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Are SOX and Dodd-Frank Securities Law? The Answer is Up in the Air

Geoffrey Christopher Rapp
University of Toledo College of Law

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*Geoffrey Christopher Rapp***

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INTRODUCTION

The securities laws have acquired a bad name. Once viewed as something akin to "the Savior of All Humanity,"[1] they have fallen into disrepute.

Partly in response to perceived flaws in private securities litigation as a tool for detecting and deterring fraud in financial markets by supplementing the government's limited enforcement resources, scholars—myself included—have argued in favor of alternative approaches.[2] Congress has on two occasions found cause to explore these "third ways"[3] to combat securities fraud. In the Sarbanes-Oxley

* UP IN THE AIR (Paramount Pictures 2009).

** Harold A. Anderson Professor of Law and Values, University of Toledo College of Law.

1. E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571, 1580 (2004).

2. *See* Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91 (2007) [hereinafter Rapp, *Beyond Protection*] (arguing that Congress should adopt a bounty model for securities fraud whistleblowers); Geoffrey Christopher Rapp, *False Claims, not Securities Fraud: Towards Corporate Governance by Whistleblowers*, 15 NEXUS J. L. & POL'Y 55 (2010) [hereinafter Rapp, *False Claims, not Securities Fraud*] (suggesting the use of the False Claims Act to facilitate payouts to whistleblowers for companies that had received federal bailout funds).

3. A "third-way" legal or policy solution draws on the insights of two dominant approaches and seeks to harness the "strengths of each in order to avoid the perils of the other." Shelley

Act of 2002 ("SOX"),[4] Congress extended anti-retaliation protection to employees who engaged in the "protected activity" of blowing the whistle on violations of the securities laws.[5] Because SOX provided protection but no "carrot," I argued in several previous articles that policymakers should develop a "bounty" scheme for securities tipsters.[6] Congress embraced that notion, to a degree, in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank").[7]

While the whistleblower protection provision of SOX and the bounty provision of Dodd-Frank attracted considerable media attention,[8] they have only recently begun to produce a body of case law interpreting the scope of each statute's coverage. Courts have begun to deal with the same kind of thorny issues of statutory interpretation in regard to SOX—and may soon confront similar issues with Dodd-Frank[9]—that they have confronted in interpreting the securities laws in their eight-decade history.

In this Essay, I attempt to uncover whether the whistleblower provisions of SOX and Dodd-Frank should be viewed as "securities laws" subject to the sort of restrictive judicial interpretation that has been so prominent in recent decades. The Supreme Court, this fall, confronted a difficult case of statutory interpretation involving SOX, and should it choose to follow the policy-infused approach to construction it has used in recent private securities cases, we should not be surprised to see a decision that sharply undercuts the scope and coverage of SOX's protections. Should the same sort of interpretation arise in future Dodd-Frank cases, the holes I have identified in that

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Cavalieri, *Between Victim and Agent: A Third-Way Feminist Account of Trafficking for Sex Work*, 86 IND. L.J. 1409, 1445 (2011).

4. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

5. Rapp, *Beyond Protection*, *supra* note 2, at 95.

6. *See id.* at 10 (discussing Securities and Exchange Commission ("SEC") bounties versus other bounty systems).

7. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (codified in scattered sections of the U.S. Code).

8. Rapp, *False Claims, not Securities Fraud*, *supra* note 2, at 104.

9. Because the bounty scheme in Dodd-Frank is largely an administrative one, however, it may be that the SEC, rather than the courts, will have to face questions of interpretation. Still, courts have begun to confront some difficult questions of statutory interpretation relating to the non-bounty components of Dodd-Frank. For instance, Dodd-Frank's reinforcing anti-retaliation provisions for securities fraud whistleblowers are ambiguous as to whether an employee is protected if she protests securities violations internally, or only if she reports them to the SEC. *See* Jenna Green, *SEC Argues Whistleblowers Can Report Internally*, LEGAL TIMES, Feb. 20, 2014, http://www.nationallawjournal.com/legaltimes/id=1392911370189?slreturn=20140125102254#.

statute[10] may widen even further.

Part I of this Essay describes the Supreme Court's policy-based concerns about securities litigation, which have prompted a steady constriction of the reach of doctrine in this area. Part II discusses *Lawson v. FMR LLC*, an example of a difficult question of statutory interpretation that has arisen in connection with the new whistleblower statutes. Part III seeks to resolve whether the bases for the judicial suspicion of securities litigation will apply with equal force when the Court confronts questions of interpretation in *Lawson* and future whistleblower cases.

I. THE JUDICIAL CASE AGAINST THE SECURITIES LAWS

For nearly four decades after their enactment in the wake of the stock market crash of 1929 and the resulting economic crisis, the United States Supreme Court interpreted federal securities laws broadly.[11] Rule 10b-5,[12] the core anti-fraud provision drafted by the Securities and Exchange Commission ("SEC"), was to be interpreted to serve the "broad remedial purposes" of the Securities Exchange Act of 1934.[13]

The tide turned in the mid-1970s, when the Court's securities opinions took a decidedly restrictive tone.[14] In 1975, the Court characterized the body of federal securities laws as a "judicial oak" spawned from a mere "legislative acorn" and warned broadly that securities litigation was "vexatious."[15] In the years that have followed, the Court's policy view on securities litigation has, at times, seemed to grow even more disdainful. The Court recently compared civil securities litigation to the *crime* of extortion, describing potential defendants as "innocent" rather than simply *not liable*.[16]

Policy concerns have shaped securities jurisprudence in ways perhaps more pronounced than in other major areas of federal litigation for two reasons.

First, many securities cases "involve complicated and specialized

10. Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 BYU L. REV. 73, 90–95 (2012) [hereinafter Rapp, *Mutiny by the Bounties*].

11. Sullivan & Thompson, *supra* note 1, at 1580.

12. 17 C.F.R. 240.10b-5 (2013).

13. J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964).

14. Sullivan & Thompson, *supra* note 1, at 1582.

15. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 739–40 (1975).

16. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, 552 U.S. 148, 162 (2008).

questions of statutory construction."[17] With the statutory text and legislative history limited in usefulness, the Court has (and federal courts following its lead have) been guided by policy in restricting the scope of the securities laws in a number of ways.

Second, where previous expansion in the coverage of the securities laws, such as the Court's embrace of a private right of action in *Borak*,[18] was motivated by policy goals, countervailing policy concerns could be used to justify restricting the laws in later interpretations.[19] The Court's characterization of securities litigation as "vexatious" "has been extraordinarily influential in the development of securities fraud jurisprudence."[20] Three decades of "judicial constriction" have been the result.[21]

Of particular concern to courts—and Congress—are class action lawsuits, widely viewed as potentially "abusive."[22] Class action securities lawsuits are theoretically problematic, since they suffer from an inherent "circularity" problem.[23] Damages are paid by a corporation but ultimately born by its current shareholders. Damages are paid *to* the corporation's former shareholders, or some subsection of its shareholders. Diversified investors are equally likely to *pay* in a class action lawsuit as they are to receive a payment; thus, a priori a rational investor should be hostile to class action lawsuits in that plaintiffs' attorneys will reap a sizable share of any settlement or judgment yet a shareholder can equally expect to lose and to win.[24] As a component of an investor protection regime, then, the class action lawsuit seems misplaced. Even though it may be that class actions have been the most objectionable branch in the "judicial oak"[25] of securities laws, the Court has handed down restrictive rulings even in cases that were not class actions,[26] perhaps concerned that an expansionist view of securities

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17. Sullivan & Thompson, *supra* note 1, at 1600.

18. *Borak*, 377 U.S. at 431.

19. Wendy Gerwick Couture, *The End of the Vexatiousness Rationale*, 41 SEC. REG. L.J. 301 (2013).

20. *Id.*

21. Marc I. Steinberg & Brent A. Kirby, *The Assault on Section 11 of the Securities Act: A Study in Judicial Activism*, 63 RUTGERS L. REV. 1, 55 (2010).

22. *See* H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.) (noting the "abusive practices" in private securities litigation).

23. Verity Winship, *Fair Funds and the SEC's Compensation of Injured Investors*, 60 FLA. L. REV. 1103, 1128 (2008).

24. Rapp, *False Claims, not Securities Fraud*, *supra* note 2, at 104.

25. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 739–40 (1975).

26. For instance, the Court adopted a restrictive view of the meaning of the term "prospectus" in *Gustafson v. Alloyd*, 513 U.S. 561 (1995). This case essentially involved a single plaintiff,

laws even in non-aggregate litigation could be used in future class action cases.

Because liability in a class action lawsuit can involve a maddeningly high level of damages, moreover, there is a strong incentive to settle any securities lawsuit that survives motions on the pleadings. There is too much risk for most defendants to "bet the company" so these cases are rarely tried, and discovery itself can be so expensive[27] that even proceeding to summary judgment appears to be a bad bet for most defendants. Therefore, private litigants will almost never try a securities case, and much of the legislative counter-revolution against securities law has involved targeting the way in which motions on the pleadings are considered.

Securities lawsuits are rarely the subject of full-blown trials. Instead, defendants either win a motion to dismiss, or the case will settle. Because of this, *facts* matter less than *law* in resolving securities disputes and the importance of legal interpretations (particularly those offered by appellate courts and the Supreme Court) is magnified. As the Court has grown more and more suspicious of the underlying legal framework regulating private securities litigation, it has repeatedly adopted restrictive readings of the laws' scope based on its policy preferences.

While scholars, such as one of this symposium's presenters, Professor Couture,[28] have criticized the use of "policy heuristics" to resolve securities laws disputes in the Court,[29] these calls have to date, in a wide variety of cases, fallen on deaf ears.[30] Consider, for example, because it will lead into the discussion I embark upon in the next section, the 2011 decision in *Janus Capital Group, Inc., et al. v. First Derivative Traders*.[31]

Plaintiff First Derivative, representing an investor class, sued Janus Capital Management, LLC ("JCM"), a wholly owned subsidiary of Janus Capital Group, Inc. ("JCG"), a major mutual fund provider. The mutual funds were organized as a Massachusetts business trust, the

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Wind Point Partners, L.P. The Court's conclusion in that case was driven largely by a view that a broad interpretation of section 12(2) would be "bad policy." Elliott J. Weiss, *Securities Act Section 12(2) After* Gustafson v. Alloyd Co.*: What Questions Remain?*, 50 BUS. LAW. 1209, 1214 (1995).

27. Rapp, *Beyond Protection*, *supra* note 2, at 104.

28. *See* Wendy Gerwick Couture, *Around the World of Securities Fraud in Eighty Motions to Dismiss*, 45 LOY. U. CHI. L.J. 553 (2014).

29. Couture, *supra* note 19, at 5.

30. *But see id.* at 13–14.

31. 131 S. Ct. 2296 (2011).

Janus Investment Fund ("JIF"). JCG created a separate, wholly-owned subsidiary entity, JCM, which became the administrator of mutual funds under the JIF umbrella.[32] The plaintiffs asserted fraud in connection with JIF's statements about the suitability of certain funds for market timing.[33] The prospectus in question was written by JCM employees but submitted to investors by JIF.[34] The claim was advanced under the familiar anti-fraud provisions, section 10(b) and Rule 10b-5.[35]

Rule 10b-5 makes it unlawful for any person "[t]o make any untrue statement" of material fact in connection with the purchase or sale of securities.[36] To be liable, said the Court, JCM must have "'made' the material misstatements in the prospectus."[37] The Court concluded that JCM could not be held liable. One "'makes' a statement by stating it."[38] Turning to rules of grammar to construe the rule, the Court opined that "to make a statement" is the equivalent of "to state," just as "to make a proclamation" is the equivalent of "to proclaim" or "to make a promise" is the equivalent of "to promise."[39]

With a carriage return and an indent, the Court hurdled from grammar and dictionaries to the following conclusion: "[T]he maker of a statement is the person or entity with ultimate authority over the statement, including its content and how to communicate it. . . . One who prepares or publishes a statement on behalf of another is not its maker."[40] A speechwriter does not "make" a speech—the credit or blame goes to the person who delivers the speech.[41] Only the party listed as the "Filer" of a prospectus—in this case, JIF—is the "maker" of the statement and subject to potential liability.[42] JIF and JCM are "legally separate entities," which "observed" proper "corporate formalities" and maintained boards more independent than required by

32. *Id.* at 2300.

33. *Id.*

34. *Id.* at 2312.

35. *Id.* at 2301.

36. 17 C.F.R. § 240.10b-5(b) (2013).

37. *Janus Capital Grp., Inc.*, 131 S. Ct. at 2301.

38. *Id.* at 2302.

39. *Id.*

40. *Id.*

41. *Id.* This analogy is an odd one. While a speech-deliverer has "ultimate control" over what comes out of her mouth, a speechwriter may still have "control" over things the speech deliverer doesn't care to overrule. Couldn't a speechwriter slip something in that a speechmaker might not notice? And doesn't a speechwriter get *some* credit if her identity is revealed? *See generally* ROBERT SCHLESINGER, WHITE HOUSE GHOSTS: PRESIDENTS AND THEIR SPEECHWRITERS (2008) (describing the "crucial" role played by Presidential speechwriters).

42. *Janus Capital Grp., Inc.*, 131 S. Ct. at 2305.

law.[43]

The Court's interpretation is certainly a plausible reading of Rule 10b-5, but as Justice Breyer pointed out in dissent, it is not compelled—the "English language does not impose upon the word 'make' boundaries of the kind the majority finds determinative."[44] Clearly, policy concerns favoring interpreting the securities laws along "narrow dimensions" played a role.[45]

The Court's reasoning is bad news for my four-old daughter. One of her favorite activities is baking cookies and brownies (and following up by eating them). Under the Court's interpretation, however, she really did not "bake" brownies if I am the one with ultimate control (for prudential reasons) of how long they stay in the oven or at what temperature they are to be cooked. Now, I have to prohibit her from claiming, when handing out treats, that she "baked" the cookies.[46]

II. INTERPRETING SOX AND DODD-FRANK

This term, the Court considered a case giving it the opportunity to interpret the text of SOX's whistleblower protection. In *Lawson v. FMR, LLC*,[47] the Court granted certiorari to review a decision by the First Circuit Court of Appeals that had read narrowly the scope of SOX protection to dismiss a case filed by the employees of a contractor of a publicly held company.[48]

Section 806 of SOX creates an anti-retaliation provision to protect whistleblowers who raise concerns about financial fraud. As codified, that provision provides:

> (a) Whistleblower protection for employees of publicly traded companies—No company with a class of securities registered under section 12 [of the '34 Act], or that is required to file reports under section 15(d) [of the '34 Act] . . . or any officer, employee, contractor,

43. *Id.*

44. *Id.* at 2307 (Breyer, J., dissenting).

45. *Id.* at 2302 (majority opinion) (citing Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, 552 U.S. 148, 167 (2008)). For a further discussion of *Janus*, see Anthony Sallah, *Scheme Liability: Conduct Beyond the Misrepresentations, Deceptive Acts, and Possible* Janus *Intervention*, 45 U. TOL. L. REV. 181, 193–95 (2013).

46. This would not be the case, of course, if she were to "bake" the goodies in an "Easy Bake Oven" designed for use by children. Being a products liability teacher as well, however, I am too familiar with the cases dealing with such a device to allow it into my own home. *See* King v. Hasbro, Inc., No. 07-4001, 2009 WL 3157319 (E.D. Pa. Sept. 28, 2009) (plaintiff suffered injuries from "Easy Bake Oven"); Overen v. Hasbro, Inc., No. 07-1430, 2007 WL 2695792 (D. Minn. Sept. 27, 2007) (same).

47. Lawson v. FMR LLC, 670 F.3d 61 (1st Cir. 2012), *cert. granted*, 133 S. Ct. 2387 (2013).

48. *See id.* at 68.

> subcontractor, or agent of such company . . . may [retaliate] against an employee . . . [for protected whistleblowing activity].[49]

In *Lawson*, the plaintiffs were employed by private companies created by Fidelity, a family of mutual funds, to provide the administrative services to Fidelity funds. Employed by privately held entities, the whistleblowers protested fraud on the part of FMR, LLC, which operated to the disadvantage of shareholders of Fidelity funds (which were public companies). The Funds themselves, while public, had essentially no employees of their own. The Court confronted the question of the scope of SOX's protection. Does it create a civil cause of action for employees of *contractors* of public companies, or only for employees of public companies?

The statutory text is amenable to two plausible interpretations. The plaintiffs, supported by the United States, pointed to the phrase "an employee" and argued that it includes "an employee" of a "contractor" of a public company. To read the coverage narrowly, argued the United States, would effectively exempt mutual funds from SOX's protection since the covered public companies in the mutual fund industry have no employees of their own who would be entitled to bring SOX anti-retaliation claims.[50]

The defendants pointed to the caption of the statute—seemingly limiting its reach to employees *of* public companies.[51] The Court was thus given the opportunity to clarify the usefulness of statutory captions in its opinion. Captions might confirm the meaning of terms contained in the text,[52] or, alternatively, provide only "short-hand references" that could not be used to limit a broadly delineated statutory right.[53]

To the defendants, the statutory provision included the phrase "contractor[s] . . . or agent[s]" to guard against the possibility that a public company would retaliate against one of its employees by retaining a third-party contractor to actually conduct the retaliation.[54] Defendants—and the First Circuit, in siding with them—explained the inclusion of the "contractor" language as an attempt to guard against the "ax-wielding specialist."[55] The First Circuit "not[ed]" the Seventh

49. 18 U.S.C. § 1514A (2012).

50. Brief for the United States as Amici Curiae Supporting Petitioners at 7–8, Lawson v. FMR LLC, No. 12-3 (U.S. Aug. 7, 2013), 2013 WL 4049264, at *7.

51. *Lawson*, 670 F.3d at 68.

52. INS v. Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. 183, 189 (1991).

53. Bhd. of R.R. Trainmen v. Balt. & O.R. Co., 331 U.S. 519, 528 (1947).

54. *Lawson*, 670 F.3d at 67.

55. *Id.* at 69 n.11 (citing Fleszar v. U.S. Dep't of Labor, 598 F.3d 912, 915 (7th Cir. 2010)).

Circuit's reference to "the character George Clooney played in 'Up in the Air.'"[56] In its brief to the Supreme Court, the defendants/respondents took up this analogy.[57] The "ax-wielding" specialist "scenario was depicted in the 2009 movie 'Up in the Air,' in which George Clooney's character works for a private company 'whose contracts are in corporate downsizing. In other words, they fire people.'"[58] Clooney's character in the film, derived from Walter Kirn's novel of the same name,[59] is an obsessive-compulsive corporate consultant with a yen to achieve super-elite status in frequent flyer programs.[60] Congress, supposed the defendants, meant only to prevent covered public companies from retaining such outside support to conduct retaliation, not to extend the coverage of SOX protection to employees of privately held firms.[61]

Up in the Air does not present precisely the scenario for which the respondents invoke it, in that Clooney's character is not retained to retaliate against a whistleblower. However, his firm is clearly valued by its clients for mitigating litigation risks associated with terminating client employees. In one passage, Clooney's character is retained by the manufacturer of a secret-formula sports-energy drink to fire three senior sales and marketing executives.[62] The character's job was to "neutralize the threat from the insiders who might well retaliate, and possibly scuttle the whole enterprise."[63] As he delivered the bad news to the executives, corporate guards were searching their desks for documents "that might play into the hands of legal foes" suing the company over the negative effects of its sports drinks on consumers.[64]

Although the Court's task in *Lawson* was a "seemingly simple exercise in statutory interpretation,"[65] the ambiguity in the statute, and

56. *Id.*

57. Brief of Respondents, Lawson v. FMR LLC, No. 12-3 (U.S. Sept. 30, 2013), 2013 WL 5441390, at *24–25; *see also* Reply Brief of Petitioner, *Lawson*, No. 12-3 (U.S. Oct. 30, 2013), 2013 WL 5863751, at *6.

58. Brief of Respondents, *supra* note 57, at *25 (quoting *Up in the Air*, *Plot Summary*, IMBD, http://www.imdb.com/title/tt1193138/plotsummary (last visited Feb. 14, 2014)).

59. WALTER KIRN, UP IN THE AIR (2001).

60. UP IN THE AIR (Paramount Pictures 2009).

61. *Lawson*, 670 F.3d at 67.

62. KIRN, *supra* note 59, at 247–48.

63. *Id.* at 248.

64. *Id.*

65. Geoffrey Rapp, *Argument Preview: Eligibility of employees of public company contractors for Sarbanes-Oxley whistleblower protection*, SCOTUSBLOG (Oct. 30, 2013, 11:00 AM), http://www.scotusblog.com/2013/10/argument-preview-eligibility-of-employees-of-public-company-contractors-for-sarbanes-oxley-whistleblower-protection/ [hereinafter Rapp, *Argument*

the lack of any legislative guidance, left open the question of how to resolve the statute's scope. Were the Court to apply the anti-vexatiousness policy heuristic familiar to securities lawyers, one would have expected the Court to be restrictive in its reading.

The Court released its decision—a divided one—on March 4, 2014. Writing for the majority, Justice Ginsburg reversed the First Circuit and held that SOX protection extended to the employees of contractors of public companies when those employees were retaliated against because they engaged in protected activity.[66]

Two preliminary comments about the Court's decision in *Lawson* that bear on the question posed in this Essay.

First, the majority decision cited very little in the way of securities law precedent; instead, it spent much of its time discussing employee whistleblower protections in other statutory schemes (such as a statute which provides whistleblower protection in airline safety cases). The majority cites tax cases,[67] a number of whistleblower cases in other areas,[68] and a number of provisions of securities statutes and secondary sources on securities law, but it doesn't cite a single case that would ordinarily be offered as an example of a "securities law" decision.

By contrast, the dissent (authored by Justice Sotomayor) prominently cites the classic "vexatiousness" case from the securities law pantheon, *Blue Chip Stamps v. Manor Drug Stores*.[69]

Second, a disagreement arose between the majority and the dissent on whether the Department of Labor's Administrative Review Board ("ARB") was entitled to administrative deference.[70] The dissent argued that if any administrative agency was to be entitled to deference in SOX interpretations, it should be the SEC (which had not issued an opinion on the coverage of the anti-retaliation provision).[71] The majority, while avoiding ruling on the issue because it decided that the text of the statute provided a sufficient basis for reversal, appeared inclined to afford deference to the Department of Labor, the agency to which

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66. Lawson v. FMR LLC, No. 12-3, slip. op. at 1 (U.S. Mar. 4, 2014).

67. *Id.* at 24 n.16.

68. *Id.* at 28 n.20.

69. *Id.* at 8 (Sotomayor, J., dissenting). Justice Sotomayor cites *Blue Chips* for the proposition that a Congressional choice to depart from an available, easy-to-follow model should not be "presume[d] . . . to be accidental." The specific line in *Blue Chips* cited by Justice Sotomayor is: "When Congress wished to provide a remedy to those who neither purchase nor sell securities, it had little trouble in doing so expressly." 421 U.S. 723, 734 (1975).

70. *Lawson*, No. 12-3, slip op. at 8 n.6 (majority opinion).

71. *Id.* at 17–18 (Sotomayor, J., dissenting).

"Congress delegated [the] responsibility [for interpreting SOX whistleblower protections]."[72]

III. WHAT ARE THE CORE FEATURES OF SECURITIES LAWS?

The basic concept of American securities laws involves a search for mechanisms to ensure investors are protected from fraud: "In short, Congress wanted to prevent fraud, deceit, and misrepresentation in securities transactions."[73] In this sense, it seems that both SOX and Dodd-Frank could be viewed as "securities laws," although Dodd-Frank more clearly so.

SOX sought to take advantage of the fact that employees had valuable information about ongoing securities fraud, yet might stay silent because blowing the whistle involved too great a risk of termination.[74] But at the same time, SOX is more about protecting employees than it is about protecting investors—even if an employee inaccurately perceives fraud, she may be protected,[75] and there has been little indication that any SOX complaints lead to governmental intervention.[76] SOX's title for section 1514A is "Civil action to protect against retaliation in fraud cases." SOX is about protecting against retaliation, more than about the fraud itself. Dodd-Frank, more directly, is about investor protection: the law sought to "put more cops on the beat" to assist the SEC in its investor protection mission.[77]

The fact that both statutes serve, in varying degrees of directness, investor-protection goals, however, would not make them subject to the suspicious interpretation the Court has employed in securities cases. It is not the goal of investor protection that makes securities cases problematic, in the Court's mind, but instead the way in which such cases are litigated and the exposure to which even "innocent"

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72. *Id.* at 8 n.6 (majority opinion).

73. Eric C. Chaffee, *Standing Under Section 10(b) and Rule 10b-5: The Continued Validity of the Forced Seller Exception to the Purchaser-Seller Requirement*, 11 U. PA. J. BUS. L. 843, 886 (2009).

74. Rapp, *Beyond Protection*, *supra* note 2, at 109.

75. Marc I. Steinberg & Seth A. Kaufman, *Minimizing Corporate Liability Exposure When the Whistle Blows in the Post Sarbanes-Oxley Era*, 30 J. CORP. L. 445, 452 (2005).

76. Geoffrey Christopher Rapp, *Four Signal Moments in Whistleblower Law: 1983–2013*, 30 HOFSTRA LAB. & EMP. L.J. 389, 395–96 (2013).

77. Rapp, *Mutiny by the Bounties*, *supra* note 10, at 89 (quoting *Industry Perspectives on the Obama Administration's Financial Regulatory Reform Proposals: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. 62 (2009) (statement of William J. Brodsky, Chairman and Chief Executive Officer, Chicago Board of Options Exchange), *available at* http://democrats.financialservices.house.gov/Hearings/hearingDetails.aspx?NewsID=1150).

defendants may be subjected. Therefore, to determine if the Court will find SOX and Dodd-Frank claims "vexatious," one has to plumb why securities laws have fallen into disrepute. The Court has worried that widely expanded plaintiff classes lead to heightened potential damages,[78] that defendants may be required to expend "large sums" in settlement negotiations and pretrial legal proceedings,[79] about the possibility that new classes of defendants could be targeted in spite of innocence,[80] and over the large number of groundless claims[81] in the securities docket.

Professor Couture identifies four aspects of private securities litigation that raise special policy concerns:

> (1) a plaintiff asserting an unmeritorious claim can nonetheless avoid dismissal and summary judgment and thereby extract settlement value; (2) a plaintiff asserting an unmeritorious claim can extract settlement value by performing extensive discovery that disrupts the business; (3) a plaintiff can establish crucial elements of the claim with uncorroborated, oral testimony; and (4) the court's power to award attorneys' fees [to defendants targeted by] vexatious litigation is "sharply circumscribed."[82]

Are these concerns present with regard to SOX and Dodd-Frank? Let us begin with SOX. The fear of unmeritorious claims by "shirking employees" seeking to "fend off scrutiny of their performance" has been lodged against the SOX provision.[83] SOX claims may be even less amenable to dismissal on the pleadings than private securities class actions. Securities class actions are subject to easier dismissal under the heightened pleading requirements of the Private Securities Litigation Reform Act of 1995.[84] Moreover, SOX claims may hinge on "factual" issues that make them poor candidates for dismissal on the pleadings.[85] The Department of Labor's ARB "highly disfavor[s]" Rule 12 motions as "impractical" within the confines of its practices.[86] Occupational Safety and Health Administration investigators, charged with initial

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78. Couture, *supra* note 19, at 2.
79. *Id.*
80. *Id.* at 3.
81. *Id.*
82. *Id.* at 7.
83. Larry E. Ribstein, *Sarbanes-Oxley After Three Years*, 2005 N.Z. L. REV. 365, 371 (2005).
84. 15 U.S.C. § 78u-4(b) (2012).
85. *See* Sylvester v. Parexel Int'l LLC, No. 07-123, 2011 WL 2517148 (Dep't of Labor May 25, 2011) (holding that heightened pleading standards for SOX claims are inappropriate because such claims "involve inherently factual issues").
86. *Id.*

evaluation of SOX complaints, are permitted to consider facts outside of the pleadings during preliminary phases of a SOX investigation.[87] On the other hand, strict interpretations of various SOX provisions such as the statute of limitations have led to quite high dismissal rates.[88]

The scope of discovery in SOX cases has been "broadly construed," with the usual methods available during the administrative proceedings of a complaint.[89] Protective orders are hard to obtain because the movant "must demonstrate good cause with specificity" to be entitled to such protection.[90] Still, the costs of discovery in defending whistleblower cases may not be unreasonably high. Whistleblower cases are not class actions, in which "company-wide policies or practices" might be relevant and therefore discoverable, dramatically raising the costs of discovery for defendants.[91] Discovery costs in a whistleblower claim based on SOX are probably closer to the level in a typical employment discrimination case—which defense attorneys do not uniformly view to be excessive.[92]

Can a SOX claim be proven with uncorroborated oral testimony? A whistleblower must establish that she engaged in protected activity in order to be covered. There may indeed be circumstances in which a whistleblower can only prove she made a report by testifying (orally) that she did so where a supervisor has denied that such a report was made.[93] Quite a few whistleblowers, however, will copy corporate documents before leaving a company and offer those up as evidence in a subsequent proceeding.[94]

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87. Stephen B. Stern, *Strategies for Analyzing and Responding to Sarbanes-Oxley Whistleblower Claims*, *in* COMPLYING WITH SARBANES-OXLEY'S WHISTLEBLOWER PROVISIONS 7, 13 (Eddie Fournier ed., 2009).

88. Richard Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 107 (2007).

89. Robert B. Fitzpatrick, *Current Developments in Employment Law: The Obama Years at Mid-Term*, 2002 A.B.A. SEC. LAB. & EMP. L. 1505.

90. *Id.*

91. Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1300 (2002).

92. *See* THOMAS E. WILLGING & EMERY G. LEE III, FED. JUDICIAL CTR., IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION 8 (Mar. 2010), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/costciv3.pdf/$file/costciv3.pdf (respondents to one survey "reported varying experiences in employment discrimination litigation, some finding it costly and others not").

93. Richard R. Carlson, *Citizen Employees*, 70 LA. L. REV. 237, 298 (2009) (when this happens, "the fact-finder will need to choose between one party's self-serving testimony and the other party's self-serving testimony").

94. James Fisher et al., *Privatizing Regulation: Whistleblowing and Bounty Hunting in the Financial Services Industry*, 19 DICK. J. INT'L L. 117, 134 (2000).

To be sure, companies targeted in a SOX complaint will rarely receive an award to cover their fees or costs. While some state whistleblower statutes have included provisions to allow for the imposition of fees for spurious complaints[95] and the False Claims Act contains a narrow provision to that effect,[96] SOX did not select that model.

Under Dodd-Frank, neither of the first two concerns would apply because the plaintiff has no control over an SEC investigation launched as a result of her tips. There is no "dismissal" of a whistleblower claim other than when the Commission declines to proceed further in an investigation or civil action. The whistleblower has no ability to extract a settlement from the target firm directly. While a whistleblower might report a tip to the SEC armed with little more than the whistleblower's own words, one doubts that, in the absence of additional support, the SEC would take further action.

In Dodd-Frank, the SEC has no power to award fees or costs to the target of a spurious whistleblower bounty submission.[97] The SEC was confident that its rules impose standards sufficient to weed out "frivolous submissions."[98] To date, Dodd-Frank has resisted calls for a broad cost and fee-shifting measure to benefit wrongfully targeted defendants.[99]

On balance, the concerns about "vexatiousness" that have driven courts to adopt highly formalistic and strict readings of the securities laws do not appear particularly pronounced in the realm of SOX and Dodd-Frank whistleblowers. Yet the superficial connection to "securities" may lead courts to a more skeptical posture than law and policy would require.

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95. Valerie P. Kirk & Ann Clarke Snell, *The Texas Whistleblower Act: Time for a Change*, 26 TEX. TECH. L. REV. 75, 103 (1995); Matt A. Vega, *Beyond Incentives: Making Corporate Whistleblowing Moral in the New Era of Dodd-Frank Act "Bounty Hunting,"* 45 CONN. L. REV. 483, 492 (2012).

96. Andrew M. Hyer, *The Good, the Bad, and the Ugly: The Unnecessarily Broad Impact of* Qui Tam *Civil False Claims Act Cases on Rural Health Care Providers*, 23 HEALTH MATRIX 459, 468–69 (2013).

97. *See generally* Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545, 76 Fed. Reg. 34,300, 34,303 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240, 249) (discussing the rationales for declining to include an enforcement provision that would allow the SEC to assess fees and/or costs for non-meritorious or frivolous complaints).

98. *Id.* at 34,303.

99. Patrick A. Barthle II, Note, *Whistling Rogues: A Comparative Analysis of the Dodd-Frank Whistleblower Bounty Program*, 69 WASH. & LEE L. REV. 1201, 1236–40 (2012).

CONCLUSION

Lawson exposed a "central tension in interpreting SOX," namely "whether the statute should be read broadly, in that it is remedial and ambitious, or narrowly, as has increasingly been the case in Supreme Court decisions in securities fraud cases."[100] There is little reason to equate SOX or Dodd-Frank with the policy concerns that have prompted the Court, over the years, to be "vex[ed]" by securities litigation. At the same time, the superficial connection between the conduct targeted by a Dodd-Frank or SOX whistleblower and a private securities class action may lead the Court to be formalistic and strict in its construction of the two whistleblower provisions.

100. Rapp, *Argument Preview*, *supra* note 65.