FEDERAL JURISDICTION AND PROCEDURE

Class Actions — Presumption of Reliance Under SEC Rule 10b-5 — Halliburton Co. v. Erica P. John Fund, Inc.

To recover damages in a securities fraud class action under section 10(b) of the Securities Exchange Act of 1934[1] (1934 Act), investors must prove that they relied on the defendant's misrepresentation in connection with the purchase or sale of a security. In *Basic Inc. v. Levinson*,[2] the Supreme Court held that investors could satisfy the reliance requirement by invoking a rebuttable presumption of classwide reliance.[3] This presumption, based on the "fraud-on-the-market theory," has two related components: first, that the price of a security traded in an efficient market reflects all material public information and, second, that the buyer of a security may be presumed to have relied on the integrity of the market price.[4] In order to invoke the presumption, a plaintiff seeking class certification must establish that the security traded in an efficient market, among other predicates.[5]

By dispensing with proof of individualized reliance, *Basic* fueled a multibillion dollar shareholder class action industry.[6] Last Term, in *Halliburton Co. v. Erica P. John Fund, Inc.* (*Halliburton II*),[7] the Supreme Court considered whether to "overrule or substantially modify" the *Basic* presumption[8] — the linchpin of modern private securities litigation. The Court declined to overturn *Basic*, but held that defendants can defeat the presumption at the class certification stage by introducing evidence that the alleged misrepresentation did not affect the stock price.[9] Although *Halliburton II* implicates substantive issues at the intersection of economic theory, financial markets, and securities regulation, the case was not decided on those terms. Instead, the outcome reflects adherence to stare decisis and reluctance to fundamentally alter securities class action practice.

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[1] Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78pp (2012)).

[2] 485 U.S. 224 (1988).

[3] *Id.* at 245–46.

[4] *Id.* at 246–47; *see also* William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 392 (2001) (explaining that *Basic* solved "two prickly problems in securities class actions: the evidentiary problem of demonstrating reliance in a complex market transaction and the procedural problem of having common issues predominate so as to justify class certification").

[5] *See Basic*, 485 U.S. at 248 n.27.

[6] Donald C. Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151, 152 ("Tens of billions of dollars have changed hands in settlements of 10b-5 lawsuits in the last twenty years as a result of *Basic*.").

[7] 134 S. Ct. 2398 (2014).

[8] Petition for a Writ of Certiorari at i, *Halliburton II*, 134 S. Ct. 2398 (No. 13-317).

[9] *Halliburton II*, 134 S. Ct. at 2407, 2416.

In June 2002, the Erica P. John Fund (the Fund) filed a securities fraud class action in the Northern District of Texas against Halliburton Co. and its CEO David Lesar (together, "Halliburton").[10] The complaint alleged that, between June 3, 1999 and December 7, 2001, Halliburton made a series of misrepresentations — downplaying asbestos liabilities, overstating revenues from construction contracts, and overstating the benefits of a merger — in an attempt to inflate its stock price.[11] The Fund further alleged that the stock price declined after Halliburton made corrective disclosures, resulting in financial loss.[12] Five years later, the Fund invoked the *Basic* presumption and moved to certify a class pursuant to Federal Rule of Civil Procedure 23.[13]

In November 2008, the district court denied the class certification motion.[14] The court found that the Fund had failed to establish "loss causation" — a causal connection between the defendant's alleged representations and the plaintiffs' economic losses[15] — and therefore could not invoke *Basic*'s presumption of classwide reliance to satisfy the Rule 23(b)(3) requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members."[16] The Fifth Circuit affirmed.[17] The Supreme Court reversed, stating that requiring loss causation as a precondition for invoking the *Basic* presumption is "not justified by *Basic* or its logic."[18]

On remand, Halliburton argued that class certification was inappropriate because the evidence introduced to disprove loss causation also revealed that the alleged misrepresentations did not impact the stock price. Absent any "price impact," Halliburton contended, the proposed class could not invoke the *Basic* presumption, and investors would have to prove reliance on an individual basis.[19] The district

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[10] Brief in Opposition at 6, *Halliburton II*, 134 S. Ct. 2398 (No. 13-317). Erica P. John Fund, formerly known as the Archdiocese of Milwaukee Supporting Fund, brought suit under section 10 of the 1934 Act, 15 U.S.C. § 78j(b) (2012), and Securities and Exchange Commission (SEC) Rule 10b-5, 17 C.F.R. § 240.10b-5 (2014), promulgated thereunder. Brief in Opposition, *supra*, at 6–7.

[11] Fourth Consolidated Amended Complaint for Violation of the Securities Exchange Act of 1934 at 1–2, Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co., No. 3:02-CV-1152-M (N.D. Tex. Apr. 4, 2006), 2006 WL 1434551.

[12] *Id.* at 2–3.

[13] Lead Plaintiff's Motion for Class Certification and Incorporated Memorandum at 16, 24–25, Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co., No. 3:02-CV-1152-M (N.D. Tex. Sept. 17, 2007), 2007 WL 3315778. The class comprised investors who had purchased common stock during the inflationary period. *Id.* at 1.

[14] Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co., No. 3:02-CV-1152-M, 2008 WL 4791492, at *1 (N.D. Tex. Nov. 4, 2008).

[15] *Id.*

[16] FED. R. CIV. P. 23(b)(3).

[17] Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co., 597 F.3d 330, 334 (5th Cir. 2010).

[18] Erica P. John Fund, Inc. v. Halliburton Co. (*Halliburton I*), 131 S. Ct. 2179, 2185 (2011).

[19] Erica P. John Fund, Inc. v. Halliburton Co., 718 F.3d 423, 433 (5th Cir. 2013).

court declined to consider Halliburton's argument, noting that price impact does not bear on the inquiry of common issue predominance under Rule 23(b)(3), and certified the class.[20]

The Fifth Circuit affirmed.[21] Writing for a unanimous panel, Judge Davis[22] found that Halliburton's price impact evidence could be used to refute the presumption of reliance at trial, but not at class certification.[23] The court relied on the recent Supreme Court decision in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*,[24] which held that classes invoking the *Basic* presumption do not need to prove materiality to obtain class certification.[25] Since failure of proof on the question of materiality "end[s] the case for one and for all," materiality has no bearing on predominance.[26] Applying similar logic, Judge Davis concluded that price impact — which "inherently applies to everyone in the class"[27] — should not be addressed at class certification because the focus of Rule 23(b)(3) is "not whether the plaintiffs will fail or succeed, but whether they will fail or succeed *together*."[28]

The Supreme Court reversed.[29] Writing for the Court, Chief Justice Roberts[30] first considered whether to overrule or modify *Basic*'s presumption of reliance. Overturning long-settled precedent requires "special justification."[31] According to the Court, Halliburton failed to "so discredit[] *Basic*" as to justify a departure from stare decisis.[32]

First, Halliburton's argument that the *Basic* presumption is inconsistent with Congress's intent in passing the 1934 Act[33] — the same

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[20] *Id.* at 427.

[21] *Id.* at 423.

[22] Judge Davis was joined by Judges Graves and Higginson.

[23] *Halliburton*, 718 F.3d at 433–35.

[24] 133 S. Ct. 1184 (2013).

[25] *Id.* at 1191.

[26] *Id.* at 1196.

[27] *Halliburton*, 718 F.3d at 433.

[28] *Id.* at 431.

[29] *Halliburton II*, 134 S. Ct. at 2417.

[30] Chief Justice Roberts was joined by Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan. Justice Ginsburg also wrote a brief concurrence, joined by Justices Breyer and Sotomayor, explaining that she signed onto the opinion on the understanding that advancing price-impact consideration from the merits stage to the certification stage would "impose no heavy toll on securities-fraud plaintiffs with tenable claims." *Id.* (Ginsburg, J., concurring).

[31] *Id.* at 2407 (majority opinion) (quoting Dickerson v. United States, 530 U.S. 428, 443 (2000) (internal quotation marks omitted)).

[32] *Id.* at 2408.

[33] *Id.* at 2409. Since section 10(b) does not provide for a private right of action, the Court must consult the "most analogous" express cause of action in the securities acts to determine the elements of the judicially implied right. Musick, Peeler & Garrett v. Emp'rs Ins., 508 U.S. 286, 294 (1993). That cause of action, according to Halliburton, is section 18(a) of the 1934 Act, which requires actual, "eyeball" reliance. Based on this reading, Halliburton argued that the Court should similarly require plaintiffs in Rule 10b-5 actions to prove actual reliance. *See* Brief for Petitioners at 12–13, *Halliburton II*, 134 S. Ct. 2398 (No. 13-317).

argument made by the dissenting Justices in *Basic* — was not persuasive in 1988, and the Court found "no new reason to endorse it now."[34]

Second, the Court explained that recent economic developments — specifically, empirical studies showing that capital markets are often inefficient — do not represent "the kind of fundamental shift in economic theory that could justify overruling a precedent."[35] *Basic* itself relied on a "fairly modest premise" and did not endorse any particular economic theory.[36] Furthermore, while *some* investors may consider price integrity "marginal or irrelevant,"[37] "*most* investors . . . rely on the security's market price as an unbiased assessment of [its] value."[38]

Third, the Court rejected the notion that the *Basic* presumption conflicts with its recent decisions construing the Rule 10b-5 action and the Rule 23 class certification analysis.[39] Previously, the Court has refused to extend Rule 10b-5 liability by eviscerating the reliance requirement,[40] acknowledging it must "give 'narrow dimensions . . . to a right of action Congress did not authorize.'"[41] The Court has also refused to lessen the pleading standard for Rule 23 class certification, requiring *actual proof* of predominance.[42] But *Basic* neither eliminates the reliance element nor alters the burden of proof; instead, as the Court noted, it provides "an alternative means of satisfying [them]."[43]

Finally, the Court stated that concerns about the "serious and harmful consequences" of the *Basic* presumption — including the volume of meritless claims, the costs to shareholders, and the strain on judicial resources — are "more appropriately addressed to Congress."[44]

Having decided not to overrule the *Basic* presumption, the Court also declined to modify the prerequisites for invoking it. To rely on *Basic*, a plaintiff must prove that "(1) the alleged misrepresentations were publicly known, (2) they were material, (3) the stock traded in an efficient market, and (4) the plaintiff traded the stock between when

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[34] *Halliburton II*, 134 S. Ct. at 2409.

[35] *Id.* at 2410.

[36] *Id.*

[37] *Id.* (quoting Reply for Petitioners at 14, *Halliburton II*, 134 S. Ct. 2398 (No. 13-317)) (internal quotation marks omitted).

[38] *Id.* at 2411 (quoting Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1192 (2013) (emphasis added)).

[39] *See id.* at 2411–12.

[40] *See id.* (citing Stoneridge Inv. Partners, LLC v. Scientific-Atl., Inc., 552 U.S. 148, 153 (2008) (refusing to extend Rule 10b-5 liability to certain secondary actors); Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 185 (1994) (refusing to extend Rule 10b-5 liability to aiders and abettors)).

[41] *Id.* at 2411 (omission in original) (quoting Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2302 (2011)).

[42] *Id.* at 2412 (citing Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1431–32 (2013); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551–52 (2011)).

[43] *Id.*

[44] *Id.* at 2413.

the misrepresentations were made and when the truth was revealed."[45] The first three prerequisites are proxies for price impact — "whether the alleged misrepresentations affected the market price in the first place."[46] According to Halliburton, these *indirect* proxies are imperfect; plaintiffs should instead be required to prove price impact *directly* by showing that a defendant's misrepresentation *actually* affected the stock price.[47] However, the Court refused to "radically alter the required showing for the reliance element of the Rule 10b-5 cause of action" for the same reasons it declined to overturn *Basic*.[48]

Finally, the Court considered whether a defendant may introduce price-impact evidence at the class certification stage to rebut the fraud-on-the-market presumption. Defendants already rely on such evidence at the merits stage to rebut the presumption, as well as at the class certification stage to counter a plaintiff's showing of general market efficiency.[49] In the Court's view, preventing defendants from relying on the same evidence prior to class certification to rebut the presumption altogether "makes no sense" and is inconsistent with *Basic*.[50] The Court distinguished *Amgen* — which held that materiality, a prerequisite for invoking *Basic*, should be left to the merits stage because it has no bearing on the predominance requirement of Rule 23(b)(3) — on the grounds that "[p]rice impact is different"[51]: "The fact that a misrepresentation . . . had price impact . . . is '*Basic*'s fundamental premise.'"[52]

Justice Thomas concurred in the judgment.[53] In his view, "*Basic*'s reimagined reliance requirement was a mistake."[54] First, the *Basic* presumption is based on "a questionable understanding of disputed economic theory and flawed intuitions about investor behavior."[55] The first assumption underlying the presumption — that public information is reflected in the market price — is on "shaky footing,"[56] and the second assumption — that investors transact in reliance on the in-

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[45] *Id.*

[46] *Id.* at 2414 (quoting *Halliburton I*, 131 S. Ct. 2179, 2182 (2011)) (internal quotation marks omitted).

[47] *Id.*

[48] *Id.*

[49] *Id.* at 2415; *see id.* at 2414–15.

[50] *Id.* at 2415. The Court observed that the current approach could lead to "bizarre results"; for example, a plaintiff could prove *general* market efficiency (by showing that the defendant's stock price tends to respond to public information) and obtain the benefit of the *Basic* presumption, even if the defendant could prove *specific* market inefficiency (by showing that the stock price did not respond to the alleged misrepresentation(s) at issue). *Id.*

[51] *Id.* at 2416.

[52] *Id.* (quoting *Halliburton I*, 131 S. Ct. 2179, 2186 (2011)).

[53] Justice Thomas was joined by Justices Scalia and Alito.

[54] *Halliburton II*, 134 S. Ct. at 2419 (Thomas, J., concurring in the judgment).

[55] *Id.* at 2420.

[56] *Id.* at 2421; *see id.* at 2420–21.

tegrity of the market price — is "simply wrong."[57] Second, *Basic* is inconsistent with recent cases clarifying that Rule 23 requires "proof" of predominance since it allows plaintiffs to bypass the evidentiary requirement.[58] Third, *Basic*'s rebuttable presumption is irrebutable in practice. Precertification rebuttal is ineffectual as long as one class representative can prove reliance, and postcertification rebuttal is infrequent due to settlement pressures.[59] Finally, stare decisis does not compel adherence to "muddled logic and armchair economics,"[60] particularly in an area of judge-made law, and inferences from congressional inaction are speculative and contrary to established principles of statutory interpretation.[61]

The outcome in *Halliburton II* cannot be explained in terms of support for a particular economic theory or agreement with a prior statutory interpretation. The majority did not seriously engage with the merits arguments challenging *Basic*, voicing concern about adjudicating an economic debate outside the Court's institutional competence[62] and emphasizing that the "wrongly decided" inquiry is not part of the stare decisis calculus.[63] Instead, reaffirmation of *Basic* can be understood in terms of congressional acquiescence, reliance, and broader policy concerns. The Court's strict adherence to precedent indicates a preference for maintaining the status quo in securities class actions, consistent with its price-impact holding.

At first glance, *Basic* seems an unlikely candidate for stare decisis deference. First, the case was decided by a "bare (four-to-two) majority of a bare quorum of the Court," with three conservative members not participating.[64] Second, it relied on "nascent economic theory and personal intuitions."[65] The Court has previously overruled decisions

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[57] *Id.* at 2422; *see id.* at 2421–22.

[58] *Id.* at 2423.

[59] *Id.* at 2424 & n.7. In the twenty-five years since *Basic*, there are appear to be only six instances in which the presumption was successfully rebutted. *Id.* at 2424.

[60] *Id.* at 2425.

[61] *Id.* at 2425–26.

[62] *Id.* at 2410 (majority opinion) (reiterating that the Court "need not determine by adjudication what economists and social scientists have debated through the use of sophisticated statistical analysis" (quoting Basic Inc. v. Levinson, 485 U.S. 224, 246 n.24 (1988)) (internal quotation mark omitted)). The Chief Justice raised this concern at oral argument: "How am I supposed to review the economic literature and decide which [theory of market efficiency] is correct . . . ?" Transcript of Oral Argument at 10, *Halliburton II*, 134 S. Ct. 2398 (No. 13-317).

[63] *Halliburton II*, 134 S. Ct. at 2407. While the Court is not constrained to follow poorly reasoned precedent, "all [this] . . . really mean[s] is that . . . the apparatus of *stare decisis* becomes engaged and the Court turns to other considerations to determine whether it should defer." Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 417 (2010).

[64] Memorandum from John F. Savarese, George T. Conway III & Charles D. Cording, Wachtell, Lipton, Rosen & Katz, *Reflections on* Halliburton (July 1, 2014) (on file with the Harvard Law School Library) [hereinafter Memorandum].

[65] *Halliburton II*, 134 S. Ct. at 2427 (Thomas, J., concurring in the judgment).

that are "unworkable" or "badly reasoned";[66] that have questionable theoretical underpinnings;[67] or that are "irreconcilable" with intervening legal and policy developments.[68] According to Justice Thomas, "*Basic* checks all the[se] boxes."[69] The majority did not seriously challenge this assessment. Third, *Basic* used a judge-made evidentiary presumption to expand a judge-made cause of action[70] — both "creations of federal common law."[71] The latter point is particularly important, as the Court generally applies a more flexible stare decisis standard to common law and constitutional precedents than to statutory precedents.[72] Justice Thomas advocated such an approach, noting that the Court has "not afforded *stare decisis* 'special force' outside the context of statutory interpretation," and "*Basic*, of course, has nothing to do with statutory interpretation."[73]

And yet, the Court ultimately declined to overrule the fraud-on-the-market presumption. First, although it did not make the argument explicitly, the Court was acutely aware that Congress has repeatedly enacted legislation to govern Rule 10b-5 litigation, and has repeatedly

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[66] *Id.* at 2425 (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)).

[67] *Id.* (quoting State Oil Co. v. Khan, 522 U.S. 3, 21 (1997)).

[68] *Id.* (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989)) (internal quotation marks omitted).

[69] *Id.*

[70] *Id.*

[71] Jill E. Fisch, *The Scope of Private Securities Litigation: In Search of Liability Standards for Secondary Defendants*, 99 COLUM. L. REV. 1293, 1307–08 (1999); *see also* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1052 (1989) (describing § 1983, § 301 of the Taft-Hartley Act, the Sherman Act, and the antifraud provisions of the securities laws as "common law statutes"); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975) (characterizing the implied Rule 10b-5 private cause of action as "a judicial oak which has grown from little more than a legislative acorn"). Since Justice Powell's dissent in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), the Court has "sworn off the habit" of finding implied private rights of action, Alexander v. Sandoval, 532 U.S. 275, 287 (2001). *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 119–20 (1998). However, it has refused to disimply private rights created "in an era of freer implication." Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 362; *see also* Edward A. Fallone, *Section 10(b) and the Vagaries of Federal Common Law: The Merits of Codifying the Private Cause of Action Under a Structuralist Approach*, 1997 U. ILL. L. REV. 71, 117 (observing that "newly implied private causes of action under federal law are a rare spectacle," but existing implied private causes of action from "the years prior to retrenchment" remain "part of the legal landscape"); Joseph A. Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority*, 107 HARV. L. REV. 961, 994 (1994) (noting that while "the Court could, if it chose, reverse field and deny the implied Rule 10b-5 private right of action," *id.* at 994, it has instead determined that the right's existence is "beyond peradventure," *id.* (quoting Herman & MacLean v. Huddleston, 459 U.S. 375, 380 (1983)) (internal quotation mark omitted)).

[72] *See generally* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988). For example, the Court suggested in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), that it would not have overruled *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), "[i]f only a question of statutory construction were involved," *Erie*, 304 U.S. at 77.

[73] *Halliburton II*, 134 S. Ct. at 2425 (Thomas, J., concurring in the judgment).

declined to disturb the *Basic* presumption.[74] Congress enacted the Private Securities Litigation Reform Act of 1995[75] (PSLRA) to combat perceived abuses in securities litigation in federal court.[76] Several years later, Congress passed the Securities Litigation Uniform Standards Act of 1998[77] (SLUSA) to prevent plaintiffs from circumventing the PSLRA by filing securities class actions in state court.[78] These statutes do not represent explicit endorsement of *Basic*;[79] however, they suggest acquiescence in the securities class action regime that it created.[80] In this context, the "natural conservative judicial move is to defer."[81]

Second, the Court found it significant that Congress not only rejected efforts to overturn *Basic*, but also made important substantive and procedural reforms.[82] These reforms rely for their intended operation on the continued existence of Rule 10b-5 class actions.[83] For example, the PSLRA can be understood as "a political compromise that preserves the foundation of the fraud-on-the-market class action while making it harder for plaintiffs to bring, plead[,] and prove a successful claim."[84] Thus, reliance concerns counsel against overturning *Basic* —

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[74] *See* Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1201 (2013). At oral argument, Justice Kagan articulated the relevance of congressional acquiescence: in order to reverse a case, there must be something "fundamentally different" today than when the case was decided, and that is "especially so . . . where Congress has had every opportunity, and has declined every opportunity, to change *Basic*." Transcript of Oral Argument, *supra* note 62, at 5.

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

[76] *See* Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913, 914. The PSLRA imposed heightened pleading requirements, limits on damages and attorney's fees, restrictions on lead plaintiff selection, sanctions for frivolous litigation, and stays of discovery pending motions to dismiss. *See id.* at 923–29, 939.

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

[78] A.C. Pritchard, *Securities Law in the Roberts Court: Agenda or Indifference?*, 37 J. CORP. L. 105, 109–10 (2011).

[79] Indeed, the PSLRA explicitly provides that "[n]othing in this Act . . . shall be deemed to create or ratify any implied right of action." *Halliburton II*, 134 S. Ct. at 2426 (Thomas, J., concurring in the judgment) (alteration and omission in original) (quoting § 203, 109 Stat. at 762).

[80] *Cf.* Stoneridge Inv. Partners, LLC v. Scientific-Atl., Inc., 552 U.S. 148, 165 (2008) (noting that Congress "ratified" the section 10(b) cause of action in enacting the PSLRA); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 144 (2000) (noting that Congress "ratified" the FDA's position on tobacco regulation by enacting legislation against the backdrop of that position).

[81] Donald C. Langevoort, *Judgment Day for Fraud-on-the-Market: Reflections on* Amgen *and the Second Coming of* Halliburton, 56 ARIZ. L. REV. (forthcoming 2014) (manuscript at 7), http://ssrn.com/abstract=2475036 [http://perma.cc/92M8-FFDT].

[82] *See Halliburton II*, 134 S. Ct. at 2413.

[83] Even Justice Scalia conceded that "the PSLRA assumes *Basic*" and that key statutory provisions would be rendered "useless" if *Basic* were overruled. Transcript of Oral Argument, *supra* note 62, at 40. With respect to price impact, Justices Scalia, Kennedy, and Kagan sought to ensure the Court's holding would preserve the effectiveness of the PSLRA. *See id.* at 41, 47–50.

[84] Langevoort, *supra* note 81 (manuscript at 6); *cf. Brown & Williamson*, 529 U.S. at 155–56, 158 (explaining that "this is not a case of simple inaction by Congress that purportedly represents its acquiescence," but, instead, is a case involving the deliberate creation of a "distinct regulatory scheme," in reliance on established legal understanding, *id.* at 155).

the sort of far-reaching judicial intervention that could disturb the careful balance that Congress has struck.

Third, the Court may have been concerned about the policy implications of overruling *Basic*. Private securities class actions are part of a broader corporate governance regime that recognizes the role of private enforcement as an "essential supplement" to criminal and civil enforcement actions brought by the Department of Justice and the SEC.[85] Without the fraud-on-the-market presumption, plaintiffs could not prove classwide reliance on misstatements;[86] without proof of reliance, plaintiffs could not satisfy the predominance requirement for class certification;[87] and without class certification, individual plaintiffs would face a huge cost barrier to bringing claims.[88] Faced with this counterfactual, the Court opted to preserve the existing enforcement structure.

Having determined that the limits of private securities liability were frozen twenty years ago,[89] the Court was reluctant to overrule a "substantive doctrine" of federal securities law[90] — despite the fact that this doctrine, and the underlying cause of action, are "judicial construct[s],"[91] and that interpretive errors in judge-made law are often corrected by the Court, not left to Congress.[92] It is true that the Court "retains discretion over the contours of *Basic*," and can revise its "proper interpretation"[93] — but only within certain bounds. And the *Halliburton II* majority defined those bounds narrowly, embracing "ordinary principles of *stare decisis*"[94] in order to justify its desired result: the preservation of the status quo for securities class actions.[95]

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[85] Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 313 (2007).

[86] In omission cases, investors are automatically entitled to a presumption of reliance. *See* Affiliated Ute Citizens v. United States, 406 U.S. 128, 153–54 (1972).

[87] *See* Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1193 (2013) ("Absent the fraud-on-the-market theory, the requirement that Rule 10b-5 plaintiffs establish reliance would ordinarily preclude [class] certification . . . because individual reliance issues would overwhelm questions common to the class.").

[88] *See* Rubenstein, *supra* note 4, at 427 ("[S]ecurities classes consist of individual interests too small to sustain separate litigations or of large interests . . . not particularly eager to litigate.").

[89] *See* Stoneridge Inv. Partners, LLC v. Scientific-Atl., Inc., 552 U.S. 148, 165–66 (2008).

[90] *Halliburton II*, 134 S. Ct. at 2411 (quoting *Amgen*, 133 S. Ct. at 1193).

[91] *Id.* at 2425 (Thomas, J., concurring in the judgment) (quoting *Stoneridge*, 552 U.S. at 164).

[92] *Id.* at 2425–26 (citing Exxon Shipping Co. v. Baker, 554 U.S. 471, 507 (2008)).

[93] *Amgen*, 133 S. Ct. at 1212 n.9 (Thomas, J., dissenting); *see* Eskridge, *supra* note 72, at 1377–78 ("Just as administrative agencies that are delegated lawmaking responsibilities to fill statutory gaps are routinely allowed to change their interpretations of the statute, courts to which Congress has implicitly [delegated such] responsibilities . . . should also be given the leeway to experiment and overrule prior interpretations . . . ." (footnote omitted)).

[94] *Halliburton II*, 134 S. Ct. at 2411. Ironically, the Court showed less-than-strict fidelity to precedent in departing from *Amgen*. *See id.* at 2416 (conceding the apparent inconsistency with *Amgen*'s logic as "[f]air enough").

[95] This status quo bias is characteristic of the Roberts Court's securities jurisprudence. *See* Pritchard, *supra* note 78, at 109 (arguing that the "overall pattern . . . suggests a bias not toward business, but rather, the status quo," with the Roberts Court "resisting attempts to both restrict —

This status quo bias, informed by similar concerns as the stare decisis analysis, is apparent in the Court's price-impact holding. Although the availability of price-impact rebuttal represents an additional tool in the corporate defendant's toolkit, it is unlikely to significantly change class certification results.[96] Certification motions unrelated to settlement are not filed in approximately seventy-five percent of securities class actions due to high dismissal and settlement rates; where such motions are filed and result in a final ruling, cases are equally likely to be granted or denied certification.[97] And in the small number of cases currently granted certification — less than fifteen percent of the total[98] — it is not clear that the opportunity to rebut the *Basic* presumption by showing lack of price impact will make much of a difference: in most cases, there is *some* price impact.[99]

To many, securities class actions conjure up images of Dickens's *Bleak House*: interminable, inconclusive, and wasteful.[100] By granting certiorari in *Halliburton II*, the Court had an opportunity to dismantle the modern securities fraud class action system by overturning *Basic*. But it seems that *Basic*, and the litigation machine it created, are here to stay because of stare decisis — at least for now. The message from the Court is clear: for meaningful securities law reform, corporate defendants, practitioners, and scholars must look to Congress.

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and expand — the reach of Rule 10b-5"); *see also* John C. Coates IV, *Securities Litigation in the Roberts Court: An Early Assessment*, 56 ARIZ. L. REV. (forthcoming 2014) (manuscript at 2), http://ssrn.com/abstract=2471643 [http://perma.cc/6WN3-NFVP] (describing the Court's "inertial approach to the substance of securities law"). Past Courts, by contrast, have shown greater willingness to depart from the status quo. *See, e.g.*, Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 168–69, 191–92 (1994) (rejecting aiding-and-abetting liability under section 10(b) despite unanimous circuit court precedent to the contrary); Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 359–60 (1991) (abandoning the practice of borrowing from analogous state law to determine the statute of limitations for Rule 10b-5 claims).

[96] While the actual effect of the decision will depend on how lower courts wrestle with price impact, at least one thing seems certain: cases will become more expensive to litigate. *See* M. Todd Henderson & Adam C. Pritchard, Halliburton *Will Raise Cost of Securities Class Actions*, LAW360.COM (July 2, 2014, 10:12 AM), http://www.law360.com/appellate/articles/552839 [http://perma.cc/KU6L-7M7F].

[97] CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2013 YEAR IN REVIEW 9 (2014). The statistics reflect aggregate outcomes for alleged Rule 10b-5, section 11, and section 12 violations. If the parties agree to settle before a class certification motion is filed, the case is treated as having no motion filed, even if a class was certified pursuant to the settlement. *Id.* at 33. There is a strong incentive to settle rather than face massive discovery costs and risk a potentially bankrupting judgment at trial. The math is straightforward: with a one percent probability of losing a $20 billion judgment, it is economically rational to settle for $200 million.

[98] *See id.* at 9; RENZO COMOLLI & SVETLANA STARYKH, NERA, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2013 FULL-YEAR REVIEW 19 (2014).

[99] Memorandum, *supra* note 64, at 2 ("Most cases fit this mold . . . because plaintiffs' lawyers go where the money is — price impact means damages, and damages mean fees.").

[100] *See* CHARLES DICKENS, BLEAK HOUSE 95 (Oxford University Press 1948) (1853) ("The Lawyers have twisted it into such a state of bedevilment that the original merits of the case have long disappeared from the face of the earth. . . . It's about nothing but Costs, now.").