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## Securities Law in the Roberts Court: Agenda or Indifference?

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# Securities Law in the Roberts Court: Agenda or Indifference?

A.C. Pritchard\*

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## I. INTRODUCTION

To outsiders, securities law is not all that interesting. The body of the law consists of an interconnecting web of statutes and regulations that fit together in ways that are decidedly counter-intuitive. Securities law rivals tax law in its reputation for complexity and dreariness. Worse yet, the subject regulated—capital markets—can be mystifying to those uninitiated in modern finance. Moreover, those markets rapidly evolve, continually increasing their complexity. If you do not understand how the financial markets work, it is hard to understand how securities law affects those markets.

Nothing in the biographies of the current members of the Supreme Court suggest they are likely to be well equipped to deal with the federal securities laws or modern financial markets. This lacunae of securities expertise is a relatively recent phenomenon. For most of the first 50 years after the federal securities laws were adopted, the Court had at least one Justice with a background in the securities laws, either as a regulator—William O. Douglas<sup>1</sup>—or as a practitioner—Lewis F. Powell, Jr.<sup>2</sup>

Powell's retirement left the Rehnquist Court with a void in securities expertise for most of its tenure, and his departure marked a significant decline in the Court's securities caseload, as demonstrated by Table 1 below. Usually the Justices' collective lack of familiarity with the securities laws means that few petitions for certiorari are granted in securities cases; the Court simply does not decide that many cases in the field. As Table 1 below demonstrates, the Rehnquist Court averaged slightly more than one securities case per term during its nearly 20 year run, a figure consistent with the average number heard by the Warren Court.

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1. A caveat is in order here. Despite Douglas's background as SEC Chairman, he exhibited little interest in the securities laws during his time on the Court. See A.C. Pritchard & Robert P. Thompson, *Securities Law and the New Deal Justices*, 95 VA. L. REV. 841, 917–20 (2009) (discussing “the role of the New Deal Justices in enacting, defending and interpreting the federal securities laws”).

2. On Powell's influence on the Court's securities law jurisprudence, see A.C. Pritchard, *Justice Lewis F. Powell, Jr. and the Counter-Revolution in the Federal Securities Laws*, 52 DUKE L.J. 841 (2003).

**Table 1: Supreme Court Securities Cases, 1936–2011**

Court	Securities Cases	Average Per Term	Total Cases	Securities Percent
New Deal (1936–1954)	21	1.11	2894	0.7%
Warren (1954–1969)	17	1.06	3491	0.5%
Burger (1969–1986)	49	2.72	3828	1.3%
Rehnquist (1986–2005)	20	1.00	2173	0.9%
Roberts (2005–2011)	12	2.00	469	2.6%
<b>Total</b>	113	1.51	12,645	0.9%

The first six years of the Roberts Court have departed from that long-term pattern. The Roberts Court has decided 12 cases in the field of securities law, a whopping 2.6% of its docket. That increase suggests the Justices have taken a new interest in the field, despite the lack of a Justice with a background in securities law.

Does this upsurge in securities cases reflect a new agenda for the Supreme Court in the field of securities law? A closer examination of the cases suggests that the numbers may deceive. As Table 2 demonstrates, no single Justice has stepped forward to take charge of the field of securities regulation as Powell did during his time on the Burger Court. Only Chief Justice Roberts and Justice Breyer have written more than one majority opinion in the area. Before his retirement, Justice Stevens appears to have been engaged with the field, but most of his seven opinions in the field were dissents or concurrences; his interest does not translate into influence, as it did for Powell.

**Table 2: Roberts Court Securities Cases, 2005–2011**

Decision	Majority	Dissent	Concur
<i>Merrill Lynch v. Dabit</i>	<b>Stevens</b>		
<i>Kircher v. Putnam Funds Trust</i>	<b>Souter</b>		<b>Scalia</b>
<i>Credit Suisse Securities v. Billing</i>	<b>Breyer</b>	<b>Thomas</b>	<b>Stevens</b>
<i>Tellabs v. Makor Issues &amp; Rights</i>	<b>Ginsburg</b>	<b>Stevens</b>	<b>Scalia, Alito</b>
<i>Stoneridge Inv. Part. v. Scientific-Atlanta</i>	<b>Kennedy</b>	<b>Stevens, Souter, Ginsburg</b>	
<i>Jones v. Harris Associates</i>	<b>Alito</b>		<b>Thomas</b>
<i>Merck &amp; Co. v. Reynolds</i>	<b>Breyer</b>		<b>Stevens, Scalia, Thomas</b>
<i>Morrison v. National Australia Bank</i>	<b>Scalia</b>	<b>Stevens</b>	<b>Breyer, Stevens, Ginsburg</b>
<i>Free Enterprise Fund v. PCAOB</i>	<b>Roberts</b>	<b>Breyer, Stevens, Ginsburg, Sotomayor</b>	
<i>Matrixx Initiatives v. Siracusano</i>	<b>Sotomayor</b>		
<i>Erica P. John Fund v. Halliburton Co.</i>	<b>Roberts</b>		
<i>Janus Capital Group v. First Derivative Traders</i>	<b>Thomas</b>	<b>Breyer, Ginsburg, Sotomayor, Kagan</b>	

Opinion authors in **bold**.

When one turns to the substance of the opinions written in these cases, one finds little effort to grapple with the relation between the financial markets and the securities laws. There are vigorous debates among the Justices in some of these cases, but they revolve around questions of statutory interpretation and the relationship between the judiciary and the administrative state. The dominant theme is judicial modesty.

One exception would appear to be the topic of securities class actions. The passage of the Private Securities Litigation Reform Act (PSLRA) in 1995,<sup>3</sup> and its follow-on, the Securities Litigation Uniform Standards Act (SLUSA) in 1998,<sup>4</sup> have generated a number of interpretive opportunities for the Roberts Court. Most of these cases have revolved around straightforward issues of statutory interpretation, but on occasion these statutes raise issues that have forced the Justices to grapple with the policy implications

3. Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.).

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

of their decisions for securities class action practice. Those decisions have caused critics to label the Roberts Court as “pro business.”<sup>5</sup> Does the “pro business” Roberts Court have a negative attitude toward securities class actions? An examination of the overall pattern of the Court’s decisions in this area suggests a bias not toward business, but rather, the status quo, resisting attempts to both restrict—and expand—the reach of Rule 10b-5 class actions.

I proceed as follows: The Justices’ debates over the appropriate method of interpreting statutes are analyzed in Part II. Part III looks at the perspective on the administrative state offered in the Roberts Court’s securities decisions. Part IV assesses whether the Roberts Court has taken a hostile attitude toward securities class actions. Part V concludes.

## II. STATUTORY INTERPRETATION AND LEGISLATIVE INTENT

Three of the securities cases decided during Chief Justice Roberts’s tenure have turned exclusively on questions of statutory interpretation. More precisely, these cases have turned on the Court’s assumptions about what Congress intended when it used specific statutory language. That language was adopted against a backdrop of judicial interpretations of similar language; the opinions purport to erect a predictable framework of interpretation. These opinions betray no indication that the Roberts Court is attempting to push the securities laws in a particular direction. The lack of an agenda in the opinions is reinforced by another common thread; in each case, the petitions for certiorari were granted by the Court only after a clear conflict had arose in the circuits over the particular question of statutory interpretation. These cases were decided because the Justices felt obligated to resolve the split, not because any member of the Court had a particular interest in the securities topic presented.

### A. SLUSA

Chief Justice Roberts’ first term brought two securities cases to the Court’s docket, both involving interpretive issues arising out of SLUSA. A brief introduction to SLUSA is necessary to set the stage for these cases. Congress adopted SLUSA in 1998, three years after enacting the PSLRA. The PSLRA made it more difficult to allege securities fraud by: (1) adopting a more stringent pleading standard, including heightened requirements for pleading scienter, i.e., state of mind;<sup>6</sup> and (2) creating an automatic stay of discovery.<sup>7</sup> Those restrictions under federal law gave rise to an exodus of securities class actions to state court; state “blue sky” anti-fraud provisions generally lack the procedural protections that the PSLRA affords defendants in federal securities class actions.<sup>8</sup> The goal of SLUSA was to preempt state law securities cases, thereby pushing

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5. See, e.g., *First Monday*, N.Y. TIMES, Oct. 4, 2010, at A26 (“The Roberts court has championed corporations.”).

6. Securities Exchange Act of 1934 § 21D(b)(2), 15 U.S.C. § 78u-4(b)(2) (2006).

7. *Id.* § 78u-4(b)(3).

8. See generally David M. Levine & A.C. Pritchard, *The Securities Litigation Uniform Standards Act of 1998: The Sun Sets on California’s Blue Sky Laws*, 54 BUS. LAW. 1 (1998) (explaining how “most state blue-sky laws . . . afford investors broader relief”).

plaintiffs back to federal court where the restrictions of the PSLRA would apply.<sup>9</sup>

Congress did not, however, preempt the substantive law of state securities fraud or its remedies. Instead, it preempted state courts from adjudicating securities fraud *class actions*.<sup>10</sup> In preempting only class actions, Congress left state law to provide a cause of action for securities fraud, albeit one that can only be pursued individually. SLUSA preempts class actions:

based upon the statutory or common law of a State or subdivision thereof . . .  
by any private party alleging –

(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>11</sup>

Although the language is not identical, SLUSA's preemption language tracks closely the general federal anti-fraud prohibition found in Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and the SEC's Rule 10b-5.<sup>12</sup> Rule 10b-5 is the typical basis for federal securities class actions.

#### 1. Merrill Lynch, Pierce, Fenner & Smith v. Dabit

*Merrill Lynch, Pierce, Fenner & Smith v. Dabit*<sup>13</sup> raised the question of the scope of SLUSA's preemption. The case arose out of the securities analyst scandals of the early 2000s, in which the New York Attorney General and the SEC alleged that securities analysis provided by the major investment banks was biased as a result of those banks' conflict of interest. Essentially, the government alleged that the banks were hyping the common stock of their investment banking clients to garner more investment banking business. A host of private claims followed the government enforcement actions. Plaintiffs asserted private claims in both federal securities class actions and arbitration proceedings. The scandal also gave rise to the claim in *Dabit*: plaintiffs alleged that they were induced to *hold* securities that they would have sold if the analyst research that they relied upon had been accurate.<sup>14</sup>

Plaintiffs' complaint was a transparent attempt to evade SLUSA's restrictions, but it gave rise to an interpretive difficulty. SLUSA preempts only claims that are "in connection with the purchase or sale of a covered security."<sup>15</sup> Plaintiffs claimed that they had *not sold* their securities. Moreover, the claim being asserted could not have been raised under federal law. In *Blue Chip Stamps v. Manor Drug Stores*, the Supreme Court held that plaintiffs must have sold or purchased securities in order to have standing under

9. See SECURITIES LITIGATION UNIFORM STANDARDS ACT OF 1998, H.R. REP. NO. 105-803, at 13 (1998) ("The purpose of this title 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.")

10. Securities Act of 1933 § 16(f)(2)(A), 15 U.S.C. § 77p(f)(2)(A) (2006).

11. Securities Act of 1933 § 16(b), 15 U.S.C. § 78bb(f)(1).

12. Securities Exchange Act of 1934 § (10)(b), 15 U.S.C. § 78j(b) (2006); 17 C.F.R. § 240.10b-5 (2010).

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

14. *Id.* at 75.

15. Securities Act of 1933 § 16(f)(2)(A), 15 U.S.C. § 77p(f)(2)(A).

Rule 10b-5.<sup>16</sup> Would *Blue Chip*'s narrow interpretation of "in connection with the purchase or sale of a security" undercut the preemptive force of SLUSA?

Ultimately, Justice Stevens, writing for the Court, was forced to engage in judicial "reimagination" of Congress's intent. No one seriously doubted that Congress, if it had considered the question, would have preempted such claims. The point of SLUSA was to protect issuers from meritless suits by funneling securities class actions into federal court. In addition, the economic logic of holder claims is dubious at best. Allowing compensation for holder claims would amount to a windfall: I would have sold if I had known the truth! And the purchaser would not have known? Presumably Congress did not anticipate the problem of holder suits because of the scant likelihood that any state court would allow such claims. The Court notes that Congress had no occasion to consider whether holder claims should be preempted at the time it adopted SLUSA: "[t]he actual assertion of such claims by way of class action was virtually unheard of before SLUSA was enacted."<sup>17</sup> Notwithstanding the novelty of such claims, it was clear to the Court that "[a] narrow reading of the statute would undercut the effectiveness of the 1995 Reform Act and thus run counter to SLUSA's stated purpose, viz., 'to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives' of the [PSLRA]."<sup>18</sup>

Fortunately for the Court, it was able to rely on prior interpretations of Rule 10b-5 that had relaxed the purchase or sale requirement. The Court had previously interpreted Rule 10b-5 to not require the allegation of a *specific* purchase or sale of a security—at least in a government enforcement action. According to the Court, "[u]nder our precedents, it is enough that the fraud alleged 'coincide' with a securities transaction—whether by the plaintiff or someone else."<sup>19</sup> Thus, the Court had two interpretations of Rule 10b-5 that it could look to in interpreting the essentially identical language used by Congress in SLUSA: first the construction of the private right of action, and second, purporting to construe only Section 10(b)'s text, which applied only to government actions. At first glance, one might have thought the interpretation used for the private right of action was the most applicable; after all, the Court was addressing a private right of action, albeit one arising under state law. The Court, however, chose the broader interpretation of Section 10(b) in defining SLUSA's scope, and offered two reasons in support of that interpretive choice.

Both of the Court's justifications are open to criticism. The first justification was that the broader position was consistent with the SEC's longstanding interpretation.<sup>20</sup> Of course, the SEC's interpretation arose out of government actions, so it is hard to see why it should guide the Court's interpretive choice here. Second, the Court conjectured that "Congress can hardly have been unaware of this broad construction adopted by both this Court and the SEC when it imported the key phrase—'in connection with the purchase or sale'—into SLUSA's core provision."<sup>21</sup> This conjecture is open to question—it seems to

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

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

18. *Id.* (quoting Securities Litigation Uniform Standards Act of 1998, Pub L. No. 105-353, § 2(5), 112 Stat. 3227, 3227 (1998)).

19. *Id.* at 85 (citing *United States v. O'Hagan*, 521 U.S. 642, 651 (1997)).

20. *Id.*

21. *Id.*



posit an ideal legislator who pays careful attention to judicial interpretations—but more importantly, it does not answer the question of *which* interpretation Congress is presumed to be *aware* of. Why not both? And why presume that Congress favored one over the other? With two interpretations available, Stevens chose the one consistent with the statute's obvious purpose. The inclusion of that purpose in the text of the statute meant there would be no debates over how to read legislative intent, a topic that would arise in later cases, since Congress enacted that intent in the statute. As a result, Stevens garnered a unanimous Court for his opinion.<sup>22</sup>

## 2. Kircher v. Putnam Funds Trust

The Court's second foray into SLUSA was almost unanimous, with only Justice Scalia declining to join the majority opinion. *Kircher v. Putnam Funds Trust* called on the Court to interpret SLUSA's removal provision.<sup>23</sup> SLUSA bolsters its preemptive effect with the option of removal to federal court.<sup>24</sup> The provision is somewhat unusual in that it allows for removal of actions so that they can be dismissed in federal court. Ordinarily, one would expect the law to require the defendant to bring its motion to dismiss or demurrer in state court. Indeed, SLUSA appears to strip the state court of subject matter jurisdiction; ordinarily, preemption would require the state court to dismiss the case.

The removal provision, however, serves two important federal interests: (1) it allows federal courts to interpret the scope of preemption, thus enhancing uniformity; and (2) it triggers the PSLRA's stay of discovery. SLUSA contains a number of exceptions to its preemptive reach, so there is some federal interest in uniformity of interpretation. The more pressing interest for defendants, however, is the ability to block discovery. Some state court rules would allow discovery while a motion to dismiss was pending, thus forcing the defendant to seek a discretionary stay from the state court or an injunction against discovery from a federal court under SLUSA.<sup>25</sup> The same discovery could be used, not only in the state court action, but also in a subsequent federal class action. Removal allows the defendant to file a motion to dismiss in federal court which automatically triggers the PSLRA's discovery stay. Thus, removal to federal court protects issuers against the costs of "fishing expedition" discovery without limiting discovery's availability in state courts.

This removal provision, however, raises the question of the appropriate response to improperly removed cases, i.e., a case not within the scope of SLUSA's preemption. If a party has erroneously removed a non-preempted action to federal court, SLUSA allows the federal court to remand the action to state court.<sup>26</sup> In *Kircher*, the district court

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22. Justice Alito did not participate, having joined the Court after oral argument.

23. *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006).

24. Securities Exchange Act of 1934 § 16(c), 15 U.S.C. § 78q (2006); Securities Act of 1933 §16(c), 15 U.S.C. § 77p(c) (2006) ("Any class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).").

25. The injunction against discovery may or may not be available, depending on whether a parallel action has been filed in federal court.

26. Securities Act of 1933 §16(d)(4), 15 U.S.C. § 77p(d)(4) (2006).

remanded the case to state court after determining that it lacked jurisdiction.<sup>27</sup> Defendants appealed to the Seventh Circuit, which held that SLUSA precluded the claims.<sup>28</sup>

To reach that conclusion, however, the Seventh Circuit first had to determine that it had jurisdiction to hear the appeal. This question was complicated by Title 28, Section 1447(d) of the United States Code, which bars appellate review of district court orders remanding for lack of subject matter jurisdiction. The Seventh Circuit held the question of preclusion to be distinct from the question of jurisdiction, and therefore reviewable on appeal.<sup>29</sup>

The Supreme Court disagreed, noting that the Court had “relentlessly repeated” that remand orders are not subject to appellate review.<sup>30</sup> That consistent approach meant “Congress is aware of the universality of th[e] practice of denying appellate review of remand orders when Congress creates a new ground for removal.”<sup>31</sup> The Court found no “clear statutory command” in SLUSA to overcome that presumption.<sup>32</sup> The Court read the statute’s removal provision as coextensive with its preclusion provision: “Once removal jurisdiction under subsection (c) is understood to be restricted to precluded actions defined by subsection (b), a motion to remand claiming the action is not precluded must be seen as posing a jurisdictional issue.”<sup>33</sup> If the issue is not precluded, then the court has no jurisdiction. Consequently, the district court’s remand order was not subject to review in the court of appeals. Moreover, federal courts do not possess exclusive authority to address the question of preclusion; the Court read the statute as allowing the defendant to seek dismissal in state court without first removing to federal court.<sup>34</sup> Few defendants will opt to do this, but it does mean that the state court will have jurisdiction to dismiss a preempted claim.

The only aspect of the case that generated any dispute among the Justices was the question of what was needed to trigger the rule of no appellate review. Justice Scalia wrote a concurrence to offer his view that it did not matter whether the remand was based on lack of jurisdiction or not.<sup>35</sup> As long as the district court *stated* that the remand was based on lack of jurisdiction, that sufficed to invoke the rule of no appellate review.<sup>36</sup> The interpretation of SLUSA was unimportant for Scalia; what mattered was the enforcement of the rule of no appellate review for remand orders.

The Justices were in unanimous agreement that there is nothing special—nothing inherently federal—about SLUSA. SLUSA is a federal law that preempts certain state court actions, but either federal or state courts can apply it. The ordinary rules of appellate (non)review apply. No Justice on the Court saw any value in having federal

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27. The district court’s decision, which is based on the fact that plaintiff had not purchased or sold securities, preceded the Court’s *Dabit* decision rejecting that interpretation of SLUSA’s preemptive language. *Kircher*, 547 U.S. at 638 n.5.

28. *Kircher v. Putnam Funds Trust*, 403 F.3d 478, 484 (7th Cir. 2005).

29. *Kircher v. Putnam Funds Trust*, 373 F.3d 847, 851 (7th Cir. 2004).

30. *Kircher*, 547 U.S. at 640–41 n.8.

31. *Id.*

32. *Id.* at 641 n.8.

33. *Id.* at 643–44.

34. *Id.* at 646.

35. *Kircher*, 547 U.S. at 648.

36. *Id.* at 649–50.

courts as the exclusive interpreters of SLUSA's reach, and no Justice mentioned the need to enforce the discovery stay as a justification for keeping the case in the federal courts until the question of preemption was resolved. The Court focused on its jurisprudence relating to remand orders, not the task of implementing SLUSA to craft a coherent federal securities class action regime.

### *B. Statute of Limitations*

The statute of limitations in Rule 10b-5 cases has a somewhat convoluted history. Given that the judiciary created the Rule 10b-5 cause of action, rather than Congress, it is no surprise that Congress did not specify a limitations period for Section 10(b) when it passed the Exchange Act in 1934. Filling this gap, the Court borrowed the Exchange Act provision applicable to securities price manipulation claims,<sup>37</sup> which requires that suits be brought "within one year after the discovery of the facts constituting the violation and within three years after such violation."<sup>38</sup> Congress claimed the issue for itself, however, when it passed the Sarbanes-Oxley Act in 2002, extending the limitations period for Section 10(b) actions to "2 years after the discovery of the facts constituting the violation" or "5 years after such violation."<sup>39</sup>

*Merck & Co. v. Reynolds* called on the Roberts Court to interpret both "discovery" and "facts constituting the violation" as this provision provided.<sup>40</sup> On the first point, the Court had to resolve the uncertainty over whether discovery required actual discovery of the facts by the plaintiff or whether it should extend to facts that a "reasonably diligent plaintiff would have discovered."<sup>41</sup> On its face, this would not seem to be much of an issue, as the parties (and the Solicitor General) agreed that the latter interpretation was correct.<sup>42</sup> Justice Breyer, however, addressed the issue at length, purportedly "because we cannot answer the question presented without considering whether the parties are right about this matter."<sup>43</sup> The more plausible explanation, however, is that Justice Scalia (joined by Justice Thomas) wrote separately to argue that discovery meant discovery by the actual plaintiff in the case.<sup>44</sup>

The Justices disagreed on the meaning of discovery because of their differing approaches to statutory interpretation. For Breyer and the majority, the reasonably diligent discovery standard made sense because lower courts had followed that approach prior to the passage of the Sarbanes-Oxley Act.<sup>45</sup> "We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent."<sup>46</sup> Congress had codified that precedent.

Scalia rejected the majority's approach:

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37. *Lampf, Pleva, Lipkind, Prupis & Pettigrow v. Gilbertson*, 501 U.S. 350, 364 (1991).  
38. Securities Exchange Act of 1934 § 9(f), 15 U.S.C. § 78(i)(f) (2006).  
39. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 804, 116 Stat. 745, 801 (2002) (codified at 28 U.S.C. § 1658(b) (2006)).  
40. *Merck & Co. v. Reynolds*, 130 S. Ct. 1784, 1799 (2010).  
41. *Id.* at 1793.  
42. *Id.*  
43. *Id.*  
44. *Id.* at 1800 (Scalia, J., concurring).  
45. *Merck*, 130 S. Ct. at 1795.  
46. *Id.*

Assuming that Congress intended to incorporate the Circuits' views[—]which requires the further unrealistic assumption that a majority of each House knew of and agreed with the Courts of Appeals' opinions[—]that would be entirely irrelevant. Congress's collective intent (if such a thing even exists) cannot trump the text it enacts, and in any event we have no reliable way to ascertain that intent apart from reading the text.<sup>47</sup>

Scalia's preferred approach: locate the statute of limitations adopted by Congress in the overall statutory scheme. Included in this scheme, in Scalia's view, were not only the other provisions of the Exchange Act, but also the Securities Act of 1933 (Securities Act). Bringing the Securities Act into the picture changes the analysis because that law includes an explicit constructive discovery provision in Section 13. The limitations period begins to run "after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence."<sup>48</sup> For Scalia, Congress's inclusion of a constructive discovery provision in the Securities Act's statute of limitations meant that its omission in the analogous provision of the Exchange Act must be given legal effect, i.e., constructive discovery would not trigger the statute of limitations period under the Exchange Act.<sup>49</sup>

One might label Breyer's approach to statutory interpretation "judicial centric" and Scalia's "textual centric." Breyer's approach can be criticized for making heroic assumptions about the average legislator's familiarity with the judicial precedents in a given area. If the goal is to further legislative intent, Breyer's postulated intent seems largely fictional. Worse yet, Breyer does not consistently take the approach throughout the opinion. Confronted with the question of whether "inquiry notice" suffices to begin the running of the statute of limitations, Breyer downplays the importance of lower court decisions adopting that standard because "[w]e cannot reconcile it with the statute, which simply provides that 'discovery' is the event that triggers the 2-year limitations period—for all plaintiffs."<sup>50</sup> Now he's a textualist? Sometimes the text controls, and sometimes prior judicial interpretation controls. Breyer leaves us to guess when to apply which standard.

Scalia candidly concedes that he is uninterested in legislative intent, only in legislative *enactments*. His textual approach can be criticized for being unrealistic in its assumptions about the competence of legislators to fit together statutory provisions into a coherent whole. The problem becomes more acute when, as is the case with the securities laws, provisions are adopted by different Congresses. In this case, the statute of limitations adopted as part of the Sarbanes–Oxley Act came almost 70 years after the Securities Act. Expecting consistency across that long a period may simply be wishful thinking on Justice Scalia's part.

A more fundamental criticism of Justice Scalia's approach is that it ignores the reality of securities class action practice. If the actual plaintiff must "discover . . . the

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47. *Id.* at 1802 (Scalia, J., concurring).

48. Securities Act of 1933 § 13, 15 U.S.C. § 77m (2006).

49. *Merck*, 130 S. Ct. at 1800 (Scalia, J., concurring) ("To interpret § 1658(b)(1) as imposing a constructive-discovery standard, one must therefore assume, contrary to common sense, that the same word means two very different things in the same statutory context of limitations periods for securities-fraud actions under the 1933 and 1934 Acts.")

50. *Id.* at 1798.

facts” to begin the tolling of the statute of limitations, it is hardly a challenge for an enterprising plaintiffs’ attorney to search out plaintiffs until he has found one who has not yet discovered the facts. Scalia’s approach would render the Exchange Act’s statute of limitations a nullity for securities class actions,<sup>51</sup> leaving only the five-year statute of repose. Even the plaintiffs did not endorse Scalia’s approach. What is surprising is that Breyer did not call Scalia on this point. Neither side of the dispute seems interested in—or perhaps aware of—the actual practice of securities litigation, in which plaintiffs are largely figureheads.

The second question at issue in the case—what are the “facts constituting the violation”—provoked no disagreement. The Court’s holding on this point—that scienter is one of the facts constituting the violation<sup>52</sup>—is unremarkable. Breyer’s discussion is notable only in that it invokes the pleading standard from the PSLRA to help interpret the statute of limitations.<sup>53</sup> The PSLRA’s pleading standard requires the plaintiff to plead facts supporting scienter in the complaint.<sup>54</sup> On this issue, Breyer harmonized the different amendments to the Exchange Act, even though they were enacted by different Congresses. He saw no need, however, to harmonize the Exchange Act’s statute of limitations with the one found in the Securities Act. Statutory context apparently matters more within a particular statute than it does across the securities laws as a whole.

### *C. Statutory Interpretation and the Securities Laws*

One common thread running through these three cases is the predominance of theories of statutory interpretation over the impact of those interpretations on actual practice. This approach suggests a somewhat confined vision of the judicial role; only certain sources matter. In *Kircher* and *Merck*, the approach to statutory interpretation focused on judicial precedent. Congress was presumed to have incorporated those judicial interpretations into its legislation. Whether any member of Congress was actually aware of that precedent, we do not know. In *Dabit*, the Court confronted two potentially relevant interpretive strands with the Court asserting that Congress was legislating against the backdrop of one strand rather than the other. The Court adopted the interpretive choice that it did because, the purpose of the statute—to prevent evasion of the PSLRA—was clear from the statute’s face. The judicial precedent mattered little to the decision, but the Court nonetheless invoked it, despite its lack of persuasive force.

The common thread here is that the Court is managing the relationship between itself and Congress. In not one of the three cases does the Court demonstrate any awareness—or interest—in the actual practice of securities litigation. It is primarily interested in applying its precedents in a predictable fashion. Whether it succeeds in this task is open to question, but the enterprise is a general one, not specific to the securities law.

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51. It would still play a role, however, in individual actions.

52. *Merck*, 130 S. Ct. at 1796.

53. *Id.* (citing 15 U.S.C. § 78u-4(b)(2) (2006)).

54. Securities Exchange Act of 1934 § 21D(b)(2), 15 U.S.C. § 78u-4(b)(2).

## III. THE ADMINISTRATIVE STATE

During the New Deal, the securities laws were a critical proving ground for the Supreme Court in developing the judiciary's approach to the fledgling administrative state.<sup>55</sup> Franklin Delano Roosevelt and his Administration faced a number of legal challenges to their efforts to tame the financial markets. Most prominent was a decade long war over the SEC's efforts to dismantle the giant public utility conglomerates under the authority granted by the Public Utility Holding Company Act.<sup>56</sup> The bottom line that emerged from those cases was that the Court was going to defer to the administrative state; the expertise of the SEC was a bedrock belief among the New Deal alumni that Roosevelt appointed to the Supreme Court.<sup>57</sup> That deference translated into a stellar win/loss record for the SEC; the agency rarely came up short in its first four decades.<sup>58</sup>

The Roberts Court has been less deferential than the New Deal Court. It has decided two cases implicating the role of the securities laws in the administrative state, and in both cases, the Court rejected the government's position. These results would suggest skepticism toward the government's claims of expertise, but the Roberts Court's real skepticism appears aimed at the case law that it has inherited from earlier Courts.

A. *Antitrust v. Securities Regulation*

The Supreme Court has struggled to reconcile the antitrust and securities laws. The antitrust laws are premised on the benefits that free competition brings to the economy: lower price and greater choice, both presumed to enhance consumer welfare. The securities laws, like most regulatory schemes, create barriers to entry that invite anticompetitive behavior. The SEC's tolerance of price fixing of commissions by broker-dealers during the first 40 years of its existence is the most notorious example.<sup>59</sup>

The Court has rarely waded into the conflict between these two regulatory regimes; it has struggled when it has done so. The Court's struggles can be traced to a bad start by the Warren Court in *Silver v. New York Stock Exchange*.<sup>60</sup> Silver was a broker-dealer, not a member of the New York Stock Exchange, who had his wire connection to a number of other broker-dealers terminated at the order of the New York Stock Exchange.<sup>61</sup> Silver brought suit against the exchange, alleging that the termination of his connection was a collective refusal to deal that violated the Sherman Act.<sup>62</sup> The Second Circuit held that the claim was barred because the Exchange was exercising powers it held under the Exchange Act, which had impliedly repealed the antitrust laws with respect to those

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55. See Pritchard & Thompson, *supra* note 1, at 872–92 (analyzing the Supreme Court cases shortly after the New Deal).

56. Public Utility Holding Act of 1935, Pub. L. No. 74-333, 49 Stat. 803 (repealed 2005).

57. See Pritchard & Thompson, *supra* note 1, at 894–912 (discussing the Supreme Court's deference to the SEC expertise in cases shortly after the New Deal).

58. See E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571, 1579–86 (2004) (describing the Supreme Court's expansive holdings in all but a handful of securities cases until 1973).

59. See *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975) (holding that the SEC's system of fixed commission rules is outside the scope of the antitrust laws).

60. *Silver v. New York Stock Exchange*, 373 U.S. 341, 343–44 (1963).

61. *Id.* at 344.

62. *Id.* at 345.

powers.<sup>63</sup>

The Supreme Court reversed, concluding that the Second Circuit had erred in excluding the antitrust laws altogether: “The proper approach . . . is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted.”<sup>64</sup> The Court then went on to reconcile the two schemes by turning to . . . due process? The Court held that the antitrust laws had been violated because the exchange had not afforded the broker-dealer notice and hearing before terminating his wire connection.<sup>65</sup> The Court’s injection of due process into antitrust was summarily dismantled by Justice Stewart in his dissent,<sup>66</sup> and has baffled both securities and antitrust lawyers since it was handed down.

The Court has not overruled *Silver*, but the Burger Court worked hard to narrow its reach. In two cases decided the same day, the Court rejected antitrust claims against participants in the securities industry. Notably, in both cases the United States and the SEC, as amici, supported opposing sides. The first, *United States v. National Association of Securities Dealers (NASD)*, involved resale practices in the mutual fund industry.<sup>67</sup> The second, *Gordon v. New York Stock Exchange*, involved the fixed brokerage commissions mentioned above.<sup>68</sup>

The Court concluded that the practices in both cases were immune from antitrust scrutiny, but only after painstaking review of the SEC’s involvement in the challenged practice. In the *NASD* case, Justice Powell reviewed the SEC’s involvement in mutual fund pricing under the Investment Company Act at length before concluding, “Maintenance of an antitrust action for activities so directly related to the SEC’s responsibilities poses a substantial danger that [the mutual fund managers] would be subjected to duplicative and inconsistent standards.”<sup>69</sup> In *Gordon*, Justice Blackmun conducted an equivalent review of the SEC’s involvement in brokerage commissions, concluding that Congress intended “to leave the supervision of the fixing of reasonable rates of commission to the SEC.”<sup>70</sup> These decisions purported to leave intact *Silver*’s governing principle that “[r]epeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary.”<sup>71</sup> *Silver* survived because the Court saw the minimum repeal “necessary” as quite broad.

The Court’s unwillingness to overrule *Silver* left the door open for the claim in *Credit Suisse Securities (USA) LLC v. Billing*.<sup>72</sup> This case arose out of the “laddering” scandals of 2001–02, in which it was alleged that underwriters, by promising allocations of shares in “hot” initial public offerings, extracted promises from institutional investors to purchase securities in the secondary market at inflated prices and/or with inflated

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63. *Silver v. New York Stock Exchange*, 302 F.2d 714 (2d Cir. 1963).

64. *Silver*, 373 U.S. at 357.

65. *Id.* at 361–62.

66. *See id.* at 367, 370 (Stewart, J., dissenting) (“Whether there has been a violation of the antitrust laws depends not at all upon whether or not the defendants’ conduct was arbitrary.”).

67. *United States v. Nat’l Ass’n of Sec. Dealers, Inc. (NASD)*, 422 U.S. 694 (1975).

68. *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975).

69. *NASD*, 422 U.S. at 735.

70. *Gordon*, 422 U.S. at 691.

71. *Silver*, 373 U.S. at 357.

72. *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007).

commissions.<sup>73</sup> The twist in *Credit Suisse* was that at least some of the conduct alleged, if proven, violated the securities laws as well as the antitrust laws.<sup>74</sup> In fact, another group of plaintiffs brought a parallel securities class action, alleging essentially the same facts, resulting in a substantial settlement.<sup>75</sup> The plaintiffs in *Credit Suisse* reasoned that if the conduct violated both the antitrust and the securities laws, then there was no inconsistency between the two regimes, making no repeal of the antitrust laws necessary.

As in *Gordon* and *NASD*, the Justice Department's Antitrust Division and the SEC were on opposing sides in the lower courts. In those earlier cases, the Solicitor General authorized the SEC to file its own brief in the Supreme Court. In *Credit Suisse*, however, the Solicitor General attempted to cobble together a compromise position. He argued the case should be remanded to the district court to determine "whether respondents' allegations of prohibited conduct can, as a practical matter, be separated from conduct that is permitted by the regulatory scheme."<sup>76</sup> That task would require the lower court to decide whether SEC-permitted and SEC-prohibited conduct are "inextricably intertwined."<sup>77</sup>

Justice Breyer, writing for the Court, rejected both the plaintiffs' and Solicitor General's arguments. He discerned "only a fine, complex, detailed line separat[ing] activity that the SEC permits or encourages (for which [plaintiffs] must concede antitrust immunity) from activity that the SEC must (and inevitably will) forbid (and which, on [plaintiffs'] theory, should be open to antitrust attack)."<sup>78</sup> The Court worried that only a "securities expert" could locate this line, and even then, the SEC might shift it by deciding that previously forbidden conduct was now permissible.<sup>79</sup> Moreover, Breyer worried that the "nuanced nature of the evidentiary evaluations necessary to separate the permissible from the impermissible" would lead to inconsistent verdicts in the hands of "different nonexpert judges and different nonexpert juries."<sup>80</sup> The unpredictability of such an arrangement for market participants is obvious. Rather than disrupting the scheme of securities regulation, the Court concluded that it should entirely exclude antitrust claims. *Credit Suisse* does not explicitly overrule *Silver*, but *Credit Suisse* steps back sharply from *Silver*'s exertions in preserving a role for antitrust. In *Credit Suisse*, Breyer leaves little doubt that *Silver* need not be taken seriously. Securities regulation is sufficiently pervasive that antitrust claims will ordinarily be barred.

Justice Thomas dissented, pointing to the savings clause found in the Exchange Act, which preserves "any and all" "rights and remedies."<sup>81</sup> For Thomas, "[w]hen Congress wants to preserve all other remedies, using the word 'all' is sufficient."<sup>82</sup> If adopted, Thomas's position would open the door to a myriad of antitrust claims challenging

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73. *Id.* at 269–70.

74. *Id.* at 278–79.

75. *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 480–86 (S.D.N.Y. 2009) (approving \$586 million settlement).

76. *Credit Suisse*, 551 U.S. at 284 (quoting Brief for United States as Amicus Curiae Supporting Vacatur at 9, *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007) (No. 05-1157), 2007 WL 173649).

77. *Id.*

78. *Id.* at 279.

79. *Id.* at 280.

80. *Id.* at 281.

81. Securities Exchange Act of 1934 § 28(a), 15 U.S.C. § 78bb(a) (2006).

82. *Credit Suisse*, 551 U.S. at 287, 289 (Thomas, J., dissenting).



practices sanctioned by the securities laws. In *Merck*, Scalia put forth literalism of this sort and the majority rejected it. The results in *Credit Suisse* and *Merck* suggest that textualism has a limited following in the Court.

*Credit Suisse's* general theme is judicial modesty; the Court lacks confidence in the ability of judges to understand the complexity of the securities markets. This judicial modesty, however, does not translate into judicial deference to the executive branch. The Court was unimpressed with the Solicitor General's effort at compromise; his "inextricably intertwined" principle failed to address the line-drawing difficulties that the Court had found. The Court was unwilling to defer to the government's effort to push it (and lower courts) into resolving complicated disputes over competing regulatory paradigms.

### B. Separation of Powers

The Roberts Court's other foray into the intersection of administrative law and securities law—*Free Enterprise Fund v. Public Company Accounting Oversight Board (PCAOB)*<sup>83</sup>—is notable in that it has almost nothing to do with the securities laws: neither the majority nor the dissenters grapple with the decision's implications for the regulation of accounting. *PCAOB* nominally involves the Sarbanes–Oxley Act, but it is mainly a constitutional separation of powers case. At issue was the provision of that law making PCAOB board members removable only by the SEC, and then only "for good cause shown."<sup>84</sup> This provision was challenged as violating the separation of powers because it deprived the President of meaningful oversight over officers exercising executive authority.<sup>85</sup> The Chief Justice, for the majority, wrote a lengthy opinion surveying the Court's prior decisions involving "for cause" restrictions, which were upheld by the New Deal Court in *Humphrey's Executor v. United States*.<sup>86</sup> The tenor of his discussion of those prior precedents is at best grudging, but he eventually concludes that some restrictions on the President's removal authority are permissible.<sup>87</sup> The double "for cause" removal provision at issue in *PCAOB*, however, was too much.<sup>88</sup> In a similarly lengthy opinion (with Appendix!), Justice Breyer, joined by Justices Stevens, Ginsburg, and Sotomayor, concluded that the majority was "wrong—very wrong."<sup>89</sup>

For the average securities lawyer, the only thing of interest in the opinions is that the Court found that the unconstitutional "for cause" provision was severable from the remainder of the Sarbanes–Oxley Act.<sup>90</sup> The question of severability was the only topic

83. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd. (PCAOB)*, 130 S. Ct. 3138 (2010).

84. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 101(e)(6), 116 Stat. 745, 752 (2002) (codified as amended at 15 U.S.C. § 7211(e)(6) (2010)). A second issue was raised in the case regarding the appointment of the PCAOB members by the SEC, but the Court rejected the argument summarily. *PCAOB*, 130 S. Ct. at 3162–64.

85. *PCAOB*, 130 S. Ct. at 3149.

86. *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

87. *PCAOB*, 130 S. Ct. at 3152–53.

88. *Id.* at 3164 ("While we have sustained in certain cases limits on the President's removal power, the Act before us imposes a new type of restriction—two levels of protection from removal for those who nonetheless exercise significant executive power. Congress cannot limit the President's authority in this way.").

89. *Id.* at 3184 (Breyer, J., dissenting).

90. *Id.* at 3161–62.

that created any drama; the Court's holding meant that the decision was largely a non-event for the practice of securities law because the Sarbanes-Oxley Act was left generally intact. Whether the members of the PCAOB are removable or not is unlikely to make much of a difference for the day-to-day practice of accounting regulation.

For the scholar of securities law, the opinion is notable both for what it includes and what it omits. The notable inclusion is the Court's assumption that the members of the SEC are removable only "for cause," despite the lack of a textual basis for that conclusion.<sup>91</sup> As Justice Breyer points out in his dissent, the majority stretches to create a constitutional question by reading a "for cause" provision for the removal of SEC Commissioners into the Exchange Act.<sup>92</sup> If the Court had instead read the Exchange Act to allow the President to remove SEC Commissioners at will, the Court could have avoided the novel constitutional question of double "for cause" removal.<sup>93</sup> Why did the Court depart from its usual practice of construing statutes to avoid constitutional questions? If one reads the majority's opinion, the most reasonable conclusion to draw from its arguments is that restrictions on the President's power to remove the SEC commissioners violate the separation of powers. The holding, however, targets the new kid in town, the PCAOB. The SEC's status in the pantheon of regulatory agencies is apparently so secure that it is unthinkable for the Court to question its independence, notwithstanding the absence of a "for cause" provision in the text of the Exchange Act.

The notable omission from the opinion is any discussion of Congress's goals in insulating the members of the PCAOB from removal. The omission is telling. Congress was not concerned about presidential interference with the Board's operations; the real threat was from Congress itself. Politics abhors a vacuum of governmental authority. By insulating the SEC from the President's removal authority, Congress made the SEC not independent, but rather, dependent on Congress.<sup>94</sup> That dependence allowed Congress to strong arm the SEC on the question of auditor independence.<sup>95</sup> When Arthur Andersen collapsed in the wake of the Enron scandal, the accounting firm's substantial revenue stream from consulting for Enron was diagnosed as the principal cause. Faced with a flurry of embarrassing headlines, Congress quickly got religious on the question of auditor independence. That newfound fervor found its expression in the independence conferred on the PCAOB, which was insulated both from the President *and* Congress, in the hope that it would protect accounting regulation from political interference.

None of this history is covered in the Court's opinion, which blinks reality by asserting that, "one branch's handicap is another's strength."<sup>96</sup> This point applies to the "for cause" removal requirement for the SEC, but has much less force when applied to the PCAOB. Moreover, the dissent fails to challenge the majority on its skewed

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91. *Id.* at 3148–49 ("The parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphrey's Executor* standard of 'inefficiency, neglect of duty, or malfeasance in office.'") (quoting *Humphrey's Ex'r*, 295 U.S. at 620).

92. *PCAOB*, 130 S. Ct. at 3182–83 (Breyer, J., dissenting).

93. *Id.* at 3184 (Breyer, J., dissenting).

94. A.C. Pritchard, *The SEC at 70: Time for Retirement?*, 80 NOTRE DAME L. REV. 1073 (2005) (explaining how Congress made the SEC dependent upon them).

95. Interview with Arthur Levitt, Former Chairman, SEC, Frontline (Mar. 12, 2002), available at <http://www.pbs.org/wgbh/pages/frontline/shows/regulation/interviews/levitt.html>.

96. *PCAOB*, 130 S. Ct. at 3156.

understanding of the balance of power between Congress and the President. This omission by both sides of any discussion of the rationale for the PCAOB's independence might be taken as further evidence of the gap between the Court's securities jurisprudence and the political economy of securities regulation. In fairness to the Court, however, it is difficult to sound judicial while discussing interest group pressures on Congress and their influence on accounting policy. Do the Justices really want to introduce the question of campaign contributions into separation of powers jurisprudence? That said, the Court's decision restores some of the influence that Congress previously held over the accounting profession. Any benefit to Presidential oversight from the Court's striking down the PCAOB's "for cause" provision seems de minimis by comparison.

### C. Securities Laws and the Administrative State

*Credit Suisse* and *PCAOB* reflect efforts by the Roberts Court to limit prior precedents that it considers misguided. *Credit Suisse* cabins the confused *Silver* decision, which conflates antitrust and due process. *PCAOB* limits *Humphrey's Executor's* attempt to insulate expert agencies from political interference. Both lines of precedent have implications that go well beyond the administration of the securities laws. The opinions in *Credit Suisse* and *PCAOB* are directed at those debates, paying scant attention to the substance of the securities laws.

## IV. THE CLASS ACTION MENACE?

The Roberts Court has been busy with securities class actions, deciding substantive issues in seven cases during the Chief Justice's first six years. On the nominal scorecard, plaintiffs have won three of those cases, and the defendants the other four. A closer look at those decisions, however, suggests more balance; informed observers would probably flip the tally closer to four to three.<sup>97</sup> The Roberts Court has consistently overturned lower court decisions that would have curtailed the existing availability of securities class actions. Plaintiffs have been rebuffed, however, when they attempted to expand the boundaries of private litigation, particularly when it comes to secondary liability.

### A. Judicial Gatekeeping: The Pleading Standard, Materiality, and Class Certification

#### 1. Pleading Scienter

*Tellabs, Inc. v. Makor Issues & Rights, Ltd.*<sup>98</sup> interprets the PSLRA's "strong inference" standard for pleading scienter—the defendants' state of mind—in Rule 10b-5 cases.<sup>99</sup> After the enactment of the PSLRA, the circuits diverged in applying the strong inference standard. The Second Circuit relied on the legislative history and held that the PSLRA codified its pre-PSLRA pleading approach based on motive and opportunity and

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97. If one were to include *Merck* (plaintiff win) and *Dabit* (defendant win) in this tally, the numbers would change to five to four in favor of the plaintiffs.

98. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007).

99. Securities Exchange Act of 1934 § 21D(b)(2), 15 U.S.C. § 78u-4(b)(2) (2006).

on recklessness.<sup>100</sup> The Ninth Circuit also relied on the PSLRA's legislative history, but concluded that the statute raised the standard above that of the Second Circuit.<sup>101</sup> Under the higher Ninth Circuit pleading standard, plaintiffs had to plead, "at a minimum, particular facts giving rise to a strong inference of deliberate or conscious recklessness."<sup>102</sup> Most circuits, however, took a middle course, concluding that motive and opportunity allegations might suffice to support a strong inference of scienter, but courts would need to evaluate such allegations on a "case-by-case" basis.<sup>103</sup>

When the Supreme Court finally entered the fray in *Tellabs* over the interpretation of the strong inference standard, it did not resolve this longstanding split among the circuits over the application of the standard, which most observers had been expecting. Instead, it addressed a collateral, but related, issue on which the circuits had also split: in considering whether the facts alleged by the plaintiff meet the strong inference standard, how should courts assess the different possible inferences that might be drawn from the allegations in the complaint with respect to scienter? In particular, should a court consider competing inferences arising from those facts?

Prior to the Supreme Court's *Tellabs* opinion, the circuit courts split into three groups in assessing competing inferences. The First, Fourth, Sixth, and Ninth Circuits adopted a "preponderance" standard.<sup>104</sup> The preponderance standard requires the inference that the defendants had the requisite scienter be the most plausible when compared with competing inferences that the defendants did not have scienter.<sup>105</sup> Combined with the Ninth Circuit's higher deliberate or conscious recklessness scienter standard, this standard made it easier for defendants in the Ninth Circuit to obtain dismissal. The Second, Eighth, Tenth, and Eleventh Circuits required that the inference that the defendants acted with the requisite scienter be at least equally plausible with competing inferences.<sup>106</sup> Finally, the Third and Seventh Circuits followed the most plaintiff-friendly approach, adopting the "reasonableness" standard that did not require

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100. *Novak v. Kasaks*, 216 F.3d 300, 311 (2000).

101. *See In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 974 (9th Cir. 1999) (interpreting the PSLRA as requiring a higher pleading standard than that found in Second Circuit decisions).

102. *Id.*

103. *Greebel v. FTP Software, Inc.*, 194 F.3d 185 (1st Cir. 1999); *Ottman v. Hanger Orthopedic Grp., Inc.*, 353 F.3d 338 (4th Cir. 2003); *Nathenson v. Zonagen, Inc.*, 267 F.3d 400 (5th Cir. 2001); *In re Comshare, Inc. Sec. Litig.*, 183 F.3d 542 (6th Cir. 1999); *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 437 F.3d 588 (7th Cir. 2006); *Fla. State Bd. of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645 (8th Cir. 2001); *In re Silicon Graphics*, 183 F.3d 970 (9th Cir. 1999); *City of Philadelphia v. Fleming Cos.*, 264 F.3d 1245 (10th Cir. 2001); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271 (11th Cir. 1999) (demonstrating the middle course approach).

The choice of scienter standard has important consequences: the Ninth Circuit, in adopting the most stringent standard post-PSLRA, also substantially increased its dismissal rate. An earlier study found that Ninth Circuit courts dismissed cases at a 63% rate, while Second Circuit courts dismissed only 36%. *See A.C. Pritchard & Hillary Sale, What Counts as Fraud? An Empirical Study of Motions to Dismiss Under the Private Securities Litigation Reform Act*, 2 J. EMPIRICAL LEGAL STUD. 125 (2005) (demonstrating the increased dismissal rate).

104. *In re Credit Suisse First Boston Corp.*, 431 F.3d 36 (1st Cir. 2005); *Ottman v. Hanger Orthopedic Grp., Inc.*, 353 F.3d 338 (4th Cir. 2003); *Helwig v. Vencor, Inc.*, 251 F.3d 540 (6th Cir. 2001); *Gompper v. VISX, Inc.*, 298 F.3d 893 (9th Cir. 2002).

105. *E.g., Gompper*, 298 F.3d at 896–97.

106. *Acito v. IMCERA Grp., Inc.*, 47 F.3d 47 (2d Cir. 1995); *Rosenzweig v. Azurix Corp.*, 332 F.3d 854 (5th Cir. 2003); *Fla. State Bd. of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645 (8th Cir. 2001); *Pirraglia v. Novell, Inc.*, 339 F.3d 1182 (10th Cir. 2003); *Garfield v. NDC Health Corp.*, 466 F.3d 1255 (11th Cir. 2006).

any assessment of competing inferences, looking only at the plausibility of the plaintiff's allegations.<sup>107</sup> Under the Seventh Circuit's reasonableness standard as set forth in *Makor Issues & Rights, Ltd. v. Tellabs, Inc.* (the lower court opinion before the Supreme Court in *Tellabs*), a complaint should survive "if it alleges facts from which, if true, a reasonable person could infer that the defendant acted with the required intent."<sup>108</sup>

The Seventh Circuit standard faced an uphill fight in the Supreme Court. The government's *Tellabs* amicus brief argues that the Seventh Circuit's reasonableness standard would have made Congress's effort in enacting the strong inference standard toothless, as it would mean reverting to pre-PSLRA standards under Rule 9(b) of the Federal Rules of Civil Procedure.<sup>109</sup>

The government's brief is notable in that it sides with the *defendants*, an unusual occurrence in its amicus practice.<sup>110</sup> The SEC has historically sided with the plaintiffs' bar,<sup>111</sup> and even minor deviations from that role bring a firestorm of criticism from the plaintiffs' bar and its allies.<sup>112</sup> The SEC's support for the plaintiffs' bar in part reflects its own institutional interests. The agency favors broad interpretations of its governing statutes; a narrow interpretation of Section 10(b) could reduce the SEC's enforcement discretion. The agency commonly sides with the plaintiffs' bar, however, even on issues that relate purely to the terms of the implied Rule 10b-5 cause of action.<sup>113</sup> So here the Court faced the unusual scenario of the government siding with the defendants.

The Court was unmoved by this unusual alignment. Ginsberg characterized her role as framing "a workable construction of the 'strong inference' standard, a reading geared to the PSLRA's twin goals: to curb frivolous, lawyer-driven litigation, while preserving investors' ability to recover on meritorious claims."<sup>114</sup> Having framed the inquiry in this way, it is no surprise that Ginsberg settled on the intermediate position. She rejected the reasonableness standard adopted by the lower court, instead requiring a comparative inquiry: "A complaint will survive, we hold, only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one

107. *In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256 (3d Cir. 2006).

108. *Tellabs*, 437 F.3d at 602.

109. Brief for the United States as Amicus Curiae Supporting Petitioners at 23, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007) (No. 06-484), 2007 WL 460606 (arguing that "the court of appeals' standard appears to be equivalent to the standard that it (and some other courts of appeals) had applied *before* the enactment of the Reform Act, under which a complaint was sufficient if the plaintiff pleaded facts that supported at least a *reasonable* inference of state of mind").

110. *See id.* at 26 (arguing that "if the alleged facts give rise to two seemingly equally strong competing inferences, a court must conclude that the inference of scienter is not itself strong") (citations and quotation marks omitted).

111. *See Pritchard, supra* note 2, at 923 (quoting Justice Lewis F. Powell, Jr., complaining that "SEC usually favors *all π*. I can't recall a case in which this was not so.").

112. *See, e.g.*, Stephen Labaton, *S.E.C. Seeks to Curtail Investor Suits*, N.Y. TIMES, Feb. 13, 2007, at C1 (presenting criticism of SEC actions to protect corporations from lawsuits); Stephen Labaton, *Is the S.E.C. Changing Course?*, N.Y. TIMES, Mar. 1, 2007, at C1 (outlining indications that the chairman of the SEC may be siding more with business interests and less with investors). Labaton is the son of a prominent plaintiffs' lawyer, Ed Labaton.

113. *See, e.g.*, *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) (adopting SEC's recommendation of the fraud on the market presumption of reliance for securities fraud class actions).

114. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

could draw from the facts alleged.”<sup>115</sup> Congress’s use of the word “strong” compelled that conclusion. According to Ginsberg, “The strength of an inference cannot be decided in a vacuum. The inquiry is inherently comparative: How likely is it that one conclusion, as compared to others, follows from the underlying facts?”<sup>116</sup> At a minimum, therefore, the Court felt compelled to choose the intermediate “equal inference” standard, rejecting “reasonableness.” Ties are resolved in favor of the plaintiff, but the plaintiff must show that the fraudulent inference is at least as likely as an innocent one.

The Court rejected the “preponderance” standard favored by the defendants and the government, which won the support of Justices Scalia and Alito in their concurrences.<sup>117</sup> Scalia gets points for his colorful illustration of his disagreement with Ginsberg:

If a jade falcon were stolen from a room to which only A and B had access, could it *possibly* be said there was a “strong inference” that B was the thief? I think not, and I therefore think that the Court’s test must fail. In my view, the test should be whether the inference of scienter (if any) is *more plausible* than the inference of innocence.<sup>118</sup>

This provoked the predictable exchange between Scalia and Ginsberg over the analogy, and more fundamentally, the “meaning” of the word strong.<sup>119</sup> Scalia also engaged in a familiar debate with both the majority and Stevens (who dissented) over the appropriate approach to statutory interpretation generally, complete with the standard Scalia complaint about the use of legislative history.<sup>120</sup> Stevens’ free-wheeling approach to statutory interpretation particularly provoked Scalia. For Scalia, such discretion is “conferred upon administrative agencies, which need not adopt what courts would consider the interpretation most faithful to the text of the statute, but may choose some other interpretation, so long as it is within the bounds of the reasonable.”<sup>121</sup> Courts “must apply judgment, to be sure. But judgment is not discretion.”<sup>122</sup>

Stevens shot back that “[t]he meaning of a statute can only be determined on a case-by-case basis and will, in each case, turn differently on the clarity of the statutory language, its context, and the intent of its drafters.”<sup>123</sup> Stevens preferred a “probable cause” standard because “it is a concept that is familiar to judges,” and “[a]s a matter of normal English usage, its meaning is roughly the same as ‘strong inference.’”<sup>124</sup> It is unclear who normally uses “probable cause” at all, other than criminal defense lawyers and prosecutors. Stevens, however, made no pretense: Congress intended “probable cause” in adopting the “strong inference” phrasing.<sup>125</sup> Suffice it to say, none of the

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115. *Id.* at 324.

116. *Id.* at 323.

117. *Id.* at 329 (Scalia, J., concurring); *Id.* at 331 (Alito, J., concurring).

118. *Tellabs*, 551 U.S. at 329 (Scalia, J., concurring).

119. *Id.* at 331–32 (Scalia, J., concurring).

120. *Id.* at 329 (Scalia, J., concurring) (“Even if I agreed with the Court’s interpretation of ‘strong inference,’ I would not join the Court’s opinion because of its frequent indulgence in the last remaining legal fiction of the West: that the report of a single committee of a single House expresses the will of Congress.”).

121. *Id.* at 332 (Scalia, J., concurring).

122. *Id.* (Scalia, J., concurring).

123. *Tellabs*, 551 U.S. at 335, 336 n.1 (Stevens, J., dissenting).

124. *Id.* at 336 (Stevens, J., dissenting).

125. *Id.* (Stevens, J., dissenting).

participants in this intramural debate persuaded the others.

In fairness to the Justices, it is not altogether clear that much of anything was at stake once the implausible “reasonableness” standard was rejected. Is there much difference between the equal inference and preponderance standards? In theory, the two differ only when the competing inferences are tied. The equal inference standard awards ties to the plaintiffs, leading to a rejection of the defendants’ motion to dismiss on scierter grounds; the preponderance standard awards ties to the defendants, leading to a dismissal. As Justice Scalia noted in his concurrence, the difference between the equal inference and preponderance standards is likely to be determinative in only a small fraction of cases: “How often is it that inferences are precisely in equipoise?”<sup>126</sup>

Given the limited change to the law *Tellabs* affected in most circuits, would it make any difference to outcomes? It turns out that it does. Steve Choi and I, in a study comparing motions to dismiss based on the pleading standard before and after *Tellabs*, found that dismissals declined sharply in the Ninth Circuit after *Tellabs*, and that the incidence of nuisance settlements climbed in that circuit.<sup>127</sup> The Justices were debating amongst themselves the proper approach to statutory interpretation; their somewhat theoretical debate had real consequences for litigants. That observation, however, is possible only in hindsight.

## 2. Materiality

The scierter standard is the most common basis for challenging securities fraud complaints.<sup>128</sup> Materiality is also popular, however, with the issue showing up in nearly a quarter of decisions resolving motions to dismiss.<sup>129</sup> A recurring complaint from corporate executives and their lawyers is that the open-ended standard the Supreme Court adopted made materiality determinations unnecessarily difficult: “[A] substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”<sup>130</sup>

Their prayers for more bright-line rules for materiality fell on deaf ears in *Matrixx Initiatives, Inc. v. Siracusano*.<sup>131</sup> Justice Sotomayor, writing for a unanimous Court, rejected the argument that materiality should require a finding of statistical significance for questions relating to drug safety.<sup>132</sup> The specific issue the case presented was whether reports of adverse drug reactions to a pharmaceutical companies’ top-selling product could be material before the number of those reports reached a statistically significant level.<sup>133</sup> The Court had no difficulty concluding that statistical significance was not a

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126. *Id.* at 331 (Scalia, J., concurring).

127. See Stephen J. Choi & A.C. Pritchard, *The Supreme Court’s Impact on Securities Class Actions: An Empirical Assessment of Tellabs*, 28 J. L. ECON. & ORG. (forthcoming 2012) (studying *Tellabs*’ impact on the Ninth Circuit), available at <http://jleo.oxfordjournals.org/content/early/2011/08/25/jleo.ewr014.full.pdf+html>.

128. *Id.* at Tbl. 3.

129. *Id.*

130. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). The Supreme Court adopted this standard for Rule 10b-5 cases in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

131. *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309 (2011).

132. *Id.* at 1321–23.

133. *Id.* at 1314.

pre-requisite, noting that the FDA and other experts commonly made decisions in the absence of statistically significant data, relying on other evidence of causation.<sup>134</sup> Once again, the Court insisted that materiality was a “fact-specific inquiry . . . .”<sup>135</sup> Any alternative standard is necessarily either under or over inclusive, but those responsible for making disclosure decisions have to face the fact that they will only know in hindsight that they have guessed right. The only consolation the Court offered to those responsible for making a materiality determination was the Court’s reiteration that there was no general duty to speak: “Even with respect to information that a reasonable investor might consider material, companies can control what they have to disclose . . . by controlling what they say to the market.”<sup>136</sup> Unless they have a 10-K or 10-Q to file next week. *Matrixx* broke no new ground for plaintiffs, but they certainly didn’t lose any either.

### 3. Class Certification

If the motion to dismiss is the principal tool for weeding out securities fraud class actions, class certification comes second in importance. *Erica P. John Fund, Inc. v. Halliburton Co.*<sup>137</sup> resolved a circuit split over the question of what a plaintiff was required to prove to certify a class. The Fifth Circuit stood alone in requiring plaintiffs to prove loss causation at the class certification stage,<sup>138</sup> which had proved a challenging barrier for plaintiffs in that circuit. Chief Justice Roberts, writing for a unanimous Court, made short work of reversing the Fifth Circuit. The Fifth Circuit had held that plaintiffs were required to prove loss causation in order to trigger the fraud-on-the-market presumption of *Basic, Inc. v. Levinson*.<sup>139</sup> The Chief Justice, however, found that the fraud-on-the market presumption had no connection to loss causation; the presumption was about reliance, not loss causation.

The fact that a subsequent loss may have been caused by factors other than the revelation of a misrepresentation has nothing to do with whether an investor relied on the misrepresentation in the first place, either directly or presumptively through the fraud-on-the-market theory. Loss causation has no logical connection to the facts necessary to establish the efficient market predicate to the fraud-on-the-market theory.<sup>140</sup>

It is hard to see *Halliburton* as anything more than mere error correction. But the case does demonstrate a willingness by the Roberts Court to take securities cases to rein in circuits imposing undue burdens on plaintiffs. *Halliburton* is hardly a case that called out for resolution; one circuit, not a terribly significant one for securities class actions, had made an obvious mistake. The Supreme Court could have left the issue to percolate in the lower courts with the hope that the deviant court of appeals would bring itself into

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134. *Id.* at 1320.

135. *Id.* at 1321 (quoting *Basic*, 485 U.S. at 232).

136. *Matrixx*, 131 S. Ct. at 1322.

137. *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011).

138. See *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 483 (2d Cir. 2008) (expunging the requirement that investors prove loss causation at class certification stage); *Schleicher v. Wendt*, 618 F.3d 679, 687 (7th Cir. 2010) (same); *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 636–37 (3d Cir. 2011) (same).

139. *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

140. *Halliburton*, 131 S. Ct. at 2186.



line with the other circuits. Instead, the Court invested the time to bring the Fifth Circuit into line when it imposed an unwarranted burden on plaintiffs. If the Roberts Court has a “pro-business” agenda, its selection of cases for review seems poorly suited for promoting its aims.

### B. Mutual Fund Litigation

A less prominent feature of the Court’s securities jurisprudence is the regulation of mutual funds under the Investment Company Act of 1940.<sup>141</sup> *Jones v. Harris Associates LP*<sup>142</sup> came to the Court from the Seventh Circuit. The dispute over the case in the Seventh Circuit is probably the most interesting aspect of the case. The plaintiffs’ claim in *Jones* was that the investment adviser to the mutual fund in question collected excessive fees for its management services, thereby breaching its “fiduciary duty with respect to the receipt of compensation for services.”<sup>143</sup> The district court granted summary judgment to the defendant, applying the multifactor analysis first adopted by the Second Circuit in *Gartenberg v. Merrill Lynch Asset Management, Inc.*<sup>144</sup> Judge Frank Easterbrook wrote the decision for the Seventh Circuit affirming the grant of summary judgment, but he departed drastically from the rationale applied by the lower court.<sup>145</sup> In Easterbrook’s view, the fiduciary duty standard of the Investment Company Act was a limited one: “A fiduciary must make full disclosure and play no tricks but is not subject to a cap on compensation.”<sup>146</sup> Easterbrook’s support for this narrow definition of fiduciary duty: the forces of competition, driven by sophisticated investors, imposed substantial pressure to keep advisory fees low, so judicial scrutiny would add little.<sup>147</sup> The free market ethos underlying this argument brought a rebuke from, of all people, Judge Richard Posner, who critiqued Easterbrook’s “economic analysis” as being “ripe for reexamination.”<sup>148</sup>

Easterbrook’s aggressive position created a circuit conflict, necessitating Supreme Court review, but his position got little support there. Both the defendant and the government declined to endorse it, instead endorsing the *Gartenberg* standard.<sup>149</sup> The Court declined to take a position on the Easterbrook/Posner debate: “The debate between the Seventh Circuit panel and the dissent from the denial of rehearing regarding today’s mutual fund market is a matter for Congress, not the courts.”<sup>150</sup> Instead, the Supreme Court fell into line with the overwhelming weight of lower court authority, endorsing the *Gartenberg* standard as a matter of statutory interpretation.

Justice Alito, writing for the Court, said that Congress meant to adopt the Court’s standard from *Pepper v. Litton*: “The essence of the test is whether or not under all the

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141. Investment Company Act of 1940 § 36(b), 15 U.S.C. § 80a-35(b) (2006).

142. *Jones v. Harris Assocs. L.P.*, 130 S. Ct. 1418 (2010).

143. Investment Company Act of 1940 § 36(b), 15 U.S.C. § 80a-35(b).

144. *Gartenberg v. Merrill Lynch Asset Mgmt., Inc.*, 694 F.2d 923 (2d Cir. 1982).

145. *Jones v. Harris Assocs. L.P.*, 527 F.3d 627 (7th Cir. 2008).

146. *Id.* at 632.

147. *Id.* at 633–34.

148. *Jones v. Harris Assocs. L.P.*, 537 F.3d 728, 730 (7th Cir. 2008) (Posner, J., dissenting from the denial of rehearing en banc). Posner’s faith in markets has apparently been shaken by the late financial crisis.

149. *Jones v. Harris Assocs. L.P.*, 130 S. Ct. 1418, 1425 (2010).

150. *Id.* at 1430–31.

circumstances the transaction carries the earmarks of an arm's length bargain."<sup>151</sup> Oddly, Alito offers no reason at all for this conclusion.<sup>152</sup> This is the correct interpretation of the statute because it is the Court's general interpretation of fiduciary duty. If Congress wants to deviate from the judicial standard, it will have to say so. *Pepper* is the standard that the Justices know.

The Court's endorsement of the *Gartenberg* standard appears grudging at best. Alito emphasized courts should be cautious in comparing fees charged to mutual funds and institutional investors.<sup>153</sup> He also noted that courts must defer to "the judgment of disinterested directors apprised of all relevant information" absent "additional evidence that the fee exceeds the arm's-length range."<sup>154</sup> Alito closes with a caution that sounds much like the business judgment rule: "In reviewing compensation under § 36(b), the Act does not require courts to engage in a precise calculation of fees representative of arm's-length bargaining . . . . [C]ourts are not well suited to make such precise calculations."<sup>155</sup> The Court rejected the Seventh Circuit's interpretation that would have largely neutered the Investment Company Act's fiduciary duty standard, but its interpretation of the *Gartenberg* standard is so narrow that plaintiffs face huge obstacles to actually winning their claims, if the lower courts pay it any heed. The Investment Company Act is an infrequent visitor to the Supreme Court, so lower courts do not need to worry about tight monitoring.<sup>156</sup>

### C. Secondary Liability

If the Roberts Court's forays into Rule 10b-5 class actions discussed above have generally been plaintiff friendly, decisions on liability for secondary actors are anything but. The first, *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.* provoked a (failed) attempt at a legislative override.<sup>157</sup> The second, *Janus Capital Group v. First Derivative Traders*, confirmed that the Supreme Court was serious about refusing any expansion of the implied right of action under Rule 10b-5 and Section 10(b) of the Exchange Act (the authorizing statute for Rule 10b-5).<sup>158</sup>

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151. *Id.* at 1427 (quoting *Pepper v. Litton*, 308 U.S. 295, 306–07 (1939)) (emphasis supplied by *Jones* Court).

152. *Id.* at 1427 ("We believe that this formulation expresses the meaning of the phrase 'fiduciary duty' in § 36(b) [of the Investment Company Act].").

153. *Id.* at 1429 ("Even if the services provided and fees charged to an independent fund are relevant, courts should be mindful that the Act does not necessarily ensure fee parity between mutual funds and institutional clients contrary to petitioners' contentions.").

154. *Jones*, 130 S. Ct. at 1430.

155. *Id.* (citations omitted).

156. Justice Thomas, concurring, would have gone still further in distancing the Court from judicial ratemaking: "I concur in the Court's decision to affirm . . . [b]ut I would not say that in doing so we endorse the . . . free-ranging judicial 'fairness' review of fees that *Gartenberg* could be read to authorize, and that virtually all courts deciding § 36(b) cases since *Gartenberg* (including the Court of Appeals in this case) have wisely eschewed . . ." *Id.* at 1431 (Thomas, J., concurring) (citations omitted).

157. *Stoneridge Inv. Partners, LLC v. Scientific Atlanta*, 552 U.S. 148 (2008).

158. *Janus Capital, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2304 (2011).

### 1. Central Bank

*Stoneridge* and *Janus* are sequels to the Rehnquist Court's most controversial effort to curtail securities class actions—*Central Bank of Denver v. First Interstate Bank of Denver*<sup>159</sup>—which provoked a partial legislative override of its own. *Central Bank*, like *Stoneridge*, was written by Justice Anthony Kennedy. A brief summary sets the stage for *Stoneridge* and *Janus*. The issue presented in *Central Bank* was whether private civil liability under Section 10(b) extends to aiders and abettors of the violation.<sup>160</sup> The open ended nature of aiding and abetting liability worried Kennedy. In *Central Bank*, he warned that uncertainty over the scope of liability could induce secondary actors to settle “to avoid the expense and risk of going to trial.”<sup>161</sup> The risk of having to pay such settlements could cause professionals, such as accountants, to avoid newer and smaller companies, and their litigation costs “may be passed on to their client companies, and in turn incurred by the company's investors, the intended beneficiaries of the statute.”<sup>162</sup>

In an effort to increase Rule 10b-5's predictability, Kennedy's opinion adopted a two-part framework for addressing the scope of the private right of action under Section 10(b).<sup>163</sup> In the first step of the inquiry, Kennedy examined the text of Section 10(b) to determine the scope of prohibited conduct. He had little difficulty determining that the text of Section 10(b) “prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act.”<sup>164</sup> This settled the question for Kennedy: Section 10(b) did not prohibit aiding and abetting.

Nonetheless, Kennedy set forth a second-step to the inquiry:

When the text of § 10(b) does not resolve a particular issue, we attempt to infer how the 1934 Congress would have addressed the issue had the 10b-5 action been included as an express provision in the 1934 Act. For that inquiry, we use the express causes of action in the securities Acts as the primary model for the § 10(b) action. The reason is evident: Had the 73d Congress enacted a private § 10(b) right of action, it likely would have designed it in a manner similar to the other private rights of action in the securities Acts.<sup>165</sup>

The plaintiffs' argument also failed under this second step, because the explicit causes of action afforded by Congress in the Securities Act and the Exchange Act were similarly silent on the question of aiding and abetting.<sup>166</sup> Whether the question is resolved under the first or the second step of this inquiry has potentially significant consequences. When the Court interprets Section 10(b), it is defining not only the limits

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159. *Cent. Bank of Denver v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994).

160. *Id.* at 167.

161. *Id.* at 189.

162. *Id.*

163. *Id.* at 177–78.

164. *Central Bank*, 511 U.S. at 177.

165. *Id.* at 178 (citations and internal quotation marks omitted). The Court has used the approach of looking to express causes of action to infer appropriate elements under the implied cause of action under Rule 10b-5 in other cases. See *Lampf, Pleva, Lipkind, Purpis & Petigrow v. Gilbertson*, 501 U.S. 350, 362 (1991) (applying statute of limitations from the Securities Act claims to a Rule 10b-5 claim); *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 297 (1993) (finding an implied right of contribution under Rule 10b-5 based on express right of contribution under Sections 9 and 18 of the Securities Exchange Act of 1934).

166. *Central Bank*, 511 U.S. at 180.

of the private cause of action, but also the reach of the SEC's authority. When it constructs the hypothetical cause of action in the second step, only the private cause of action is implicated.

In passing, Kennedy touched on an additional problem with the plaintiffs' argument, which would have important consequences in *Stoneridge*: "Were we to allow the aiding and abetting action proposed in this case, the defendant could be liable without any showing that the plaintiff relied upon the aider and abettor's statements or actions."<sup>167</sup> The Court left the door open for some liability for secondary participants, such as accountants, investment bankers, and lawyers, but only if they have exposed themselves by inducing investor reliance.<sup>168</sup> The bottom line after *Central Bank*: a defendant must make a misstatement (or omission) on which a purchaser or seller of a security relies. Kennedy did not explain further the connection between reliance and the scope of Rule 10b-5; that issue would reemerge in *Stoneridge*.

## 2. Stoneridge

The scope of a primary violation of Rule 10b-5 came back to the Court in *Stoneridge*. The *Stoneridge* plaintiffs attempted an end run around *Central Bank*. Instead of alleging that the secondary defendants had made or participated in the making of a misstatement, the plaintiffs alleged that the secondary defendants were part of a "scheme to defraud," thus invoking a separate provision in Rule 10b-5.<sup>169</sup> The plaintiffs' complaint in *Stoneridge* alleged that cable company Charter Communications committed a massive accounting fraud inflating its reported operating revenues and cash flow.<sup>170</sup> The plaintiffs also named as defendants two equipment suppliers, Motorola and Scientific-Atlantic.<sup>171</sup> The plaintiffs alleged that Charter paid the suppliers \$20 extra for each cable set-top box in return for the supplier's agreement to make additional payments back to Charter in the form of advertising fees.<sup>172</sup> Charter then capitalized the \$20 extra expense (shifting the accounting cost into the future) while treating the advertising fees as current income, artificially boosting Charter's current accounting revenues.<sup>173</sup> The suppliers had no direct role in preparing or disseminating the fraudulent accounting information, nor did they approve Charter's financial statements.<sup>174</sup> The plaintiffs alleged, however, that the vendors facilitated Charter's deceptions by preparing false documentation and backdating contracts.<sup>175</sup> The district court granted the suppliers' motion to dismiss, relying on *Central Bank* to hold that the vendors were not primary violators under Rule 10b-5.<sup>176</sup> The court of appeals affirmed, concluding that the suppliers had not engaged in any deception because they had made no misstatements, had

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167. *Id.*

168. *Id.*

169. Securities Exchange Act Rule 10b-5(a), 17 C.F.R. § 240.10b-5(a) (2007).

170. *Stoneridge Inv. Partners, LLC v. Scientific Atlantic*, 128 S. Ct. 761, 766 (2008).

171. *Id.*

172. *In re Charter Communications, Inc. Sec. Litig.*, 443 F.3d 987, 989 (8th Cir. 2006).

173. *Id.* at 990.

174. *Id.*

175. *Stoneridge*, 128 S. Ct. at 767.

176. *Id.* at 991.

no duty to disclose to Charter's investors, and had not manipulated Charter's shares.<sup>177</sup>

As noted above, the SEC has consistently supported the expansion of private securities class actions.<sup>178</sup> So, too, in *Stoneridge*, with the majority of the commissioners voting to file a brief siding with the plaintiffs.<sup>179</sup> The Solicitor General, however, sided with the defendants and overruled the agency.<sup>180</sup> Here, the Court adopted the government's argument essentially *in toto*, so we have deference to the government, but not to the SEC.

The Supreme Court, by a vote of 5–3 (with Justice Breyer recused), affirmed. Justice Kennedy, writing for the Court, rejected the appellate court's holding that there was no deception, noting that “[c]onduct itself can be deceptive.”<sup>181</sup> He instead hung the affirmance on the other doctrinal point from his *Central Bank* decision, the incompatibility of aiding and abetting liability with the “essential element” of reliance.<sup>182</sup> In this case, investors relied on Charter for its financial statements, not the cable set-top box transactions underlying those financial statements.<sup>183</sup>

Why did Kennedy focus on defendants' conduct, rather than the plaintiff's, when assessing reliance? According to Kennedy, “reliance is tied to causation, leading to the inquiry whether [suppliers'] acts were immediate or remote to the injury.”<sup>184</sup> Kennedy treats the reliance inquiry as a species of the tort concept of proximate cause. Kennedy's principal concern was the specter of unlimited liability, as it was in *Central Bank*: “were this concept of reliance to be adopted, the implied cause of action would reach the whole marketplace in which the issuing company does business.”<sup>185</sup> The plaintiff's theory threatened to inject the Section 10(b) cause of action into “the realm of ordinary business operations.”<sup>186</sup>

Kennedy's rationale for limiting the concept of reliance would have more naturally fit in Section 10(b)'s “in connection with the purchase or sale of any security”

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177. *Id.* at 993.

178. *See, e.g.*, Donald C. Langevoort, *Basic at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151, 157 (2009) (“[T]he *Basic* opinion was for all practical purposes drafted by the SEC and the Office of the Solicitor General. Most all of the key arguments, analysis, quotes and citations that one finds in the Court's holdings on both materiality and reliance come directly out of the amicus curiae brief filed on behalf of the SEC.”).

179. The vote was 3–2. *See* Paul Atkins, *Just Say 'No' to the Trial Lawyers*, WALL ST. J., Oct. 9, 2007, at A17. Chairman Christopher Cox voted with the majority, despite having introduced the bill that in 1995 that would have reversed *Basic*. JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET* 663–64 (3d ed. 2003). The SEC had filed a brief in a Ninth Circuit case raising similar issues, arguing that “[t]he reliance requirement is satisfied where a plaintiff relies on a material deception flowing from a defendant's deceptive act, even though the conduct of other participants in the fraudulent scheme may have been a subsequent link in the causal chain leading to the plaintiff's securities transaction.” Brief for the Securities Exchange Commission as Amicus Curiae Supporting Appellant at 12, *Simpson v. Homestore.com, Inc.*, 519 F.3d 1041 (9th Cir. 2008) (No. 04-55665), available at [http://www.sec.gov/litigation/briefs/homestore\\_020405.pdf](http://www.sec.gov/litigation/briefs/homestore_020405.pdf).

180. Brief for the United States as Amicus Curiae Supporting Respondents, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.* 552 U.S. 148 (2008) (No. 06-43).

181. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 158 (2008).

182. *Id.* at 159.

183. *Id.* at 158.

184. *Id.* at 160.

185. *Id.*

186. *Stoneridge*, 552 U.S. at 160.

language.<sup>187</sup> Kennedy pointed to that language, but said that it did not control in this case because the “in connection with” requirement goes to the “statute’s coverage rather than causation.”<sup>188</sup> Another reason for not putting the limit into that doctrinal category is that the Court had only recently affirmed a very broad scope for that requirement.<sup>189</sup> A more substantial reason is that cabining Rule 10b-5 through the “in connection with the purchase or sale” requirement would limit not only private plaintiffs, but potentially, the SEC, whose enforcement authority is limited by the reach of the statute. Kennedy conceded that the SEC’s enforcement authority might reach commercial transactions like those between Charter and its suppliers, but he was reluctant to grant the same freedom to the plaintiffs’ bar.<sup>190</sup>

Given the need to cabin the plaintiffs’ bar, but maintain the SEC’s discretion, the reliance requirement was an attractive tool. The reliance requirement, despite being an “essential element,” does not flow from the language of Section 10(b), but is instead derived from the common law of deceit.<sup>191</sup> More importantly for Kennedy’s purposes, reliance does not apply in enforcement actions brought by the SEC or criminal prosecutions brought by the Justice Department.<sup>192</sup> Using the reliance element to limit secondary party liability allowed the Court to have its cake—unfettered government enforcement—and eat it too—constrain the scope of private actions.

The importance of the SEC’s enforcement efforts had been reinforced by Congress’s response to *Central Bank*. Rebuffing calls to restore aiding-and-abetting liability, Congress instead gave that authority only to the SEC.<sup>193</sup> Accepting the plaintiff’s argument in *Stoneridge*, Kennedy reasoned, would thus “undermine Congress’ determination that this class of defendants should be pursued by the SEC and not by private litigants.”<sup>194</sup> Kennedy’s rationale for the need to constrain private litigants echoed and amplified his policy concerns from *Central Bank*. Expanding liability would undermine the United States’ international competitiveness and raise the cost of capital

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187. *Id.* at 156 (quoting Securities Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5 (2007)).

188. *Id.* at 160.

189. See *Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 547 U.S. 71, 84 (2006) (holding that “the identity of the plaintiffs does not determine whether the complaint alleges fraud ‘in connection with the purchase or sale’ of securities”); *SEC v. Zandford*, 535 U.S. 813, 824–25 (2002) (holding that “a fraudulent scheme in which the securities transactions and breaches of duty coincide” is “‘in connection with’ securities sales within the meaning of § 10(b)”).

190. *Stoneridge*, 552 U.S. at 161 (“Were the implied cause of action to be extended to the practices described here . . . there would be a risk that the federal power would be used to invite litigation beyond the immediate sphere of securities litigation and in areas already governed by functioning and effective state-law guarantees.”).

191. See, e.g., *List v. Fashion Park, Inc.* 340 F.2d 457, 462–63 (2d Cir. 1965) (finding the failure to include a reasonable reliance requirement in the language of Section 10(b) “as an inadequate reason for reading out the rule so basic an element of tort law as the principle of causation in fact”).

192. *Geman v. SEC*, 334 F.3d 1183, 1191 (10th Cir. 2003) (“The SEC is not required to prove reliance or injury in enforcement actions.”); *United States v. Haddy*, 134 F.3d 542, 549–51 (3d Cir. 1998) (stating that the government need not prove reliance in criminal case).

193. Private Securities Litigation Reform Act, Pub. L. No. 104-67, § 104, 109 Stat. 737, 757 (1998) (codified as amended at 15 U.S.C. § 78t(e) (2006)). Congress recently expanded the SEC’s authority by reducing the state of mind requirement from knowledge to recklessness. See H.R. REP. NO. 111-4173, § 9290 (2010) (amending § 20(e) of the Exchange Act).

194. *Stoneridge*, 552 U.S. at 163.

because companies would be reluctant to do business with American issuers. Issuers might list their shares elsewhere to avoid these burdens.<sup>195</sup>

Looking at the question of reliance, it is difficult to extract any consistent guiding principle from the Court's decisions. Justice Stevens, dissenting in *Stoneridge* (as he had in *Central Bank*), hammered on this point:

*Basic* is surely a sufficient response to the argument that a complaint alleging that deceptive acts which had a material effect on the price of a listed stock should be dismissed because the plaintiffs were not subjectively aware of the deception at the time of the securities' purchase or sale.

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The fraud-on-the-market presumption helps investors who cannot demonstrate that they, themselves, relied on fraud that reached the market. But that presumption says nothing about causation from the other side: what an individual or corporation must do in order to have "caused" the misleading information that reached the market. The Court thus has it backwards when it first addresses the fraud-on-the-market presumption, rather than the causation required.<sup>196</sup>

It is fair to say that Justice Blackmun, who wrote the *Affiliated Ute* and *Basic* reliance decisions,<sup>197</sup> would have reached a different outcome in *Stoneridge*. As Blackmun observed after reviewing the *Affiliated Ute* briefs, "I feel we should plump for a high standard in this area, and that this is in line with the intent of Congress in enacting the legislation."<sup>198</sup> A generation before, Blackmun set a "high standard" in *Affiliated Ute* and *Basic*; Kennedy ratcheted it down in *Central Bank*, and again in *Stoneridge*. Stevens pushed, unsuccessfully, to further Blackmun's legacy in expanding the Rule 10b-5 private cause of action.<sup>199</sup>

The point is not that one side or the other is correct in their divining of congressional intent. That quest seems futile. Rule 10b-5's reliance element is nowhere to be found in the language of Section 10(b) or Rule 10b-5; the Court borrowed it from the common law of deceit. Despite that borrowing, the Court does not refer to the common law when it is interpreting the reliance requirement for the Rule 10b-5 private cause of action. In *Stoneridge*, Kennedy brusquely rejected the argument that the plaintiffs had adequately pled reliance under common law standards: "Even if the assumption is correct, it is not controlling. Section 10(b) does not incorporate common-law fraud into federal law."<sup>200</sup> It would seem more accurate to say that the incorporation is selective: the Court borrows

195. *Id.* at 163–64.

196. *Id.* at 170–71 (Stevens, J., dissenting).

197. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972); *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

198. Harry A. Blackmun, Memo, No. 70–78 *Affiliated Ute Citizens v. United States* (Oct. 18, 1971) (on file with the Library of Congress, Manuscript Division, Harry A. Blackmun Papers).

199. *Stoneridge*, 552 U.S. at 175–76 (Stevens, J., dissenting) ("A theme that underlies the Court's analysis is its mistaken hostility towards the § 10(b) private cause of action. The Court's current view of implied causes of action is that they are merely a relic of our prior heady days.") (citations and internal quotation marks omitted).

200. *Id.* at 162.

the common law element of reliance, without really explaining why, but then disregards it when inconvenient. Kennedy's rejection of common law standards in *Stoneridge* suggests that the Court is charting its own common law course. The Court's interventions, however, are episodic; the Court takes an insufficient number of securities cases to develop this "common law" in any meaningful manner. Will the larger number of cases heard by the Roberts Court change this? Given the framing of the debates in these cases, it seems unlikely.

Kennedy's two-part interpretive approach in *Central Bank* purports to depart from the common law interpretation that typified Rule 10b-5 for many years. Cases like *Affiliated Ute* and *Basic* focused on assuring recovery for plaintiffs, with little regard for the costs created by private litigation. The Court used a common law, policy-oriented approach when it was expanding the Rule 10b-5 private cause of action, then seen as an "essential supplement" to SEC enforcement.<sup>201</sup> *Central Bank* promised a textual, formalist approach when the Court turned to reining in the reach of the private cause of action. *Stoneridge*, with its return to a fuzzy "requisite causal connection" notion of reliance,<sup>202</sup> fails to deliver on that promise, instead returning to common law decision-making. The opinion does little more than tell us that the defendants' conduct was "too remote" for plaintiffs to rely on.<sup>203</sup> Both factions of the Court manipulate the reliance element to scale the scope of the securities fraud cause of action to their liking. Lately, the faction resisting expansion has prevailed.

### 3. Janus

*Janus Capital Group v. First Derivative Traders*<sup>204</sup> is the Roberts Court's second decision addressing secondary liability under Rule 10b-5. The only real surprise coming out in *Janus* is that it is authored by Justice Thomas, rather than Justice Kennedy. The outcome is entirely predictable: the Court rebuffed efforts by the plaintiffs' bar to rope in secondary defendants under Rule 10b-5.

The defendants in *Janus* were Janus Capital Group, Inc. (JCG), the public company behind the Janus family of mutual funds, and Janus Capital Management LLC (JCM), its wholly-owned subsidiary that acted as the investment advisor to the Janus funds.<sup>205</sup> Janus Investment Fund, of the mutual funds in the Janus family, was caught up in the market timing scandals of 2003 when the New York Attorney General accused JCG and JCM of allowing certain investors to purchase shares in the mutual fund based on stale prices.<sup>206</sup> The allegations led to substantial redemptions from the mutual funds. They also led to a sharp drop in the share price of JCG, which earned fees, through its subsidiary JCM, based upon a percentage of assets under management.<sup>207</sup> A class action suit followed.<sup>208</sup>

The problem for the suit was that the misstatements alleged—about policies discouraging market timing—were all in prospectuses issued by Janus Investment Fund,

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201. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2504 (2007).

202. *Stoneridge*, 552 U.S. at 159 (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 243 (1988)).

203. *Id.* at 161.

204. *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011).

205. *Id.* at 2299.

206. *Id.* at 2300.

207. *Id.*

208. *Id.* at 2297.



not JCG or JCM.<sup>209</sup> The plaintiffs nonetheless alleged that JCM should be held primarily liable for the misstatements in those prospectuses, and that JCG could be held liable as the “control person” of JCM under Section 20(a) of the Exchange Act.<sup>210</sup> Critically, the plaintiffs did not allege that JCM should be held liable as the control person of the Janus Investment Fund, despite the fact that all of the officers of the mutual fund were also officers of JCM.<sup>211</sup> This omission proved fatal to their case.<sup>212</sup>

Justice Thomas framed the issue as whether JCM had “‘made’ the material misstatements in the prospectuses,”<sup>213</sup> which *Central Bank* had set out as the requirement for primary liability. Thomas rejected the argument of plaintiffs and the government as amicus that “make” should be defined as “create,”<sup>214</sup> offering two principal reasons to justify that conclusion. The first was based on dictionary definitions, with the Court’s citation to the 1933 edition of the Oxford English Dictionary and the 1934 edition of Webster’s New International Dictionary trumping the government’s reference to the 1958 definition of Webster’s.<sup>215</sup> The flavor of Thomas’s dictionary argument can only be captured by a somewhat lengthy quotation:

One “makes” a statement by stating it. When “make” is paired with a noun expressing the action of a verb, the resulting phrase is “approximately equivalent in sense” to that verb. For instance, “to make a proclamation” is the approximate equivalent of “to proclaim,” and “to make a promise” approximates “to promise.” The phrase at issue in Rule 10b-5, “[t]o make any . . . statement,” is thus the approximate equivalent of “to state.” For purposes of Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it. Without control, a person or entity can merely suggest what to say, not “make” a statement in its own right. One who prepares or publishes a statement on behalf of another is not its maker. And in the ordinary case, attribution within a statement or implicit from surrounding circumstances is strong evidence that a statement was made by—and only by—the party to whom it is attributed. This rule might best be exemplified by the relationship between a speechwriter and a speaker. Even when a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it. And it is the speaker who takes credit—or blame—for what is ultimately said.<sup>216</sup>

One can agree or disagree with the Court’s linguistic analysis. What is notable here is that the Court is not interpreting Section 10(b), which presumably entails an effort to discern what Congress meant 1934, but instead, Rule 10b-5, which the SEC promulgated in 1942. The Court is refusing to defer to the SEC on the interpretation of its own rule.

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209. *Janus*, 131 S. Ct. at 2300.

210. *Id.* at 2301.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Janus*, 131 S. Ct. at 2303.

215. *Id.* at 2302–03.

216. *Id.* at 2302 (citations omitted).

Why? The Court found the definition of “make” to be unambiguous; more telling perhaps, the Court had “previously expressed skepticism over the degree to which the SEC should receive deference regarding the private right of action” and “[t]his also is not the first time this Court has disagreed with the SEC’s broad view of § 10(b) or Rule 10b-5.”<sup>217</sup> Shades of Justice Powell! These contentions are nonetheless somewhat odd; the Court usually couches the limits it places on the private cause of action as a matter of interpreting Section 10(b), not Rule 10b-5.<sup>218</sup> But “make” does not appear in Section 10(b). Perhaps this leaves open the possibility that the SEC can amend Rule 10b-5 to incorporate its preferred “create” standard?

Not likely. The Court tied its *Janus* holding to its prior rejections of broadened secondary liability in *Central Bank* and *Stoneridge*.<sup>219</sup> Thomas’s opinion is initially grounded in textualism, but one suspects that precedent played a much larger role in determining the outcome in *Janus*. The plaintiff’s theory of liability looked too much like the secondary defendant’s “substantial assistance” in *Central Bank* and the fraudulent transactions that were later incorporated into false public statements in *Stoneridge*.<sup>220</sup> That ship had long since sailed by the time *Janus* made it to the Supreme Court.

The Court’s final justification for its ruling puts the final nail in the possibility of agency rulemaking to expand liability under the Rule 10b-5 private cause of action:

[Plaintiff’s final] theory of liability based on a relationship of influence resembles the liability imposed by Congress for control [by Section 20(a)]. To adopt [that] theory [of liability] would read into Rule 10b-5 a theory of liability similar to—but broader in application than—what Congress has already created expressly elsewhere.<sup>221</sup>

Here the Court identifies the statutory constraint missing from its linguistic analysis: Rule 10b-5 must be read to fit with Section 20(b). To put it differently, the SEC cannot do an end run around the limitations in Section 20(b) through a broad interpretation of its rulemaking authority under Section 10(b).

*Janus*, like *Central Bank* and *Stoneridge* before it, provoked a vigorous dissent. Breyer, writing for four dissenters, predictably took issue with the majority’s linguistic analysis, finding considerably more play in the joints of “make” as a verb.<sup>222</sup> Ultimately, it is difficult to say who wins this tussle; you agree with one side or the other depending on what “make” means. Breyer also disputed that *Central Bank* and *Stoneridge* were controlling; the former addressed aiding and abetting, while the latter turned on reliance.<sup>223</sup> Responding to Thomas’s point that the plaintiff’s broad theory of Rule 10b-5 would usurp Section 20(a), Breyer worried that the majority’s construction would create

217. *Id.* at 2303 n.8 (citations omitted).

218. *See Ernst Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976) (“[D]espite the broad view of the Rule advanced by the Commission in this case, its scope cannot exceed the power granted the Commission by Congress under § 10(b).”).

219. *Janus*, 131 S. Ct. at 2304–05.

220. *See id.* at 2303–05 (determining that providing the “substantial assistance” in *Central Bank* and the fraudulent transactions in *Stoneridge* were insufficient theories of liability).

221. *Id.* at 2304 (citations omitted).

222. *Id.* at 2305, 2307 (Breyer, J., dissenting) (“The English language does not impose upon the word ‘make’ boundaries of the kind the majority finds determinative.”).

223. *Id.* at 2307–10.

a loophole for “cases in which one actor exploits another as an innocent intermediary for its misstatements.”<sup>224</sup> Breyer contended that this possibility applied to the facts of *Janus*: “Here, it may well be that the Fund’s board of trustees knew nothing about the falsity of the prospectuses.”<sup>225</sup> This, according to Breyer, was “the 13th stroke of the new rule’s clock.”<sup>226</sup> In Breyer’s view, potentially no one could be liable for misstatements in the prospectus.

Here is the real distinction between *Janus* and *Stoneridge*. In *Stoneridge*, Kennedy shoehorned the Court’s holding into the reliance requirement, even though it would have fit more naturally into the “in connection with” requirement. The reason for that move was straightforward: reliance applied to private plaintiffs but not the SEC. The *Janus* holding, by contrast, limits both private plaintiffs, as well as the SEC because its aiding-and-abetting authority also requires a primary violation.<sup>227</sup>

But that analysis applies only to Rule 10b-5. It does not determine the outcome under Section 20(b), as Breyer concedes,<sup>228</sup> but it also does not address the outcome under Section 17(a)(2) of the Securities Act or Section 206(2) of the Investment Advisers Act, neither of which require scienter,<sup>229</sup> or under the books and records provision of Section 13 of the Exchange Act, which is a strict liability provision. None of these provisions gives rise to a private cause of action, but the SEC has all the authority it needs to close Breyer’s loophole through its enforcement efforts. Indeed, JCM paid a \$100 million penalty to the SEC based on the market-timing conduct.<sup>230</sup>

If private causes of action are the concern, does an enterprising plaintiff’s attorney have to look very far under state law to find a breach of duty to the investment company if the investment advisor is introducing misstatements into the mutual fund’s prospectus? The investment company itself, along with its CEO, CFO, directors, and underwriters, faces the threat of suit under Sections 11 and 12(a)(2) for misstatements in the registration statement. All that is being sacrificed by *Janus*’s narrow construction of Rule 10b-5 is the fraud-on-the-market suit against the public holding company, and one can question the marginal deterrence provided by such suits in the highly regulated area of mutual funds. For run of the mill misstatements made by public companies, it is hard to see any broad implications from *Janus*. The plaintiffs’ bar should still be able to pin to the company the acts of its agents.

*Janus* provides additional evidence of the Roberts Court’s lack of engagement with the securities laws. Only Sections 20(b) is mentioned in the majority’s opinion, and then only in a footnote.<sup>231</sup> Neither the majority, nor the dissent, grapples with the complicated regulatory overlap of the securities laws to determine precisely what is given up by limiting the Rule 10b-5 cause of action.

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224. *Janus*, 131 S. Ct. at 2310.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 2311.

229. *Aaron v. SEC*, 446 U.S. 680, 694 (1980); *SEC v. Steadman*, 967 F.2d 636, 647 (D.C. Cir. 1992).

230. In the Matter of *Janus Capital Mgmt.*, Exchange Act Release No. 2277, 2004 WL 1845502 (Aug. 18, 2004) (finding that JCM willfully violated Sections 206(1) and 206(2) of the Investment Advisers Act, Sections 17(d) and 34(b) of the Investment Company Act, and Rule 17d-1 thereunder).

231. *Janus*, 131 S. Ct. at 2304 n.10.

#### D. Foreign Class Actions

The second area where the Roberts Court has confined securities class actions is the extraterritorial reach of the federal securities laws. *Morrison v. National Australia Bank Ltd.* was a so-called “F-cubed” securities class action: Australian investors who had purchased common shares of the largest Australian bank over the Australian Stock Exchange.<sup>232</sup>

The district court dismissed the case for lack of subject matter jurisdiction and the Second Circuit affirmed.<sup>233</sup> The Second Circuit had developed a two-prong test to determine whether the application of the U.S. securities laws was appropriate. Jurisdiction to adjudicate a Section 10(b) claim would exist if the plaintiff could show either: (1) an effect of American securities markets or investors; or (2) significant conduct relating to the fraud taking place in the United States.<sup>234</sup> The *Morrison* plaintiffs disclaimed reliance on the effects prong because the American investor who purchased National Australia’s ADRs on the New York Stock Exchange was dismissed from the litigation at an early stage.<sup>235</sup> The conduct at issue was the inflation of the value of assets of HomeSide, a wholly-owned subsidiary of National Australia operating a mortgage servicing business out of Florida.<sup>236</sup> The plaintiffs alleged that HomeSide had exaggerated the value of its mortgage servicing contracts and that these exaggerated figures were passed through to National Australia’s consolidated balance sheet, thereby causing National Australia’s stock to trade at an inflated value.<sup>237</sup> When National Australia eventually wrote down the value of HomeSide’s assets, the price of National Australia’s stock plummeted and the plaintiffs filed suit.<sup>238</sup> The Second Circuit, however, said that the federal courts lacked jurisdiction over the Australian investors’ claims because conduct in Australia was the source of the alleged misrepresentations.<sup>239</sup>

The plaintiffs filed a petition for certiorari, and the Supreme Court asked for the Solicitor General’s views. In the government’s amicus brief, the Solicitor General argued that the Second Circuit had erred in treating the question as jurisdictional, rather than relating to the merits.<sup>240</sup> Turning to the merits, the government argued that the Second Circuit was at once too restrictive and too generous in conferring jurisdiction over Section 10(b) claims. Too restrictive, because the Second Circuit had held that private plaintiffs and the SEC should be held to the same standard; the government argued that it should be held to a lower standard.<sup>241</sup> Perhaps taking their cue from *Stoneridge*, the

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232. *Morrison v. Nat’l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2875–76 (2010).

233. *Morrison v. Nat’l Austl. Bank, Ltd.*, 547 F.3d 167, 177 (2d Cir. 2008).

234. *SEC v. Berger*, 322 F.3d 187, 192–93 (2d Cir. 2003).

235. *In re Nat’l Austl. Bank Sec. Litig.*, No. 03 Civ. 6537(BSJ), 2006 WL 3844465, at \*9 (S.D.N.Y. Oct. 25, 2006).

236. *Morrison*, 130 S. Ct. at 2875–76.

237. *Id.*

238. *Id.* at 2876.

239. *Morrison v. Nat’l Austl. Bank Ltd.*, 547 F.3d 167, 176 (2008) (“NAB, not HomeSide, is the publicly traded company, and its executives—assisted by lawyers, accountants, and bankers—take primary responsibility for the corporation’s public filings, for its relations with investors, and for its statements to the outside world.”).

240. Brief for the United States as Amici Curiae Supporting Respondents at 9–13, *Morrison v. Nat’l Austl. Bank, Ltd.*, 130 S. Ct. 2869 (2010) (No. 08-8-1191), 2010 WL 719337.

241. *Id.* at 30 (criticizing the holding of *SEC v. Berger*, 322 F.3d 187 (2d Cir. 2003) that the same jurisdictional standard applies to private plaintiffs and SEC).

government urged that the correct standard for enforcement and criminal actions was what it characterized as the full reach of Section 10(b): “[A] transnational securities fraud violates Section 10(b) when the fraud involves significant conduct in the United States that is material to the fraud’s success.”<sup>242</sup> For private plaintiffs, additional restrictions were in order; specifically, a private plaintiff should be required to “establish not simply that his loss resulted from the fraudulent scheme as a whole, but that the loss resulted directly from the component of the fraud that occurred in the United States.”<sup>243</sup>

The SEC’s efforts to throw the plaintiffs under the bus were to no avail. The Court rejected not only the plaintiffs’ claim, but also the government’s argument that private actions should be held to a higher standard. Justice Scalia wrote for the majority; he was clearly a jurist on a mission. After summarily dispatching the Second Circuit’s “threshold error” in treating the question as jurisdictional,<sup>244</sup> Scalia turned to dismantling the Second Circuit’s conduct and effects test. The Second Circuit, noting the silence of Section 10(b) on extraterritorial effect, had taken it upon itself to divine what Congress would have done if it had thought about the question. What would the Second Circuit’s hypothetical Congress do: (1) protect American investors; or (2) discourage fraudsters from operating out of the United States? In Scalia’s view, however, the Second Circuit’s test was wrong from its inception. The Second Circuit’s test failed to accord due weight to the Court’s longstanding presumption against giving statutes extraterritorial effect: “When a statute gives no clear indication of an extraterritorial application, it has none.”<sup>245</sup> The Second Circuit had gone off the tracks when it had inferred from Section 10(b)’s silence on the question of extraterritorial application an invitation to engage in “judicial-speculation-made-law-divining what Congress would have wanted if it had thought of the situation before the court.”<sup>246</sup> That judicial speculation was bad enough, but it had led to “unpredictable and inconsistent application of Section 10(b) to transnational cases.”<sup>247</sup> From Scalia’s perspective, “[t]here is no more damning indictment of the ‘conduct’ and ‘effects’ tests than the Second Circuit’s own declaration that ‘the presence or absence of any single factor which was considered significant in other cases . . . is not necessarily dispositive in future cases.’”<sup>248</sup> Judicially created out of whole cloth, and unpredictable to boot? A recipe for a Scalia tirade on the proper role of judges. The Solicitor General’s somewhat cosmetic repackaging of that test fared no better.<sup>249</sup> Nor was the SEC’s endorsement of that test entitled to deference as it was premised on the judicial errors committed by the Second Circuit.<sup>250</sup>

And what does Scalia see as the proper role of judges? Reading statutes for their ordinary meaning. Having debunked the Second Circuit’s approach, Scalia was forced to devise his own rule of decision. Unsurprisingly, he argued that his preferred test was

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242. *Id.* at 16.

243. *Id.* at 26.

244. *Morrison v. Nat’l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2876–77 (2010).

245. *Id.* at 2878.

246. *Id.* at 2881.

247. *Id.* at 2880 (citing numerous commentators).

248. *Id.* at 2879 (quoting *IIT v. Cornfeld*, 619 F.2d 909, 918 (1980)).

249. *Morrison*, 130 S. Ct. at 2886.

250. *Id.* at 2887–88 (“Since the Commission’s interpretations relied on cases we disapprove, which ignored or discarded the presumption against extraterritoriality, we owe them no deference.”).

grounded in the text of the statute.<sup>251</sup> Examining the text of Section 10(b), Scalia found that the focus was not on deception, but rather, the provision's requirement that deception, to be actionable, must be "in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered."<sup>252</sup> The purchase or sale transaction, Scalia thought, was the touchstone of what Congress sought to regulate; Congress sought to protect purchasers and sellers.<sup>253</sup> This analysis of Section 10(b)'s text led Scalia to his test for its application: "transactions in securities listed on domestic exchanges, and domestic transactions in other securities."<sup>254</sup> Scalia's conclusion derived from the statutory text was bolstered by the structure of the statute.<sup>255</sup>

Scalia also worried about "the probability of incompatibility with the applicable laws of other countries."<sup>256</sup> On this point, the Court appears to have been swayed by the amicus briefs filed by a number of foreign governments who protested the exposure of companies headquartered in their jurisdictions to American class actions.<sup>257</sup> When the Second Circuit was developing its "conduct" and "effects" test, the United States was the only game in town for securities class actions, so the Second Circuit's imperialism was not directly stepping on the toes of any foreign government. Many countries object, however, to the exposure of their companies to our class action regime, a point noted by Justice Scalia.<sup>258</sup> Most countries remain skeptical of the utility of the class action as an enforcement device. A handful, however, most notably Australia and Canada, recently have adopted securities class action regimes of their own.<sup>259</sup> The conflict with American law becomes more acute when companies are also subject to class action suit in their home jurisdictions. The threat of over-deterrence posed by double liability is obvious.

On the opposite end was Justice Stevens' concurrence.<sup>260</sup> Continuing his lonely defense of the Rule 10b-5 private cause of action, Stevens embraced the Second Circuit's "conduct" and "effects" test, and more generally, the judiciary's role in creating the Section 10(b) cause of action.<sup>261</sup>

The development of § 10(b) law was hardly an instance of judicial usurpation. Congress invited an expansive role for judicial elaboration when it crafted such an open-ended statute in 1934. And both Congress and the Commission

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251. *Id.* at 2884.

252. *Id.*

253. *Id.*

254. *Morrison*, 130 S. Ct. at 2884.

255. *Id.* at 2885 (parsing Sections 30(a), (b) of the Exchange Act, which provide for limited extraterritorial effect).

256. *Id.*

257. *Id.* at 2885–86 (citing briefs filed by Australia, Great Britain, and France).

258. *Id.* at 2886 ("While there is no reason to believe that the United States has become the Barbary Coast for those perpetrating frauds on foreign securities markets, some fear that it has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets.")

259. See Ashley Black & Kathleen Harris, *Corporate class actions in Australia*, MALLESONS STEPHEN JACQUES (June 15, 2006), [www.mallesons.com/publications/marketAlerts/2006/Documents/8472865W.htm](http://www.mallesons.com/publications/marketAlerts/2006/Documents/8472865W.htm) (outlining developing trends in Australian corporate claim actions); A.C. Pritchard & Janis P. Sarra, *Securities Class Actions Move North: A Doctrinal and Empirical Analysis of Securities Class Actions in Canada*, 47 ALBERTA L. REV. 881 (2010) (discussing securities class action in Canada).

260. *Morrison*, 130 S. Ct. at 2888–95.

261. *Id.* at 2889.

subsequently affirmed that role when they left intact the relevant statutory and regulatory language, respectively, throughout all the years that followed.<sup>262</sup>

Stevens gave considerable weight to the fact the Second Circuit test was long-standing.<sup>263</sup> More pointedly, while agreeing with the Court's conclusion, he reiterated his lament from *Stoneridge*, decrying "the Court's continuing campaign to render the private cause of action under § 10(b) toothless."<sup>264</sup>

The *Morrison* decision produced an immediate, if somewhat clumsy, reaction from Congress. Less than a month after the decision was handed down, Congress passed the Dodd–Frank Wall Street Reform and Consumer Protection Act, a wholesale reform of financial regulation in the wake of the recent financial crisis.<sup>265</sup> Among its reforms was one aimed at overruling the result in *Morrison*, as the bill's legislative history makes clear: "This bill's provisions concerning extraterritoriality . . . are intended to rebut [*Morrison*]'s presumption by clearly indicating that Congress intends extraterritorial application in cases brought by the SEC or the Justice Department."<sup>266</sup> Unfortunately, Congress enacted language ensuring only that the courts would have *jurisdiction* to hear cases with extraterritorial application, not that Section 10(b) would have extraterritorial application.<sup>267</sup> Thus, Congress repeated the Second Circuit's error of treating the scope of the law as jurisdictional, rather than a merits question. Even if the courts ignore the provision's language and follow its intent to expand the substantive scope of Section 10(b), it applies only to actions brought by the SEC or the Justice Department (private plaintiffs won only a study by the SEC, which is required to report to Congress within eighteen months of Dodd–Frank's passage).<sup>268</sup> Congress's reaction is rather humorous in light of Justice Scalia's claim that one benefit of a clear presumption against extraterritorial application is that it "preserv[es] a stable background against which Congress can legislate with predictable effects."<sup>269</sup> The "predictable effects" that Justice Scalia claims for his rule are premised on an assumption of minimal competence on the part of Congress (or the SEC, which likely drafted the bumbling language, although one assumes that they attempted to fix it after *Morrison* was handed down). That assumption proved unjustified in this case; it does not appear that anyone on Capitol Hill bothered to read Justice Scalia's opinion. Will courts follow Dodd–Frank's legislative history, or its text, when it comes to interpreting the extraterritorial provision?

#### E. Anti-Plaintiff Court?

At the time that Roberts was nominated to be the Chief Justice, there were claims that he would head a "pro business" Court. The majority of the decisions of Roberts Court, however, if anything show a bias toward the *status quo*. *Tellabs*, *Halliburton*, and

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262. *Id.* at 2890 (Stevens, J. concurring).

263. *Id.* at 2895 (Stevens, J. concurring) (criticizing the majority for paying "short shrift . . . to the accumulated wisdom and experience of the lower courts").

264. *Id.* (Stevens, J. concurring) (quoting *Stoneridge Inv. Partners v. Scientific-Atlanta*, 552 U.S. 148, 175 (2008) (Stevens J., dissenting)).

265. Dodd–Frank Wall Street Reform and Consumer Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

266. 111 CONG. REC. 5237 (daily ed. June 30, 2010) (statement of Congressman Paul B. Kanjorski).

267. H.R. REP. NO. 111-4173, § 929P(b) (2010).

268. *Id.* § 929Y.

269. *Morrison*, 130 S. Ct. at 2881.

*Jones* all rebuffed efforts by lower courts to narrow the gates through which securities class actions could proceed.<sup>270</sup> A fair-minded scorekeeper would have to put these decisions in the plaintiff's column, despite the defendant's nominal victory in *Tellabs*. In *Tellabs*, the Supreme Court reversed a lenient Seventh Circuit decision for drawing inferences with respect to scienter, but replaced it with a standard that is nonetheless relatively generous to plaintiffs.<sup>271</sup> In so doing, the Court rejected a more stringent standard adopted by a number of lower courts and urged by both the government as amicus and the dissenting Justices. On balance, the *Tellabs* decision was likely a net benefit to the plaintiffs' bar. Both *Tellabs* and *Jones* are cautious decisions grounded in conventional approaches to statutory interpretation. *Halliburton* reverses a rogue lower court decision with little basis in the Supreme Court's precedent. *Matrixx* affirms the Roberts Court's bias toward the status quo, continuing the Court's open-ended approach to materiality from *TSC* and *Basic*. If the Roberts Court has a "pro-business" agenda, its selection of cases for review seems poorly suited for promoting its aims.

*Stoneridge* and *Morrison*, by contrast adopt considerably more aggressive language. Both decisions rebuffed efforts by the plaintiffs' bar to expand the pool of potential defendants; *Stoneridge* to third party defendants, *Morrison* to foreign companies. The perceived disregard of Supreme Court precedents by lower courts in these cases were calculated to provoke hot button responses from individual Justices. In *Stoneridge*, it was Justice Kennedy, who likely saw "scheme liability" as an attempt to do an end run around the holding of his *Central Bank* opinion (*Janus*, although it resolved a lower court split, simply confirmed the trend established by *Stoneridge*). In *Morrison*, Justice Scalia was provoked by the Second Circuit's disregard for the Court's presumption against extraterritorial application. Accordingly, it should come as no surprise that the rhetoric in *Stoneridge* and *Morrison* takes on a more muscular tone. These decisions reflect the Roberts Court bringing the lower courts to heel. It is reaction to the lower courts' waywardness, rather than any agenda peculiar to the securities laws, that drives the more strident tenor of those decisions.

## V. CONCLUSION

The Roberts Court's work in the field of securities law demonstrates what happens when a court of general jurisdiction is charged with making decisions in an area with which it is unfamiliar. Analysis of the Court's decisions yields few, if any, common threads tying them together as a body of work. Whatever direction the securities laws take in the Supreme Court, do not expect opinions to grapple more seriously with the interplay between securities law and the securities markets anytime soon. The randomness of the Roberts Court's securities jurisprudence results in part from the stream of cases that make their way on to the Court's docket. It is also a product, however, of the absence of any individual Justice having an interest in the field. A comparison with Lewis Powell's tenure on the Court illustrates the point. Powell drew on his background as a corporate lawyer to push the Court in a particular direction during his time on the

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270. *Tellabs, Inc. v. Makor Issue & Rights, Ltd.*, 551 U.S. 308 (2007); *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011); *Jones v. Harris Assoc. LP*, 130 S. Ct. 1418 (2010).

271. It is worth noting the plaintiffs' case withstood the motion to dismiss on remand in *Tellabs*. *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 513 F.3d 702, 712 (7th Cir. 2008).



Court, reining in securities class actions and imposing a common law framework on the SEC's vendetta against insider trading.<sup>272</sup>

The Roberts Court does not have a figure like Powell in the field of securities law. To be sure, the increased number of securities cases heard by the Roberts Court relative to the Rehnquist Court suggests that the Court recognizes the significance of the securities laws. But it agrees to hear securities cases because there is a circuit split, not because it is anxious to impose its mark on the field of securities law. The debates that engage the Justices in these cases do not come from the field of securities laws, but rather, are more general: statutory interpretation, the use of legislative history, the presumption against the extraterritorial application of legislation, etc.

What does this lack of agenda mean for securities law? First, it means that the path of law is somewhat unpredictable. It is hard to know when a Justice will be so galvanized by a particular issue that he takes ownership of it, such as Justice Kennedy with aiding and abetting. Second, absent a galvanizing issue, there is likely to be a presumption in favor of the position taken by the government. This attitude of occasional deference means that the relationship between the SEC and the Solicitor General takes on critical importance. If the SEC can persuade the Solicitor General, its position is likely to prevail in the Roberts Court. With a Democrat currently in the White House, the SEC and the Solicitor General are likely to see eye-to-eye in the near term. If Republicans regain control of the White House, that could change. For now though, the government is likely to take positions that maximize the SEC's reach, as it did in *Morrison* (albeit unsuccessfully).

No Justice is likely to push securities law in a more aggressive direction than the SEC. The retirement of Justice Stevens means that there is no one left on the Court with any pretensions of being an activist in the field, particularly in the area of the private right of action. Justice Ginsberg, writing for the *Tellabs* majority, made it clear that the Court intends to defer to Congress in this area: "It is the federal lawmaker's prerogative . . . to allow, disallow, or shape the contours of—including the pleading and proof requirements for—§ 10(b) private actions."<sup>273</sup> This language suggests we should not expect the Court to be anything more than a passive observer here; major changes, if any, will come from Congress.

The Roberts Court's cautious attitude is a departure for the Supreme Court. The Court's treatment of the basic question regarding the existence of the implied private right of action in *Stoneridge* sends a clear signal that the Court's expansionist days are over in the field of securities law. Kennedy made it clear that the initial implication of a private cause of action had been a mistake; under current doctrine, private causes of action are based only on explicit instruction from Congress.<sup>274</sup> Having recognized the mistake, the Court was not going to compound the error: "Concerns with the judicial creation of a private cause of action caution against its expansion. The decision to extend the cause of action is for Congress, not for us. Though it remains the law, the § 10(b)

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272. See Pritchard, *supra* note 2, at 863–91 (discussing Justice Powell's efforts to curtail lawsuit).

273. *Tellabs*, 551 U.S. at 327.

274. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 164 (2008) ("Though the rule once may have been otherwise, it is settled that there is an implied cause of action only if the underlying statute can be interpreted to disclose the intent to create one.") (internal citations omitted).

private right should not be extended beyond its present boundaries.”<sup>275</sup> Thus, *Stoneridge* stands for the proposition that the Rule 10b-5 cause of action is now frozen, at least when it comes to the expansion of liability by the Court.<sup>276</sup> Expansion of the cause of action will have to come from Congress, if it is to come at all. This attitude of deference is a far cry from the heady days of the Warren Court, or even Justice Blackmon’s expansionist push in *Basic Inc. v. Levinson*. Securities law in the Roberts Court is likely to be focused on maintaining the status quo.

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275. *Id.* at 165.

276. *See id.* at 150 (“[W]hen [the aiding and abetting provision of the PSLRA] was enacted, Congress accepted the § 10(b) private cause of action as then defined but chose to extend it no further.”); *see also* *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2303 (2011) (“Our holding also accords with the narrow scope that we must give the implied private right of action.”).