrogatories, or if there is no jury, shall make findings, with respect to each covered person and each of the other persons claimed by any of the parties to have caused or contributed to the loss incurred by the plaintiff, including persons who have entered into settlements with the plaintiff or plaintiffs, concerning—
> (i) whether such person violated the securities laws;
> (ii) the percentage of responsibility of such person, measured as a percentage of the total fault of all persons who caused or contributed to the loss incurred by the plaintiff; and
> (iii) whether such person knowingly committed a violation of the securities laws.[106]

This provision received no mention in Justice Breyer's dissenting opinion.[107] Thus, it is entirely possible that the Court remained unaware of it.

C. THE REJECTION OF *AMERICAN PIPE* TOLLING—*CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM V. ANZ SECURITIES, INC.*

In *California Public Employees' Retirement System v. ANZ Securities, Inc.*, the Supreme Court denied securities class action plaintiffs access to the *American Pipe* tolling doctrine that is available to their antitrust class action counterparts.[108] To reach this result, the Court distinguished the securities and antitrust limitation provisions in a manner that cannot survive scrutiny.

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104. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 191 (1994) (citation omitted).
105. *See generally* Donald C. Langevoort, *The Reform of Joint and Several Liability Under the Private Securities Litigation Reform Act of 1995: Proportionate Liability, Contribution Rights and Settlement Effects*, 51 BUS. LAW. 1157 (1996); Marc I. Steinberg & Christopher D. Olive, *Contribution and Proportionate Liability Under the Federal Securities Laws in Multidefendant Securities Litigation After the Private Securities Litigation Reform Act of 1995*, 50 SMU L. REV. 337 (1996).
106. Exchange Act § 21D(f), 15 U.S.C. § 78u-4(f)(3)(A) (2012).
107. *See Janus*, 564 U.S. at 148–61 (Breyer, J., dissenting).
108. 137 S. Ct. 2042, 2055 (2017).

The *ANZ* plaintiff was a pension plan that had been a member of a timely class action filed under Section 11 of the Securities Act.[109] The plaintiff opted out of that action and initiated an individual action based on the same allegations following the expiration of Section 11's three-year limitation period. To establish the timeliness of its action, the plaintiff relied on *American Pipe Construction Company v. Utah,* which tolls the limitation period for the benefit of the putative class members until the issue of class certification is resolved.[110] Without such tolling, the expiration of the limitation period would prevent the class members from pursuing individual actions unless they had filed protective actions in advance. But as explained by *American Pipe*, requiring them to do so would lead to the "multiplicity of activity" that class actions were "designed to avoid."[111]

Prior to *ANZ*, lower courts deciding whether to apply *American Pipe* tolling in the securities context tended to rely on *Lampf, Pleva, Lipkind, Prupris & Petigrew v. Gilbertson*.[112] At issue in *Lampf* was whether Rule 10b-5's governing three-year (now five-year) limitation period was amenable to a different type of equitable tolling—tolling occasioned by the plaintiffs' delay in discovering the fraud.[113] Refusing to allow that extension in *ANZ*, the Court explained that the Rule 10b-5 limitation period, along with its Section 11 counterpart, was intended as a "cutoff" or "period of repose."[114] This "firm cut-off" characterization led the lower courts to disallow tolling of the sort permitted by *American Pipe* as well.[115]

In *ANZ*, a sharply divided Supreme Court held that *American Pipe* does not apply to Section 11 class actions,[116] or, by implication, to Rule 10b-5 class actions either.[117] Writing for the majority was Justice Anthony Kennedy, who announced a framework for determining the relevance of *American Pipe* to any limitation provision, regardless of subject area. The framework proceeds from the definitions of the terms "statute of limitation" and "statute of repose" set forth in *CTS Corporation v. Waldburger.*[118] According to *CTS*, those terms had long been used interchangeably, but eventually developed different characteristics of which Congress became cognizant in 1982.[119] One such characteristic in-

109. Securities Act § 11, 15 U.S.C. § 77k (2012).
110. 414 U.S. 538, 552–53 (1974).
111. *Id.* at 551.
112. 501 U.S. 350 (1991). For an example of a court drawing on *Lampf* to determine whether *American Pipe* applies in the securities context, *see* Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc., 721 F.3d 95, 107, 109 (2d Cir. 2013).
113. *See Lampf*, 501 U.S. at 363.
114. *Id.*
115. *See, e.g.*, *IndyMac*, 721 F.3d at 109.
116. Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc., 137 S. Ct. 2042, 2052 (2017).
117. *See, e.g.*, W. Va. Pipe Trades Health & Welfare Fund v. Medronic, Inc., 299 F. Supp. 1055, 1063 (D. Minn. 2018) (citing *ANZ*, 137 S. Ct. at 2049, 2051).
118. *ANZ*, 137 S. Ct. at 2049 (citing CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2182 (2014)).
119. *See CTS*, 134 S. Ct. at 2186.

volves when the clock starts ticking: the date of the harm or its discovery (statutes of limitation) versus the date of the defendant's last act (statutes of repose). The other involves purpose. Unlike statutes of limitation, statutes of repose are designed to provide defendants with an inviolable shield. Thus, an expired statute of repose is not subject to equitable tolling, but an expired statute of limitation may be.[120]

Justice Kennedy applied the foregoing considerations to the limitation provisions applicable to Section 11 and the antitrust violation at issue in *American Pipe*. The limitation provision applicable to the former, set forth in Section 13 of the Securities Act, reads in pertinent part: "In no event shall any . . . action be brought to enforce a liability created under [Section 11] . . . more than three years after the security was bona fide offered to the public . . . ."[121] According to Justice Kennedy, Section 13 clearly qualifies as a statute of repose, as the time runs from the defendant's last act.[122] In addition, Section 13's "in no event" declaration "admitt[ed] of no exception and on its face create[d] a fixed bar against future liability."[123] In contrast, he found the limitation provision applicable to the antitrust violation to be a statute of limitation on the ground that the clock starts ticking from the time that the action accrues.[124]

Justice Kennedy failed to make a compelling case for classifying the antitrust provision as a statute of limitation. That provision—the text of which does not appear in the opinion—includes language signifying as firm a cut-off as the "in no event" language in Section 13: "Any action to enforce any cause of action under the antitrust laws shall be *forever barred* unless commenced within four years after the cause of action accrued."[125] While it is true that time begins running from the accrual date, that fact carries less significance than might first appear. Indeed, Congress enacted the limitation provision applicable to the antitrust violation in 1955—more than a quarter century before 1982, the magic year designated by *CTS* for when Congress could be assumed to have become aware of the statute of limitation/statute of repose distinction. In *ANZ*, however, Justice Kennedy did not acknowledge the significance of the 1982 date, much less explain how to reconcile it with the antitrust provision's pre-1982 enactment.

To be sure, Congress enacted Section 13 still earlier—in 1933. But that date only further underscores the mismatch between the Court's analysis and its framework built on *CTS*.

Was Justice Kennedy aware of these problems? The "forever barred" language in the antitrust provision—and its comparability to the "in no

120. *See id.* at 2182–83.
121. 15 U.S.C. § 77m (2012).
122. *ANZ*, 137 S. Ct. at 2049.
123. *Id.* (first alteration in original).
124. *Id.* at 2052–53.
125. 15 U.S.C. § 15b (2012) (emphasis added).

event" phraseology in Section 13—arose at the oral argument.[126] While the significance of the 1982 date went unmentioned, it is surely relevant that the author of the Court's opinion in *CTS* was Justice Kennedy himself.[127] Did he fail to recall this aspect of his own opinion? Did none of his colleagues recall it either? These questions hover over his opinion in *ANZ*.

V. THE CHAIN OF EVENTS IN PERSPECTIVE

As Part IV shows, the Supreme Court's recent decisions restricting Rule 10b-5 are not models of craftsmanship. It is profoundly ironic that lack of craftsmanship would characterize decisions in a sequence precipitated by Judge Friendly, who was widely revered as a master craftsman.[128]

Why have securities law academics largely ignored the lack of craftsmanship underlying the Court's recent Rule 10b-5 restrictions? I suspect that the answer is straightforward. As a group we tend to be fairly antagonistic towards private Rule 10b-5 litigation, with the result that we are not inclined to criticize efforts to restrict it. On the other hand, we would become indignant if confronted with misinterpretations that brought about Rule 10b-5's expansion. There would not be enough forests to supply the paper needed for the volumes that we would write.

Our selective indignation is troublesome for several reasons. One is that it makes us appear hypocritical. We would object loudly if lawyers or boards of directors tailored performance of their respective monitoring obligations to suit their respective policy agendas.

Another is that some restrictions that may appear to govern only private litigation may eventually be found to extend to government enforcement as well. Consider the ultimate authority test upheld by *Janus Capital Group, Inc. v. First Derivative Traders*.[129] On the one hand, the Court attributed the test's restrictiveness to the fact that the private action is implied,[130] thereby suggesting that the test applies to private litigation only. On the other hand, the Court prefaced the test with the words "[f]or purposes of Rule 10b-5,"[131] thus raising the prospect that the test extends more broadly.

Consider also the transnational test upheld by *Morrison v. National Australia Bank Ltd*.[132] While the Dodd-Frank Act may seem to have overridden that decision on behalf of the SEC and the DOJ, reality is more complicated. According to Professor Richard W. Painter and vari-

126. *See* Transcript of Oral Argument at *12, *20, *31, Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc., 137 S. Ct. 2042 (2017) (No. 16-373), 2017 WL 1375796.
127. CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2180 (2014).
128. *See, e.g.*, Michael Boudin, *Judge Henry Friendly and the Craft of Judging*, 159 U. PA. L. REV. 1, 1–2 (2010).
129. 564 U.S. 135 (2011).
130. *See supra* note 100 and accompanying text.
131. *See supra* note 102 and accompanying text.
132. 561 U.S. 247 (2010).

ous prominent defense attorneys, Dodd-Frank did not succeed in expanding the government's enforcement authority over transnational securities fraud.[133] Professor Painter's view has caused some federal district judges to wonder whether Dodd-Frank overcame *Morrison*, which they have continued to apply.[134]

Morrison, *Janus*, and *ANZ* offer guidance to those of us inclined to critique the Court's future Rule 10b-5 restrictions. First, we should be skeptical about solutions alleged to be rooted in statutory text. Consider that it was Justice Scalia, founder of the textualist approach to statutory interpretation and a master practitioner thereof,[135] who became sufficiently captivated by the transactional test that he failed to probe its textual soundness. If he, of all people, can stumble in this fashion, literally anyone can.

Second, we should watch for red flags that the Court, intentionally or not, sends our way. The *ANZ* Court provided such a flag by omitting the text of the antitrust limitation provision that played a critical role in its reasoning. That text calls into question the soundness of the holding, which was dubious for other reasons as well.

Finally, we should all keep our eyes on Justice Sonia Sotomayor, who did not participate in the *Morrison* decision and joined dissenting opinions in *Janus* and in *ANZ*. She served for eleven years as a member of the United States Court of Appeals for the Second Circuit, the "Mother Court" of securities law,[136] renowned not only for the sheer volume of its securities cases but also for their doctrinal richness.[137] In that capacity, she heard more appeals of securities cases—at least as measured by reported decisions—than did any of her Supreme Court colleagues with prior service as circuit court judges, as the following table shows.

Justice	**Years as Circuit Judge Hearing Securities Cases**	**Service on Panels**
Sotomayor	11	27
Alito	16	17
Breyer	14	21
Ginsburg	13	2
Kennedy	13	17
Roberts	2	1
Gorsuch	11	8

133. *See, e.g.*, Richard W. Painter et al., *When Courts and Congress Don't Say What They Mean: Initial Reactions to* Morrison v. National Australia Bank *and to the Extraterritorial Provisions of the Dodd-Frank Act*, 20 MINN. J. INT'L L. 1, 4 (2011).

134. *See, e.g.*, SEC v. Chi. Convention Ctr., LLC, 961 F. Supp. 2d 905, 916–17 (N.D. Ill. 2013).

135. *See, e.g.*, Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857, 858–59 (2017).

136. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 677, 762 (1975) (Blackmun, J., dissenting).

137. *See* NAGY, PAINTER & SACHS, *supra* note 28, at 15.

Will Justice Sotomayor come to the aid of her fellow justices on the securities law front? Notwithstanding her impressive background, she may choose instead to pursue other priorities.

VI. CONCLUSION

Judge Friendly's *Texas Gulf Sulphur* concurrence reverberates today in a manner that could not have been anticipated. He urged curtailment of private Rule 10b-5 litigation to blunt its perils, a warning heeded by the Supreme Court, and thereafter by Congress as well. But now the Court, buoyed by the reinforcement, has become less careful when restricting Rule 10b-5. The Court—as well as securities law academics—need to temper their policy inclinations with fidelity to Judge Friendly's standards of legal craftsmanship.