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# The Supreme Court as Museum Curator: Securities Regulation and the Roberts Court

Eric C. Chaffee

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# THE SUPREME COURT AS MUSEUM CURATOR: SECURITIES REGULATION AND THE ROBERTS COURT

*Eric C. Chaffee*<sup>†</sup>

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## INTRODUCTION

Mosaic theory is a research methodology used in various different contexts based upon piecing together bits of available information to draw conclusions about an entity or a phenomenon.<sup>1</sup> Although the term

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† Professor of Law, The University of Toledo College of Law; J.D., University of Pennsylvania Law School; B.A., The Ohio State University. This Article benefited from discussions with scholars too numerous to mention. I would like to offer thanks to Professors Jonathan H. Adler, A.C. Pritchard, Lee Strang, and Evan Zoldan for providing feedback and advice that contributed greatly to this Article. I would also like to offer special thanks to Professor Jonathan H. Adler and the editorial board of the *Case Western Reserve Law Review* for inviting me to contribute to this symposium issue. As always, I would like to express my appreciation to Christine Gall, Esq. for her encouragement while drafting this work. The views set forth in this Article are completely my own and do not necessarily reflect the views of any employer or client either past or present.

1. See Bradley J. Bondi & Steven D. Lofchie, *The Law of Insider Trading: Legal Theories, Common Defenses, and Best Practices for Ensuring Compliance*, 8 N.Y.U. J.L. & BUS. 151, 154-55 (2011) (“[I]nstitutional investors, such as hedge funds, often piece together bits of public and nonpublic, *non-material* information to understand the broader position of a particular

“mosaic theory” is a relatively recent entrant into the intelligence gathering lexicon, it describes the process that has been used by scholars studying the Supreme Court of the United States throughout the existence of that body. In regard to the Supreme Court, however, analogizing understanding the Court to viewing a mosaic is not a perfect description. While a mosaic is a picture or pattern created by an arrangement of smaller pieces, understanding the Court involves analyzing a rich tapestry of interwoven precedent, judicial theory, history, and individual personalities. One must look at the strands that compose the tapestry, how those strands are interconnected, and the patterns that have emerged to understand the role of the Court in American democracy and American history.

Although the portion of the tapestry known as the “Roberts Court” is not yet complete, important patterns have begun to emerge. This is especially true in the area of securities regulation. As a result, analysis can and should be done.

The number of opinions that have been handed down so far relating to securities law is substantial. Since Chief Justice Roberts began his tenure on September 29, 2005,<sup>2</sup> the Court has authored roughly twenty-one opinions relating to securities regulation.<sup>3</sup> Notably, deciding which

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company. This practice is commonly referred to as the ‘mosaic’ theory of investing . . . .”); Jonathan Hafetz, *Calling the Government to Account: Habeas Corpus in the Aftermath of Boumediene*, 57 WAYNE L. REV. 99, 124 (2011) (“Originally employed in intelligence-analysis, the mosaic theory is premised on the notion that pieces of evidence must be evaluated as a whole rather than examined independently.”); David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 630 (2005) (“The ‘mosaic theory’ describes a basic precept of intelligence gathering: Disparate items of information, though individually of limited or no utility to their possessor, can take on added significance when combined with other items of information.”); Christina E. Wells, *CIA v. Sims: Mosaic Theory and Government Attitude*, 58 ADMIN. L. REV. 845, 853 (2006) (“[M]osaic theory is a theory of informational synergy in which intelligence agencies convert independently innocuous information into potentially significant intelligence information.”).

2. See *Biographies of Current Justices of the Supreme Court*, SUP. CT. U.S., <http://www.supremecourt.gov/about/biographies.aspx> [<https://perma.cc/T7Q5-6LYX>] (last visited Feb. 19, 2017) [hereinafter *Biographies of Current Justices*] (referencing the date President George W. Bush appointed Chief Justice John Roberts).
3. See *Salman v. United States*, 137 S. Ct. 420 (2016); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562 (2016); *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015); *Halliburton Co. v. Erica P. John Fund, Inc. (Halliburton II)*, 134 S. Ct. 2398 (2014); *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014); *Chadbourn & Parke LLP v. Troice*, 134 S. Ct. 1058 (2014); *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184 (2013); *Gabelli v. SEC*, 133 S. Ct. 1216 (2013); *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414 (2012); *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011); *Erica*

cases to include on this list is controversial because one of the cases had certiorari granted before Chief Justice Roberts joined the Court,<sup>4</sup> which creates a question as to which version of the Court to assign it, and two cases focus on issues that are outside the traditional realm of securities regulation.<sup>5</sup> Moreover, two additional cases were dismissed prior to judgment, which requires a decision as to what granting certiorari in those cases means.<sup>6</sup> This Article takes an all-inclusive approach.

Importantly, regardless of how narrow an approach is employed, the number of cases seems to erroneously reflect a deep and pervasive interest by the Court in securities regulation issues. The Roberts Court has taken approximately two securities regulation cases per term, which is twice the number that the Rehnquist Court took.<sup>7</sup> Moreover, the number of cases granted certiorari continues to shrink, which means that securities regulation cases represent an even larger portion of the Court's docket.<sup>8</sup> But the opinions themselves tell a different story with

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P. John Fund, Inc. v. Halliburton Co. (Halliburton I), 563 U.S. 804 (2011); Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27 (2011); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010); Merck & Co., Inc. v. Reynolds, 559 U.S. 633 (2010); Jones v. Harris Assocs. L.P., 559 U.S. 335 (2010); Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008); Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007); Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264 (2007); Kircher v. Putnam Funds Tr., 547 U.S. 633 (2006); Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71 (2006).

4. See Order Granting Certiorari, Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 545 U.S. 1164 (2005) (granting certiorari in *Dabit* two days before Chief Justice Roberts joined the Court).
5. See *infra* Part I.D (discussing the opinions by the Roberts Court relating to securities law that are on the outer limits of securities regulation).
6. See Pub. Emps. Ret. Sys. of Miss. v. IndyMac MBS, Inc., 135 S. Ct. 42 (2014) (dismissing the writ of certiorari for being “improvidently granted”); UBS Fin. Servs. Inc. of P.R. v. Union de Empleados de Muelles de P.R. PRSSA Welfare Plan, 134 S. Ct. 40 (2013) (dismissing the petition at the agreement of the parties).
7. A.C. Pritchard, *Securities Law in the Roberts Court: Agenda or Indifference?*, 37 J. CORP. L. 105, 107 (2011) (explaining that the Roberts Court has on average taken two cases relating to securities regulation per term, while the Rehnquist Court took only one).
8. See Jason Iuliano & Ya Sheng Lin, *Supreme Court Repeaters*, 69 VAND. L. REV. 1349, 1356 (2016) (“[T]he total number of cases decided by the Supreme Court has declined by more than fifty percent over the last ninety years.”); Hillel Y. Levin, *A Reliance Approach to Precedent*, 47 GA. L. REV. 1035, 1047–48 (2013) (“In contrast to the federal intermediate appellate courts, which consider tens of thousands of cases each year, the Supreme Court chooses its own docket and, in the recent past, has elected to shrink its caseload to roughly seventy-five cases a year.”); Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV.

the Court serving in the role of a museum curator maintaining historical relics from bygone eras, doing minor restoration work as needed, limiting access to these relics through statutory interpretation, and occasionally offering an exhibition involving issues at the periphery of securities law.<sup>9</sup> This approach deviates substantially from a judicial body deeply invested in securities law.

A small number of excellent articles have already been authored regarding the Roberts Court and securities regulation.<sup>10</sup> This Article adds to the existing scholarship in three main ways. First, this Article supplements the previous analyses of the Roberts Court because more opinions now exist to be analyzed.<sup>11</sup> Currently, the Roberts Court has authored twenty-one opinions in securities regulation cases, and it granted certiorari in two other cases that were dismissed prior to a decision by the Court.<sup>12</sup> As a result, a new examination is possible and warranted. Second, since the last article on this topic, the Court has handed down *Salman v. United States*,<sup>13</sup> which represents the Court's first major examination of insider trading regulation in two decades,<sup>14</sup> and the Court's first major examination of tipper-tippee liability in more than three decades.<sup>15</sup> This Article places that opinion in context with

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1219, 1225 (2012) (“Today’s Supreme Court decides markedly fewer cases than its predecessors. Since the 2005 Term, the Court has decided an average of 80 cases per Term, far fewer than the roughly 200 cases it heard earlier in the twentieth century.”).

9. See *infra* Part II (explaining the Roberts Court’s approach to securities law).
10. See John C. Coates IV, *Securities Litigation in the Roberts Court: An Early Assessment*, 57 ARIZ. L. REV. 1 (2015); Eric Alan Isaacson, *The Roberts Court and Securities Class Actions: Reaffirming Basic Principles*, 48 AKRON L. REV. 923 (2015); Pritchard, *supra* note 7.
11. The available scholarship on securities regulation and the Roberts Court focuses on a smaller number of cases because of the cases existing at the time that the articles were written or the aspect of securities law being examined. See Coates, *supra* note 10, at 5 (examining fifteen cases from the Roberts Court on securities regulation); Isaacson, *supra* note 10, at 925 (focusing on *Halliburton I*, *Amgen*, and *Halliburton II* for purposes of examining securities class actions in the Roberts Court); Pritchard, *supra* note 7, at 107 (analyzing twelve cases from the Roberts Court on securities regulation).
12. See *infra* Part I (surveying the existing case law from the Roberts Court regarding securities regulation).
13. 137 S. Ct. 420 (2016).
14. See *United States v. O’Hagan*, 521 U.S. 642 (1997) (providing the Supreme Court’s last major opinion relating to insider trading regulation prior to *Salman*).
15. See *Dirks v. SEC*, 463 U.S. 646 (1983) (providing the Supreme Court’s last major opinion relating to tipper-tippee liability for insider trading prior to *Salman*).

the rest of the Roberts Court's securities law opinions. Third, this Article provides new analysis of the Roberts Court's approach to securities regulation, including offering a new analogy for understanding the Court's approach to securities regulation, i.e., as a museum curator. It also examines the death of the lower court laboratories approach in creating and developing securities law and discusses the impact of the Court's current methodology of unflinchingly entrenching existing Supreme Court precedent.<sup>16</sup> Beyond that, this Article also puts to rest any claims that the Roberts Court is pro-business in regard to securities law.<sup>17</sup>

Obviously, this Article can offer only part of the story. At the time of the writing of this Article, Chief Justice John Roberts was sixty-two years old.<sup>18</sup> This means that Chief Justice Roberts tenure is likely to be at least twice the time he has already been on the Court. During that time, because of the ages of the other Justices, a number of Justices are likely to depart and join the Court. This means that the Roberts Court's approach to securities regulation could shift dramatically, especially if a Justice with a background and interest in securities regulation similar to William O. Douglas or Lewis F. Powell is appointed.<sup>19</sup> Chief Justice Roberts, however, has been sitting on the Court for over a decade, and at least some of the story of the Roberts Court and securities regulation can be written.

The remainder of this Article is structured as follows. Part I provides a survey of existing securities regulation case law from the Roberts Court, including the Court's issuing of unrealized landmark opinions, tinkering with core substantive issues of securities regulation, addressing issues relating to securities litigation procedure, and dealing with

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16. See *infra* Part II (discussing the Roberts Court as acting like a museum curator and examining the implications of that approach upon securities law).

17. See *infra* Part II.C (discussing why the Roberts Court should not be viewed as a pro-business Court in regard to securities regulation).

18. *Biographies of Current Justices*, *supra* note 2.

19. See Kelly S. Kibbie, *The Currently Mandated Myopia of Rule 10b-5: Pay No Attention to that Manager Behind the Mutual Fund Curtain*, 78 MO. L. REV. 171, 181 n.58 (2013) ("Justice William O. Douglas, former chairman of the SEC, and Justice Powell, a practitioner before his time on the Court, were the only two securities lawyers to serve on the Court since the enactment of the 1933 Act and the 1934 Act."); Pritchard, *supra* note 7, at 106 ("For most of the first 50 years after the federal securities laws were adopted, the Court had at least one Justice with a background in the securities laws, either as a regulator—William O. Douglas—or as a practitioner—Lewis F. Powell, Jr."); A.C. Pritchard, *Justice Lewis F. Powell, Jr., and the Counter-revolution in the Federal Securities Laws*, 52 DUKE L.J. 841, 847 (2003) ("Apart from William O. Douglas, who served as chairman of the SEC before his nomination to the Supreme Court, Lewis Powell is the only securities lawyer to serve on the Court since the federal securities laws were passed in 1933 and 1934. Although other Justices had private practice experience, none could match Powell's hands-on experience with the federal securities laws.").

issues at the outer limits of securities regulation. Based upon this survey, Part II offers a description of the Roberts Court as a museum curator in the area of securities regulation by preserving Supreme Court precedent, doing minor restoration work when necessary, controlling issues of access, and having the occasional special exhibit with issues at the outer limits of securities regulation. This Part will also explore the implications of this analogy, including the death of the lower court laboratories approach in creating and developing securities law, the impact of the Court's current methodology of entrenching existing Supreme Court precedent, and the fact that the Roberts Court should not be referred to as a pro-business court in the area of securities regulation, which is a foundational aspect of business law. Finally, the Conclusion will discuss the future of the Roberts Court and offer brief concluding remarks.

## I. SURVEY OF THE EXISTING CASE LAW

The question of how to slice and dice the existing opinions from the Roberts Court regarding securities regulation into categories is a difficult one. First, a decision must be made whether to include *Dabit*, in which certiorari was granted prior to Chief Justice Roberts taking his seat on the Court, because although members of the Roberts Court authored the opinion, members of the Rehnquist Court were the ones who thought the issues involved in that case was worth hearing in the first place.<sup>20</sup> Second, a decision must be made whether to include two cases in which certiorari was granted that were dismissed prior to a decision by the Roberts Court, i.e., *IndyMac*<sup>21</sup> and *UBS*.<sup>22</sup> In *IndyMac*, the Court dismissed the case because a settlement was reached prior to oral arguments,<sup>23</sup> and in *UBS*, the Court dismissed an appeal pursuant to agreement between the parties under Rule 46.1 of the Rules of the Supreme Court.<sup>24</sup>

In both instances, the cases have been included in the pool of cases for analysis for this Article. In regard to the case in which certiorari was granted prior to Chief Justice Roberts taking his seat on the Court, although the granting of certiorari occurred by the Rehnquist Court,

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20. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 545 U.S. 1164 (2005) (order granting certiorari).

21. *Pub. Emps. Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 135 S. Ct. 42 (2014).

22. *UBS Fin. Servs. Inc. of P.R. v. Union de Empleados de Muelles de P.R. PRSSA Welfare Plan*, 134 S. Ct. 40 (2013).

23. Lyle Denniston, *Securities Case Dropped; Split on Legal Issue Remains*, SCOTUSBLOG (Sept. 29, 2014, 1:45 PM), <http://www.scotusblog.com/2014/09/securities-case-dropped-split-on-legal-issue-remains/> [https://perma.cc/2BPN-AWS6].

24. *UBS*, 134 S. Ct. at 40.

the opinion is the product of the Roberts Court and reflects the jurisprudence of that Court. In regard to the cases that were dismissed prior to a decision by the Roberts Court, those cases are included in the pool for analysis as well because despite the lack of an opinion in those cases, they evidence the types of issues that are important enough for the Court to grant certiorari, which is becoming an even rarer occurrence.<sup>25</sup>

The next question is how to divide the pool for purposes of analysis. Numerous ways exist to do this. For example, one could divide the cases into narrow discrete issues to provide a nuanced overview of the securities regulation issues that the Roberts Court has addressed; one could divide the opinions between procedural and substantive issues to understand how the Court deals with such categories of issues; or one could pick a discrete issue, such as securities litigation, to focus the scope of analysis to a limited topic. Notably, all of these articles have already been written.<sup>26</sup> Of course, at some point, each of these articles will almost certainly need to be updated, especially if the Supreme Court continues at its current pace of deciding approximately two new securities law opinions per term.<sup>27</sup> However, that updating is left for another day.

This Article takes a different approach than previous scholarship by grouping the opinions of the Roberts Court into four broad categories: (1) Unrealized Landmark Opinions, (2) Tinkering with Core Substantive Issues of Securities Law, (3) Securities Litigation Procedure, and (4) The Outer Limits of Securities Regulation. Obviously, these categories are not neat and discrete. For example, *Morrison v. National Australia Bank Ltd.*,<sup>28</sup> which involved the extraterritorial application of federal securities regulation, could be considered both an unrealized landmark opinion and a case focusing on securities litigation procedure.<sup>29</sup> Also, in regard to Supreme Court case law, one person's triviality can be another person's treasure, which means that some of

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25. See *supra* note 8 and accompanying text (discussing the declining number of cases in which the Supreme Court is willing to grant certiorari).

26. See Pritchard, *supra* note 7 (providing a nuanced overview of securities law in the Roberts Court by discussing the various issues that the Roberts Court has addressed); Coates, *supra* note 10 (dividing securities regulation opinions of the Roberts Court into substantive and procedural opinions for purposes of engaging in qualitative and quantitative analysis); Isaacson, *supra* note 10 (analyzing securities regulation in the Roberts Court for purposes of understanding securities class action litigation).

27. See *supra* note 7 and accompanying text (discussing that the current pace of the Roberts Court in deciding cases regarding securities regulation is two per term).

28. 561 U.S. 247 (2010).

29. *Id.*

the cases that are characterized as tinkering with core issues of securities regulation in the pages of this Article might be characterized as an unrealized landmark opinion or even a realized landmark opinion by another commentator. The grouping of cases within this Article, however, does not need to be perfect. The purpose of this Article is to get a general sense of how the Roberts Court is approaching securities regulation for purposes of determining general themes and understanding the consequences of those themes. Unlike if this piece focused on quantitative analysis, loose groupings are enough for purposes of the qualitative analysis of this piece.<sup>30</sup>

As these groupings show, and as will be developed in the next Part, the Roberts Court is playing the role of museum curator in regard to securities regulation by preserving the artifacts created by Supreme Court precedent. It at times does minor restoration work to these artifacts, and it helps to arrange access to them. However, the days of an activist Court in the area of securities regulation have long past. As a means of exploring this approach by the Roberts Court, each of the four broad categories of opinions will be examined in turn.

#### *A. Unrealized Landmark Opinions*

As previously mentioned, the Roberts Court has authored twenty-one opinions in securities regulation cases,<sup>31</sup> and it granted certiorari in two other cases that were dismissed prior to a decision by the Court.<sup>32</sup> All of this suggests a deep and abiding love for securities regulation, especially considering that the Rehnquist Court heard roughly half the number of securities law cases per term during its existence,<sup>33</sup> and the number of cases granted certiorari is much smaller than it used to be.<sup>34</sup> The cases themselves, however, tell a very different story. The vast

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30. The discussion in this Article will focus on a qualitative analysis of the existing opinions, rather than quantitative analysis. This approach is taken for three main reasons. First, qualitative analysis better tells the story of securities regulation in the Roberts Court. The granting of certiorari by the Roberts Court grossly distorts the Court's interest in shaping securities regulation, which appears to be minimal. Second, even if all twenty-one opinions are included in the analysis, this is a relatively small sample size for meaningful quantitative analysis. Third, the confounding variables based upon the wide array of issues contained within these opinions makes statistical analysis difficult. As a result, a qualitative analysis to tell the story of the Roberts Court and securities regulation is superior.
  31. See *supra* note 3 and accompanying text (identifying securities law cases decided by the Roberts Court).
  32. See *supra* note 6 and accompanying text (referencing *IndyMac* and *UBS*).
  33. See *supra* note 7 and accompanying text (providing a comparison of the securities regulation caseloads of the Rehnquist Court and the Roberts Court).
  34. See *supra* note 8 and accompanying text (discussing the decreasing number of cases granted certiorari and decided by the Supreme Court).

majority of the cases that the Roberts Court has heard represent minor tinkering with key issues of securities regulation,<sup>35</sup> procedural issues that might more easily be taught as part of a course in civil procedure,<sup>36</sup> and issues on the outer limits of securities regulation.<sup>37</sup> The bulk of the cases would at best be included within notes in securities law textbooks and treatises, rather than receiving lengthy, in-depth treatment.

The cases that had the potential to be landmark opinions are few and far between. Of the twenty-one opinions of the Roberts Court and the two cases granted certiorari that were dismissed prior to judgment, the number that could have substantially altered the landscape of securities regulation can perhaps be counted on one hand. *Stoneridge*, *Morrison*, *Halliburton II*, and *Salman* each offered the Roberts Court the opportunity to leave a lasting mark on the field of securities regulation, and in each instance the Court opted to be guided almost solely by existing Supreme Court precedent.<sup>38</sup>

In *Stoneridge Investment Partners, LLC v. Scientific-Atlanta*,<sup>39</sup> the Court had and declined the opportunity to expand liability based upon the private right of action under section 10(b) and Rule 10b-5 to a broader class of individuals and entities.<sup>40</sup> The Court refused to adopt a theory known as “scheme liability” under the private right of action that was substantially similar to aiding and abetting liability, which the Court had previously rejected.<sup>41</sup> In that case, Stoneridge Investment Partners, LLC (Stoneridge) brought a class action suit against Charter Communications, Inc. (Charter), Scientific-Atlanta, Inc. (Scientific-Atlanta), and Motorola, Inc. (Motorola).<sup>42</sup> Stoneridge alleged that Charter

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35. See *infra* Part I.B (examining various cases that can be characterized as the Roberts Court tinkering with core substantive issues of securities regulation).

36. See *infra* Part I.C (analyzing cases that can be characterized as the Roberts Court addressing procedural issues relating to securities litigation).

37. See *infra* Part I.D (discussing various cases that can be characterized as the Roberts Court addressing issues on the outer limits of securities regulation).

38. See *Salman v. United States*, 137 S. Ct. 420 (2016); *Halliburton Co. v. Erica P. John Fund, Inc. (Halliburton II)*, 134 S. Ct. 2398 (2014); *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008).

39. 552 U.S. 148 (2008).

40. *Id.* at 165 (“The decision to extend the cause of action is for Congress, not for us. Though it remains the law, the § 10(b) private right should not be extended beyond its present boundaries.”).

41. *Id.* at 159–60; see also *id.* at 155–56 (referring to the Court’s decision in *Central Bank* not to extend § 10(b) liability to aiders and abettors).

42. *Id.* at 153.

had issued various fraudulent statements to meet Wall Street expectations about its financial outlook.<sup>43</sup> Stoneridge alleged that in an attempt to disguise these fraudulent statements, Charter engaged in various sham transactions with Scientific-Atlanta and Motorola.<sup>44</sup> The United State District Court for the Eastern District of Missouri granted Scientific-Atlanta's and Motorola's motions to dismiss, and the United States Court of Appeals for the Eighth Circuit affirmed.<sup>45</sup> The Supreme Court granted certiorari because "[d]ecisions of the Courts of Appeals [were] in conflict respecting when, if ever, an injured investor may rely upon § 10(b) to recover from a party that neither makes a public misstatement nor violates a duty to disclose but does participate in a scheme to violate § 10(b)."<sup>46</sup>

The Supreme Court affirmed the decisions of the District Court and the Circuit Court and held that Scientific-Atlanta and Motorola could not be held liable under the private right of action.<sup>47</sup> Speaking for the majority that included Chief Justice Roberts and Justices Alito, Scalia, and Thomas, Justice Anthony Kennedy wrote, "[t]he § 10(b) implied private right of action does not extend to aiders and abettors. The conduct of a secondary actor must satisfy each of the elements or preconditions for liability . . . ."<sup>48</sup> In reaching this holding, the Court relied heavily on precedent from the Rehnquist Court.<sup>49</sup> In *Central Bank of Denver v. First Interstate Bank of Denver*,<sup>50</sup> a case handed down in 1994, the Court held that no aiding and abetting liability existed under section 10(b) and Rule 10b-5.<sup>51</sup> The Court also noted that while Congress had elected to give the government the ability to pursue aiders and abettors under the Private Securities Litigation Reform Act of 1995<sup>52</sup> that Congress had never extended liability to aiders and abettors under the private right of action.<sup>53</sup> Justice Kennedy also wrote, "[t]he determination of who can seek a remedy has significant consequences

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43. *Id.*

44. *Id.* at 153–54.

45. *Id.* at 155.

46. *Id.* at 156.

47. *Id.* at 158.

48. *Id.*

49. *Id.* at 157–58.

50. 511 U.S. 164 (1994).

51. *Id.* at 191 ("Because the text of § 10(b) does not prohibit aiding and abetting, we hold that a private plaintiff may not maintain an aiding and abetting suit under § 10(b).").

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

53. *Stoneridge*, 552 U.S. at 158.

for the reach of federal power. . . . Concerns with the judicial creation of a private cause of action caution against its expansion. The decision to extend the cause of action is for Congress, not for us.”<sup>54</sup>

Justice John Paul Stevens authored a dissent that was joined by Justices Ginsburg and Souter.<sup>55</sup> Justice Stevens expressed concern about interpreting *Central Bank* broadly.<sup>56</sup> As he wrote, “while I recognize that the *Central Bank* opinion provides a precedent for judicial policymaking decisions in this area of the law, I respectfully dissent from the Court’s continuing campaign to render the private cause of action under § 10(b) toothless.”<sup>57</sup>

*Morrison* offered the Court its next opportunity to remake previous Supreme Court precedent, and although the Court discarded a well-developed body of lower court law, it once again refused to extend or contract the scope of the private right of action under section 10(b) and Rule 10b-5 beyond the boundaries that had previously been set by the Court.<sup>58</sup> In that case, National Australia Bank Limited (National), a foreign bank, acquired HomeSide Lending, Inc. (HomeSide), a mortgage servicing company headquartered in Florida.<sup>59</sup> As alleged in the case, despite National’s annual reports, other public documents, and other public statements from 1998 to mid-2001 asserting that Homeside was operating successfully, National wrote down the value of HomeSide’s assets by \$450 million on July 5, 2001, and National wrote down the value of HomeSide’s assets by another \$1.75 billion on September 3, 2001.<sup>60</sup> During the period of the alleged misstatements, National’s ordinary shares, which are the same as common stock in the United States, were not sold on any exchange in the United States.<sup>61</sup> Russell Leslie Owen, Brian Silverlock, and Geraldine Silverlock (the Plaintiffs), who are all Australians, attempted to represent a class of foreign purchasers of National’s ordinary shares during a period prior to National’s write-down of HomeSide’s assets in September of 2001.<sup>62</sup> The Plaintiffs brought their case in the United States District Court for the Southern District of New York alleging violations of sections 10(b) and 20(a) of

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54. *Id.* at 165.

55. *Id.* at 167 (Stevens, J., dissenting).

56. *Id.* at 175.

57. *Id.*

58. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 272–73 (2010).

59. *Id.* at 251.

60. *Id.* at 251–52.

61. *Id.* at 251.

62. *Id.* at 252–53.

the Securities Exchange Act of 1934 and Rule 10b-5.<sup>63</sup> The District Court granted the defendant's motion to dismiss based upon Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction.<sup>64</sup> The United States Court of Appeals for the Second Circuit affirmed the District Court's opinion.<sup>65</sup> In affirming the dismissal, the Circuit Court held, "[t]he issue for us to resolve here boils down to what conduct comprises the heart of the alleged fraud."<sup>66</sup> It concluded, "[t]he actions taken and the actions not taken by [National] in Australia were, in our view, significantly more central to the fraud and more directly responsible for the harm to investors than the manipulation of the numbers in Florida."<sup>67</sup>

The Supreme Court affirmed the District Court and the Circuit Court.<sup>68</sup> The Court began its opinion by holding that the case should have been dismissed based upon Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, rather than based upon Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, because the District Court was being asked to determine what conduct section 10(b) and Rule 10b-5 prohibit, which is a question focused on the merits, rather than a subject matter jurisdiction question that is based on the power of a court to hear a case.<sup>69</sup> The Court, however, declined to remand the case because nothing in the lower courts' analyses turned on the error, and remand would have led to the same result.<sup>70</sup>

The Court then held that section 10(b) and Rule 10b-5 do not apply extraterritorially.<sup>71</sup> In reaching this holding, the Court relied on Supreme Court precedent regarding a general presumption against Congressional intent to provide extraterritorial application of United States law.<sup>72</sup> Writing for the majority, which included Chief Justice Roberts and Justices Alito, Kennedy, and Thomas, Justice Antonin Scalia wrote, "[w]hen a statute gives no clear indication of an extraterritorial

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63. *Id.*

64. *In re Nat'l Austl. Bank Sec. Litig.*, No. 03 Civ. 6537(BSJ), 2006 WL 3844465, at \*8 (S.D.N.Y. Oct. 25, 2006), *aff'd*, 547 F.3d 167 (2d Cir. 2008), *aff'd*, 561 U.S. 247 (2010).

65. *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 177 (2d Cir. 2008), *aff'd*, 561 U.S. 247 (2010).

66. *Id.* at 175.

67. *Id.* at 176.

68. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 273 (2010).

69. *Id.* at 254.

70. *Id.*

71. *Id.* at 255–61.

72. *Id.* at 255.

application, it has none.”<sup>73</sup> He continued that litigation over the extraterritorial application of section 10(b) and Rule 10b-5, which began in the Second Circuit approximately four decades ago, has been substantial and “has produced a collection of tests for divining what Congress would have wanted, complex in formulation and unpredictable in application.”<sup>74</sup> The Court viewed this as “judicial-speculation-made-law.”<sup>75</sup> Based upon concerns about these departures from the presumption against extraterritoriality and the related unpredictability that has ensued, the Court held, “[r]ather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects.”<sup>76</sup> The Court also held, “it is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies.”<sup>77</sup> As a consequence, this transactional test replaced the conduct and effects test that had been previously used to determine the limits of section 10(b) and Rule 10b-5, and four decades of lower court precedent regarding the extraterritorial application of those provisions was overruled.<sup>78</sup>

Two concurring opinions were also authored in the case. Justice Stephen Breyer wrote an opinion concurring with the majority, but he argued that its opinion should have been more focused on the specific facts of the case.<sup>79</sup> Justice John Paul Stevens also wrote a concurring opinion that Justice Ginsburg joined in which he took significant issue with the majority’s reasoning.<sup>80</sup> He argued that in regard to the extraterritorial application of section 10(b) and Rule 10b-5 “[t]he Second Circuit’s test became the ‘north star’ of § 10(b) jurisprudence . . . [in this area], not just regionally but nationally as well.”<sup>81</sup> Justice Stevens claimed that Congress welcomed “judicial elaboration” in the area of the private right of action under section 10(b) and Rule 10b-5.<sup>82</sup> He also argued that the majority misapplied the presumption against extraterritoriality.<sup>83</sup> As a result, he concluded, “[t]he Court instead elects to

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73. *Id.*

74. *Id.* at 255–56.

75. *Id.* at 261.

76. *Id.*

77. *Id.* at 267.

78. *Id.*

79. *Id.* at 273–74 (Breyer, J., concurring in part and concurring in the judgment).

80. *Id.* at 274–86 (Stevens, J., concurring in the judgment).

81. *Id.* at 275.

82. *Id.* at 276.

83. *Id.* at 278–85.

upend a significant area of securities law based on a plausible, but hardly decisive, construction of the statutory text.”<sup>84</sup>

In *Halliburton II*, the Court again had the chance to reimagine securities regulation in the United States by potentially destroying the fraud-on-the-market theory that creates a presumption of reliance that allows for class certifications under the implied private right of action based upon section 10(b) and Rule 10b-5.<sup>85</sup> Again, the Court with minor clarification chose to reaffirm previous Supreme Court precedent and neither limit nor expand federal securities regulation, despite the fact that the Roberts Court could have significantly advanced business interests by effectively destroying the existence of class actions under section 10(b) and Rule 10b-5.<sup>86</sup>

In *Halliburton II*, Erica P. John Fund, Inc. (Fund) sought to be lead plaintiff in a class action against Halliburton and one of its executives (collectively Halliburton) for alleged violations of section 10(b) and Rule 10b-5.<sup>87</sup> Halliburton argued that the fraud-on-the-market presumption had been rebutted in the case because it had presented evidence that the alleged misrepresentations were not reflected in the stock price, and that as a result, investors would have to prove reliance on an individual basis.<sup>88</sup> The District Court rejected Halliburton’s arguments and certified the class, and the Fifth Circuit affirmed.<sup>89</sup> The Supreme Court granted certiorari for two reasons. First, the Court “accepted Halliburton’s invitation to reconsider the presumption of reliance for securities fraud claims” brought as class actions that had been established by previous Supreme Court precedent, i.e. the fraud-on-the-market theory.<sup>90</sup> Second, the Supreme Court wanted to resolve a dispute among the Circuit Courts of Appeals over whether the presumption of reliance can be rebutted at the class certification stage based upon evidence of lack of price impact by the alleged misrepresentation.<sup>91</sup>

The Court refused to overrule the “fraud-on-the-market” theory that had been established by the Rehnquist Court in *Basic Inc. v. Levinson*.<sup>92</sup> In *Basic*, the Court held that reliance is a required element

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84. *Id.* at 286.

85. *Halliburton Co. v. Erica P. John Fund, Inc. (Halliburton II)*, 134 S. Ct. 2398, 2407 (2014).

86. *Id.* at 2417.

87. *Id.* at 2405–06.

88. *Id.* at 2406.

89. *Id.* at 2406–07.

90. *Id.* at 2407.

91. *Id.*

92. *Id.* at 2407–13 (discussing *Basic Inc. v. Levinson*, 485 U.S. 224 (1988)).

of the implied private right of action under section 10(b) and Rule 10b-5,<sup>93</sup> and that reliance can be presumed in instances in which a plaintiff purchased or sold securities in a well-developed, impersonal market.<sup>94</sup> This presumption allows for the certification of class actions under the implied private right of action because otherwise reliance would have to be proven on an individual basis.<sup>95</sup> This fraud-on-the-market theory is founded upon the notion that the price of securities in an efficient market reflects all material, public information.<sup>96</sup> Justice Blackmun, writing for the Court in *Basic*, stated, “[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance.”<sup>97</sup>

In *Halliburton II*, Chief Justice John Roberts wrote the majority opinion of the Court, which was joined by Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan.<sup>98</sup> The Court refused to overrule *Basic* because the Court held that it will only overrule “long-settled precedent” based upon “special justification,” rather than just a claim that the precedent was erroneously established.<sup>99</sup> The Court rejected an argument that the implied private right of action is defined inconsistently with the express cause of action under section 18(a) of the Exchange Act because such an argument was made by the dissenting Justices in *Basic*.<sup>100</sup> The Court also rejected concerns that the “efficient capital markets hypothesis” on which the fraud-on-the-market theory is founded has been in part discredited,<sup>101</sup> and it also rejected concerns that investors might not invest based on the integrity of the market price.<sup>102</sup> The Court dismissed these concerns based in large part upon the presumption of reliance being rebuttable, which suggests that the Court in *Basic* already considered these issues.<sup>103</sup> In regard to applying stare decisis, Chief Justice Roberts wrote it has “special force” because “Congress may overturn or modify any aspect of our interpretations of

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93. *Basic*, 485 U.S. at 243.

94. *Id.* at 241–45.

95. *Id.*

96. *Id.* at 241–42.

97. *Id.* at 248.

98. *Halliburton Co. v. Erica P. John Fund, Inc. (Halliburton II)*, 134 S. Ct. 2398, 2404–05 (2014).

99. *Id.* at 2407.

100. *Id.* at 2408–09.

101. *Id.* at 2409–10.

102. *Id.* at 2410–11.

103. *Id.* at 2408–11.

the reliance requirement, including the *Basic* presumption itself.<sup>104</sup> The Court viewed the presumption as maintaining the original scope of the implied private right of action.<sup>105</sup> The Court also rejected concerns about the presumption of reliance being used as a means to “allow plaintiffs to extort large settlements from defendants for meritless claims; punish innocent shareholders, who end up having to pay settlements and judgments; impose excessive costs on businesses; and consume a disproportionately large share of judicial resources.”<sup>106</sup> The Court did so because it believed that Congress has addressed these issues to some extent in other ways, such as by passing the Private Securities Litigation Reform Act of 1995<sup>107</sup> and the Securities Litigation Uniform Standards Act of 1998.<sup>108</sup>

The Court also clarified the *Basic* presumption by holding that defendants are allowed to introduce evidence at the class certification stage rebutting the presumption by demonstrating that the alleged misrepresentation did not impact the price of the security.<sup>109</sup> The Court reached this holding because *Basic* provides for wide latitude to defeat the presumption of reliance and because allowing the presumption to be challenged at the class certification stage makes sense because the presumption is inherently related to the certification of the class.<sup>110</sup>

Two concurring opinions were also authored in the case. Justice Ruth Bader Ginsburg wrote one of the concurrences, which was joined by Justices Breyer and Sotomayor.<sup>111</sup> The concurrence is a single paragraph that is designed to convey her belief that “[t]he Court’s judgment . . . should impose no heavy toll on securities-fraud plaintiffs with tenable claims.”<sup>112</sup> Justice Thomas authored the other concurrence, which Justices Alito and Scalia joined.<sup>113</sup> Justice Thomas unabashedly argues that *Basic* should be overruled and that the “fraud-on-the-market” theory should be discarded.<sup>114</sup> Justice Thomas did not believe that stare

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104. *Id.* at 2411.

105. *Id.* at 2412.

106. *Id.* at 2413.

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

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

109. *Halliburton II*, 134 S. Ct. at 2414-17.

110. *Id.*

111. *Id.* at 2417 (Ginsburg, J., concurring).

112. *Id.*

113. *Id.* at 2417 (Thomas, J., concurring in the judgment).

114. *Id.* at 2417-18.

decisis requires the Court to preserve the presumption created in *Basic*.<sup>115</sup> He reached this conclusion because the Court is dealing with an implied private right of action, rather than express statutory language.<sup>116</sup> He wrote: “[W]hen we err in areas of judge-made law, we ought to presume that Congress expects us to correct our own mistakes—not the other way around.”<sup>117</sup> As a result, Justice Thomas concluded, “*Basic*’s presumption of reliance remains our mistake to correct.”<sup>118</sup>

Finally, *Salman v. United States*<sup>119</sup> offered the Roberts Court an opportunity to remake federal securities regulation in the area of insider trading, and once again the Court chose to preserve the status quo created by existing precedent.<sup>120</sup> In that case, Bassam Salman (Salman) was convicted of insider trading based upon receiving material, non-public information as a gift from his friend and brother-in-law, Mounir Kara.<sup>121</sup> Mounir Kara had received the information from his own brother, Maher Kara.<sup>122</sup> Maher Kara had possession of the information because he was an investment banker in Citigroup’s healthcare investment banking group.<sup>123</sup> Evidence was presented at trial that Salman knew the source of the information.<sup>124</sup> Salman was indicted on one count of conspiracy to commit securities fraud and four counts of insider trading under section 10(b) and Rule 10b-5.<sup>125</sup> The United States District Court for the Northern District of California convicted Salman on all counts.<sup>126</sup> Citing a recent opinion of the United States Court of Appeals for the Second Circuit, *United States v. Newman*,<sup>127</sup> which required a “close personal relationship” to convict a tippee for making a gift of confidential information to a trading relative or a friend, Salman sought review of his conviction from the United States Court of Appeals for

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115. *Id.* at 2425.

116. *Id.* at 2425–26.

117. *Id.* at 2426.

118. *Id.*

119. 137 S. Ct. 420 (2016).

120. *Id.* at 426–29.

121. *Id.* at 423–24.

122. *Id.* at 424.

123. *Id.*

124. *Id.* at 425.

125. *Id.* at 424.

126. *Id.* at 425.

127. 773 F.3d 438 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 242 (2015).

the Ninth Circuit.<sup>128</sup> The Ninth Circuit disagreed with the Second Circuit's grafting on of a "close personal relationship" requirement for tippee liability and affirmed Salman's conviction.<sup>129</sup>

The Supreme Court affirmed the opinions of the District Court and the Ninth Circuit and upheld Salman's conviction.<sup>130</sup> Writing for a unanimous Court, Justice Samuel Alito stated, "[i]n *Dirks v. SEC* . . ., this Court explained that a tippee's liability for trading on inside information hinges on whether the tipper breached a fiduciary duty by disclosing the information. A tipper breaches such a fiduciary duty, we held, when the tipper discloses the inside information for a personal benefit."<sup>131</sup> In *Dirks*, the Court held that an inference of such a personal benefit exists "when an insider makes a gift of confidential information to a trading relative or friend."<sup>132</sup> Salman urged that the Court to adopt a test that requires monetary benefit to the tipper because otherwise, liability would often turn on the closeness of relationship, which could render the boundaries of insider trading indeterminate with liability for remote tippees.<sup>133</sup> Justice Alito was unequivocal that *Dirks* already resolved the issue before the Court.<sup>134</sup> He wrote, "[o]ur discussion of gift giving [in *Dirks*] resolves this case,"<sup>135</sup> and "Salman's conduct is in the heartland of *Dirks's* rule concerning gifts."<sup>136</sup> As a result, Salman's conviction was affirmed.<sup>137</sup>

#### *B. Tinkering with Core Substantive Issues of Securities Law*

In addition to the unrealized landmark cases discussed above, the Roberts Court has also granted certiorari and issued decisions in a number of other cases dealing with core substantive issues of federal securities regulation. *Jones*, *Matrixx*, *Halliburton I*, *Janus*, *Amgen*, and *Omnicare* could all be included in this group.<sup>138</sup> While none of these cases

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128. *Salman*, 137 S. Ct. at 425 (quoting *Newman*, 773 F.3d at 452).

129. *Id.* at 425.

130. *Id.* at 429.

131. *Id.* at 423 (citation omitted).

132. *Dirks v. SEC*, 463 U.S. 646, 664 (1983).

133. *Salman*, 137 S. Ct. at 426.

134. *Id.* at 427.

135. *Id.*

136. *Id.* at 429.

137. *Id.*

138. *See Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015); *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184 (2013); *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011); *Erica P. John Fund, Inc. v. Halliburton Co.*

presented as large of an opportunity for the Roberts Court to have an impact on federal securities regulation as the cases discussed in the last Section, each of these opinions represented the Court interpreting important aspects of federal securities law, and the fact that the Court viewed the issues contained within them significant enough to grant certiorari is important in itself because of how rarely the Court currently grants certiorari.

The cases themselves entailed a myriad of different issues. In *Jones v. Harris Associates L.P.*,<sup>139</sup> for example, the Court examined a claim that an investment advisor had violated section 36(b) of the Investment Company Act of 1940 by breaching its fiduciary duties by charging fees that were too high to manage investors' mutual funds.<sup>140</sup> Writing for a unanimous Court, Justice Alito stated, "to face liability under § 36(b), an investment adviser must charge a fee that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining."<sup>141</sup> Notably, the Supreme Court relied extensively on a Second Circuit opinion in *Gartenberg v. Merrill Lynch Asset Management, Inc.*<sup>142</sup> in formulating its holding.<sup>143</sup> Although joining the majority opinion, Justice Thomas authored a concurring opinion to suggest that the Court

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(Halliburton I), 563 U.S. 804 (2011); *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27 (2011); *Jones v. Harris Assocs. L.P.*, 559 U.S. 335 (2010).

139. 559 U.S. 335 (2010).

140. *Id.* at 338. One could argue whether this case should be discussed in this Section. The Securities Act of 1933 and the Securities Exchange Act of 1934 are traditionally viewed as the most important sources of federal securities law. See Ronald J. Gilson, Henry Hansmann & Mariana Pargendler, *Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the United States, and the European Union*, 63 STAN. L. REV. 475, 512 (2011) ("To be sure, the most significant pieces of investor protection legislation in the United States, the Securities Act of 1933 and the Securities Exchange Act of 1934 . . ."); James D. Gordon III, *Defining a Common Enterprise in Investment Contracts*, 72 OHIO ST. L.J. 59, 63 (2011) ("[A]fter the stock market crash of 1929, Congress passed comprehensive legislation regulating securities. The two most important acts are the Securities Act of 1933 and the Securities Exchange Act of 1934."); Carol B. Swanson, *Corporate Governance: Sliding Seamlessly into the Twenty-First Century*, 21 J. CORP. L. 417, 441 (1996) ("Securities market regulations flowed from the 1929 stock market crash and the subsequent collapse of economic activity . . . . The two most significant laws were the Securities Act of 1933, which regulated new public offerings, and the Securities and Exchange Act of 1934 . . ."). As a result, because this case involved a provision of the Investment Company Act of 1940, this case is included here.

141. *Jones*, 559 U.S. at 346.

142. 694 F.2d 923 (2d Cir. 1982).

143. *Jones*, 559 U.S. at 343–46.

should not be viewed as adopting the “*Gartenberg* standard” because of the breadth of the scope of that standard.<sup>144</sup>

The Court in *Matrixx Initiatives, Inc. v. Siracusano*<sup>145</sup> addressed the standards for materiality and scienter under section 10(b) and Rule 10b-5.<sup>146</sup> Relying on the standard for materiality announced in *Basic Inc. v. Levinson*,<sup>147</sup> the Court held that statistical significance of information that has failed to be disclosed is not a prerequisite to establishing the materiality,<sup>148</sup> and similarly, relying on the standard announced in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*<sup>149</sup> for scienter, the Court held that statistical significance of the information that has failed to be disclosed is also not a prerequisite to establishing scienter.<sup>150</sup> Notably, this case involved a unanimous Court with an opinion written by Justice Sonia Sotomayor allowing a class action to be maintained against a corporation by maintaining the existing boundaries of Supreme Court precedent.<sup>151</sup>

In *Halliburton I*, the Court addressed whether loss causation must be proven for purposes of obtaining class certification under the implied private right of action based upon section 10(b) and Rule 10b-5.<sup>152</sup> Relying on the discussion of class certification in *Basic Inc. v. Levinson*,<sup>153</sup> the unanimous Court in an opinion authored by Chief Justice John Roberts held that proof of loss causation is not a prerequisite for obtaining class certification, or even use of the fraud-on-the-market theory, under the implied private right of action.<sup>154</sup> Once again, the Roberts Court allowed an action against a corporate defendant to proceed by maintaining the existing boundaries of Supreme Court precedent.<sup>155</sup>

Of course, not all of the securities regulation issues addressed by the Roberts Court have fit neatly within existing Supreme Court case law, and unsurprisingly, in these cases, unanimous opinions are far less

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144. *Id.* at 353–55 (Thomas, J., concurring).

145. 563 U.S. 27 (2011).

146. *Id.* at 30–31.

147. 485 U.S. 224 (1988).

148. *Matrixx*, 563 U.S. at 43–44.

149. 551 U.S. 308, 313–14 (2007).

150. *Matrixx*, 563 U.S. at 48–50.

151. *Id.* at 29–31.

152. *Erica P. John Fund, Inc. v. Halliburton*, (Halliburton I), 563 U.S. 804, 807 (2011).

153. 485 U.S. 224 (1988).

154. *Halliburton I*, 563 U.S. at 811–13.

155. *Id.* at 815.

common. In *Janus Capital Group, Inc. v. First Derivative Traders*,<sup>156</sup> for instance, the Court explored the question of what it means to “make” material misrepresentations for purposes of rendering behavior unlawful under section 10(b).<sup>157</sup> Writing for a majority that included Chief Justice Roberts and Justices Alito, Kennedy, and Scalia, Justice Clarence Thomas began the analysis of the Court by stating that when faced with a new issue, the implied right of action under section 10(b) and Rule 10b-5 should be interpreted narrowly because of the lack of Congressional authorization and guidance for its existence and expansion.<sup>158</sup> As a result, relying heavily on the limits set by such cases as *Central Bank* and *Stoneridge*, the Court held, “[f]or purposes of Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it.”<sup>159</sup> Justice Stephen Breyer authored a dissenting opinion that was joined by Justices Ginsburg, Kagan, and Sotomayor in which he argued for a broader definition of when an individual “makes” a misrepresentation for purposes of liability.<sup>160</sup>

In *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*,<sup>161</sup> the Roberts Court was divided over the issue of whether proof of materiality is required for class certification to maintain a class action based upon the private right of action under section 10(b) and Rule 10b-5.<sup>162</sup> In an opinion authored by Justice Ruth Bader Ginsburg that was joined by Chief Justice Roberts and Justices Alito, Breyer, Kagan, and Sotomayor, the Court held that it is not.<sup>163</sup> As a result, opinions from the Second Circuit and Third Circuit with contrary holdings were abrogated, and a class action against a corporation was allowed to proceed.<sup>164</sup> Justice Scalia and Justice Thomas both filed dissenting opinions that argued for requiring proof of materiality prior to class certification.<sup>165</sup> Notably, both dissents focused on interpreting the guidance that the Court had previously provided in *Basic v. Levinson* regarding how class certification is supposed to be granted in matters involving the

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156. 564 U.S. 135 (2011).

157. *Id.* at 137–38.

158. *Id.* at 141–42.

159. *Id.* at 143.

160. *Id.* at 149–50 (Breyer, J., dissenting).

161. 133 S. Ct. 1184 (2013).

162. *Id.* at 1191.

163. *Id.*

164. *Id.* at 1191, 1194.

165. *Id.* at 1205 (Scalia, J., dissenting); *id.* at 1206 (Thomas, J., dissenting).

private right of action under section 10(b) and Rule 10b-5.<sup>166</sup> In addition, Justice Alito filed a concurrence that the reason why he signed onto the majority opinion was because he did not view the issue in the case as entailing the fraud-on-the-market presumption that was announced in *Basic*.<sup>167</sup>

Finally, in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*,<sup>168</sup> the Roberts Court addressed the materiality of opinion statements in the context of a class action under section 11 of the Securities Act of 1933.<sup>169</sup> That case involved a circumstance in which an issuer had offered an opinion in a registration statement that might have suggested facts to investors that were in conflict with facts that were known, but not included in the registration statement, by the issuer.<sup>170</sup> Writing for a majority that included Chief Justice Roberts and Justices Alito, Breyer, Ginsburg, Kennedy, and Sotomayor, Justice Elena Kagan stated: “[I]f a registration statement omits material facts about the issuer’s inquiry into or knowledge concerning a statement of opinion, and if those facts conflict with what a reasonable investor would take from the statement itself, then § 11’s omissions clause creates liability.”<sup>171</sup> As a result, the Court remanded the matter to apply this new standard, and as a consequence, the class action against the corporation was potentially allowed to proceed.<sup>172</sup> Justice Scalia and Justice Thomas each offered concurring opinions that agreed with the judgment of the Court, but that would have applied more refined standards for determining the materiality of opinions.<sup>173</sup>

### *C. Securities Litigation Procedure*

As previously mentioned, the grouping of cases within this Article is not perfect because one of the unrealized landmark cases and some of the cases involving core issues of securities regulation have procedural aspects to them. For example, *Morrison* involved the extraterritorial application of the federal securities regulation, which could be characterized as a jurisdictional issue, although one might take issue with this

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166. *Id.* at 1204–06 (Scalia, J., dissenting); *id.* at 1206–16 (Thomas, J., dissenting).

167. *Id.* at 1204 (Alito, J., concurring).

168. 135 S. Ct. 1318 (2015).

169. *Id.* at 1323.

170. *Id.* at 1323–24.

171. *Id.* at 1329.

172. *Id.* at 1332–33.

173. *Id.* at 1334–37 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 1337–38 (Thomas, J., concurring in the judgment).

characterization.<sup>174</sup> In addition, many of the opinions already discussed, e.g., *Halliburton I*, *Halliburton II*, and *Amgen*, relate to questions of class certification, which is a procedural matter.<sup>175</sup> This evidences, however, how invested the Roberts Courts is regarding settling procedural questions, especially in the area of securities regulation. The Roberts Court has decided numerous cases squarely focusing on procedural issues, including *Dabit*, *Kircher*, *Billing*, *Tellabs*, *Merck*, *Simmonds*, *Gabelli*, *Chadbourne*, and *Manning*.<sup>176</sup> In addition, the Roberts Court also granted certiorari on two cases, *IndyMac* and *UBS*, that were dismissed prior to the Court issuing an opinion, and both of these cases focused on procedural issues as well.<sup>177</sup>

A number of the cases that the Roberts Court has decided regarding securities litigation procedure involve the Securities Litigation Uniform Standards Act of 1998 (SLUSA), which had been relatively recently enacted at the time when Chief Justice Roberts took his seat on the

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174. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 253–54 (2010). Notably, in *Morrison*, the District Court granted the defendant's motion to dismiss based upon Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. *In re Nat'l Austl. Bank Sec. Litig.*, No. 03 Civ. 6537 (BSJ), 2006 WL 3844465, at \*4, \*9 (S.D.N.Y. Oct. 25, 2006), *aff'd sub nom.*, *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167 (2d Cir. 2008), *aff'd*, 561 U.S. 247 (2010). The Supreme Court held, however, that the case should have been dismissed based upon Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, rather than based upon Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, because the District Court was being asked to determine what conduct section 10(b) and Rule 10b-5 prohibit, which is a question based on the merits, rather than a subject matter jurisdiction question that focuses on the power of a court to hear a case. *Morrison*, 561 U.S. at 253–54. Regardless, however, the case had strong procedural overtones.

175. *See* *Halliburton Co. v. Erica P. John Fund, Inc.* (*Halliburton II*), 134 S. Ct. 2398 (2014); *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184 (2013); *Erica P. John Fund, Inc. v. Halliburton Co.* (*Halliburton I*), 563 U.S. 804 (2011).

176. *See* *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562 (2016); *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058 (2014); *Gabelli v. SEC*, 133 S. Ct. 1216 (2013); *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414 (2012); *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633 (2010); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007); *Kircher v. Putnam Funds Tr.*, 547 U.S. 633 (2006); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71 (2006).

177. *See* *Pub. Emps. Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 135 S. Ct. 42 (2014) (dismissing the Writ of Certiorari “as improvidently granted”); *UBS Fin. Servs. Inc. of P.R. v. Union de Empleados de Muelles de P.R. PRSSA Welfare Plan*, 134 S. Ct. 40 (2013) (dismissing the Writ of Certiorari pursuant to Rule 46.1 of the Rules of the Supreme Court).

Court.<sup>178</sup> In *Dabit*, for instance, the Court vacated an opinion from the United States Court of Appeals for the Second Circuit written by then circuit judge, Sonia Sotomayor, on the ground that SLUSA's preemptive power should be interpreted broadly.<sup>179</sup> At issue was whether SLUSA's federal preemption of class actions involving more than 50 people in connection with the purchase or sale of securities traded nationally and listed on a national exchange should apply to an action brought by individuals who just held their securities.<sup>180</sup> Writing for a unanimous Court, Justice John Paul Stevens stated: "For purposes of SLUSA pre-emption, [the] distinction [between holders and purchasers and sellers] is irrelevant; the identity of the plaintiffs does not determine whether the complaint alleges fraud 'in connection with the purchase or sale' of securities."<sup>181</sup> As a result, the Court interpreted the preemptive scope of SLUSA broadly to include holders of securities bringing state law claims in federal court as a class action, even though federal securities law would not allow these holders to proceed to obtain relief.<sup>182</sup>

In *Kircher v. Putnam Funds Trust*,<sup>183</sup> the Court again addressed a procedural issue created by Congress's enactment of SLUSA; this time in the context of the appealability of orders remanding cases to state court that had been held not to fall within SLUSA's ambit.<sup>184</sup> In that case, Justice David Souter wrote for a nearly unanimous Court in which Justice Scalia disagreed with only one part of the majority opinion and as a result authored a relatively brief concurring opinion.<sup>185</sup> Based largely on interpreting 28 U.S.C. § 1447, which is not a provision viewed as being part of federal securities law, the Court held that orders remanding cases to state court that were held not to fall within SLUSA's ambit are not appealable, which led to the United States Court of Appeals for the Seventh Circuit's opinion to be vacated and the appeal to that court being dismissed for lack of jurisdiction.<sup>186</sup>

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

179. *Dabit*, 547 U.S. at 74, 89, *rev'g* 395 F.3d 25 (2d Cir. 2005).

180. *Id.* at 82-84.

181. *Id.* at 89.

182. *Id.* at 88-89.

183. 547 U.S. 633 (2006).

184. *Id.* at 635-36.

185. *Id.* at 635; *id.* at 648-50 (Scalia, J., concurring in part and concurring in the judgment).

186. *Id.* at 648.

The Roberts Court has also addressed numerous other procedural issues beyond the scope of SLUSA. The Court in *Credit Suisse Securities (USA) LLC v. Billing*<sup>187</sup> explored when federal securities law implicitly precludes the application of antitrust law.<sup>188</sup> In *Billing*, writing for a majority that included Chief Justice Roberts and Justices Alito, Ginsburg, Scalia, and Souter, Justice Stephen Breyer explained:

[I]n finding sufficient incompatibility to warrant an implication of preclusion, [this Court's decisions] have treated the following factors as critical: (1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct.<sup>189</sup>

Based on application of this test, the Court held that federal securities law implicitly precluded the application of antitrust law in a case involving a class action asserting that underwriting firms allegedly violated antitrust law by entering into illegal contracts with purchasers of securities distributed in an initial public offering because federal securities law is “clearly incompatible” with antitrust law in addressing the matter and securities law is designed to govern initial public offerings.<sup>190</sup> As a result, the Court reversed an opinion of the Second Circuit, and the antitrust claims were not allowed to proceed.<sup>191</sup> Justice Stevens authored a concurring opinion that asserted that antitrust law did not prohibit the alleged behavior of the underwriting firms.<sup>192</sup> In addition, Justice Thomas filed a dissenting opinion arguing that the Securities Act of 1933 and Securities Exchange Act of 1934 both explicitly preserve the right to relief under antitrust law.<sup>193</sup>

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187. 551 U.S. 264 (2007).

188. *Id.* at 267. While this case does involve a procedural issue, it is sufficiently unique and discrete that it may merit separate treatment from the traditional issues thought of as securities procedure, which are discussed in this Section, especially considering the case involved another substantial and well-developed area of the law, *i.e.*, antitrust law. However, because the decision is procedural in nature, the choice has been made to include it here.

189. *Id.* at 275–76.

190. *Id.* at 285.

191. *Id.* at 270.

192. *Id.* at 285–87 (Stevens, J., concurring in the judgment).

193. *Id.* at 287 (Thomas, J., dissenting).

In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,<sup>194</sup> the Court examined the pleading standard for scienter in actions under section 10(b) and Rule 10b-5 that was established in the Private Securities Litigation Reform Act of 1995 (PSLRA) in a case involving a securities fraud class action.<sup>195</sup> Writing for a majority that included Chief Justice Roberts and Justices Breyer, Kennedy, Souter, and Thomas, Justice Ruth Bader Ginsburg stated that to meet the “strong inference” standard for scienter established by the PLSRA, “an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.”<sup>196</sup> As a result, the Court held: “A plaintiff alleging fraud in a § 10(b) action . . . must plead facts rendering an inference of scienter *at least as likely as* any plausible opposing inference . . . . [S]he must demonstrate that it is *more likely* than not that the defendant acted with scienter.”<sup>197</sup> Justice Scalia and Justice Alito each filed concurring opinions arguing that the PSLRA established a stronger standard for pleading scienter.<sup>198</sup> Justice Stevens also filed a dissenting opinion in which he argued that the proper standard to use was something closer to probable cause.<sup>199</sup>

The Roberts Court has also heard and issued opinions in a number of cases involving issues related to federal securities regulation and statutes of limitation. In *Merck & Co., Inc. v. Reynolds*,<sup>200</sup> for example, the Court examined the statute of limitations for the private right of action under section 10(b) and Rule 10b-5 in the context of a securities class action.<sup>201</sup> The Court granted certiorari to address a split among the circuit courts regarding the issue.<sup>202</sup> In an opinion written by Justice Stephen Breyer that was joined by Chief Justice Roberts and Justices Alito, Ginsburg, Kennedy, and Sotomayor, the Court held that the statute of limitations begins to run under 28 U.S.C. § 1658(b) for a private right of action under section 10(b) and Rule 10b-5 at the time a plaintiff knows or a reasonably diligent plaintiff would have known of the facts constituting the violation.<sup>203</sup> Through this holding, the Court

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194. 551 U.S. 308 (2007).

195. *Id.* at 313–14.

196. *Id.* at 314.

197. *Id.* at 328–29.

198. *Id.* at 329 (Scalia, J., concurring in the judgment); *id.* at 333–34 (Alito, J., concurring in the judgment).

199. *Id.* at 335–37 (Stevens, J., dissenting).

200. 559 U.S. 633 (2010).

201. *Id.* at 637.

202. *Id.* at 643–44.

203. *Id.* at 653.

ended up adopting the approach being used by the Sixth Circuit and abrogating the approaches used by the Second Circuit and the Eleventh Circuit.<sup>204</sup> The Court also held that discovery of the facts constituting the violation for the private right of action under section 10(b) and Rule 10b-5 includes facts relating to scienter.<sup>205</sup> As a result, the Court held that investors in a corporation were allowed to proceed with their class action.<sup>206</sup> Justice Stevens filed a concurring opinion and Justice Scalia filed a concurring opinion that Justice Thomas joined explaining their reasoning for supporting the outcome of the majority opinion.<sup>207</sup>

In *Credit Suisse Securities (USA) LLC v. Simmonds*,<sup>208</sup> the Court addressed the application of the statute of limitations to the disgorgement of short-swing profits under section 16(b) of the Securities Exchange Act.<sup>209</sup> In that case, as a result of Chief Justice Roberts taking no part in the consideration or decision of the case, the Court was equally divided four to four as to whether the statute of limitations in section 16(b), which provides that actions for disgorgement must be brought within “two years after the date such profit was realized,”<sup>210</sup> could be tolled.<sup>211</sup> Regardless, the Court held that tolling would not apply in the case because of the manner in which equitable tolling rules are traditionally applied.<sup>212</sup> Justice Antonin Scalia wrote a unanimous opinion for the Court regarding this holding, and the Court abrogated holdings from the Second Circuit and Ninth Circuit to the contrary.<sup>213</sup>

The Court in *Gabelli v. SEC*<sup>214</sup> explored the role of a statute of limitations in an SEC enforcement action under the Investment Advisers Act of 1940<sup>215</sup> for civil penalties for aiding and abetting fraud.<sup>216</sup> In that case, the Court reversed the Second Circuit and held that the

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204. See *id.* at 643–44 (differentiating the Sixth Circuit’s approach from the approaches adopted by the Second and Eleventh Circuits).

205. *Id.* at 649, 653.

206. *Id.* at 654.

207. *Id.* at 655 (Stevens, J., concurring in part and concurring in the judgment); *id.* at 655–61 (Scalia, J., concurring in part and concurring in the judgment).

208. 132 S. Ct. 1414 (2012).

209. *Id.* at 1417.

210. 15 U.S.C. § 78p(b) (2012).

211. *Simmonds*, 132 S. Ct. at 1419–1421.

212. *Id.* at 1421.

213. *Id.*

214. 133 S. Ct. 1216 (2013).

215. Pub. L. No. 76-768, 54 Stat. 789, 847–57 (codified as amended at 15 U.S.C. §§ 80b-1–80b-21 (2012)).

216. *Gabelli*, 133 S. Ct. at 1218–19.

statute of limitations, which was found in 28 U.S.C. § 2462, began running at the time when the alleged fraud occurred, not when the alleged fraud was discovered.<sup>217</sup> Chief Justice Roberts delivered the unanimous opinion of the Court in the case.<sup>218</sup>

In 2014, the Roberts Court returned to interpreting SLUSA again in *Chadbourne & Parke LLP v. Troice*.<sup>219</sup> In that case, the Court held that for purposes of federal preemption under SLUSA, a fraudulent misrepresentation or omission is not made “in connection with” a purchase or sale of a covered security under SLUSA unless that misrepresentation is material to one or more individuals in the purchase or sale of that security.<sup>220</sup> As a result of this holding, the Court permitted four class actions against alleged fraudsters to proceed in state court.<sup>221</sup> Justice Stephen Breyer wrote the majority opinion of the Court, which Chief Justice Roberts and Justices Ginsburg, Kagan, Scalia, Sotomayor, and Thomas joined.<sup>222</sup> Although Justice Thomas joined the majority opinion, he also filed a concurring opinion to state his belief that the phrase “in connection with” is to be construed broadly, and that the majority opinion was in conformance with SLUSA’s statutory design.<sup>223</sup> Justice Kennedy authored a dissenting opinion that was joined by Justice Alito that argued that SLUSA should have preempted the class actions that were at issue in the case.<sup>224</sup>

Finally, in *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*,<sup>225</sup> the Court examined the jurisdiction of federal courts to hear securities regulation cases.<sup>226</sup> To determine when the exclusive grant of jurisdiction applies, the Court held that the test under the general federal question statute, 28 U.S.C. § 1331, should be applied, i.e. exclusive jurisdiction is granted to federal courts in regard to actions “arising under” federal law.<sup>227</sup> Writing for a majority that included Chief Justice Roberts and Justices Alito, Breyer, Ginsburg, and Kennedy, Justice Elena Kagan explained that “§ 27’s jurisdictional test matches the one

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217. *Id.* at 1224.

218. *Id.* at 1218.

219. 134 S. Ct. 1058 (2014).

220. *Id.* at 1066.

221. *Id.* at 1071–72.

222. *Id.* at 1061.

223. *Id.* at 1072 (Thomas, J., concurring).

224. *Id.* at 1072–74 (Kennedy, J., dissenting).

225. 136 S. Ct. 1562 (2016).

226. *Id.* at 1566.

227. *Id.* at 1569–70.

we have formulated for § 1331, as applied to cases involving the Exchange Act. If (but only if) such a case meets the ‘arising under’ standard, § 27 commands that it go to federal court.”<sup>228</sup> This holding abrogated opinions from the Second Circuit, Fifth Circuit, and Ninth Circuit, and it allowed the class action brought by the stockholders in state court to proceed in state court.<sup>229</sup> Justice Thomas filed a concurring opinion that Justice Sotomayor joined that would have also remanded the case strictly on the language of section 27.<sup>230</sup>

*D. The Outer Limits of Securities Regulation*

In addition to the unrealized landmark opinions, the cases that have involved tinkering with core substantive issues of securities law, and the cases related to securities litigation procedure, the Roberts Court has also decided two cases on the periphery of securities law, *Free Enterprise Fund* and *Lawson*.<sup>231</sup> While these cases are important, they are far outside the heartland of traditional securities regulation. A few words, however, ought to be said about both of these opinions.

In *Free Enterprise Fund v. Public Company Accounting Oversight Board*,<sup>232</sup> the Court examined the constitutionality of the creation and design of the Public Company Accounting Oversight Board (Board) under the Sarbanes-Oxley Act of 2002.<sup>233</sup> The Board was created to have oversight over every accounting firm that audits companies under the federal securities laws.<sup>234</sup> Concerns arose about the design of the Board and an accounting firm and nonprofit brought an action in the United States District Court for the District of Columbia challenging its creation.<sup>235</sup> The Supreme Court held that the district court originally hearing the case had jurisdiction despite section 25 of the Securities Exchange Act of 1934, which grants courts of appeals the ability to challenge final orders or rules of the SEC, because section 25 did not grant the courts of appeals exclusive jurisdiction.<sup>236</sup> The Supreme Court also held that for-cause limitations on the removal of members of the Board were constitutionally impermissible because they contravened

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228. *Id.* at 1570.

229. *See id.* at 1567 n.1 (distinguishing the Third Circuit’s approach from the approaches adopted by the Second, Fifth, and Ninth Circuits).

230. *Id.* at 1575–76 (Thomas, J., concurring in the judgment).

231. *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

232. *Free Enter. Fund*, 561 U.S. 477.

233. *Id.* at 487–88.

234. *Id.* at 484–87.

235. *Id.* at 487.

236. *Id.* at 489.

the Constitution's separation of powers.<sup>237</sup> In addition, the Court held that the Sarbanes-Oxley Act authorizing the SEC to appoint members of the Public Company Oversight Board did not violate the Appointments Clause of the Constitution.<sup>238</sup> The majority opinion was authored by Chief Justice John Roberts and was joined by Justices Alito, Kennedy, Scalia, and Thomas.<sup>239</sup> Justice Breyer authored a dissent that was joined by Justices Ginsburg, Sotomayor, and Stevens.<sup>240</sup>

The Court in *Lawson v. FMR LLC*<sup>241</sup> addressed the scope of whistleblower protection under the Sarbanes-Oxley Act.<sup>242</sup> The portion of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A(a), at issue in the case was designed to protect whistleblowers who reported securities violations being perpetrated in public companies.<sup>243</sup> The Court interpreted this provision to protect employees of private contractors and subcontractors serving public companies.<sup>244</sup> Justice Ruth Bader Ginsburg wrote the opinion of the Court, which was joined by Chief Justice Roberts and Justices Breyer and Kagan.<sup>245</sup> Justice Antonin Scalia authored a concurring opinion, which was joined by Justice Thomas, that endorsed the Court's textual interpretation of the provision, but he objected to the Court's resorting to the legislative history.<sup>246</sup> In addition, Justice Sonia Sotomayor authored a dissent, joined by Justices Kennedy and Alito, that argued that the provision should be interpreted more narrowly based on its text, context, and purpose.<sup>247</sup>

## II. THE ROBERTS COURT AS MUSEUM CURATOR AND ITS IMPACT ON SECURITIES REGULATION

In *Blue Chip Stamps v. Manor Drug Stores*,<sup>248</sup> Justice Rehnquist famously wrote: "When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a

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237. *Id.* at 492.

238. *Id.* at 510–13.

239. *Id.* at 482.

240. *Id.* at 514 (Breyer, J., dissenting).

241. 134 S. Ct. 1158 (2014).

242. *Id.* at 1161.

243. *Id.* at 1163.

244. *Id.* at 1175–76.

245. *Id.* at 1160.

246. *Id.* at 1176 (Scalia, J., concurring in principal part and concurring in the judgment).

247. *Id.* at 1177–78 (Sotomayor, J., dissenting).

248. 421 U.S. 723 (1975).

legislative acorn.”<sup>249</sup> This is likely the most famous analogy in federal securities regulation because of the importance of the implied private right of action in securities litigation,<sup>250</sup> and because the scope of that private right of action has regularly grown and been pruned through litigation.<sup>251</sup> The Roberts Court, for example, has already heard numerous cases involving the private right of action under section 10(b) and Rule 10b-5.<sup>252</sup> Beyond its broad scope, the reason why the implied private right of action has yielded so much litigation is because it is judicially implied, and as Justice Scalia accurately put it in his concurrence to *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson* while talking about defining the contours of the implied private right of action: “We are imagining here.”<sup>253</sup> Despite the fact that the oak analogy has been widely used, it is no longer accurate. A tree is a growing living organism that needs to be cultivated, fertilized and pruned. To the Roberts Court, the private right of action and the other core issues of securities regulation are relics from past decades.

In regard to the Roberts Court and its treatment of securities regulation, the better comparison is to a museum curator, rather than an arborist. As evidenced by the unrealized landmark opinions, the Court

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249. *Id.* at 737.

250. The legislative history of section 10(b) evidences that Congress drafted the provision as a “catch-all.” *Hearing on H.R. 7852 and H.R. 8720 Before the H. Comm. on Interstate and Foreign Commerce*, 73d Cong. 115 (1934) (statement of Thomas G. Corcoran, Counsel, Reconstruction Finance Corporation) (“[Section 10(b)] is a catch-all clause to prevent manipulative devices[,] I do not think there is any objection to that kind of a clause. The Commission should have the authority to deal with new manipulative devices.”). The Supreme Court has recognized this purpose of section 10(b) in numerous opinions. *See, e.g.*, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983) (describing section 10(b) as a “‘catchall’ anti-fraud provision”); *Chiarella v. United States*, 445 U.S. 222, 226 (1980) (same); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203 (1976) (same).

251. *See* Jill E. Fisch, *As Time Goes By: New Questions About the Statute of Limitations for Rule 10b-5*, 61 *FORDHAM L. REV.* S101, S101 (1993) (“There are dozens of Supreme Court decisions and perhaps thousands of lower court opinions addressing problems of statutory interpretation that arise in connection with private rights of action under section 10(b) of the Securities Exchange Act of 1934 . . . and Rule 10b-5 of the Securities and Exchange Commission . . . .”) (citations omitted); James D. Gordon III, *Acorns and Oaks: Implied Rights of Action Under the Securities Acts*, 10 *STAN. J.L. BUS. & FIN.* 62, 62 (2004) (reporting that “federal courts have issued thousands of decisions defining the scope of th[e] private right of action” under section 10(b) and Rule 10b-5).

252. *See supra* Part I (surveying securities regulation and the Roberts Court, and discussing a large number of cases involving the private right of action under section 10(b) and Rule 10b-5).

253. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 366 (1991) (Scalia, J., concurring in part and concurring in the judgment).

has been unwilling to expand or contract the current scope of federal securities law.<sup>254</sup> Unlike previous iterations of the Court, the Roberts Court has expressed no interest in sculpting securities law for purposes of advancing any particular theory of market regulation. The Court is willing to do restoration work and fill in gaps when cracks appear, as evidenced by its inclination to tinker with core substantive issues of securities law.<sup>255</sup> Through its willingness to address issues of securities litigation procedure, the Court has also been willing to answer issues relating to access to federal courts similar to a curator establishing operating hours of a museum and deciding issues of gallery entrance.<sup>256</sup> Finally, the Court has offered a couple of cases that are special exhibitions because they are at the periphery of securities law.<sup>257</sup>

A number of implications of the Roberts Court acting as museum curator in the area of securities regulation exist that should be explored. First, the Roberts Court's approach to securities regulation has brought to an end the Second Circuit being the leading court in the field of securities law, and it has also brought to an end the practice of previous iterations of the Court of using the circuit courts as laboratories to develop securities regulation generally. In addition, the current approach by the Roberts Court leads to the entrenchment of bad precedent that needs to be discarded. Finally, the most obvious implication of the Roberts Court's approach to securities law is that the Roberts Court is not pro-business in the realm of securities regulation because of the absence of a regulatory agenda whether it be pro-business, pro-management, pro-investor, or pro-market. Each of these implications will be examined in turn.

*A. The Death of the Mother Court and the Lower Court  
Laboratories Approach*

Albert Camus's *L'étranger* begins with the following sentence: "Aujourd'hui, maman est morte," which can be translated as "Today, mother is dead."<sup>258</sup> Although this sentence refers to the death of the narrator's mother in the novel, the same sentence could have been uttered when Chief Justice Roberts took his seat on the Court on September 29, 2005. In his dissenting opinion in *Blue Chip Stamps*, Justice

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254. See *supra* Part I.A (discussing the unrealized landmark opinions by the Roberts Court relating to securities regulation).

255. See *supra* Part I.B (discussing the opinions by the Roberts Court involving tinkering with core substantive issues of securities regulation).

256. See *supra* Part I.C (discussing the opinions by the Roberts Court addressing securities litigation procedure).

257. See *supra* Part I.D (discussing the opinions by the Roberts Court addressing the outer limits of securities regulation).

258. ALBERT CAMUS, *L'ÉTRANGER* 9 (Gallimard ed., 1942).

Harry Blackmun famously referred to the United States Court of Appeals for the Second Circuit as the “Mother Court” in the field of securities regulation.<sup>259</sup> Notably, Justice John Paul Stevens in his concurrence in *Morrison* went so far as to continue the “judicial oak” analogy penned by Justice Rehnquist, when Justice Stevens declared Judge Henry Friendly of the Second Circuit to be the “master arborist” of the implied private right of action under section 10(b) and Rule 10b-5.<sup>260</sup> Historically, the Supreme Court has used the lower courts in general as laboratories for experimenting with and developing securities law.<sup>261</sup> For example, the implied right of action under section 10(b) and Rule 10b-5 was originally recognized in 1946 by the United States District Court for the Eastern District of Pennsylvania in *Kardon v. National Gypsum Company*.<sup>262</sup> Twenty five years after *Kardon*, the Supreme Court finally held in *Superintendent of Insurance v. Bankers Life & Casualty Co.*<sup>263</sup> in a single sentence in footnote nine of the opinion: “It is now established that a private right of action is implied under § 10(b).”<sup>264</sup> Similarly, the purchaser-seller requirement, one of the most important limitations on the implied private right of action under section 10(b) and Rule 10b-5, was announced by the Second Circuit in 1952 in *Birnbaum v. Newport Steel Corp.*<sup>265</sup> The Supreme Court waited until 1975 in *Blue Chip Stamps* to confirm its existence.<sup>266</sup>

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259. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting).

260. *Morrison v. Natl. Austl. Bank Ltd.*, 561 U.S. 247, 276 (2010) (Stevens, J., concurring in the judgment).

261. See Stephen M. Bainbridge, *Insider Trading Regulation: The Path Dependent Choice Between Property Rights and Securities Fraud*, 52 SMU L. REV. 1589, 1640 (1999) (“Another consequence of the infrequency with which the Supreme Court decides securities law issues is that the ballgame typically is not the specific pronouncement the Supreme Court makes [in] a given case, but how that pronouncement is interpreted, extended, and/or restricted by the lower courts.”) (citation omitted); Donald C. Langevoort, *Words from on High About Rule 10b-5: Chiarella’s History, Central Bank’s Future*, 20 DEL. J. CORP. L. 865, 865 (1995) (“A securities law decision by the United States Supreme Court is an extraordinary event . . . . Adjudication of securities law disputes is a task reserved almost exclusively for the lower courts and, to a lesser extent, SEC administrative proceedings.”).

262. 69 F. Supp. 512, 513 (E.D. Pa. 1946).

263. 404 U.S. 6 (1971).

264. *Id.* at 13 n.9 (citation omitted). Remarkably, the Supreme Court did not even interpret section 10(b) and Rule 10b-5 until 1969. *SEC v. Nat’l Sec., Inc.*, 393 U.S. 453, 465 (1969) (“Although § 10(b) and Rule 10b-5 may well be the most litigated provisions in the federal securities laws, this is the first time this Court has found it necessary to interpret them.”).

265. 193 F.2d 461, 464 (2d Cir. 1952).

266. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 748–49 (1975).

The Roberts Court has ended the Second Circuit's role as the "Mother Court" and the lower court laboratories approach in regard to the development of securities law in favor of maintaining and entrenching existing precedent and respecting the separation of powers established by the Constitution. In cases such as *Dabit*, *Billing*, *Merck*, *Morrison*, *Simmonds*, *Gabelli*, *Amgen*, *Manning*, and *Salman*, the Roberts Court abrogated case law from the Second Circuit.<sup>267</sup> The Roberts Court still does rely on the Second Circuit on rare occasion. For example, in *Jones v. Harris Associates*,<sup>268</sup> the Court relied heavily on

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267. *Salman v. United States*, 137 S. Ct. 420, 427–28 (2016) (abrogating *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014) on the ground that tipper-tippee liability can be created solely based upon a tipper making a gift of material nonpublic confidential information to a trading relative or a friend); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1575 (2016) (abrogating *Barbara v. New York Stock Exchange, Inc.*, 99 F.3d 49 (2d Cir. 1996) on the ground that in determining when an exclusive grant of federal jurisdiction applies to a case involving the Securities Exchange Act of 1934, the correct test is the one under the general federal question statute, 28 U.S.C. § 1331, i.e. exclusive jurisdiction is granted to federal courts in regard to actions "arising under" federal law); *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184, 1196, 1198–99 (2013) (abrogating *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623 (2d Cir. 2011) on the ground that proof of materiality is not a prerequisite to certification of a class employing the fraud on the market presumption under section 10(b) and Rule 10b-5); *Gabelli v. SEC*, 133 S. Ct. 1216, 1224 (2013) (reversing the Second Circuit on the ground that the statute of limitations, found in 28 U.S.C. § 2462, begins running at the time when an alleged fraud occurs under section 80b-6 of the Investment Advisor Act of 1940, not when the alleged fraud was discovered); *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1421 n.7 (2012) (abrogating *Litzler v. CC Investments, L.D.C.*, 362 F.3d 203 (2d Cir. 2004) on the ground that the two-year statute of limitations on causes of action under section 16(b) of the Securities Exchange Act of 1934 should not be tolled beyond when the plaintiff was aware or should have been aware of the facts providing the basis for disgorgement); *Morrison v. Natl. Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010) (abrogating decades of precedent for the Second Circuit and other circuit courts regarding the extraterritorial application of the private right of action under section 10(b) and Rule 10b-5); *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 653 (2010) (abrogating *Shah v. Meeker*, 435 F.3d 244 (2d Cir. 2006) on the ground that the statute of limitations for private rights for an action for security fraud should run from the time when a plaintiff discovers the facts constituting the violation or when "a reasonably diligent plaintiff would have 'discover[ed] the facts constituting the violation'"); *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 285 (2007) (reversing a Second Circuit opinion on the ground that securities law should have precluded the antitrust claims in the case); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 89 (2006) (vacating a Second Circuit opinion written by Judge Sonia Sotomayor on the ground that SLUSA's preemptive power should be interpreted broadly).

268. 559 U.S. 335 (2010).

*Gartenberg v. Merrill Lynch Asset Management, Inc.*,<sup>269</sup> to determine the proper standard for when an investment advisor breaches its fiduciary duties under section 36(b) of the Investment Company Act of 1940 by charging fees that are too high to manage an investor's mutual fund.<sup>270</sup> In *Haliburton I*, the Court also agreed with *In re Salomon Analyst Metromedia Litigation*<sup>271</sup> in reaching its holding that plaintiffs need not prove loss causation for purposes of class certification under section 10(b) and Rule 10b-5.<sup>272</sup> Based on the number of instances in which the Roberts Court has abrogated the holdings of the Second Circuit in securities regulation cases, however, the Second Circuit is no longer the "Mother Court" in the development of securities law. This is especially true because in *Morrison*, one of the unrealized landmark opinions, the Roberts Court expressly rejected over four decades of precedent that had originated in the Second Circuit regarding the extra-territorial application of federal securities law.<sup>273</sup> In addition, the Court in *Salman*, another unrealized landmark opinion, rejected the Second Circuit's attempt to create better defined and more logical limits for

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269. 694 F.2d 923 (2d Cir. 1982).

270. *Jones*, 559 U.S. at 351–53.

271. 544 F.3d 474, 483 (2d Cir. 2008).

272. *Erica P. John Fund, Inc. v. Halliburton Co. (Halliburton I)*, 563 U.S. 804, 809 (2011).

273. *Morrison*, 561 U.S. at 261 ("Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects."). See Daniel S. Kahn, *The Collapsing Jurisdictional Boundaries of the Antifraud Provisions of the U.S. Securities Laws: The Supreme Court and Congress Ready to Redress Forty Years of Ambiguity*, 6 N.Y.U. J.L. & BUS. 365, 372–73 (2010) ("The Second Circuit was the first to address the application of the antifraud provision to a partially foreign transaction in *Schoenbaum v. Firstbrook*, where the court applied an effects test to assert jurisdiction, and then again four years later in *Leasco Data Processing Equipment Corp. v. Maxwell*, where the court applied a nascent version of the conduct test to assert jurisdiction.") (citations omitted); Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657, 714–15 (2013) ("*Morrison v. National Australia Bank Ltd* . . . swept away the conduct and effects tests that the Second Circuit had developed to determine the transnational reach of the antifraud provisions in federal securities laws."); see also Franklin A. Gevurtz, *An Introduction to the Symposium and an Examination of Morrison's Impact on the Presumption Against Extraterritoriality*, 27 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 173, 178 (2014) ("The combination of *Schoenbaum* and *Leasco* created what became known as the conduct and effects test to determine the reach of Section 10(b) and Rule 10b-5 with respect to securities fraud having a transnational dimension. . . . The test spread from the Second Circuit to the other circuits, albeit with some differences.") (citations omitted).

the scope of tipper-tippee liability under the prohibition against insider trading based upon section 10(b) and Rule 10b-5.<sup>274</sup>

The court that the Supreme Court now seeks guidance from in making determinations of key issues of securities regulation is itself. In each of the Roberts Court unrealized landmark opinions the Court relied heavily upon its own precedent to allow neither expansion nor contraction of the boundaries that it had set for the scope of federal securities law. In *Stoneridge*, the Court relied heavily upon the rejection of secondary liability in *Central Bank*, which had prohibited the expansion of liability under the implied private right of action under section 10(b) and Rule 10b-5 to aiders and abettors.<sup>275</sup> In *Morrison*, the Court relied on existing case law from the Court regarding the extraterritorial application of statutes to reach its holding that no extraterritorial application exists under the Securities Exchange Act of 1934.<sup>276</sup> In *Halliburton II*, the Court relied heavily on *Basic*<sup>277</sup> in making the determination that the fraud-on-the-market theory still exists to allow class certification in cases brought under the implied private right of action under section 10(b) and Rule 10b-5.<sup>278</sup> Finally, in *Salman*, the Court held that *Dirks v. SEC*<sup>279</sup> should be the beginning and the end of the analysis when determining the scope of tipper-tippee liability for insider trading under section 10(b) and Rule 10b-5.<sup>280</sup> While the Supreme Court's precedent is the obvious place for the Court to begin in looking for guidance in addressing new issues, the Roberts Court has become wedded to notions of judicial restraint and modesty, and as a result, unless Congress acts, securities law is likely to remain static for the foreseeable future. While the Second Circuit and the other circuit courts may have some role to play when the Supreme Court tinkers with core substantive issues of securities regulation, construes securities litigation

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274. *Salman v. United States*, 137 S. Ct. 420, 428 (2016) (“To the extent the Second Circuit held that the tipper must also receive something of a ‘pecuniary or similarly valuable nature’ in exchange for a gift to family or friends . . . we agree with the Ninth Circuit that this requirement is inconsistent with [Supreme Court precedent].” (quoting *United States v. Newman*, 773 F.3d 438, 452 (2d Cir. 2014))).

275. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157–58 (2008); *Cent. Bank of Denver v. Interstate Bank of Denver*, 511 U.S. 164, 191 (1994).

276. *Morrison*, 561 U.S. at 255, 265.

277. 485 U.S. 224 (1988).

278. *Halliburton Co. v. Erica P. John Fund, Inc. (Halliburton II)*, 134 S. Ct. 2398, 2405 (2014).

279. 463 U.S. 646 (1983).

280. *Salman*, 137 S. Ct. at 427.

procedure, and addresses issues on the periphery of securities regulation, a return of the circuit courts creating new securities law is unlikely.

*B. The Entrenchment of Well-Constructed and Ill-Constructed Case Law*

The current role of the Roberts Court as museum curator could arguably reflect that security law has finally reached its maturity. As previously mentioned, the implied private right of action under section 10(b) and Rule 10b-5 has been heavily litigated because of the lack of statutory guidance regarding its contours,<sup>281</sup> and this is perhaps best evidenced by the well-developed and well-litigated test that exists for the implied private right.<sup>282</sup> Still, in a certain regard, this maturity seems forced. For example, in *Morrison*, the Court simply rejected a large and well-developed body of law from the lower courts regarding the extraterritorial application of the federal securities law,<sup>283</sup> which suggested the need for some sort of development of this area of law, if not by the Court, then Congress.

Examining the cases that the Court has decided, the opinions issued by the Court have reinforced and entrenched existing case law regardless of whether it has been good or bad precedent. In terms of the unrealized landmark opinions, despite the fact that they have maintained existing Supreme Court case law, the entrenchment of this case law has led to some very negative results depending on the quality of the case law the Roberts Court is relying upon.

The opinion in *Salman* provides perhaps the best example of the Roberts Court's approach to securities regulation leading to bad results.<sup>284</sup> *Salman* represents a missed opportunity for the Roberts Court

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281. *See supra* notes 248–253 and accompanying text (discussing the extensive litigation of the implied private right of action under section 10(b) and Rule 10b-5).

282. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008) (“In a typical § 10(b) private action a plaintiff must prove (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.”). This language has been used in various other Supreme Court opinions. *See Halliburton II*, 134 S. Ct. at 2407 (providing identical language); *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184, 1192 (2013) (same); *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 37–38 (2011) (same).

283. *See Morrison v. Natl. Austrl. Bank Ltd.*, 561 U.S. 247, 255–56 (2010) (“This disregard of the presumption against extraterritoriality did not originate with the Court of Appeals panel in this case. It has been repeated over many decades by various Courts of Appeals in determining the application of the Exchange Act . . . . That has produced a collection of tests for divining what Congress would have wanted, complex in formulation and unpredictable in application.”).

284. *Salman*, 137 S. Ct. 420.

to fine tune and improve insider trading regulation in a way that is logical and conforms to the language and intent of the statute and the rule. Unlike the existence of the private right of action under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereupon, which creates substantial separation of powers concerns and is a study in judicial activism, insider trading regulation is a logical and congressionally authorized extension of these provisions. Unfortunately, the standard for tipper-tippee liability, which is improperly moored to notions of state fiduciary duties and personal gain, is not.

In *Salman*, the Court left untouched the existing test for insider trading.<sup>285</sup> The problem is that the current test for insider trading is erroneously founded upon fiduciary duty, and the current test for tipper-tippee liability is erroneously founded upon notions of personal gain. In *Salman*, Justice Alito begins the Court's unanimous opinion by stating: "Section 10(b) of the Securities Exchange Act of 1934 and the Securities and Exchange Commission's Rule 10b-5 prohibit undisclosed trading on inside corporate information by individuals who are under a duty of trust and confidence that prohibits them from secretly using such information for their personal advantage."<sup>286</sup> This holding embodies the current understanding of insider trading regulation by the Court that originates from the SEC administrative action, *In re Cady, Roberts & Co.*<sup>287</sup> The Court has crystalized the *In re Cady, Roberts & Co.* opinion into the following test for insider trading: "(i) the existence of a relationship affording access to inside information intended to be available only for a corporate purpose, and (ii) the unfairness of allowing a corporate insider to take advantage of that information by trading without disclosure."<sup>288</sup> In *Dirks* and other opinions, the Court has held that such a violation occurs in the context of a breach of fiduciary duty on the part of the insider.<sup>289</sup> In addition, the Court has clarified that, for section 10(b) and Rule 10b-5 to apply, a "manipulation or deception" must have occurred.<sup>290</sup> *Dirks* also established the test for tipper-tippee liability:

[A] tippee assumes a fiduciary duty to the shareholders of a corporation not to trade on material nonpublic information only

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285. *Id.* at 427.

286. *Id.* at 423.

287. 40 SEC 907 (1961).

288. *Chiarella v. United States*, 445 U.S. 222, 227 (1980).

289. *Dirks v. SEC*, 463 U.S. 646, 654 (1983); *Chiarella*, 445 U.S. at 227-29.

290. *Dirks*, 463 U.S. at 654.

when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach.<sup>291</sup>

In attempting to clarify when a tipper has committed a breach of fiduciary duty, the Court held that “the test is whether the insider personally will benefit, directly or indirectly, from his disclosure.”<sup>292</sup> From this holding, the issues that beget *Salman* ensued.

The problem is that the Supreme Court uncharacteristically provided too much guidance in the area of insider trading regulation. In developing this area of law, the Court needlessly imported the complex and evolving web of fiduciary duty law into insider trading regulation. Because fiduciary duty law is determined by the state, this creates questions of which notions of fiduciary duties to follow. Even if one chooses to focus on Delaware, a lot has happened since 1983 when *Dirks* was decided, including the dramatic expansion of the duty of care in *Smith v. Van Gorkom*,<sup>293</sup> the ability to eliminate the duty of care using section 102(b)(7) of the Delaware General Incorporation Law,<sup>294</sup> the unearthing of the duty of good faith in cases such as *In re Walt Disney Co. Derivative Litigation*,<sup>295</sup> and the reimagining of the duty of loyalty in cases such as *Stone v. Ritter*.<sup>296</sup> Considering how much fiduciary duty law has evolved since *Dirks* and how much it is likely to evolve in the future, one must wonder why the Roberts Court continues to build on this unstable foundation for insider trading regulation. This is especially true when the Court in *Dirks* acknowledged that deception is at the core of an insider trading violation, rather than a breach of fiduciary

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291. *Id.* at 660.

292. *Id.* at 662.

293. 488 A.2d 858, 872–73 (Del. 1985) (analyzing the scope of “a director’s duty to exercise an informed business judgment” as an aspect of the duty of care).

294. See John L. Reed & Matt Neiderman, *Good Faith and the Ability of Directors to Assert § 102(b)(7) of the Delaware General Corporation Law as a Defense to Claims Alleging Abdication, Lack of Oversight, and Similar Breaches of Fiduciary Duty*, 29 DEL. J. CORP. L. 111, 113 (2004) (“Section 102(b)(7) first appeared in the [Delaware General Corporation Law] in 1986, in response to the declining availability of adequate directors’ and officers’ liability insurance created in the wake of *Smith v. Van Gorkom*, a case where the Delaware Supreme Court upheld a finding that directors breached their fiduciary duty of care in connection with the approval of an acquisition.”) (citations omitted).

295. 906 A.2d 27, 64–67 (Del. 2006) (examining the definition of the duty of good faith under Delaware law).

296. 911 A.2d 362, 369–70 (Del. 2006) (identifying the duty to act in good faith as a part of the duty of loyalty).

duty.<sup>297</sup> Similarly, one must wonder why the Roberts Court is hanging onto the personal benefit language in *Dirks* when it has proven unworkable and left open so many questions.<sup>298</sup>

The Court could have adopted the following approach, which I have developed. First, the Court could have retained the *Cady, Roberts* rule, and rather than requiring a breach of fiduciary duty on the part of the insider, the Court could have held that “unfairness of allowing a corporate insider to take advantage of that information by trading without disclosure”<sup>299</sup> exists only when the insider has recklessly, knowingly, or intentionally obtained the information through deception. Second, rather than requiring any analysis of personal benefit, the Court could have held that tipper-tippee liability exists when the tippee knows or should have known that the tipper has recklessly, knowingly, or intentionally obtained the information through deception. Such deception could include breaching company policies mandating that such information be kept secret, and those policies could be trumped by ethical and legal obligations to disclose, such as those that animated *Secrist* to disclose in *Dirks*,<sup>300</sup> which means that my proposal would keep the result in *Dirks* the same.

Such an approach is truer to the underlying purpose of the federal securities law. As the Supreme Court held in *SEC v. Capital Gains Research Bureau, Inc.*,<sup>301</sup> the “fundamental purpose” underlying both the Securities Act and the Exchange Act is “to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve

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297. *Dirks*, 463 U.S. at 653–54.

298. See Ronald J. Colombo, *Tipping the Scales Against Insider Trading: Adopting a Presumption of Personal Benefit to Clarify Dirks*, 45 HOFSTRA L. REV. 117, 145 (2016) (“U.S. securities law suffers from a number of vexing difficulties, one of which is the proper understanding and application of the Supreme Court’s personal benefit test as set forth in *Dirks*.”); Jill E. Fisch & Hillary A. Sale, *The Securities Analyst as Agent: Rethinking the Regulation of Analysts*, 88 IOWA L. REV. 1035, 1060–61 (2003) (“[I]t is unclear what type of personal benefit is necessary after *Dirks*.”); Joan MacLeod Heminway, *Martha Stewart and the Forbidden Fruit: A New Story of Eve*, 2009 MICH. ST. L. REV. 1017, 1040 (“Among other things, the need to meet the personal-benefit requirement, the nature of the personal benefit that may trigger tipper/tippee liability, and whether the tipper must actually receive a personal benefit or intend to receive a personal benefit in giving material nonpublic information to the alleged tippee are unclear issues [under the standard created by *Dirks*], especially where the tipper is a misappropriator rather than a classical insider (e.g., an officer or director of the corporation that issued the securities that are traded by the tippee).”).

299. *Chiarella v. United States*, 445 U.S. 222, 227 (1980).

300. *Dirks*, 463 U.S. at 648–49.

301. 375 U.S. 180 (1963).

a high standard of business ethics in the securities industry.”<sup>302</sup> This “fundamental purpose” is founded upon elimination of deception in the purchase and sale of securities, rather than eliminating breaches of fiduciary duty.<sup>303</sup>

In addition, a deception based theory of insider trading is also more in keeping with the history and intent of Rule 10b-5. Milton Freeman has famously recounted the thinness of the drafting history of Rule 10b-5 as follows:

We called the Commission and we got on the calendar, and I don't remember whether we got there that morning or after lunch. We passed a piece of paper around to all the commissioners. All the commissioners read the rule and they tossed it on the table, indicating approval. Nobody said anything except Sumner Pike who said, “Well,” he said, “we are against fraud, aren't we?” That is how it happened.<sup>304</sup>

What this quotation evidences is that Rule 10b-5 was designed to prevent fraud and deception in the purchase and sale of securities, which means that grafting requirements onto Rule 10b-5 for breaches of fiduciary duty and personal benefit are unnecessary and inappropriate.

My approach would provide better notice to investors regarding what is rendered unlawful by insider trading regulation, which helps to address the Due Process and Rule of Lenity concerns with the existing state of regulation.<sup>305</sup> My approach prevents investors from feeling obligated to keep up with complex and convoluted insider trading law because they already have an understanding of what deception is. In addition, foreign investors better understand their obligations because, while they likely understand what constitutes a deception, fiduciary duty regulation in the United States may feel very foreign to them.

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302. *Id.* at 186.

303. *Id.*

304. Milton V. Freeman, *Administrative Procedures*, 22 BUS. LAW. 891, 922 (1967).

305. See Kathleen Coles, *The Dilemma of the Remote Tippee*, 41 GONZ. L. REV. 181, 235 (2006) (“Regardless of whether the lack of clarity in the insider trading rules is sufficient at this point to justify overturning on constitutional grounds a set of tests that have been in place for decades, it remains troubling from a policy standpoint that increasing civil and criminal penalties are being imposed where the laws remain so expansive, complicated, inconsistent, and unclear.”); J. Kelly Strader, *(Re)Conceptualizing Insider Trading: United States v. Newman and the Intent to Defraud*, 80 BROOK. L. REV. 1419, 1484 (2015) (“Insider trading law raises concerns endemic to white collar criminalization: due process vagueness and the concurrent risk of overcriminalization.”).

*Salman* represents a missed opportunity to fine tune and improve insider trading regulation in a way that is logical and conforms to the language and intent of the statute and the rule. The question of whether the entrenchment by the Roberts Court of existing precedent in other cases is problematic is more open. In *Haliburton II*, for example, the Court affirmed the existence and application of the fraud-on-the-market theory to the implied private right of action under section 10(b) and Rule 10b-5,<sup>306</sup> despite the fact that the fraud-on-the-market theory is founded upon questionable economic theory that some view as being discredited.<sup>307</sup> In addition, in *Morrison*, the Court rejected four decades of well-developed lower court precedent regarding the extraterritorial application of the private right of action under section 10(b) and Rule 10b-5,<sup>308</sup> despite the fact that the private right could have a role to play in policing the emerging global securities markets.<sup>309</sup> And, in *Stoneridge*, the Court rejected a theory of “scheme liability,”<sup>310</sup> despite the fact that this theory could help in policing securities transactions.<sup>311</sup> Each of these

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306. *Halliburton Co. v. Erica P. John Fund, Inc. (Halliburton II)*, 134 S. Ct. 2398, 2413 (2014).

307. See William W. Bratton & Michael L. Wachter, *The Political Economy of Fraud on the Market*, 160 U. PA. L. REV. 69, 72 (2011) (“The fraud-on-the-market (FOTM) cause of action just doesn’t work.”); Michael J. Kaufman & John M. Wunderlich, *Fraud Created the Market*, 63 ALA. L. REV. 275, 306 (2012) (“[T]he premise of the fraud-on-the-market theory, the efficient-market hypothesis, has been heavily criticized. Proponents of behavioral finance observe irrationality in investor behavior and argue that markets are in the main inefficient.”); Saul Zipkin, *A Common Law Court in a Regulatory World*, 74 OHIO ST. L.J. 285, 317 (2013) (“The fraud-on-the-market theory has been criticized by numerous commentators, for a variety of reasons . . . .”) (citation omitted).

308. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 261 (2010).

309. See Eric C. Chaffee, *A Call for Legislative Reform: Expanding the Extraterritorial Application of the Private Rights of Action under Federal Securities Law while Limiting the Scope of the Relief Available*, 22 STAN. J.L. BUS. & FIN. (forthcoming 2017) (discussing the role that the private right of action under section 10(b) and Rule 10b-5 could play in helping to regulate the emerging international securities markets).

310. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159–60 (2008).

311. See Melissa C. Nunziato, Comment, *Aiding and Abetting, a Madoff Family Affair: Why Secondary Actors Should be Held Accountable for Securities Fraud through the Restoration of the Private Right of Action for Aiding and Abetting Liability under the Federal Securities Laws*, 73 ALB. L. REV. 603, 643 (2010) (“Congress should restore the right of private litigants to bring aiding and abetting claims. Its failure to do so would encourage and perpetuate further fraudulent conduct in the market, thereby injuring investor confidence.”); Jamie Heine, *The Whittling Away of the Private Right of Action under Rule 10b-5: The PSLRA, Janus, and the Financial Crisis*, 48 CREIGHTON L. REV. 23, 62 (2014) (“Providing for a private right of action

cases potentially represent a missed opportunity for meaningful change in federal securities regulation that was thwarted at least in part based on the Roberts Court being wedded to existing Supreme Court precedent.

Whether this evidences judicial modesty, respecting the role of Congress, or something else is hard to say. The Roberts Court approach could evidence a belief that Congress will legislate when necessary in the area of securities regulation. Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA) and the Securities Litigation Uniform Standards Act of 1998 (SLUSA) relatively close to the time when Chief Justice Roberts took his seat on the Court on September 29, 2005.<sup>312</sup> In regard to *Stoneridge*, for example, the Roberts Court's holding was based largely upon the Supreme Court's holding in *Central Bank*, which made clear that no secondary liability exists based upon the implied private right of action under section 10(b) and Rule 10b-5.<sup>313</sup> Notably, just after *Central Bank* was handed down by the Court, Congress enacted section 104 of the PSLRA, which created section 20(e) of the Securities Exchange Act that provides the government the ability to prosecute aiding and abetting violations of section 10(b) and Rule 10b-5, but it did not grant or provide parties the ability to sue.<sup>314</sup> Similarly, *Morrison* abrogated over four decades of precedent from the lower courts about applying a conduct and effects test to determine the extraterritorial application of the private rights of action under section 10(b) and Rule 10b-5,<sup>315</sup> and speaking for the majority in that case,

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for secondary liability both deters primary actors from committing securities fraud, since gatekeepers are more likely to prevent the primary actor from making fraudulent statements and to report those statements if they are made, and deters aiders and abettors from participating in fraud schemes, since they could face liability not only from the SEC but from every shareholder they defraud.”); Mark Klock, *Improving the Culture of Ethical Behavior in the Financial Sector: Time to Expressly Provide for Private Enforcement Against Aiders and Abettors of Securities Fraud*, 116 PENN ST. L. REV. 437, 446 (2011) (“There were, and still are, strong policy arguments supporting the doctrine of private action liability for aiding and abetting violations of securities laws.”).

312. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified in scattered sections of 15 U.S.C.); Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.); *Biographies of Current Justices*, *supra* note 2.

313. *Stoneridge*, 552 U.S. at 157-58; *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 191 (1994).

314. 15 U.S.C. § 78t(e) (2012) (providing that the SEC has the power to bring actions against individuals aiding and abetting securities violations under the Exchange Act).

315. *Morrison v. Natl. Austl. Bank Ltd.*, 561 U.S. 247, 255-61 (2010).

Justice Scalia wrote: “Rather than guess anew in each case [involving the extraterritorial application of federal securities law], we apply the presumption [against the extraterritorial reach] in all cases, preserving a stable background against which Congress can legislate with predictable effects.”<sup>316</sup> Remarkably, in response to this implicit challenge from Court to legislate, when President Barack Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>317</sup> (Dodd-Frank Act) on July 21, 2010, Congress reinstated the SEC’s and DOJ’s extraterritorial jurisdiction by adopting a conduct and effects approach in section 929P of the Act.<sup>318</sup> Moreover, Congress demonstrated a willingness to consider extending the extraterritorial application of the private rights of action under the Securities Exchange Act of 1934 by mandating a study of the issue by the United States Securities and Exchange Commission.<sup>319</sup>

Perhaps, the Court now feels that it can rely upon Congress to do its job in regard to sculpting federal securities regulation, or, perhaps, Chief Justice Roberts has been able to guide the Court to take a more modest role, which is something for which he advocated during his confirmation hearings.<sup>320</sup> Regardless, while one can argue that the Roberts Court’s decision to maintain the status quo in regard to the private right of action under section 10(b) and Rule 10b-5 in cases such as *Stoneridge* and *Morrison*, evidences proper judicial restraint, the neglect of insider trading regulation is disturbing, especially considering the criminal penalties and social scorn that are associated with insider trading accusations.

### C. *The Lack of a Pro-Business Bias*

This Article would be incomplete if it failed to include some analysis of whether the Roberts Court has a pro-business bias in regard to cases involving securities law. The debate over whether the Roberts Court is pro-business is almost as old as the Roberts Court itself. Shortly after

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316. *Id.*

317. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. § 5301).

318. *See id.* § 929P(b), 124 Stat. at 1864–65 (to be codified at 15 U.S.C. § 80a-47) (granting federal courts jurisdiction over actions instituted by the SEC alleging fraudulent “conduct occurring outside the United States that has a foreseeable substantial effect within the United States”).

319. *Id.* § 929Y(a), 124 Stat. at 1871 (requiring the SEC to solicit public comment and conduct a study to determine whether to extend the extraterritorial application of the private rights of action under the Securities Exchange Act of 1934).

320. *See infra* note 336 and accompanying text (discussing John Roberts’ comments regarding judicial modesty and respect for the separation of powers during his confirmation hearings).

John G. Roberts, Jr. took his seat as Chief Justice of the Court on September 29, 2005,<sup>321</sup> these claims began to emerge.<sup>322</sup> Commentators continue to regularly make these assertions.<sup>323</sup> The question of the validity of these claims is a complex one that requires the untangling of a myriad of issues within a large number of areas of the law. Obviously, in certain areas of the law, businesses have benefited greatly from the decisions by the Roberts Court. For example, with cases like *Citizens United v. FEC*<sup>324</sup> and *Burwell v. Hobby Lobby Stores, Inc.*,<sup>325</sup> the scope of certain corporate rights has expanded dramatically in the past decade.<sup>326</sup> The problem is that the definition of “business” is an elusive one.<sup>327</sup> For example, if you choose to define a business as a profit-

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321. *Biographies of Current Justices*, *supra* note 2.

322. *See, e.g.*, Jonathan H. Adler, *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 SANTA CLARA L. REV. 943, 943 (2009) (“It did not take long for the Roberts Court to earn its reputation as a ‘pro-business’ Court. . . . Indeed, some were ready to make this charge before the current Court had sat two full terms together.”) (citation omitted); Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, 962 (2008) (“[T]he Roberts Court is the most pro-business Court of any since the mid-1930s.”); Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1555 (2008) (“The decidedly pro-business tilt of the Court’s docket and rulings was certainly a major theme of those assessing the first full Term of the Roberts Court.”); Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAG., Mar. 16, 2008, at 38 (“[E]ver since John Roberts was appointed chief justice in 2005, the [Supreme Court] has seemed only more receptive to business concerns.”).

323. *See, e.g.*, Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1431–32 (2013) (“A number of scholars, journalists, and at least one member of Congress claim that the current Supreme Court (the ‘Roberts Court’) is more favorable to business than previous Supreme Courts have been.”) (citation omitted); Stephen M. Feldman, *The End of the Cold War: Can American Constitutionalism Survive Victory?*, 41 OHIO N.U. L. REV. 261, 314 (2015) (“[F]or corporations, the Roberts Court is the most pro-business Supreme Court since World War II.”); Deborah C. Malamud, *The Strange Persistence of Affirmative Action Under Title VII*, 118 W. VA. L. REV. 1, 22 (2015) (“The Roberts Court is marked by a combination of ideological conservatism and business conservatism: it has a strong pro-business bent.”).

324. 558 U.S. 310 (2010).

325. 134 S. Ct. 2751 (2014).

326. *See Citizens United*, 558 U.S. at 365 (holding “the Government may not suppress political speech on the basis of the speaker’s corporate identity”); *Burwell*, 134 S. Ct. at 2769 (holding that the term “person” in the Religious Freedom Restoration Act reaches closely held corporations).

327. *See* Simone M. Haug, *The United States Policy of Stringent Anti-Treaty-Shopping Provisions: A Comparative Analysis*, 29 VAND. J. TRANSNAT’L L.

seeking enterprise, you exclude all of the nonprofit businesses that most would expect to be incorporated into the definition. Moreover, because the definition of business is so expansive, it touches a multitude of different areas of law, which makes it difficult to know where to begin and end when it comes to analyzing the question of whether the Roberts Court can be properly characterized as pro-business.

As a result, this Article addresses only whether the Roberts Court is pro-business in its securities regulation opinions. Because capital is the life blood of business entities, issues of securities regulation and the regulation of capital markets are at the heart of beginning to answer whether the Roberts Court is pro-business. While understanding securities regulation in the Roberts Court does not definitively answer whether the Roberts Court is pro-business, it is a good place to begin.

In the realm of securities regulation, the Roberts Court has not shown a pro-business bias. Because the Roberts Court has acted as a museum curator in this area, the Court has not advanced a theory of market regulation that is pro-business, pro-management, pro-market, or pro-investor. It has merely done its best to maintain the status quo. Although one could argue that the Court helped to protect foreign businesses by abrogating case law in *Morrison* that extended the reach of federal securities regulation internationally,<sup>328</sup> and that the Court helped to protect businesses by refusing to adopt a theory of scheme regulation in *Stoneridge*,<sup>329</sup> the Court in *Halliburton II* refused to destroy the fraud-on-the-market theory and the presumption of reliance that it creates, which enables so many class actions to exist against businesses and their managers.<sup>330</sup> In addition, the Court in *Salman* rejected making any clarification of insider trading regulation that might have helped to better protect insiders, i.e., business people, from engaging in unlawful behavior.<sup>331</sup> This approach of neither expanding nor contracting the scope of securities regulation carries through the Roberts Court's case law.

The claim that the Roberts Court is pro-business in the area of securities regulation has no merit. Unlike previous iterations of the Supreme Court, the Roberts Court is not advancing any theory of market regulation, and as a result, grounds do not exist to claim that the Court is pro-business in regard to securities regulation because the Roberts

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191, 230 (1996) (“[I]t is extremely difficult to define what constitutes an active trade or business.”) (citation omitted).

328. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 261 (2010).

329. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159–60 (2008).

330. *Halliburton Co. v. Erica P. John Fund, Inc. (Halliburton II)*, 134 S. Ct. 2398, 2407 (2014).

331. *Salman v. United States*, 137 S. Ct. 420, 427 (2016).

Court is merely acting as a museum curator in this area.<sup>332</sup> Rather than being pro-business, the behavior of the Roberts Court evidences a newfound respect in the securities regulation realm for the separation of powers mandated by the Constitution. Notably, because capital formation is the foundation to the creation of business entities and securities regulation regulates this process, the conclusion that the Roberts Court is not pro-business in the area of securities law means that the argument that the Roberts Court is pro-business generally is built upon shaky ground.

#### CONCLUSION: THE FUTURE OF THE ROBERTS COURT

The future of the Roberts Court is an interesting question. The themes woven into the tapestry of the Roberts Court are pronounced. The polarization in the securities law area, as measured by dissents, is less than it has been during previous iterations of the Court,<sup>333</sup> and the voting of Justices do not map well to the Justices' partisan affiliations.<sup>334</sup> All of this demonstrates that the Court is at least facially relatively stable in regard to its approach to securities regulation. Whether any of this can really be attributed to Chief Justice Roberts is difficult to say. Notably, in all twenty-one opinions handed down by the Court, the Chief Justice has sided with the majority in every opinion in which he has been involved.<sup>335</sup> Whether this reflects the Chief Justice guiding the Court or a temperamental change of the Court in general is difficult to say. Both positions likely have some validity. At his confirmation hearing, Chief Justice Roberts famously declared:

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332. Other commentators have reached similar conclusions. *See* Coates, *supra* note 10, at 3 (“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.”); Pritchard, *supra* note 7, at 109 (“Does the ‘pro business’ Roberts Court have a negative attitude toward securities class actions? An examination of the overall pattern of the Court’s decisions in this area suggests a bias not toward business, but rather, the status quo, resisting attempts to both restrict—and expand—the reach of Rule 10b-5 class actions.”).

333. *See* Coates, *supra* note 10, at 3 (“[T]he Roberts Court has offered less dissent in securities and antitrust cases, as measured by minority votes and five-vote majorities, than prior Courts.”).

334. *See* Coates, *supra* note 10, at 22 (“[T]he overall Roberts Court’s securities-law case *outcomes* do not map well the Justices’ partisan affiliations.”).

335. *See supra* Part I (providing a survey of the securities regulation opinions issued by the Roberts Court); *see also* Coates, *supra* note 10, at 3 (“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.”) (citation omitted).

“Judges are like umpires. Umpires don’t make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.”<sup>336</sup> With a judicial philosophy like that, one should not be surprised that the Chief Justice has consistently joined opinions of the Court that maintain existing Supreme Court precedent with only minor tinkering and clarification of procedural issues.<sup>337</sup> At least one commentator has credited the Roberts Court’s willingness to grant certiorari and address securities litigation procedural issues in part to Chief Justice Roberts own background as an appellate litigator.<sup>338</sup> To claim that one member of the Court is responsible for the altitudinal disposition of the Court, however, is shortsighted. For example, after the passing of Justice Scalia, Justice Kagan stated: “I think we’re all textualists now in a way that just . . . was not remotely true when Justice Scalia joined the bench.”<sup>339</sup> If this is true, it helps to explain why the Court may no longer have the appetite that it once did for developing securities regulation because so much of securities litigation focuses on the implied private right of action under section 10(b) and Rule 10b-5 that is the product of judicial imagination.<sup>340</sup>

One would have a difficult time predicting when, how, and whether the Roberts Court’s disposition in regard to securities regulation will evolve. Filling the seat that was previously occupied by Antonin Scalia will obviously have an impact on the Court. In terms of the recent confirmation of Justice Neil Gorsuch, he has publicly stated his disdain for the implied private right of action under section 10(b) and Rule 10b-5. For example, in 2005, while Justice Gorsuch was a partner at Kellogg, Huber, Hansen, Todd, Evans & Figel prior to his appointment to the Tenth Circuit, he wrote an opinion column published in *The*

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336. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John Roberts).

337. *See supra* Part I (surveying the securities regulation case law of the Roberts Court).

338. *See Coates, supra* note 10, at 28 (“[C]omplex 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.”).

339. Justice Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes at Harvard Law School*, at 8:28 (Nov. 17, 2015), <https://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation/> [<https://perma.cc/H2ZE-L4XW>].

340. *See supra* Part I (surveying the case law of the Roberts Court involving securities regulation).

*National Law Journal* in which he described class actions under section 10(b) and Rule 10b-5 as a “free ride to fast riches enjoyed by securities class action attorneys in recent years” and that interpreting the private right narrowly would “curb frivolous fraud claims.”<sup>341</sup> Whether he still holds these views more than a decade later and how they might translate into action if he is hard to say. Still, as evidenced by the roles played by Justice William O. Douglas or Justice Lewis F. Powell, Jr a single Justice can have significant impact on the area of securities regulation.<sup>342</sup> Of course, at this point, the polarization and partisan bias of the members of the Court is low, and as a result, any new Justice or Justices would need to be very persuasive to set change into motion.<sup>343</sup> Moreover, in regard to securities regulation, the Roberts Court has been a study in judicial modesty and respect for the separation of powers. If Congress would choose to remake securities law in some significant regard, this would create an opportunity for the Court to become a more active force regarding developing and shaping securities law. PSLRA, SLUSA, Sarbanes-Oxley, and Dodd-Frank each show that Congress does choose to act from time to time regarding securities regulation. If Congress would enact new legislation, the Court’s disposition to securities regulation could change remarkably. In addition, the SEC also has power to regulate securities within the scope of authority that Congress has granted the agency. As a result, a dispositional shift in the SEC could also create a dispositional shift in the Court depending on what regulatory and enforcement strategies the SEC chooses to undertake.

Regardless, the current disposition of the Court is well-established. This Article is rife with analogies that rely on imagery as diverse as mosaics, tapestries, oak trees, arborists, and umpires. The one that matters the most, however, is the Roberts Court as a museum curator because this reflects the current approach by the Court regarding securities regulation. The Roberts Court has decided to preserve relics created by previous iterations of the Court, do minor restoration work as needed, answer questions of access in relation to securities litigation, and have the occasional special exhibition at the periphery of securities law. The implications of this approach include the death of the lower courts laboratories approach in regard to securities regulation, especially in regard to the Second Circuit, which was previously the “Mother

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341. Neil M. Gorsuch & Paul B. Matey, *No Loss, No Gain: The Supreme Court Should Make Clear That Securities Fraud Claims Can’t Dodge the Element of Causation*, NAT’L L.J., Jan. 31, 2005, at 52.

342. See *supra* note 19 and accompanying text (discussing the experience that Justice William O. Douglas and Justice Lewis F. Powell, Jr. brought to the Court regarding securities regulation).

343. See *supra* notes 333–335 and accompanying text (discussing the low polarization and partisan bias of members of the Court in cases involving securities regulation).

Court” in securities regulation; the entrenchment of good and bad Supreme Court precedent; and a clear message that the Roberts Court is not pro-business in the securities regulation realm because the Court is not pushing any market regulation agenda. While the future remains open, this role for the Court is well-entrenched, and the narrative of the Roberts Court is well-developed.