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Courts have long assumed the existence of exclusive federal jurisdiction over private actions implied from section 10(b)[1] of the Securities Exchange Act of 1934[2] and rule 10b-5.[3] The result is not only to restrict forum choice for rule 10b-5 claimants[4] but also to generate a host of questions concerning the extent of federal

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1. Section 10(b) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
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> . . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b)(1982) [hereinafter § 10(b)].

2. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1982) [hereinafter 1934 Act].

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

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

17 C.F.R. § 240.10b-5 (1987) [hereinafter rule 10b-5].

Neither rule 10b-5 nor § 10(b) expressly creates a private action. *See supra* notes 1, 3. Beginning with Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946), however, lower federal courts implied a private action for violations of the rule. By 1969 ten of the eleven United States courts of appeals had done so. *See* 6 L. LOSS, SECURITIES REGULATION 3871-73 (2d ed. Supp. 1969)(collecting cases). The Supreme Court first recognized a private action under rule 10b-5 in Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n.9 (1971). For a discussion of the Supreme Court's rule 10b-5 jurisprudence, see Sachs, *The Relevance of Tort Law Doctrines to Rule 10b-5: Should Careless Plaintiffs Be Denied Recovery?*, 71 CORNELL L. REV. 96 (1985).

Dicta in several Supreme Court opinions endorse exclusive jurisdiction over rule 10b-5 actions. In Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), the Court suggested that rule 10b-5 actions might be arbitrable in part because of the exclusivity of federal jurisdiction. *See id.* at 514. *See also* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 225 (1985) (White, J., concurring). In upholding the arbitrability of rule 10b-5 claims in Shearson/Am. Express, Inc. v. McMahon, 107 S. Ct. 2332 (1987), however, the Court did not rely upon the exclusivity of federal jurisdiction. In Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978), the Court indicated that state courts lacked jurisdiction over rule 10b-5 damages actions. *Id.* at 666. This was not essential to the Court's holding, which was that the court of appeals had erred in granting a writ of mandamus directing a district judge to hear claims stayed in deference to a state court proceeding. The judge had not stayed the rule 10b-5 damage claim, however. *See id.* at 659–60, 666.

Lower federal courts have uniformly upheld exclusive jurisdiction over rule 10b-5 actions. *See, e.g.*, Brannan v. Eisenstein, 804 F.2d 1041, 1044-45 (8th Cir. 1986); Murphy v. Gallagher, 761 F.2d 878, 885 (2d Cir. 1985); Cotler v. Inter-County Orthopaedic Ass'n, 526 F.2d 537, 542 (3d Cir. 1975); Abramson v. Pennwood Inv. Corp., 392 F.2d 759, 762 (2d Cir. 1968); Osborne v. Mallory, 86 F. Supp. 869, 879 (S.D.N.Y. 1949). *See also* Jeanes v. Henderson, 688 S.W.2d 100, 105 (Tex. 1986); Kleckley v. Hebert, 464 So. 2d 39, 42 (La. App. 1985).

4. Forum choice for rule 10b-5 counterclaimants is likewise restricted, as Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978), illustrates. In *Calvert*, a state court defendant filed a new action in federal district court for the purpose of obtaining money damages under rule 10b-5. *See id.* at 658. *See also* Andrea Theatres, Inc. v. Theatre Confections, Inc.,

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authority: whether rule 10b-5 actions[5] are exempt from the claim and issue preclusive effects of state court decisions;[6] whether state courts can hear defenses[7] and

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787 F.2d 59, 63 (2d Cir. 1986); Movielab, Inc. v. Berkey Photo, Inc., 321 F. Supp. 806, 810 (S.D.N.Y. 1970), *aff'd*, 452 F.2d 662 (2d Cir. 1971) (per curiam).

5. To avoid the awkward phrase "private actions implied under rule 10b-5," this Article will use "rule 10b-5 actions" to refer to actions under rule 10b-5 brought by private plaintiffs unless there is a need to differentiate actions under rule 10b-5 brought by the SEC.

6. In Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985), the Supreme Court addressed how to ascertain the claim and issue preclusive effects of state court judgments on actions within the federal courts' exclusive jurisdiction. First, a determination must be made as to whether state law would require preclusion of the claim or issue in a later federal action. State law is not apt to provide a precise answer: the Court acknowledged that "a state court will not have occasion to address the *specific* question whether a state judgment has issue or claim preclusive effect in a later action that can be brought only in federal court." *Id.* at 381–82 (emphasis added). Therefore, reliance upon the state's more general preclusion principles will be necessary. *Id.* at 382. If preclusion is not required under state law, it is not allowable in federal court. *Id.* at 383. If, however, preclusion is required under state law, preclusion by a federal court may still not be permissible if the applicable grant of exclusive federal jurisdiction is found expressly or impliedly to repeal the full faith and credit statute, 28 U.S.C. § 1738 (1982). *See id.* at 383–86.

Only a few courts have yet had the occasion to apply *Marrese* to the 1934 Act. In Murphy v. Gallagher, 761 F.2d 878 (2d Cir. 1985), the court affirmed the dismissal of the entire rule 10b-5 action on the basis of New York issue preclusion rules after determining that the grant of exclusive federal jurisdiction in the 1934 Act did not repeal the full faith and credit statute. Similarly, in Gardner v. Surnamer, No. 82-2723 (E.D. Pa. Sept. 5, 1985) (LEXIS, Genfed library, Dist file), the court dismissed the entire rule 10b-5 action on the basis of Pennsylvania issue preclusion rules after determining that the grant of exclusive federal jurisdiction in the 1934 Act did not repeal the full faith and credit statute.

7. Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978), has been the only Supreme Court decision to date to raise the issue of whether state courts have jurisdiction over defenses based on rule 10b-5. In *Calvert*, the Court suggested that state courts do have this jurisdiction. *Id.* at 659. *See also id.* at 669 (Brennan, J., dissenting) (asserting that supremacy clause of federal Constitution requires state court adjudication of defenses based on the 1934 Act). This was merely dictum, however, since the parties did not dispute the existence of state court jurisdiction over defenses based on rule 10b-5. *See id.* at 666 n.9.

In other substantive areas, the Court has sent somewhat conflicting signals about state court power to adjudicate defenses based upon statutes that grant exclusive federal jurisdiction. In Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981), the Court stated categorically that "exclusive federal jurisdiction will not prevent a state court from deciding a federal question collaterally even if it would not have subject-matter jurisdiction over a case raising the question directly." *Id.* at 483–84 n.12. *See also* Pan Am. Petroleum Corp. v. Superior Court, 366 U.S. 656, 663 (1961) (approving state court adjudication of defense based on Natural Gas Act); American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257 (1916) (holding state courts to have jurisdiction over defamation action involving a defense based on the federal patent laws); Bement v. National Harrow Co., 186 U.S. 70 (1902) (affirming state court decision that upheld defense based on the Sherman Act); Pratt v. Paris Gas Light & Coke Co., 168 U.S. 255, 259 (1897) (distinguishing between the state court's lack of jurisdiction of "'*cases*' arising under [the patent] laws" and the state courts' "power to determine *questions* arising under the patent laws") (emphasis in original). The Court appeared to back away somewhat in Hathorn v. Lovorn, 457 U.S. 255 (1982), however. At several points the *Hathorn* Court suggested that state court jurisdiction over defenses derived from statutes granting exclusive federal jurisdiction was typical, but not inevitable. Thus, the Court stated: "even a finding of exclusive federal jurisdiction over claims arising under a federal statute *usually* 'will not prevent a state court from deciding a federal question collaterally.'" *Id.* at 266 (emphasis added) (quoting Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 483 n.12 (1981)). The Court also stated that "[n]othing in [the relevant statutes] negates the *presumption* that, at least where the issue arises collaterally, state courts may decide [it]." *Id.* at 268 (emphasis added).

Lower courts are divided over whether state courts have jurisdiction to hear defenses based on the 1934 Act. *Compare* cases finding no state court jurisdiction over 1934 Act defense: Alkoff v. Gold, 611 F. Supp. 63, 66 (S.D.N.Y. 1985); Investment Assocs., Inc. v. Standard Power & Light Corp., 29 Del. Ch. 225, 239, 48 A.2d 501, 509 (1946), *aff'd*, 29 Del. Ch. 593, 51 A.2d 572 (1947); New York Stock Exch., Inc. v. Goodbody & Co., 42 A.D.2d 556, 345 N.Y.S.2d 58, 59 (1973); Reuben Rose & Co. v. Davon Assocs., Ltd., [1967-69 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,109 (N.Y. Sup. Ct. Dec. 7, 1967) *with* cases finding state court jurisdiction over 1934 Act defense: McGough v. First Arlington Nat'l Bank, 519 F.2d 552, 555 & n.1 (7th Cir. 1975); Shareholders Management Co. v. Gregory, 449 F.2d 326, 327 (9th Cir. 1971); Scope Indus. v. Skadden, Arps, Slate, Meagher & Flom, 576 F. Supp. 373, 379 (C.D. Cal. 1983).

Commentators are likewise divided. *Compare* 2 L. Loss, *supra* note 3, at 977–84 (maintaining that supremacy clause of federal Constitution requires state court adjudication of defenses based on 1934 Act) *and* Note, *Exclusive Jurisdiction of the Federal Courts in Private Civil Actions*, 70 HARV. L. REV. 509, 514 (1957) (maintaining that state court jurisdiction over defenses derived from statutes with exclusive jurisdictional grants "may exist only because there is no practical

state-created claims[8] that involve rule 10b-5; and whether federal courts can stay rule 10b-5 actions in deference to state court litigation.[9] In dividing on these questions,[10] courts invariably fail to examine the underlying premise: that exclusive federal jurisdiction has a valid legal basis.[11]

The thesis of this Article is that exclusive federal jurisdiction over rule 10b-5 actions lacks a legitimate foundation and should be rejected. State courts should share with federal courts the adjudication of rule 10b-5 actions.

Courts have summarily assumed that rule 10b-5 actions are governed by the grant of exclusive jurisdiction in section 27[12] of the 1934 Act.[13] Judicial failure to question this assumption can probably be traced to two factors. The first factor is uncertainty concerning the purpose of section 27; Congress's reason for granting exclusive jurisdiction in the 1934 Act and concurrent jurisdiction in the other five

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alternative") *with* Dickinson, *Exclusive Federal Jurisdiction and the Role of the States in Securities Regulation*, 65 IOWA L. REV. 1201, 1212–37 (1980) (finding state court adjudication of 1934 Act defenses to be required neither by the supremacy clause nor by the 1934 Act).

8. *Compare* Matlack v. Board of Chosen Freeholders, 191 N.J. Super. 236, 247, 466 A.2d 83, 94 (1982) (finding no state court jurisdiction over state-created claim alleging violation of 1934 Act), *aff'd on other grounds*, 194 N.J. Super. 359, 476 A.2d 1262 (App. Div.), *certif. denied*, 99 N.J. 191, 491 A.2d 693 (1984) *and* Malkan v. General Transistor Corp., 27 Misc. 2d 677, 679, 207 N.Y.S.2d 345, 347 (1960) (expressing "grave doubt" that state courts have jurisdiction over a state-created claim alleging violation of the 1934 Act) *with* Guiterman v. Pennsylvania R.R. Co., 48 F.2d 851 (E.D.N.Y. 1931) (upholding state court jurisdiction over state-created claim alleging violation of Sherman Act). For a discussion of the problem as it relates to the proxy provisions of the 1934 Act, see Loss, *The SEC Proxy Rules and State Law*, 73 HARV. L. REV. 1249, 1274 (1960).

9. In Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978), the Supreme Court expressly avoided the question of whether a federal court is "without power to stay proceedings, in deference to a contemporaneous state action, where the federal courts have exclusive jurisdiction over the issue presented." *Id.* at 666. Lower federal courts are divided. *Compare* Silberkleit v. Kantrowitz, 713 F.2d 433, 434 (9th Cir. 1983) (no power to stay section 10(b) claims) *and* Cotler v. Inter-County Orthopaedic Ass'n, 526 F.2d 537, 542 (3d Cir. 1975) (same) *with* Weiner v. Shearson, Hammill & Co., 521 F.2d 817, 822 (9th Cir. 1975) (directing district court to determine whether stay of section 10(b) claim would be appropriate).

10. *See supra* notes 6–9 and accompanying text.

11. The only extensive treatment of the question appears in Note, *Implied Rights Under the Securities Exchange Act of 1934—Federal Jurisdiction—Exclusive or Concurrent?*, 21 CASE W. RES. L. REV. 93 (1969) (supporting concurrent jurisdiction) [hereinafter Note, *Implied Rights Under the Securities Exchange Act*]. Professor Loss has addressed the topic briefly as it relates to actions implied under the 1934 Act proxy provisions. *See* Loss, *supra* note 8, at 1272–73. For a description of his views, see *infra* notes 105–10 and accompanying text. Professor Bromberg has simply noted the question. *See* 1 A. BROMBERG & L. LOWENFELS, SECURITIES FRAUD AND COMMODITIES FRAUD § 2.4 (124) (1986). *See also* Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 293–94 (1963) (questioning in general whether a statutory grant of exclusive federal jurisdiction is applicable to implied actions).

12. Section 27 as currently codified provides:

> The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or the rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291 and 1292 of title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

15 U.S.C. § 78aa (1982) [hereinafter § 27]. This Article will use "§ 27" to encompass only that portion of § 27 containing the grant of exclusive federal jurisdiction.

13. For illustrative cases, see *supra* note 3.

federal securities acts[14] remains a matter of speculation.[15] Without a rationale for the 1934 Act's general rule, there is perhaps a natural hesitancy to create exceptions. The second factor is simply the length of time it took the Supreme Court finally to endorse rule 10b-5 actions. While implication under rule 10b-5 began in the lower courts in 1946,[16] the Supreme Court did not give its imprimatur until 1971.[17] To legitimate implied actions during this long period of uncertainty, lower courts applied the same jurisdictional provision that governed the express actions.[18] Since rule 10b-5 actions are today firmly entrenched,[19] the time has come to examine critically whether federal courts are in fact the sole forum for their adjudication.[20]

Summary assumptions favoring exclusive jurisdiction are always inappropriate, since concurrent jurisdiction over every federal action is a well-entrenched presumption.[21] The presumption is rebuttable only upon a substantial showing: "an explicit statutory directive, . . . unmistakable implication from legislative history, or . . . clear incompatibility between state-court jurisdiction and federal interests."[22] Courts have not attempted to make—and cannot make—such a showing with respect to rule 10b-5.[23]

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14. *See* Securities Act of 1933, § 22(a), 15 U.S.C. § 77v(a) (1982); Public Utility Holding Company Act of 1935, § 25, 15 U.S.C. § 79y (1982); Trust Indenture Act of 1939, § 322(b), 15 U.S.C. § 77vvv(b) (1982); Investment Company Act of 1940, § 44, 15 U.S.C. § 80a-43 (1982); Investment Advisers Act of 1940, § 214, 15 U.S.C. § 80b-14 (1982).

15. For a discussion of the traditional explanations for the grant of exclusive jurisdiction in the 1934 Act, along with a new explanation, see *infra* notes 190–219 and accompanying text.

For cases acknowledging that the legislative history provides no explanation, see Calvert Fire Ins. Co. v. American Mut. Reins. Co., 600 F.2d 1228, 1236 n.16 (7th Cir. 1979); Gardner v. Surnamer, No. 82-2723 (E.D. Pa. Sept. 5, 1985) (LEXIS, Genfed library, Dist file); *In re* Transocean Tender Offer Secs. Litig., 427 F. Supp. 1211, 1221 (N.D. Ill. 1977). *But cf.* McClure v. Borne Chem. Co., 292 F.2d 824, 833 (3d Cir.) (existence of § 27 suggests that "Congress intended uniform enforcement of rights arising under" the 1934 Act), *cert. denied*, 368 U.S. 939 (1961).

16. The first case to imply a private action under rule 10b-5 was Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946).

17. *See* Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n.9 (1971).

18. At least one lower court stated explicitly that its purpose in holding § 27 applicable to an action implied under the margin rules was to give that action "credentials of legitimacy." *See* Remar v. Clayton Secs. Corp., 81 F. Supp. 1014, 1018 (D. Mass. 1949).

19. In Herman & MacLean v. Huddleston, 459 U.S. 375 (1983), the Court observed that "[t]he existence of this implied remedy is simply beyond peradventure." *Id.* at 380.

20. Courts have not given careful attention to whether other grants of exclusive federal jurisdiction govern implied actions. *See, e.g.*, Award Serv., Inc. v. Northern Cal. Retail Clerks Unions & Food Employers Joint Pension Trust Fund, 763 F.2d 1066, 1068 (9th Cir. 1985) (not deciding whether grant of exclusive jurisdiction in Employment Retirement Income Security Act governs implied actions), *cert. denied*, 474 U.S. 1081 (1986); Enders v. American Patent Search Co., 535 F.2d 1085, 1089 (9th Cir.) (concluding in dictum after brief discussion that grant of exclusive federal jurisdiction over patent actions governs action implied under federal patent laws), *cert. denied*, 429 U.S. 888 (1976); Shields v. C.D. Johnson Marine Serv., Inc., 342 Pa. Super. 501, 506–07, 493 A.2d 701, 704 (1985) (concluding without discussion that grant of exclusive jurisdiction in Employment Retirement Income Security Act governs action implied under Internal Revenue Code).

21. *See, e.g.*, Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477–84 (1981); Claflin v. Houseman, 93 U.S. 130, 136–42 (1876).

22. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981).

23. The currently prevailing judicial view contains an element of absurdity. Just as rule 10b-5 actions are thought to be governed by the grant of exclusive federal jurisdiction in the 1934 Act, *see supra* note 3 and accompanying text, actions implied under § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1982), are thought to be governed by the concurrent jurisdictional provision of that Act, 15 U.S.C. § 77v(a) (1982). *See, e.g.*, Luce v. Edelstein, 802 F.2d 49, 53, 57 n.5 (2d Cir. 1986); Jost v. Locke, 65 Or. App. 704, 709 n.5, 673 P.2d 545, 548 n.5 (1983), *review denied*, 296 Or. 712, 678 P.2d 740 (1984). Yet § 17(a) was the model for rule 10b-5. *See In re* Ward LaFrance Truck Corp., 13 S.E.C. 373, 381 n.8 (1943); *Conference on Codification of the Federal Securities Laws.*, 22 BUS. LAW. 793, 922 (1967) (remarks of Milton Freeman). Actions implied under § 17(a) and rule 10b-5 have close to identical elements. *See* 5 A. JACOBS, LITIGATION AND PRACTICE UNDER RULE 10b-5 § 3.01[d] (1987). That an action pled under § 17(a) can be brought in state

Part I of this Article traces the evolution of the presumption of concurrent jurisdiction. The Supreme Court established the presumption in order to safeguard the power of state courts to hear federal actions. The presumption has been accorded wide applicability for more than one hundred years.

Parts II, III, and IV apply the presumption of concurrent jurisdiction to rule 10b-5 actions. Part II addresses whether the presumption can be rebutted by section 27, the 1934 Act's grant of exclusive jurisdiction. The examination shows that while section 27 may be read to include implied actions, to read it this way is to ignore the legal context from which the 1934 Act arose.

Part III addresses whether the presumption of concurrent jurisdiction over rule 10b-5 actions can be rebutted by legislative history. After reviewing the traditional explanations for why Congress granted exclusive jurisdiction, it proposes a new explanation premised on the need to safeguard the express actions. Thus understood, section 27 should be applicable only to those implied actions that resemble the endangered express actions. Rule 10b-5 actions, however, bear no such resemblance.[24] Part III also shows that Congress's failure to amend section 27 to exclude rule 10b-5 actions does not ratify their inclusion.

Part IV addresses whether the presumption of concurrent jurisdiction over rule 10b-5 actions can be rebutted by federal interests. It considers first the policies specific to the 1934 Act. The 1934 Act evinces solicitude for state authority over securities matters by preserving state statutory and common law securities remedies in section 28(a).[25] This suggests that provisions restricting state authority should be given a narrow reading. Section 27 restricts state authority by making jurisdiction exclusively federal. Read narrowly, section 27 would exclude implied actions, since the statutory language does not mandate their inclusion.[26] Part IV then proceeds to consider the practical considerations that generally favor exclusive federal jurisdiction: the need for uniform interpretation, for federal expertise, or for sensitivity to federal policies. It shows that these considerations are germane only where state courts are estranged from the underlying substantive law, whereas state courts have become conversant with the law relevant to rule 10b-5 as the result of the design of the federal securities acts.

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or federal court whereas the same action pled under rule 10b-5 must be brought in federal court is therefore highly anomalous.

The Supreme Court has expressly left open the question of whether there is an implied action under § 17(a). *See, e.g.*, Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 304 n.9 (1985); Herman & MacLean v. Huddleston, 459 U.S. 375, 378 n.2 (1983); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 734 n.6 (1975). Lower courts are divided. *Compare* Mosher v. Kane, 784 F.2d 1385, 1390–91 & n.9 (9th Cir. 1986) (action exists) *with* Yoder v. Orthomolecular Nutrition Inst., Inc., 751 F.2d 555, 559 n.3 (2d Cir. 1985) (open question) *with* Brannan v. Eisenstein, 804 F.2d 1041, 1043 n.1 (8th Cir. 1986) (action does not exist).

One commentator has suggested that a reason not to imply an action under § 17(a) is that its substantial similarity to the rule 10b-5 action would mean that "the congressional purpose of having 1934 Act claims heard exclusively in the federal courts would be thwarted." Horton, *Section 17(a) of the 1933 Securities Act—The Wrong Place for a Private Right*, 68 NW. U.L. REV. 44, 54–55 (1973).

24. *See infra* notes 217–19 and accompanying text.

25. Section 28(a) of the 1934 Act, 15 U.S.C. § 78bb(a) (1982) [hereinafter § 28(a)].

26. *See infra* notes 111–13, 161–62 and accompanying text.

I. The Presumption Favoring Concurrent State and Federal Court Jurisdiction Over Federal Actions

The power of state courts to hear federal actions is rooted in the federal Constitution. Under article III, Congress may choose—but is not required—to establish lower federal courts.[27] Had lower federal courts not been established, the initial forum for federal actions would of necessity have been state courts.[28] Alexander Hamilton confirms that the drafters expected state courts to hear federal actions:

> I hold that the State courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion, that in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth.[29]

The first Congress concurred. The Judiciary Act of 1789[30] clearly presupposed state court jurisdiction over federal actions when it provided for Supreme Court review of state court judgments involving federal questions.[31] Moreover, the Act's grant of jurisdiction to the newly created federal trial courts involved "a constant exercise of the authority to include or exclude the State courts."[32] Thus, for example, federal courts were accorded concurrently with state courts the power to adjudicate private civil actions involving parties from different states,[33] a party who was an alien,[34] or the United States as plaintiff.[35] On the other hand, state courts were prohibited, with certain exceptions, from hearing suits against foreign consuls,[36] admiralty and maritime actions,[37] and federal crimes.[38]

This history notwithstanding, the Supreme Court did not thereafter consistently adhere to the view that federal actions could be heard in state courts. In its 1816 decision in *Martin v. Hunter's Lessee*,[39] Justice Story maintained that cases arising under the Constitution and federal laws could be heard only in federal courts, which he suggested were constitutionally required:

> In the first place, as to cases arriving [sic] under the constitution, laws, and treaties of the United States. Here the state courts could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the state courts previous to the adoption of the

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27. Article III provides: "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1.

The decision to give Congress the choice of whether to establish lower federal courts represented a compromise, described in Frank, *Historical Bases of the Federal Judicial System*, 13 Law & Contemp. Probs. 3, 9–11 (1948). For the classic history of the federal judiciary, see F. Frankfurter & J. Landis, The Business Of The Supreme Court (1928).

28. *See* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts And The Federal System 11–12 (2d ed. 1973) [hereinafter Hart & Wechsler].

29. The Federalist No. 82, at 493 (A. Hamilton) (C. Rossiter ed. 1961).

30. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

31. *See id.*, ch. 20, § 25, 1 Stat. 73, 85–87.

32. Claflin v. Houseman, 93 U.S. 130, 139 (1876).

33. *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. The amount in controversy had to exceed five hundred dollars. *See id.*

34. *See id.* The amount in controversy had to exceed five hundred dollars. *See id.*

35. *See id.* The amount in controversy had to exceed five hundred dollars. *See id.*

36. *See* Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77.

37. *See id.*

38. *See id.* at 76.

39. 14 U.S. (1 Wheat.) 304 (1816).

> constitution, and it could not afterwards be directly conferred on them; for the constitution expressly requires the judicial power to be vested in courts ordained and established by the United States.[40]

The Supreme Court did not conclusively lay to rest Justice Story's views until after both the Civil War[41] and Congress's 1875 grant to lower federal courts of jurisdiction over federal questions.[42] The pivotal decision was *Claflin v. Houseman*,[43] which upheld state court jurisdiction of an action under the Bankrupt Act of 1867.[44] Specifically rejecting language from *Martin v. Hunter's Lessee*[45] and relying heavily on the views of Hamilton[46] and the 1789 Judiciary Act,[47] the *Claflin* Court affirmed the "general principle" that "if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it."[48] The assumption derived from the nature of the federal system:

> The fact that a State court derives its existence and functions from the State laws is no reason why it should not afford [federal] relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.[49]

The Court in *Claflin* did more, however, than merely endorse the general principle of concurrent jurisdiction over federal actions. The Court established the principle as a rebuttable presumption, apparently perceiving the presumptive form as either the truest exposition of the principle or else its best protection.[50] Thus, concurrent jurisdiction was held to be the norm, applicable unless "excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case."[51]

In the decades that followed, the Court applied the presumption of concurrent jurisdiction to numerous constitutional and statutory provisions. Relying on the presumption, the Court ruled that neither the Constitution's commerce clause[52] nor its grant of diversity jurisdiction[53] implicitly conferred exclusive jurisdiction on federal

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40. *Id.* at 334–35. *See also* Testa v. Katt, 330 U.S. 386, 390 & n.6 (1947) (collecting cases "in which this Court and state courts broadly questioned the power and duty of state courts to exercise their jurisdiction to enforce United States civil and penal statutes"). *But cf.* Houston v. Moore, 18 U.S. (5 Wheat.) 1, 28–32 (1820) (endorsing state court jurisdiction over federal military offenses).

41. *See* Testa v. Katt, 330 U.S. 386, 390 (1947).

42. *See* Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470.

43. 93 U.S. 130 (1876).

44. Bankrupt Act of 1867, ch. 176, 14 Stat. 517.

45. Claflin v. Houseman, 93 U.S. 130, 140–41 (1876).

46. *See id.* at 138.

47. *See id.* at 139–40.

48. *See id.* at 136. Congress has the power to make all federal jurisdiction exclusive. *See, e.g.*, Bowles v. Willingham, 321 U.S. 503, 512 (1944); Houston v. Moore, 18 U.S. (5 Wheat.) 1, 26 (1820).

49. Claflin v. Houseman, 93 U.S. 130, 137 (1876).

50. The *Claflin* Court did not specify its precise reason for adopting the presumptive form. *See id.* at 136, 137.

51. *Id.* at 136.

52. U.S. CONST. art. I, § 8, *construed in* Grubb v. Public Util. Comm'n, 281 U.S. 470, 475–76 (1930).

53. U.S. CONST. ART. III, § 2, *construed in* Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511 (1898).

courts.[54] The Court likewise found no implied exclusivity for actions under the following federal statutes: the Hepburn Act,[55] the Employers Liability Act,[56] the grant of federal jurisdiction over civil actions brought by the United States,[57] and the Labor Management Relations Act,[58] as well as habeas corpus proceedings alleging violations of state prisoners' federal rights.[59] Although collectively these decisions illustrate the presumption's wide applicability,[60] individually they provided no real guidance as to how the presumption would operate in a close case.[61] Most of these decisions simply invoke the presumption after noting that no reference to exclusive jurisdiction appears in the statutory language.[62] Legislative history seemed to play a significant role in only one of the decisions.[63]

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54. An additional decision applying the presumption of concurrent jurisdiction to the federal Constitution was Ohio *ex rel.* Popovici v. Agler, 280 U.S. 379 (1930), discussed *infra* notes 95–100 and accompanying text.

55. Hepburn Act, ch. 3591, § 7, 34 Stat. 584, 595 (1906), *construed in* Missouri *ex rel.* St. Louis, B. & M. Ry. v. Taylor, 266 U.S. 200, 207–08 (1924); Galveston H. & S.A. Ry. v. Wallace, 223 U.S. 481, 490 (1912).

56. Employers Liability Act of 1908, ch. 149, 35 Stat. 65, *construed in* Mondou v. New York N.H. & H. R.R., 223 U.S. 1, 56–59 (1912).

57. Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091, *construed in* United States v. Bank of N.Y. & Trust Co., 296 U.S. 463, 479 (1936).

58. Labor Management Relations Act, 29 U.S.C. § 185 (1982), *construed in* Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962), discussed *infra* notes 264–73 and accompanying text.

59. *See* Robb v. Connolly, 111 U.S. 624 (1884). *But cf.* Tarble's Case, 80 U.S. (13 Wall.) 397 (1871) (finding no state court jurisdiction to issue writ of habeas corpus directing federal officer to produce a soldier in the U.S. army); McClung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821) (finding no state court jurisdiction to issue writs of mandamus to federal officials).

60. The Court made no overt reference to *Claflin* in its decisions upholding without discussion exclusive jurisdiction over federal antitrust actions. *See, e.g.*, Freeman v. Bee Machine Co., 319 U.S. 448, 451 n.6 (1943); General Inv. Co. v. Lake Shore & M.S. Ry., 260 U.S. 261, 287 (1922); Blumenstock Bros. Advertising Agency v. Curtis Pub. Co., 252 U.S. 436, 440–41 (1920). *See also* Marrese v. American Academy of Orthopaedic Surgeons, 726 F.2d 1150, 1152–53 (7th Cir. 1984) (questioning exclusive jurisdiction over federal antitrust actions but accepting it as "settled law"), *rev'd*, 470 U.S. 373, 379–80 (1985) (affirming without discussion exclusive jurisdiction over federal antitrust actions). The statutory jurisdictional language at issue in these decisions did not refer to federal exclusivity. *See* Sherman Act, ch. 647, § 7, 26 Stat. 209, 210 (1890); Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (currently codified at 15 U.S.C. § 15 (1982)). Commentators have noted that these decisions contravened the intent of Congress. *See* Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 317 (1976); Note, *supra* note 7, at 510 n.13.

Nor did the Court refer to *Claflin* in Minnesota v. United States, 305 U.S. 382 (1939), which implied exclusive jurisdiction over an action to condemn Indian lands. The Court concluded:

> There are persuasive reasons why that statute [permitting condemnation] should not be construed as authorizing suit in a state court. It relates to Indian lands under trust allotments—a subject within the exclusive control of the federal government. The judicial determination of controversies concerning such lands has been commonly committed exclusively to federal courts.

Id. at 389 (footnote omitted). In searching for reasons to justify exclusive jurisdiction, however, the Court was acting consistently with *Claflin*. Also consistent with *Claflin* was the Court's rejection of the government's argument that "a statute granting permission to sue the United States must be construed to apply only to the federal courts unless there is an explicit reference to the state tribunals." *Id.* at 389–90 n.5. Dictum in two other decisions, however, did appear to contravene *Claflin*. *See* Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 559 (1963) (indicating in dictum that there could have been "grave doubt" about state court jurisdiction over suits against national banks had the National Banking Act not affirmatively provided for state court jurisdiction); First Nat'l Bank v. Fellows, 244 U.S. 416, 428 (1917) (containing dictum to the same effect).

61. For a criticism of the imprecision of the *Claflin* decision, see Redish & Muench, *supra* note 60, at 313–25.

62. *See* United States v. Bank of N.Y. & Trust Co., 296 U.S. 463, 479 (1936); Grubb v. Public Util. Comm'n, 281 U.S. 470, 475–76 (1930); Missouri *ex rel.* St. Louis, B. & M. Ry. Co. v. Taylor, 266 U.S. 200, 207–08 (1924); Mondou v. New York, N.H. & H. R.R., 223 U.S. 1, 56–59 (1912); Galveston, H. & S.A. Ry. v. Wallace, 223 U.S. 481, 490–91 (1912); Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511 (1898); Robb v. Connolly, 111 U.S. 624 (1884).

63. *See* Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 508–13 (1962). *See also* Ohio *ex rel.* Popovici v. Agler, 280 U.S. 379, 383–84 (1930) (examination of contemporaneous legal context).

The imprecision of the *Claflin* standard notwithstanding, lower courts applied the presumption of concurrent

The Supreme Court provided some clarification in its 1981 decision in *Gulf Offshore Co. v. Mobil Oil Corp.*[64] Reaffirming *Claflin*,[65] the *Gulf* Court ruled that the presumption of concurrent jurisdiction can be rebutted by statutory language, legislative history, or federal interests.[66] The federal interests to be considered are of two types: policies specific to the statute or action in question, and practicalities generally favoring exclusive jurisdiction.[67] Rebuttal invariably requires a substantial showing: "an *explicit* statutory directive, . . . *unmistakable* implication from legislative history, or . . . *clear* incompatibility between state-court jurisdiction and federal interests."[68] The use of the words "explicit," "unmistakable," and "clear" indicates that the presumption of concurrent jurisdiction will not be easily overcome. Further evidence of the presumption's strength is the narrowness of the Court's ruling that rebuttal as to one action has no necessary application to other actions under the same statute.[69]

Lower courts have applied *Gulf* to determine the appropriateness of exclusive jurisdiction for a wide variety of federal actions, including those under the Racketeer Influenced and Corrupt Organizations Act,[70] Title VII of the Civil Rights Act,[71] the Voting Rights Act,[72] the Bank Holding Company Act,[73] the Federal Consumer

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jurisdiction to actions under a variety of federal statutes. *See, e.g.*, Tsang v. Kan, 173 F.2d 204 (9th Cir.) (upholding concurrent jurisdiction for action under Selective Training and Service Act), *cert. denied*, 337 U.S. 939 (1949); Western Fruit Growers, Inc. v. United States, 124 F.2d 381, 386–87 (9th Cir. 1941) (upholding exclusive jurisdiction for action under Agricultural Adjustment Act); Safe Workers' Org. v. Ballinger, 389 F. Supp. 903, 910 (S.D. Ohio 1974) (upholding exclusive jurisdiction for action under the Labor-Management Reporting and Disclosure Act); S.P. Growers Ass'n v. Rodriguez, 17 Cal. 3d 719, 726, 552 P.2d 721, 725, 131 Cal. Rptr. 761, 765 (1976) (upholding concurrent jurisdiction for action under Farm Labor Contractor Registration Act); Sands v. Weingrad, 99 Misc. 2d 598, 416 N.Y.S.2d 969 (N.Y. Sup. Ct. 1979) (upholding concurrent jurisdiction for action for negligent disclosure of federal income tax returns).

64. 453 U.S. 473 (1981).

65. *See id.* at 478. *See also* Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 508 (1962) (describing *Claflin* as "remain[ing] unmodified through the years").

66. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981).

67. *Id.* at 483–84.

68. *Id.* at 478 (emphasis added).

69. The *Gulf* Court stated: "this case only involves state-court jurisdiction over actions based on incorporated state law. We express no opinion on whether state courts enjoy concurrent jurisdiction over actions based on the substantive provisions of OCSLA." *Id.* at 480 n.7.

It therefore follows that this Article's thesis that concurrent jurisdiction is appropriate for rule 10b-5 actions has no necessary application to other actions implied under the 1934 Act, such as those implied under the proxy provisions, *see* J.I. Case Co. v. Borak, 377 U.S. 426 (1964), or under the margin or stock exchange rules, *see* 2 A. BROMBERG & L. LOWENFELS, *supra* note 11, §§ 5.5–5.6.

70. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–68 (1982) [hereinafter RICO]. Courts are divided as to whether jurisdiction over RICO actions is exclusively federal. *Compare* those cases finding concurrent jurisdiction: Karel v. Kroner, 635 F. Supp. 725, 728–31 (N.D. Ill. 1986); Luebke v. Marine Nat'l Bank, 567 F. Supp. 1460, 1462 (E.D. Wis. 1983) (alternate holding); Cianci v. Superior Court, 40 Cal. 3d 903, 710 P.2d 375, 221 Cal. Rptr. 575 (1985) *with* those cases finding exclusive jurisdiction: Kinsey v. Nestor Exploration, Ltd., 604 F. Supp. 1365, 1370–71 (E.D. Wash. 1985); County of Cook v. MidCon Corp., 574 F. Supp. 902, 911–12 (N.D. Ill. 1983), *aff'd on other grounds*, 773 F.2d 892, 905 n.4 (7th Cir. 1985); Levinson v. American Accident Reins. Group, 503 A.2d 632, 634–35 (Del. Ch. 1985); Greenview Trading Co. v. Hershman & Leicher, P.C., 108 A.D.2d 468, 489 N.Y.S.2d 502 (1985); Main Rusk Assocs. v. Interior Space Constructors, Inc., 699 S.W.2d 305 (Tex. Ct. App. 1985).

71. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e17 (1982) [hereinafter Title VII claims]. *See, e.g.*, Valenzuela v. Kraft, Inc., 739 F.2d 434 (9th Cir. 1984) (exclusive jurisdiction); Retired Pub. Employees' Ass'n v. Board of Admin., 184 Cal. App. 3d 378, 229 Cal. Rptr. 69 (1986) (same). *But cf.* Kremer v. Chemical Constr. Corp., 456 U.S. 461, 479 n.20 (1982) (expressly not determining whether jurisdiction over Title VII claims is exclusively federal).

72. Voting Rights Act of 1965, 42 U.S.C. §§ 1971–74 (1982) [hereinafter Voting Rights Act]. *See* Pendleton v. Heard, 642 F. Supp. 940, 942–43 (S.D. Miss. 1986) (concurrent jurisdiction for claims under § 5 of Voting Rights Act). *But cf.* Hathorn v. Lovorn, 457 U.S. 255, 267–68 (1982) (indicating that jurisdiction of claims under § 5 may be exclusively federal), discussed *infra* notes 88–93 and accompanying text.

73. Bank Holding Company Act Amendments of 1970, 12 U.S.C. §§ 1971–78 (1982). *See, e.g.*, Lane v. Central

Product Safety Act,[74] the Petroleum Market Practices Act,[75] and federal common law.[76] Most of these decisions have upheld concurrent jurisdiction,[77] in accordance with *Gulf*'s teaching that the presumption of concurrent jurisdiction is strong.[78] Whether jurisdiction over rule 10b-5 actions should be exclusively federal must likewise be analyzed in accordance with *Gulf*.

II. Federal Jurisdiction Over Rule 10b-5: Statutory Language

The Supreme Court has ruled that the presumption of concurrent jurisdiction may be rebutted by statutory language.[79] The Court has, moreover, provided several principles by which this language may be assessed.

The first principle is that to overcome the presumption of concurrent jurisdiction, statutory language must be unequivocal. When the language is instead amenable to conflicting interpretations, rebuttal will fail. The Court's decisions in *Gulf Offshore Co. v. Mobil Oil Corp.*[80] and *Hathorn v. Lovorn*[81] provide illustrations.

In *Gulf*, the Court upheld concurrent jurisdiction for personal injury claims under the Outer Continental Shelf Lands Act[82] based in part on the language of OCSLA's jurisdictional grant.[83] The grant gave federal district courts "original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf;"[84] state courts were simply not mentioned.[85] Stressing that state courts had not been affirmatively excluded, the Court ruled that they remained appropriate forums.[86] The OCSLA grant, it should be noted, was literally consistent with exclusive federal jurisdiction. Following the well

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Bank, 756 F.2d 814 (11th Cir. 1985) (concurrent jurisdiction over claims arising from antitying provisions); Nesglo, Inc. v. Chase Manhattan Bank, 562 F. Supp. 1029, 1044 n.25 (D.P.R. 1983) (same).

74. Consumer Product Safety Act, 15 U.S.C. §§ 2051–83 (1982). *See, e.g.*, Swenson v. Emerson Elec. Co., 374 N.W.2d 690, 697 (Minn. 1985) (concurrent jurisdiction), *cert. denied*, 476 U.S. 1130 (1986); Howard v. Poseidon Pools, Inc., 133 Misc. 2d 43, 48–49, 506 N.Y.S.2d 519, 522–23 (N.Y. Sup. Ct. 1986) (same).

75. Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801–41 (1982). Courts are divided over whether jurisdiction is exclusively federal. *Compare* Johnson v. Mobil Oil Corp., 364 Pa. Super. 275, 528 A.2d 155 (1987) (concurrent jurisdiction) *with* Rustom v. Atlantic Richfield Co., 618 F. Supp. 210 (C.D. Cal. 1985) (exclusive jurisdiction).

76. *See* Nordlicht v. New York Tel. Co., 799 F.2d 859, 863–65 (2d Cir. 1986) (concurrent jurisdiction for state-created claim alleging violation of federal law of telecommunications), *cert. denied*, 107 S. Ct. 929 (1987); Stalnaker v. Boeing Co., 186 Cal. App. 3d 1291, 1304, 231 Cal. Rptr. 323, 330–31 (1986) (concurrent jurisdiction over claim implied from fourth amendment).

77. *See supra* notes 70–76 and accompanying text.

78. *See supra* notes 68–69 and accompanying text.

79. *See, e.g.*, Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478–79 (1981); Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 506 (1962).

80. 453 U.S. 473 (1981).

81. 457 U.S. 255 (1982).

82. Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–56 (1982) [hereinafter OCSLA].

83. Outer Continental Shelf Lands Act, ch. 345, § 4, 67 Stat. 462, 463 (1953) (currently codified at 43 U.S.C. § 1349(b) (1982)).

84. *See id.*

85. *See id.*

86. Supreme Court cases prior to *Gulf* had announced the principle that a grant of jurisdiction to federal courts does not by itself deprive state courts of jurisdiction. *See* United States v. Bank of N.Y. & Trust Co., 296 U.S. 463, 479 (1936), *cited in* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 479 (1981); Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511, 521 (1898).

recognized rule of construction, *expressio unius est exclusio alterius*,[87] a reference solely to federal courts could reasonably be read to exclude state courts. Such a reading was not required, however, and therefore the presumption of concurrent jurisdiction was not overcome.

In *Hathorn*, the Court addressed section 5[88] of the Voting Rights Act,[89] which provides that "'[a]ny action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28' of the United States Code."[90] Section 5 would seem to presuppose exclusive jurisdiction by its imposition of procedures applicable solely to federal courts.[91] Nonetheless, the Court ruled that section 5 constituted only a "possible" grant of exclusive jurisdiction.[92] Perhaps the Court thought it conceivable that the procedures were required solely upon the choice of a federal forum.[93] The *Hathorn* Court's willingness to seek out ambiguity thus demonstrates the difficulty of rebutting the presumption of concurrent jurisdiction on the basis of statutory language.

The second principle is that statutory language must be understood in terms of the legal context extant at its enactment.[94] The Court's decision in *Ohio ex rel. Popovici v. Agler*[95] provides an illustration. At issue in *Popovici* was whether various statutory and constitutional provisions granting exclusive federal jurisdiction over actions against foreign consuls deprived state courts of jurisdiction over a divorce action brought by an American citizen against a foreign vice-consul.[96] Describing the statutory language as "pretty sweeping,"[97] the Court nonetheless ruled that "like all language it has to be interpreted in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used."[98] Since the language was adopted at a time when state courts were understood to have exclusive jurisdiction over family matters,[99] the Court decided that the grants of exclusive federal jurisdiction over "suits against consuls and vice-consuls" should be read to extend to ordinary civil proceedings only.[100] Therefore, the divorce action against the vice-consul could be heard by a state court.

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87. *See* BLACK'S LAW DICTIONARY 521 (5th ed. 1979).

88. 42 U.S.C. § 1973c (1982) [hereinafter § 5].

89. Voting Rights Act, 42 U.S.C. §§ 1971–74 (1982).

90. 42 U.S.C. § 1973c (1982).

91. *But cf.* Pendleton v. Heard, 642 F. Supp. 940, 943 (S.D. Miss. 1986) (finding no analog under state law to three judge federal court requirement but nonetheless upholding concurrent jurisdiction over § 5 claims).

92. Hathorn v. Lovorn, 457 U.S. 255, 267 (1982). The Court noted that the parties had not referred to any legislative history addressing the issue of federal jurisdiction. *See id.* at 268 n.22.

93. The *Hathorn* Court did not have to resolve the question of federal exclusivity over § 5 claims given its determination that § 5 did not govern the suit before the Court. *See id.* at 268.

94. This is a basic principle of statutory construction that is applicable as well where the presumption of concurrent jurisdiction is inapposite. *See, e.g.*, Randall v. Loftsgaarden, 106 S. Ct. 3143, 3153 (1986) (applying principle to determine meaning of phrase "actual damages"); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 378 (1982) (applying principle to determine whether to imply an action).

95. 280 U.S. 379 (1930).

96. The provisions at issue were U.S. CONST. art. III, § 2; Act of March 3, 1911, ch. 231, §§ 24(18), 233, and 256(8), 36 Stat. 1087, 1093, 1156, 1161.

97. Ohio *ex rel.* Popovici v. Agler, 280 U.S. 379, 383 (1930).

98. *Id.*

99. *Id.* at 383–84.

100. *Id.* at 384.

Thus, the presumption of concurrent jurisdiction can be overcome only by statutory language that is unequivocal. The language must, moreover, be judged in its contemporaneous legal context. These principles must govern the determination of whether exclusive federal jurisdiction is appropriate for rule 10b-5 actions. The analysis begins with section 27, the jurisdictional provision of the 1934 Act. Section 27 clearly grants exclusive jurisdiction;[101] the question is whether it embraces any or all implied actions within its sweep. If not, state and federal courts have concurrent jurisdiction over rule 10b-5 actions unless legislative history or federal interests demonstrate that jurisdiction should be exclusively federal.

Section 27 grants exclusive jurisdiction over private civil actions in the following language:

> The district courts of the United States . . . shall have exclusive jurisdiction . . . of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder.[102]

This language clearly governs the three express private actions created by the 1934 Act.[103] Whether the language likewise governs implied actions is less obvious. On the one hand, implied actions are not affirmatively mentioned. On the other hand, the language is consistent with their inclusion.[104] As Professor Loss has argued, the language does not require that the 1934 Act or rules create the "suits or actions;"[105] all that they must create is the "liability or duty" to be enforced.[106] The suits or

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101. For the text of § 27, see *supra* note 12.

102. For the full text of § 27, see *supra* note 12. Section 27 also grants exclusive federal jurisdiction over "violations" of the 1934 Act and rules. *See id.* Professor Loss has implied that "violations" refers to actions brought by the government. *See* Loss, *supra* note 8, at 1272–73. The Supreme Court intimated a similar view in Leroy v. Great W. United Corp., 443 U.S. 173 (1979). The lower court in *Leroy* had acknowledged confusion as to the distinction between "violation" and "duty" for a private action challenging a takeover statute. *See* Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1271–72 & n.31 (5th Cir. 1978), *rev'd sub nom.* Leroy v. Great W. United Corp., 443 U.S. 173 (1979). The Supreme Court in *Leroy* thereupon provided definitions of "liability" and "duty," but not of "violation," *see* 443 U.S. 173, 181–82 & n.12, thereby suggesting that "violation" had no relevance. *See also* Deckert v. Independence Shares Corp., 311 U.S. 282, 288 (1940) (applying to private action 1933 Act's jurisdictional reference to "liability or duty" but not its reference to "violation"). For a discussion of the *Leroy* Court's definitions of liability and duty, see *infra* note 104. For the view that "violation" refers to defenses premised on the 1934 Act, see Note, *Implied Rights Under the Securities Exchange Act, supra* note 11, at 102 n.47.

103. The express private actions are § 9(e), 15 U.S.C. § 78i(e) (1982) [hereinafter § 9(e)]; § 16(b), 15 U.S.C. § 78p(b) (1982) [hereinafter § 16(b)]; § 18(a), 15 U.S.C. § 78r(a) (1982) [hereinafter § 18(a)].

104. In Leroy v. Great W. United Corp., 443 U.S. 173 (1979), the Supreme Court sidestepped the question of whether the "liabilities and duties" phraseology in § 27 includes implied actions. *Leroy* held that "[t]he reference in § 27 to the 'liabilit[ies] or dut[ies] created by this chapter' clearly corresponds to the various provisions in the 1934 Act that explicitly establish duties for certain participants in the securities market or that subject such persons to possible actions brought by the Government, the Securities and Exchange Commission, or private litigants." *Id.* at 181–82 (footnote omitted). As examples, the Court cited § 16(b), 15 U.S.C. § 78p(b), § 17(a)(1), 15 U.S.C. § 78q(a)(1), and § 14(a), 15 U.S.C. § 78n(a). *See id.* at 182 n.12. Section 16(b) is an express private action. *See* 15 U.S.C. § 78p(b) (1982). The Supreme Court had previously refused to imply a private action under § 17(a)(1). *See* Touche Ross & Co. v. Redington, 442 U.S. 560 (1979). Although the Court had implied a private action under § 14(a) and rule 14a-9, 17 C.F.R. § 240.14a-9 (1987), in J.I. Case Co. v. Borak, 377 U.S. 426 (1964), those provisions also create an express action on behalf of the SEC. Therefore, the *Leroy* Court did not address the specific question of whether § 27 governs implied actions.

105. *See* Loss, *supra* note 8, at 1273 & nn. 70–71 (collecting cases).

106. *Id.* at 1273. Professor Loss did not distinguish between liabilities and duties in § 27. *See id.* at 1272–73. Nor did the Supreme Court attempt such a distinction in Leroy v. Great W. United Corp., 443 U.S. 173 (1979), discussed *supra* note 104.

Upon concluding that § 27 can be read to include implied actions, Professor Loss maintained that there is "no reason in the policy of the statute to limit that section to . . . [express actions]." Loss, *supra* note 8, at 1272. He nonetheless

actions, therefore, could conceivably originate elsewhere, such as in other federal statutes, state statutes, state common law,[107] or federal common law.[108] Since one variety of federal common law is implied actions,[109] section 27 can be read to encompass implied actions brought to enforce duties created by rule 10b-5.[110]

That section 27 can be read to include implied actions, however, does not mean that it should be. Indeed, the view that it should be because it can be is seriously flawed. The view violates the principle that only through unequivocal statutory language can the presumption of concurrent jurisdiction be rebutted. Section 27 requires exclusive federal jurisdiction over "suits" and "actions" "brought to enforce any liability or duty created by" the Act or rules.[111] By this language, Congress may have intended "suits" and "actions" to refer only to those expressly created by the 1934 Act or rules. Indeed, if Congress instead intended "suits" and "actions" to embrace implied actions, the question arises as to why it did not say so, especially given its awareness[112] of the narrow construction accorded federal jurisdictional grants.[113] Moreover, to read implied actions into section 27 is to nullify the legal context of 1934. Examination of that context reveals a number of considerations suggesting that Congress would not have anticipated implied actions under the 1934 Act and therefore could not have intended section 27 to embrace them.[114]

One such consideration is that in 1934 actions implied under federal statutes were exceedingly rare.[115] Judicial implication of actions originated in the English common law in response to legislation that created a duty but no express remedy for

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recommended amending the 1934 Act to provide for concurrent jurisdiction because "the dubious advantages of exclusive federal jurisdiction do not sufficiently outweigh the complexities it has created." *See id.* at 1275.

107. Courts are divided over whether violation of a duty contained in a statute granting exclusive federal jurisdiction can be alleged in a state-created action. *See* cases cited *supra* note 8.

108. In Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), the Supreme Court held that federal courts could create common law in diversity cases. *Swift* was overruled by Erie R.R. v. Tompkins, 304 U.S. 64 (1938), which rejected "federal *general* common law." *Id.* at 78 (emphasis added). The Court has nonetheless subsequently upheld what Judge Friendly has termed "specialized federal common law" for situations in which federal interests are at stake. *See* Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964).

109. Judge Friendly has identified four kinds of federal common law: "spontaneous generation as in the cases of government contracts or interstate controversies, implication of a private federal cause of action from a statute providing other sanctions, construing a jurisdictional grant as a command to fashion federal law, and the normal judicial filling of statutory interstices." Friendly, *supra* note 108, at 421. For illustrative cases, see Cannon v. University of Chicago, 441 U.S. 677 (1979) (implying action from federal statute); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (interpreting grant of federal jurisdiction to require creation of body of federal common law); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) ("spontaneous generation" from interests of federal government).

110. Rule 10b-5 imposes duties of disclosure as well as the duty not to engage in fraudulent activities. For the text of rule 10b-5, see *supra* note 3.

111. For the text of § 27, see *supra* note 12.

112. *See, e.g.*, Cannon v. University of Chicago, 441 U.S. 677, 696–97 (1979) (endorsing the assumption that members of Congress know the law).

113. *See, e.g.*, Healy v. Ratta, 292 U.S. 263, 270 (1934) (strictly construing amount in controversy requirement for grant of federal jurisdiction over federal questions); Matthews v. Rodgers, 284 U.S. 521 (1932) (strictly construing federal equity jurisdiction).

114. Reading § 27 to exclude implied actions has the liberal consequence of allowing rule 10b-5 claimants to choose between state and federal courts. *Cf.* Tsang v. Kan, 173 F.2d 204 (9th Cir.) (noting the liberal effects of a finding of concurrent federal jurisdiction), *cert. denied*, 337 U.S. 939 (1949).

115. *Cf.* Cannon v. University of Chicago, 441 U.S. 677, 732-35 (1979) (Powell, J., dissenting) (summarizing the Supreme Court's implication of actions under federal statutes until 1964); City of Gainesville v. Florida Power & Light Co., 488 F. Supp. 1258, 1270 (S.D. Fla. 1980) (noting the rarity of implied actions under federal statutes in the 1930's).

its enforcement.[116] The technique was recognized frequently in nineteenth and early twentieth century American case law,[117] as well as by the 1934 *Restatement of Torts*.[118] Thus by 1934, the technique was entrenched,[119] but with a key qualification: it had been largely confined to state statutes and local ordinances.[120] The Supreme Court had by then issued only two decisions upholding implied actions under federal statutes: *Texas & New Orleans Railroad v. Brotherhood of Railway & Steamship Clerks*,[121] which involved unique circumstances, and *Texas & Pacific Railway v. Rigsby*,[122] which was effectively reversed prior to the enactment of the 1934 Act.[123]

In *Brotherhood*, the Court implied an action under the Railway Labor Act.[124] *Brotherhood* became the third decision in eight years in which the Court had to address whether to imply an action under legislation involving settlement of railroad labor disputes. The first two decisions had involved the Railway Labor Act's predecessor legislation: the Transportation Act of 1920.[125] In each of the earlier cases, the Court had rejected implication. These decisions directly precipitated enactment of the Railway Labor Act. The Senate Report on that Act explained that new legislation was necessary in significant measure because of the Supreme Court's

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116. *See, e.g.*, Anonymous, 87 Eng. Rep. 791 (Q.B. 1703); North v. Musgrave, 82 Eng. Rep. 410 (K.B. 1639). For a history of implication, see Foy, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501, 524–69 (1986); Fricke, *The Juridical Nature of the Action upon the Statute*, 76 LAW Q. REV. 240 (1960); Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 667–77 (1987).

117. *See, e.g.*, Union Pac. Ry. v. McDonald, 152 U.S. 262, 283 (1894); Osborne v. McMasters, 40 Minn. 103, 41 N.W. 543 (1889). For additional cases, see W. PROSSER & W. KEETON, HANDBOOK OF THE LAW OF TORTS 220–33 (5th ed. 1984). Implication was recognized as early as Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), where the Court inquired:

> If he has a right, and that right has been violated, do the laws of his country afford him a remedy?
>
> . . . .
>
> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

Id. at 162–63. *But cf.* Nixon v. Fitzgerald, 457 U.S. 731 (1982), where the Court observed: "*Marbury* does not establish that the individual's protection must come in the form of a particular remedy. Marbury . . . *lost* his case in the Supreme Court. The Court turned him away with the suggestion that he should have gone elsewhere with his claim." *Id.* at 755 n.37 (emphasis in original).

118. RESTATEMENT OF TORTS §§ 286–87 (1934).

119. Implication was the subject of a number of law review articles around the time Congress considered the 1934 Act. *See, e.g.*, Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361 (1932); Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1933); Schneider, *Negligence By Violation of Law*, 11 B.U. L. REV. 217 (1931); Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914).

120. *See* cases cited *supra* note 117.

121. 281 U.S. 548 (1930).

122. 241 U.S. 33 (1916).

123. The *Rigsby* decision was effectively reversed by Moore v. Chesapeake & O. Ry., 291 U.S. 205 (1934), discussed *infra* notes 140–48.

A few other cases provided no more than weak support for implication under federal statutes. In Jacobs v. United States, 290 U.S. 13 (1933), the Court appeared to approve an action implied from the fifth amendment. *See id.* at 16. This was not, however, the question before the Court. *See id.* The Court likewise seemed to sanction an implied remedy in Ward v. Board of County Commissioners, 253 U.S. 17, 24 (1920). The Court failed to clarify whether the action would emanate from state law, a federal statute, or the federal Constitution. *See id.* The *Ward* Court's ambiguity in this regard has previously been noted. *See* HART & WECHSLER, *supra* note 28, at 521.

124. Railway Labor Act, ch. 347, 44 Stat. 577 (1926) [hereinafter Railway Labor Act].

125. Transportation Act of 1920, ch. 91, 41 Stat. 456. *See* Pennsylvania R.R. Sys. v. Pennsylvania R.R., 267 U.S. 203 (1925); Pennsylvania R.R. v. United States R.R. Labor Bd., 261 U.S. 72 (1923).

decisions refusing implication under the Transportation Act.[126] It noted further that the provisions at issue in those decisions had been repealed.[127] Given this history, the *Brotherhood* Court acknowledged that what Congress wanted was a "fresh start:"[128] "[i]t was with clear appreciation of the infirmity of the existing legislation, and in the endeavor to establish a more practicable plan in order to accomplish the desired result, that Congress enacted the Railway Labor Act of 1926."[129] Although the Railway Labor Act contained express judicial remedies,[130] none had been provided for the specific provision at issue in *Brotherhood*.[131] Refusing to find this omission significant, the Court ruled that "the conclusion must be that enforcement was contemplated."[132] The Court's implication of an action here appears simply to have been the only practical option available given Congress's palpable desire to overcome the two prior decisions.[133] *Brotherhood* therefore would not have provided a model for implication under the 1934 Act, because Congress had very much anticipated implication.

Likewise incapable of providing a model was *Texas & Pacific Railway v. Rigsby*.[134] In *Rigsby*, a railroad employee was injured while climbing a defective ladder. By providing such a ladder, the railroad violated the Safety Appliance Act,[135] under which the Court implied an action on the employee's behalf. Two rationales for implication were provided. One rationale was congressional intent. The Court was of the view that while not expressly creating the action, Congress had nonetheless twice recognized it. First, there was the statutory reference to "'liability in any remedial action for the death or injury of any railroad employee.'"[136] Second, there was the statute's abolition of the assumption of risk defense in any action on behalf of a railroad employee injured by a statutory violation.[137] The *Rigsby* Court's other rationale for implication was tort law:

> A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law . . . .
>
> . . . [T]he Act must therefore be deemed to create a liability in [plaintiff's] favor.[138]

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126. *See* S. REP. No. 222, 69th Cong., 1st Sess. (1926), *quoted in* Texas & N.O. R.R. v. Brotherhood of Ry. & Steamship Clerks, 281 U.S. 548, 563 (1930).

127. *See* Texas & N.O. R.R. v. Brotherhood of Ry. & Steamship Clerks, 281 U.S. 548, 563 (1930). *See also* Railway Labor Act, ch. 347, § 14, 44 Stat. 577, 587 (1926).

128. Texas & N.O. R.R. v. Brotherhood of Ry. & Steamship Clerks, 281 U.S. 548, 563 (1930).

129. *Id.* at 562–63.

130. For a description of the Railway Labor Act's express judicial remedies, see *id.* at 564–67.

131. *See id.* at 567.

132. *Id.* at 569.

133. *See* Cannon v. University of Chicago, 441 U.S. 677, 733 (1979) (Powell, J., dissenting).

134. 241 U.S. 33 (1916).

135. Act of Mar. 2, 1893, ch. 196, 27 Stat. 531; Act of Apr. 1, 1896, ch. 87, 29 Stat. 85; Act of Mar. 2, 1903, ch. 976, 32 Stat. 943; Act of Apr. 14, 1910, ch. 160, 36 Stat. 298 (current versions at 45 U.S.C. §§ 1–43 (1982)). For the violations involving ladders, see Act of Apr. 14, 1910, ch. 160, § 2, 36 Stat. 298.

136. Texas & Pacific Ry. v. Rigsby, 241 U.S. 33, 39 (1916) (quoting ch. 160, § 4, 36 Stat. 298, 299 (1910)).

137. *Id.* at 40 (relying upon ch. 196, § 8, 27 Stat. 531, 532 (1893)).

138. *Id.* at 39–40.

While not addressed by the *Rigsby* Court, the relevance of tort law was presumably premised on the perception that Congress ordinarily intends a tort law remedy for statutory violations when the statute provides none.[139]

The implied action upheld by *Rigsby* had a short life. In its decision in *Moore v. Chesapeake & Ohio Railway*,[140]—issued four months prior to enactment of the 1934 Act[141]—the Court emasculated *Rigsby* by ruling that no action under the Safety Appliance Act had actually been implied. In sharp contrast to the understanding of lower courts,[142] *Rigsby* was deemed to be an action authorized by state law for violation of a federal duty[143] as to which federal jurisdiction had attached only because defendant was a federal corporation.[144] When state law failed to provide an action, the *Moore* Court suggested, railroad employees injured as the result of Safety Appliance Act violations would simply be without a remedy.[145] Thus, since *Rigsby* had already been effectively reversed by the time the 1934 Act was enacted, it would not have fostered the expectation of 1934 Act implied actions.

A second consideration suggesting that Congress did not anticipate implied actions under the 1934 Act was that at the time of its enactment, there was no underlying rationale for implication under federal statutes. Indeed, *Moore* not only extinguished the action implied in *Rigsby* but also undermined *Rigsby*'s rationales for implication. Rejection of the congressional intent rationale was indirect. The *Moore* Court conceded that Congress had anticipated actions by injured railroad employees,[146] but denied that Congress had federal actions in mind. Had federal actions been intended, the Court maintained, Congress would have enacted venue and limitations provisions.[147] With this analysis, the Court undercut the congressional intent rationale for implication without expressly rejecting it: limiting recognition to actions with venue and limitations provisions amounts to limiting recognition to express actions. The *Moore* Court sidestepped completely the tort law rationale for implication under a federal statute, thereby insinuating that it might no longer be

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139. *Cf.* Ruder, *Civil Liability Under Rule 10b-5: Judicial Revision of Legislative Intent?*, 57 NW. U.L. REV. 627, 634 (1963).

140. 291 U.S. 205 (1934).

141. The 1934 Act was enacted on June 6, 1934. *See* 1934 Act, ch. 404, 48 Stat. 881 (1934). Moore v. Chesapeake & O. Ry., 291 U.S. 205 (1934), was decided on February 5, 1934.

142. *See, e.g.*, Ross v. Schooley, 257 F. 290, 291–92 (7th Cir.) (relying upon *Rigsby* for the proposition that the existence of an action under the Safety Appliance Act is not "dependent upon the legislative wills of the several states"), *cert. denied*, 249 U.S. 615 (1919); Director General of Railroads v. Ronald, 265 F. 138, 146–47 (2d Cir. 1920) (Manton, J., concurring) (interpreting *Rigsby* as upholding a uniform remedy under the Safety Appliance Act applicable regardless of the vagaries of state law); Neiswonger v. Goodyear Tire & Rubber Co., 35 F.2d 761 (N.D. Ohio 1929) (relying upon *Rigsby* to imply an action under the Air Commerce Act without first determining the existence of a state law remedy).

143. Moore v. Chesapeake & O. Ry., 291 U.S. 205, 215–16 (1934).

144. *Id.* at 215 n.6. *Cf.* Pacific R.R. Removal Cases, 115 U.S. 1, 11 (1885) (upholding the right of removal of federal corporations).

145. Moore v. Chesapeake & O. Ry., 291 U.S. 205, 215–16 (1934). *See also* Gilvary v. Cuyahoga Valley Ry., 292 U.S. 57, 61–62 (1934) (observing that the Safety Appliance Act does not "create, prescribe the measure or govern the enforcement of, the liability arising from [its] breach"). Professor Loss has observed that the "Court's motive for this retreat from [*Rigsby* was that] . . . [i]t did not wish federal preemption to apply to such matters as contributory negligence and last clear chance." Loss, *supra* note 8, at 1268 (footnote omitted).

146. *See* Moore v. Chesapeake & O. Ry., 291 U.S. 205, 215 (1934).

147. *See id.*

viable. By jeopardizing both of *Rigsby*'s rationales, *Moore* endangered implication under all federal statutes.[148]

A third consideration suggesting that Congress did not anticipate implied actions under the 1934 Act was that the Supreme Court had refused to imply actions under the Sherman Act and the federal copyright statute.[149] Writing for the majority in the 1917 decision in *Paine Lumber Co. v. Neal*,[150] Justice Holmes declined to imply an action under the Sherman Act even assuming that special damages could be shown.[151] This refusal to imply was supported solely by a reference to two pages in a previous Supreme Court Sherman Act decision,[152] which stated:

> We cannot suppose it was intended that the enforcement of the act should depend in any degree upon . . . suits . . . instituted . . . by individuals to prevent violations of its provisions. . . . Congress has prescribed a specific mode for preventing restraints upon [commerce] namely, suits . . . under the direction of the Attorney General.[153]

Thus, *Paine* held that by expressly providing a remedy for the government, the Sherman Act had impliedly rejected a remedy for private individuals: the express remedies, in other words, were the exclusive remedies.[154]

Precisely why the Court adopted this approach to the Sherman Act was explained neither in *Paine* nor in the decision to which *Paine* referred.[155] The apparent explanation instead emerges from the Court's decision two years earlier in *D.R. Wilder Manufacturing Co. v. Corn Products Refining Co.*[156] In *Wilder*, the Court had refused to imply a defense from the Sherman Act on the ground that the express remedies were exclusive. The *Wilder* Court explained that the Sherman Act "was intended in the most comprehensive way to provide against combinations or conspiracies in restraint of trade or commerce, the monopolization of trade or commerce or attempts to monopolize the same. . . . [N]ot only the prohibitions of the statute, but the remedies which it provided were co-extensive with such conceptions."[157] Thus, *Wilder* suggested that the very comprehensiveness of the Sherman Act made additions by the judiciary inappropriate.

That comprehensiveness represented a key stumbling block to implication receives support from the Court's 1908 decision in *Globe Newspaper Co. v. Walker*.[158] In *Globe*, the Court refused to imply an action under the federal copyright

148. For analyses of the Supreme Court's willingness to imply actions under federal statutes in the years following 1934, see Foy, *supra* note 116, at 557–66; Cannon v. University of Chicago, 441 U.S. 677, 733–39 (1979) (Powell, J., dissenting).

149. Act of July 8, 1870, ch. 230, 16 Stat. 198.

150. 244 U.S. 459 (1917).

151. *See id.* at 471.

152. *See id.* (citing Minnesota v. Northern Secs. Co., 194 U.S. 48, 70, 71 (1904)).

153. Minnesota v. Northern Secs. Co., 194 U.S. 48, 70–71 (1904). *Northern Securities* did not itself dispose of the question of whether to imply an action under the Sherman Act because plaintiffs in that case had not suffered direct or special injury. *See* Paine Lumber Co. v. Neal, 244 U.S. 459, 478 (1917) (Pitney, J., dissenting).

154. *See* Geddes v. Anaconda Copper Mining Co., 254 U.S. 590, 593 (1921); General Inv. Co. v. Lake Shore & M.S. Ry., 260 U.S. 261, 286 (1922).

155. Justice Holmes did not address the argument made by Justice Pitney in dissent that the federal courts possessed the inherent power to imply remedies. *See* Paine Lumber Co. v. Neal, 244 U.S. 459, 473 (1917) (Pitney, J., dissenting).

156. 236 U.S. 165 (1915).

157. *Id.* at 173–74.

158. 210 U.S. 356 (1908).

statute for infringement of a copyrighted map, for which the statute provided no express remedy. The Court premised its refusal on the legislation's comprehensiveness: "And we think an inspection of the copyright statute indicates that the purpose of Congress was not only to create the rights granted in the statute, but also to create the specific remedies by which alone such rights may be enforced."[159]

While *Paine* and *Globe* confirm the Supreme Court's distaste for implying actions under federal statutes, they convey a further message: that in 1934 a statute would be impervious to implication by virtue of its comprehensiveness. The import of this principle for the 1934 Act is obvious, since it represented an attempt to deal comprehensively with post-distribution securities trading.[160]

Thus, section 27 cannot rebut the presumption of concurrent jurisdiction over rule 10b-5 actions. Section 27 requires exclusive federal jurisdiction over "suits" and "actions" "brought to enforce any liability or duty created by" the Act or rules. While "suits or actions" could encompass actions implied from the Act or rules,[161] they could just as easily refer only to actions that the Act or rules expressly create.[162] To nonetheless read section 27's grant of exclusive jurisdiction to encompass implied actions violates the principle that statutory language must be unequivocal for the presumption of concurrent jurisdiction to be overcome.[163] To read implied actions into section 27, moreover, ignores the legal context of its enactment. In 1934, actions implied under federal statutes were a rarity,[164] and implication itself lacked an underlying rationale.[165] Therefore, the presumption of concurrent jurisdiction over rule 10b-5 actions must stand unless it is rebutted by legislative history or federal interests.

III. Federal Jurisdiction Over Rule 10b-5: Legislative History

As noted above, the Supreme Court ruled in *Gulf Offshore Co. v. Mobil Oil Corp.*[166] that the presumption of concurrent jurisdiction may be rebutted by legislative history.[167] The Court has, moreover, set forth principles by which legislative history may be evaluated.

The first principle is that the presumption can be rebutted only where legislative history contains incontrovertible evidence of intent to confer exclusive jurisdiction;[168] evidence that only arguably supports exclusive jurisdiction is insufficient. An

159. *Id.* at 365.

160. The legislative history of the 1933 and 1934 Acts is assembled in Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934 (comp. by J.S. Ellenberger & E. Mahar 1973) [hereinafter Legislative History].

For the comprehensiveness of the 1934 Act, see Senate Banking and Currency Comm., Stock Exchange Practices, S. Rep. No. 1455, 73d Cong., 2d Sess. (1934), *reprinted in* 5 Legislative History, *supra*, item 21, at 1–4.

161. *See supra* notes 104–10 and accompanying text.

162. *See supra* notes 111–13 and accompanying text.

163. *See supra* notes 80–93 and accompanying text.

164. *See supra* notes 115–45 and accompanying text.

165. *See supra* notes 146–48 and accompanying text.

166. 453 U.S. 473 (1981).

167. *See id.* at 478. *See also* Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507–13 (1962).

168. *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981) (requiring "unmistakable implication from legislative history").

illustration is provided by *Gulf*, in which the Court upheld concurrent jurisdiction for claims under OCSLA by workers injured on the outer continental shelf. The *Gulf* Court discounted several references in OCLSA's legislative history that might have evidenced that exclusive jurisdiction had been granted. First, a senator opposed to OCSLA had expressed concern that OCSLA would have precisely this effect.[169] His views were dismissed, however, on the ground that "'[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation.'"[170] Second, a Justice Department report to the Senate committee considering OCSLA had at least arguably assumed that jurisdiction would be exclusive.[171] The Court dismissed the report as irrelevant on the ground that Congress had rejected one of its key premises.[172] While finding the evidence in the legislative history insufficient, the Court apparently did not regard it as frivolous: "[w]e do not think the legislative history of OCSLA can be read to rebut the presumption of concurrent state-court jurisdiction, given Congress' silence on the subject in the statute itself."[173]

The second principle for interpreting legislative history is that evidence of congressional intent to confer exclusive jurisdiction may not always be accepted at face value. The Court's decision in *Moragne v. States Marine Lines, Inc.*[174] is illustrative. At issue in *Moragne* was whether exclusive jurisdiction applied to suits under the Death on the High Seas Act.[175] DOHSA's floor manager had indicated that "exclusive jurisdiction would follow necessarily from the fact that the Act would be part of the federal maritime law."[176] Stressing that this reasoning was "erroneous"[177] and lacking any additional evidence favoring exclusive jurisdiction, the Court upheld concurrent jurisdiction.[178]

The foregoing principles must govern examination of the legislative history of the 1934 Act. Three aspects of that history are relevant to determining whether to rebut the presumption of concurrent jurisdiction over rule 10b-5 actions: (i) the history of section 27; (ii) the history of section 10(b); and (iii) Congress's subsequent failure to amend section 27.

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169. *Id.* at 483 n.10 (citing 99 CONG. REC. 7233 (1953)).

170. *Id.* at 483 (quoting Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394 (1951)).

171. *See id.* at 483 n.9.

172. *See id.*

173. *Id.* at 482–83.

174. 398 U.S. 375 (1970).

175. Death on the High Seas Act, 46 U.S.C. §§ 761–68 (1982) [hereinafter DOHSA].

176. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 400 n.14 (1970) (citing 59 CONG. REC. 4485 (1920)).

177. The *Moragne* Court found the floor manager's position mistaken because it "disregards the 'savings clause' in 28 U.S.C. § 1333, and the fact that federal maritime law is applicable to suits brought in state courts under the permission of that clause." *Id.*

178. *See id. See also* Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 231 (1986) (acknowledging that note 14 of *Moragne* rejected exclusive jurisdiction for admiralty actions under DOHSA). Since the *Moragne* Court found the floor manager's views to be mistaken, it did not have to consider whether a floor manager's views, standing alone, would be sufficient to confer exclusive federal jurisdiction.

A. *Legislative History of Section 27*

The legislative history of section 27 gives no explanation for Congress's choice of exclusive jurisdiction.[179] Nor was the choice apparent from the start of the legislative process. In both the House and Senate, early bills either failed to mention exclusive jurisdiction[180] or affirmatively conferred concurrent jurisdiction.[181] Exclusive jurisdiction was not even mentioned in the final bills reported out of the House and Senate committees.[182]

An amendment to grant exclusive jurisdiction was offered on the House floor by Congressman Rayburn, chairman of the House committee considering the 1934 Act. The only reported discussion of the amendment was Rayburn's commentary:[183]

> Mr. Chairman, I have only this to say—that we thought the bill as drawn meant exclusive, but in order that it may be entirely clear we offer this amendment.[184]

The amendment was adopted,[185] thereby creating a conflict between the House and Senate versions of what was to become section 27.[186] On the Senate floor, Senator Byrnes observed that the House version conflicted not only with the Senate version but with the Securities Act of 1933.[187] The conflict was referred to a conference committee,[188] which adopted the House version but did not report its reason.[189]

From this limited history, Professor Loss and the American Law Institute ("ALI") have each developed explanations for section 27. Both explanations are flawed, however, and this Article will attempt to offer a more cogent explanation.

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179. For cases acknowledging that the legislative history provides no explanation, see *supra* note 15.

180. *See* H.R. 7852, 73d Cong., 2d Sess. (1934), *reprinted in* 10 LEGISLATIVE HISTORY, *supra* note 160, item 24, at 44 (bill introduced February 10, 1934); H.R. 7855, 73d Cong., 2d Sess. (1934), *reprinted in* 10 LEGISLATIVE HISTORY, *supra* note 160, item 25, at 44 (bill introduced February 10, 1934); H.R. 8720, 73d Cong., 2d Sess. (1934), *reprinted in* 10 LEGISLATIVE HISTORY, *supra* note 160, item 28, at 53 (bill introduced March 19, 1934); H.R. 9323, 73d Cong., 2d Sess. (1934), *reprinted in* 10 LEGISLATIVE HISTORY, *supra* note 160, item 29, at 52 (bill introduced April 25, 1934); S. 2693, 73d Cong., 2d Sess. (1934), *reprinted in* 11 LEGISLATIVE HISTORY, *supra* note 160, item 34, at 44 (bill introduced February 9, 1934).

181. *See* S. 2642, 73d Cong., 2d Sess. (1934), *reprinted in* 11 LEGISLATIVE HISTORY, *supra* note 160, item 33, at 11 (bill introduced February 7, 1934); H.R. 7924, 73d Cong., 2d Sess. (1934), *reprinted in* 10 LEGISLATIVE HISTORY, *supra* note 160, item 26, at 9 (bill introduced February 13, 1934).

182. The bill reported out of the House Committee provided in pertinent part as follows concerning what was then § 26: "The district courts of the United States . . . shall have jurisdiction of . . . all suits in equity and actions at law brought to enforce any liability or duty created by this Act or the rules and regulations thereunder." H.R. REP. No. 1383, 73d Cong., 2d Sess., April 27, 1934, *reprinted in* 10 LEGISLATIVE HISTORY, *supra* note 160, item 30, at 52.

The bill reported out of the Senate Committee provided in pertinent part as follows concerning what was then § 26(a): "The district courts of the United States . . . shall have jurisdiction of . . . all suits in equity and actions at law brought to enforce any liability or duty created by this Act." S. REP. No. 792, 73d Cong., 2d Sess., April 20, 1934, *reprinted in* 11 LEGISLATIVE HISTORY, *supra* note 160, item 37, at 51.

183. 78 CONG. REC. 8099 (1934).

184. *Id.*

185. *See id.*

186. The Senate bill did not specify whether jurisdiction was exclusive or concurrent. *See supra* note 182 and accompanying text.

187. Securities Act of 1933, 15 U.S.C. §§ 77a–77mm (1982) [hereinafter 1933 Act]. *See* 78 CONG. REC. 8571 (1934).

188. *See* 78 CONG. REC. 8571 (1934).

189. *See* 78 CONG. REC. 9939 (1934). *See* H.R. REP. No. 1838, 73d Cong., 2d Sess., (Conference Report) to accompany H.R. 9323, May 31, 1934, *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 160, item 20, at 23, 27; S. Doc. No. 185, 73d Cong., 2d Sess., (Conference Report) to accompany H.R. 9323, May 30, 1934, *reprinted in* 5 LEGISLATIVE HISTORY, *supra* note 160, item 19, at 23.

Upon examining the jurisdictional provisions of the 1933 and 1934 Acts in its *Study of the Division of Jurisdiction Between State and Federal Courts*,[190] the ALI has concluded that "[s]o far as the legislative history shows, th[e] difference in these two related statutes is pure happenstance."[191] This interpretation might be more plausible if Congress had simply ignored section 27 altogether. While undeniably giving section 27 short shrift,[192] Congress seemed to have paid just enough attention to suggest intentionality:[193] section 27 was specifically referred to the conference committee,[194] where the discrepancy with the 1933 Act could only have become patent, if it was not already.[195] Moreover, the fact that the Senate contemporaneously defeated an amendment to grant exclusive jurisdiction over the 1933 Act[196] provides additional confirmation that Congress had a reason for its enactment of section 27.

Unlike the ALI, Professor Loss believes that the 1934 Act's imposition of exclusive jurisdiction was deliberate. In his view, section 27 grew out of the 1934 Act's technical nature. He reasons:

> The 1934 act is considerably more technical, and contains some provisions (like the section on recapture of certain insiders' short-term trading profits) which go much further beyond the common law than anything in the 1933 act. The logical inference from these Delphic indications is that the exclusive-federal-jurisdiction provision in the 1934 act was motivated by a desire to achieve a greater uniformity of construction, and perhaps a more sympathetic judicial approach, than would be possible if the many state courts were to be kept in line only through the Supreme Court's certiorari jurisdiction.[197]

Professor Loss apparently is of the view that section 27 came about due to the technicality of the 1934 Act as a whole, rather than the technicality specifically of the express actions (or of those provisions most apt to give rise to implied actions). In illustrating technicality by a reference to section 16(b),[198] he neither refers to its status as an express action nor mentions the other express actions at all.[199] In Loss's view,

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190. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969).

191. *Id.* at 183.

In any event, acceptance of the ALI's happenstance explanation would provide a further justification for reading § 27 narrowly. If § 27 has no discernible purpose, as the ALI asserts, its reach should be confined to what its language unequivocally requires. Since § 27 does not equivocally embrace implied actions, see *supra* notes 104–13 and accompanying text, they should be deemed to be outside § 27's sweep.

The ALI, however, did proceed to recommend that the 1934 Act be amended so as to grant concurrent jurisdiction on the ground that "there is no compelling reason for exclusive jurisdiction." *See id.* at 183–84. *See also id.* at 78–79.

192. *See supra* notes 179–89 and accompanying text.

193. *Cf.* Note, *The Effect of Prior Nonfederal Proceedings on Exclusive Federal Jurisdiction over Section 10(b) of the Securities Exchange Act of 1934*, 46 N.Y.U. L. REV. 936, 938 n.15 (1971) (describing Congress's imposition of exclusive jurisdiction as a "conscious choice").

194. *See supra* note 188 and accompanying text.

195. The conflict with the 1933 Act had previously been noted on the House floor by Senator Byrnes. *See supra* note 187 and accompanying text.

196. 78 CONG. REC. 8717 (1934).

197. *See* Loss, *supra* note 8, at 1275 (footnotes omitted). Similarly, Justice Brennan has maintained, albeit without citation, that § 27 "evinces a legislative desire for the uniform determination of . . . claims by tribunals expert in the administration of federal laws and sensitive to the national concerns underlying them." Will v. Calvert Fire Ins. Co., 437 U.S. 655, 670 (1978) (Brennan, J., dissenting).

198. *See* Loss, *supra* note 8, at 1275.

199. *See id.*

moreover, section 27 is appropriately applied to any action implied under the 1934 Act.[200]

Professor Loss's explanation presents several difficulties. To identify the technicality of the 1934 Act as the explanation for the grant of exclusive jurisdiction prompts the question of why concurrent jurisdiction is granted in the Investment Company Act,[201] which is more technical still.[202] Moreover, even assuming the relative technicality of the 1934 Act, it is likely that the explanation for section 27 lies elsewhere. Rather than emanating from the nature of the 1934 Act as a whole, the explanation is more likely to originate from the provisions at which section 27 was at least primarily directed: the express private actions.

Congress had reason to be concerned about the reception courts would give to the 1934 Act's express actions. Sections 9(e) and 18(a) imposed unusually heavy burdens of proof on plaintiffs[203] and section 16(b) was without a parallel in the common law.[204] Section 27 may well have been enacted in order to preserve their viability.

Section 9(e) allows an investor who trades in a security at a price affected by certain forms of stock manipulation to sue willful participants in the manipulation for damages.[205] The investor's burden of proof is extremely heavy. First, the causation requirement is "double-barreled" and thereby more demanding than that for common law deceit: the manipulation must not only cause plaintiff's damages, but affect the price at which he bought or sold.[206] Second, defendant's participation must have been "willful,"[207] the only such requirement in any civil liability provision in any federal securities act.[208] Similarly, section 18(a) authorizes suit by an investor who trades in a security as to which there are misstatements in reports filed under the 1934 Act.[209] As with section 9(e), causation is double-barreled.[210] In addition, reliance must be specific: unlike other federal securities act plaintiffs,[211] the investor must show that he actually read the document in question.[212]

The heavy burden of proof imposed by sections 9(e) and 18(a) may have precipitated their confinement to the federal courts. Congress may have assumed that

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200. *See id.* at 1272.

201. *See* 15 U.S.C. § 80a-43 (1982). *See* Note, *Implied Rights Under the Securities Exchange Act*, *supra* note 11, at 97.

202. For a general overview of the Investment Company Act, see T. FRANKEL, THE REGULATION OF MONEY MANAGERS: THE INVESTMENT COMPANY ACT AND THE INVESTMENT ADVISERS ACT (1978).

203. *See infra* notes 205–12 and accompanying text.

204. *See infra* notes 214–15 and accompanying text.

205. 15 U.S.C. § 78i(e) (1982).

206. *See* L. LOSS, FUNDAMENTALS OF SECURITIES REGULATION 920–21 (2d ed. 1988). *See also* Rich v. Touche Ross & Co., 415 F. Supp. 95, 103 (S.D.N.Y. 1976).

207. *See* 15 U.S.C. § 78i(e) (1982).

208. *See* L. LOSS, *supra* note 206, at 921.

209. 15 U.S.C. § 78r(a) (1982).

210. *See* L. LOSS, *supra* note 206, at 922.

211. *See id.*

212. *Id. See, e.g.*, Ross v. A.H. Robins Co., 607 F.2d 545, 552–53 (2d Cir. 1979), *cert. denied*, 446 U.S. 946 (1980); Beebe v. Pacific Realty Trust, 99 F.R.D. 60, 70 (D. Or. 1983).

Professor Loss has characterized plaintiff's burden under § 18(a) as at least as heavy as that under common law deceit. *See* L. LOSS, *supra* note 206, at 922–23.

only if the actions were interpreted by those courts with the most sensitivity to the underlying federal policies could they provide investors a viable remedy.[213]

Section 16(b) allows a corporation or security holder on the corporation's behalf to sue for recovery of short-swing profits made by corporate insiders.[214] This remedy represented a radical innovation unknown at common law.[215] Given the remedy's uniqueness, Congress might have been concerned that it would be distorted through judicial misconstruction. For this reason, Congress may have confined it to the federal courts, which, with their presumably greater sensitivity to federal policies, would be more likely to construe it as Congress intended.[216]

Thus, this Article proposes the view that section 27 was enacted specifically to safeguard the express actions. So understood, section 27 should extend only to those implied actions that resemble the endangered express actions. The result is that section 27 would be inapplicable to rule 10b-5 actions. Unlike the section 16(b) action, the rule 10b-5 action is derived from the common law.[217] Moreover, unlike the actions under sections 9(e) and 18(a), the rule 10b-5 action—the most widely used of any of the federal securities fraud actions[218]—does not have a double-barreled causation requirement, a specific reliance requirement, or any other requirement that threatens the action's disuse.[219] There is therefore no basis in the history of section 27 for rebutting the presumption of concurrent jurisdiction over rule 10b-5 actions.

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213. Counterparts to § 18(a) appear in § 323(a) of the Trust Indenture Act, 15 U.S.C. § 77www (1982) and in § 16(a) of the Public Utility Holding Company Act, 15 U.S.C. § 79p (1982). Both of these Acts provide for concurrent jurisdiction. *See supra* note 14 and accompanying text. The existence of concurrent jurisdiction over § 18(a)'s counterparts does not jeopardize this Article's new explanation for § 27. It may simply be that it was the cumulative effect of three endangered actions under the 1934 Act that precipitated enactment of § 27. *See also infra* note 216.

214. 15 U.S.C. § 78p(b) (1982).

215. *See* Cook & Feldman, *Insider Trading Under the Securities Exchange Act*, 66 HARV. L. REV. 385, 408–10 (1953). *See also supra* notes 198–99 and accompanying text.

216. A counterpart to § 16(b) appears in § 30(f) of the Investment Company Act, 15 U.S.C. § 80a-29(f) (1982). That Act provides for concurrent jurisdiction. *See supra* note 14 and accompanying text. The existence of concurrent jurisdiction over § 16(b)'s counterpart does not jeoparidize this Article's new explanation for § 27. It may simply be that it was the cumulative effect of three endangered actions under the 1934 Act that precipitated enactment of § 27. *See also supra* note 213.

217. *See* 3 L. LOSS, *supra* note 3, at 1430–44; 3 A. BROMBERG & L. LOWENFELS, *supra* note 11, § 8.1. *See also* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 225 (1985) (White, J., concurring) (describing the rule 10b-5 action as "not so different from the common-law action"); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 744 (1975) (finding rule 10b-5 "certainly [to have] some relationship" to the tort of common law deceit); Murphy v. Gallagher, 761 F.2d 878, 885 (2d Cir. 1985) (elements of rule 10b-5 familiar to state courts); Davis v. Avco Fin. Serv., 739 F.2d 1057, 1063 (6th Cir. 1984) (finding rule 10b-5 remedy to be "roughly equivalent to that existing for fraud at common law"), *cert. denied*, 470 U.S. 1005 (1985). *Cf.* Herman & MacLean v. Huddleston, 459 U.S. 375, 388–89 (1983) (noting that federal securities provisions are "not coextensive" with common law fraud and that federal securities laws were enacted to cure deficiencies in the common law).

218. 5 A. JACOBS, *supra* note 23, § 1, at 1-4 (1987).

219. Under rule 10b-5 a private plaintiff must plead and prove the following elements:

(1) PURCHASER/SELLER REQUIREMENT. The plaintiff must be a purchaser or seller of a security. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 754–55 (1975).

(2) MATERIALITY. The fact omitted or misrepresented must have been material. A fact is material "if there is a substantial likelihood that a reasonable [investor] would consider it important . . . ." *See* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). Although the *TSC Industries* standard was propounded in the context of § 14(a) of the 1934 Act, 15 U.S.C. § 78n(a) (1982), and rule 14a-9, 17 C.F.R. § 240.14a-9 (1987), it also applies to actions brought under § 10(b) and rule 10b-5. *See* Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 474 n.14 (1977) (*TSC Industries* cited as sole authority for finding of lack of materiality under rule 10b-5); S.D. Cohn & Co. v. Woolf, 426 U.S. 944 (1976) (rule 10b-5 action remanded for reconsideration in light of *TSC Industries*). *See also* Abrams v. Oppenheimer Gov't Sec., Inc., 737 F.2d 582, 593 (7th Cir. 1984) (*TSC Industries* standard applied to rule 10b-5 action); Madison Consultants v.

B. *History of Section 10(b)*

Nothing in the history of section 10(b) bears upon the question of jurisdiction. Congress gave scant attention to section 10(b).[220] Moreover, it completely failed to consider private actions.[221] Thus, Congress had no occasion to consider whether private actions under section 10(b) would be governed by section 27.[222] The presumption of concurrent jurisdiction over rule 10b-5 actions is therefore not rebutted by the history of section 10(b).[223]

C. *The Significance of Congress's Failure to Amend Section 27*

Since it is hard to know what meaning to attribute to Congress's failure to act, congressional inaction is "at best only an auxiliary tool for use in interpreting

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FDIC, 710 F.2d 57, 62 (2d Cir. 1983) (same); Simpson v. Southeastern Inv. Trust, 697 F.2d 1257, 1259 (5th Cir. 1983) (same); Austin v. Loftsgaarden, 675 F.2d 168, 176 & n.17 (8th Cir. 1982) (same).

(3) SCIENTER. Defendant must have acted with scienter, defined as an intent to deceive, manipulate, or defraud. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976). The Supreme Court has not determined whether recklessness is sufficient for liability. *Id.* at 194 n.12; Herman & MacLean v. Huddleston, 459 U.S. 375, 378 n.4 (1983). Lower courts after *Hochfelder* have held recklessness to be sufficient for liability. *See, e.g.*, Pegasus Fund, Inc. v. Laraneta, 617 F.2d 1335, 1340 (9th Cir. 1980); Healey v. Catalyst Recovery, Inc., 616 F.2d 641, 649 (3d Cir. 1980); Broad v. Rockwell Int'l Corp., 614 F.2d 418, 440 (5th Cir. 1980).

(4) "IN CONNECTION WITH" REQUIREMENT. The fraud must have occurred "in connection with" the purchase or sale of a security. *See* the texts of § 10(b), *supra* note 1, and rule 10b-5, *supra* note 3. *See also* Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6 (1971) (addressing scope of "in connection with" requirement).

(5) RELIANCE. Plaintiff must have relied on the fact that was omitted or misrepresented. Where the fact was omitted, plaintiff's reliance is presumed. Affiliated Ute Citizens v. United States, 406 U.S. 128, 153–54 (1972). *See* Huddleston v. Herman & MacLean, 640 F.2d 534, 548 (5th Cir. 1981), *rev'd in part on other grounds*, 459 U.S. 375 (1983); Sundstrand Corp. v. Sun Chem. Corp., 553 F.2d 1033, 1048 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977). *Cf.* Sharp v. Coopers & Lybrand, 649 F.2d 175, 188–89 (3d Cir. 1981) ("flexible approach" adopted with respect to presumption of reliance), *cert. denied*, 455 U.S. 938 (1982). Courts have relaxed the reliance element when the claim involves "fraud on the market." *See generally* Black, *Fraud on the Market: A Criticism of Dispensing With Reliance Requirements in Certain Open Market Transactions*, 62 N.C.L. REV. 435 (1984).

(6) CAUSATION. The injury to the plaintiff must have resulted from the omission or misrepresentation. Bloor v. Carro, Spanbock, Londin, Rodman & Fass, 754 F.2d 57, 61 (2d Cir. 1985); Huddleston v. Herman & MacLean, 640 F.2d 534, 549 (5th Cir. 1981), *rev'd in part on other grounds*, 459 U.S. 375 (1983); St. Louis Union Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 562 F.2d 1040, 1048 (8th Cir. 1977), *cert. denied*, 435 U.S. 925 (1978); Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 380–81 (2d Cir. 1974), *cert. denied*, 421 U.S. 976 (1975). The causation element is also relaxed when the claim involves "fraud on the market." *See generally* Black, *supra*.

(7) JURISDICTIONAL MEANS REQUIREMENT. The defendant must have used interstate commerce, the mails, or a facility of a national securities exchange. *See supra* notes 1, 3. *Cf.* Affiliated Ute Citizens v. United States, 406 U.S. 128, 148 (1972) (affirming district court's holding that defendants made use of jurisdictional means).

220. The Supreme Court has acknowledged that the history of § 10(b) is extremely limited. *See, e.g.*, Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 473 n.13 (1977); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 202–05 (1976).

For the history of § 10(b), see Sachs, *supra* note 3, at 117–19.

221. The Supreme Court has recognized that Congress did not contemplate private actions under § 10(b). *See, e.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 729 (1975).

222. Occasionally Congress removes certain substantive provisions from the scope of the general jurisdictional provision. *Compare* § 44 of the Investment Company Act, 15 U.S.C. § 80a-43 (1982) (imposing concurrent jurisdiction over "all suits in equity and actions at law brought to enforce any liability or duty created by . . . this title") *with* § 36(b)(5) of the Investment Company Act, 15 U.S.C. § 80a-35(b)(5) (1982) (imposing exclusive federal jurisdiction over actions under § 36(b)).

223. Nor were private actions contemplated in the brief history of rule 10b-5. That history consists of a short release, *see* SEC Securities Exchange Act Release No. 3230 (May 21, 1942), *reprinted in* 5 A. JACOBS, *supra* note 23, § 5.02, at 1-181, a paragraph in the SEC's annual report, *see* 8 SEC ANN. REP. 10 (1942), and the subsequent recollections of an SEC staff attorney, *see Conference on Codification of the Federal Securities Laws*, 22 BUS. LAW. 793, 921–22 (1967) (remarks of Milton Freeman).

ambiguous statutory provisions."[224] The Supreme Court appears willing to employ this tool only when the surrounding context suggests that Congress's inaction has meaning. Thus, ratification has been inferred from inaction when the precise issue has been raised in hearings or debate.[225] Ratification has likewise been inferred from Congress's failure to overturn a consistent series of decisions following its review of the entire subject area.[226] Since congressional inaction is not perceived to be a fully reliable indicator,[227] it seems at best a highly unlikely basis for overcoming the heavy presumption of concurrent jurisdiction established by the Supreme Court in *Claflin v. Houseman*[228] and *Gulf Offshore Co. v. Mobil Oil Corp.*[229] It nonetheless appears appropriate to explore whether any significance, even if not conclusive, can be inferred from Congress's failure to amend section 27 in the face of numerous court decisions holding it applicable to rule 10b-5 actions.[230]

No significance appears to emerge, however, when Congress's inaction is examined in its surrounding context. There is no indication that Congress has ever considered modifying the exclusive jurisdictional grant.[231] Although Congress did undertake a comprehensive review of the securities laws in 1975,[232] it did not face as true a judicial consensus on section 27 as might first appear. While courts have uniformly stated that section 27 governs rule 10b-5 actions,[233] the decisions are inconsistent with respect to such crucial questions as whether rule 10b-5 actions are subject to the claim and issue preclusive effects of state court decisions;[234] whether state courts can hear defenses[235] and state-created claims[236] that involve rule 10b-5; and whether federal courts can stay rule 10b-5 actions in favor of state court actions.[237] These inconsistencies completely vitiate the apparent agreement with respect to exclusive federal jurisdiction. Underscoring the lack of consensus on

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224. Jones v. Liberty Glass Co., 332 U.S. 524, 533–34 (1947).

225. *Compare* Bob Jones Univ. v. United States, 461 U.S. 574, 600–01 (1983) (finding significant Congress's failure to act in response to the introduction of thirteen bills on an important issue) *with* Aaron v. SEC, 446 U.S. 680, 694 n.11 (1980) (attaching no significance to Congress's failure to act where "legislative consideration . . . was addressed principally to matters other than that at issue").

226. *See, e.g.*, Herman & MacLean v. Huddleston, 459 U.S. 375, 385–86 (1983); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 381–82 (1982).

227. The Supreme Court also refrains from relying upon congressional inaction as the sole basis for its conclusions. *See, e.g.*, Herman & MacLean v. Huddleston, 459 U.S. 375, 380–87 (1983); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 382 (1982). *But cf.* United States v. Elgin, J. & E. Ry., 298 U.S. 492, 500 (1936).

228. 93 U.S. 130 (1876).

229. 453 U.S. 473 (1981).

230. *See supra* note 3 and accompanying text.

231. The House and Senate reports on the 1934 Act subsequent to 1934 are assembled in 11A-Parts 2E, 2F E. GADSBY, FEDERAL SECURITIES EXCHANGE ACT (1987).

232. The Supreme Court has observed that in 1975 Congress undertook the "'most substantial and significant revision of this country's Federal securities laws since the passage of the Securities Exchange Act in 1934.'" Herman & MacLean v. Huddleston, 459 U.S. 375, 384-85 (1983) (quoting *Securities Acts Amendments of 1975: Hearings on S. 249 before the Subcomm. on Securities of the Senate Committee on Banking, Housing, and Urban Affairs*, 94th Cong., 1st. Sess. 1 (1975)).

233. *See supra* note 3 and accompanying text. The Supreme Court has taken this position only in dictum. *See supra* note 3.

234. *See supra* note 6 and accompanying text.

235. *See supra* note 7 and accompanying text.

236. *See supra* note 8 and accompanying text.

237. *See supra* note 9 and accompanying text.

section 27 would have been the recommendations of both Professor Loss and the ALI that exclusive jurisdiction be eliminated from the 1934 Act altogether.[238]

Moreover, Congress's failure to amend section 27 may remain enigmatic simply because jurisdiction is involved. Congress has a history of avoiding confrontation with courts over jurisdictional issues. For example, while Congress apparently intended the grant of federal question jurisdiction to give federal district courts power coextensive with the Constitution,[239] it has never insisted upon this position in the face of Supreme Court decisions holding the opposite.[240] In addition, while Congress apparently intended concurrent jurisdiction over the Sherman Act,[241] it has never enforced this view in the face of Supreme Court decisions upholding exclusive jurisdiction.[242] In failing to amend a jurisdictional statute, therefore, Congress may be according courts the decisive interpretative role without actually endorsing their views. Hence congressional failure to amend section 27 to confer concurrent jurisdiction on rule 10b-5 actions may simply reflect passivity on matters of jurisdiction.

Thus, the presumption of concurrent jurisdiction over rule 10b-5 actions is not rebutted by the 1934 Act's legislative history. The most likely explanation for section 27—a desire to safeguard the express actions—has no necessary bearing on rule 10b-5 actions. Nor is the presumption rebutted by Congress's subsequent failure to amend section 27. Congress's inaction cannot reasonably be construed as endorsing case law applying section 27 to rule 10b-5 actions, since no judicial consensus exists on how such application operates. Moreover, congressional inaction is probably too speculative a basis for rebutting the presumption of concurrent jurisdiction.

IV. Federal Jurisdiction Over Rule 10b-5: Federal Interests

The Supreme Court has ruled that exclusive jurisdiction may be implied from a "clear incompatibility between state-court jurisdiction and federal interests."[243] The federal interests to be addressed are of two types. First, there are policies specific to the statute or action in question.[244] Second, there are practical considerations that generally favor exclusive jurisdiction: "the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims."[245]

238. *See supra* notes 106 and 191.

239. *See* Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 568 (1985).

240. *Id.* at 568 n.145 (collecting cases).

241. *See* Redish & Muench, *supra* note 60, at 317; Note, *supra* note 7, at 510 n.13.

242. For Supreme Court decisions upholding exclusive jurisdiction over federal antitrust claims, see *supra* note 60. Similarly, Congress has allowed the federal courts to develop abstention doctrines that decline the jurisdiction granted by Congress. *See* Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L.J. 71 (1984); Zeigler, *supra* note 116, at 682–708.

243. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981).

244. *Id.* at 484.

245. *Id.* at 483–84 (footnote omitted).

A. *Policies Specific to the Statute or Action*

The Court's decision in *Gulf Offshore Co. v. Mobil Oil Corp.*[246] illustrates how policies specific to the statute or action are treated. *Gulf* upheld concurrent jurisdiction for claims under OCSLA by workers injured on the outer continental shelf. Concurrent jurisdiction was found not to thwart but in fact to advance the specific policies underlying OCSLA. The Court noted the repeated references in the legislative history to "'the special relationship between the men working on these [platforms] and the adjacent shore to which they commute to visit their families.'"[247] The Court thus concluded that state jurisdiction for personal injury claims "will allow these workers, and their lawyers, to pursue individual claims in familiar, convenient, and possibly less expensive fora."[248]

Concurrent jurisdiction over rule 10b-5 actions would not thwart policies specific to either section 27 or the 1934 Act as a whole. The only discernible policy specific to section 27 is a desire to preserve the viability of the express actions.[249] As indicated, their viability seemed threatened because they possess certain qualities that are not shared by rule 10b-5 actions.[250] With no threat to the viability of rule 10b-5 actions, therefore, concurrent jurisdiction over such actions would not frustrate the policy of section 27. The policies underlying the 1934 Act as a whole are "compensating defrauded investors . . . deter[ring] fraud and manipulative practices in the securities markets, and . . . ensur[ing] full disclosure of information material to investment decisions."[251] That concurrent jurisdiction would not frustrate these policies follows from the fact that they underlie the 1933 Act as well,[252] for which concurrent jurisdiction is the rule.[253]

Moreover, at least one specific policy of the 1934 Act affirmatively supports a narrow construction of section 27. The 1934 Act specifically evinces solicitude for state authority over securities matters in section 28(a), which reads in pertinent part as follows:

> The rights and remedies provided . . . shall be in addition to any and all other rights and remedies that may exist at law or in equity . . . . Nothing in this title shall affect the jurisdiction of the securities commission . . . of any State over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder.[254]

246. 453 U.S. 473 (1981).

247. *Id.* at 484 (quoting Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352, 365 (1969)).

248. *Id.* at 484.

249. *See supra* notes 190–219 and accompanying text.

250. *See supra* notes 203–19 and accompanying text.

251. Randall v. Loftsgaarden, 106 S. Ct. 3143, 3154 (1986). *See also* Piambino v. Bailey, 610 F.2d 1306, 1333 (5th Cir.) (finding no evidence of congressional concern that state courts would defeat rights under the 1934 Act), *cert. denied*, 449 U.S. 1011 (1980).

252. *See, e.g.*, Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976); United Housing Found., Inc. v. Forman, 421 U.S. 837, 849 (1975); SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963).

253. *See supra* note 14 and accompanying text.

254. 15 U.S.C. § 78bb(a) (1982).

By preserving both state common law and statutory authority over securities matters,[255] section 28(a) thus reflects congressional recognition of state competence in the securities field.[256]

Section 28(a)'s vote of confidence in the state law-based remedies may well suggest that any 1934 Act provision restricting state authority should be given a narrow reading.[257] Section 27 restricts state authority by making jurisdiction exclusively federal. Read narrowly, section 27 would exclude implied actions, since the statutory language does not mandate their inclusion.[258] While there is no direct evidence that Congress expected section 27 to be read with reference to section 28(a), the policy underlying section 28(a) comports more with a narrow reading of section 27 than with a broad reading.

Thus, nothing in the policies specific to section 27 or the 1934 Act overcomes the presumption of concurrent jurisdiction. In addition, section 28(a) reflects a policy offering at least some affirmative support for concurrent jurisdiction over rule 10b-5 actions.

B. *Practical Considerations*

In *Gulf Offshore Co. v. Mobil Oil Corp.*,[259] the Court ruled for the first time that the presumption of concurrent jurisdiction can be rebutted by practical considerations: the need for uniformity of construction, for federal expertise, or for receptivity to the underlying federal policies.[260] The ruling does not represent a departure from the Court's longstanding view that Congress decides whether jurisdiction is exclusively federal.[261] Indeed, the practical considerations warrant attention simply because Congress is thought to regard them as important even when it does not actually say so.[262]

Applying the practical considerations, the *Gulf* Court found no basis for imposing exclusive jurisdiction over OCSLA personal injury claims:

> These factors cannot support exclusive federal jurisdiction over claims whose governing rules are borrowed from state law. There is no need for uniform interpretation of laws that vary from State to State. State judges have greater expertise in applying these laws and

255. Thomas Corcoran, spokesman for the 1934 Act drafters, stated that § 28(a) was intended to give states the maximum latitude in regulating securities that is consistent with the supremacy clause. *See Stock Exchange Practices: Hearings Before the Senate Banking and Currency Committee on S. Res. 84 (72d Cong.) and S. Res. 56 and S. Res. 97 (73d Cong.)*, 73d Cong., 1st Sess. (1934), *reprinted in* 6 LEGISLATIVE HISTORY, *supra* note 160, item 22, at 6577.

256. *Cf.* Murphy v. Gallagher, 761 F.2d 878, 885 (2d Cir. 1985) (§ 28(a) reflects Congress's cognizance of "the long-established state securities acts and the well-developed common law of fraud").

257. *Cf.* Murphy v. Gallagher, 761 F.2d 878, 885 (2d Cir. 1985) (concluding that the 1934 Act did not impliedly repeal the full faith and credit statute partly on the basis of § 28(a)); Roberts v. Magnetic Metals Co., 611 F.2d 450, 459 (3d Cir. 1979) (Sloviter, J., concurring) (finding § 28(a) to support use of state law as source for rule 10b-5 limitations period); Gardner v. Surnamer, No. 82-2723 (E.D. Pa. Sept. 5, 1985) (LEXIS, Genfed library, Dist file) (§ 28(a) implies that state court judgments should have claim and issue preclusive effect on rule 10b-5 actions).

258. *See supra* notes 111–13 and accompanying text.

259. 453 U.S. 473 (1981).

260. *Id.* at 483–84.

261. *See supra* Part I.

262. *Cf.* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981) (referring to Congress's ability to confer exclusive jurisdiction "either explicitly or implicitly").

certainly cannot be thought unsympathetic to a claim only because it is labeled federal rather than state law.[263]

Application of these considerations to other actions requires examination of two points that the *Gulf* Court failed to clarify.

The first point is whether practical considerations alone can rebut the presumption of concurrent jurisdiction or whether their role is simply to supplement the more explicit congressional directives found in statutory language, legislative history, and statutory policies. Practical considerations were relegated to a supplementary role in the Supreme Court's 1962 decision in *Charles Dowd Box Co. v. Courtney*.[264] *Dowd* upheld concurrent jurisdiction for actions brought under section 301(a)[265] of the Labor Management Relations Act.[266] In accordance with a previous decision,[267] these actions were governed by a body of judge-generated federal common law.[268] The *Dowd* Court thus had to confront the argument that exclusive jurisdiction was necessary because "[o]nly the federal judiciary . . . possesses both the familiarity with federal labor legislation and the monolithic judicial system necessary for the proper achievement of the creative task . . . ."[269] The Court rejected this contention: "Whatever the merits of this argument as a matter of policy, we find nothing to indicate that Congress adopted such a policy in enacting to § 301."[270] Thus, *Dowd* seemed to stand for the principle that practical considerations alone are insufficient to rebut the presumption of concurrent jurisdiction.

The *Gulf* Court left the status of *Dowd* in doubt by sending conflicting signals. On the one hand, it cited *Dowd* with apparent approval.[271] On the other hand, it not only upheld the relevance of the very practical considerations that the *Dowd* Court had rejected, but also seemed to sanction a law review article that critized *Dowd* for not giving practical considerations their proper due.[272] While it is therefore conceivable that *Dowd* remains good law after *Gulf*, it seems far more likely that *Gulf* modified *Dowd* so as to allow practical considerations to rebut the presumption of concurrent jurisdiction should they prove especially compelling.[273]

The second point not clarified by *Gulf* is when the first practical consideration—the need for more uniform federal interpretation—becomes operative.[274] Presumably

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263. *Id.* at 484.

264. 368 U.S. 502 (1962).

265. 29 U.S.C. § 185(a) (1982).

266. Labor Management Relations Act of 1947, 29 U.S.C. §§ 141–87 (1982).

267. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

268. *Id.* at 456. *See also* Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers v. Lucas Flour Co., 369 U.S. 95, 102 (1962).

269. Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507 (1962).

270. *Id.*

271. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981).

272. *Id.* at 484 n.13 (citing Redish & Muench, *supra* note 60, at 329–35 for the practical considerations generally favoring exclusive federal jurisdiction. The pages cited, however, contain a criticism of *Dowd*).

273. The Court of Appeals for the Second Circuit has recently observed: "Mindful of the cautions expressed by the Supreme Court concerning exclusivity of federal statutory claims, we think it would take a truly extraordinary set of circumstances to demonstrate that a claim arising under federal common law is within exclusive federal jurisdiction." Nordlicht v. New York Tel. Co., 799 F.2d 859, 864 (2d Cir. 1986) (rejecting exclusive federal jurisdiction for state-created claims premised on violation of federal telecommunications law), *cert. denied*, 107 S. Ct. 929 (1987).

274. Interpretation of rule 10b-5 can never be entirely uniform. Even with exclusive federal jurisdiction, lower

it is when state court interpretation presents the threat of rampant erraticism. That in turn would occur when the two other practical considerations become operative: when the nature of the federal claims are such that only federal courts possess the relevant expertise or sensitivity to the underlying federal policies. Thus, the first practical consideration may be defined by the other two: the need for uniformity may arise only when federal courts possess especial competence and sensitivity born of the intrinsically federal nature of the claims.

To rebut the presumption of concurrent jurisdiction over rule 10b-5 actions, practical considerations would have to be especially compelling, since rebuttal cannot be premised upon statutory language, legislative history, and statutory policies. There do not appear to be any such practical considerations, however. Unlike the 1934 Act express actions, the rule 10b-5 action has no technical qualities that commend it exclusively to the federal courts.[275] Moreover, the design of the 1933 and 1934 Acts has generated state court familiarity with the concepts relevant to rule 10b-5, thereby mooting any need for uniform federal interpretation, for federal expertise, or for sensitivity towards federal policies.

First, section 28(a) has preserved state securities statutes,[276] for which rule 10b-5 has provided a model. Provisions substantially identical to rule 10b-5 appear in both the 1956 Uniform Securities Act[277] and the 1985 Revised Uniform Securities Act.[278] Thus, state courts regularly confront a close analog to rule 10b-5.[279]

Second, section 28(a) permits state courts to hear securities actions grounded on common law deceit.[280] State court familiarity with deceit facilitates familiarity with rule 10b-5 as well, since deceit is the body of law from which the elements of rule 10b-5 ultimately derive.[281]

Third, in accordance with the grant of concurrent jurisdiction in the 1933 Act, state courts can and do hear actions under sections 11 and 12.[282] These remedies

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federal courts inevitably vary in their interpretations, and the Supreme Court does not address all such conflicts. *See* C. WRIGHT, LAW OF FEDERAL COURTS 756 n.14 (1983).

275. *See supra* notes 217–19 and accompanying text.

276. For a discussion of § 28(a), see *supra* notes 254–58 and accompanying text.

277. The Uniform Securities Act was approved by the National Conference of Commissioners on Uniform State Laws in 1956. Thirty-seven states have adopted the Act. *See* 7B UNIFORM LAWS ANNOT. 509–10 (1985).

Section 101 of the Uniform Securities Act provides:

It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

For the text of rule 10b-5, see *supra* note 3.

278. In 1985, a revised uniform securities act was promulgated and submitted to the states for consideration. *See* 7B UNIFORM LAWS ANNOT. 30 (Supp. 1987). Section 101 (renumbered § 501) has been retained. *See id.* at 73.

279. For illustrative state cases involving § 101, see People v. Riley, 708 P.2d 1359 (Colo. 1985); People v. Cook, 89 Mich. App. 72, 279 N.W.2d 579 (1979); State v. Fairchild, 298 S.E.2d 110, 125–28 (W. Va. Ct. App. 1982).

280. For a discussion of § 28(a), see *supra* notes 254–58 and accompanying text.

281. *See supra* note 217 and accompanying text.

282. Section 11 of the 1933 Act, 15 U.S.C. § 77k (1982) [hereinafter § 11]. Section 12(2) of the 1933 Act, 15 U.S.C. § 77l(2) (1982) [hereinafter § 12(2)]. For illustrative state cases involving §§ 11 and 12, see Grayco Resources, Inc. v. Poole, 500 So. 2d 1030 (Ala. 1986) (§ 12); Insurance Underwriters Clearing House, Inc. v. Natomas Co., 184 Cal. App. 3d 1520, 1526, 228 Cal. Rptr. 449, 453 (1986) (§§ 11 and 12); Peoples Bank v. North Carolina Nat'l Bank,

represent an important point of reference in shaping the elements of rule 10b-5. For example, the Supreme Court has relied on these provisions in upholding rule 10b-5's scienter[283] and purchaser-seller[284] requirements. Thus, state court adjudication of actions under sections 11 and 12 provides significant exposure to concepts essential to rule 10b-5.

In any event, rule 10b-5 actions are in part governed by state substantive law, thereby making the practical considerations in some respects simply irrelevant. While in general the rules governing rule 10b-5 actions do not vary from state to state,[285] there is one significant exception: the limitations period. In the absence of an expressly applicable limitations period in the 1934 Act,[286] lower courts have invariably derived the limitations period from state law,[287] a practice that the Supreme Court has approved in dictum.[288]

Perhaps more significant than state law governance itself is the fact that courts have chosen state law rather than a uniform federal limitations period derived from the 1933 Act or 1934 Act express actions.[289] The choice was not inevitable. Although the Supreme Court has ruled that in general state law supplies the period of limitations where a federal statute is silent,[290] it has also found state law to be inapplicable when federal law provides a closer analogy or otherwise better fosters the relevant statutory policies.[291] Therefore, the choice of state rather than federal law may imply the judgment that uniform interpretation of rule 10b-5 actions is of less than critical importance.

Exclusive federal jurisdiction over rule 10b-5 actions is thus called for neither by the policies specific to section 27 and the 1934 Act nor by practical considerations. The presumption of concurrent jurisdiction over these actions therefore stands unrebutted.

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139 Ga. App. 405, 228 S.E.2d 334 (1976) (§ 12); Drexel Burnham Lambert, Inc. v. Merchants Inv. Counseling, Inc., 451 N.E.2d 346, 347 (Ind. App. 1983) (§ 11).

283. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 210–11 (1976) (upholding scienter requirement under rule 10b-5 in part on the ground that not to do so would nullify §§ 11 and 12).

284. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 736 (1975) (upholding the purchaser-seller requirement under rule 10b-5 in part because §§ 11 and 12 are limited to purchasers and sellers). *See also* Herman & MacLean v. Huddleston, 459 U.S. 375, 382–84 (1983) (impact on §§ 11 and 12 is factor to consider in determining elements of rule 10b-5).

285. For the elements of rule 10b-5, see *supra* note 219.

286. Section 10(b) does not contain a limitations period. For the text of § 10(b), see *supra* note 1. Nor does the 1934 Act contain a general limitations provision.

287. For a review of the leading cases in every circuit, see 4 A. BROMBERG & L. LOWENFELS, *supra* note 11, § 11.9 (300)–(400).

288. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 210 n.29 (1976).

289. The limitations periods for §s 11 and 12 is one year. *See* 15 U.S.C. § 77m (1982). Sections 9(e) and 18(a) likewise have a one year limitations period. *See* 15 U.S.C. § 78i(e) (1982) and 15 U.S.C. § 78r(c) (1982). The limitations period for § 16(b) is two years. *See* 15 U.S.C. § 78p(b) (1982).

290. Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 107 S. Ct. 2759, 2762 (1987) (quoting DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 158–59 (1983) (quoting Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946))).

291. *See* Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 107 S. Ct. 2759, 2762–63 (1987) (collecting cases); DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 159 n.13 (1983).

Conclusion

The presumption of concurrent state and federal court jurisdiction over federal actions results inevitably from our system of state-federal relations. The presumption is therefore rebuttable only when clear evidence of a contrary congressional intent emerges from statutory language, legislative history, or federal interests. This Article has demonstrated that none of these factors rebuts the presumption for actions implied under rule 10b-5. Recognizing the appropriateness of concurrent state and federal jurisdiction over these actions would thus represent the triumph of both reason and federalism.