

SUING FOR A BIT(COIN) OF JUSTICE—CLASS ACTIONS AND THE ROLE OF TECHNOLOGY IN MORRISON EXTRATERRITORIALITY ANALYSIS

EDMUND H.S. BROSE*

In the wild west of crypto, courts are slowly coming to realize that crypto assets present novel questions of law that challenge core assumptions of United States securities law. This online feature argues that a more comprehensive understanding of blockchain technology counsels courts to apply the antifraud provisions of the federal securities laws extraterritorially. Such a move will economize judicial capacity, deter fraud, and protect U.S. investors. Instead of relying on a nodular analysis, courts should look to the policy rationales of the Court's Morrison decision, as well as the Second Circuit's Absolute Activist opinion, to lead out of the jurisdictional morass of locating crypto transactions. In addition to relying on enumerated factual allegations laid out in Absolute Activist, courts should find that transactions occur where the parties are physically located rather than where the physical structure that underlies the crypto network is located. Further, they should utilize a plus factor of whether the company has marketed the product into a jurisdiction. As a result, courts can dispense with legal fiction and preserve the aims of the Morrison ruling. As private class actions only continue to increase in number, the time to develop a consistent and encompassing rationale is now.

INTRODUCTION	472
I. EXTRATERRITORIAL APPLICATIONS OF THE SECURITIES LAWS	474
A. <i>The Second Circuit's Lead in Defining Extraterritorial Limits to Section 10(b)</i>	475
B. <i>The Court's Ruling in Morrison</i>	477
C. <i>The Second Prong of Morrison and Absolute Activist's Grasp for Clarity</i>	478
II. LOCATING CRYPTO TRANSACTIONS	479
A. <i>Locating the Blockchain</i>	480
B. <i>District Courts' Reliance on Legal Fiction</i>	482
1. <i>Fictions of Locating Internet Transactions: Placing Purchase Orders</i>	482

* Copyright © 2024 by Edmund Brose. J.D., 2023, New York University School of Law; B.A., 2017, Columbia University. I am once again deeply grateful to Judge Jed. S. Rakoff for inspiring an interest in securities litigation and class actions, as well as his thoughtful comments on the piece. Thank you also to Professor David Reiss for his thoughts on an early draft. Thank you also to the phenomenal Online Editors of the *New York University Law Review*, especially Colin Heath and Soomin Shin for her careful and incisive edits. I am always grateful for my loving family, especially my parents, who endured endless but important conversations around this complicated topic.

2. <i>Fictions of Locating Internet Transactions:</i>	
<i>Passing Title</i>	483
C. <i>A Nodular Analysis Creates More Problems Than It Solves</i> ..	484
D. <i>Moving Away from a Nodular Analysis</i>	486
III. BACK TO THE FUTURE: (RE)INTEGRATING CONDUCT AND EFFECTS?	487
A. <i>Crypto Transactions Represent an Evolution in the Ease of Investing (and Scams)</i>	487
B. <i>A Transaction and Conducts/Effect Hybrid Within the Absolute Activist Framework</i>	488
1. <i>Establish a Domestic Presumption If Sale or Purchase Occurs in the United States</i>	489
2. <i>U.S. Solicitation as a Plus Factor</i>	491
3. <i>Recent Supreme Court Decisions Emphasize Conducts and Effects</i>	492
CONCLUSION.....	494

INTRODUCTION

“FTX. You In?” ask worldwide supermodel Gisele Bündchen and NFL star Tom Brady in an advertisement for FTX, the now-bankrupt cryptocurrency exchange and hedge fund.¹ A slew of other high-profile endorsements, including Shark Tank investor Kevin O’Leary, Red Sox legend David Ortiz, NBA star Steph Curry, the affable Shaquille O’Neal, and even comedian Larry David (the main actor in the 2022 Super Bowl FTX ad) boosted FTX to the status of a household name,² even if the average American couldn’t quite tell you what the company actually *did*.

Just as quickly as the company rocketed to stardom, it collapsed.³ The

¹ Megan Graham, *Tom Brady and Gisele Bündchen to Star in \$20 Million Campaign for Crypto Exchange*, WALL ST. J. (Sept. 8, 2021), <https://www.wsj.com/articles/tom-brady-and-gisele-bundchen-to-star-in-20-million-campaign-for-crypto-exchange-11631116800> [<https://perma.cc/X8BH-CJPT>] (describing FTX’s advertisement campaign in which Brady and Bündchen call upon others to join the platform). Bündchen, an “Environmental and Social Initiatives Advisor” to the company, has served as the UN Environment Program’s Goodwill Ambassador for over a decade and joined the company putatively to help with mitigating the damage from the massive amounts of energy generated by blockchain technology, on which crypto products run. See Amy Shoenthal, *Gisele Bündchen Partners with FTX CEO Sam Bankman-Fried to Address Crypto’s Sustainability Challenges*, FORBES (Apr. 28, 2022), <https://www.forbes.com/sites/amyshoenthal/2022/04/28/gisele-bndchen-partners-with-ftx-ceo-sam-bankman-fried-to-address-cryptos-sustainability-challenges> [<https://perma.cc/268S-USVM>].

² See Class Action Complaint and Demand for Jury Trial at 21–31, *Garrison v. Bankman-Fried*, No. 1:22-cv-23753 (S.D. Fla. Nov. 15, 2022).

³ See, e.g., David Yaffe-Bellany, *Sam Bankman-Fried Blames ‘Huge Management Failures’ for FTX Collapse*, N.Y. TIMES (Nov. 30, 2022),

first class action lawsuit (brought by David Boies on behalf of plaintiffs) against FTX names Bündchen and Brady as co-defendants, along with all the other celebrity endorsers listed above.⁴ The successful prosecution of former CEO Sam Bankman-Fried in the Southern District of New York exposed and punished the largest fraud in the industry thus far.⁵

However, it appears that the mix of increasing retail interest in crypto (arguably a result of high-profile celebrity endorsements) as well as the bull market in cryptocurrencies like Bitcoin and Ethereum between 2019 and 2022 brought with it a deluge of fraud.⁶ The Federal Trade Commission reported that “of the reported crypto fraud losses that began on social media, most are investment scams. Indeed, since 2021, \$575 million of all crypto fraud losses reported to the FTC were about bogus investment opportunities, far more than any other fraud type.”⁷

As investors continue to lose considerable sums in crypto ventures, litigating such fraud has only begun. Courts and judges are currently wrestling with how to apply precedent to this new wild west of transactions. While this particular FTX class action will proceed under Florida state blue-sky antifraud laws,⁸ many investors and companies are waiting to see how courts decide to rule on federal securities laws—whether crypto exchanges and investment products fall under the laws’ aegis. One particularly difficult

<https://www.nytimes.com/2022/11/30/business/sam-bankman-fried-ftx-collapse.html> [<https://perma.cc/VT9Y-97Y7>] (describing how FTX “soared” and “disintegrated practically overnight”).

⁴ Class Action Complaint and Demand for Jury Trial, *supra* note 2, at 21–31, 41. As FTX may have over one million creditors, *see* Alison Morrow, *We Finally Know Whom FTX Owes Money to: Wall Street Elite, Big Tech, Airlines, and Many More*, CNN (Jan. 27, 2023), <https://www.cnn.com/2023/01/26/investing/ftx-creditors-wall-street/index.html> [<https://perma.cc/N4GW-92TK>], recovery against the celebrity promoters is likely the only way that any plaintiff will see any compensation, given FTX’s current state of collapse.

⁵ Sealed Indictment, *United States v. Bankman-Fried*, No. 1:22-cr-00673, 2022 WL 1765772 (S.D.N.Y. Dec. 9, 2022); Benjamin Weiser, *Prosecutor in Bankman-Fried Case Made a Career of White-Collar Cases*, N.Y. TIMES (Dec. 13, 2022), <https://www.nytimes.com/2022/12/13/business/damian-williams-ftx.html> [<https://perma.cc/A28Y-QTMW>]; David Yaffe-Bellany, Matthew Goldstein & J. Edward Moreno, *Sam Bankman-Fried Is Found Guilty of 7 Counts of Fraud and Conspiracy*, N.Y. TIMES (Nov. 2, 2023) <https://www.nytimes.com/2023/11/02/technology/sam-bankman-fried-fraud-trial-ftx.html> [<https://perma.cc/L89K-A5QT>] (describing the events that led up to Bankman-Fried’s conviction and his potential legal battles in the future).

⁶ Emma Fletcher, *Data Spotlight: Reports Show Scammers Cashing In on Crypto Craze*, FED. TRADE COMM’N (June 3, 2022), <https://www.ftc.gov/news-events/data-visualizations/data-spotlight/2022/06/reports-show-scammers-cashing-crypto-craze> [<https://perma.cc/LFN2-FUVB>] (“Reports point to social media and crypto as a combustible combination for fraud. Nearly half the people who reported losing crypto to a scam since 2021 said it started with an ad, post, or message on a social media platform.”).

⁷ *Id.* (internal citation omitted).

⁸ Some claims against these celebrity endorsers might be as simple as finding that they promoted an unregistered security, which under Florida state law constitutes a strict liability offense. *See* Class Action Complaint and Demand for Jury Trial, *supra* note 2, at 36–39.

issue is applying the extraterritorial reach of these laws to crypto transactions. Indeed, FTX was incorporated in Antigua and Barbuda, and was headquartered in the Bahamas.⁹ Any private class action against the firm would seem to implicate an international application of a domestic statute. This puzzle is the focus of this feature.

This feature argues that a more comprehensive understanding of blockchain technology should allow federal courts to apply the antifraud provisions of the federal securities laws extraterritorially in a way that economizes judicial capacity, while deterring fraud and protecting U.S. investors.¹⁰ Part I provides a background into the extraterritorial application of the federal securities laws in private suits under the Supreme Court's *Morrison v. National Australia Bank* decision. Part II discusses the current approaches district courts have taken in locating crypto transactions and laments the confusion such efforts have created. Part III proposes two small tweaks that courts can use to dispense with legal fiction and preserve the aims of the *Morrison* ruling. It argues that such changes are necessary because of the lack of a comprehensive crypto regulatory regime. This is a critical question to answer now, as private class actions will only continue to increase in number as more frauds like the FTX scheme come to light.

I.

EXTRATERRITORIAL APPLICATIONS OF THE SECURITIES LAWS

To analyze crypto transactions, courts must understand the history and policy rationales of securities caselaw. For decades, federal circuit courts took the lead in filling in the gaps in section 10(b) of the Securities Exchange Act¹¹ to define the extraterritorial reach of the law.¹² In 2010, the Supreme Court sought to clarify and simplify what had become complicated analyses by different circuits in its (in)famous *Morrison* test.¹³ This section outlines

⁹ Timothy Smith, *FTX: An Overview of the Exchange and Its Collapse*, INVESTOPEDIA (Jan. 5, 2023), <https://www.investopedia.com/ftx-exchange-5200842> [<https://perma.cc/7B5M-5T75>].

¹⁰ This paper will not cover the *Howey* test for whether crypto products constitute securities. *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946). Already much ink has been spilled on that important and necessary link in finding liability, both in the academic literature and by courts. The SEC has defined certain tokens in litigation as securities as early as 2017. SEC. & EXCH. COMM'N, RELEASE NO. 81207, REPORT OF INVESTIGATION PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT OF 1934: THE DAO, at 1 (2017), <https://www.sec.gov/litigation/investreport/34-81207.pdf> [<https://perma.cc/NGA6-3892>]. Many courts now regularly accept at the pleading stages of litigation that crypto products can count as securities. *See, e.g.*, *Barron v. Helbiz, Inc.*, No. 1:20-cv-04703 (LLS), 2021 WL 229609, at *6 (S.D.N.Y. Jan. 22, 2021) (“The HelbizCoin Initial Coin Offer was of a security which was not listed on a United States exchange or purchased in the United states [sic].”), *vacated and remanded on other grounds*, No. 21-278, 2021 WL 4519887 (2d Cir. Oct. 4, 2021).

¹¹ 15 U.S.C. § 78a.

¹² *See* discussion *infra* Part I.A.

¹³ *See* discussion *infra* Part I.B.

that history and explains how the same issues that plague the courts' quest to apply a consistent legal standard with registered securities continues in the crypto space.

A. *The Second Circuit's Lead in Defining Extraterritorial Limits to Section 10(b)*

The “overwhelming majority” of private securities class actions are brought under section 10(b), which contains the antifraud provisions of the Securities Exchange Act.¹⁴ While the corresponding 17 C.F.R. § 240.10b-5 (“Rule 10b-5”) defines causes of action, it does not provide an express private right of action.¹⁵ However, courts have read an implied right of action into the rule,¹⁶ allowing investors to bring suits (subject to the standing requirement that they have actually purchased or sold the security).¹⁷ The reason why debate existed as to whether section 10(b) of the Securities Exchange Act, or the Securities Act of 1933,¹⁸ applies extraterritorially is that Congress simply left any language about that very important consideration out of the laws.¹⁹ This rather unhelpful silence has left the question to the courts.

The Second Circuit took the lead on defining the extraterritorial application of the statute, due to New York's prominence as a global financial center. It took the law's silence as an opportunity for it “to discern” whether Congress would have wanted the statute to apply.²⁰ The circuit

¹⁴ Amanda Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1302 (2008).

¹⁵ See Rule 10b-5.

¹⁶ See Rose, *supra* note 14, at 1303.

¹⁷ *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 751 (1975) (barring respondent from bringing action under Rule 10b-5 because the implied right of action retained prior courts' requirement that plaintiffs were actual “purchasers” and “sellers” of securities, of which respondent was neither).

¹⁸ 15 U.S.C. § 77a. Congress implemented these twin founding statutes of securities regulation in the United States in the aftermath of the Great Depression.

¹⁹ See *id.* Later case law established a two-step framework for analyzing extraterritorial applications of statutes. See *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325 (2016). The first step asks whether the presumption against extraterritoriality has been rebutted by a “clear, affirmative indication that it applies extraterritorially.” *Id.* at 2094. The second step asks “whether the case involves a domestic application of the statute.” *Id.* at 2101. If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad. *Morrison* held that section 10(b) of the Securities Exchange Act lacks an affirmative indication of extraterritoriality. See *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) (describing how Congress, in writing the Securities and Exchange Act, “omitted any discussion” of extraterritorial applications). This paper seeks to analyze the applications of defining the conduct relevant to the focus of section 10(b) of the Securities and Exchange Act.

²⁰ See *Morrison*, 547 F.3d at 170 (quoting *Eur. & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 125 (2d Cir. 1998)) (explaining how the Securities

created “conduct and effects” tests, which analyzed “(1) whether the wrongful conduct occurred in the United States, and (2) whether the wrongful conduct had a substantial effect in the United States or upon United States citizens.”²¹ Through the ensuing jurisprudence, the circuit attempted to further refine each of the tests,²² although the court “has not always applied the . . . tests in a distinct manner.”²³ It was not always clear whether a plaintiff needed to satisfy one or both of the tests. Indeed, in one case the circuit found that an “admixture or combination of the two often gives a better picture of whether there is sufficient United States involvement.”²⁴ In taking this approach, the circuit sought to ensure that federal courts did not “expend . . . resources resolving cases that do not affect Americans or involve fraud emanating from America,”²⁵ while preventing the United States from serving, in the words of the influential Judge Henry Friendly, as a “base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners.”²⁶

A three-way circuit split on these extraterritorial issues (between those following the Second Circuit, the more permissive Third Circuit,²⁷ and the stricter D.C. Circuit²⁸) prompted the Supreme Court to grant certiorari on a

Exchange Act’s silence on extraterritorial application guides the use of antifraud provisions in asking whether Congress would have intended to devote “precious resources” to international transactions).

²¹ SEC v. Berger, 322 F.3d 187, 192 (2d Cir. 2003), *abrogated by* Morrison v. Nat’l Austl. Bank Ltd., 561 U.S. 247 (2010).

²² For early defining cases for the conduct test, see, for example, Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972) (finding that significant conduct that occurred on U.S. soil was sufficient to find liability, and that whether harm accrued to U.S. or foreign stockholders was not dispositive), *abrogated by* Morrison v. Nat’l Austl. Bank Ltd., 561 U.S. 247 (2010). For early defining cases for the effects test, see, for example, Schoenbaum v. Firstbrook, 405 F.2d 200, 209 (2d Cir. 1968) (finding that the harm alleged in violation of the Securities Exchange Act had a “sufficiently serious effect” upon American commerce to warrant jurisdiction), *abrogated by* Morrison v. Nat’l Austl. Bank Ltd., 561 U.S. 247 (2010); *see also* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 989 (2d Cir. 1975) (explaining that an adverse effect on the American economy of fraudulent acts relating to securities and committed abroad was not alone sufficient to establish subject matter jurisdiction for actions under section 10(b)), *abrogated by* Morrison v. Nat’l Austl. Bank Ltd., 561 U.S. 247 (2010).

²³ Joshua L. Boehm, *Private Securities Fraud Litigation After Morrison v. National Australia Bank: Reconsidering a Reliance-Based Approach to Extraterritoriality*, 53 HARV. INT’L L.J. 249, 255 (2012).

²⁴ Itoba Ltd. v. Lep Grp. P.L.C., 54 F.3d 118, 122 (2d Cir. 1995), *abrogated by* Morrison v. Nat’l Austl. Bank Ltd., 561 U.S. 247 (2010).

²⁵ *Morrison*, 547 F.3d at 175.

²⁶ IIT v. Vencap, Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975), *abrogated by* Morrison v. Nat’l Austl. Bank Ltd., 561 U.S. 247 (2010).

²⁷ *See, e.g.*, SEC v. Kasser, 548 F.2d 109, 114 (3d Cir. 1977) (ruling that only “some activity designed to further a fraudulent scheme” must have taken place on U.S. territory to grant jurisdiction).

²⁸ *See, e.g.*, Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 32, 35–36 (D.C. Cir. 1987)

so-called “F-cubed” case, where the plaintiffs, defendant corporation, and securities transaction were all located outside the United States. The facts of *Morrison* gave the Court their shot at bringing uniformity to judicial decision-making in this area—to fashion a more consistent test to apply.

B. *The Court’s Ruling in Morrison*

The Supreme Court rejected the Second Circuit’s test in *Morrison*.²⁹ Australian shareholders had sued in the Southern District of New York for alleged fraud by executives of an Australian company for securities they bought in Australia. The only tenuous link to the United States was through a U.S. subsidiary that was wholly unrelated to any of the alleged violations of section 10(b).³⁰ The district court and circuit court both threw the case out—but the Supreme Court wanted to mark its imprimatur on this contested area of law.³¹

The Court reiterated that any foreign application of the law should be tightly cabined, as it is a “longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’”³²

The Court eschewed the flexibility (or difficulty of consistent administration, in their minds)³³ of the Second Circuit’s approach, and instead created a bright-line, transaction-focused rule. Justice Scalia, writing for the majority, held that section 10(b) applied only in two cases, the two “prongs” of the test: first, in “transactions in securities listed on domestic exchanges,” and second, “domestic transactions in other securities.”³⁴ Scalia summarized the Court’s policy-balancing concerns in two quips: that the United States must be “prevent[ed]” from “becoming a ‘Barbary Coast’ for malefactors perpetrating frauds in foreign markets,” but also that there is

(finding that conduct needed to rise to the level of a U.S. securities law violation to grant jurisdiction).

²⁹ See *Morrison*, 561 U.S. at 255–56 (rejecting the Second Circuit’s test, among other tests, as “complex in formulation” and “unpredictable in application” by using the presumption against extraterritoriality to reject the circuit’s position that silence as to extraterritorial applications of section 10(b) permitted courts to discern Congressional intent). The Court also found that this inquiry was not a jurisdictional question but instead a merits question. *Id.* at 254.

³⁰ *Id.* at 252, 266 (finding that, while the U.S. subsidiary was alleged to have engaged in deceptive conduct, petitioners failed to allege a violation of section 10(b), which prohibits deceptive conduct only in connection with the purchase or sale of securities in the U.S.).

³¹ See *id.* at 247, 269–70 (“[Foreign nations and international financial organizations] all complain of the interference with foreign securities regulation that application of § 10(b) abroad would produce The transactional test we have adopted . . . meets that requirement.”).

³² *Id.* at 255 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

³³ *Id.* at 258–59 (“There is no more damning indictment of [these] tests than the Second Circuit’s own declaration that ‘the presence or absence of any single factor which was considered significant in other cases . . . is not necessarily dispositive in future cases.’”).

³⁴ *Id.* at 267.

“some fear [that the U.S.] has become the Shangri-La of class-action litigation for lawyers.”³⁵ The Court was attempting to strike a balance between catching fraud occurring in the U.S. while preventing litigants anywhere in the world from suing in U.S. court when the fraud was mostly unconnected to America.

The concurrence cast doubt on whether this newly articulated test would work. While bright-line rules often promise (and sometimes deliver) clarity, Justice Stevens’s concurrence posed a hypothetical that revealed a potential weakness of the holding. He asked: What if an American investor bought foreign-listed shares of stock in a company where a New York subsidiary commits major fraud?³⁶ Such investors would be unable to recover, as the test “narrows [section 10(b)’s] reach to a degree that would surprise and alarm generations of American investors . . . [and] the Congress that passed the Exchange Act.”³⁷ Stevens located the crux of the matter succinctly: “[T]he real question in this case is how much, and what kinds of *domestic* contacts are sufficient to trigger application of § 10(b).”³⁸ As the ensuing decade since the *Morrison* decision proves, that question is still alive—and cryptocurrency only complicates an already confused jurisprudence.

C. *The Second Prong of Morrison and Absolute Activist’s Grasp for Clarity*

Despite the Justices’ goals, *Morrison* has failed to bring the substantial clarity the decision promised.³⁹ While the first prong of the test has been easy to apply to securities traded on domestic exchanges, the second, concerning “domestic transactions in other securities” has proven substantially more difficult.⁴⁰ The lack of any other language in the opinion for what this phrase connotes led to the Second Circuit’s clarification in their *Absolute Activist*

³⁵ *Id.* at 270.

³⁶ *See id.* at 285 (Stevens, J., concurring).

³⁷ *Id.* at 285.

³⁸ *Id.* at 281.

³⁹ Jared Gerber, Roger Cooper & Andy Bernstein, *Cleary Gottlieb Discusses the Morrison Decision, 10 Years On*, CLS BLUE SKY BLOG (Oct. 12, 2020), <https://clsbluesky.law.columbia.edu/2020/10/12/cleary-gottlieb-discusses-the-morrison-decision-10-years-on> [https://perma.cc/QH4X-LVUT] (“[C]ourts have struggled to apply its transactional focus to . . . real world capital markets—and it has spawned a number of unintended consequences that have exposed foreign issuers to liability in U.S. securities class actions.”).

⁴⁰ *Id.* The Supreme Court has continued to grapple with the extraterritorial application of RICO laws, using a slightly different analysis to ascertain a domestic nexus, often citing to *Morrison*. *See, e.g.*, *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 349 (2016). But for another recent case where the presumption of extraterritoriality was rebutted in the RICO context, see *Yegiazaryan v. Smagin*, 143 S. Ct. 1900, 1910–12 (2023). And for application of the principles of *Morrison* to the Lanham Act for copyright infringement, see *Abitron Austria GmbH v. Hetronic Int’l, Inc.*, No. 21-1043, slip op. at 13 (U.S. 2023).

Value Master Fund, Inc. v. Ficeto decision.⁴¹ The circuit court ruled that courts can find such transactions sufficiently domestic if either irrevocable liability is incurred, or title to a security transfers, in the U.S.⁴² Courts in the circuit have largely analyzed cases under the “irrevocable liability” prong instead of asking whether title changed hands in the U.S.⁴³ To aid district courts, the circuit directed courts to consider four factual allegations to determine the location of the transaction: 1) the formation of contracts, 2) the placement of purchase orders, 3) the passing of title, and 4) the exchange of money.⁴⁴ They also suggested that the origin of the deception was insufficient to establish liability.⁴⁵

Courts using these criteria must find both 1) when the irrevocable liability was incurred (when the parties could no longer withdraw from the transaction), and 2) where the liability was incurred.⁴⁶ Such cases therefore become incredibly fact-specific, and “[t]here are at this point very few clear rules and many unanswered questions for market participants about how courts will weigh factors.”⁴⁷ Further, the “issue has been particularly challenging given that transactions are often negotiated electronically in impersonal markets, either by parties located in different countries or by agents whose locations may be unknown.”⁴⁸ As these tests are already hard to ascertain in securities markets, the question is whether there is something inherently different about the technology underlying cryptocurrencies that militates in favor of either applying the current test or modifying it—and if applying it is correct, the extent to which the idea of a physical location can mesh with an inherently decentralized technology.

II.

LOCATING CRYPTO TRANSACTIONS

Early district court opinions on crypto class actions struggle to understand how to locate these transactions and the underlying blockchain. They mainly try to analogize between crypto and the existing securities laws. In some ways they succeed, but in others an understanding of the technology and the goals of the *Morrison* decision counsel a different approach.

⁴¹ See 677 F.3d 60, 67 (2d Cir. 2012) (describing how *Morrison* provided “little guidance” to define a domestic purchase or sale).

⁴² *Id.* at 62.

⁴³ The Second Circuit has found that title transfer is limited to cases of the changing of hands of legal title. See, e.g., *In re Petrobras Securities Litigation*, 862 F.3d 250, 272 n.24 (2d Cir. 2017) (finding that a transaction settling through the Depository Trust Company located in New York was not a domestic transfer of legal title).

⁴⁴ *Absolute Activist*, 677 F.3d at 70.

⁴⁵ *Id.*

⁴⁶ Gerber et al., *supra* note 39.

⁴⁷ *Id.*

⁴⁸ *Id.*

A. *Locating the Blockchain*

The term cryptocurrency is used to mean many things, and it is helpful to delineate between the main types of crypto products that exist: cryptocurrency and crypto tokens.⁴⁹ “Cryptocurrency” refers to digital payment currencies, like Bitcoin and Ethereum, that serve as means of completing electronic transactions.⁵⁰ These products are best thought of as commodities or currencies. Crypto tokens, however, are increasingly likely to be categorized as securities.⁵¹ These crypto assets purport to serve a wide array of use cases, including as stores of value (like “Non-Fungible Tokens,” or NFTs), or Security Tokens, that give fractional ownership in a common venture.⁵² These likely will be found to possess many of the same attributes of traditional securities, as the SEC found in litigation all the way back in 2017.⁵³

Crypto products run on a technology called blockchain, labeled as such because the process of organizing and inputting new data includes the linking of new “blocks” of information together to create a record of transactions.⁵⁴ Every block includes a “hash” which can be thought of as a “digital fingerprint” of data that links a new block of transactions with previous blocks.⁵⁵ Every block added to the chain increases the reliability of the information, as “each additional block strengthens the verification of the previous block and hence the entire blockchain.”⁵⁶

The mechanics of crypto transactions are critically important for defining the legal location of the sale. There are two main types of crypto transactions: peer-to-peer or through an intermediary. When peers exchange crypto, either directly to each other or through decentralized exchanges, they

⁴⁹ The “crypto” or “secret” label is now largely a fiction, as the financialization of such products leaves much less privacy than initially intended by the founders of the products. Christiaan Vos, *Are Bitcoin Transactions Anonymous and Traceable?*, COINTELEGRAPH (Sept. 3, 2022), <https://cointelegraph.com/explained/are-bitcoin-transactions-anonymous-and-traceable> [<https://perma.cc/6Z9C-E9H8>] (describing the increasing difficulty of anonymously conducting Bitcoin transactions).

⁵⁰ Andrew Loo, *Types of Cryptocurrency*, CORP. FIN. INST. (Feb. 1, 2023), <https://corporatefinanceinstitute.com/resources/cryptocurrency/types-of-cryptocurrency> [<https://perma.cc/9ZYM-MZYG>].

⁵¹ SEC. & EXCH. COMM’N, *supra* note 10, at 1 (noting that the SEC has determined that DAO Tokens “are securities” under the 1933 and 1934 Acts).

⁵² *Id.* There are many other subtypes, but these are the most relevant for this online feature’s scope.

⁵³ SEC. & EXCH. COMM’N, *supra* note 10.

⁵⁴ TIANA LAURENCE, *BLOCKCHAIN FOR DUMMIES* loc. 8, 11–12 (2019) (ebook) (describing how blockchain makes it possible to create a “digital ledger of data” and share that data among independent parties).

⁵⁵ *Id.* at loc. 11.

⁵⁶ *What Is Blockchain Technology?*, IBM, <https://www.ibm.com/topics/blockchain> [<https://perma.cc/KSG3-8JSA>].

run on the blockchain. Individuals utilize “wallets,” which contain the crypto assets.⁵⁷ Using public and private “keys,”⁵⁸ a user sends out a signal to the entire network, made up of “nodes,” which constitute the physical infrastructure of the blockchain.⁵⁹ There are three main types of nodes: full nodes, which store the entire blockchain; lightweight nodes, which function as wallets; and mining nodes, which confirm transactions by including them in blocks.⁶⁰ It is best to think of these nodes as simply computers or servers that can send and receive information. After the signal is sent out to the network, there is a race between mining nodes to incorporate the transaction into a new block that will be added to the blockchain, connected to and referencing the previous block.⁶¹ Usually, at this point, “the transaction can no longer be reversed,” unless the block is “orphaned.”⁶² “Most cryptocurrency wallets and exchanges require several block confirmations before accepting a transaction,” as the greater number of confirmations, the harder it is to hack.⁶³

While peer-to-peer transactions utilize the blockchain, full intermediaries are more akin to traditional broker-dealers, as they often own a reserve of Bitcoin and only have a certain amount available for transactions.⁶⁴ Thus they do not utilize the blockchain in the same way, as

⁵⁷ See *Confirmed and Unconfirmed Blockchain Transactions*, BITSTAMP (Aug. 5, 2022), <https://www.bitstamp.net/learn/blockchain/confirmed-and-unconfirmed-blockchain-transactions> [<https://perma.cc/DR86-ACRB>].

⁵⁸ *How Do Bitcoin Transactions Work?*, BITCOIN, <https://www.bitcoin.com/get-started/how-bitcoin-transactions-work> [<https://perma.cc/7E3H-GN6S>] (describing “key pair[s], which consist of public keys, an “address” to which assets were previously sent, and private keys, a “password” authorizing assets to be sent to an address other than the public key).

⁵⁹ See *What Are Bitcoin Blockchain Nodes?*, BITSTAMP (Aug. 17, 2022), <https://www.bitstamp.net/learn/crypto-101/what-are-bitcoin-blockchain-nodes> [<https://perma.cc/Q55C-EKY6>].

⁶⁰ *Id.*

⁶¹ See BITCOIN, *supra* note 58 (describing how miners include transactions into blocks and are rewarded for doing so with mining rewards and transaction fees). The exact mechanics of this process are not critical to this paper, but they are slightly more complicated than presented.

⁶² BITSTAMP, *supra* note 57. When two miners mine a block at the same time, it is possible for there to be disagreement about which block is fully confirmed. Therefore, there are often times when a transaction is not yet final. Thus an initial confirmation may not guarantee a final acceptance. For a more complete discussion, see *What Are Orphan, Uncle and Stale Blocks?*, BITSTAMP (Aug. 9, 2022), <https://www.bitstamp.net/learn/blockchain/what-are-orphan-uncle-and-stale-blocks> [<https://perma.cc/Y2ZB-FNPB>].

⁶³ *Confirmed and Unconfirmed Blockchain Transactions*, BITSTAMP (Aug. 5, 2022), <https://www.bitstamp.net/learn/blockchain/confirmed-and-unconfirmed-blockchain-transactions> [<https://perma.cc/U4AX-XN4F>] (explaining how each cryptocurrency wallet or exchange sets its own limit for the number of block confirmations required before consummating the transaction, with one such exchange requiring twelve).

⁶⁴ See Nathan Reiff, *What Are Centralized Cryptocurrency Exchanges?*, INVESTOPEDIA (July 31, 2023), <https://www.investopedia.com/tech/what-are-centralized-cryptocurrency-exchanges> [<https://perma.cc/LE2E-4J98>] (comparing full intermediaries in centralized cryptocurrency exchanges to banks, as crypto buyers and sellers trust intermediaries to handle assets).

their investors do not have a private key to access their wallet⁶⁵—they have an account login like a brokerage. A traditional broker-dealer usually acts as the registered owner of the securities, and their customers only hold beneficial title.⁶⁶ The same is true here.

District courts are currently fighting over where this blockchain resides to physically locate these transactions. The application of the *Absolute Activist* factors—1) the formation of contracts, 2) the placement of purchase orders, 3) the passing of title, and 4) the exchange of money—reveal inconsistencies and contradictions in the crypto space. Indeed, the legal fiction created by courts to categorize blockchain technology underscores the harm of an overreliance on a transaction-oriented approach.

B. District Courts' Reliance on Legal Fiction

In analogizing between securities transactions and crypto purchases, courts have charted a muddled course in deciding whether blockchain technology constitutes merely another medium of transaction, or something more integral to the sale itself.

1. Fictions of Locating Internet Transactions: Placing Purchase Orders

Courts already seem to create some legal fiction by trying to physically locate transactions that occur over the internet, resulting in different conceptions of extraterritoriality. One S.D.N.Y. judge found that a crypto transaction occurred at the location where the plaintiff “accepted the offer and agreed to the contract of purchase.”⁶⁷ The Tenth Circuit agrees, as it applied the *Absolute Activist* test to internet transactions in other unregistered securities, and found they occur at the location of *both* the seller and buyer.⁶⁸

However, other courts have found the location of the purchaser to be insufficient to locate internet transactions. In the case of a traditional securities purchase, the Second Circuit found in *City of Pontiac Policemen's & Firemen's Retirement System v. UBS AG* that a plaintiff located in the U.S.

⁶⁵ Louis DeNicola, *What's the Difference Between Centralized and Decentralized Crypto Exchanges?*, EXPERIAN (June 11, 2022), <https://www.experian.com/blogs/ask-experian/centralized-vs-decentralized-crypto-exchanges> [<https://perma.cc/43QL-J8PE>] (describing that intermediaries utilize account logins for investors rather than providing private keys to investor crypto wallets).

⁶⁶ See U.S. SEC. & EXCH. COMM'N, *What Is a "Registered" Owner? What Is a "Beneficial" Owner?*, <https://www.investor.gov/what-registered-owner-what-beneficial-owner> [<https://perma.cc/74YB-7AFU>] (defining registered owners and beneficial owners).

⁶⁷ *Barron v. Helbiz, Inc.*, No. 1:20-cv-04703 (LLS), 2021 WL 229609 at *6 (S.D.N.Y. Jan. 22, 2021), *vacated and remanded on other grounds*, No. 21-278, 2021 WL 4519887 (2d Cir. Oct. 4, 2021).

⁶⁸ *SEC v. Traffic Monsoon*, 245 F. Supp. 3d 1275, 1295 (D. Utah 2017), *aff'd sub nom.* *SEC v. Scoville*, 913 F.3d 1204 (10th Cir. 2019).

who bought a security on a foreign exchange did not engage in a domestic transaction.⁶⁹ A different S.D.N.Y. judge relied on this precedent to dismiss a crypto class action, analogizing between securities transactions and crypto to find the location outside of the country.⁷⁰ Thus, there is not clear consensus on how the internet and peer-to-peer transactions should be located—is there something special about the internet or should the rule in *City of Pontiac* govern?

2. *Fictions of Locating Internet Transactions: Passing Title*

Other courts have focused on the location of internet infrastructure. In *In re Tezos Securities Litigation*,⁷¹ a group of plaintiffs brought a class action against defendants who had allegedly conducted an unregistered securities sale in tokens.⁷² In ruling on a motion to dismiss, the court found that the infrastructure of the coin offering was sufficient to find the transactions domestic, although the defendant was a Swiss foundation. The interactive website through which the transaction took place was hosted on a server in Arizona, run by a defendant in California, and marketed to investors in the U.S.⁷³ It also rejected contractual terms that purported to locate the transactions in Alderney, a Channel Island, writing that *Morrison* demanded an inquiry into the “actual (rather than contractual) situs of ICO transactions.”⁷⁴ The court also noted that the plaintiff’s financial contribution to the initial coin offering (ICO) was validated through a “network of global ‘nodes’ clustered more densely in the United States than in any other country.”⁷⁵ While the court is factually correct about this claim,⁷⁶ locating the transaction where the nodes physically exist is a problematic approach.

⁶⁹ 752 F.3d 173, 188–89 (2d Cir. 2014); *see also In re Foreign Exch. Benchmark Rates Antitrust Litig.*, No. 13 Civ. 7789 (LGS), 2016 WL 5108131, at *27 (S.D.N.Y. Sept. 20, 2016) (“Similarly, in Plaintiffs’ described scenario, an American investor is essentially submitting buy or sell orders on foreign exchanges, and that investor’s location at the time of placing his order does not disturb the conclusion that the transaction ‘occurred’ on the foreign exchange.”).

⁷⁰ *Anderson v. Binance*, No. 1:20-cv-2803 (ALC), 2022 WL 976824, at *4 (S.D.N.Y. Mar. 31, 2022).

⁷¹ No. 17-cv-06779-RS, 2018 WL 429334 (N.D. Cal. Aug. 7, 2018).

⁷² These claims proceeded under sections 12 and 15 of the Securities Exchange Act of 1934, which both govern the issuance of securities. *See id.* at *9–11.

⁷³ *Id.* at *8.

⁷⁴ *Id.*

⁷⁵ *Id.* The court found that these factors collectively “support[ed] an inference” that the alleged transaction took place within the U.S. *Id.*

⁷⁶ *See Ethereum Mainnet Statistics*, ETHERNODES.ORG, <https://ethernodes.org/countries> [<https://perma.cc/KMB3-L2LK>] (showing that as of December 2022, 42.5% of the nodes of the Ethereum network are physically located within the United States).

C. A Nodular Analysis Creates More Problems Than It Solves

Three immediate problems stand out. First, the blockchain is *designed* to be decentralized. One of the main value propositions of the programming architecture is that it is less susceptible to hacking because of the redundancy of copies located all over the world.⁷⁷ Thus, blockchain technology ab initio seems to cut against easy analysis that attempts to aggregate transactions or locate them in a particular place. Accordingly, the second confusion assuming that a nodular analysis is appropriate would be to fix some threshold amount of nodes to find a transaction “occurs” in a certain place. A plurality? One? Third, nodes can come on and off the network at any time, so having a legal test turn on an impermanent state of nodular makeup seems to be a moving target.

The last point is the position of one S.D.N.Y. judge that suggested, in dicta, that “‘irrevocable liability’ is incurred when the transaction has been verified by at least one individual node of the blockchain” and that “the location of the node that verified the specific transaction at issue should control in [the Second Circuit].”⁷⁸ The court understands the technology but suggests an unworkable test. As detailed above, the court nails the technological point that the first node is the point of consummation of a transaction.⁷⁹ The court also cited another Second Circuit precedent that the further validation process is essentially analogous to a traditional exchange, as it “lies outside of the transacting parties’ control” and that “whether [an] exchange can cancel or modify trades . . . says nothing about whether either trading party is free to revoke its error-free acceptance of a trade after matching.”⁸⁰

However, what could be termed a “first node” rule is perhaps both over and underinclusive. It is potentially overinclusive because for blockchains like Ethereum, upon which many token technologies run,⁸¹ a plurality of nodes are located in the U.S., as noted in the *Tezos* opinion.⁸² In a random

⁷⁷ *Confirmed and Unconfirmed Blockchain Transactions*, BITSTAMP (Aug. 5, 2022), <https://www.bitstamp.net/learn/blockchain/confirmed-and-unconfirmed-blockchain-transactions> [<https://perma.cc/48DH-MDHU>] (describing the nature of blockchain as requiring more proof of work based on the numerous nodes requiring confirmation and thus making hacking harder).

⁷⁸ *Williams v. Block One*, Civ. No. 1:20-cv-02809-LAK, 2022 WL 5294189, at *7 (S.D.N.Y. Aug. 15, 2022).

⁷⁹ See *supra* note 62 and accompanying text.

⁸⁰ *Williams*, 2022 WL 5294189, at *7 (quoting *Myun-Uk Choi v. Tower Rsch. Cap. LLC*, 890 F.3d 60, 68 (2d Cir. 2018)).

⁸¹ Nathan Reiff, *What Are ERC-20 Tokens on the Ethereum Network?*, INVESTOPEDIA (Feb. 4, 2023), <https://www.investopedia.com/news/what-erc20-and-what-does-it-mean-ethereum> [<https://perma.cc/X3WX-MFM2>].

⁸² *In re Tezos Sec. Litig.*, No. 17-cv-06779-RS, 2018 WL 4293341 at *8 (N.D. Cal. Aug. 7, 2018) (describing the network of nodes as being “clustered more densely in the United States than in any other country”).

distribution of probabilities, there would be a 42.53% chance that the first node for a security token running on that blockchain would be in the United States.⁸³ This would not only create a coin-toss level of legal indeterminacy, but also could potentially include transactions of tokens wholly unrelated to the United States that utilize this worldwide technology. The rule could also be underinclusive. It is possible to program certain nodes within a network such that a clever, legally-cautious token issuer could route their transactions to a first node overseas, even though their marketing, operations, and investors all were located within the United States.

The analysis might be sharpened by an explicit reference to existing securities infrastructure, for instance a broker. In *Absolute Activist* itself, the Second Circuit agreed that “the location of the broker could be relevant to the extent that the broker carries out tasks that irrevocably bind the parties to buy or sell securities”⁸⁴ As described *supra*, certain crypto exchanges allow for peer-to-peer interaction, while others can be disintermediated.⁸⁵ One of the largest crypto trading platforms is a publicly-traded company with a multi-billion dollar market cap: Coinbase. Coinbase’s public disclosures reveal invaluable information about an often-opaque industry. Unlike peer-to-peer crypto exchanges, like Binance, Coinbase acts much like a traditional broker—it acts as an asset custodian.⁸⁶ Users are beneficial owners of their tokens: “Since both ends of the trade are on Coinbase’s platform, the coins involved never leave Coinbase’s wallet. Coinbase merely notes the trade internally and keeps the transaction off the blockchain until one of the traders withdraws assets from the exchange.”⁸⁷ This is the same as a traditional broker who buys securities and holds the actual title of the asset. In the securities context, the Second Circuit agreed with the district court in the *In re Petrobras Securities Litigation* that settlement through a domestic securities depository was insufficient to find a domestic transaction.⁸⁸ Thus a court would likely rule that plaintiffs would be unable to find that title had passed if they bought foreign unregistered crypto tokens on Coinbase. However, under the irrevocable liability prong, Coinbase’s domestic operations would likely open it up to liability as a domestic seller. A broker analysis can help bring some conceptual clarity; Coinbase has even registered as a money transmitter across the U.S. and so is subject to at least

⁸³ ETHERNODES.ORG, *supra* note 76.

⁸⁴ *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 68 (2d Cir. 2012).

⁸⁵ *See supra* note 64 and accompanying text.

⁸⁶ Michael Miller, *How Coinbase Is Different from a Standard Financial Exchange*, MORNINGSTAR (Aug. 25, 2021), <https://www.morningstar.com/articles/1055567/how-coinbase-is-different-from-a-standard-financial-exchange> [<https://perma.cc/FP9T-LMKR>].

⁸⁷ *Id.*

⁸⁸ 862 F.3d 250, 272 n.24 (2d Cir. 2017) (citing *In re Petrobras Sec. Litig.*, 150 F. Supp. 3d 337, 342 (S.D.N.Y. 2015)).

some legal regulation.⁸⁹ But the question of peer-to-peer interactions remains.

Lastly, the fourth *Absolute Activist* factor of the exchange of money could make almost every crypto transaction in the world a domestic transaction. As both Bitcoin and Ethereum have a plurality of their nodes located in the United States, and tokens are often purchased with cryptocurrency, a plurality test would tilt towards finding these transactions domestic. Under the “first node” test, a great many of these foreign transactions will be pulled into the orbit of 10b-5, inundating courts with cases completely unconnected with U.S. domestic concerns.

D. Moving Away from a Nodular Analysis

In an attempt to exit this technical morass, Judge Stanton found in *Barron v. Helbiz Inc.* that the location of the nodes of a blockchain do not matter, as “*Morrison* dealt with the location of the change in the legal relationship between persons, not the electronic operations of creation, transport and delivery of the product.”⁹⁰ However, in this same decision the district court arguably ruled against the Second Circuit on locating the sale as where the buyer was physically located (although, as this paper will argue, this is the correct approach for crypto).⁹¹ The reasoning in the 2015 *Petrobras* order likewise serves as a good rationale for disregarding the physical location of nodes: “The mechanics of DTC [depository trust company] settlement are actions needed to carry out transactions, but they involve neither the substantive indicia of a contractual commitment necessary to satisfy *Absolute Activist*’s first prong nor the formal weight of a transfer of [legal] title necessary for its second.”⁹² Under this logic, blockchain is just another settlement technology.

The Southern District of New York, one of the most sophisticated and competent securities litigation districts in the country, seems perplexed about crypto and its extraterritorial application. While not discussed explicitly in

⁸⁹ *Licenses* & *Disclosures*, COINBASE, <https://www.coinbase.com/legal/licenses#:~:text=Coinbase%2C%20Inc.%20is%20licensed%20by,Industry%20as%20a%20money%20transmitter> [https://perma.cc/K56N-RBKT] (listing Coinbase’s licenses as a money transmitter in different U.S. states).

⁹⁰ No. 1:20-cv-04703 (LLS), 2021 WL 229609 at *6 (S.D.N.Y. Jan. 22, 2021), *vacated and remanded on other grounds*, No. 21-278, 2021 WL 4519887 (2d Cir. Oct. 4, 2021).

⁹¹ *See id.* But *see In re Foreign Exch. Benchmark Rates Antitrust Litig.*, No. 13 Civ. 7789 (LGS), 2016 WL 5108131, at *27 (S.D.N.Y. Sept. 20, 2016) (finding that a U.S. investor placing a buy order did so on the foreign exchange, not where they were physically located in the U.S.); *Sullivan v. Barclays PLC*, No. 1:13-cv-02811 (PKC), 2017 WL 685570, at *29 (S.D.N.Y. Feb. 21, 2017) (finding that the fact that “plaintiffs are U.S. residents who engaged in LIFFE Euribor futures transactions through LIFFE Connect terminals located in the United States” did not create a domestic transaction).

⁹² *In re Petrobras*, 150 F. Supp. 3d at 342.

its judges' opinions, the whispers of Judge Friendly must be passing through their ears. Crypto class actions offer a private device for deterrence and compensation for those who have fallen prey to different schemes and financial fraud. But this fraud is occurring all over the world.⁹³ Other countries were more wary of the potential abuses of the craze,⁹⁴ and the United States has served as a base for several crypto operations, many legitimate but unfortunately some fraudulent.⁹⁵ What ruling or test should courts look to in the face of an already confusing *Morrison* test? What can they do when this unclear schema is compounded with the ease of secure transacting over the internet, facilitated by blockchain and the rise of unregulated security tokens and coins? Perhaps a look to the past will elucidate the path forward for judicial decisionmakers.

III.

BACK TO THE FUTURE: (RE)INTEGRATING CONDUCT AND EFFECTS?

The transaction test promulgated by the Court in *Morrison* can be flexible enough to capture the economic and technological realities of internet transactions by re-integrating some of the emphases of the conducts and effects tests. *Morrison*'s second prong of "domestic transactions" should acknowledge the ease of transacting through cryptocurrency in sales of unregistered securities over the internet. While not a complete departure from the internet trading of the last few decades, crypto represents an evolution and democratization of finance. A hybrid approach between transactional location and conducts and effects could best capture the transactions the Court intended to target in *Morrison*.

A. *Crypto Transactions Represent an Evolution in the Ease of Investing (and Scams)*

Technologists developed blockchain as a reaction to the global financial

⁹³ See, e.g., Stefan Von Imhof, *Crypto's Biggest Scams of All Time*, ALTS.CO (June 5, 2022), <https://alts.co/cryptos-biggest-scams-of-all-time> [https://perma.cc/2PUY-ESGF].

⁹⁴ For instance, China progressively banned more crypto transactions, starting with crypto exchanges, Bitcoin mining, and then all cryptocurrencies outright. For the state of different global regulations, see Kevin George, *Cryptocurrency Regulations Around the World*, INVESTOPEDIA (July 31, 2023), <https://www.investopedia.com/cryptocurrency-regulations-around-the-world-5202122> [https://perma.cc/W9WG-PY23].

⁹⁵ See Javier Paz, *The Best Global Crypto Exchanges*, FORBES (Mar. 16, 2022), <https://www.forbes.com/sites/javierpaz/2022/03/16/the-best-global-crypto-exchanges/?sh=45d13a07742c> [https://perma.cc/UW2D-KNXW] (describing U.S.-based operations of Coinbase, Kraken, Robinhood, and Gemini); Laurel Murphy, *2022 Crypto Crime Annual Report: North Korea Heads Up the World's Top Five Crypto Crime Locations*, COINCUB (2022), <https://coincub.com/ranking/top-5-countries-for-crypto-crime-2022> [https://perma.cc/A9VQ-DYQZ] (noting that, in 2022, the United States ranked second internationally for cases of crypto fraud).

crisis of 2008,⁹⁶ as investor confidence in global capital markets dropped, and investors and citizens alike wanted ways to avoid interacting with the traditional financial system. Blockchain technology therefore was *designed* to be decentralized⁹⁷—an investor did not need to put their faith in the global financial system to protect their savings, but instead could hold and transact in these assets that existed aside and apart from the traditional system.

However legitimate such concerns, the lack of any meaningful regulation or oversight has rendered the larger crypto ecosystem prone to abuse and fraud. Additionally, the ease of transacting,⁹⁸ coupled with the ability to target individuals through social media and the internet with almost no rules,⁹⁹ makes the dangers posed by crypto a clear and urgent concern. While retail-propelled bubbles constitute an unfortunate feature of American financial market cycles, even dot-com bubble investors flocked to securities on established exchanges—public companies that had to adhere to established regulatory regimes. So such investors theoretically had the information necessary to make their risky decisions. Crypto prospectuses can contain anything, and without any real enforcement mechanism, can lie with impunity to the detriment of the investing community (and crypto ecosystem more broadly).¹⁰⁰ Courts need to think critically about their role in this wild west. But how then should they address crypto transactions?

B. A Transaction and Conducts/Effect Hybrid Within the Absolute Activist Framework

While not directly confronting the precedential force of the *Morrison* ruling, a partial return to the conduct and effects tests would allow courts

⁹⁶ David Gerard, *The Cryptocurrency Crash Is Replaying 2008 as Absurdly as Possible*, FOREIGN POL'Y (May 12, 2022), <https://foreignpolicy.com/2022/05/12/cryptocurrency-crash-2008-financial-crisis> [<https://perma.cc/L58R-REDB>] (“Cryptocurrency started in 2009 with idealistic dreams of a new economy built on libertarian principles and freedom from the fiat currency system that had just crashed.”).

⁹⁷ *See id.* (highlighting the “libertarian principles” driving cryptocurrency such as the decentralized nature of blockchain’s design).

⁹⁸ The U.S. government has acknowledged the ability for securities scams to take place over the internet for decades. U.S. GOV’T GEN. ACCOUNTABILITY OFF., GAO/T-GGD-99-34, SECURITIES FRAUD: THE INTERNET POSES CHALLENGES TO REGULATORS AND INVESTORS (1999).

⁹⁹ *See* Connor Sephton, *Facebook and Instagram Relax Rules on Crypto Ads*, COINMARKETCAP (Nov. 26, 2021), <https://coinmarketcap.com/alexandria/article/facebook-and-instagram-relax-rules-on-crypto-ads> [<https://perma.cc/TE9E-Q4VB>] (noting that, back in 2021, Meta allowed more crypto ads because “the cryptocurrency landscape has continued to mature and stabilize in recent years and has seen more government regulations that are setting clearer rules for their industry”).

¹⁰⁰ *See* Philipp Maume & Mathias Fromberger, *Regulation of Initial Coin Offerings: Reconciling U.S. and E.U. Securities Laws*, 19 CHICAGO J. INT’L L. 548, 554 (2019) (describing the “legal limbo” of prospectus liability).

more flexibility, and to dispense with the legal fiction that crypto and internet transactions “occur” wherever their transactional infrastructure is located. Courts should look at two ways of expanding the reach of the “formation of a contract” factor of the *Absolute Activist* test: 1) institute a presumption that in sales of unregistered securities, if either the buyer or seller is in the U.S., the sale is domestic, and that 2) the advertising of an unregistered security or crypto product may be a plus factor in finding domesticity.

1. Establish a Domestic Presumption If Sale or Purchase Occurs in the United States

Courts should follow the Tenth Circuit’s rule that an internet transaction takes place both where the buyer accepts, and a seller fulfills, the crypto offer. Indeed, the words of 10b-5 allow courts to consider fraud in connection with the “purchase or sale” of any security.¹⁰¹ While *Absolute Activist* counsels that courts consider the location of the “placement of purchase orders,” it also held that at the pleading stage a plaintiff must allege that “the purchaser incurred irrevocable liability within the United States to take and pay for a security, or that the seller incurred irrevocable liability within the United States to deliver a security.”¹⁰² By counting both sides of the transaction, courts will not miss sales that implicate the United States.¹⁰³ This doctrine also creates a more plausible legal fiction, as instead of locating a transaction in an ever-shifting and uncertain cyberspace, individuals are located wherever they make the deal. By analogy, if two businesspeople made a deal while using Zoom, it would not make sense to locate that purchase wherever Zoom’s internet infrastructure was located. It is a less stretched legal fiction to find the transaction occurring where parties are located physically when irrevocable liability attaches. Thus, as explained in the context of the *Tezos* litigation,¹⁰⁴ passing title in crypto cyberspace should be de-emphasized to allow a greater focus on the other three factors, as passing title in the cyber realm is a complicated and unhelpful factor for courts to consider in light of the policy rationales in *Morrison* and *Absolute Activist*.

Courts should also not allow for contracts to rule where crypto transactions take place. The Second Circuit wrote that “territoriality under *Morrison* concerns where, physically, the purchaser or seller committed him or herself, not where, as a matter of law, a contract is said to have been

¹⁰¹ 17 C.F.R. § 240.10b-5 (1948).

¹⁰² *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 68, 70 (2d Cir. 2012).

¹⁰³ *SEC v. Traffic Monsoon LLC*, 245 F. Supp. 3d 1275 (D. Utah 2017) (“Either a domestic purchaser or a domestic seller of a security may bring a transaction within the purview of Section 10(b).”).

¹⁰⁴ *See supra* Section II.B.2.

executed.”¹⁰⁵ They should follow the approach the court took in *In re Tezos*, where it rejected a contractual term the company sought to use to define for itself where the transaction occurred.¹⁰⁶

If one of the parties is not a legal person, but instead an entity, the better rule is to locate the entity wherever it is incorporated. This adds simplicity both with finding the location¹⁰⁷ and will also allow businesses legal certainty in knowing whether their operations will come under the scrutiny of U.S. securities laws and class action lawsuits. A security should be found to be unregistered if there is no comprehensive regulatory scheme for the asset in the country where it is offered. This should be determined on a case-by-case basis and will be up to a plaintiff to prove that the security is sufficiently unregulated as to warrant protection of the presumption.¹⁰⁸

Allowing courts to find that transactions occur in both places also prevents the abuses the *Morrison* court identified: F-Cubed lawsuits, where the plaintiffs, defendant corporation, and securities transaction are all located outside the United States. By locating the transaction where both offer and acceptance occur, courts can protect the twin policy aims of the *Morrison* Court: that domestic sellers committing fraud cannot create a “Barbary Coast” to export their schemes, and that the U.S. will be less likely to become a “Shangri-La of class-action litigation.”¹⁰⁹ This rule also harkens back to and incorporates some of the policy concerns animating the “effects” test previously controlling in the Second Circuit. It ensures that foreign frauds that impact the U.S. and its markets do not stand outside the protection of the law for private litigants.

The obvious counterargument to this rule is that the Second Circuit has already ruled that residency and a single buy order from the U.S. of a security on a foreign exchange on its own was insufficient to find a transaction domestic.¹¹⁰ An expanded crypto rule is easily distinguishable based on the type of exchange. The key difference between traditional securities and sales of unregistered securities is that there is no comprehensive scheme in place

¹⁰⁵ *United States v. Vilar*, 729 F.3d 62, 77 n.11 (2d Cir. 2013) (emphasis added) (citing *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 268 (2010)).

¹⁰⁶ *See supra* note 74.

¹⁰⁷ In *Traffic Monsoon*, the court rejected arguments that the location of the LLC’s owner was determinative for locating the sale whenever a victim of the scam purchased a security. The owner did not himself sell the unregistered securities to anyone, the court reasoned, but only the LLC conducted transactions. 245 F. Supp. 3d at 1295.

¹⁰⁸ This point will be a fact-intensive inquiry. Courts could compare the crypto oversight either to current securities regulations (under which almost every crypto product would probably be unregistered), or more weakly could compare to other crypto regulations globally. The former would be a more comprehensive and investor-friendly rule and could also incentivize a greater push for companies to create regulations to get them out of this liability trap.

¹⁰⁹ *Morrison*, 561 U.S. at 270.

¹¹⁰ *City of Pontiac Policemen’s & Firemen’s Ret. Sys. v. UBS AG*, 752 F.3d 173, 188 (2d Cir. 2014).

to prevent fraud in the crypto space. The securities purchased in *City of Pontiac* were those of the largest private bank in the world, and the largest Swiss banking institution, UBS, on the Swiss Exchange, the third largest stock exchange in Europe—both regulated by domestic and international bodies.¹¹¹ In contrast, FTX, or any of the other crypto exchanges, have *no* real regulatory system. Such an analogy compares long-established, extensive compliance systems with, at worst, the machinations of precocious psuedo-visionaries and fraudsters.¹¹² One recent commentator even compared so-called “stablecoins,” a crypto product whose value is intended to be pegged to a reference asset to make it less volatile,¹¹³ to the wildcat banks of the 1800s, “which issued dubious paper dollars backed with questionable reserves.”¹¹⁴ This situation demands a more permissive standard for private plaintiffs to press their claims. Hopefully the proposed solution in this feature also changes the calculus for potential token scammers in both foreign and domestic locations, as the fix would capture all U.S. crypto brokers, as their incorporation would make them domestic sellers of securities (even though title would not pass). This will put them under some limited regulation, while the SEC and Congress continue to debate creating laws for this asset class. It will thus create greater clarity and expectations for businesses transacting in this space.

2. *U.S. Solicitation as a Plus Factor*

Alternatively, another idea would be to find that marketing a security in the United States is a plus factor to find the transaction domestic. While the Second Circuit eschewed marketing as a factor in *Absolute Activist*,¹¹⁵ a comprehensive understanding of a transaction could include the “offer” as the marketing that induced a person to make the purchase. In expanding the ambit of the “formation of a contract” factor, courts could also incorporate elements of the old conduct test—the actions an allegedly fraudulent seller took to market the products to the U.S. investing public.

This inquiry would not hamper courts, as they currently conduct an identical analysis when finding personal jurisdiction over defendants.

¹¹¹ *Regulatory Affairs*, SIX, <https://www.six-group.com/en/products-services/the-swiss-stock-exchange/site/regulatory-affairs.html> [<https://perma.cc/RNF4-YJT3>] (describing the domestic and international regulatory regimes for the Swiss Exchange).

¹¹² See *supra* Introduction.

¹¹³ Adam Haynes, *Stablecoins: Definitions, How They Work, and Types*, INVESTOPEDIA (July 6, 2023), <https://www.investopedia.com/terms/s/stablecoin.asp> [<https://perma.cc/KU4G-S5FE>].

¹¹⁴ Gerard, *supra* note 96.

¹¹⁵ *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 70 (2d Cir. 2012) (“[A]llegations that the Funds were heavily marketed in the United States and that United States investors were harmed by the defendants’ actions, while potentially satisfying the now-defunct conduct and effects test . . . do not satisfy the transactional test announced in *Morrison*.”).

Indeed, the foregoing discussion in this paper contains similar policy and legal rationales as those for personal jurisdiction doctrine. In finding specific jurisdiction over a defendant, the *Tezos* court found that it could exercise jurisdiction over the Tezos Foundation, not because its interactive website was hosted in Arizona, but because it employed workers in the United States, there was “little to no marketing of the ICO anywhere other than in the U.S.,” and U.S. citizens made up a large proportion of the contributors to the ICO.¹¹⁶ It also wrote that if marketing occurred solely in another country, and the plaintiff purchaser had found out on their own, jurisdiction would not have been appropriate.¹¹⁷

In addition to the physical locations of the parties, using additional factors gives a fuller picture of the entire transaction. Purposeful availment of the privilege of transacting in a certain forum is a different question from deciding a claim (and the court made clear in *Morrison* that the extraterritoriality inquiry was no longer a jurisdictional question, but one of merit),¹¹⁸ but thinking of solicitation as persuasive in understanding the location of a transaction should assist courts in applying the extraterritoriality principle. As the court in *Tezos* proved, courts can delineate between marketing targeted largely at U.S. citizens and marketing targeted largely at foreign citizens, and thus will not draw in F-Cubed cases. If a domestic seller marketed heavily to foreign investors, courts would not apply the factor to the analysis. This softer plus factor, together with the physical location of the transaction, would not disturb the aims of *Morrison*; instead, it would carry the Court’s goals into crypto cyberspace.

3. *Recent Supreme Court Decisions Emphasize Conducts and Effects*

District courts could also feel more secure in adopting the proposed framework in this feature in light of the Court’s recent *Abitron* copyright infringement decision.¹¹⁹ The Court continued its trend of tightening the requirements for extraterritoriality it began in *Morrison*, as the unanimous decision ruled against the extraterritorial application of the Lanham Act for copyright infringement. However, with some parallels to *Morrison*, the Court was sharply divided on the expansiveness of what counted as a

¹¹⁶ *In re Tezos Sec. Litig.*, No. 17-cv-06779, 2018 WL 4293341, at *6 (N.D. Cal. Aug. 7, 2018).

¹¹⁷ *Id.* While section 12(a)(2) of the Securities Act allows for investors to bring suits on solicitations for the sales of securities based on untrue statements of material facts in prospectuses and communications, “[p]laintiffs often specifically disclaim fraud in their Section 12(a)(2) claim to avoid the heightened pleading standards for fraud allegations.” *Securities Act: Section 12(a)(2) Elements and Defenses*, THOMSON REUTERS PRACTICAL LAW (2022), <https://bit.ly/3hZRC7e> [<https://perma.cc/2Z4R-5ZJ4>]. Section 12 claims should also be considered in a comprehensive way as applied to crypto suits.

¹¹⁸ *Morrison v. Nat’l Austl. Bank, Inc.*, 561 U.S. 247, 254 (2010).

¹¹⁹ *Abitron Austria GmbH v. Hetronic Int’l, Inc.*, No. 21-1043, slip op. at 1 (U.S. 2023).

“domestic claim” to find that alleged infringements with some foreign aspect could be sufficiently domestic. Justice Alito’s majority position found that such claims had to be supported by conduct in the United States,¹²⁰ in line with the *RJR Nabisco* line of cases.¹²¹ In contrast, the concurrence written by Justice Sotomayor and joined by Justices Kagan, Barrett, and Chief Justice Roberts looked also to effects in the United States, namely if such conduct created “a likelihood of consumer confusion in the United States”¹²²

While the Lanham Act is not the Securities and Exchange Act, and cannot be directly compared, the Court’s approach to its evolving extraterritoriality analysis is instructive for possible rulings on a crypto suit. Justice Alito seems to be channeling Justice Scalia in trying to apply a bright line rule to a complicated body of law and technology.¹²³ Indeed, commentators have already indicated that the decision has generated confusion.¹²⁴ In contrast to the majority’s position, the minority opinion looks at a more comprehensive view of the effects of an infringement. Further, a separate concurrence penned by Justice Jackson attempted to define Justice Alito’s “use in commerce” line and posits a very broad test: “A [defendant’s] ‘use in commerce’ does not cease at the place the mark is first affixed, or where the item to which it is affixed is first sold. Rather, it can occur wherever the mark serves its source-identifying function.”¹²⁵ By emphasizing the effects of wherever a trademark *is*, Justice Jackson’s opinion could be read to be quite broad.¹²⁶

The rub for crypto suits is this: Both the minority and the concurrence views of this most recent extraterritoriality ruling seem to emphasize both conducts and effects in finding an infringement domestic. The most expansive interpretation of this ruling could be that if a crypto case were to make its way to the Court, there may be five sympathetic votes to find crypto transactions as domestic. At a more modest reading, lower courts have cover to incorporate more factors into a crypto analysis, similarly to the *Abitron* concurrences. While the suggestions in this online feature do not create a

¹²⁰ *Id.* at 5.

¹²¹ *Id.* (quoting *RJR Nabisco, Inc. v. European Community*, 579 U.S. 325, 337 (2016)).

¹²² *Abitron*, slip op. at 6.

¹²³ Kyle Jahner, *US Trademark Law’s Global Reach Curtailed by Supreme Court*, Bloomberg Law (June 29, 2023), <https://news.bloomberglaw.com/ip-law/justices-gut-trademark-win-by-limiting-us-laws-global-reach> [<https://perma.cc/2CQ2-LQ2B>] (“Alito also aimed for a simple bright-line rule, Getzoff said, but the opinion ignored the nuance of a global marketplace.”).

¹²⁴ *Id.* (noting that Holland & Hart LLP intellectual property attorney Timothy Getzoff stated, “I think this decision has made the rule murkier, not clearer.”).

¹²⁵ *Abitron*, slip op. at 2 (Jackson, J., concurring).

¹²⁶ Jonah M. Knobler, *Abitron v. Hetronic: SCOTUS Nixes Foreign Lanham Act Suits, But Key Questions Remain*, PATTERSON BELKNAP (July 12, 2023), <https://www.pbwt.com/jonah-m-knobler/misbranded-blog/abitron-v-hetronic-scotus-nixes-foreign-lanham-act-suits-but-key-questions-remain> [<https://perma.cc/P57E-MGEJ>] (arguing Justice Jackson’s approach could extend liability as broad as to any jurisdiction which is considered “in commerce”).

bright line or easy solution, crypto products are complex and relying on the appropriate factors is a much better endeavor than some elusive panacea for courts. *Abitron* reveals that the Court is still open to hearing arguments about the domestic nature of a transaction or commercial act—and lower courts will have to make their own decisions in the absence of any clearer guidance.

CONCLUSION

This feature has argued that the current jurisprudence attempting to locate crypto transactions under the *Morrison* test is better focused on understanding the location of the parties at the time of the transaction and argues for a softer plus factor for the direction of solicitation. The current nodular analysis misunderstands blockchain technology and creates an untenable legal fiction that courts would do best to avoid completely. For class actions to protect the investing public through deterrence and allow for recovery for those already harmed, the rules of the road need to recognize and account for the unregulated nature of these securities. At the same time, courts can uphold the rationales in *Morrison* and ensure that only scams that either affect Americans or are perpetrated from America's shores can take up the federal courts' limited time and resources.