



# Securities Litigation in the Roberts Court: An Early Assessment

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AN EARLY ASSESSMENT

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## SECURITIES LITIGATION IN THE ROBERTS COURT: AN EARLY ASSESSMENT

*John C. Coates IV\**

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Ten years ago, as the Rehnquist Court was coming to a close, Professors Thomas Sullivan and Robert Thompson (S&T) showed<sup>1</sup> that “private law” cases – by which they meant securities and antitrust – had plummeted in importance in the Supreme Court from an earlier heyday, and had cycled through decisions that first expanded, then contracted, and finally preserved the status quo in the reach of those laws. Their work was useful as description – in giving an overview and assessment of cases in their study – and as explanation – offering a more complex analysis than the standard, simplistic, attitudinal model that political scientists use to reduce law to partisan affiliations.<sup>2</sup> By showing that the decline in caseload and inflection points in the case outcome cycle coincided with the presence of Justice Lewis Powell, S&T provided persuasive evidence that Powell played an important business-oriented entrepreneurial role in shaping the Court’s docket and decisions – a role related to ideology, but one that distinguished him from other Republican appointees. In so doing, S&T improved our understanding of patterns in the mix and outcomes of Supreme Court cases from those predicated by simple counts of Republican and Democratic appointees.

This article updates S&T with a preliminary assessment of the Roberts Court’s securities law decisions (along with some comparative data on antitrust cases and a broader set of “economic” cases), through the date of this writing. One finding is that securities and antitrust cases represent a larger share of the Roberts Court’s docket than under Rehnquist, but only because its docket is substantially smaller than that of prior Courts (as others have explored<sup>3</sup>). The absolute number of securities law cases per term has increased slightly, while the number of antitrust law cases has declined slightly, and

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\* \* *John F. Cogan Jr. Professor of Law and Economics*, Harvard Law School. Thanks for helpful discussions but no blame for the contents of this paper should go to Ava Scheibler, ..., and to workshop participants at ... – all faults are mine. Min Suk Choi, Casey Holzapfel, and Jason Wasser provided excellent research assistance. For disclosure of financial interests potentially relevant to this article, see [www.law.harvard.edu/faculty/COI/2012CoatesJohn.html](http://www.law.harvard.edu/faculty/COI/2012CoatesJohn.html).

<sup>1</sup> The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust, 53 Emory L.J. 1571 (2004); see also A.C. Pritchard, [Justice Lewis F. Powell, Jr., and the Counterrevolution in the Federal Securities Laws](#), 52 Duke L.J. 841 (2003) (discussing cases between 1972 and 1987). Their analysis updated a prior study by Alfred F. Conard, Securities Regulation in the Burger Court, 56 U. Col L. Rev. 183 (1985) (reporting on securities law cases through 1984).

<sup>2</sup> E.g., Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (2002); Theodore W. Ruger et al., The [Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking](#), 104 Colum. L. Rev. 1150, 1171-79 (2004); cf. H.W. Perry, [Taking Political Science Seriously](#), 47 St. Louis U. L.J. 889, 891 (2003) (most political scientists would not believe that attitudes are the sole determinant, or that they play as singular a role as propounded by the so-called “attitudinal model”).

<sup>3</sup> E.g., Ryan J. Owens and David A. Simon, Explaining the Supreme Court's Shrinking Docket, 53 Wm. & Mary L. Rev. 1219 (2012), <http://scholarship.law.wm.edu/wmlr/vol53/iss4/4> (arguing that declining docket from 1940 to 2008 is due to increased ideological polarization; the Congressional elimination of mandatory appellate jurisdiction in 1988; and the presence of Justice White on the Court from 1962 to 1992, who made Circuit-conflict resolution a priority).

both types of cases continue to occupy a much smaller role (absolutely and relatively) than in pre-Rehnquist Courts. Because the number of securities law decisions made by the Roberts Court is small (n=15), the remaining analysis necessarily remains conjectural.

With that caveat, the Roberts Court to date has exhibited much less dissent in securities and antitrust law cases than prior Courts, or in its decisions in other issue areas, as measured both by minority votes and five-vote majorities. Inconsistent with any sweeping view that the Roberts Court is “pro-business,” it continues to be significantly more “expansive” in securities law cases than in the “restrictive” Powell era.<sup>4</sup> Quantitatively, 50% of the decisions expand the reach of the securities laws, slightly higher than the 47% under Rehnquist after Powell, versus the much lower 22% in the Powell era. This mixed quantitative assessment is matched by a qualitative review of the cases, which are generally preservative and modest in their effects, whether expansive or restrictive. This continuation of what one might call an inertial approach to the substance of securities law is partly attributable to the votes of Roberts himself, who has been the only Justice in the majority in every securities law decision in his time as Chief.<sup>5</sup>

Where the Roberts Court has been restrictive, its decisions are perhaps best understood as part of a broader retrenchment on procedure that has the effect of constraining federal court litigation in favor of business.<sup>6</sup> At the same time, the Roberts Court has rejected bright-lines rules of substantive securities law that might have benefited managerial interests even more.<sup>7</sup> This combination of proceduralism and a preference for standards over rules matches up well with the background of the Chief Justice as an appellate litigator and a member of the Judicial Conference’s Advisory Committee on Appellate Rules. Appellate litigators are trained to not overreach – to shape arguments that focus on the case before them, to preserve discretion for judges, and to enhance the relative importance of litigation as a means of determining the law. I would not be surprised if Chief Justice Roberts was sincere when he likened judges to “umpires” who “don’t make the rules; they apply them. ...”<sup>8</sup> But those words come in the context of other words, less pithy but freighted with connotations – not of partisan ideology, but of legal ideology: “Judges ... operate within a system of precedent, shaped by other judges ... and have to have the modesty to be open in the decisional process to the considered views of their colleagues on the bench,” yet a precedent “is not an inexorable command” and there are “circumstances under which you should revisit a prior precedent that you think may be flawed...”<sup>9</sup> This is the ideology of the common law, not of a transactional lawyer looking for clear guidance in the form of bright-line rules, but of a litigator who is more comfortable with shifting standards of litigation and the nuances of procedure than with the substantive statutes and SEC regulations that constitute the bulk of securities law practice.

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<sup>4</sup> See note 25 *infra* on how cases were classified as “expansive” or “restrictive”.

<sup>5</sup> See Appendix I.

<sup>6</sup> See note 18 *infra*.

<sup>7</sup> These conclusions led the first draft of the article to conclude that it would have been surprising if *Halliburton II* had resulted in a bright-line rejection of the “fraud-on-the-market” presumption of reliance, and instead was likely to result in a more modest holding. For a discussion of the actual holding, see text accompanying notes 41-54 *infra*.

<sup>8</sup> See <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300693.html>.

<sup>9</sup> See <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091301981.html>.

Part I of this article provides a quantitative and qualitative overview of securities litigation in the Roberts Court, in absolute terms, and relative to other types of cases and relative to prior Courts. Part II breaks down the cases on two dimensions – (a) procedural versus substantive, and (b) bright-lines versus standards – and shows that outcomes map reasonably well onto those dimensions, with expansive decisions being most common when lower courts had based restrictive decisions on bright-line, substantive decisional rules, and least common when lower courts had based restrictive decisions on procedural standards. Part III (a) suggests the trends depicted in Parts I and II reflect the effects of having a Chief Justice who is a former appellate litigator and now a litigation entrepreneur leading a “procedural revolution” on a Court, (b) applies the analysis in the article to cases to be argued in the October 2014 term, and (c) sketches the types of cases likely to attract the Supreme Court’s attention in the future.

The main take-away is that the Court can be expected to continue to have marginal and lottery-like effects on substantive securities law, particularly where it intersects with “growth areas” of doctrine, such as the ever-expanding modern First Amendment that produced *Schwarzenegger*,<sup>10</sup> where the Court’s demand for a more carefully “tailored” regime of video game regulation reflected a blindness to basic facts of political economy, and *Citizens United*,<sup>11</sup> where the Court’s reasoning reflected a similar blindness to basic facts of how public companies function and are regulated. Where the Court may be expected to matter more systematically to business law generally and securities law in particular is in procedure – not only civil procedure, but also in responding to the D.C. Circuit’s interpretations and applications of the Administrative Procedure Act and other aspects of administrative law relevant to securities regulation.<sup>12</sup>

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<sup>10</sup> Also known as *Brown v. EMA*, 564 U.S. 08-1448 (2011) (striking down California ban on sale of violent video games to children).

<sup>11</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

<sup>12</sup> See John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, Yale L.J. (forthcoming 2014); John C. Coates IV, *Towards Better Cost-Benefit Analysis: An Essay On Regulatory Management*, L. & Contemp. Probs. (forthcoming 2014).

## Part I. General Trends in Securities Law Cases in the Supreme Court

This Part of the paper provides a quantitative and qualitative overview of securities litigation in the Roberts Court, in absolute terms, and relative to other types of cases and relative to prior Courts.

### A. Data and Coding

To gather a comprehensive set of securities law cases under the Roberts Court, article collects cases coded as issue 80120 in the Supreme Court Database (SCD)<sup>13</sup> for the terms 2005 to 2012 (n=11). Cases decided after Roberts joined the Court for which certiorari was granted before he joined the Court are excluded – the goal is to contrast both case selection as well as outcomes. SCOTUSblog<sup>14</sup> was reviewed for cases pending in the 2013 term (n=3), and Westlaw was searched for additional securities law cases (n=1, *Halliburton I*,<sup>15</sup> coded as 90110 in SCD, i.e., civil procedure). The result is a dataset of fourteen securities law decisions from 2005 to 2013. *Halliburton II*,<sup>16</sup> argued in the 2013 term, was pending when this article was first drafted, but was decided on June 23, 2014, adding a fifteenth case to the sample – or, if one wants to think of it this way, a “hold-out” sample of one, which is consistent with the analysis that follows. These cases are listed in Appendix A. These data were augmented with the full SCD for prior Courts, focusing on antitrust law cases (issues 80010 or 80020 in SCD) and economic issue cases (issue area 8 in SCD).<sup>17</sup>

For each decision, the author and a research assistant separately read the opinion and independently applied the “expansive” and “restrictive” definitions used in S&T,<sup>18</sup> resulting in the classifications in Appendix A. In addition, each case was coded as “procedural” or “substantive” based on whether the decision turned primarily on an issue that is typically and primarily covered in a procedure course, as opposed to solely and primarily being taught in a substantive securities law course. (Examples of “procedural” cases are discussed in Part I.C below.) Finally, the cases were read to decide if the Supreme Court’s holding was, relative to the lower court holding, more of a “bright-line” rule or a “standard.”<sup>19</sup> The coding of “expansive/restricted” resulted in 85% agreement, and the coding of “substantive/procedural” resulted in 93% agreement. Cases where the coding differed were reread by each and discussed before a final code was assigned.

One case (*PCAOB*<sup>20</sup>) was classified for “expansive/restrictive” purposes as “neutral,”

<sup>13</sup> <http://scdb.wustl.edu> (last visited July 20, 2014).

<sup>14</sup> <http://www.scotusblog.com> (last visited July 20, 2014).

<sup>15</sup> *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 180 L. Ed. 2d 24 (2011).

<sup>16</sup> *Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317, 573 U. S. \_\_\_\_ (2014).

<sup>17</sup> Additional searches or recoding were not done – inconsistent with the construction of the Roberts Court dataset, but given the small numbers unlikely to bias the qualitative results in a meaningful way.

<sup>18</sup> As in S&T, *supra* note 1, “expansive” is defined to mean “broadening the reach of a securities law or regulation, or increasing the likelihood of liability,” “restrictive” is defined to mean “reducing the reach or decreasing the likelihood of liability,” and “neutral” is defined to mean neither expansive or restrictive.

<sup>19</sup> Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 *Duke L.J.* 557 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *Harv. L. Rev.* 1685 (1976).

<sup>20</sup> *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010) (holding for-cause removal provision unconstitutional).

since it upheld the Sarbanes-Oxley Act overall and generally upheld that statute’s scheme for the Public Company Accounting Oversight Board (PCAOB), but did strike down one aspect of that scheme. *Troice* presented the only other case that was not obviously expansive or restrictive – in the instant facts, the result of the decision was to treat the pending complaint as not precluded by the Securities Litigation Uniform Standards Act of 1998 (*SLUSA*), and hence the complaint could proceed – an expansive result; but as discussed more below, the Court had to interpret the phrase “in connection with” narrowly, which could result (in future cases) in a more restrictive reach for the federal (as opposed to state) securities laws. Nevertheless, for purposes of assessing the Roberts Court to date, the result of *Troice* was to expand the reach of securities litigation overall – and hence it is coded as “expansive” in the remaining analysis, although that choice does not materially affect the qualitative conclusions.

The only case that was difficult to assess for the substantive/procedural coding was *Morrison*, which could be viewed in procedural terms (since it is essentially about what types of plaintiffs may bring cases) or substantive terms (since the Court held that the Second Circuit’s view of the case as raising jurisdictional questions was mistaken, and instead based its holding on a view of the substantive purposes of the securities laws). For purposes of the remaining analysis, *Morrison* is classified as procedural, for reasons discussed below.

## B. Quantitative Overview

Analysis of the data set shows the following.

### a. Increase in Share of Securities Law Cases

Table 1 presents the share of securities law, antitrust law, and economic issue cases under each of the Supreme Court Chief Justices since Chief Vinson. It shows that securities law has experienced a resurgence in how large a share of the Roberts Court docket it represents compared to the Rehnquist Court – and, indeed, relative to any prior Court. Just below two percent of the decisions on the Roberts Court have been devoted to securities law – more than antitrust law, and roughly 10% of the economic issue cases. Of course, two percent is still not a large share, and the total share of the docket devoted to “economic” issues (as coded by SCD) is not much higher than the Rehnquist Court, and well below that of the Vinson and Warren Courts. Nevertheless, the resurgence in securities law might lead an observer to believe that the Roberts Court has returned to the securities law activity levels of the Powell era.

PRELIMINARY AND INCOMPLETE – PLEASE DO NOT CIRCULATE

<b>Table 1</b>	<b>Years</b>	<b>Securities Law Cases as % of Total Supreme Court Docket</b>	<b>Antitrust Law Cases as % of Total</b>	<b>Economic Issue Cases as % of Total</b>
<b>Vinson</b>	1946 to 1952	1.2%	4.6%	29%
<b>Warren</b>	1953 to 1968	0.5%	5.8%	25%
<b>Burger</b>	1969 to 1985	1.2%	2.8%	17%
<b>Rehnquist</b>	1986 to 2004	0.8%	1.2%	17%
<b>Roberts</b>	2005 to 2013	1.8%	1.5%	19%
<b>Total</b>	1946 to 2013	0.9%	3.3%	20%

b. Decline in Overall Docket

However, the increased share of securities law cases is due largely to the Court’s overall shrunken docket. Table 2 presents the absolute numbers of cases under each of the Supreme Court Chief Justices since Chief Vinson, and of securities, antitrust and economic issue cases. The total Roberts Court docket per year is half that of the Burger Court, and 30% smaller than the Rehnquist Court. As a result, the absolute numbers of securities law cases per year have barely increased – from one per year under Rehnquist to 1.6 per year under Roberts – and remain well below that of the Burger Court. Economic issue cases generally, and antitrust law cases, are both down in absolute terms, from 1.5 and 22 per year under Rehnquist, to 1.3 and 16 per year under Roberts.

<b>Table 2</b>	<b>Total Cases</b>	<b>Cases Per Year</b>	<b>Securities Law Cases</b>	<b>Securities Law Cases Per Year</b>	<b>Antitrust Law Cases</b>	<b>Antitrust Law Cases Per Year</b>	<b>Economic Issue Cases</b>	<b>Economic Issue Cases Per Year</b>
<b>Vinson</b>	1011	144.4	12	1.7	47	6.7	292	41.7
<b>Warren</b>	2643	165.2	12	0.8	152	9.5	648	40.5
<b>Burger</b>	3234	190.2	38	2.2	90	5.3	562	33.1
<b>Rehnquist</b>	2325	129.2	18	1.0	27	1.5	393	21.8
<b>Roberts</b>	795	88.3	14	1.6	12	1.3	141	15.7
<b>Total</b>	9941	148.4	90	1.3	328	4.9	2036	30.4

Still, as also illustrated by Table 2, while the absolute numbers of securities law cases remain low, they have increased as a share of economic issue cases overall under the Robert Courts – from roughly 5% under Rehnquist to roughly 10% under Roberts. Thus, while both the overall docket and the economic issue docket have been shrinking, securities law has made up an increasing share of that smaller docket.

c. Dissent and Polarization

Has the degree of dissent or polarization increased under Chief Roberts, overall or in securities law? The answer is “no,” as shown in Table 3. If anything, securities law (and even more so, antitrust law) has seen a significant drop in the number of minority votes, and in the number of 5-vote majority decisions. Under Chief Rehnquist, dissenting votes



in securities law cases represented 22% of total votes, and there were 5-vote majorities in seven (39%) securities law cases, including such cases as infamous *Central Bank*,<sup>21</sup> inscrutable *Gustafson*,<sup>22</sup> and intricate *Reves*,<sup>23</sup> among other cases. Under Chief Roberts, there have been only 15% dissenting votes in securities law cases, and only three (20%) 5-vote cases: *PCAOB*, *Stoneridge*, and *Janus*. This increase in harmony is also present in antitrust law cases under Chief Roberts, but not in economic issue cases beyond securities and antitrust law, where close votes have increased from 17% to 23%, and dissenting votes increased from 15% to 17%.

<b>Table 3</b>	<b>Securities Law Case Minority / All Votes</b>	<b>5-Vote Majorities as % of Securities Law Cases</b>	<b>Antitrust Law Case Minority / All Votes</b>	<b>5-Vote Majorities as % of Antitrust Law Cases</b>	<b>Economic Issue Case Minority / All Votes</b>	<b>5-Vote Majorities as % of Economic Issue Cases</b>	<b>All Case Minority / All Votes</b>	<b>5-Vote Majorities as % of All Cases</b>
<b>Vinson</b>	8%	17%	19%	21%	20%	21%	20%	23%
<b>Warren</b>	24%	50%	17%	22%	18%	18%	18%	28%
<b>Burger</b>	15%	5%	19%	28%	16%	16%	19%	20%
<b>Rehnquist</b>	22%	39%	20%	19%	15%	17%	20%	29%
<b>Roberts</b>	15%	20%	9%	8%	17%	23%	20%	23%
<b>Total</b>	16%	19%	19%	22%	17%	18%	19%	22%

It is also worth noting here that, as discussed more below, the qualitative importance of the cases generating dissent under Chief Roberts is not high. *PCAOB* had symbolic importance, but the outcome had little effect on the securities regulatory regime created by the Sarbanes-Oxley Act, and while *Stoneridge* and *Janus* represented potentially important efforts by plaintiffs to maneuver around the equally divisive *Central Bank* and expand Rule 10b-5 cases to third parties, they did not substantially restrict securities law from where it had been prior to those decisions. In contrast, the case most restricting the reach of securities law from the status quo ante was *Morrison*, which was a unanimous decision, as was the recently decided *Halliburton II*.

d. No Overall Change in Restrictive Outcomes

What about outcomes? How if at all has the Roberts Court changed the way that securities law cases come out? Table 4 breaks down case outcomes according to the “expansive” and “restrictive” classification scheme used in S&T, by era.<sup>24</sup> As can be seen, the Roberts Court is characterized by neither the strongly expansive approach of the pre-Powell era, nor the strongly restrictive approach of the Powell era. Instead, the Roberts Court is best characterized as merely continuing the balanced approach of the

<sup>21</sup> *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994).

<sup>22</sup> *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995) (holding that a “prospectus” as defined in the Securities Act of 1933 was not a “prospectus” for liability purposes under Section 12(2) of the same act, but instead limited to a statutory prospectus required for public offerings registered under that act, exempting private placements and secondary resales from liability under that statute). For a mild statement of the reaction of the majority of securities law specialists, see, e.g., Peter Letsou, *The Scope of Section 12(2) of the Securities Act of 1933: A Legal and Economic Analysis*, 45 *Emory L.J.* 95, 112 (1996) (“Justice Kennedy’s definition ... is difficult to reconcile with the words of the statute.”).

<sup>23</sup> *Reves v. Ernst & Young*, 494 U.S. 56 (1990) (holding that “notes” were “notes” for purposes of determining whether they are “securities” and that demand notes did not fall within the statutory exemption for notes with a maturity of less than nine months).

<sup>24</sup> See note 18 *supra*.

post-Powell Rehnquist Court, with a substantial portion of cases expanding the reach of the securities law (or at least declining to restrict it), while another substantial portion of the cases restricts the law.

<b>Table 4</b>	<b>Years</b>	<b>% Securities Law Expansive</b>	<b>% Securities Law Restrictive</b>	<b>% Securities Law Neutral</b>
<b>Pre-Powell era</b>	1936-1972	75%	11%	11%
<b>Powell era</b>	1973-1987	22%	63%	15%
<b>Post-Powell Rehnquist era</b>	1988-2004	47%	53%	0%
<b>Roberts Court</b>	2005-2013	50%	43%	7%

Eras from Sullivan and Thompson, supra note 1. “Expansive” = “broadening the reach of a securities law or regulation, or increasing the likelihood of liability.” “Restrictive” = “reducing the reach or decreasing the likelihood of liability.” “Neutral” = neither expansive or restrictive.

### C. Qualitative Overview

So much for the raw numbers. But numbers never tell the whole story. Perhaps the cases in which the Roberts Court has been restrictive are more important than the numbers suggest, or than in the cases in which it has been expansive. What have been the substantive results of the Roberts Court’s securities law decisions? Here is a brief summary of those decisions:

#### a. Status Quo Preserving Decisions

Several of the cases essentially preserved the status quo. *Stoneridge*<sup>25</sup> and *Janus*<sup>26</sup> were both decisions rejecting efforts to find a way around *Central Bank*, which disallowed private parties from bringing aiding and abetting suits under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. Whatever one may think of the merits of *Central Bank*,<sup>27</sup> neither *Stoneridge* nor *Janus* made substantial changes to the Supreme Court’s 1994 decision to restrict the reach of Rule 10b-5 to primary violators. *Janus* did represent an opportunity for the Court to take a realistic position on the actual economic and practical function of mutual fund advisors – they are not merely “third parties” but the practical locus of control for mutual funds, and hence practically responsible for disclosure (fraudulent or not) by the funds they sponsor and advise – a point recognized by the Court when it (under)stated that advisors “exercise significant influence” over funds. But the Court, focusing on the corporate formalities, drew a line at the separate formal existence of the advisor and the fund, rendering the holding in *Janus* a logical (if formalistic) implication of *Central Bank*.<sup>28</sup> Two additional decisions classified as “restrictive” – *Credit Suisse*<sup>29</sup> and *Gabelli*<sup>30</sup> – concerned statutes of

<sup>25</sup> *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 128 S. Ct. 761, 169 L. Ed. 2d 627, 6 EXC 62 (2008).

<sup>26</sup> *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 180 L. Ed. 2d 166 (2011).

<sup>27</sup> *Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A.*, 511 U. S. 164 (1994).

<sup>28</sup> In principle, at least, a fund that was found liable as a direct defendant could also bring its own action against its advisor if the advisor were responsible for the misstatement or omission, and its shareholders could sue derivatively if the fund board failed to do so.

<sup>29</sup> *Credit Suisse Securities (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 182 L. Ed. 2d 446 (2012).

limitations in the securities context. Neither was so dramatic as to have sweeping implications for most securities litigation. As they address quintessentially “procedural” issues, they are discussed more in Part II below.

b. Restrictive Decisions

Two of the remaining “restrictive” decisions – *Tellabs*<sup>31</sup> and *Morrison*<sup>32</sup> – were important developments in the important subfield of Rule 10b-5 litigation, while the importance of the third – *Halliburton II* – remains uncertain. In *Tellabs*, the Court interpreted the requirement in the Private Securities Litigation Reform Act of 1995 (PSLRA) requiring private plaintiffs to “state with particularity facts giving rise to a strong inference” of scienter. It held that to pass this test, the facts alleged must be both “cogent” and at least as compelling as alternatives, a tougher standard than the test articulated by the Seventh Circuit,<sup>33</sup> viz., whether a “reasonable person could infer” scienter from all the facts plead. At the same time, the Court also rejected other formulations of the test, including a test from the Sixth Circuit,<sup>34</sup> viz., whether an inference of scienter was the “most plausible of competing inferences,” which would have been tougher than the one adopted in *Tellabs*. In effect, the Supreme Court gave ties to the plaintiff, while the Sixth had given them to the defendant, and the Seventh had only required a good effort.

While the *Tellabs* decision did tighten standards relative to one possible interpretation of the PSLRA, it left a great deal of room for judgment to lower courts in applying its approach to the required pleading standard. Because different judges can be expected to apply the *Tellabs* differently, it may not be surprising that no practical effect of the case has been discernible in studies of aggregate litigation rates or outcomes. This is shown by the fact that, as depicted in Figure 1, the number of class actions under Rule 10b-5 did not drop in 2008, following the 2007 decision in *Tellabs*.<sup>35</sup>

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<sup>30</sup> *Gabelli v. SEC*, 568 U.S. 133, 133 S. Ct. 1216, 185 L. Ed. 2d 297 (2013).

<sup>31</sup> *Tellabs, Inc., Et Al., Petitioners, v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S.Ct. 2499 (2007).

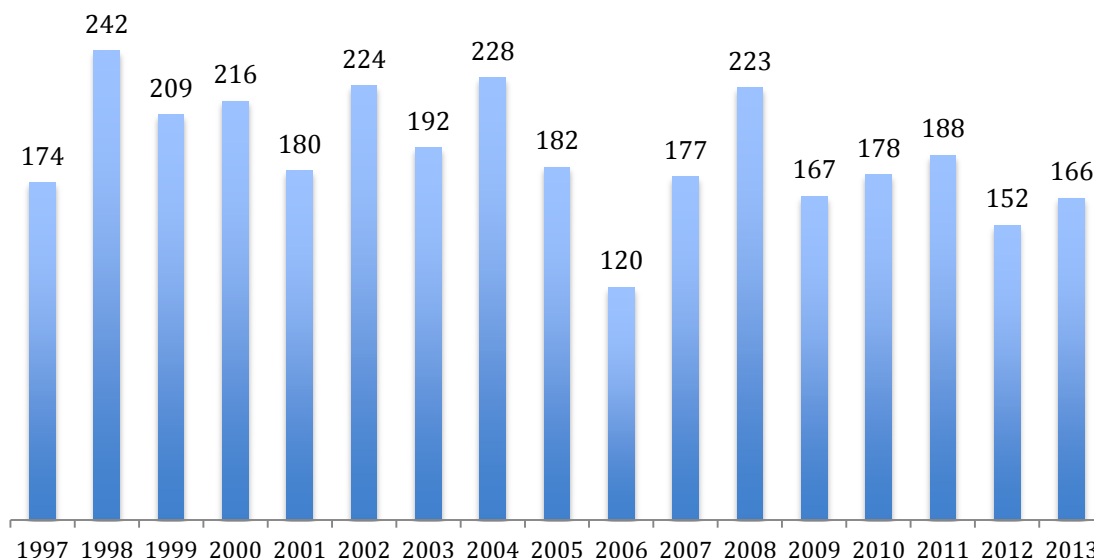
<sup>32</sup> *Morrison v. Natl. Australia Bank Ltd.*, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010).

<sup>33</sup> 437 F.3d 588, 602 (2006).

<sup>34</sup> *Fidel v. Farley*, 392 F.3d 220, 227 (2004).

<sup>35</sup> *Tellabs* did coincide with the financial crisis, and a large share (roughly 40%) of the securities class actions brought in 2008 are attributed to the crisis by analysts at Cornerstone Research, which might suggest that *Tellabs* had an effect on non-crisis related filings. Cornerstone Research, *Securities Class Action Filings: 2013 Year in Review*, at 3. Consistent with this reasoning, if one removed crisis-related filings, 2008 and 2009 would have shown modest declines in filings. However, filings unrelated to either the crisis or M&A have picked back up 2012 and 2013, exceeding the numbers from 2007, without any large increase in the numbers of issuers, or external shocks such as the crisis, to provide an explanation.

Figure 1. Class Action Private Securities Litigation Filings



Source: Cornerstone Research, Securities Class Action Filings: 2013 Year in Review at 3

The “restrictive” decision that had the most important potential practical effect was the 2010 decision in *Morrison*. That decision held that Section 10(b) of the Securities and Exchange Act of 1934 (and thus, Rule 10b-5) does not provide a cause of action for misconduct by *foreign plaintiffs* who purchased securities issued by *foreign companies* on *foreign exchanges* – hence the “foreign cubed” or “*f-cubed*” label. That was true, said the Court, even if deceptive conduct itself included that by US citizens in the US, because (said the Court) of a canon of statutory interpretation against extraterritorial application of federal statutes absent clear intent by Congress. While the “location” of the purchase and trading of intangibles can be something of a metaphysical question – suppose, for example, that an offer to purchase is made in the US but the acceptance is made outside the US, or vice versa, or the security was “issued” in the US but then purchased and subsequently retraded outside the US, or both offer and acceptance are made by foreign traders outside the US but they connect via an exchange owned by a US trading platform, etc. – there are clearly cases such as *Morrison* where a great deal of the activity relevant to purchases and sales of securities occurs beyond US borders, and the Roberts Court clearly sought to push litigation arising out of such transactions out of the US federal courts.

Practically, this case was of importance not only because it restricts the reach of US securities law on the relatively unusual fact pattern in *Morrison* – where a foreign buyer buys and repeats statements made by a deceptive US target and foreign investors who bought securities in the foreign buyer sue after the deception is revealed and the buyer’s stock price falls – but because it reduces the size of relevant classes of investors in cases

involving issuers with some shares trading in the US.<sup>36</sup> Smaller classes would lead to smaller damage awards in those rare instances a securities law case proceeds to trial, and expectations of smaller awards should lead to smaller settlements, and smaller settlements should lead to fewer cases in expectation.<sup>37</sup> *Morrison* had disturbing implications for the ability of the Securities and Exchange Commission (SEC) and US Department of Justice (DOJ) to police securities-related deceptive misconduct that clearly occurs in the US. However, on that front, Congress quickly intervened in the Dodd-Frank Act<sup>38</sup> to provide the necessary affirmative indication of extraterritoriality for Section 10(b) actions involving transnational securities frauds brought by the Commission and DOJ. Congress further directed the SEC to conduct a study of whether that authority should extend to private actions, which the SEC completed in 2012.<sup>39</sup> That study concluded that “news of the ... June 24, 2010 decision in *Morrison* ... [did not produce] a statistically significant stock price reaction for U.S. cross-listed companies” and that the staff was “unable to document evidence of either economic costs or economic benefits that could be clearly and directly linked to extending a private right of action.”<sup>40</sup> While the study laid out possible options for further re-extending the reach of *Morrison* to some foreign-cubed private actions, it seems unlikely that Congress will do so in the near future.

*c. Halliburton II*

In the most recent restrictive decisions, *Halliburton II*,<sup>41</sup> the Court overturned the Fifth Circuit’s holding that evidence of lack of price impact could not be used to rebut the Basic presumption at the class certification stage of a Section 10(b) Exchange Act private action. As a result, defendants in such cases will have an additional ability to block class certification by showing that the alleged misrepresentations had no impact on the price of the stock when made. The holding was similar to, but – because it put the burden on the defendant – slightly less restrictive than proposals advanced by legal academics.<sup>42</sup> This

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<sup>36</sup> Subsequent lower court cases have limited *Morrison* in some ways (such as by permitting actions based on trading in American Depositary Receipts representing interests in foreign-listed securities) and expanded on it in other ways (such as by dismissing actions by plaintiffs who purchased a security on a foreign stock exchange even if the security is part of a class that is also cross-listed on a US exchange, or by dismissing actions against US-based intermediaries who invested the plaintiffs’ money in foreign securities purchased outside the US).

<sup>37</sup> Elaine Buckberg and Max Gulker, *Cross-Border Shareholder Class Actions Before and After Morrison* (NERA working paper 2011) report that “filings against foreign companies” did not immediately decline following the *Morrison* decision, but it would be of interest to revisit that factual question now that more time has elapsed for litigation outcomes and strategies to respond.

<sup>38</sup> Section 929P(b)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

<sup>39</sup> Securities and Exchange Commission, Study on the Cross-Border Scope of the Private Right of Action under Section 10(b) of the Securities Exchange Act of 1934, available at <http://www.sec.gov/news/studies/2012/929y-study-cross-border-private-rights.pdf> (last visited March 10, 2014).

<sup>40</sup> *Id.* at B1.

<sup>41</sup> *Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317, 573 U. S. \_\_\_, 134 S. Ct. 2398 (2014).

<sup>42</sup> See Brief of Law Professors as Amici Curiae in Support of Petitioners at *Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317, 2014 WL 60721 (arguing that the plaintiff should have to prove price impact through an event study prior to class certification); Lucian Bebchuk and Allen Farrell, Rethinking *Basic*, 69 Bus. Law. 671 (2014) (arguing that the *Basic* presumption be replaced by the use of a combination of event studies focused on time of misstatement, event studies focused on time of corrective disclosure, and “forward-casting” studies that relate suppressed bad information in a given instance, such as in a false earnings release, to average impact of similar information in other instances, such as when unexpected bad earnings information has been announced by other companies).

was apparently an important difference for three of the Justices (Ginsburg, Breyer, and Sotomayor), as noted in their brief concurrence.<sup>43</sup>

The importance of the decision is unclear. The Court did not sweep as far as defendants sought, refusing to reverse the holding in *Basic, Inc. v. Levinson*<sup>44</sup> that plaintiffs in such cases should be presumed to have relied on alleged misrepresentations when they purchased securities in a publicly traded stock, because the market price would have reflected the effect of those misrepresentations. Had the Court gone that far, it would have been the most significant securities law decision in the Roberts era.

The actual holding was more modest, although the significance of its effects is uncertain. Some argue that the holding will be generally unimportant, since most securities class actions are prompted by a drop in the stock price that follows revelation of bad information (hence the moniker “stock drop” cases), and the only disputed issue is whether the defendant fraudulently concealed the information.<sup>45</sup> This argument assumes that the relevant evidence of “price impact” in a typical case is when corrective disclosure is made, and the stock drops, and not when the original misstatement was made. While plausible as a method to implement *Halliburton II* in many cases, such an approach would move away from the question that nominally framed the decision, that is, whether reliance can be presumed because “efficient” market prices reflect *misstatements*, as accepted in *Basic*. As Larry Mitchell has noted,<sup>46</sup>

The vast majority of securities fraud cases do not involve alleged false statements of positive news that might be expected to increase the value of the stock price. Rather, ... the false statement ... conceals a development adversely affecting the [issuer]. Under those circumstances, there is little or no "impact" on the stock *at the time the false statement is made*; the false statement minimizes or prevents the decline that would ... have occurred had investors been [informed and] given the opportunity to ... reassess the value of their investments. A measurable "impact" on the stock price in such circumstances would not be seen until a "corrective disclosure" occurs, which could be substantially after the fraudulent statement is made.

As noted by Bebchuk and Ferrell, a common form of misstatement is the “confirmatory lie,” i.e., a statement that merely confirms what the market already (falsely) believes about a company, such as an earnings release that matches analyst expectations (when in fact the company’s earnings are falsely inflated by fraud).<sup>47</sup> In such cases, there will no price impact at the time of the lie, only when corrective disclosure is made. Corrective

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<sup>43</sup> 134 S. Ct. at 2417.

<sup>44</sup> 485 U.S. 224 (1988).

<sup>45</sup> John F. Savarese, George T. Conway III, and Charles D. Cording, Reflections on Halliburton (July 1, 2014) (client memo on file with author).

<sup>46</sup> Lawrence Mitchell on Halliburton v. Erica P. John Fund and the Other Law Professors, Business Law Prof Blog (Apr. 27, 2014), available at <http://bit.ly/1n0X6XT> (last visited July 18, 2014).

<sup>47</sup> Lucian Bebchuk and Allen Ferrell, Remarks on the Halliburton Oral Argument (2): Implementing a Fraudulent Distortion Approach, The Harvard Law School Forum on Corporate Governance and Financial Regulation (March 12, 2014, 9:10 AM) (emphasis added), available at <https://blogs.law.harvard.edu/corpgov/2014/03/12/remarks-on-the-halliburton-oral-argument-2-implementing-a-fraudulent-distortion-approach/> (last visited July 18, 2014).

disclosure, it should be remembered, reveals two things, which affect price simultaneously: they reveal the information in the corrective disclosure, and they reveal that the company had previously provided false information to the market (perhaps inadvertently, perhaps not, but false nonetheless). This makes “back-casting” the results of an event study of the corrective disclosure a noisy and contestable tool for purposes of inferring reliance (on market prices and hence on the misstatement). Further, in some instances, companies may have an ability to game the holding, by pairing the release of negative information with positive information, confounding the price impact that any one statement would have, and increasing the likelihood that (later, in a subsequently brought case) the defendant company will be able to show that an alleged misrepresentation (or corrective disclosure that is also paired with positive news) did not impact the price when made.

It remains unclear how lower courts will wrestle with these complications. Lower courts may view a non-finding of price impact around dual-effect statements as insufficient to block class certification, on the ground that the defendant has the burden of proof on the point and the confounding effects are attributable to the defendant. Other courts may decide that such non-findings warrant shifting the burden back to the plaintiffs to prove actual reliance. Plaintiffs will point to any contemporaneous statement as a reason for a non-finding of price impact, while defendants will argue that the arguable confounding are not plausibly material and so not actual confounds.

The only certain effect of *Halliburton II*, then, will be to generate more disputes on how to interpret and apply the holding, all at the pre-certification stage. Defendants and plaintiffs’ lawyers alike will face higher costs – in the form of briefing designed to elicit interpretations to permit the decision to be implemented, and in the form of experts in finance (or at least those who can carry out a useful event study with authority), who can study and opine on price impact at the certification stage, prior to discovery. The effect of the increased costs may not be symmetric, at least for large defendants in some settings: these pre-certification proceedings will increase litigation risks for both sides, but large defendants are likely to be able to better bear those risks than plaintiffs’ law firms. In some cases, moreover, the new procedural defense may produce results (i.e., a showing of no price impact) that may effectively bring the case to an end, but the result will never be better than would have occurred prior to *Halliburton II*. Hence, the case is clearly restrictive, even if the Ginsburg concurrence turns out to be correct that the result will not be a “heavy toll on ... tenable claims.”<sup>48</sup>

d. Reconciling *Halliburton II* with *Amgen* and *Halliburton I*

*Halliburton II* is also in tension with *Amgen* and *Halliburton I*, earlier Roberts’ Court cases. In *Amgen*, a 6-3 decision, the Court refused to allow defendants to argue that, because the misstatements were immaterial and so could not impact price, the *Basic* presumption did not apply and a class could not be certified;<sup>49</sup> in *Halliburton I*, the Court

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<sup>48</sup> 134 S. Ct. at 2417.

<sup>49</sup> *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 568 U.S. —, —, 133 S. Ct. 1184 (2013).



reached the same bottom-line with respect to loss causation.<sup>50</sup> Materiality and loss causation could not be considered on class certification, held the Court in those cases, because resolution of those issues would not determine whether common issues predominated over individual ones under Rule 23(b)(3). If the misstatements were not material or caused no loss, all putative class members' claims would fail, and if they were material and caused loss, then all claims could survive, under *Basic*.

The reasoning in those cases, commented litigators at Wachtell Lipton (after the case was decided),<sup>51</sup> should have led *Halliburton II* to come out the other way:

If there is no price impact in an efficient market, not only can there be no materiality, there can also be no causation, no damages, and no claim. ... As the Fifth Circuit held, the claims rise and fall together, and the common issues predominate, regardless of whether or not there is price impact.

Put differently, one common way to show materiality and prove loss causation is to show that a misstatement or corrective disclosure has a price impact – functionally equivalent to the defense created by *Halliburton II*.

The Court in *Halliburton II* conceded the validity of this critique, calling it “fair enough.”<sup>52</sup> But the Court ultimately decided to allow defendants to rebut the presumption—and defeat class certification—with evidence of a lack of price impact. The Court reasoned (correctly) that materiality and reliance are “discrete” legal issues, and (correctly) that other elements of proof (such as publicity) would be relevant at both the certification and merits stages of a case, and left it at that.

A concurrence written by Thomas, joined by Scalia and Alito, advocated completely overruling *Basic*,<sup>53</sup> on the ground that market prices cannot be and are not relied upon by investors, a position that is somewhat ironic given their pro-market, de-regulatory ideological commitments.<sup>54</sup> But their concurrence did not make much of the inconsistency between *Amgen* and the majority opinion in *Halliburton II*. That may be because one of those concurring (Alito) in fact voted with the majority in *Amgen*. If one views *Amgen* and *Halliburton II* as inconsistent, six of nine justices switched positions in the space of a year. (Kennedy voted in the minority in *Amgen*, along with Scalia and Thomas.) If one views *Halliburton I* and *Halliburton II* as inconsistent, all nine justices switched positions in the space of three years.

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<sup>50</sup> *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. —, —, 131 S. Ct. 2179, 2185–2186 (2011).

<sup>51</sup> Savarese et al. supra note 43.

<sup>52</sup> *Halliburton*, supra note 41 at 2416.

<sup>53</sup> 134 S. Ct. at 2417 et seq.

<sup>54</sup> Prior to going on the bench, Scalia was general counsel of the United States Office of Telecommunications Policy (which promoted telecommunications deregulation) from 1972 to 1974, and from 1977 to 1981 was coeditor-in-chief of the American Enterprise Institute's magazine, *REGULATION*, which consistently advocated abolition of economic regulation in competitive markets and improvement-through reform of health, safety, and environmental regulation. See Archive of *REGULATION* issues, [www.cato.org/pubs/regulation/regulmpast\\_issues.html](http://www.cato.org/pubs/regulation/regulmpast_issues.html). Alito's personal qualifications statement in seeking a position in the Reagan administration stated, “I believe very strongly in limited government, federalism [and] free enterprise.” Available at <http://bit.ly/1qOR9Nz> (last visited July 18, 2014).



Might we see in these inconsistencies a lack of strong interest in securities law by the Supreme Court? Might the justices might have weak preferences that align with their ideological commitments, discussed more below, but be willing to give them up in a type of within-term horse-trading if doing so will buy them goodwill or a vote in another case involving issues about which they care more?<sup>55</sup>

Or do these inconsistencies suggest that framing effects<sup>56</sup> can influence even Supreme Court Justice? The result in *Halliburton II* was a termed a “midway position” by Justice Kennedy during oral argument,<sup>57</sup> because it was not as extreme as the “reverse *Basic* position advocated by defendants and many amici, but neither was it a complete plaintiff victory. The equivalent result in *Amgen*, by contrast, would have been precisely what the defendant requested, because there the effort to reverse *Basic* was not front and center. In other words, this outcome might have been the product of clever litigation tactics – by pushing hard for a complete reversal of *Basic* (invited by the dissenters in *Amgen*, as well as by Alito in his brief concurrence in that case)<sup>58</sup> – the defendant was able to achieve a result that could not have been achieved had it simply asked for that result on its own.

Or, finally, is it the case that what distinguishes *Halliburton II* from *Amgen* and *Halliburton I* can be found in legal formalism? As the majority opinion states, materiality and loss causation are formally class-wide questions (as a matter of law), and (actual) reliance is not. The formal legal implication is that a presumption of reliance should be available for rebuttal at the class certification stage, even if rebutting that presumption will involve reviewing evidence that overlaps with, and may even be identical to, legal issues (materiality and loss causation) that will arise again at the merits stage. This way of reconciling the cases is not inconsistent with the above explanations – perhaps legal formalism would matter less in cases implications stronger political commitments, or if the psychological framing of the cases had been identical. In other words, perhaps the best way to understand the Court is to think of law, politics and litigation tactics as all mattering, in different combinations in different cases.

e. Expansive Decisions

What of the Roberts Court’s record on expansionary securities law decisions? Most

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<sup>55</sup> E.g., Lee Epstein and Jack Knight, *The Choices Justices Make* 9-10 (1998) (advancing ideological preferences is only one of many motives and judges sometimes behave strategically).

<sup>56</sup> E.g., D. Kahneman and A. Tversky, *Choices, values, and frames*, 39 *Am. Psych.* 341-50 (1984).

<sup>57</sup> Oral Argument Transcript, *Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317 (Mar. 5, 2014), at 17, available at <http://1.usa.gov/1nEuuj1> (last visited July 18, 2014).

<sup>58</sup> See Donald C. Langevoort, *Judgment Day for Fraud-on-the-Market?: Reflections on Amgen and the Second Coming of Halliburton*, Working Paper (Nov. 16, 2013) at 2 (“The three dissenters made clear that they thought *Basic* was wrongly decided in 1988, and Justice Alito joined the majority but wrote a cryptic concurrence strongly suggesting that the *Basic* presumption has a shaky foundation that warrants future reconsideration by the Court. The defense bar wasted no time in taking up the four justices’ invitation and sought review in a case that had already been up once to the Court, *Erica P. John Fund v. Halliburton Co.*, now asking that *Basic* be overruled. Certiorari was granted in November 2013.”).

PRELIMINARY AND INCOMPLETE – PLEASE DO NOT CIRCULATE

were as modest as the majority of restrictive decisions. *Jones*<sup>59</sup> rejected a decision by Judge Frank Easterbrook<sup>60</sup> that would have ruled out consideration of comparative fee data in cases under section 36(b) of the Investment Company Act, which provides a private right of action for mutual fund investors to sue over “excessive” fees, but the Court did not articulate any test of its own in its place, being content to return the lower courts to the *Gartenberg* standard established by the Second Circuit in 1982.<sup>61</sup> The decision is thus expansive relative to an alternative, lower court holding, but no more so than prior law.

Both *Halliburton I*<sup>62</sup> and *Amgen*<sup>63</sup> rejected efforts to impose requirements on the class certification stage of securities litigation – better understood as “not restrictive” rather than “expansive” – and (in the case of *Amgen*), effectively overturned in many settings by *Halliburton II*. Similarly, *Matrixx*<sup>64</sup> rejected a specific statistically based test for the “materiality” qualifier of Rule 10b-5 and many other securities rules. *Merck*<sup>65</sup> affirmed a Third Circuit decision preserving inquiry notice for commencement of the statute of limitations period in Rule 10b-5 cases, linked to when a plaintiff should be on notice about the defendants’ scienter, and not merely when a plaintiff should have been on notice about the related misstatement or omission – again, a decision preserving the majority rule among lower courts that had confronted the issue.

Of the decisions “expanding” the reach of securities litigation, only the *Lawson*<sup>66</sup> and *Troice*<sup>67</sup> decisions from the October 2013 term are genuinely expansive, and the practical importance of each remains uncertain. The odds that a future Charles Ponzi will sell certificates of deposit backed even indirectly by listed securities, as was the fact-pattern in *Troice*, and therefore outside the preemptive scope of the SLUSA,<sup>68</sup> remains (like the extent of so much fraudulent activity) as speculative as any “blue sky” investment scheme. In *Lawson*, a 6-3 decision, the Court vigorously debated the frequency with which an employee of a contractor for a public company would obtain information about securities violations and seek “whistleblower” status under Sarbanes-Oxley. There does not seem to be any study that provides even rough information on the question. If any of these decisions has a general expansive effect, it will be to permit more “whistleblower” lawsuits against mutual fund advisory companies, such as Fidelity, the defendant in *Lawson*, than would have been permitted by the dissent’s reading of the Sarbanes-Oxley Act’s unclear language, coupled with the kind of formalist “factual” predicate deployed in *Janus* (i.e., that advisors are formally distinct legal entities from the funds they create,

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<sup>59</sup> *Jones v. Harris Assocs.*, 559 U.S. 335, 130 S. Ct. 1418, 176 L. Ed. 2d 265 (2010). See John C. Coates IV, *The Downside of Judicial Restraint: The (Non-) Effect of Jones v. Harris*, 6 *Duke J. of Constitutional Law and Public Policy* 58 (2010).

<sup>60</sup> 527 F. 3d 627, 632 (2008), motion to rehear en banc denied 537 F. 3d 728 (2008) (per curiam).

<sup>61</sup> *Gartenberg v. Merrill Lynch Asset Management, Inc.*, 694 F. 2d 923 (CA2 1982). For a discussion of *Gartenberg*, see John C. Coates and R. Glenn Hubbard, *Competition in the Mutual Fund Industry: Evidence and Implications for Policy*, 33 *J. Corp. L.* 152 (2007).

<sup>62</sup> *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 180 L. Ed. 2d 24 (2011).

<sup>63</sup> *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013).

<sup>64</sup> *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 179 L. Ed. 2d 398 (2011).

<sup>65</sup> *Merck & Co. v. Reynolds*, 559 U.S. 633, 130 S. Ct. 1784, 176 L. Ed. 2d 582 (2010).

<sup>66</sup> *Lawson v. FMR LLC*, No. 12-3, 134 S. Ct. 1158, 118 L. Ed. 2d 158 (2014).

<sup>67</sup> *Chadbourne & Parke LLP v. Troice*, No. 12-79, 12-86, and 12-88, 2014 BL 51065 (U.S. Feb. 26, 2014).

<sup>68</sup> 15 U.S.C. §78bb(f)(1).

sell and advise).

In sum, the quantitative assessment above more or less lines up with a qualitative assessment of the Roberts Court’s securities law jurisprudence. With the exception of *Morrison*, that body of case law is composed of a modest number of modest decisions that mostly preserve rather than alter the status quo, even if they resolve some Circuit-splitting ambiguities created by Congress since 1995 (the PSLRA, SLUSA and the Sarbanes-Oxley Act). Overall, their qualitative effects are more restrictive than the quantitative analysis would suggest, as the effects of *Morrison*, and possibly *Tellabs* and *Halliburton II*, are likely to dominate the effects of *Troice* and *Lawson*. Rather than being particularly expansive or restrictive, pro-manager or pro-shareholder (or pro-SEC), these cases are perhaps better characterized on different, more “legal” dimensions, as articulating loosely stated standards and emphasizing procedure, as discussed next.

## Part II. An Emphasis on Procedure and Standards

How can we best understand securities law decisions in the Roberts Court? This Part of the paper breaks down the cases reviewed in Part I on two dimensions – (a) procedural versus substantive, and (b) bright-lines versus standards – and shows that the outcomes of the cases map reasonably well onto those dimensions. That is, expansive decisions are most common when lower courts had based restrictive decisions on bright-line, substantive decisional rules, and they are least common when lower courts had based restrictive decisions on procedural standards.

### A. A Pure Attitudinal Model and Securities Law Cases under Chief Roberts

Before analyzing the Roberts Court’s securities law cases in more detail, it is worth asking if the simple political science attitudinal model can explain the case outcomes. The analysis produces a bit of a puzzle: while individual justices vote as one would expect, the overall results do not add up to a set of predictable outcomes. Something else must be going on besides party politics.

In the simplest version of an attitudinal model, one would predict that Republican-appointees would vote for restrictive decisions, and Democrat-appointees would vote for expansive decisions. To be sure, securities law is an area where the standard Republican = business/manager-friendly and Democrat = consumer/worker-friendly polarities do not always dominate. Business interests in a general sense have an interest in law that punishes and deters fraud, because that will translate into lower capital costs for non-fraudulent issuers. It would likely not be beneficial for business if (hypothetically) securities fraud were to be legalized, or even to be made significantly easier to perpetrate. The typical plaintiff in a high-profile securities case is an investor – usually a class of investors, sometimes including large institutions that have more in common with other for-profit businesses than with individual consumers or workers. In *Stoneridge*, the plaintiff was a hedge fund; in *Amgen*, it was public pension fund; in *Central Bank*, it was a national bank. Even if Republican-appointees would always favor business interests, the nature of securities law case plaintiffs would at least leave some cases uncertain in

outcome. Still, as a general matter, most plaintiffs in securities class actions are individuals, and their representatives are lawyers – who are clearly identified in public discourse as a Democratic lobby and political force, suggesting that, at least on average, this simple model might have some traction despite the potential ideological complexities of some securities law disputes.

As a first pass, a simple attitudinal model does fit the votes on the three, and only, close cases under Chief Roberts: *PCAOB*, *Stoneridge*, and *Janus*, where each of the majority votes was appointed by a Republican and each of the dissents was either appointed by a Democrat or (in the cases of Justices Stevens and Souter) drifted “left” to become *de facto* members of the Court’s liberal wing.<sup>69</sup> The average “expansive” vote among the Democrat-appointees Justices (51%) is greater than that among the Republican-appointees (41%), and each of the former votes more expansively on average than each of the latter. As shown in Table 5, Democrat appointees’ expansive votes range from 62% to 67% and Republican appointees’ expansive votes ranging from 29% to 54%. These individual vote shares correlate fairly well with the Segal-Cover ex ante measure of ideology at time of confirmation (correlation coefficient = 0.6, p-value <0.043), although less well with the Quinn-Martin dynamic measure of votes over time (correlation coefficient = -0.6, p-value < 0.075). A simple regression of expansiveness in securities law cases on Segal-Cover scores generates a positive coefficient of 0.54 (standard error = 0.22, p-value <0.042, R-squared 0.42).

Table 5	Segal-Cover Score	Quinn-Martin Scores as of 2012	% Expansive Votes in Securities Law Cases
<b>Sotomayor</b>	0.780	0.287	64%
<b>Kagan</b>	0.730	0.322	67%
<b>Ginsburg</b>	0.680	0.190	64%
<b>Breyer</b>	0.475	0.439	62%
<b>Kennedy</b>	0.365	1.636	29%
<b>Thomas</b>	0.160	4.782	43%
<b>Roberts</b>	0.120	2.837	54%
<b>Alito</b>	0.100	3.345	36%
<b>Scalia</b>	0.000	3.326	43%

Notes: Justices Stevens and Souter are omitted because they only voted in three and two of the securities law cases under Chief Roberts, respectively. The Segal-Cover scores are an estimate of the ideology of the Justice based on editorials at the time of their confirmations, available at [www.stonybrook.edu/commcms/polisci/jsegal/QualTable.pdf](http://www.stonybrook.edu/commcms/polisci/jsegal/QualTable.pdf) (last visited March 11, 2014). The Quinn-Martin scores are another estimate of the ideology of the Justices based on votes over time, and are available at [mqscores.wu](http://mqscores.wu) (last visited March 11, 2014).

However, the overall Roberts Court’s securities law case *outcomes* do not map well the Justices’ partisan affiliations. In more than half (53%) of the cases, the decision was unanimous, so partisan ideology has no straightforward role to play in explaining these votes. In *Tellabs*, Justices Ginsburg and Breyer voted in favor of the restrictive outcome,

<sup>69</sup> For evidence of these Justices’ drift left, see Andrew D. Martin and Kevin M. Quinn, Dynamic Point Estimation Via Markov Chain Monte Carlo for the US. Supreme Court, 1953-1999, *Political Analysis* 10:2 134-53 (2002), at 146 (Stevens) and Andrew D. Martin and Kevin M. Quinn, Can Ideal Point Estimates Be Used as Explanatory Variables?, Working Paper (Oct. 8, 2005), available at <http://mqscores.wustl.edu/media/resnote.pdf> (last visited March 11, 2014), at 11.

while only Justice Stevens dissented. In the recent *Lawson* decision, Justice Sotomayor penned a dissent joined by Justices Kennedy and Alito – a relatively unusual grouping based on partisan affiliation alone, as was the majority, which included three left- and three right-leaning Justices. In *Amgen*, Chief Justice Roberts and Justice Alito joined the left wing of the Court, while in *Troice*, Chief Justice Roberts and Justices Thomas and Scalia joined the left wing. The most expansive Democrat appointee (Sotomayor) voted expansively only two-thirds of the time, and the least expansive voted expansively almost a quarter of the time, and the difference between Chief Justice Roberts (54% expansive) and Justice Breyer (62% expansive) is not large.

Most importantly, overall, the ideological model would not predict the relative balance between expansion and restriction. That is because the majority of Republican appointees bent on pursuing narrowly framed, politically ideological ends would have been able to push through an entirely restrictive set of decisions. If one sets aside the neutral *PCAOB* decision, the partisan-only model would have predicted all fourteen of the remaining cases would have come out restrictive, when in fact seven came out expansive. A correct classification percentage of 50% (seven out of fourteen) is precisely the same as a coin toss.

B. Procedural Cases

What besides partisan identity might better rationalize the case outcomes summarized in Part I? One possible dimension of variation is procedure vs. substance. Just under half (seven, or 47%) of the fifteen securities law cases were not primarily about interpretations or open questions under the substantive securities laws or related rules, but about aspects of procedure that are special to the securities law context. Thus, these are not “procedural” in the general sense – not necessarily coded as “Civil Procedure” by the SCD database – but nonetheless raise predominantly procedural questions. These are summarized in Table 7.

Table 7	Procedural Aspect	Expansive Outcome?
<b>Merck</b>	Inquiry notice for statute of limitations for Section 10(b)	Yes
<b>Morrison</b>	Quasi-jurisdictional reach of securities laws	No
<b>Halliburton I</b>	Loss causation before class certification	Yes
<b>Credit Suisse</b>	Equitable tolling for statute of limitations under Section 16	No
<b>Gabelli</b>	Commencement of statute of limitations period for IAA	No
<b>Amgen</b>	Proof of materiality prior to class certification	Yes
<b>Halliburton II</b>	Ability to rely on market price as proof of reliance	No

More procedural cases are “restrictive” (57% for procedural cases vs. 43% for substantive cases), but given small numbers, this difference could be due to random chance. Nonetheless, the simple scheme of typing the cases does a better job of classifying the cases than the attitudinal model (57% vs. 50%). Further making the importance of procedure plausible is the fact that six of the seven (86%) procedural decisions were unanimous, as compared to only two of the remaining eight (25%)

decisions. As a result, the procedural categorization may explain those outcomes that cannot map onto partisan identities.

*Morrison* illustrates the inevitable line-drawing problem at the border of procedure and substance. Formally, the Supreme Court in *Morrison* rejected the Second Circuit’s holding that it lacked subject matter jurisdiction to decide the case. Jurisdiction, the Court held, was granted in the federal securities statutes. Instead, the Court dismissed the case because it “interpreted” Rule 10b-5 itself as not covering f-cubed cases, based on a “principle” of interpretation that disfavors extraterritorial reach of federal statutes. One could view *Morrison* as addressing the substance of the securities laws. However, nothing in the Court’s reasoning relates to the purpose or goals of those laws, and instead the Court’s “interpretation” is derived from a trans-substantive commitment to limiting the reach of all federal laws with identical effect as a decision that the courts lack jurisdiction. Few observers would understand the difference between the Court’s holding and the Second Circuit’s holding that the Court purported to reverse unless they read the Court’s opinion. *Morrison* is best classified (for future predictive purposes), then, as a procedural decision, and so too with other cases involving similar extraterritorial questions.

### C. Resistance to Bright-Line Rules

Another means to classify the securities law cases is to break them down into those in which a bright-line rule was a part of the lower court decision, or not. Coding cases as “bright-line rules” versus “standards” is even more subjective than coding them as expansive or restrictive, or procedural versus substantive. But as with those distinctions, in a few cases, the use of bright-line rules is a clear part of a lower-court case: *Jones*, where the Seventh Circuit sought to preclude recoveries in Section 36(b) cases based solely on comparative fee evidence; *Matrixx*, where the Ninth Circuit sought to base findings of materiality on showings of statistical significance in a factual inquiry on the relevant disclosure; and *Credit Suisse*, where the Ninth Circuit had adopted a bright-line test automatically tolling the statute of limitations for Section 16(b) cases until the insider had filed the requisite form under Section 16(a). In each case, the Supreme Court reversed the decision – in two cases expanding the reach of the securities laws (*Jones* and *Matrixx*) and in the other case restricting it (*Credit Suisse*). Again, all three of these anti-bright-line decisions were unanimous – making it easier to understand the outcomes where partisan-affiliation cannot provide an explanation.

In contrast to these three cases, several of the other case holdings articulated classic “standards” in both the lower court and in the Supreme Court. In *Troice*, the Court had to interpret the phrases “in connection with” the “purchase or sale of a covered security.” The factual context – a Ponzi scheme in which the securities sold were not covered securities but where part of the marketing pitch was that the proceeds of the sales of non-covered securities would be used by the issuer to purchase covered securities – was not clearly included or excluded by the explicit language of SLUSA. Each of the majority and the dissent (and the lower court) had to give meaning to “in connection with.” The majority held that the phrase only included false statements “material to” a purchase of a

covered security; the dissent, by contrast, would have read the phrase to include false statements that “coincided with” and “furthered” the sales or purchases of covered securities. Neither interpretation is self-defining – the majority’s reading merely transfers the inquiry to the equally standard-like word “material,” which has given rise to very large numbers of disputes and different interpretations, while the dissent’s reading requires an interpretation of what counts as “furthering” the requisite transaction in covered securities. The result of either standard would be more potential disputes in future cases.

The only exception to this pattern is *Janus*. In *Janus*, the Court’s formalist approach to mutual funds effectively leads to a bright-line outcome, allowing for easy dismissal of cases in which fund advisors are sued on the basis that they had practical control over fund disclosures. It is worth noting that *Janus* is one of the Court’s few contested decisions, splitting 5-4, and concerns a subspecialization (the interaction of the Investment Company Act and the Securities Act of 1933) that few lawyers (even corporate lawyers) ever master.

If one combines the procedural vs. substantive classification with a “bright-line” dummy variable (taking on the value of -1 for a lower court with a bright-line restrictive rule, 0 for a lower court with a standard, and +1 for a lower with a bright-line expansive rule), this simple combined model successfully classifies 70% of the cases as either expansive or restrictive.

The above analysis should not be understood in any meaningful sense as “hypothesis testing,” “science,” or anything similar. If it were, the small numbers of cases would be rightly labeled “overfitting,” even with the simple two-variable model used. Rather, the analysis is exploratory data analysis, designed to generate a hypothesis. The only slightly complex hypothesis that emerges is this:

Under Chief Justice Roberts, securities law cases will (more often) have outcomes that expand the reach of securities law if they involve substantive (i.e., non-procedural) securities law or a bright-line rule used by the court below to restrict the reach of securities law, but will more often result in restrictive outcomes if they involve procedures or a bright-line rule used by the court below to expand the reach of securities law.

This hypothesis can only be tested with more case data. It is reassuring that the one case decided after these hypotheses were generated – *Halliburton II* – fits them like a glove. It was restrictive, but not sweepingly so. It was procedural, adding a defense to class certification, a quintessential element of procedure. It rejected two bright-line rules, both the one used by the Court below, to rule out consideration of price impact at the class certification stage altogether, and the one advanced by the defense, to reject *Basic* altogether, and require proof of reliance by each member of the class, which would have effectively been a bright-line rule against class actions. A “sample” of one is, of course, not a meaningful test of these hypotheses, which necessarily await future cases. Time will tell.

### Part III. A Jurisprudence Focused on Procedure and Standards

Why might the Roberts Court's securities jurisprudence be better explained with attendance to the role of procedure and loosely phrased standards than by the political backgrounds of the Justices? In this last part of the Article, the background of Chief Justice Roberts and the Court's more general revival of a focus on civil procedure are briefly reviewed, as context for understanding the analysis of securities law cases above, followed by brief sketches of what implications this broader context has for the future of securities law under Chief Roberts.

#### A. Roberts's Background as an Appellate Litigator

Chief Justice Roberts was of course a Republican appointee, with solid credentials as a member of two Republican administrations. But it is also worth remembering that he had spent his career within the upper reaches of the U.S. appellate litigation system before going on the bench.<sup>70</sup> At Harvard, he earned a bachelor's degree (in history) in three years (graduating summa), followed by a law degree and, showing his interest in law-related management, a turn as managing editor of the Harvard Law Review. He clerked for Judge Henry J. Friendly on the Second Circuit and Justice William H. Rehnquist on the U.S. Supreme Court, and then worked on and off for twelve years in the federal government, principally as a litigator – first as Special Assistant to the Attorney General, then as Associate Counsel in the White House Counsel's Office, and finally as Principal Deputy Solicitor General. For seven years, in two periods separated by his stint as Deputy Solicitor General, he practiced law at the D.C. law firm of what was then Hogan & Hartson and is now Hogan Lovells, first as an associate and then partner.<sup>71</sup> Roberts served no time as a lawyer in private practice as a securities lawyer, other than in his role as an appellate litigator. (As noted at the outset, no transactional lawyer – corporate or securities from a non-litigation perspective – has served on the Supreme Court since Justice Powell.)

On Roberts's return to private practice, he headed the firm's appellate practice group,<sup>72</sup> taught as an adjunct law professor at Georgetown,<sup>73</sup> and argued 39 cases before the Supreme Court. The first of those cases was – of note for this article – a securities law case,<sup>74</sup> and one that involved quintessentially procedural questions. Specifically, the case posed the issue of how courts should decide *who* should decide whether a contract dispute was subject to arbitration. Roberts, representing defendants who had successfully resisted confirmation of the arbitration award in the Third Circuit, lost the legal question in the Supreme Court. He argued that courts should apply a *de novo* standard to their review of an arbitrator's decision about the scope of arbitration, but the Court held that

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<sup>70</sup> Biographies of Current Justices of the Supreme Court, Supreme Court of the U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited July 20, 2014).

<sup>71</sup> "Former Hogan & Hartson Partner John G. Roberts, Jr. Confirmed as Chief Justice of the United States" (Press release), Hogan Lovells, (Sep. 29, 2005) (last visited July 20, 2014).

<sup>72</sup> Id.

<sup>73</sup> [http://en.wikipedia.org/wiki/John\\_Roberts](http://en.wikipedia.org/wiki/John_Roberts) (last visited July 20, 2014).

<sup>74</sup> E.g., *First Options of Chicago, Inc., v. Kaplan et al.*, 514 U.S. 938 (1995).



lower courts should apply a deferential standard of review.<sup>75</sup>

Nevertheless, Roberts won on the law as applied to the facts, because the company seeking confirmation of the award had not produced clear evidence that the defendants had agreed to arbitration. The Supreme Court endorsed a split standard on how to address ambiguous evidence on the scope of arbitration: (1) if the record showed the parties had agreed to arbitration, but disputed the precise scope of the arbitration, or if the record was silent on the scope, courts should presume arbitrability from silence, in line with a policy favoring arbitration reflected in the Federal Arbitration Act; but (2) if the record was silent – or indeed, if there was no clear and convincing evidence – on whether they had agreed to arbitration at all – courts should (at least under the state law relevant in that case) presume arbitrability is *not* for the arbitrator to decide.<sup>76</sup> In other words, silence weighs in favor of arbitration in the presence of an arbitration agreement, but against arbitration in the absence of one.

The decision in *First Options* – the product of Roberts’s personal experience as a litigator, and likely one of the most vivid, as his first and successful Supreme Court argument in private practice – is a cartoon of legal complexity. Instead of a simple rule, such as “arbitration’s scope is for the arbitrator” or “arbitration’s scope is for the court,” or even a rule subject to exceptions, such as “arbitration’s scope is for the arbitrator, absent fraud,” the Court announced a multilayered, complex system of standards. First, because arbitration’s scope is determined by agreement, it will vary with choice of law, since different jurisdictions have different rules for interpreting private agreements, particularly when the agreement is silent or ambiguous. Second, *First Options* assigns to the arbitrator the question of deciding the scope of arbitration if the agreement is unclear, based on the policy of favoring arbitration. Third, that assignment is subject to review by a court, but under a deferential standard of review. Fourth, that assignment falls away if the parties have not agreed to arbitration at all, contrary to the policy favoring arbitration. Fifth, silence or ambiguity as to whether the parties have agreed to arbitration will return decisions over scope to the court, who can decide on its own (as the Supreme Court itself did in *First Options*) if there is clear and convincing evidence that the parties agreed to arbitration.

All of this has to be decided before the arbitrator (or court) decides who decides the scope of arbitration, after which the arbitrator (or court) still must decide the merits of the dispute. The complexity and ambiguity of *First Options* has had consequences. It has already been cited sixteen times in Supreme Court cases alone,<sup>77</sup> including four in which

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<sup>75</sup> 514 U.S. at 943-44.

<sup>76</sup> *Id.* at 944-44.

<sup>77</sup> *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010); *Granite Rock Co. v. Int’l Brotherhood of Teamsters*, 561 U.S. 287 (2010); *BG Group PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014); *Stolt-Nielsen S.A. v. Animalfeeds Int’l Corp.*, 559 U.S. 662 (2010); *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000); *Ornelas v. U.S.*, 517 U.S. 690 (1996); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009); *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008); *Air Line Pilots Association v. Miller*, 523 U.S. 866 (1998);

it was distinguished,<sup>78</sup> six in which it was cited to different purposes in different opinions (dissenting or concurring),<sup>79</sup> and twice in which it was cited by the dissent only.<sup>80</sup> Only a lawyer – indeed, only a litigator could love – or even like – the doctrinal complexity spawned by *First Options*. In sum, complex procedural standards are part of Chief Justice Roberts’s personal experience as a Supreme Court litigator. This background may help explain why the Roberts Court’s decisions have been marked by a distinct revival of cases in civil procedure, which in turn may help explain its securities law decisions.

## B. The Procedural Revolution in the Roberts Court

As noted by Wasserman, the Roberts Court has “heard and decided more than twenty cases in core civil procedure areas, including pleading, summary judgment, ... jurisdiction, ... removal procedure, class actions, civil representation, arbitration..., appeal[s], remedies, and Erie/Hanna.”<sup>81</sup> This turn towards procedure is all the more striking because of how little time the Court had spent on procedure under prior Chief Justices. “Souter joined the Court in the fall of 1990 ... and served for nineteen years, but never decided a personal jurisdiction case, despite ... explicit requests from lower-court judges for the Supreme Court to [resolve] lingering questions.”<sup>82</sup>

More controversially, the Roberts Court has been using procedure to cut back on civil litigation against business defendants, deploying a range of loosely phrase standards. These cases include decisions on jurisdiction, pleading, class action requirements, and enforcement of arbitration contracts. As Burbank testified to Congress, these decisions appear likely to “contribute to the phenomenon of vanishing trials, the degradation of the Seventh Amendment right to jury trial, and the emasculation of private civil litigation as a means of enforcing public law,” all done in the guise of interpretation, hence evading the Congressional review that accompanies open changes to the Federal Rules of Civil Procedure.<sup>83</sup>

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*Pacesetter Construction Co., Inc. v. Carpenters 46 Northern California Counties Conference Board*, 516 U.S. 802 (1995); *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995).

<sup>78</sup> *Howsam v. Dean Witter Reynolds, Inc.* 537 U.S. 79 (2002); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010); *Granite Rock Co. v. Int’l Brotherhood of Teamsters*, 561 U.S. 287 (2010); *BG Group PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014).

<sup>79</sup> *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010); *Granite Rock Co. v. Int’l Brotherhood of Teamsters*, 561 U.S. 287 (2010); *BG Group PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014); *Stolt-Nielsen S.A. v. Animalfeeds Int’l Corp.*, 559 U.S. 662 (2010); *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013).

<sup>80</sup> *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000); *Ornelas v. U.S.*, 517 U.S. 690 (1996).

<sup>81</sup> Howard M. Wasserman, *The Roberts Court and the Civil Procedural Revival*, 31 *Rev. of Lit.* 313, 314 (2012) (citations omitted).

<sup>82</sup> *Id.* at 317.

<sup>83</sup> Has the Supreme Court Limited Americans’ Access to Courts? Hearing Before the S. Comm. on the Judiciary, 111th Cong. app. B (2009) (testimony of Stephen B. Burbank, Professor, U. Penn. Law School), available at <http://1.usa.gov/Wkx4Fw> (last visited July 18, 2014); see 28 U.S.C. §§ 2071-2077 (Rules Enabling Act governing explicit rule changes).

In *Goodyear*<sup>84</sup> and *McIntyre Machine*,<sup>85</sup> the Court held that state courts lack general jurisdiction over corporate defendants merely because their products reached the state through “stream of commerce,” even if they sell throughout the US through a local (but out of state) distributor, while leaving open precisely what “plus” factor needs to be shown to establish jurisdiction. In *Bell Atlantic Corp. v. Twombly*<sup>86</sup> and *Ashcroft v. Iqbal*,<sup>87</sup> the Court “case aside a fifty-year-old precedent”<sup>88</sup> to held that in all civil cases, to survive a motion to dismiss, a complaint must be “plausible on its face,” and not merely “possible” or “consistent” with defendant liability, inviting judges to play a new and more aggressive role in bringing their “common sense” to bear at the motion to dismiss stage, prior to discovery, in evaluating the plausibility of a complaint.<sup>89</sup> The Court articulated expressly the goals of “checking discovery abuse.”<sup>90</sup> In *Wal-Mart*, the Court held that a class did not satisfy the “commonality” requirement if damages would differ across plaintiffs, even if other elements of the plaintiffs’ claims were identical.<sup>91</sup> In *Comcast*, the Court held that plaintiffs seeking class certification must “ ‘affirmatively demonstrate’ ” certification requirements like the predominance of common questions.<sup>92</sup>

Under all of these loosely phrased standards, judges can (on a case by case basis) dismiss cases early, increasing costs of successful litigation on plaintiffs, while potentially reducing the costs of litigation to defendants, and reducing the incidence of litigation. In other words, the Roberts Court has been – outside the securities context – using procedural standards to reduce litigation, piecemeal, in a way that will be hard to observe, except in the aggregate, over time.<sup>93</sup> This is the approach of an appellate litigator to a perceived problem of excessive litigation against business.

The Court has departed from the use of loosely phrased standards in one area of its procedurally oriented, pro-business decisions: enforcing arbitration clauses. In *Rent-a-Center*, the Court held enforceability of agreements could be made subject to arbitration;<sup>94</sup> in *Animalfeeds*, the Court held that arbitrators may not impose class-wide remedies unless the arbitration clause explicitly provides for class arbitration;<sup>95</sup> and in *AT&T Mobility*, the Court held that California’s common law rule making class-action waivers in arbitration agreements unenforceable as unconscionable was preempted by the Federal Arbitration Act;<sup>96</sup> and in *American Express*,<sup>97</sup> the Court extended *AT&T Mobility*

<sup>84</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846 (2011).

<sup>85</sup> *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

<sup>86</sup> *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 545-46 (2007).

<sup>87</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

<sup>88</sup> John F. Savarese, George T. Conway III, David B. Anders and Adir Waldman, Supreme Court Abandons Long-Standing Precedent on Pleading Standards, Wachtell Lipton Rosen & Katz Client Memo (May 22, 2007) (on file with author).

<sup>89</sup> For a powerful empirical critique of judicial “common sense,” see Dan M. Kahan, David A. Hoffman, Donald Braman, Daniel Evans and Jeffrey J. Rachlinski, “They Saw a Protest”: Cognitive Illiberalism and the Speech-Conduct Distinction, 64 *Stan. L. Rev.* 851 (2012).

<sup>90</sup> *Twombly*, 550 U.S. at 560.

<sup>91</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011).

<sup>92</sup> *Comcast Corp. v. Behrend*, 569 U.S. —, 133 S.Ct. 1426, 1432, 185 L.Ed.2d 515 (2013).

<sup>93</sup> Wasserman, *supra* note 81 at 319.

<sup>94</sup> *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010).

<sup>95</sup> *Stolt-Nielsen S.A. v. Animalfeeds Int’l Corp.*, 559 U.S. 662 (2010).

<sup>96</sup> *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011).

to hold that class-action bans in arbitration contracts were legal “even if they left citizens with no resource at all.”<sup>98</sup> Together, even more than the standard-based decisions, these sharp-edged rule-like decisions provide large companies with incentives to use arbitration clauses in form consumer contracts to greatly curtail if not eliminate the risks of class actions arising out of the consumer transactions governed by the contracts. The sweep of these cases is stunning. As Kagan put it in dissent in *American Express*, “Amex has insulated itself from antitrust liability—even if it has in fact violated the law.”<sup>99</sup>

Overall, procedure scholars from all sides of the political spectrum have agreed that the Roberts Court has in its procedural decisions exhibited a pro-business bent, consistent with a political (attitudinal) model. “The analysis ... has been favorable to, and applauded by, repeat-player defendants in modern litigation seeking relief from the burdens of litigation, discovery, and liability—namely business and government defendants.”<sup>100</sup> While Wasserman argues that a simple pro-business/anti-plaintiff attitudinal model does not explain all of the Roberts Courts’ procedure cases, noting that *Twombly* was unanimous, he concedes that political ideology “does reveal itself in the most fundamental procedure cases, those touching on core issues at the heart of civil litigation and reflecting foundational divides about the purpose and operation of the civil justice system.” As he notes, the Roberts Court has split 5-4 (on partisan lines) in its arbitration, class action, civil remedies and pleading cases – i.e., those decisions “directly and bluntly limiting plaintiffs’ access to court ...”<sup>101</sup> At least some of these decisions have had discernible real-world effects. Motions to dismiss have been filed more frequently post-*Iqbal*,<sup>102</sup> and have been granted more frequently,<sup>103</sup> particularly in civil rights and employment discrimination cases,<sup>104</sup> with more modest effects in disability cases.<sup>105</sup>

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<sup>97</sup> *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).

<sup>98</sup> Lina Khan, *How Corporations Became People You Can’t Sue*, *Washington Monthly* (June/July/August 2014).

<sup>99</sup> 133 S. Ct. at 2313.

<sup>100</sup> Wasserman, *supra* note 80 at 328 & n. 101, citing Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 *Wash. U. J.L. & Pol’y*, 61 (2007) at 66-68; Mark Herrmann, James M. Beck, & Stephen B. Burbank, *Debate: Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 *U. Pa. L. Rev. Pennumbra* 141, 146-47 (2009) (Opening Statement of Mark Herrmann & James M. Beck), available at [www.pennumbra.com/debates/debate.php?did=24](http://www.pennumbra.com/debates/debate.php?did=24); Mark Moller, *Procedure’s Ambiguity*, 86 *Ind. L.J.* 645, 667 (2011), at 693.

<sup>101</sup> Wasserman, *supra* note 81 at 332.

<sup>102</sup> Joe S. Cecil et al., *Fed. Judicial Ctr., Motions to Dismiss for Failure to State a Claim After Iqbal* (2011), available at [www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/\\$file/motioniqbal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf).

<sup>103</sup> Patricia Hatamyar Moore, [An Updated Quantitative Study of Iqbal's Impact on 12\(b\)\(6\) Motions](#), 46 *U. Rich. L. Rev.* 603, 604 (2012); Scott Dodson, *A New Look: Dismissal Rates of Federal Civil Claims*, 96 *Judicature* 127 (Nov. / Dec. 2012). Cf. Cecil et al., *supra* note 101 (finding no overall increase in grants of motions to dismiss); Joe S. Cecil et al., *Fed. Judicial Ctr., Update on Resolution of Rule 12(b)(6) Motions Granted with Leave to Amend 1* (2011), available at [www.fjc.gov/public/pdf.nsf/lookup/motioniqbal2.pdf/\\$file/motioniqbal2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal2.pdf/$file/motioniqbal2.pdf) (same) with Lonny Hoffman, [Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss](#), 6 *Fed. Cts. L. Rev.* 1, 30-32 (2011) (critiquing Cecil et al. studies as not making clear that its findings of no effect may be due to small sample size low power).

<sup>104</sup> Kendall W. Hannon, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic v. Twombly on 12(b)(6) Motions*, 83 *Notre Dame L. Rev.* 1811, 1814, 1829 (2008); Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 *Am. U. L. Rev.* 553, 612-13 (2010); Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and*

## C. Other Possible Cases at Intersection of Civil Procedure and Securities Law

This review of the procedural revolution in the Roberts Court helps illuminate its securities law decisions. As shown in Parts I and II, the Roberts Court has not been generally restrictive in its approach to securities law. Instead, it tended to be restrictive when they involve procedure, and when a restrictive approach is more commensurate with a standard than with a bright-line rule. As just shown above, both of those features are shared with the outcomes of the Court’s decisions more generally. In other words, its restrictive securities law decisions are perhaps best understood as part of a broader retrenchment on procedure that has the effect of constraining federal court litigation in favor of business, even as it has a rejected bright-lines rules of substantive law that might have benefited managerial interests even more. This combination of proceduralism and a preference for standards over rules lines up with the background of the Chief Justice as an appellate litigator, who are trained to shape arguments that focus on specific case facts, to not try to cabin judicial discretion in future cases with strongly worded interpretations of statutes, to argue for (or at least not argue against) interpretations and case law developments that incorporate complexity and ambiguity and hence generate future litigation.

This analysis suggests that the Supreme Court is likely to grant certiorari and overturn lower courts in future securities law cases not simply where they have favored shareholders over managers, or encouraged more litigation, but instead they have applied bright-line rules, as in *Jones*, *Matrixx* and *Credit Suisse*, or where the issues concern procedural components of the securities litigation process, as in *Halliburton II*. By contrast, in substantive securities law cases, where no bright-line rule was used in the lower courts, the Court will have the same marginal and lottery-like effects that it S&T argued it was having under the post-Powell Rehnquist Court.

This analysis and set of predictions is consistent with the two grants of certiorari the Court has issued in securities law cases for the October 2014 term, *IndyMac MBS*<sup>106</sup> and *Omnicare*.<sup>107</sup> Both involve procedure and hence are more likely to produce restrictive outcomes. *IndyMac MBS* presents two intertwined procedural issues: whether the filing of a class action tolls the limitations period under the Securities of 1933. The foregoing analysis suggests that the answer will be “not necessarily.” *Omnicare* is another procedural issue, involving pleading standards: whether a plaintiff under Section 11 of the Securities of 1933 must plead that a statement of opinion was subjectively disbelieved by the speaker, or whether it is enough to plead that the opinion was untrue. Again, given

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Housing Discrimination Litigation, 100 Ky. L.J. 235, 241, 254-55 (2012); cf. Joseph A. Seiner, The Trouble with *Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases, 2009 Ill. L. Rev. 1011 (finding non-statistically significant increase in employment discrimination cases) post-*Twombly*)

<sup>105</sup> Joseph A. Seiner, [Pleading Disability](#), 51 B.C. L. Rev. 95, 95-99 (2010). Title I of the ADA prohibits an employer with fifteen or more employees from discriminating against a qualified individual on the basis of disability. [42 U.S.C. §§ 12111-12117 \(2006\)](#).

<sup>106</sup> No. 13-640.

<sup>107</sup> No. 13-435.

its procedural component, the analysis of the article suggests that the answer will be that plaintiffs must plead the opinion was subjectively disbelieved. Beyond the October 2014 term, the issues generated or left open by recent securities law cases, and hence likely to generate litigation in the lower courts, are how to determine whether a fund fee is excessive under Section 36(b), how to apply the “price impact” defense to class certification, and what kinds of discovery will be permitted prior to class certification, in order to permit the parties to join the issues that *Halliburton II* will permit defendants to raise. Given the ongoing mass of securities litigation, particularly in the context of mergers and acquisitions, lower courts can also be expected to attempt to use bright-line to manage their dockets and knock out whole classes of cases. Certiorari will not be granted in all such cases, but when it is, we can expect the Roberts Court to refuse to accept such methods of shutting the courthouse door.

The one exception is likely to track that in procedure more generally – arbitration – where the Court has been exceedingly deferential to the arbitration to reduce litigation. That might suggest that the various kinds of arbitration bylaws being disputed recently<sup>108</sup> will fare well in the Supreme Court, but *First Options* suggests that the outcome will be more unpredictable than a simple pro-business assumed ideology for the Court would predict, precisely because such bylaws implicate one of the many complex steps in the *First Options* doctrine – did the parties actually consent to arbitration? Can shareholders be presumed to have consented to them if they buy stock after they are adopted? If not, might they be valid as against some shareholders but not those who purchased before they were adopted? Does the fact that such a bylaw was adopted pursuant to a disclosed process of board adoption, pursuant to authority granted in the company’s charter or default law, create enough of an indirect form of consent to satisfy *First Options* and progeny? The smart money will be that whatever the answers to those questions under the Roberts Court, they will be complex, hard-to-predict, and generate yet more litigation in the future.

One last implication of this article’s analysis is that the Court may be most likely to take up securities law cases where they intersect with the “procedural revolution” reviewed above, or in other “growth areas” of doctrine, such as the ever-expanding modern “commercial speech” component of the First Amendment. But in those areas, precisely because securities law cases are part of a broader shift, and not the focus of the court’s attention per se, the results are likely to be somewhat lottery-like, hard to predict on the merits, and have unsystematic effects. Where the Court may be expected to matter more systematically to financial regulatory law (including securities law), is when it decides to respond to the increasingly polarized D.C. Circuit in its oversight of the federal regulatory agencies, including the SEC.<sup>109</sup> In that setting, the Republican members of the

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<sup>108</sup> E.g., *Galaviz v. Berg*, D.Ct. N. D. Cal. No. C 10-4233 RS (Jan. 3, 2011), available at <http://www.wsgr.com/PDFSearch/oracle0111.pdf> (last visited July 20, 2014); *Boilermakers Local 154 Ret. Fund v. Chevron Corp.* (Del. Ch. June 25, 2013); *Groen v. Safeway Inc.*, No. RG 14716641 (Superior Court of Cal. May 14, 2014), available at <http://blogs.reuters.com/alison-frankel/files/2014/06/safeway-MTDopinion.pdf> (last visited July 14, 2014).

<sup>109</sup> See John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, Yale L.J. (forthcoming 2014); John C. Coates IV, *Towards Better Cost-Benefit Analysis: An Essay On Regulatory Management*, L. & Contemp. Probs. (forthcoming 2014).



Court will be torn between two ideological imperatives:<sup>110</sup> to favor business, by upholding an activist lower court, or to maintain a commitment to judicial modesty in reviewing regulatory agency decisions, as reflected in decisions such as *Chevron*<sup>111</sup> or *Baltimore Gas*.<sup>112</sup> It has a pair of related cases in the October 2014 term, involving the degree of process required under the Administrative Procedure Act before an agency can change non-binding interpretive rules, that may indicate which way the administrative law is blowing.<sup>113</sup>

## Conclusion

This article has shown that, quantitatively, the Roberts Court’s securities law jurisprudence does not mark a significant departure from prior Supreme Courts. While the share of securities law cases has increased, that is because it has kept the number of securities law cases constant, while shrinking its overall docket. The decisions have not been marked by polarization and dissent – if anything the trend is towards more unanimity. Nor has the Court been generally restrictive of shareholder rights. A qualitative review of the fifteen decisions bears out this analysis, but also suggests two ways to understand the outcomes: the Court has been most restrictive where the cases have involved procedural issues, and it has consistently rejected bright-line rules articulated by lower courts to restrict shareholder rights. Those factors do at least as well, and (given the limits of a small sample) perhaps better in rationalizing outcomes than a simple attitudinal model. Those factors also line up with the Court’s broader retrenchment through procedure on litigation against business generally, as well as with the Chief Justice’s background as an appellate litigator. If this analysis is correct, we should expect to see a continued low level of securities law cases, most commonly occurring where they intersect with procedure, or perhaps the Court’s growing interest in an active “commercial speech” doctrine under the First Amendment, or perhaps where the increasingly polarized D.C. Circuit has been using both the First Amendment and administrative law principles to intervene actively in striking down SEC regulations. What we are likely *not* to see are sweeping bright-line rules, or wholesale reversals of existing doctrines, such as the judicial elimination of Rule 10b-5 litigation. Instead, the Roberts Court’s securities law decisions to date promise just the opposite: continued use of standards, common-law evolution, and increasing doctrinal complexity.

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<sup>110</sup> For a discussion of the broader issues at stake, see Cass R. Sunstein and Adrian Vermeule, *Libertarian Administrative Law*, Working Paper (June 29, 2014), available at <http://ssrn.com/abstract=2460822> (last visited July 1, 2014).

<sup>111</sup> *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

<sup>112</sup> *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983) (“a reviewing court must generally be at its most deferential” when examining scientific determinations).

<sup>113</sup> *Perez v. Mortgage Bankers Association*, No. 13-1041 and *Nickols v. Mortgage Bankers Association*, No. 13-1052.

PRELIMINARY AND INCOMPLETE – PLEASE DO NOT CIRCULATE

<b>Appendix A – Securities Cases in the Roberts Court Through July 15, 2014</b>					
<b>Case</b>	<b>Term</b>	<b>Expansive?</b>	<b>Procedural?</b>	<b>Vote</b>	<b>Roberts Vote Expansive?</b>
<b>Tellabs</b>	2006	No	No	8-1	No
<b>Stoneridge</b>	2007	No	No	5-3	No
<b>Jones</b>	2009	Yes	No	9-0	Yes
<b>Merck</b>	2009	Yes	Yes	9-0	Yes
<b>Morrison</b>	2009	No	Yes	8-0	No
<b>PCAOB</b>	2010	Neutral	No	5-4	N/A
<b>Matrixx</b>	2010	Yes	No	9-0	Yes
<b>Janus</b>	2010	No	No	5-4	No
<b>Halliburton I</b>	2010	Yes	Yes	9-0	Yes
<b>Credit Suisse</b>	2011	No	Yes	8-0	No
<b>Gabelli</b>	2012	No	Yes	9-0	No
<b>Amgen</b>	2012	Yes	Yes	6-3	Yes
<b>Troice</b>	2013	Yes	Yes	7-2	Yes
<b>Lawson</b>	2013	Yes	No	6-3	Yes
<b>Halliburton II</b>	2013	No	Yes	9-0	No
<b>% Expansive</b>		50% (7 of 14)	53% (8 of 15)		50% (7 of 14)
<b>Dissents/Votes</b>				15%	
<b>5 Vote Decisions</b>				3 (20%)	
<b>Unanimous Votes</b>				8 (53%)	