

RE-EVALUATING HOLDER ACTIONS: GIVING  
DEFRAUDED SECURITIES HOLDERS A  
FIGHTING CHANCE

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INTRODUCTION

On November 8, 2001, Enron admitted that it had overstated its profit by more than half a billion dollars over the previous five years.<sup>1</sup> For many months leading up to this admission—and even the day of—the vast majority of securities analysts, relying on the fraudulent information provided by Enron, had recommended buying or holding Enron's stock.<sup>2</sup> Less than a month after investors learned the truth about Enron's financial condition, the company filed for Chapter 11 bankruptcy.<sup>3</sup>

While the destructive fallout from Enron's collapse is difficult to overstate, perhaps no one suffered more direct and palpable harm than those who relied on Enron's fraudulent misrepresentations and invested in the company.<sup>4</sup> Enron's shareholders included not only independent individual and corporate investors, but also those who held shares in mutual funds—which widely invested in Enron<sup>5</sup>—and thousands of Enron employees, who had significant portions of their

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1 See Richard A. Oppel Jr. & Andrew Ross Sorkin, *Enron Admits to Overstating Profits by About \$600 Million*, N.Y. TIMES, Nov. 9, 2001, at C1.

2 See Dan Ackman, *Enron Analysts: We Was Duped*, FORBES (Feb. 27, 2002), <http://www.forbes.com/2002/02/27/0227analysts.html>.

3 *Enron: The Amazing Disintegrating Firm*, ECONOMIST, Dec. 6, 2001, at 62, 62.

4 See Kenneth N. Gilpin, *Plenty of Pain to Go Around for Small Investors, Funds, Workers and Creditors*, N.Y. TIMES, Dec. 4, 2001, at C8 (discussing the widespread losses suffered by investors).

5 See *id.*

retirement savings tied up in Enron stock and held in their 401(k) accounts.<sup>6</sup>

Thousands of Enron investors turned to the judicial system for relief, bringing class action suits to seek redress for the losses they suffered because of Enron's fraud.<sup>7</sup> While these actions initially achieved a considerable amount of success,<sup>8</sup> later efforts at recovery were thwarted by recent developments in federal law, leaving countless defrauded shareholders with little recourse.<sup>9</sup>

The problem largely centers on the existence and application of the "purchaser-seller rule," or the *Birnbaum* rule, in federal law.<sup>10</sup> Originally articulated by the Second Circuit in *Birnbaum v. Newport Steel Corp.*<sup>11</sup> and later endorsed by the U.S. Supreme Court in *Blue Chip Stamps v. Manor Drug Stores*,<sup>12</sup> the rule holds that a person who is neither a purchaser nor a seller of securities may not bring an action under the Securities and Exchange Commission's (SEC) Rule 10b-5.<sup>13</sup> In other words, a company's fraudulent misrepresentation regarding its financial condition must induce the plaintiff to either purchase or sell that company's securities in order for the plaintiff to have standing to sue under federal securities law.<sup>14</sup>

This rule was intended to prevent various problems believed to be inherent in securities fraud suits that are not tied to a specific transaction. In establishing the rule, courts primarily feared "strike suits"<sup>15</sup> or vexatious litigation brought for the purpose of forcing an inequitable settlement as well as conjectural or speculative claims.<sup>16</sup> While the rule may have been the product of good intentions, its effect has been

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6 See PATRICK J. PURCELL, CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS: THE ENRON BANKRUPTCY AND EMPLOYER STOCK IN RETIREMENT PLANS I (2002), available at [fpc.state.gov/documents/organization/9102.pdf](http://fpc.state.gov/documents/organization/9102.pdf); Gilpin, *supra* note 4.

7 See, e.g., *Newby v. Enron Corp. (In re Enron Corp. Sec., Derivative & "ERISA" Litig.) (Enron I)*, 490 F. Supp. 2d 784, 786–88 (S.D. Tex. 2007).

8 See Bill Hensel, Jr., *Settlement Adds \$2.4 Billion to the Kitty*, HOUS. CHRON., Aug. 3, 2005, at D1 (reporting that shareholder-plaintiffs in Enron-related class actions had obtained over seven billion dollars in settlements).

9 See, e.g., *Newby v. Enron Corp. (In re Enron Corp. Sec.) (Enron II)*, 535 F.3d 325, 340 (5th Cir. 2008) (holding that Enron shareholders' state class action suit was preempted by federal law).

10 See generally Scott Jones, Note, *Revisiting Birnbaum: Changed Conditions and the Providence of the Purchaser-Seller Rule*, 2006 COLUM. BUS. L. REV. 603, 609–25 (discussing the development of the rule).

11 193 F.2d 461, 463 (2d Cir. 1952).

12 421 U.S. 723, 754–55 (1975).

13 See *id.* at 730–31.

14 See *id.* at 729–30.

15 See *id.* at 740–41.

16 See *id.* at 734–35.

to severely limit meritorious “holder” causes of action—that is, actions where the shareholder-plaintiff alleges that the defendant’s misrepresentation induced him to continue holding his stock when he would have otherwise purchased or sold and seeks to recover for the diminished value of the stock suffered as a result.<sup>17</sup> Since holders of stock are neither purchasers nor sellers for purposes of Rule 10b-5,<sup>18</sup> the *Birnbaum* rule and subsequent judicial and congressional actions have deprived countless numbers of shareholders of redress for their injuries. And while the injuries suffered by holders do not stem directly from an induced purchase or sale of stock, they are no less palpable. In the case of Enron, the company’s stock traded near ninety dollars per share at its height in August 2000—when the company was artificially inflating its stock prices through fraudulent statements<sup>19</sup>—but by December 2002, after the fraud had been disclosed, the price fell to just over six cents.<sup>20</sup> For long-term stockholders who had invested significant portions of their wealth in the company, Enron’s fraudulent scheme was devastating.<sup>21</sup>

While many of the concerns that courts have expressed about holder actions are legitimate,<sup>22</sup> the dangers of such actions are largely overstated, and as this Note will show, taking away holders’ right to sue creates far greater dangers and potential for injustice. Part I addresses the development of the law in this area while Part II illustrates the current state of the problem, and Part III suggests possible judicial and legislative solutions.

## I. BACKGROUND AND DEVELOPMENT OF THE LAW

### A. *Rule 10b-5 and the Blue Chip Stamps Doctrine*

Securities and Exchange Commission Rule 10b-5 states:

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17 See *Enron I*, 490 F. Supp. 2d 784, 787 n.4 (S.D. Tex. 2007).

18 See, e.g., *Small v. Fritz Cos.*, 65 P.3d 1255, 1260 (Cal. 2003).

19 See *supra* note 1 and accompanying text.

20 *Enron Corporation Common Stock Historical Price Table*, GILARDI & CO. LLC, 33–38, <http://www.gilardi.com/pdf/enro13ptable.pdf> (last visited Nov. 27, 2010).

21 See Dennis J. Buckley, *Enron: Where Is It Today?*, MARTINDALE.COM (April 8, 2004), [http://www.martindale.com/bankruptcy-law/article\\_Buchanan-Ingersoll-Rooney-PC\\_64920.htm](http://www.martindale.com/bankruptcy-law/article_Buchanan-Ingersoll-Rooney-PC_64920.htm) (“If you read the message boards on public sites such as CBS MarketWatch, you can get a glimpse of the pathos and despair of those left holding practically valueless Enron stock.”).

22 See Joshua D. Fulop, *Agency Costs and the Strike Suit: Reducing Frivolous Litigation Through Empowerment of Shareholders*, 7 J. BUS. & SEC. L. 213, 215–16, 221–22 (2007) (noting the dangers of strike suits in securities litigation).

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

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

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

*in connection with the purchase or sale of any security.*<sup>23</sup>

Although not explicitly stated, courts have long held that the rule implies a private cause of action that allows individuals to supplement the SEC's enforcement with private lawsuits.<sup>24</sup> However, this implied cause of action has been limited from very early on in its existence. Since the *Birnbaum* rule was first articulated in 1952, courts have interpreted the "in connection with the purchase or sale" language to require that a fraudulent statement must induce either a specific purchase or sale of securities in order to be actionable under Rule 10b-5.<sup>25</sup>

Courts have offered various justifications for the *Birnbaum* rule. In the seminal case, the Second Circuit based its reasoning largely on legislative history and intent,<sup>26</sup> while the Supreme Court in *Blue Chip Stamps* offered a justification that was primarily based on policy consid-

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23 17 C.F.R. § 240.10b-5 (2010) (emphasis added).

24 See *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971); cf. *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964) (finding a private cause of action implicit in Section 14(a)), *abrogated by Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 (1979) ("We do not now question the actual holding of that case, but we decline to read the opinion so broadly that virtually every provision of the securities Acts gives rise to an implied private cause of action.").

25 See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 754–55 (1975). Interestingly, although *Blue Chip Stamps* is widely cited as the Supreme Court's disapproval of holder actions, the case was not a holder action at all. The plaintiff was offered stock in a stamp corporation, but declined the offer, allegedly because of a misleadingly pessimistic prospectus. See *id.* at 725–27. Although the plaintiff was never a holder of the corporation's stock, the Supreme Court sweepingly disapproved of holder actions, along with the case in question. See *id.* at 754–55.

26 See *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461, 464 (2d Cir. 1952) ("The absence of a . . . provision in Section 10(b) [explicitly giving shareholders a right of action] strengthens the conclusion that that section was directed solely at that type of misrepresentation or fraudulent practice usually associated with the sale or purchase of securities . . .").

erations.<sup>27</sup> The Court was concerned that permitting causes of action outside the narrow purchaser-seller context would invite vexatious litigation and strike suits,<sup>28</sup> encourage the “extensive discovery and disruption of normal business activities,”<sup>29</sup> and create “conjectural and speculative” recoveries because the number of shares a plaintiff in a holder action alleges he would have sold is a “subjective hypothesis.”<sup>30</sup>

### B. *The Private Securities Litigation Reform Act of 1995*

Judicial concerns about plaintiffs abusing private securities litigation<sup>31</sup> soon brought about legislative action as well. In the mid 1990s, the corporate lobby went to Washington to petition for stricter federal regulations on securities litigation, complaining that its members were being harassed by frivolous class action lawsuits brought by securities holders who were more concerned with the suits’ settlement values than their merits.<sup>32</sup> Despite the inconclusive nature of the evidence purportedly supporting a “securities litigation crisis,”<sup>33</sup> Congress soon passed the Private Securities Litigation Reform Act of 1995 (“Reform Act”)<sup>34</sup> over President Clinton’s veto.<sup>35</sup>

The Reform Act “continue[d] a judicial trend toward narrowing the availability of relief for investors under the federal securities laws”<sup>36</sup> by making a number of significant changes to the private securities fraud class action litigation system.<sup>37</sup> Among the most significant changes implemented by the Reform Act were (1) a “safe har-

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27 See *Blue Chip Stamps*, 421 U.S. at 740–49.

28 *Id.* at 740.

29 *Id.* at 742–43.

30 *Id.* at 735.

31 See *supra* Part I.A.

32 See David M. Levine & Adam C. Pritchard, *The Securities Litigation Uniform Standards Act of 1998: The Sun Sets on California’s Blue Sky Laws*, 54 BUS. LAW. 1, 1–2 (1998).

33 See John W. Avery, *Securities Litigation Reform: The Long and Winding Road to the Private Securities Litigation Reform Act of 1995*, 51 BUS. LAW. 335, 339–341 (1996). Avery notes that at Senate hearings regarding this matter, much of the testimony involved anecdotal evidence, and that empirical evidence was weak. See *id.*; see also GARY W. SHORTER, CONG. RESEARCH SERV., CRS REPORT: SECURITIES LITIGATION REFORM 34 (1995) (“On balance, the evidence does not appear to be compelling enough for one to definitively assert that warrantless class action suits have exploded.”).

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

35 William J. Clinton, Veto Message (Dec. 19, 1995) (“I am not . . . willing to sign legislation that will have the effect of closing the courthouse door on investors who have legitimate claims. Those who are the victims of fraud should have recourse in our courts.”), *reprinted in* 141 CONG. REC. H15,214–15 (daily ed. Dec. 20, 1995).

36 Levine & Pritchard, *supra* note 32, at 4–5.

37 See *id.*

bor” for forward-looking statements that were not known to be false when made or were accompanied by meaningful cautionary language;<sup>38</sup> (2) heightened pleading standards, whereby plaintiffs must plead facts which give rise to a “strong inference” that the defendant acted with the required state of mind for fraud;<sup>39</sup> (3) a stay of discovery provision that prohibits plaintiffs from having access to discovery while a motion to dismiss is pending;<sup>40</sup> and (4) a lead plaintiff presumption, which designates the plaintiff with the largest financial stake in the litigation as the lead plaintiff and allows that lead plaintiff to select counsel for the class, subject to court approval.<sup>41</sup>

The Reform Act’s restrictions on federal shareholder class actions, coupled with *Blue Chip Stamps* and other recent Supreme Court cases limiting the ability of shareholders to sue in federal court,<sup>42</sup> led defrauded shareholders to seek redress for their grievances in state court.<sup>43</sup> Holder actions in state courts initially achieved a considerable amount of success because state common law often recognized holder claims, or state securities fraud statutes—more commonly known as “blue sky laws”<sup>44</sup>—specifically provided for them.<sup>45</sup> However, this avenue of relief did not remain as favorable to shareholders for long.

### C. *The Securities Litigation Uniform Standards Act of 1998*

Not long after significantly curtailing investors’ right and ability to sue in federal court, Congress limited their ability to sue in state

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38 15 U.S.C. § 77z-2(c) (2006).

39 *Id.* § 78u-4(b)(2).

40 *Id.* § 77z-1(b). The stay of discovery provision ensures, as a practical matter, that every complaint will be met with a motion to dismiss and that plaintiffs cannot use the discovery process to make an adequate complaint. *See* Levine & Pritchard, *supra* note 32, at 4.

41 15 U.S.C. § 77z-1(a)(3). This provision was designed to ensure that large institutional investors would lead securities class actions. *See* Levine & Pritchard, *supra* note 32, at 4–5.

42 *See* Levine & Pritchard, *supra* note 32, at 5 n.23 (listing cases in which federal courts have been resistant to holder claims).

43 *See* Jones, *supra* note 10, at 606.

44 Michael A. Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 STAN. L. REV. 273, 279 (1998).

45 *See, e.g.,* Rogers v. Cisco Sys., Inc., 268 F. Supp. 2d 1305, 1311 n.13 (N.D. Fla. 2003) (noting that Florida common law recognizes “holding claim[s]”); Small v. Fritz Cos., 65 P.3d 1255, 1258–59 (Cal. 2003) (holding that California common law recognizes holder actions); *see also* Enron I, 490 F. Supp. 2d 784, 818–19 (S.D. Tex. 2007) (noting that, although “the express language of the Texas statutes excludes ‘holder’ claims,” such claims have been brought under Texas common law).

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courts as well. After the passage of the Reform Act, the corporate lobby, led by Silicon Valley, returned to Washington to petition for further legislative action in response to what it viewed as the plaintiffs' bar using state law to circumvent the restriction of the Reform Act.<sup>46</sup> Congress responded by passing the Securities Litigation Uniform Standards Act of 1998 ("Uniform Standards Act").<sup>47</sup>

The Uniform Standards Act expressly preempts certain state law securities class actions by providing for automatic removal to federal court, followed by dismissal.<sup>48</sup> The Act applies to any "covered class action" that alleges

(A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or

(B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.<sup>49</sup>

The Act defines "covered class actions" as

(i) any single lawsuit in which—

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which—

(I) damages are sought on behalf of more than 50 persons; and

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46 See Jones, *supra* note 10, at 606–07; Leslie Eaton, *The Silicon Valley Gang: An Influential Industry with Lots of Money Is Getting Its Way on Capitol Hill*, N.Y. TIMES, June 11, 1998, at D1.

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

48 See Amanda M. Rose, *Life After SLUSA: What Is the Fate of Holding Claims?*, 69 DEF. COUNS. J. 455, 456 (2002).

49 15 U.S.C. § 78bb(f)(1) (2006).

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.<sup>50</sup>

For several years after the Uniform Standards Act came into existence, defrauded holders of securities continued to bring holder class actions under state law with considerable success. This was due in large part to widespread judicial determinations that, since the text of the Uniform Standards Act explicitly limits its reach to actions based on fraud “in connection with the purchase or sale” of a security,<sup>51</sup> holder claims should be exempt from its preemptive force.<sup>52</sup>

One court to conclude that the Uniform Standard Act’s preemption did not encompass holder claims was the Second Circuit in *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*<sup>53</sup> In that case, a former Merrill Lynch broker brought a class action suit under state law, alleging that Merrill Lynch’s misleadingly positive stock assessments had induced him to hold securities he would otherwise have sold.<sup>54</sup> In holding that the action was not preempted, the court examined the legislative history and intent underlying the Uniform Standards Act. The court noted that the Act employs the same “in connection with a purchase or sale” language as Rule 10b-5 and the language had already been “extensively interpreted” by the Supreme Court in cases such as *Blue Chip Stamps* at the time the Act was enacted.<sup>55</sup> The court therefore concluded Congress intended to give the “in connection with” language the same meaning that courts had given it in the Rule 10b-5 context, reasoning that “where Congress uses terms that have accumulated settled meaning under either equity or the common law,

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50 *Id.* § 77p(f)(2)(A). The Act creates exceptions for certain types of actions, including derivative actions and actions brought solely by states and pension plans. See Levine & Pritchard, *supra* note 32, at 23–31.

51 15 U.S.C. § 78bb(f)(1).

52 See, e.g., *Gordon v. Buntrock*, No. 00 CV 303, 2000 WL 556763, at \*4 (N.D. Ill. Apr. 28, 2000) (“Because Congress did not so provide [for the preemption of holder claims], this court must conclude that the Uniform Standards Act subjects only those actions in which the plaintiff alleges that misrepresentations occurred in connection with the purchase or sale of a covered security to removal in federal court.”); *Small v. Fritz Cos.*, 65 P.3d 1255, 1261 (Cal. 2003) (holding that the Uniform Standards Act does not preempt holder actions, since the Act “by its terms applies only to suits involving the purchase or sale of stock”). But see *Kircher v. Putnam Funds Trust*, 403 F.3d 478, 484 (7th Cir. 2005) (holding that the Uniform Standards Act preempts holder actions), *vacated on other grounds*, 547 U.S. 633 (2006).

53 395 F.3d 25 (2d Cir. 2005), *vacated*, 547 U.S. 71 (2006).

54 See *id.* at 27–28. For a more detailed discussion of the *Dabit* case, see Melanie P. Goolsby, Note, *Merrill Lynch v. Dabit: The Case of the Scorned Broker and the Death of the State Securities Fraud Class Action Suit*, 67 LA. L. REV. 227 (2006).

55 See *Dabit*, 395 F.3d at 34–35.

a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.’”<sup>56</sup> The court concluded that since Congress did *not* intend to assign new meaning to this language, that clause’s preemptive sweep must apply only to class actions brought by purchasers or sellers of securities, and holder claims must not be preempted.<sup>57</sup> Furthermore, the court noted that it must operate under “‘the assumption that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress.’”<sup>58</sup> Since there was no clear legislative intent to preempt holder claims, but rather an apparent intent to preempt only those claims that could have been brought in federal court to begin with, the Act could not preempt holder claims.<sup>59</sup>

The Supreme Court granted certiorari to decide whether state law holder claims were preempted by the Uniform Standards Act and reversed the Second Circuit’s ruling, holding that state-law holder actions like the one in that case were preempted.<sup>60</sup> The Court rejected the Second Circuit’s holding that the “in connection with” language should be given the same narrow meaning assigned to it by the Supreme Court in *Blue Chip Stamps*, reasoning that the purchaser-seller limitation on 10b-5 actions endorsed by the Court in *Blue Chip Stamps* was based on policy considerations rather than statutory interpretation.<sup>61</sup> The Court insisted that when it had interpreted the “in connection with” language in the context of Rule 10b-5, it had given it a broad interpretation.<sup>62</sup> Relying on its ruling in *United States v. O’Hagan*,<sup>63</sup> the Court reasoned that the “in connection with a

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56 *Id.* at 35 (quoting *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334, 1342 (11th Cir. 2002)).

57 *See id.* at 39–40.

58 *Id.* at 41 (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981)).

59 *See id.* at 42 (“[The Reform Act,] ‘if enacted, will allow Congress to address this State litigation problem . . . in a very targeted and narrow way, essentially preempting only those class actions that have recently migrated to State court, while leaving traditional State court actions and procedures solidly in place.’” (second alteration in original) (quoting 143 CONG. REC. S10,477 (daily ed. Oct. 7, 1997) (statement of Sen. Christopher Dodd))).

60 *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 74 (2006). Interestingly, Justice Sotomayor, who authored the Second Circuit’s opinion in this case, was recently elevated to the position of Supreme Court Justice. Perhaps if the Court were to revisit this issue in the near future, it would reach a different conclusion.

61 *See id.* at 84.

62 *See id.* at 85.

63 521 U.S. 642, 651 (1997).

purchase or sale” language of Rule 10b-5—and by extension, the Uniform Standards Act—is satisfied when the alleged fraud merely “coincides” with a securities transaction.<sup>64</sup>

Although the Second Circuit concluded that Dabit’s claims were not preempted in part because they did *not* sufficiently “coincide” with the purchase or sale of a security, the Supreme Court declined to review this portion of the holding.<sup>65</sup> Rather, the Court reiterated the policy concerns regarding holder claims that were expressed in *Blue Chip Stamps* and decided that “[i]t would be odd, to say the least, if [the Uniform Standards Act] exempted that particularly troublesome subset of class actions from its pre-emptive sweep.”<sup>66</sup>

As for the presumption noted by the Second Circuit “‘that Congress does not cavalierly pre-empt state-law causes of action,’”<sup>67</sup> the Court favored form over substance by holding that this presumption did not apply because the Act “does not actually pre-empt any state cause of action. . . . [but] simply denies plaintiffs the right to use the class-action device to vindicate certain claims.”<sup>68</sup>

In vacating the judgment of the Second Circuit, the Court ruled that the Uniform Standards Act preempts holder actions brought under state law. In doing so, it effectively read the “in connection with [a] purchase or sale” requirement right out of the statute.

## II. IMPLICATIONS OF THE CURRENT PROBLEM

The story of the law’s development in the area of securities fraud holder claims is the story of individual investors gradually losing their rights and opportunities to seek relief when they are defrauded by the very companies in which they have entrusted their fortunes. The *Blue Chip Stamps* doctrine took away the right to sue in federal court under Rule 10b-5, and the Uniform Standards Act and its judicial interpretation have severely constrained their ability to sue in state court. While the holder action has not been completely eliminated,<sup>69</sup> holders’ options are now extremely limited. The problem stems largely from the fact that, in efforts to prevent vexatious litigation or “strike suits,” Congress and the courts have eliminated nearly *all* holder actions—

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64 *Dabit*, 547 U.S. at 85 (citing *O’Hagan*, 521 U.S. at 651).

65 *Id.* at 77 n.3.

66 *Id.* at 86 (citing *Kircher v. Putnam Funds Trust*, 403 F.3d 478, 484 (7th Cir. 2005)).

67 *Id.* at 87 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

68 *Id.*

69 See John C. Coffee Jr. & Stefan Paulovic, *The Future of Class Actions*, in *CLASS ACTION LITIGATION 2008*, at 193, 235 (PLI Litig. & Admin. Practice, Course Handbook Series No. 14,175, 2008).

rather than merely the frivolous ones. These actions prevent even the most meritorious claims from being litigated.<sup>70</sup>

#### A. *Holders' Insufficient Opportunities for Redress*

Some commentators have noted that even in the wake of the Supreme Court's *Dabit* ruling, defrauded holders of securities still retain the right to bring suit in state court in their individual capacity or in classes of less than fifty people.<sup>71</sup> While this may be true, the individual suit is not a feasible option for most individual investors.<sup>72</sup> Since the majority of corporations are owned by diffuse shareholders<sup>73</sup>—that is, a large number of shareholders who each own a small number of shares—it is not feasible for most shareholders to invest the substantial time or resources necessary to litigate a securities fraud case on their own, and investors may be forced to bear the losses they incurred as a result of the fraud perpetrated upon them.

Limiting holder-plaintiffs to individuals and those in classes of fifty or less leads to inequitable results. In practice, the only plaintiffs likely to be able to litigate cases on their own are large institutional investors,<sup>74</sup> while individuals who hold a relatively small number of shares, yet bear their losses personally and directly are left without recourse. Allowing shareholders to bring suit in small groups of up to fifty is not much better. Large public corporations may have thousands of shareholders whose interests cannot be adequately represented by a class of fifty or fewer plaintiffs. Furthermore, placing such a limitation on the size of permissible class actions ensures that only large individual and institutional shareholders will be represented in the class. Since plaintiffs' attorneys in securities class action suits generally work on a contingency fee basis,<sup>75</sup> they will have a strong incentive to recruit only the fifty largest shareholders possible for the class action. Small individual shareholders—such as the low-level Enron employees whose retirement savings were lost when

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70 See generally Lynn A. Stout, *Type I Error, Type II Error, and the Private Securities Litigation Reform Act*, 38 ARIZ. L. REV. 711 (1996) (discussing the need to strike a balance between preventing meritless strike suits and encouraging meritorious claims).

71 See Coffee & Paulovic, *supra* note 69, at 235; Goolsby, *supra* note 54, at 251–52.

72 See Elizabeth Chamblee Burch, *Securities Class Actions as Pragmatic Ex Post Regulation*, 43 GA. L. REV. 63, 126 (2008) (“Absent securities class actions, vindicating rights is not economically feasible.”).

73 See Raymond K. Van Ness & Charles F. Seifert, *Boards of Directors and Corporate Performance: An Analysis Model*, 7 REV. BUS. RES., no. 3, 2007, at 11, 12.

74 See Coffee & Paulovic, *supra* note 69, at 234–35.

75 See Burch, *supra* note 72, at 75 & n.48.

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Enron's stock plummeted<sup>76</sup>—will almost certainly be excluded from the holder class actions and be left with no remedy by which to recover their losses.

Furthermore, the fifty-plaintiff limitation creates perverse incentives for corporations contemplating acts of fraud. Since only fifty holders will be able to sue regardless of the size of the scheme perpetrated, firms that engage in fraud will have an incentive to ensure that the fraud is perpetrated on a grand scale. Because their revenue will potentially increase with the number of shareholders they are able to deceive, but their costs remain fixed at a low rate—since they will only have to compensate fifty shareholders at most—corporations engaging in fraud will have an incentive to defraud as many holders as possible.

And while in theory it may be possible for many small groups of defrauded shareholders to file separate suits against the same corporation, this does not appear to be a viable strategy in practice. The Fifth Circuit addressed this issue in a 2008 Enron holder class action appeal brought under state law.<sup>77</sup> In that case, a law firm brought numerous holder class actions throughout several counties in the state of Texas on behalf of former Enron shareholders.<sup>78</sup> Although there were over 750 plaintiffs, the firm assigned less than fifty plaintiffs to each individual action in an effort to circumvent the preemption provisions of the Uniform Standards Act.<sup>79</sup> Upon removal, the district court consolidated the actions and subsequently dismissed them, holding that the actions were preempted.<sup>80</sup> The Fifth Circuit affirmed the dismissal, holding that since the actions were pending in the same court and the plaintiffs had been acting in unison throughout the litigation, they were “proceed[ing] as a single action”<sup>81</sup> and were thus preempted by the Uniform Standards Act.

This issue was also addressed in a case involving holders of WorldCom stock,<sup>82</sup> which had become valueless after WorldCom executives engaged in a fraudulent scheme to manipulate public fil-

76 See Gilpin, *supra* note 4.

77 See *Enron II*, 535 F.3d 325, 331–33 (5th Cir. 2008).

78 *Id.* at 332.

79 *Id.*

80 See *Newby v. Enron Corp. (In re Enron Corp. Sec., Derivative & “ERISA” Litig.)*, Nos. H-01-3624, H-03-1087, H-03-3320, H-03-5332, H-03-5333, H-03-5334, H-03-5335, H-04-3330, 04-3331, 04-4455, H-01-3914, 2006 WL 3716669, at \*5–9 (S.D. Tex. Dec. 12, 2006), *aff'd*, *Enron II*, 535 F.3d 325.

81 *Enron II*, 535 F.3d at 340 (alteration in original) (quoting 15 U.S.C. § 78bb(f)(5)(B)(ii) (2006)).

82 See *Bell v. Ebbers (In re WorldCom, Inc. Sec. Litig.) (Worldcom I)*, 308 F. Supp. 2d 236, 241–49 (S.D.N.Y. 2004).

ings concerning its financial condition, and the company subsequently filed for bankruptcy.<sup>83</sup> In that case, ten securities fraud class actions of forty-eight or less plaintiffs each were filed in separate state courts.<sup>84</sup> The actions were removed as related to the WorldCom bankruptcy, and the district court consolidated them for pretrial proceedings.<sup>85</sup> The district court then dismissed the actions, holding that due to the consolidation and the fact that they were “proceed[ing] jointly as a single action,” they were preempted by the Uniform Standards Act.<sup>86</sup> Accordingly, it appears to be fairly well settled that plaintiffs may not circumvent the Act’s limitation on the number of plaintiffs in a state law holder class action by bringing numerous small actions rather than one large one.

*B. Undermining the Enforcement of Securities Laws and Deterrence of Fraud*

The Uniform Standards Act’s limitation on the number of shareholders that may bring a holder class action under state law also undercuts the ability of private litigation to act as an enforcement mechanism for antifraud laws. At least since *J.I. Case Co. v. Borak*<sup>87</sup> in 1964, the Supreme Court has recognized a private cause of action for fraud under federal securities laws,<sup>88</sup> and the tort of fraud has existed in the common law for far longer.<sup>89</sup> Private litigation under federal securities law has long been recognized as an important supplement to public enforcement by the SEC.<sup>90</sup> With all of the publicly traded

83 See *In re WorldCom, Inc. Sec. Litig. (Worldcom II)*, 346 F. Supp. 2d 628, 634–35 (S.D.N.Y. 2004) (discussing the WorldCom fraud scheme).

84 *Worldcom I*, 308 F. Supp. 2d at 244.

85 *Id.* at 238–39.

86 *Id.* at 247.

87 377 U.S. 426 (1964).

88 See *id.* at 430–31. The first judicial recognition of a private right of action under federal securities laws was in 1947 in *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1947). See Nishal Ray Ramphal, *The Role of Public and Private Litigation in the Enforcement of Securities Laws in the United States* 13 (Aug. 2007) (unpublished Ph.D. dissertation, Pardee RAND Graduate School), available at [http://www.rand.org/pubs/rgs\\_dissertations/2007/RAND\\_RGSD224.pdf](http://www.rand.org/pubs/rgs_dissertations/2007/RAND_RGSD224.pdf).

89 See KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW* 189 (2007) (“The tort of fraud is so basic that it is one of the most longstanding legal doctrines in our Western society. There is evidence of a ‘writ of deceit’ as early as 1201.”).

90 See *Borak*, 377 U.S. at 432 (noting that private litigation is a “most effective weapon” in the enforcement of securities laws); *Securities Fraud Litigation: Hearing on H.R. 417 Before the Subcomm. on Telecomms. and Fin. of the H. Comm. on Energy and Commerce*, 103d Cong. 5–9 (1994) (testimony of Leonard B. Simon, Partner, Milberg Weiss Bershad Hynes & Lerach) (noting the importance of private litigation as an enforcement mechanism for securities laws); Ramphal, *supra* note 88, at 11–14.

companies in the United States,<sup>91</sup> it would be difficult or impossible for the SEC to adequately monitor them all for fraudulent activity on its own. As a result, private litigation has become an important mechanism for ensuring corporate accountability and compliance with the law. By strictly limiting the class of plaintiffs who can participate in the litigation process to purchasers and sellers, the federal government prevents thousands of investors from assisting the SEC with its enforcement duties and thus undermines the well-established system for enforcing federal securities laws.

Even if securities holders exercise other means of helping the SEC to enforce the securities laws—such as reporting instances of fraud directly to the Commission<sup>92</sup>—the deterrent effect of private class action litigation will still be constrained. Private litigation is important not only as an ex post remedy for compensating shareholders and enforcing securities laws, but also as a means of deterring companies from engaging in fraudulent and illegal behavior. It is plausible to assume that those who commit white-collar crimes, such as securities fraud, act as rational, cost-benefit calculators.<sup>93</sup> Thus, a corporate executive's decision to engage in securities fraud or refrain from it will likely be heavily influenced by the potential gains to be had relative to the costs he expects to bear if he is caught.<sup>94</sup> Taking all other variables—including the actor's scruples—as exogenous, the potential fraudfeasor will commit the crime only if the expected gain ( $g$ ) is greater than the expected cost ( $c$ ) times the probability of getting caught ( $p$ ), where  $g > cp$ .<sup>95</sup> The optimal punishment is reached when the potential offender is forced to internalize the entire cost of his crime, by making the expected cost to the offender ( $cp$ ) equal to the entire harm caused by the fraud ( $h$ ).<sup>96</sup> In this scenario, where  $cp = h$ , the fraudfeasor will commit the fraud only when the gain exceeds the total harm, or  $g > h$ , which is the efficient level of deterrence.<sup>97</sup> If the expected cost is set higher than the harm, it is possible to cause overdeterrence. For instance, corporate executives may become too

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91 In 2002, there were 2783 companies listed on the New York Stock Exchange alone. *NYSE Number of Listed Companies (1929–2002)*, NYSE TECHS., [http://www.nyxdata.com/nyxdata/asp/factbook/viewer\\_edition.asp?mode=table&key=3010&category=5](http://www.nyxdata.com/nyxdata/asp/factbook/viewer_edition.asp?mode=table&key=3010&category=5) (last visited Nov. 27, 2010).

92 See *SEC Center for Complaints and Enforcement Tips*, U.S. SEC. & EXCHANGE COMMISSION, <http://www.sec.gov/complaint.shtml> (last modified July 21, 2010).

93 See THOMAS J. MICELI, *THE ECONOMIC APPROACH TO LAW* 289 (2004).

94 See *id.* at 288–90.

95 See *id.* at 289.

96 See *id.* at 291.

97 See *id.*

wary of liability to make any forward-looking assessments whatsoever regarding their company's financial condition.<sup>98</sup> This would deprive investors of potentially valuable market information.<sup>99</sup> However, because the law already contains mechanisms that protect against this type of danger, such as the safe harbor provisions of the Reform Act,<sup>100</sup> overdeterrence is less of a concern than underdeterrence. Furthermore, overdeterrence is a concern most closely associated with negligent conduct, and because fraud is intentional conduct, the possibility of overdeterrence is not a significant cause for concern.<sup>101</sup> Therefore, the law should err on the side of overdeterrence, rather than underdeterrence, in this regard.

However, by severely constraining holders' ability to sue for losses they suffer as a result of corporate fraud, Congress and the courts have effectively allowed corporations to defraud huge groups of investors without any fear of having to compensate the victims and have likely lowered the expected cost of committing securities fraud to well below the optimal level. Given the large scale and the high stakes of the claims that have now been nearly eliminated,<sup>102</sup> the expected cost may now be set at a dangerously low level. It may be possible to compensate for effectively eliminating this class of potential plaintiffs by using other forms of punishment—such as fines and imprisonment<sup>103</sup>—to increase the expected cost of the fraud.<sup>104</sup> However, there does not appear to be any evidence that the SEC has increased the amount of fines or prison sentences it has levied in recent years in response to the Supreme Court's ruling that the Uniform Standards Act preempts state law holder actions. Furthermore, private litigation

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98 See Rose, *supra* note 48, at 462.

99 See *id.*

100 See 15 U.S.C. § 77z-2 (2006).

101 See Jill E. Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 94 IOWA L. REV. 811, 860–64 (2009).

102 See, e.g., *Enron II*, 535 F.3d 325, 336–42 (5th Cir. 2008); *WorldCom I*, 308 F. Supp. 2d 236, 241–49 (S.D.N.Y. 2004).

103 The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.), for example, significantly increased the criminal penalties for committing fraud. See Gary M. Brown, *Fraud and Related Issues Under Rule 10b-5 and the Sarbanes-Oxley Act*, in 2 UNDERSTANDING THE SECURITIES LAWS 2009, at 57, 108–12 (PLI Corp. Law & Practice, Course Handbook Ser. No. B-1757, 2009).

104 In the case of Enron, for example, Kenneth Lay, the former chairman and CEO, was convicted of multiple counts of fraud and faced twenty-five years or more in prison, though he died before he could be sentenced. See Kate Murphy, *Judge Throws Out Kenneth Lay's Conviction*, N.Y. TIMES, Oct. 18, 2006, at C3; John C. Roper, *Sentencing for Lay, Skilling Pushed Back*, HOUS. CHRON., June 17, 2006, at D1.

carries a benefit that fines and imprisonment do not—that is, restitution for the victims. When shareholders can sue those that defrauded them, they stand to actually recoup their losses—or at least a portion of them. When the government fines corporate executives or throws them in prison, however, investors do not get their money back.

Private enforcement carries other potential advantages over public enforcement as well. The direct financial interest that the plaintiffs have in the litigation helps to promote rigorous enforcement through zealous advocacy. Furthermore, private litigation is arguably more equitable as an enforcement tool than public prosecution because the costs of private litigation are borne largely by the parties to the litigation and their attorneys,<sup>105</sup> while public enforcement is funded by the public at large. Thus, with private litigation, enforcement of the securities laws is funded directly by those with the most direct interest in the enforcement. This creates a more equitable result by reconciling the burdens of enforcement with its benefits.<sup>106</sup>

### C. *Federalism Concerns*

The federal government's sweeping preemption of holder actions brought under state law raises significant federalism issues.<sup>107</sup> The primary concerns are the federal government's usurpation of an area of traditional importance for state law, the loss of "interjurisdictional competition," and the loss of states' ability to act as "laboratories of experimentation."

Securities fraud is an area of historical concern and importance for state law. State "blue sky laws" predate federal securities legislation, with the first state securities fraud statute appearing in Kansas in 1911.<sup>108</sup> By the time Congress enacted the Securities Act of 1933<sup>109</sup>—the first federal legislation regulating the purchase and sale of securi-

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105 See James D. Cox, *Private Litigation and the Deterrence of Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 1, 8–10, 36–37 (1997).

106 Cf. VINCENT R. JOHNSON, *STUDIES IN AMERICAN TORT LAW* 8 (3d ed. 2004) (noting that the reconciliation of the burdens of an activity with its benefits is an important policy consideration in tort law).

107 See generally Perino, *supra* note 44, at 273–88 (discussing federalism issues related to securities litigation); Robert B. Thompson, *Preemption and Federalism in Corporate Governance: Protecting Shareholder Rights to Vote, Sell, and Sue*, 62 LAW & CONTEMP. PROBS. 215, 216–25 (1999) (discussing the traditional roles of federal and state governments in corporate governance).

108 See Perino, *supra* note 44, at 279–80.

109 See ch. 38, tit. I, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa (2006)).

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ties<sup>110</sup>—every state except Nevada had already enacted securities regulations.<sup>111</sup> These state laws provided significant guidance to the drafters of subsequent federal legislation.<sup>112</sup> For most of the twentieth century, the federal government respected the importance of state law in the area of securities regulation, with Congress continually deferring to state law by declining to enact a federal incorporations act, and federal courts often limiting the reach of federal securities laws in order to preserve the benefits of federalism and state autonomy.<sup>113</sup> In fact, the Court in *Blue Chip Stamps* recognized that its endorsement of the purchaser-seller requirement for Rule 10b-5 actions could well deprive some deserving plaintiffs of their ability to recover damages,<sup>114</sup> but noted that there was little danger of this injustice occurring because defrauded stockholders still retained the right to sue under state securities law.<sup>115</sup> Thus, the Court in *Blue Chip Stamps* anticipated the importance of state law in providing defrauded holders with opportunities for redress and eliminated their ability to sue in federal court on the assumption that they would retain this right under state law.

Nevertheless, the Supreme Court's broad interpretation of the Uniform Standards Act has almost entirely eliminated a crucial state law remedy for securities fraud. In contrast to the *Blue Chip Stamps* Court, the Court in *Dabit* casually discounted the importance of state law to holder class actions, and securities law generally.<sup>116</sup> In making its decision, the Court noted that *Dabit* and his amici identified only one state law holder class action brought during the years between *Blue Chip Stamps* and the enacting of the Uniform Standards Act.<sup>117</sup> However, the fact that the state law holder class action was not a heavily utilized remedy during the years between 1975 and 1998 does not

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110 See *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 78 (2006).

111 See Perino, *supra* note 44, at 280.

112 See *id.*

113 See Thompson, *supra* note 107, at 222.

114 See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 738–39 (1975). The SEC filed an amicus brief in that case also expressing this concern. See *id.* at 738; see also *Small v. Fritz Cos.*, 65 P.3d 1255, 1261 (Cal. 2003) (“In short, the high court’s decision in *Blue Chip Stamps* . . . did not view [policy] considerations as justification for a total denial of relief to defrauded holders; it reasoned only that the *federal* courts could deny a forum to wronged stockholders who are not sellers or buyers without unjust consequences because these stockholders retained a remedy in *state* courts.”).

115 See *Blue Chip Stamps*, 421 U.S. at 738 n.9.

116 See *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 88 (2006) (“[F]ederal law, not state law, has long been the principal vehicle for asserting class-action securities fraud claims.”).

117 See *id.*

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undermine the importance of the remedy today or in the future. In fact, this remedy is more important now than ever before, in light of the unprecedented scale of corporate fraud in recent years from companies such as Enron and WorldCom.<sup>118</sup>

The preemption of state law holder actions also limits the ability of state securities laws to create beneficial “interjurisdictional competition” among the states.<sup>119</sup> Like the market for corporate charters, allowing defrauded shareholders to bring class actions under state law may give rise to a market for state securities fraud actions.<sup>120</sup> Since state holder actions are likely to be brought under the law in which the entity is incorporated,<sup>121</sup> states would have an incentive to ensure that their corporate laws adequately protect the interests of shareholders.<sup>122</sup> Since it is generally advantageous for states when companies incorporate under their laws, they would also have an incentive to ensure that their laws governing holder actions also protect the interests of corporations.<sup>123</sup> Thus, allowing holder actions under state law could likely lead to more efficient securities regulations.

Similarly, allowing state courts to entertain holder class actions would enable states to act as “laboratories for experimentation” for these actions.<sup>124</sup> Although the Supreme Court has expressed significant concerns about allowing holder actions,<sup>125</sup> there has been little empirical testing of the Court’s fears due to the historical rarity of holder cases.<sup>126</sup> Permitting holder actions in state courts would give states a chance to test the legitimacy of these concerns, and if the Court’s fears prove to be well founded, state courts may develop effec-

118 See HARRY SHUTT, *THE DECLINE OF CAPITALISM* 94 (2005) (noting the recent “unprecedented epidemic of corporate fraud and malfeasance”).

119 See Rose, *supra* note 48, at 462.

120 See *id.* at 460–63.

121 See *id.* at 462.

122 See Douglas G. Smith, *A Federalism-Based Rationale for Limited Liability*, 60 ALA. L. REV. 649, 672 (2009) (“The fact that each state’s laws may have an effect on its own citizens should they hold stock in, or interact with, corporations that are incorporated within the jurisdiction provides state actors with an incentive to protect the interests of these constituencies . . .”).

123 Cf. Perino, *supra* note 44, at 322–28 (analyzing the advantages and disadvantages of interjurisdictional competition for securities fraud actions).

124 *Id.* at 320; see also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory . . .”).

125 See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740–49 (1975); *supra* text accompanying notes 27–30.

126 See *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 88 (2006); *supra* text accompanying notes 117–118.

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tive ways of addressing them—rather than simply eliminating holder actions altogether.

Furthermore, the oft-raised argument against federalism-based approaches to lawmaking, that having one set of standards is more efficient, does not apply here. In allowing the Uniform Standards Act to preempt state law holder causes of action, the federal government did not create a new set of rules that trump state law rules. Rather, it denied holders the right to seek relief in state court without creating any corresponding federal alternative.<sup>127</sup> Thus, in preempting state holder class actions, the federal government has sacrificed the significant benefits that accompany federalism without any corresponding efficiency gains.<sup>128</sup> By the same token, allowing holder class actions to proceed in state court also would not subject corporations to “wasteful, duplicative litigation,”<sup>129</sup> as the Supreme Court has suggested, because would-be state court plaintiffs do not have a corresponding remedy under federal law.

### III. POSSIBLE SOLUTIONS

#### A. *Judicial Solutions*

Courts could solve the problems created by the effective elimination of the holder action either by abandoning the *Dabit* Court’s broad interpretation of the “in connection with” language of the Uniform Standards Act to allow holder class actions under state law or by abandoning the *Blue Chip Stamps* Court’s narrow interpretation of the same language in the context of federal 10b-5 actions.

#### 1. Overruling *Blue Chip Stamps*

The Supreme Court’s ruling in *Blue Chip Stamps*, which adopted the purchaser-seller requirement for plaintiffs suing under SEC’s Rule 10b-5, did not rely on a textual reading of that rule or Section 10(b) of the Securities Exchange Act.<sup>130</sup> Rather, the Court’s decision was based almost entirely on policy considerations.<sup>131</sup> The Court gave those considerations far too much weight in the decision.

One of the Court’s chief concerns was the potential for vexatious litigation or “strike suits” brought only to harass corporations and

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127 See *Dabit*, 547 U.S. at 87; *supra* text accompanying notes 67–68.

128 See *Rose*, *supra* note 48, at 462.

129 *Dabit*, 547 U.S. at 86.

130 15 U.S.C. § 78j(b) (2006).

131 See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734–49 (1975).

attain undeserved settlements.<sup>132</sup> The Court feared that allowing holders to sue under Rule 10b-5 would encourage shareholders to launch nonmeritorious actions against their corporations whenever the stock price falls, and as long as the shareholders could survive the dismissal or summary judgment phase, they could use abusive discovery practices to extort a settlement.<sup>133</sup> However, while the danger of strike suits is theoretically possible, even before the *Blue Chip Stamps* ruling, empirical studies suggested that in reality, strike suits appear to be relatively uncommon.<sup>134</sup> Furthermore, developments in the law since *Blue Chip Stamps* have made strike suits even less likely to occur.<sup>135</sup> Namely, the Reform Act's stay of discovery provision helps to ensure that plaintiffs in securities litigation cannot abuse the discovery process to prevent an inadequate complaint from being dismissed,<sup>136</sup> its heightened pleading standards discourage plaintiffs from making assertions that they cannot support with evidence,<sup>137</sup> and the "lead plaintiff presumption" helps to ensure that securities class actions will be led by large institutional investors, who are less likely to bring frivolous claims.<sup>138</sup> Since the provisions of the Reform Act would apply to any holder action brought under Rule 10b-5, the Supreme Court's concerns about strike suits and accompanying abuses in the discovery process—while somewhat dubious when *Blue Chip Stamps* was decided—are even less compelling today.

The Court in *Blue Chip Stamps* also expressed concerns about "conjectural and speculative" recovery.<sup>139</sup> Since the number of shares a holder alleges he would have sold due to the corporation's fraud is a subjective matter, the Court feared that allowing holder claims under Rule 10b-5 would lead to recovery based on mere speculation.<sup>140</sup> While this may be a legitimate concern, it is one that should be

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132 See *id.* at 740–41.

133 See *id.*

134 See Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 78 (1991).

135 See Jones, *supra* note 10, at 637 (noting that the Reform Act and the Uniform Standards Act have dramatically shifted the policy interests originally considered in *Blue Chip Stamps*).

136 See 15 U.S.C. § 77z-1(b) (2006).

137 See *id.* § 78u-4(b)(2).

138 See *id.* § 77z-1(b). In enacting the Reform Act, Congress realized that class actions led by large institutional investors are more likely to be meritorious, since institutional investors have the most to gain from meritorious suits but the most to lose from frivolous ones. See Fulop, *supra* note 22, at 220.

139 See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734–35 (1975).

140 See *id.*

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addressed on a case-by-case basis and does not justify eliminating holder actions altogether. The problem of how to measure damages is always difficult in fraud cases, “‘since the person defrauded has, because of the fraud, not pursued alternative courses of action, and the results of those untaken courses therefore remain speculative.’”<sup>141</sup> Rather than simply eliminate plaintiffs’ right to sue for fraud, however, courts routinely make this determination to the best of their ability. Many have simplified the process of determining certainty of damages by establishing that “absolute certainty concerning the amount of damage is not necessary to justify a recovery where the existence of damage is established” and that where such damage has been established, the evidence need only show a basis for computing them “‘with a fair degree of probability.’”<sup>142</sup> The same principle could be applied in holder cases. With the Enron scandal, where the company’s stock became essentially worthless after a fraudulent scheme was made public,<sup>143</sup> those who continued to hold their stock due to the misrepresentations clearly suffered damage. It should be sufficient for such plaintiffs to establish their damages with a “fair degree of probability.” The question of holder action damages has been addressed by state courts, which have suggested that damages may be fairly calculated by comparing the stock prices before and after the fraud is disclosed, though it may be necessary to require that the plaintiff sell his stock after learning of the fraud to ensure that only permanent and actually realized damages may be recoverable.<sup>144</sup>

Courts could also alleviate the speculative damages concern by requiring heightened pleading standards in holder actions similar to the ones required by the Reform Act. The court in at least one state law holder action, for example, required the plaintiffs to allege that they actually read and relied upon a fraudulent prospectus and that they would have sold a specific amount of shares at a specific time but for the fraud.<sup>145</sup>

In *Dura Pharmaceuticals, Inc. v. Broudo*,<sup>146</sup> the Supreme Court addressed the issue of loss causation in 10b-5 actions and held that a

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141 *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 366–67 (9th Cir. 2005) (quoting *Leibert v. Fin. Factors, Ltd.*, 788 P.2d 833, 837 (Haw. 1990)).

142 *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 57–58 (2d Cir. 2004) (emphasis omitted) (quoting *In re Application of Busse*, 464 N.E.2d 651, 655 (Ill. App. Ct. 1984)).

143 See *supra* note 20 and accompanying text.

144 See *Small v. Fritz Cos.*, 65 P.3d 1255, 1266–71 (Cal. 2003) (Kennard, J., concurring).

145 See *Rogers v. Cisco Sys., Inc.*, 268 F. Supp. 2d 1305, 1311–14 (N.D. Fla. 2003).

146 544 U.S. 336 (2005).

securities fraud plaintiff may not rely merely on the fact that misrepresentations inflated the price of securities but must actually prove that the defendant's fraudulent conduct proximately caused the plaintiff's economic loss.<sup>147</sup> The *Dura* ruling may make it more difficult for plaintiffs in holder actions to recover and that counsels in favor of permitting such actions under Rule 10b-5. The requirement that a holder must prove that the defendant's misrepresentation proximately caused his economic loss would act as a further safeguard against the speculative claims over which the Supreme Court expressed concern in *Blue Chip Stamps*.

Since the policy considerations addressed by the Court in *Blue Chip Stamps* do not justify denying a federal forum to an entire class of plaintiffs, especially in light of the Reform Act and other recent developments, the purchaser-seller requirement for 10b-5 actions should be abandoned. Instead, legitimate policy concerns should be addressed by courts on a case-by-case basis.<sup>148</sup>

## 2. Overruling *Dabit*

As an alternative to overruling *Blue Chip Stamps* and permitting holder actions in federal court under Rule 10b-5, the Supreme Court could also overrule its decision in *Dabit* to the extent that it construes the Uniform Standards Act to preempt state law holder class actions and allow such actions to proceed in state court. Doing so would be consistent with the Court's intention expressed in *Blue Chip Stamps* for holders with genuine claims to be able to seek redress in state courts and would also solve the problems created by effectively denying all relief to defrauded securities holders.

*Dabit* could be readily overturned by applying a different textual interpretation to the "in connection with" language in the Uniform Standards Act. When the Court interpreted the nearly identical language of Rule 10b-5 in *Blue Chip Stamps*, it held that the language did not encompass holder claims.<sup>149</sup> However, in *Dabit*, interpreting the language in the context of the Uniform Standards Act, the Court

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147 See *id.* at 346.

148 See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 770 (1975) (Blackmun, J., dissenting) ("Perhaps it is true that more cases that come within the *Birnbaum* doctrine can be properly proved than those that fall outside it. But this is no reason for denying standing to sue to plaintiffs . . . who allegedly are injured by novel forms of manipulation. We should be wary about heeding the seductive call of expediency and about substituting convenience and ease of processing for the more difficult task of separating the genuine claim from the unfounded one.").

149 See *supra* notes 27–28 and accompanying text.

reached the opposite conclusion.<sup>150</sup> Although the *Blue Chip Stamps* ruling was based largely on policy grounds and *Dabit* was based more on textual interpretation and legislative intent,<sup>151</sup> it is difficult to justify giving such conflicting meanings to the same language in two different securities laws. Moreover, it is not clear that the Court's holding in *Dabit* even comports with the "broad" interpretation it has given the "in connection with" language when it has interpreted that language in the past. The Court has held that in order to satisfy this requirement, a deceptive device must merely "coincide" with the purchase or sale of securities.<sup>152</sup> In *Dabit*, however, the court of appeals held that holder actions do not satisfy even this broad requirement, therefore they could not be encompassed by the Uniform Standards Act's preemption.<sup>153</sup> Although the Supreme Court did not reach this portion of the lower court's holding in *Dabit*, this is one possible basis for concluding that holder actions are not preempted by the Uniform Standards Act.<sup>154</sup>

Likewise, *Dabit* could conceivably be overturned upon a reexamination of the legislative intent behind the Uniform Standards Act. In *Dabit*, the Court came to the conclusion that since they have long given a broad interpretation to the "in connection with" language found in the Act, Congress must have intended to incorporate that settled meaning. The Court wrote:

Congress can hardly have been unaware of the broad construction adopted by both this Court and the SEC when it imported the key phrase—"in connection with the purchase or sale"—into [the Act's] core provision. And when "judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well."<sup>155</sup>

However, the Court could just have easily reasoned that Congress was well aware of the well-settled purchaser-seller rule that is derived from that language at the time of the Uniform Standards Act's enactment. In fact, that was exactly the conclusion that the Second Circuit

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150 See *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 84–86 (2006).

151 See *id.* at 84.

152 *United States v. O'Hagan*, 521 U.S. 642, 655–56 (1997).

153 See *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25, 34–35 (2d Cir. 2005).

154 See *Dabit*, 547 U.S. at 77 n.3.

155 *Id.* at 85–86 (alterations in original) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)).

reached in the same case, in evaluating legislative history and intent.<sup>156</sup>

Finally, *Dabit* could be overturned purely on policy grounds. For the same reasons that the policy considerations underlying the *Blue Chip Stamps* doctrine no longer necessitate a purchaser-seller requirement for federal actions brought under Rule 10b-5,<sup>157</sup> the concerns over allowing holder actions expressed by the Court in *Blue Chip Stamps* and reiterated in *Dabit* do not justify eliminating holders' right to sue in state court. Furthermore, the significant federalism concerns raised by the preemption of these actions<sup>158</sup> and the need to provide defrauded shareholders a remedy by which they can recover their economic losses also counsel in favor of abandoning *Dabit's* interpretation of the Uniform Standards Act.

### B. Legislative Solutions

Although it is quite possible that Congress did not intend to create either the purchaser-seller requirement under Rule 10b-5 or the sweeping preemption of state-law holder class actions,<sup>159</sup> both principles are now fairly well established but could easily be nullified by Congressional action.

Creating a remedy for defrauded holders through legislative action would carry all the benefits of the judicial solution but with some added benefits as well. In enacting legislation that addresses this problem, Congress could directly address the Supreme Court's concerns by including specific provisions that create safeguards against strike suits and speculative recovery.

For example, Congress could impose heightened pleading standards similar to those adopted by the Reform Act that would require plaintiffs to plead facts giving rise to a "strong inference" that the defendants acted with the requisite scienter.<sup>160</sup> Likewise, Congress could also require corroborative evidence and oral testimony to establish reliance on the misrepresentation, as the SEC itself has proposed.<sup>161</sup> Congress could also, if it saw fit, impose a requirement that holder-plaintiffs sell the stock in question prior to bringing suit in order to prevent unjust enrichment in the form of future, unrelated

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156 *Dabit*, 395 F.3d at 34–35.

157 *See supra* Part III.A.1.

158 *See supra* Part II.C.

159 *See supra* Part III.A.

160 *See* 15 U.S.C. § 78u-4(b)(2) (2006).

161 *See Jones, supra* note 10, at 638. Interestingly, the SEC filed an amicus brief in *Blue Chip Stamps* opposing the adoption of the purchaser-seller rule and has asked for the rule's revision on several other occasions. *See id.* at 627.

rises in the stock price.<sup>162</sup> By enacting legislation, Congress could strike a much better balance between the interests of defrauded shareholders and corporations. Any limited remedies Congress afforded to defrauded holders would drastically improve their current situation.

#### CONCLUSION

It is clear in light of the unprecedented fraudulent schemes seen in recent years that enforcement of the securities laws, deterrence of fraud, and protection for victims are all important considerations. Although these policies have been hindered by recent developments in the law that have effectively eliminated defrauded holders' ability to seek redress for their injuries, Congress and the Supreme Court could advance these goals once more by taking swift action to reauthorize holder actions.

While many commentators have written about lessons to be gleaned from Enron's collapse,<sup>163</sup> one of the most important lessons can be garnered from the subsequent litigation. While many defrauded former shareholders initially brought successful claims, countless others lost their ability to seek recovery after the *Dabit* Court's interpretation of the Uniform Standards Act.<sup>164</sup> The elimination of holders' ability to bring any claim whatsoever—regardless of how meritorious—has dangerous and inequitable implications. Since corporations do not internalize the full cost of their fraudulent acts if individual holders cannot seek compensation for their losses,<sup>165</sup> denying these individuals the right to sue enables corporations to profit at the expense of their investors by engaging in fraud. In order to prevent future instances of wide-scale fraud like the scheme perpetrated by Enron and ensure that victims are compensated if it does occur, Congress and the courts should work toward the “elimination of artificial barriers to recovery on just claims”<sup>166</sup> by giving a remedy back to defrauded securities holders.

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162 See *Small v. Fritz Cos.*, 65 P.3d 1255, 1266–71 (Cal. 2003) (Kennard, J., concurring).

163 See generally *CORPORATE AFTERSHOCK: THE PUBLIC POLICY LESSONS FROM THE COLLAPSE OF ENRON AND OTHER MAJOR CORPORATIONS* (Christopher L. Culp & William A. Niskanen eds., 2003) (compiling numerous essays concerning the effects of the Enron collapse).

164 See *supra* notes 7–9 and accompanying text.

165 See *supra* Part II.B.

166 *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 747 (1975).

