
Federal Jurisdiction — Securities Exchange Act of 1934 —
Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning

During the early 1990s, “an explosion of securities fraud litigation”¹ revealed “meritless shareholder suits . . . being initiated for the sole purpose of obtaining large attorneys’ fees.”² Endeavoring to restore the true purpose of investor-protection statutes in the face of such chicanery, Congress enacted a series of specific pleading rules governing securities plaintiffs in federal courts, including the Private Securities Litigation Reform Act of 1995³ (PSLRA). As a result of this increased burden, class action securities plaintiffs faced unprecedented hurdles in reaching trial on the merits in federal courts at the outset of the twenty-first century. Since then, plaintiffs have sought refuge from the PSLRA’s stringency in state court, even though the Securities Litigation Uniform Standards Act⁴ (SLUSA) — which requires that the lion’s share of securities cases be filed in federal court⁵ — largely blocks that escape valve. Yet last Term in *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*,⁶ the Supreme Court permitted such an escape in recognizing that the exclusive-jurisdiction provision of the Securities Exchange Act of 1934⁷ (Exchange Act) does not extend to claims brought under state law even if the complaint refers to alleged violations of federal securities laws. The majority insisted that precedent “positively compel[led]”⁸ its holding, but in conflating uniform jurisdictional standards with uniform outcomes in its administrability analysis, it disregarded the practical ramifications of such a “compelled” holding.

Stamp aficionado Greg Manning of Far Hills, New Jersey, began selling stamps through the mail as a teenager in the 1950s.⁹ Forty years later, he took his hobby public.¹⁰ By 2006, Manning’s collectibles brokerage, Escala Group, Inc., had become the third-largest

¹ *A Growing Increase in Class-Action Securities Litigation Against Publicly-Traded Companies, Particularly High Technology, Accountants, Outside Directors and Lawyers: Hearings Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous., & Urban Affairs*, 103d Cong. 3 (1993) (statement of Sen. Donald W. Riegle, Jr.).

² *Disher v. Citigroup Glob. Mkts. Inc.*, 419 F.3d 649, 652 (7th Cir. 2005).

³ Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

⁴ Pub. L. No. 105-353, 112 Stat. 3227 (1998) (codified as amended in scattered sections of 15 U.S.C.).

⁵ 15 U.S.C. § 78bb(f) (2012).

⁶ 136 S. Ct. 1562 (2016).

⁷ 15 U.S.C. § 78aa-78pp (2012).

⁸ *Manning*, 136 S. Ct. at 1567.

⁹ See Brett Joshpe, *Sold Short*, AM. SPECTATOR (Aug. 14, 2009, 10:07 AM), http://www.spectator.org/41099_sold-short [<https://perma.cc/A4A9-7FPR>].

¹⁰ See Dan Goldblatt, *Reinventing an Auction House*, BUS. NEWS (N.J.), Nov. 29, 1999, at 8.

online auction house in the world after Sotheby's and Christie's.¹¹ During this period of expansion, the company's stock price experienced significant volatility.¹²

Unhappy with their stock's depreciation in value, Manning and other aggrieved Escala shareholders filed a complaint in New Jersey state court against Merrill Lynch and several other financial institutions, alleging they engaged in naked short sales¹³ of Escala stock.¹⁴ Manning argued that Merrill Lynch contravened several New Jersey statutes when it made short sales without possessing or intending to possess sufficient stock to deliver to buyers.¹⁵ Although Manning did not formally allege that Merrill Lynch had violated any federal securities law, the complaint he filed frequently referenced Regulation SHO, a federal regulation that prohibits a seller from selling a security without at least "reasonable grounds to believe" that it can be delivered.¹⁶

Seizing upon Manning's invocation of federal regulations, Merrill Lynch removed the case to the United States District Court for the District of New Jersey under two discrete jurisdictional grants.¹⁷ It argued first that the district court had jurisdiction to hear the case pursuant to the general federal question statute, which grants district courts jurisdiction over "all civil actions arising under" federal laws.¹⁸ It then asserted that the court also had jurisdiction to hear the case pursuant to section 27 of the Exchange Act,¹⁹ which grants district courts exclusive jurisdiction over claims "brought to enforce any liabil-

¹¹ "Enron of Spain" Fallout Ripples into U.S. Markets, FOXNEWS.COM (June 8, 2006), <http://www.foxnews.com/story/2006/06/08/enron-spain-fallout-ripples-into-us-markets.html> [<https://perma.cc/Z3TY-K3UX>].

¹² Cf. Joshpe, *supra* note 9 (noting that Escala trading volume increased by 3500% between April and May 2006 alone).

¹³ Short selling occurs when a seller borrows a security for sale in the open market, with the intent to buy the borrowed security back before settlement date at a lower price. *See, e.g.*, Elec. Trading Grp., LLC v. Banc of Am. Sec. LLC, 588 F.3d 128, 132 (2d Cir. 2009). When naked short selling, by contrast, the seller does not arrange to borrow — and by extension, cannot deliver — the security. *See, e.g., id.* at 135–36. Because this practice allows for the sale of an unlimited number of securities, it can serve as "a tool to drive down a company's stock price," to investors' detriment. "Naked" Short Selling Antifraud Rule, 73 Fed. Reg. 61,666, 61,670 (2008) (to be codified at 17 C.F.R. § 240).

¹⁴ *Manning*, 136 S. Ct. at 1566.

¹⁵ Manning's complaint included a panoply of state law causes of action, ranging from violations of New Jersey's Racketeer Influenced and Corrupt Organizations (RICO) Act, N.J. STAT. ANN. § 2C:41-2(a) (West 2005), the New Jersey Criminal Code, *id.* §§ 2C:20-2, -4, and New Jersey Uniform Securities Law, *id.* §§ 49:3-47 to -83 (West 2005 & Supp. 2016), to common law claims of negligence, unjust enrichment, and interference with contractual relations. *See Manning*, 136 S. Ct. at 1577 (Thomas, J., concurring in the judgment) (listing all "standard state-law contract and tort law claims").

¹⁶ 17 C.F.R. § 242.203(b)(1) (2008).

¹⁷ *Manning*, 136 S. Ct. at 1567.

¹⁸ 28 U.S.C. § 1331 (2012).

¹⁹ 15 U.S.C. § 78aa (2012).

ity or duty created by [the Exchange Act] or the rules and regulations thereunder,”²⁰ including Regulation SHO. Manning sought remand, but the district court held remand inappropriate because he could not succeed without proving a violation of Regulation SHO.²¹ The district court certified interlocutory appeal on the federal jurisdiction question.²²

The Court of Appeals for the Third Circuit reversed and remanded to state court.²³ Writing for the panel, Judge Smith²⁴ addressed each possible grant of federal jurisdiction in turn. First, he found that because Manning’s claims were “brought under state law” and did not “necessarily” raise any federal issue under Regulation SHO, § 1331 — the grant of jurisdiction for questions “arising under” federal law — did not provide any basis for establishing jurisdiction.²⁵ Turning next to the Exchange Act’s exclusive-jurisdiction provision, Judge Smith found that section 27 does not provide an “independent basis” of federal jurisdiction, but instead “merely serves to *divest* state courts of jurisdiction.”²⁶ Under the Third Circuit’s reasoning, a court must address as a threshold question whether a plaintiff’s claims meet § 1331’s requirements in order to engage in section 27 analysis.²⁷ Because Manning’s claims were insufficient to establish federal jurisdiction under § 1331, they were necessarily insufficient to establish such jurisdiction under section 27.²⁸ Merrill Lynch petitioned for a writ of certiorari solely as to whether section 27 provided an independent basis for federal jurisdiction.²⁹

The Supreme Court affirmed,³⁰ but offered a different interpretation of the relationship between section 27 and § 1331. Writing for the Court, Justice Kagan³¹ chose not to read a § 1331 inquiry as prerequisite to, and thus broader than, section 27 analysis.³² Instead, the Court interpreted the two grants of jurisdiction as identical and coexten-

²⁰ *Id.* § 78aa(a).

²¹ *Manning v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 12-4466, 2013 WL 1164838, at *4–5, *7 (D.N.J. Mar. 20, 2013).

²² *Manning v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 12-4466, 2013 WL 2285955 (D.N.J. May 23, 2013).

²³ *Manning v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 772 F.3d 158, 160 (3d Cir. 2014).

²⁴ Judge Smith was joined by Judges Vanaskie and Sloviter.

²⁵ *Manning*, 772 F.3d at 160–61.

²⁶ *Id.* at 167–68 (emphasis added).

²⁷ *Id.*

²⁸ *See id.*

²⁹ *Manning*, 136 S. Ct. at 1567.

³⁰ *See id.* at 1567, 1570.

³¹ Justice Kagan was joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Alito.

³² *See Manning*, 136 S. Ct. at 1567.

sive.³³ Under this interpretation, a case may only reach federal court under section 27 of the Exchange Act if and when § 1331's jurisdiction is established.³⁴

Under the majority's reasoning, which equates the jurisdictional grants of section 27 and § 1331, a "special and small category" of cases exists where a federal law need not create the cause of action in order for federal jurisdiction to exist.³⁵ Under the test of *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*,³⁶ this threshold is reached when a federal issue is "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress."³⁷

In interpreting the Exchange Act's exclusive-jurisdiction provision in light of these normal bases for federal jurisdiction, the Court rejected the litigants' proposed readings.³⁸ Merrill Lynch asserted that section 27 jurisdiction applies where a "complaint either explicitly or implicitly 'assert[s]' that 'the defendant breached an Exchange Act duty.'"³⁹ Under this interpretation, even mere "incidental assertions" that a defendant had violated a federal duty would suffice to create exclusive federal jurisdiction.⁴⁰ The Court objected to such an "expansive" understanding of section 27 as one that would violate a "natural reading" of the provision's text.⁴¹ Manning's argument — that section 27 applies only where the Exchange Act or associated regulations *create* a cause of action — fared no better.⁴² The Court rejected this "far more restrictive interpretation" of section 27 as insufficiently broad to capture state law actions that "necessarily depend[]" on the breach of a federal duty.⁴³

³³ See *id.* at 1570 ("§ 27's jurisdictional test matches the one we have formulated for § 1331 . . ."); see also *id.* ("[O]ur rule construes . . . the phrases 'arising under' and 'brought to enforce' in § 1331 and § 27 . . . 'to mean exactly the same thing.'" (quoting Reply Brief for Petitioners at 7, *Manning*, 136 S. Ct. 1562 (No. 14-1132))).

³⁴ See *id.*

³⁵ See *id.* at 1569 (quoting *Gunn v. Minton*, 133 S. Ct. 1059, 1064 (2013)). The Court noted that while federal jurisdiction is also appropriate where the Exchange Act or an implementing regulation "creates the cause of action" asserted, *id.* (quoting *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916)), this application of federal jurisdiction was irrelevant to the case at bar because Manning asserted only state law causes of action, see *id.*

³⁶ 545 U.S. 308 (2005).

³⁷ *Gunn*, 133 S. Ct. at 1065 (applying components of analysis enumerated in *Grable* as a four-part test of federal jurisdiction).

³⁸ *Manning*, 136 S. Ct. at 1568–71.

³⁹ *Id.* at 1568 (alteration in original) (first quoting Brief for Petitioners at 22, *Manning*, 136 S. Ct. 1562 (No. 14-1132); then quoting Reply Brief for Petitioners, *supra* note 33, at 11).

⁴⁰ *Id.* at 1568–69.

⁴¹ *Id.* at 1568.

⁴² *Id.* at 1569.

⁴³ *Id.*

The Court emphasized that precedent constrained its interpretation of the Exchange Act's exclusive-jurisdiction provision. The majority opinion noted that its construction of section 27 comported with two previous cases — *Pan American Petroleum Corp. v. Superior Court*⁴⁴ and *Matsushita Electric Industrial Co. v. Epstein*⁴⁵ — that interpreted statutory “brought to enforce” language.⁴⁶ Although the plaintiffs in both cases did not allege securities fraud,⁴⁷ in both instances the Court held that the “linguistic distinction” between the “brought to enforce” language of the federal statute in question and the “arising under” language of § 1331 did not compel conflicting interpretations.⁴⁸ Calling the statutory provisions of *Pan American*, *Matsushita*, and *Manning* “materially indistinguishable,”⁴⁹ the Court wrote that its conclusion was “positively compel[led]” by precedent.⁵⁰

The Court also invoked federalism and administrability concerns to justify its decision. It expressed confidence in the ability of federal courts to apply the familiar “arising under” test to jurisdictional questions under section 27 and in the ability of state courts to follow federal courts’ interpretations of the Exchange Act when necessary.⁵¹ The majority also lauded the “administrative simplicity”⁵² of its outcome. By avoiding an additional jurisdictional test for securities law claims, the majority argued, a uniform jurisdictional inquiry curbs inconsistency between securities law decisions and all other cases, and diminishes the likelihood that plaintiffs will merely excise all references to federal securities legislation in order to remain in state court.⁵³

Justice Thomas, writing for himself and Justice Sotomayor,⁵⁴ concurred in the judgment but rejected the majority’s understanding of

⁴⁴ 366 U.S. 656 (1961).

⁴⁵ 516 U.S. 367 (1996).

⁴⁶ See *Manning*, 136 S. Ct. at 1571.

⁴⁷ The Court in *Pan American* interpreted a provision of the Natural Gas Act that granted federal courts jurisdiction over “all suits in equity and actions at law brought to enforce any liability or duty created by . . . [the Natural Gas Act] or any rule, regulation, or order thereunder.” See 366 U.S. at 662 (quoting 15 U.S.C. § 717u). In *Matsushita*, on the other hand, the Court was interpreting section 27 of the Exchange Act, but only insofar as it related to a breach of fiduciary duty by corporate directors. See 516 U.S. at 370.

⁴⁸ See *Manning*, 136 S. Ct. at 1571–73.

⁴⁹ *Id.* at 1571. The Court identified nine other statutory provisions with such language. See *id.* at 1568 n.3.

⁵⁰ See *id.* at 1567 (“This Court’s precedents interpreting identical statutory language positively compel [its] conclusion.”).

⁵¹ See *id.* at 1573–74.

⁵² *Id.* at 1574 (quoting *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010)).

⁵³ See *id.* at 1575.

⁵⁴ Of the sitting Supreme Court Justices, Justice Thomas and Justice Sotomayor are the second-least likely to reach such an agreement; on nonunanimous cases, they agreed with one another just eighteen percent of the time in the 2015 Term. See *The Supreme Court, 2015 Term* —

the relationship between section 27 and § 1331.⁵⁵ Because Justice Thomas could find no nexus between “arising under” jurisdiction and “brought to enforce” jurisdiction in section 27’s text, he refused to countenance the majority’s application of the *Grable* test.⁵⁶ The concurrence instead opted for a “straightforward test: If a complaint alleges a claim that necessarily depends on a breach of a requirement created by the Act, § 27 confers exclusive federal jurisdiction over that suit.”⁵⁷ Because this formulation does not oblige a court to determine whether the issue is “substantial” or “actually disputed,” the concurrence’s approach captures a broader set of claims: *any* case necessarily raising breach of a federal duty is bound for federal court. In so reasoning, the concurrence dismissed the majority’s interpretation of *Pan American*⁵⁸ and *Matsushita*⁵⁹ precedent. Irrespective of the test applied, the concurring Justices agreed with the majority that Manning’s claim did not necessarily depend on a breach of any federal regulation, and thus should remain in state court.⁶⁰

The capital markets have long been recognized as a sector replete with self-dealing and moral hazard.⁶¹ Lawmakers concocted a gallimaufry of laws and regulations — federal and state, industry-specific and general — during the early twentieth century to protect naïve investors from such exploitation, but obliquitous applications of these forms of relief effectively neutralized their efficacy. Consequently, much securities legislation enacted during the late twentieth century was designed to restore investor confidence by ensuring uniform protection of meritorious claims and dismissal of nonmeritorious claims, irrespective of jurisdiction. Against this backdrop, the *Manning* Court’s insistence on uniform jurisdictional requirements superficially

The Statistics, 130 HARV. L. REV. 504, 507 (2016). *Manning* is the first opinion the two have ever filed as a pair.

⁵⁵ *Manning*, 136 S. Ct. at 1575–76 (Thomas, J., concurring in the judgment).

⁵⁶ *Id.* at 1579–80; *see also id.* at 1580 (advocating for a “text-based view” and “hewing to § 27’s text” rather than adopting the majority’s interpretation).

⁵⁷ *Id.* at 1576.

⁵⁸ Although Justice Thomas acknowledged that the outcome in *Pan American* lent “some support” to the majority’s reasoning in the case at bar, he found that the earlier decision’s reliance on legislative history did not “warrant [his] respect” when interpreting provisions of an entirely different statute. *See id.* at 1579.

⁵⁹ Justice Thomas cared even less for the Court’s invocation of *Matsushita*, writing that because it “did not decide whether § 27 adopts the arising-under standard, . . . its passing use of the phrase ‘arising under’ [could not] bear the weight” the majority granted it. *See id.* at 1580.

⁶⁰ *See id.*

⁶¹ *See* John Maynard Keynes, *National Self-Sufficiency*, 22 STUD. IRISH Q. REV. 177, 183 (1933) (“[D]ecadent international but individualistic capitalism . . . is not a success. It is not intelligent, it is not beautiful, it is not just, it is not virtuous . . .”); *see also Parks and Recreation: Go Big or Go Home* (NBC television broadcast Jan. 20, 2011) (“Capitalism: God’s way of determining who is smart, and who is poor.” (statement of Ron Swanson, Director, Pawnee Parks and Recreation Department)).

makes sense. However, the Court's narrow focus on jurisdictional requirements may perversely result in *more* unpredictability, both because its preservation of federalism shores up plaintiffs' ability to avail themselves of diverse investor-friendly state statutes, and because encumbering state courts with federal question analysis creates an additional line of inquiry that may lead to divergent results.

Securities law, with its labyrinthine dual-regulatory system, has long been recognized as a significant theater of war for federalism.⁶² The Exchange Act and other investor-protection statutes were meant to augment, rather than preempt, preexisting state securities laws.⁶³ Since the promulgation of those acts, however, Congress has repeatedly attempted to reconfigure the balance of power between federal and state regulatory authorities in order to empower federal enforcement agencies.⁶⁴ In none of these reconfigurations has Congress gone so far as to preempt state law altogether.⁶⁵

Because federal regulation supplemented, rather than supplanted, sundry state regulations, innovative plaintiffs — and their attorneys⁶⁶ — quickly began invoking this bricolage of investor-protection statutes irrespective of a case's merit and purely for their own profit.⁶⁷ Congress reacted to deter the filing of unmeritorious se-

⁶² See, e.g., Edward M. Cowett, *Federal-State Relationships in Securities Regulation*, 28 GEO. WASH. L. REV. 287, 290 (1959) ("That such parallel systems are permitted to exist is at once the genius and the curse of our federal system."). The odds of prevailing on such a battleground are the subject of much scholarly debate. Where some critics see a fruitless exercise, others find it meritorious. Compare Eugene V. Rostow, Book Review, 62 YALE L.J. 675, 677 (1953) (calling dual regulation "a monument to the shibboleth, not the reality, of federalism"), with, e.g., Stefania A. Di Trolio, *Public Choice Theory, Federalism, and the Sunny Side to Blue-Sky Laws*, 30 WM. MITCHELL L. REV. 1279, 1307 (2004) ("Dual regulation . . . is efficient because federalism itself is efficient.").

⁶³ As a hearing on the initial draft of the Securities Act of 1933 noted, "savings clauses" in both the Securities Act and Exchange Act were inserted "to assure the states that [the Acts were] not an attempt to supplant their laws, but an attempt to supplement their laws." Roberta S. Karmel, *Reconciling Federal and State Interests in Securities Regulation in the United States and Europe*, 28 BROOK. J. INT'L L. 495, 501 (2003) (quoting *Federal Securities Act: Hearings on H.R. 4314 Before the Comm. on Interstate and Foreign Commerce*, 73d Cong. 117 (1933) (statement of Ollie M. Butler, Foreign Serv. Div., Dep't of Commerce)).

⁶⁴ See, e.g., National Securities Markets Improvement Act of 1996 (NSMIA), Pub. L. No. 104-290, 110 Stat. 3416 (codified as amended in scattered sections of 15 U.S.C.).

⁶⁵ The NSMIA, for example, expressly preserves state authority to "investigate and bring enforcement actions with respect to fraud or deceit, or unlawful conduct by a broker or dealer, in connection with the securities or securities transactions." *Id.* § 102; see also *Patterman v. Travelers, Inc.*, 11 F. Supp. 2d 1382, 1387 (S.D. Ga. 1997) ("Neither the text of the statute nor its legislative history manifest[s] Congress' intent to completely pre-empt state law claims within NSMIA's scope.").

⁶⁶ See 141 CONG. REC. S19,084 (daily ed. Dec. 21, 1995) (statement of Sen. Reid) ("[I]nvestors . . . ultimately lose out to the operators of the scam — in this case, these attorneys."); see also *id.* at S19,085 (calling meritless securities fraud cases "windfalls to scrupulous attorneys").

⁶⁷ See *id.* at S9034 (statement of Sen. Bennett) (asserting the PSLRA was written "to deal with those people who file lawsuits without any expectation that they will ever come to trial but in the

curities claims in federal court by passing the PSLRA in 1995.⁶⁸ The PSLRA's nominal success in reducing the number of federal securities fraud claims filed in the following years was vitiated by the corresponding increase in the number of state law claims filed over the same time period,⁶⁹ as plaintiffs recast their securities claims as breach of contract, negligent misrepresentation, common law fraud, or breach of fiduciary duty claims.⁷⁰ Congress sought to fill this so-called "federal flight" interstice just three years later by enacting the SLUSA.⁷¹ Its core provisions,⁷² paired with the Supreme Court's broad reading of those provisions,⁷³ eviscerated most securities plaintiffs' hope of recovering under state law.⁷⁴

The Court's solicitude for maintaining state court jurisdiction over facially state law claims explains its reluctance to "endorse [a] 'broad reading'" of exclusive jurisdiction pursuant to section 27 in *Manning*.⁷⁵ As a matter of pure statutory interpretation, federalism concerns should — and did — shape the Court's analysis. Wary of the "sensitive judgments about congressional intent, judicial power, and the fed-

hope that the economics of the circumstance will force people to settle with them short of a trial, so that they can enjoy . . . the 'perfect' law practice — a law practice without clients and a law practice that does not require you to ever go to court, to ever hold discovery, to ever go through any procedure — simply file a set of papers and wait . . . for the check to arrive in the mail").

⁶⁸ See *id.* See generally Marc I. Steinberg, *Securities Law After the Private Litigation Securities Reform Act — Unfinished Business*, 50 SMU L. REV. 9, 10–12, 17 (1996) (discussing how the PSLRA's reforms aimed to increase the difficulty of federal securities litigation).

⁶⁹ See *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 108 (2d Cir. 2001) (citing H.R. REP. NO. 105-803 (1998) (Conf. Rep.)) ("According to a joint House-Senate Committee Report, the decline in federal securities class action suits that occurred after the passage of PSLRA was accompanied by a nearly identical increase in state court filings."); see also S. REP. NO. 105-182, at 4 (1998) (citing testimony that state court securities class actions were mostly unheard of before PSLRA's enactment).

⁷⁰ See *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 123 (2d Cir. 2003) ("Confronted with more onerous procedural requirements and dimmed prospects of success under the PSLRA, litigants simply abandoned use of federal court and filed suit in state court under state securities laws.")

⁷¹ See *id.*; see also H.R. REP. NO. 105-803, at 13 ("The purpose of [SLUSA] is to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court.")

⁷² SLUSA prevents prospective class action plaintiffs from bringing claims in state court alleging either "a misrepresentation or omission of a material fact" or use of "manipulative or deceptive device or contrivance" in connection with the purchase or sale of a nationally traded security. 15 U.S.C. § 78bb(f)(1)(A)–(B) (2012).

⁷³ See *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85–86 (2006).

⁷⁴ See, e.g., *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305, 311 (6th Cir. 2009) ("For the same reason a claimant does not have the broader authority to disclaim the applicability of SLUSA to a complaint, he cannot avoid its application through artful pleading that removes the covered words from the complaint but leaves in the covered concepts.")

⁷⁵ *Manning*, 136 S. Ct. at 1573 (quoting *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 379 (1959)).

eral system”⁷⁶ that federal jurisdiction entails, the Court allows federal question jurisdiction only where “the plaintiff’s right to relief *necessarily* depends on resolution of a substantial question of federal law.”⁷⁷ Manning’s complaint in the Superior Court of New Jersey, alleging violations of myriad state laws, could be decided without invocation of any federal securities laws.⁷⁸ As the Court’s unanimous decision implies, the outcome is uncontroversial in light of federalism and traditional methods of statutory interpretation.

However, when viewed in light of U.S. securities regulation’s complicated history, the Court’s holding in *Manning* is far less anodyne than it appears in the abstract. Instead, the Court’s decision to restore some adjudicative power to states, paired with the ingenuity of the plaintiffs’ bar, portends change for litigants in cases alleging any kind of securities fraud. Plaintiffs seeking to maximize the likelihood of recovery — as Manning did with New Jersey’s broad definition of “fraud,”⁷⁹ manifold forms of relief,⁸⁰ and extended statute of limitations,⁸¹ for example — should be encouraged by this increased latitude not just in New Jersey but also in other states.⁸² This phenomenon creates dissonance within the majority’s rhetoric: one of its primary justifications — federalism — necessarily imperils the other — uniformity.

In addition, the majority’s jejune statement that uniformity of jurisdictional statute will yield uniformity of outcome for litigants⁸³ belies the complexity inherent in federal question jurisdiction. Section

⁷⁶ *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 810 (1986).

⁷⁷ *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 28 (1983) (emphasis added); see also *Gunn v. Minton*, 133 S. Ct. 1059, 1065 (2013); cf. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 809–10 (1988) (declining to find federal jurisdiction where patent law question was not “essential to each of [the plaintiff’s] theories,” *id.* at 810).

⁷⁸ Seven of Manning’s ten state law causes of action were “standard state-law contract and tort claims” that invoked no Exchange Act requirement. *Manning*, 136 S. Ct. at 1577 (Thomas, J., concurring in the judgment).

⁷⁹ See N.J. STAT. ANN. § 49:3-49(e) (West 2005).

⁸⁰ See *id.* § 49:5-12 (injunctive relief); *id.* § 49:5-15 (restitution of illegally obtained money or other property).

⁸¹ Compare *id.* § 2A:14-1 (New Jersey’s six-year limitation for common law fraud), with 15 U.S.C. §§ 78i(f), 78r(c), 78cc(b) (2012) (Exchange Act’s three-year limitation for fraud).

⁸² See A.A. Sommer, Jr., *Preempting Unintended Consequences*, 60 LAW & CONTEMP. PROBS., Summer 1997, at 231, 231 (“Most states do not have laws that impose the stringent pleading requirements of the [Exchange] Act, set the hurdles so high in prevailing on fraudulent forecasts, provide for separate and proportionate damages, or place other impediments in the path of success in class actions like those created by the [Exchange] Act.”); cf. *id.* at 234 (postulating that defendants would be subject to “fifty-plus definitions of scienter, fifty-plus statutes of limitations, fifty-plus rules on attorneys’ fees, fifty-plus rules on what constitutes a class, fifty-plus rules on standing, and conflict questions galore” where SLUSA does not apply).

⁸³ See *Manning*, 136 S. Ct. at 1575 (claiming that “forcing courts to toggle back and forth between” Merrill Lynch’s proposed alternative standard and the “arising under” standard “would undermine consistency and predictability in litigation”).

1331 creates federal jurisdiction where state courts already enjoy plenary jurisdiction. Thus, a § 1331 inquiry unilaterally imposes burdens on federal courts to ensure they may properly exert jurisdiction. However, section 27 establishes *exclusive* federal jurisdiction, rather than concurrent federal jurisdiction as § 1331 does.⁸⁴ As a result, it obliges state courts to undertake an additional line of inquiry to ensure that a cause of action does *not* fall under federal courts' exclusive jurisdiction before proceeding. This additional procedural step introduces another opportunity for discrepancies between states in their interpretations of what qualifies as "arising under" a federal securities law, irrespective of state courts' familiarity with that standard. Thus, it seems unclear whether the majority's insistence that this test "provides ready answers to jurisdictional questions"⁸⁵ will provide such ready, uniform answers to substantive securities law questions themselves. Indeed, it appears that potentially dissimilar interpretations of even a familiar "arising under" standard will yield the kind of "tortuous inquiry" of federal question jurisdiction that the Court took great pains to avoid with respect to artful pleading.⁸⁶

Although calling *Manning* revolutionary for securities law may be hyperbolic, the case provides a potentially meaningful opportunity for prospective plaintiffs to get — and stay — in state court, availing themselves of the favorable procedures and more diverse forms of investor protections available in those fora. The Court's rhetoric suggested that it felt hamstrung by precedential interpretations of "materially indistinguishable" language, and it justified this compelled conclusion through invocations of federalism and uniform application of jurisdictional standards. However, the majority's facile understanding of uniformity as impacting jurisdictional inquiries and substantive law with equal force cuts against its stated "uniformity" aim. Plaintiffs eager to stay away from federal court will avail themselves of this new analytical burden, encouraging more litigation — and, by extension, more unpredictability — in state courts.

⁸⁴ Compare 28 U.S.C. § 1331 (2012) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."), with 15 U.S.C. § 78aa(a) (2012) ("[D]istrict courts . . . 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.").

⁸⁵ *Manning*, 136 S. Ct. at 1574.

⁸⁶ *Id.* at 1575.