SECURITIES LITIGATION IN THE ROBERTS COURT: AN EARLY ASSESSMENT

John C. Coates IV*

This Article provides an early assessment—both quantitative and qualitative—of the Roberts Court's securities-law decisions. While the Roberts Court has continued to take an average of one to two securities-law cases per year, such cases represent an increased share of the Supreme Court's docket, compared to prior Courts, because its overall docket has shrunk. The Roberts Court has maintained the same overall split in "expansive" or "restrictive" outcomes as the post-Powell Rehnquist Court, but has reduced polarization: more than half were unanimous and only three included five-vote majorities. An attitudinal model does no better than a coin flip in predicting outcomes. This Article shows a newly heightened role for procedure and a resistance to bright-line rules, with procedural decisions more restrictive and rejections of bright-line rules more expansive, factors that predict outcomes for cases argued in the October 2014 term, and the types of cases likely to attract the attention of the Court in the future. The turn to procedure matches the background and interests of the Chief Justice, a former appellate litigator, leading a broader "procedural revolution" on the Court that stretches beyond the limited reach of securities law.

TABLE OF CONTENTS

---

* John F. Cogan Jr. Professor of Law and Economics, Harvard Law School. Thanks for helpful discussions, but no blame for the contents of this Article, should go to Allen Farrell, Helen Hershkoff, Scott Hershovitz, Bert Huang, Martha Minow, Bill Rubenstein, Ava Scheibler, and Kathy Stone—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.

INTRODUCTION

Ten years ago, as the Rehnquist Court was coming to a close, Professors Thomas Sullivan and Robert Thompson ("S&T") demonstrated that "private-law" cases—by which they meant securities and antitrust—had plummeted in importance in the Supreme Court from their earlier heyday. They pointed out that the Court's case law has cycled through decisions that first expanded, then contracted, and finally preserved the status quo in the reach of securities and antitrust laws.[1] Their work was useful as both a description and an explanation of Supreme Court cases—it gives an overview and assessment of cases in their study, as well as offers a more complex analysis than the standard, simplistic, attitudinal model that political scientists use to reduce law to partisan affiliations.[2] 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

---

1. E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571, 1572–74 (2004) [hereinafter S&T]; *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. *See* Alfred F. Conrad, *Securities Regulation in the Burger Court*, 56 U. COLO. L. REV. 193 (1985) (reporting on securities-law cases through 1984).

2. *E.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86–87 (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").

and outcomes of Supreme Court cases from simple models predicated on simple counts of Republican and Democratic appointees on the Court.[3]

This Article updates S&T's work 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. One finding is that securities and antitrust cases represent a larger share of the Roberts Court's docket than they did under Rehnquist. But, as others have explored, this is only because its docket is substantially smaller than that of prior Courts.[4] The total number of securities-law cases per term has increased slightly, while the number of antitrust-law cases has declined slightly—and 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 has offered less dissent in securities and antitrust cases, as measured by minority votes and five-vote majorities, than prior Courts. Inconsistent with any sweeping view that the Roberts Court is "pro-business," it continues to be significantly more "expansive" in securities-law cases than the Court was in the "restrictive" Powell era.[5] Quantitatively, 50% of the decisions expand the reach of the securities laws, slightly higher than the 47% under post-Powell Rehnquist Court, versus the much lower 22% in the Powell era.[6] This mixed quantitative assessment is matched by a qualitative review of the cases: they 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, in his time as Chief, has been the only Justice that has sided with the majority in every securities-law decision.[7]

Where the Roberts Court has been restrictive, its decisions are perhaps best understood as part of a broader retrenchment on procedure that constrains federal court litigation in favor of business.[8] At the same time, the Roberts Court has rejected bright-line rules of substantive securities law that might have benefited managerial interests even more.[9] This combination of proceduralism, and a preference for standards over rules, matches up well with the Chief Justice's

3. *See generally* S&T, *supra* note 1.

4. *E.g.*, Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219 (2012) (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).

5. *See infra* notes 25–26 and accompanying text (explaining how cases were classified as "expansive" or "restrictive").

6. *See infra* Appendix AI; S&T *supra* note 1, at 1580 (Table 1).

7. *See infra* Appendix AI.

8. *See infra* notes 12–13 and accompanying text.

9. 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 *infra* text accompanying notes 45–58.

background as an appellate litigator and 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 in order to preserve discretion for judges, as well as 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 . . . ."[10] But that statement must be taken in context with less-pithy statements which are freighted with connotations—not of partisan, but rather 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 . . . ."[11] This is the ideology of the common law. It is not the ideology of a transactional lawyer looking for clear guidance in the form of bright-line rules. Instead, it is the ideology of a litigator who is more comfortable with shifting standards of litigation and the nuances of procedure, than with the substantive statutes and Securities and Exchange Commission ("SEC") regulations that constitute the bulk of securities-law practice.

Part I of this Article provides a quantitative and qualitative overview of securities litigation in the Roberts Court—in absolute terms, as well as relative both to other types of cases and 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 prior restrictive decisions on bright-line, substantive decisional rules, and least common when lower courts had based prior, restrictive decisions on procedural standards. Part III proceeds in three sections: Section (a) suggests the trends depicted in Parts I and II are 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; Section (b) applies the Article's analysis to cases argued in the October 2014 term; and finally, Section (c) sketches the types of cases likely to attract the Supreme Court's attention in the future.

This Article's main takeaway is that the Court can be expected to continue to have both marginal and lottery-like effects on substantive securities law. This is particularly true where it intersects with "growth areas" of doctrine, such as the ever-expanding modern First Amendment that produced *Brown v. EMA*, also known as "*Schwarzenegger*"[12]—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 v. Federal Election Commission*[13]—where the Court's reasoning reflected a lack of basic understanding of how public companies

10. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States*: *Hearing before the S. Comm. on the Judiciary*, 109th Cong. 31 (2005) (statement of John Roberts).

11. *See id.* at 55, 270.

12. 131 S. Ct. 2729 (2011) (striking down California ban on sale of violent video games to children).

13. 558 U.S. 310 (2010).

function and are regulated. With respect to business law generally and securities law in particular, where the Roberts Court can be expected to systematically matter most 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, as well as other aspects of administrative law relevant to securities regulation.[14]

I. General Trends in Securities-Law Cases in the Supreme Court

This Part of the 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.

A. Data and Coding

To gather a comprehensive set of securities-law cases under the Roberts Court, this Article collects cases coded as issue 80120 in the Supreme Court Database ("SCD")[15] for the 2005–2012 terms (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[16] was reviewed for cases pending in the 2013 term (n=3), and Westlaw was searched for additional securities-law cases (n=1, *Erica P. John Fund, Inc. v. Halliburton Co.*,[17] coded as 90110 in SCD, i.e., civil procedure). Additionally, *Halliburton Co. v. Erica P. John Fund, Inc.*,[18] 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.[19] The result is a dataset of 15 securities-law decisions from 2005 to 2014. These data were augmented with the full SCD from prior Courts, focusing on antitrust cases (issues 80010 or 80020 in SCD) and economic-issue cases (issue area 8 in SCD).[20]

For each decision, the Author and a research assistant separately read the opinion and independently applied the definitions of "expansive" and "restrictive"

---

14. *See* John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882 (2015) [hereinafter Coates, *Case Studies and Implications*]; John C. Coates IV, *Towards Better Cost-Benefit Analysis: An Essay On Regulatory Management*, 78 L. & CONTEMP. PROBS. (forthcoming 2015) [hereinafter Coates, *Regulatory Management*].

15. SUPREME COURT DATABASE, http://scdb.wustl.edu (last visited July 20, 2014).

16. SCOTUSBLOG, http://www.scotusblog.com (last visited July 20, 2014).

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

18. Halliburton Co. v. Erica P. John Fund, Inc. (*Halliburton II*), 134 S. Ct. 2398 (2014).

19. *See infra* Appendix A.

20. Additional searches or recoding were not done—this is inconsistent with the construction of the Roberts Court dataset, but given the small numbers, it is unlikely to bias the qualitative results in a meaningful way.

used in S&T,[21] resulting in the classifications reflected in Appendix A of this Article. In addition, each case was coded as "procedural" or "substantive" based on whether the decision turned on an issue that is taught in a procedure course, as opposed to solely in a substantive securities-law course.[22] Finally, each case was read to decide if the Supreme Court's holding was more of a "bright-line" rule or more of a "standard," in comparison to the lower court's holding.[23] 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.

Among the dataset, there were two cases that were not obviously expansive or restrictive: *Free Enterprise Fund v. Public Company Accounting Oversight Board*[24] (*PCAOB*) and *Chadbourne & Parke LLP v. Troice*.[25] *PCAOB* was classified as "neutral" for "expansive/restrictive" purposes because it upheld the Sarbanes–Oxley Act overall, and upheld all but one aspect of the statute's scheme with respect to the *PCAOB*. In *Troice*, the Court held that the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") did not preclude the pending state-law complaint, and thus allowed the complaint to proceed. As discussed more below, though the result in *Troice* was expansive, the Court interpreted the phrase "in connection with" narrowly, which, in future cases, could restrict the reach for federal—as opposed to state—securities laws. Nevertheless, for purposes of assessing the Roberts Court to date, *Troice* expanded the reach of securities litigation overall and, thus, is coded as "expansive" in the remaining analysis—though that choice does not materially affect the qualitative conclusions.

The only case that was difficult to assess for the substantive/procedural coding was *Morrison v. National Australia Bank Limited*,[26] which could be viewed in either procedural or substantive terms—procedural because it is essentially about what types of plaintiffs may bring cases; and substantive because the Court held that the Second Circuit's view of the case as raising jurisdictional questions was mistaken, and instead, the Court based its holding on a view of the substantive purposes of the securities laws. For reasons discussed below, *Morrison* is classified as procedural.

B. Quantitative Overview

Analysis of the data set shows four trends or characteristics of the Roberts Court. First, there is an increased share of securities-law cases. Table 1 presents the

---

21. *See* 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.)

22. Examples of "procedural" cases are discussed in Part I.C.

23. *See generally* 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).

24. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd. (*PCAOB*), 561 U.S. 477 (2010) (holding for-cause removal provision unconstitutional).

25. 134 S. Ct. 1058 (2014).

26. 130 S. Ct. 2869 (2010).

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 2% 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, 2% 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.[27]

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

Second, during the Roberts Court there has been a decline in the overall docket. However, the increased share of securities-law cases is due largely to the

27. Over the period 1971–1991, about 1.2% of all federal court civil cases were securities-law cases. Terence Dunworth & Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971–1991*, 21 LAW & SOC. INQ. 497, 564–67 (1996) (Table A1) (44,374 securities law cases out of 3,584,578 federal law cases). In 2013, the share of the federal court civil case docket represented by securities law cases was significantly down, to roughly 0.4%. *Compare Table C-7*, U.S. COURTS, HTTP://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/C07Sep13.pdf (last visited November 27, 2014) (1,113 securities, commodities and exchange cases filed in 2113 in federal courts) *with Table C*, U.S. COURTS, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/C00Sep13.pdf (last visited November 27, 2014) (284,604 total federal civil cases).

Court's overall shrunken docket. Table 2 presents the absolute numbers of cases under each of the Supreme Court Chief Justices since Chief Justice 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 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.

Table 2	**Total Cases**	**Cases Per Year**	**Securities-law cases**	**Securities-law cases Per Year**	**Antitrust-law cases**	**Antitrust-law cases Per Year**	**Economic-issue cases**	**Economic-issue cases Per Year**
Vinson	1011	144.4	12	1.7	47	6.7	292	41.7
Warren	2643	165.2	12	0.8	152	9.5	648	40.5
Burger	3234	190.2	38	2.2	90	5.3	562	33.1
Rehnquist	2325	129.2	18	1.0	27	1.5	393	21.8
Roberts	795	88.3	14	1.6	12	1.3	141	15.7
Total	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 Roberts 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.

Third, as shown in Table 3, there has been a decrease in dissent and polarization in securities and antitrust law. Securities law (and even more so, antitrust law) has seen a significant drop in the number of minority votes, and in the number of five-vote majority decisions. Under Chief Justice Rehnquist, dissenting votes in securities-law cases represented 22% of total votes, and there were five-vote majorities in seven (39%) securities-law cases, including such cases as the infamous *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*,[28]

28. 511 U.S. 164 (1994).

the inscrutable *Gustafson v. Alloyd Co.*,[29] and the intricate *Reves v. Ernst & Young*.[30] Under Chief Justice Roberts, there have been only 15% dissenting votes in securities-law cases, and only three (20%) five-vote cases: *PCAOB*,[31] *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*,[32] and *Janus Capital Group, Inc. v. First Derivative Traders*.[33] 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%.

Table 3	**Securities-law cases**		**Antitrust-law cases**		**Economic-issue cases**		**All Cases**	
	Minority / All Votes	5-Vote Majorities as % of	Minority / All Votes	5-Vote Majorities as % of	Minority / All Votes	5-Vote Majorities as % of	Minority / All Votes	5-Vote Majorities
Vinson	8%	17%	19%	21%	20%	21%	20%	23%
Warren	24%	50%	17%	22%	18%	18%	18%	28%
Burger	15%	5%	19%	28%	16%	16%	19%	20%
Rehnquist	22%	39%	20%	19%	15%	17%	20%	29%
Roberts	15%	20%	9%	8%	17%	23%	20%	23%
Total	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 Justice 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. Additionally, 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 that most restricted the reach of

29. 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 § 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 V. 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.").

30. 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).

31. 561 U.S. 477 (2010).

32. 552 U.S. 148 (2008).

33. 131 S. Ct. 2296 (2011).

securities law from the status quo ante was *Morrison*, which was a unanimous decision, as was the recently decided *Halliburton II*.

What about outcomes? How, if at all, has the Roberts Court changed the results of securities-law cases? The dataset shows no overall change in restrictive outcomes during the Roberts Court than was seen in the post-Powell Rehnquist Court. Table 4 breaks down case outcomes according to the "expansive" and "restrictive" classification scheme used in S&T by era.[34] As exhibited by Table 4, the Roberts Courts can be 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 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.

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

C. Qualitative Overview

So much for the raw numbers—but numbers never tell the whole story. Perhaps the cases where the Roberts Court has been restrictive are more important than the numbers suggest, or more important than where it has been expansive. What have been the substantive results of the Roberts Court's securities-law decisions? Below is a brief summary of those decisions.

34. *See infra* Appendix A.

** Eras from S&T, *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 nor restrictive.

1. Status-Quo-Preserving Decisions

Several of the cases essentially preserved the status quo. *Stoneridge*[35] and *Janus*[36] were both decisions rejecting efforts to find a way around *Central Bank*, which disallowed private parties from bringing aiding and abetting suits against third parties under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. Whatever one may think of the merits of *Central Bank*,[37] 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*: since the advisor is legally separate from the fund, and since the fund is the formal "speaker" when it issues disclosure documents, the advisor is protected by *Central Bank*'s ban on suits against third parties.[38] Two additional decisions classified as "restrictive"—*Credit Suisse Securities LLC v. Simmonds*[39] and *Gabelli v. Securities & Exchange Commission*[40]—concerned statutes of limitations in the securities context. Neither was so dramatic as to have sweeping implications for most securities litigation. As these cases address quintessentially "procedural" issues, they are discussed more in Part II.

2. Restrictive Decisions

Two of the remaining "restrictive" decisions—*Tellabs, Inc. v. Makor Issues & Rights, Ltd.*[41] and *Morrison*[42]—were important developments in the 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") to require private plaintiffs to "state with particularity facts giving rise to a strong inference" of scienter.[43] The Court went on to hold that, to pass this test, the facts alleged must be both "cogent" and at least as compelling as alternatives—a tougher standard than

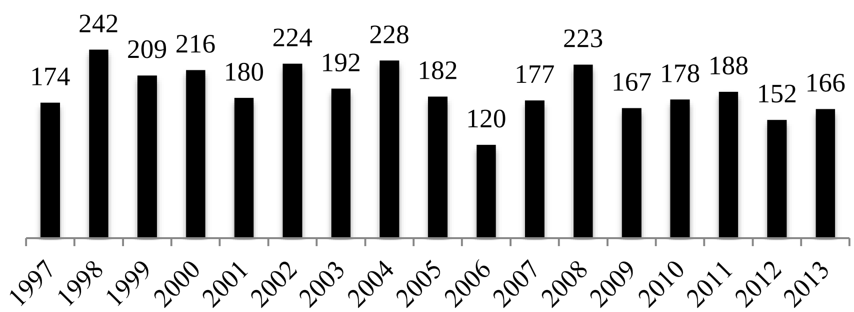
---

35. 552 U.S. at 148.
36. 131 S. Ct. at 2296.
37. Cent. Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A., 511 U. S. 164 (1994).
38. 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.
39. 132 S. Ct. 1414 (2012).
40. 133 S. Ct. 1216 (2013).
41. 551 U.S. 308 (2007).
42. Morrison v. Natl. Austl. Bank Ltd., 561 U.S. 247 (2010).
43. *Tellabs*, 551 U.S. at 334.

the Seventh Circuit's test:[44] whether a "reasonable person could infer" scienter from all the facts plead. At the same time, the Supreme Court also rejected other formulations of the test, the Sixth Circuit's test:[45] whether an inference of scienter was the "most plausible of competing inferences," which would have been more stringent than the test adopted in *Tellabs*. In effect, the Supreme Court gave factual ties to the plaintiff, while the Sixth Circuit had given them to the defendant, and the Seventh Circuit had only required the plaintiff's good effort.

While the *Tellabs* decision tightened 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* decision differently, it may not be surprising that, in studies of aggregate litigation rates or outcomes, no practical effect of the case has been discernible. As depicted in Figure 1, this is shown by the fact that, following the 2007 decision in *Tellabs*, the number of class actions under Rule 10b-5 did not drop in 2008.[46]

Figure 1. Class Action Private Securities Litigation Filings[***]



The "restrictive" decision that had the most important potential practical effect was the 2010 decision in *Morrison*. That decision held that §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

44. *Tellabs*437 F.3d at 602.

45. Fidel v. Farley, 392 F.3d 220, 227 (2004).

46. *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 3 (2013). 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 in 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.

[***] Source: Cornerstone Research, Securities Class Action Filings: 2013 Year in Review at 3.

foreign companies on *foreign exchanges*—hence the "foreign cubed" or "*f-cubed*" label.[47] That was true, said the Court, even if deceptive conduct itself included behavior by U.S. citizens in the United States because of a canon of statutory interpretation against extraterritorial application of federal statutes absent clear intent by Congress.[48] 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 United States but the acceptance is made outside the United States, or vice versa, or the security was "issued" in the United States but then purchased and subsequently retraded outside the United States, or both offer and acceptance are made by foreign traders outside the United States but they connect via an exchange owned by a U.S. 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 U.S. borders, and the Roberts Court clearly sought to push litigation arising out of such transactions out of the U.S. federal courts.

Practically, this was an important case not only because it restricts the reach of U.S. securities law on the relatively unusual fact pattern in *Morrison*—where a foreign buyer buys and repeats statements made by a deceptive U.S. 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 shares trading in the United States.[49] Smaller classes would lead to smaller damage awards in those rare instances where 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.[50] *Morrison* had disturbing implications for the ability of the SEC and U.S. Department of Justice ("DOJ") to police securities-related misconduct within the United States. However, Congress quickly intervened with the Dodd–Frank Act[51] to provide the necessary affirmative indication of extraterritoriality for §10(b) actions involving transnational securities-fraud cases brought by the SEC and DOJ. Congress further directed the SEC to conduct a study of whether that authority

47. *Morrison*, 561 U.S. at 265–70.

48. *Id.* at 256–62.

49. Subsequent lower court cases have limited *Morrison* in some ways (such as by permitting actions based on trading in American Depository 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 U.S. exchange, or by dismissing actions against U.S.-based intermediaries who invested the plaintiffs' money in foreign securities purchased outside the United States).

50. Elaine Buckberg and Max Gulker 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. Elaine Buckberg & Max Gulker, Cross-Border Shareholder Class Actions Before and After Morrison 6 (Dec. 16, 2011) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1973770.

51. Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 929P(b)(2), 124 Stat. 1862–63.

should extend to private actions, which the SEC completed in 2012.[52] 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."[53] 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.

3. Halliburton II

In the most recent restrictive decision, *Halliburton II*,[54] the Court overturned the Fifth Circuit's holding that evidence of lack of price impact could not be used to rebut the *Basic* presumption[55] at the class certification stage of a § 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 at the time the misrepresentations were made. The holding was similar to, but—because it put the burden on the defendant—slightly less restrictive than proposals advanced by legal academics.[56] This was apparently an important difference for Justices Ginsburg, Breyer, and Sotomayor, as noted in their brief concurrence.[57]

The importance of the *Halliburton II* decision is unclear. The Court did not sweep as far as defendants sought, and refused to reverse the holding in *Basic Inc. v. Levinson*.[58] In *Basic*, the Court established that plaintiffs in securities-fraud class actions should be presumed to have relied on alleged misrepresentations at the time they purchased securities in a publicly traded stock because the market price would have reflected the effect of those misrepresentations.[59] Had the Court gone so far as to overturn *Basic*, it would have been the most significant securities-law decision in the Roberts era.

---

52. SECS. & EXCH. COMM'N, STUDY ON THE CROSS-BORDER SCOPE OF THE PRIVATE RIGHT OF ACTION UNDER SECTION 10(B) OF THE SECURITIES EXCHANGE ACT OF 1934 (2012), *available at* http://www.sec.gov/news/studies/2012/929y-study-cross-border-private-rights.pdf.

53. *Id.* at B1.

54. *Halliburton II*, 134 S. Ct. 2398 (2014).

55. *See infra* text accompanying note 56.

56. *See* Brief for Erica P. John Fund, Inc. as Amici Curiae Supporting Petitioners at Halliburton Co. et al., 134 S. Ct. 2398, (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 A. Bebchuk & Allen Ferrell, *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).

57. *Halliburton II*, 134 S. Ct. at 2417.

58. 485 U.S. 224 (1988).

59. *Id.* at 245.

The actual holding in *Halliburton II* was more modest—although its long-term significance is uncertain. Some argue that the holding will be generally unimportant, since most securities class actions are prompted by a drop in 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.[60] 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 this is a plausible method for implementing *Halliburton II* in many cases, such an approach would depart 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:

> 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.[61]

As noted by Lucian Bebchuk and Allen Farrell, 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).[62] In such cases, there will only be price impact when corrective disclosure is made, not at the time the lie was made. Corrective 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).[63] 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

60. Memorandum from John F. Savarese et al., Reflections on *Halliburton* (July 1, 2014) (client memo on file with author).

61. Stefan J. Padfield, *Lawrence Mitchell on* Halliburton v. Erica P. John Fund *and the Other Law Professors*, BUS. LAW PROF BLOG (Apr. 27, 2014), http://bit.ly/1n0X6XT.

62. Lucian Bebchuk & Allen Ferrell, *Remarks on the* Halliburton *Oral Argument (2): Implementing a Fraudulent Distortion Approach*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (March 12, 2014, 9:10 AM), https://blogs.law.harvard.edu/corpgov/2014/03/12/remarks-on-the-halliburton-oral-argument-2-implementing-a-fraudulent-distortion-approach/ (emphasis added).

63. *Id.*

any one statement would have, and increasing the likelihood that 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 nonfinding of price impact around dual-effect statements as insufficient to block class certification on grounds 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 nonfindings warrant shifting the burden back to the plaintiffs to prove actual reliance. Plaintiffs will point to any contemporaneous statement as reason for a nonfinding 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 precertification stage. Defendants' and plaintiffs' lawyers alike will face higher costs in the form of briefings 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 precertification 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."[64]

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

Halliburton II is also in tension with earlier Roberts Court cases: *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds* and *Halliburton I*. In *Amgen*, a 6-3 decision, the Court refused to allow defendants to argue that the *Basic* presumption did not apply because the misstatements were immaterial and could not impact price.[65] In *Halliburton I*, the Court reached the same bottom line with respect to loss causation.[66] The Court held in those cases that materiality and loss causation could not be considered on class certification 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*.

64. *Halliburton II*, 134 S. Ct. 2398, 2417 (2014).
65. Amgen Inc. v. Conn. Ret. Plans and Trust Funds, 133 S. Ct. 1184, 1190 (2013).
66. *Halliburton I*, 131 S. Ct. 2179, 2185–86 (2011).

As litigation partners at Wachtell Lipton commented, the reasoning in *Amgen* and *Basic* 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.[67]

Put differently, a 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 *Halliburton II* Court conceded the validity of this critique, calling it "fair enough."[68] 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 Justice Thomas, joined by Justices Scalia and Alito, advocated for overruling *Basic*[69] on grounds that market prices cannot be relied upon by investors—an ironic position given their pro-market, deregulatory ideological commitments.[70] But their concurrence did not make much of the inconsistency between *Amgen* and the *Halliburton II* majority. That may be because one of those concurring—Justice 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 span of a year—Justice Kennedy voted in the minority in *Amgen*, along with Justices Scalia and Thomas. If one views *Halliburton I* and *Halliburton II* as inconsistent, all nine Justices switched positions in the span of three years.

Might we see in these inconsistencies a lack of strong interest in securities law by the Supreme Court? Might the Justices have weak preferences that align with their ideological commitments, discussed more below, but be willing to give them

---

67. Savarese et al., *supra* note 60.

68. *Halliburton II*, 134 S. Ct. at 2416.

69. *Id.* at 2417–27.

70. Prior to going on the bench, Justice Scalia was General Counsel of the U.S. Office of Telecommunications Policy (which promoted telecommunications deregulation) from 1972 to 1974, and from 1977 to 1981 was co-editor-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 Regulation Magazine Archives*, CATO INST., http://www.cato.org/regulation/archives (last visited Jan. 23, 2015). 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." Samuel Alito, Jr., U.S. Supreme Court Justice, Personal Statement on Abortion (Nov. 15, 1985), *available at* http://news.findlaw.com/hdocs/docs/alito/111585stmnt2.html.

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?[71]

Or do these inconsistencies suggest that framing effects[72] can influence even a Supreme Court Justice? The result in *Halliburton II* was termed a "midway position" by Justice Kennedy during oral argument 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."[73] 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 Justice Alito in his brief concurrence in that case[74]—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 what distinguishes *Halliburton II* from *Amgen* and *Halliburton I* found in legal formalism? As the majority opinion states, materiality and loss causation are formally class-wide questions as a matter of law, while actual reliance is not.[75] 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 reconciliation of the cases is consistent with the above explanations—perhaps legal formalism would matter less in cases that implicate 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.

5. Expansive Decisions

What of the Roberts Court's record on expansionary securities-law decisions? Most were as modest as the majority of restrictive decisions. *Jones v*

71. *E.g.*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 9–10 (1998) (advancing ideological preferences is only one of many motives and judges sometimes behave strategically).

72. *E.g.*, D. Kahneman & A. Tversky, *Choices, Values, and Frames*, 39 AM. PSYCH. 341–50 (1984).

73. Transcript of Oral Argument, Halliburton Co. v. Erica P. John Fund, Inc., No. 13-317 (Mar. 5, 2014), at 17, *available at* http://1.usa.gov/1nEuuj1.

74. *See* Donald C. Langevoort, *Judgment Day for Fraud-on-the-Market?: Reflections on* Amgen *and the Second Coming of* Halliburton, 57 ARIZ. L. REV. 37, 38 (2015) ("[T]he two dissents suggested that *Basic* may have been wrongly decided in 1988, and while Justice Alito joined the majority, he wrote a cryptic concurrence indicating that the *Basic* presumption had a shaky foundation that warranted future reconsideration. 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.*").

75. *Halliburton II*, 134 S. Ct. 2398, 2424–26 (2014).

Harris Associates[76] rejected a decision by Judge Frank Easterbrook[77] that would have ruled out consideration of comparative fee data in cases under § 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.[78] The decision is thus expansive relative to an alternative, lower court holding, but no more so than prior law.

Both *Halliburton I*[79] and *Amgen*[80] 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 Initiatives, Inc. v. Siracusano* rejected a specific statistically based test for the "materiality" qualifier of Rule 10b-5 and many other securities rules.[81] *Merck & Company v. Reynolds* 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.[82] Again, the Court's decision preserved the majority rule among lower courts that had confronted the issue.

Of the decisions "expanding" the reach of securities litigation, only the *Lawson v. FMR LLC*[83] and *Troice*[84] 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,[85] 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.[86] 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

---

76. Jones v. Harris Assocs., 559 U.S. 335 (2010). *See* John C. Coates IV, *The Downside of Judicial Restraint: The (Non-) Effect of* Jones v. Harris, 6 DUKE J. CON. L. & PUB. POL'Y 58 (2010).

77. Jones v. Harris Assocs., 527 F.3d 627, 632 (2008), motion to rehear en banc denied 537 F. 3d 728 (2008) (per curiam).

78. Gartenberg v. Merrill Lynch Asset Mgmt., 694 F.2d 923 (2d Cir. 1982). For a discussion of *Gartenberg*, see John C. Coates IV & R. Glenn Hubbard, *Competition in the Mutual Fund Industry: Evidence and Implications for Policy*, 33 J. CORP. L. 151 (2007).

79. *Halliburton I*, 131 S. Ct. 2179 (2011).

80. Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184 (2013).

81. 131 S. Ct. 1309, 1319 (2011).

82. 559 U.S. 633, 653 (2010).

83. Lawson v. FMR LLC, 134 S. Ct. 1158 (2014).

84. Chadbourne & Parke LLP v. Troice, 134 S. Ct. 1058 (2014).

85. 15 U.S.C. § 78bb(f)(1) (2012).

86. 134 S. Ct. at 1158.

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, 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.

II. AN EMPHASIS ON PROCEDURE AND STANDARDS

How can we best understand securities-law decisions in the Roberts Court? This Part of the Article 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 were most common when lower courts based restrictive decisions on bright-line, substantive-decisional rules, and were least common when lower courts based restrictive decisions on procedural standards.

A. A Pure Attitudinal Model

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 at work besides party politics.

In the simplest version of an attitudinal model, one would predict that Republican appointees would vote for restrictive decisions, and Democratic appointees would vote for expansive decisions. To be sure, securities law is an area where the standard Republican equals business- and manager-friendly and the standard Democrat equals consumer- and worker-friendly polarities do not always dominate. In a general sense, business has an interest in law that punishes and deters fraud because that will translate into lower capital costs for nonfraudulent 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 a 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 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 three, 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.[87] The average "expansive" vote among the Democratic appointee 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 62%–67% and Republican appointees' expansive votes range 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),[88] although less well with the Quinn–Martin dynamic measure of votes over time (correlation coefficient = -0.6, p-value < 0.075).[89] 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).

87. For evidence of these Justices' drift left, see Andrew D. Martin & Kevin M. Quinn, *Dynamic Point Estimation Via Markov Chain Monte Carlo for the US. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 146 (2002). *See also* Andrew D. Martin & Kevin M. Quinn, Can Ideal Point Estimates Be Used as Explanatory Variables? 11 (Oct. 8, 2005) (unpublished manuscript), *available at* http://mqscores.wustl.edu/media/resnote.pdf.

88. *See* Jeffrey Segal, *Perceived Qualifications and Ideology of Supreme Court Nominees, 1937–2012*, STONY BROOK UNIV., www.stonybrook.edu/commcms/polisci/jsegal/QualTable.pdf (last visited Jan. 24, 2015).

89. *See Martin-Quinn Scores: Measures*, BERKELEY LAW, http://mqscores.berkeley.edu/measures.php (last visited Jan. 24, 2015).

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

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, 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. The majority was an equally unusual grouping, which included three left- and three right-leaning Justices. In *Amgen*, Chief Justice Roberts and Justice Alito joined the liberal wing of the Court, while in *Troice*, Chief Justice Roberts and Justices Thomas and Scalia joined the liberal wing. The most expansive democratic appointee (Justice Sotomayor) voted restrictively almost a quarter of the time, the least expansive (Justice Kennedy) voted expansively almost a third 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. This 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

**** 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 (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 http://mqscores.berkeley.edu/measures.php (last visited Jan. 24, 2015).

in fact seven came out expansive. A correct classification percentage of 50% (7 out of 14) is precisely the same as odds in 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 versus substance. Just under half (7, or 47%) of the 15 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?
Merck	Inquiry notice for statute of limitations for Section 10(b)	Yes
Morrison	Quasi-jurisdictional reach of securities laws	No
Halliburton I	Loss causation before class certification	Yes
Credit Suisse	Equitable tolling for statute of limitations under Section 16	No
Gabelli	Commencement of statute of limitations period for IAA	No
Amgen	Proof of materiality prior to class certification	Yes
Halliburton II	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.[90] 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.[91] 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; the same goes for 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. As with those distinctions, however, in a few cases, the use of bright-line rules is a clear part of a lower-court case: *Jones*, where the Seventh Circuit precluded recoveries in § 36(b) cases based solely on comparative fee evidence; *Matrixx*, where the Ninth Circuit based findings of materiality on showings of statistical significance in a factual inquiry on the relevant disclosure; and *Credit Suisse*, where the Ninth Circuit adopted a bright-line test automatically tolling the statute of limitations for § 16(b) cases until the insider had filed the requisite form under § 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."[92] 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.[93] The majority and the dissent (and the lower court) each provided meaning for "in connection with."[94] The majority held that the phrase only included false statements "material to" a purchase of a covered security;[95] the

90. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 253–54 (2010).
91. *Id.* at 255.
92. Chadbourne & Parke LLP v. Troice, 134 S. Ct. 1058 (2014).
93. *Id.* at 1071.
94. *Id.*
95. *Id.* at 1066.

dissent, by contrast, read the phrase to include false statements that "coincided with" and "furthered" the sales or purchases of covered securities.[96] 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 potentially be more 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 versus 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 court 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.

96. *Id.* at 1073 (Kennedy, J., dissenting).

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 Justice Roberts.

A. Roberts's Background as an Appellate Litigator

Chief Justice Roberts was 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 joining the bench.[97] At Harvard, he earned a bachelor's degree (in history) in three years (graduating summa cum laude), followed by a law degree where, showing his interest in law-related management, he was managing editor of the *Harvard Law Review*.[98] 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 12 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.[99] 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 as a partner.[100] Roberts served no time as a securities lawyer while in private practice, other than in his role as an appellate litigator. (As noted at the outset, no transactional lawyer—corporate or securities from a nonlitigation 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,[101] taught as an adjunct law professor at Georgetown,[102] and argued 39 cases before the Supreme Court. The first of those cases was a securities-law case[103] 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.[104] Roberts, representing defendants who had successfully resisted confirmation of the arbitration award in the Third Circuit, lost

---

97. *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE U.S., http://www.supremecourt.gov/about/biographies.aspx (last visited Jan. 24, 2015).

98. *Id.*

99. *Id.*

100. Press Release, Hogan Lovells, Former Hogan & Hartson Partner John G. Roberts, Jr. Confirmed as Chief Justice of the United States (Sept. 29, 2005), *available at* http://www.hoganlovells.com/newsmedia/newspubs/detail.aspx?news=456.

101. *Id.*

102. *John Roberts Fast Facts*, CNN (Jan. 12, 2014, 6:44 PM), http://www.cnn.com/2013/03/25/us/john-g-roberts-fast-facts/.

103. *E.g.*, First Options of Chi., Inc., v. Kaplan, 514 U.S. 938 (1995).

104. *Id.*

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 lower courts should apply a deferential standard of review.[105]

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 relevant state law) presume arbitrability is *not* for the arbitrator to decide.[106] In other words, silence weighs in favor of arbitration in the presence of an arbitration agreement, but against arbitration in the absence of one.

First Options of Chicago, Inc. v. Kaplan, was the product of Roberts's personal experience as a litigator, and likely one of the most vivid—his first 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 because 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.[107]

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 16 times in Supreme Court cases alone,[108]

---

105. *Id.* at 943–44.
106. *Id.* at 944–46.
107. *Id.* at 945.
108. *See, e.g.*, BG Grp. PLC v. Republic of Arg., 134 S. Ct. 1198 (2014); Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (2013); Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., 559 U.S. 662 (2010); Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63 (2010); Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287 (2010); Arthur Andersen LLP v. Carlisle,

including four in which it was distinguished,[109] six in which it was cited to different purposes in different opinions (dissenting or concurring),[110] and twice in which it was cited by the dissent only.[111] 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 the *Erie–Hanna* doctrine."[112] This turn towards procedure is all the more striking because of how little time the Court spent on procedure under previous 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."[113]

More controversially, the Roberts Court has been using procedure to cut back on civil litigation against business defendants, deploying a range of loosely phrased standards. These cases include decisions on jurisdiction, pleading, class action requirements, and enforcement of arbitration contracts. As scholar Stephen 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, thus evading the Congressional

---

556 U.S. 624 (2009); Hall Street Assocs., LLC v. Mattel, Inc., 552 U.S. 576 (2008); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003); Howsam v. Dean Witter Reynolds, Inc. 537 U.S. 79 (2002); Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000); Air Line Pilots Ass'n v. Miller, 523 U.S. 866 (1998); Ornelas v. United States, 517 U.S. 690 (1996); Pacesetter Constr. Co., v. Carpenters 46 N. Cal. Cntys. Conference Bd., 516 U.S. 802 (1995); Wilton v. Seven Falls Co., 515 U.S. 277 (1995).

109. *BG Grp.*, 134 S. Ct. at 1198; *Rent-A-Center*, 561 U.S. at 63; *Granite Rock Co.*, 561 U.S. at 287; *Howsam*, 537 U.S. at 79.

110. *BG Grp.C*, 134 S. Ct. at 1198; *Rent-A-Center*, 561 U.S. at 63; *Granite Rock Co.*, 561 U.S. at 287; *Stolt-Nielsen*, 559 U.S. at 662; *Green Tree Fin. Corp.*, 539 U.S. at 444; *Oxford Health Plans*, 133 S. Ct. at 2064.

111. *Green Tree Fin. Corp.*, 539 U.S. at 444; *Ornelas*, 517 U.S. at 690.

112. Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 314–15 (2012) (citations omitted).

113. *Id.* at 317.

review that accompanies open changes to the Federal Rules of Civil Procedure.[114] These moves have been labeled a "procedural revolution."[115]

In *Goodyear Dunlop Tires Operations, S.A. v. Brown* [116] and *J. Mcintyre Machinery, Limited v. Nicastro*,[117] 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 are sold throughout the United States 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 Corporation v. Twombly*[118] and *Ashcroft v. Iqbal*,[119] the Court "[tossed] aside a fifty-year-old precedent"[120] to hold 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.[121] The Court expressly articulated the goals of "checking discovery abuse."[122] In *Wal-Mart Stores, Inc. v. Dukes*,[123] 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.[124] In *Comcast Corporation v. Behrend*, the Court held that plaintiffs seeking class certification must "'affirmatively demonstrate' certification requirements like the predominance of common questions."[125]

Under all of these loosely phrased standards, judges can dismiss cases early on a case-by-case basis—thus, increasing the costs of successful litigation on plaintiffs, while potentially reducing the costs of litigation to defendants, and reducing the incidence of litigation. In other words, outside of the securities context,

---

114. *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, University of Pennsylvania Law School), *available at* http://1.usa.gov/Wkx4Fw; *see also* Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (governing explicit rule changes).

115. Michael E. Harriss, Note, *Rebutting the Roberts Court: Reinventing the Collateral Order Doctrine Through Judicial Decision Making*, 91 WASH. U. L. REV. 721, 721 (2014) ("Even considering the civil procedure revolution that has gone largely undetected, far less attention has been drawn to the Roberts Court's decisions interpreting the Court's role in determining the scope of the collateral order doctrine.").

116. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2857 (2011).

117. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2857 (2011).

118. 550 U.S. 544, 545–46, 570 (2007).

119. 556 U.S. 662, 678 (2009).

120. Memorandum from John F. Savarese et al., Supreme Court Abandons Long-Standing Precedent on Pleading Standards (unpublished client memo) (May 22, 2007) (on file with author).

121. For a powerful empirical critique of judicial "common sense," see Dan M. Kahan et al., *"They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851 (2012).

122. *Twombly*, 550 U.S. at 560.

123. 131 S. Ct. 2541 (2011).

124. *Id.* at 2555.

125. 133 S. Ct. 1426, 1432 (2013).

the Roberts Court has been using procedural standards to reduce litigation, piecemeal, in a way that will be hard to observe, except in the aggregate, over time.[126] This is the approach well matched to a particular type of 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, West, Inc. v. Jackson*, the Court held enforceability of agreements could be made subject to arbitration;[127] in *Stolt-Nielsen S.A. v. Animalfeeds International Corp.*, the Court held that arbitrators may not impose class-wide remedies unless the arbitration clause explicitly provides for class arbitration;[128] in *AT&T Mobility LLC v. Concepcion*, 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;[129] and in *American Express Co. v. Italian Colors Restaurant*,[130] the Court extended *Concepcion* to hold that class action bans in arbitration contracts were legal "even if they left citizens with no resource at all."[131] Together, even more than the standard-based decisions, these sharp-edged rule-like decisions provide large companies with incentives to use arbitration clauses in consumer form 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 Justice Kagan articulated in her *American Express* dissent, "Amex has insulated itself from antitrust liability—even if it has in fact violated the law."[132]

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. "[T]he analysis . . . has been favorable to, and applauded by, repeat-player defendants in modern litigation—notably business and government defendants—seeking relief from the burdens of litigation, discovery, and liability."[133] While Wasserman argues that a simple pro-business/anti-plaintiff attitudinal model does not explain all of the Roberts Court's procedure cases, (noting that many have been unanimous or nearly unanimous[134]), he concedes that political ideology "does reveal itself in the most fundamental procedure cases, those touching on core issues at the heart of civil

---

126. Wasserman, *supra* note 112, at 319.

127. 561 U.S. 63, 74–75 (2010).

128. 559 U.S. 662, 685–86 (2010).

129. 131 S. Ct. 1740, 1753 (2011).

130. 133 S. Ct. 2304 (2013).

131. Lina Khan, *Thrown Out of Court: How Corporations Became People You Can't Sue*, WASH. MONTHLY, June/July/August 2014, http://www.washingtonmonthly.com/magazine/junejulyaugust_2014/features/thrown_out_of_court050661.php?page=all.

132. *Am. Express Co.*, 133 S. Ct. at 2313.

133. Wasserman, *supra* note 112, 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, 66–68 (2007)); *see also* Mark Herrmann et al., *Debate: Plausible Denial: Should Congress Overrule* Twombly *and* Iqbal*?*, 158 U. PA. L. REV. PENNUMBRA 141, 146–47 (2009); Mark Moller, *Procedure's Ambiguity*, 86 IND. L.J. 645, 693 (2011).

134. Wasserman, *supra* note 112, at 329 n.105.

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 . . . ."[135] At least some of these decisions have had discernible real-world effects. Post-*Iqbal*, motions to dismiss have been filed and granted more frequently,[136] particularly in civil rights and employment discrimination cases,[137] with more modest effects in disability cases.[138]

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 generally has not been restrictive in its approach to securities law. Instead, it tends to be restrictive where cases involve procedure, and where a restrictive approach is more commensurate with a standard than with a bright-line rule. As just shown above, both of these 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 rejected bright-line rules of substantive law that might have benefited managerial interests even more. This combination of proceduralism and a preference for standards over bright-line rules lines up with the background of the Chief Justice as an appellate

---

135. *Id.* at 330.

136. *Compare* JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER IQBAL (2011) [hereinafter CECIL ET AL., MOTIONS TO DISMISS], *available at* www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf; JOE S. CECIL ET AL., FED. JUDICIAL CTR., UPDATE ON RESOLUTION OF RULE 12(B)(6) MOTIONS GRANTED WITH LEAVE TO AMEND 1 (2011) [hereinafter CECIL ET AL., UPDATE ON RESOLUTION], *available at* www.fjc.gov/public/pdf.nsf/lookup/motioniqbal2.pdf/$file/motioniqbal2.pdf (finding no overall increase in grants of motions to dismiss); Scott Dodson, *A New Look: Dismissal Rates of Federal Civil Claims*, 96 JUDICATURE 127 (Nov./Dec. 2012); Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 604 (2012); *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).

137. Raymond H. Brescia, *The* Iqbal *Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 241, 254–55 (2012); Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically*?, 59 AM. U. L. REV. 553, 612–13 (2010); Kendall W. Hannon, Note, *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); *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*).

138. 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).

litigator. Successful appellate litigators often shape arguments to focus on specific case facts, to not try to cabin judicial discretion in future cases with strongly worded interpretations of statutes, and 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 where 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 S&T argued it had 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, *Public Employees' Retirement System of Mississippi v. IndyMac MBS, Inc.*[139] and *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*.[140] Both involve procedure and are therefore 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 § 11 of the Securities Act 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 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 thus likely to generate litigation in the lower courts, are how to determine whether a fund fee is excessive under § 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 rules 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.

One exception to this set of predictions—which follows the Court's path in its general procedure cases—involves arbitration. In cases involving arbitration, the Court has been exceedingly deferential to lower court decisions that compel

---

139. 721 F.3d 95 (2d Cir. 2013), *cert granted sub nom*. Pub. Emps. Ret. Sys. v. IndyMac MBS, Inc., 82 U.S.L.W. 3527 (U.S. Mar. 10, 2014) (No. 13-640).

140. 719 F.3d 498 (6th Cir. 2013), *cert. granted sub nom.* Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 82 U.S.L.W. 3508 (U.S. Mar. 3, 2014) (No. 13-435).

arbitration as a means to reduce litigation. This might suggest that the various kinds of arbitration bylaws disputed recently[141] will fare well in the Supreme Court. However, *First Options* suggests that the outcome will be more unpredictable than what simply predicting the Court's outcomes from its pro-business ideology, 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.[142] In that setting, the Republican members of the Court will be torn between two ideological imperatives:[143] 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 U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[144] or *Baltimore Gas & Electrical Co. v. Natural Resources Defense Council, Inc*.[145] 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.[146]

---

141. *E.g.*, Groen v. Safeway Inc., No. RG 14716641 (Cal. Super. Ct. May 14, 2014); Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934 (Del. Ch. 2013); Galaviz v. Berg, 763 F. Supp. 2d 1170 (N.D. Cal. 2011).

142. *See* Coates, *Case Studies and Implications*, *supra* note 14; Coates, *Regulatory Management*, *supra* note 14.

143. For a discussion of the broader issues at stake, see Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law* (Working Paper No. 14-29), *available at* http://ssrn.com/abstract=2460822.

144. 467 U.S. 837 (1984).

145. 462 U.S. 87, 103 (1983) ("a reviewing court must generally be at its most deferential" when examining scientific determinations).

146. Mortg. Bankers Ass'n v. Harris, 720 F. 3d 966 (D.C. Cir. 2013), *cert. granted sub nom.* Perez v. Mortg. Bankers Ass'n, 82 U.S.L.W. 3719 (U.S. June 16, 2014) (No. 13-1041); Mortg. Bankers Ass'n v. Harris, 720 F. 3d 966 (D.C. Cir. 2013), *cert. granted sub nom.* Nickols v. Mortg. Bankers Ass'n, (U.S. June 16, 2014) (No. 13-1052).

CONCLUSION

This Article has shown, quantitatively, that 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 15 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.

Appendix A – Securities Cases in the Roberts Court Through July 15, 2014

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