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Back to Class: Lessons from the Roberts Court Class Action Jurisprudence

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I. INTRODUCTION

This symposium issue on *The Class Action After a Decade of Roberts Court Decisions* provides perspectives on how the class action has fared under persistent Supreme Court scrutiny. Over the past ten years, the Roberts Court has repeatedly returned to questions concerning class action litigation. Indeed, contributors to this symposium perceive an "unprecedented flurry" of Supreme Court decisions regarding the class action[1] and observe that the Roberts Court has given the class action "more frequent and searching scrutiny than has occurred during any decade since the modern class action was created by the 1966 amendments to Rule 23."[2]

The modern class action evokes strong sentiments both from those who favor expanding access to aggregate litigation and those who would curtail such access. Those favoring the class action champion the

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1. Richard D. Freer, *Front-Loading, Avoidance, and Other Features of the Recent Supreme Court Class Action Jurisprudence*, 48 AKRON L. REV. 721, 721-22 (2015).

2. Elizabeth J. Cabraser, *The Class Abides: Class Actions and the "Roberts Court,"* 48 AKRON L. REV. 757, 800 (2015).

deterrent value in aggregating negative value claims that will not otherwise be pursued and the efficiency of permitting plaintiffs to pool resources to obtain a realistic chance at success against large defendants. There is value for defendants, too, in that class litigation permits the defendant to put an end to many claims in a single lawsuit. Many, however, have come to view the class suit as "legalized blackmail," arguing that defendants must settle or "stake their companies on the outcome of a single trial."[3] In this scenario, defendants facing overwhelming liability may settle to avoid the potentially huge judgment, even when the odds of losing are quite low.[4] There is symmetry, however, in the potential losses apportioned to plaintiffs and defendants in the class certification contest – the steep potential cost to defendants of settlement or a plaintiffs' verdict at trial parallels the substantial loss to plaintiffs when the class action is resolved in defendants' favor, particularly when the claims are too small to warrant individual suits.[5] The symmetrical potential for tremendous gain or loss to plaintiffs and defendants justifies the increased scrutiny class action procedure receives.

The Roberts Court has, to date, issued more than a dozen decisions regarding the class action[6] and has considered additional cases dealing with other types of aggregate litigation.[7] The cases cover varied terrain.

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3. *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1300 (7th Cir. 1995).

4. *E.g.*, Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J.L. REFORM 1097, 1110 (2013); *but see* Michael Selmi & Sylvia Tsakos, *Employment Discrimination Class Actions After* Wal-Mart v. Dukes, 48 AKRON L. REV. 803, 811-814 (2015) (noting that there are tools to deal with opportunistic plaintiffs and questioning court solicitude for what economists, in other scenarios, would view as "irrational" fears of defendants, particularly in light of the lack of concern for plaintiffs who lose their claims when courts deny certification).

5. Selmi & Tsakos, *supra* note 4, at 813 (quoting Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2316 (2013) (Kagan, J., dissenting)).

6. Dart Cherokee Operating Basin Co., LLC v. Owens, 135 S. Ct. 547 (2014); Halliburton Co. v. Erica P. John Fund, Inc. (*Halliburton II*), 134 S. Ct. 2398 (2014); Chadbourne & Parke, LLP v. Troice, 134 S. Ct. 1058 (2014); *Italian Colors*, 133 S. Ct. 2304; Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (2013); Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013); Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345 (2013); Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184 (2013); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011); Smith v. Bayer Corp., 131 S. Ct. 2368 (2011); Erica P. John Fund, Inc. v. Halliburton Co. (*Halliburton I*), 131 S. Ct. 2179 (2011); AT&T Mobility v. Concepcion, 131 S. Ct. 1740 (2011); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010); and Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010).

7. *E.g.*, Mississippi *ex rel.* Hood v. AU Optronics Corp., 134 S. Ct. 736, 739 (2014) (analyzing a "mass action," as opposed to a class action, but construing a portion of the Class Action Fairness Act); Genesis HealthCare Corp. v. Symczyk, 133 S. Ct. 1523, 1527 (2013) (addressing the Fair Labor Standards Act "collective action").

Some of the most visible address the standards for certifying class actions under Rule 23.[8] Others consider provisions of the Class Action Fairness Act (CAFA),[9] resolve issues regarding the Federal Arbitration Act (FAA) and class action waivers,[10] examine standards for certifying securities fraud class actions,[11] and assess, under the *Erie* doctrine, potential conflicts between Rule 23 and state law.[12]

Despite the number of class action decisions it has issued, the Roberts Court's class action jurisprudence is often associated with two 5-4 decisions, both of which impose limitations on the class action – *Wal-Mart Stores, Inc. v. Dukes*, in which the Court construed provisions of Rule 23 to create additional hurdles to class certification,[13] and *AT&T Mobility v. Concepcion*, in which the Court broadly held that the Federal Arbitration Act preempted state law that would have barred class action waivers in arbitration agreements.[14] Views of the death of the class action, in light of the *Wal-Mart* and *Concepcion* decisions, have been espoused[15] and discarded.[16] Professor Mullenix, indeed, has identified no fewer than six announcements of the death of the class action in the past forty years, including one death attributed to the Roberts Court's *Wal-Mart* and *Concepcion* decisions.[17] She reports, however, that the class action survived and, in fact, thrived following each obituary.[18] The contributors to this symposium sound no death knell based on the Roberts Court class action jurisprudence and, in the main, avoid characterizing the cases, as a whole, as either hostile or hospitable, perceiving a complexity in the large set of decisions that precludes such

8. *E.g.*, *Comcast*, 133 S. Ct. at 1426; *Amgen*, 133 S. Ct. at 1194; *Wal-Mart*, 131 S. Ct. at 2548-49.

9. *Dart Cherokee*, 135 S. Ct. at 551; *Standard Fire*, 133 S. Ct. at 1347.

10. *Italian Colors*, 133 S. Ct. at 2307; *Oxford Health*, 133 S. Ct. at 2066; *Concepcion*, 131 S. Ct. at 1740.

11. *Halliburton II*, 134 S. Ct. at 2407; *Amgen*, 133 S. Ct. at 1190; *Halliburton I*, 131 S. Ct. at 2719.

12. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398 (2010).

13. *Wal-Mart*, 131 S. Ct. at 2551.

14. *Concepcion*, 131 S. Ct. at 1753.

15. *E.g.*, John Campbell, *Unprotected Class: Five Decisions, Five Justices, and Wholesale Change to Class Action Law*, 13 WYO. L. REV. 463, 463 (2013); George Rutherglen, Wal-Mart, AT&T Mobility, *and the Decline of the Deterrent Class Action*, 98 VA. L. REV. IN BRIEF 24, 25 (2012); Suzette M. Malveaux, *How Goliath Won: The Future Implications of* Dukes v. Wal-Mart, 106 NW. U. L. REV. COLLOQUY 34, 37 (2011).

16. Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 529-32 (2013). *Accord* Bone, *supra* note 4, at 1125; Andrew J. Trask, *Reactions to* Wal-Mart v. Dukes*: Litigation Strategy & Legal Change*, 62 DEPAUL L. REV. 791 (2013).

17. Mullenix, *supra* note 16, at 517-32.

18. *Id.* at 536.

overarching generalization.

The class action decisions of the Roberts Court, like the class action process itself, form a complex tapestry. Although the Roberts Court decisions regarding class certification and class action waivers figure prominently in the contributors' discussions of the Court's impact on class action litigation, the commentators also acknowledge other, less heralded cases as having had substantial impact.[19] Some decisions strengthen the availability of the class action. Some, decidedly, do not. Others weave together analyses that seem to favor the class action in some contexts, but not others. From the contributions to this symposium, one may draw not so much an overarching conclusion regarding class action health, but close study of particular cases and their potential for significant impact on class action litigation and a set of recurrent themes that cross a number of articles yet evoke differing conclusions.

One recurrent theme is the institutional role of the Supreme Court in establishing class action policy, in its adjudicatory capacity, as opposed to the role of the federal rulemakers acting through the Enabling Act process.[20] In his contribution to this symposium, Professor Mark Moller posits that federal rules governing the scope of class certification are an integral part of "our system of judicial federalism."[21] He, thus, suggests that the Supreme Court, when acting in its adjudicatory capacity, should adopt the most "cautious, narrowest interpretation consistent with the Rule's text—leaving the decision to greenlight more expansive approaches to class certification, and with it greater inroads on state autonomy, to Congress and its surrogate, the federal rulemaking process."[22] Others, too, have concluded that the federal rulemakers, as Congress's expressly delegated rulemakers,

19. *E.g.*, Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345 (2013); Smith v. Bayer Corp., 131 S. Ct. 2368 (2011). Andrew Trask identifies the *Knowles* and *Bayer* cases as among the Roberts Court decisions that signify the Court's acceptance of an aggregate theory of the class action, as opposed to an entity theory. Andrew J. Trask, *The Roberts Court and the End of the Entity Theory*, 48 AKRON L. REV. 831, 851-54 (2015). Professor Mark Moller references the *Bayer* case as pointing to structural separation-of-powers principles that may underlie the seemingly "accidental" federalism that results from the Roberts Court's narrow construction of class certification under Rule 23. Mark Moller, *The New Class Action Federalism*, 48 AKRON L. REV. 861, 874-79 (2015).

20. *E.g.*, Moller, *supra* note 19, at 877-78; *see also* Selmi & Tsakos, *supra* note 4, at 808-09 (reviewing history of Congress's passage of the Civil Rights Act of 1991, which extended damages for intentional discrimination from "modest" backpay, lost wages, and attorneys' fee awards, to compensatory and punitive awards of up to $300,000 per class member and suggesting that, because this change was enacted by Congress, federal courts should have been neutral to class actions asserting intentional discrimination, though some were not).

21. Moller, *supra* note 19, at 876.

22. *Id*. at 877.

should play an important role in creating a "coherent" and "functional" theory of the class action through amendments to Rule 23 or in creating procedural policy.[23]

This ten-year retrospective on the Roberts Court's class action decisions provides a timely opportunity to reflect on the Supreme Court's institutional role in construing the Federal Rules and in creating class action policy through decisions construing Rule 23. In April 2015, on the eve of the publication of this symposium issue, the Rule 23 Subcommittee of the Advisory Committee on Civil Rules (Rule 23 Subcommittee) released its "conceptual sketches" of amendment "ideas" regarding Rule 23 and its conceptual sketches of Committee Note "ideas."[24] The Rule 23 Subcommittee also suggested that a fairly ambitious time schedule might be possible, which could permit the publishing of proposed amendments to the class action rule for public comment in August 2016.[25] The Rule 23 Subcommittee is currently considering possible rule amendments regarding the following class action issues: (1) settlement approval criteria; (2) settlement class certification; (3) *cy pres* distributions; (4) dealing with objectors; (5) Rule 68 offers and mootness; (6) issues classes; and (7) notice to class members.[26]

The Supreme Court, meanwhile, has continued to grant certiorari in cases involving important class action issues. It recently granted certiorari in *Campbell-Ewald Co. v. Gomez*[27] to explore issues regarding

23. *E.g.*, Bone, *supra* note 4, at 1098-99, 1114-19 (noting that federal rulemakers are better positioned to obtain and evaluate relevant information and to invite broad participation of relevant stakeholders and also suggesting that the rulemakers, to whom Congress expressly delegated the task of creating federal rules, should consider but not be constrained by decisions of the Supreme Court on nonconstitutional issues); *see also* Laura J. Hines, *The Unruly Class Action*, 82 GEO. WASH. L. REV. 718, 723-24, 762-65 (2014) (concluding that decisions regarding the permissible extent of issues classes in class actions should be determined through the Enabling Act process, which permits both greater access to information and heightened participation by scholars, practitioners, judges, and others, and also suggesting that the rulemakers might undertake a "holistic" approach to Rule 23); Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1193-94 (2012) (suggesting that the Supreme Court should defer to the federal rulemaking process, in lieu of providing procedural change through Federal Rule interpretation, when, *inter alia*, presented with questions regarding Federal Rules for which it must make "policy pronouncements similar to legislative rules, rather than interpretive rules").

24. ADVISORY COMMITTEE ON CIVIL RULES, *Report of Rule 23 Subcommittee*, *in* AGENDA, WASHINGTON, D.C., APRIL 9-10, 2015, at 243, 244-86, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2015-04.pdf.

25. *Id*. at 244.

26. *Id*. at 244-86.

27. Campbell-Ewald Co. v. Gomez, 768 F.3d 871 (9th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3637 (U.S. May 18, 2015) (No. 14-857).

whether an offer of complete relief to a named plaintiff may moot a class action and whether such an offer would moot an action if made to a plaintiff before a class is certified. The Court has also granted certiorari in *Spokeo, Inc. v. Robins*,[28] in which the Court will consider whether a violation of a federal statute is alone sufficient to create standing or whether a plaintiff must show both cognizable harm and the defendant's violation of a statute. A decision on this issue will impact class action litigation significantly since class plaintiffs often assert statutory claims. Thus, the Supreme Court and federal rulemakers will continue to share responsibility for class action policy.

A second theme that pervades the articles is that, notwithstanding the restrictive interpretations of class action certification in some of the Roberts Court decisions and the consequent "front-loading" of litigation to the class certification stage, class actions continue to be certified in significant numbers and some circuit courts continue to issue decisions that encourage resolution of large numbers of claims through the class action procedure.[29] The symposium contributors, thus, conclude that, even after the Roberts Court decisions on class certification, class action practice remains vibrant.

The contributors to this symposium focus on the Roberts Court class action decisions as a whole; the Roberts Court's new insights regarding the nature of the class action; and the practical impact of the Court's class action decisions. Section II of this Foreword discusses articles that offer perspectives regarding the body of class action cases decided by the Roberts Court. Professor Freer observes that the set of cases includes some decisions favorable to plaintiffs and others that are favorable to defendants, but concludes that those favoring defendants will have more far-reaching effects.[30] Attorneys Paul Karlsgodt and Dustin Dow conclude that the Roberts Court class actions cases, as a whole, reveal a Court that has passed on opportunities to provide clear guidance, has hesitated to issue broad holdings, and has been selective in choosing cases it will review.[31]

Section III reviews articles that discuss (1) the Roberts Court's perception of the class action and (2) the interplay of federalism

28. Spokeo, Inc. v. Robins, 742 F.3d 409 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 1892 (Apr. 27, 2015) (No. 13-1339).

29. *E.g.*, Cabraser, *supra* note 2, at 800-01; Selmi & Tsakos, *supra* note 4, at 814-17 (discussing the employment discrimination claims alleging intentional discrimination).

30. Freer, *supra* note 1, at 721-24; *see also infra* notes 39 to 69 and accompanying text.

31. Paul G. Karlsgodt & Dustin M. Dow, *The Practical Approach: How the Roberts Court Has Enhanced the Class Action Procedure by Strategically Carving at the Edges*, 48 AKRON L. REV. 883 (2015); *see also infra* notes 70 to 86 and accompanying text.

principles and the Court's restrictive approach to class certification under Rule 23. Andrew Trask revisits the debate about whether the class action should be construed as an "entity" or should be viewed, instead, as an "aggregation" of the claims of numerous individuals, as a prelude to his conclusion that the Roberts Court has definitively resolved that debate in favor of an aggregation model.[32] Professor Moller suggests that the Court's restrictive approach to interpreting class certification under Rule 23 can be viewed as an "outgrowth of basic separation of powers (and federalism) principles," and, hence, these decisions support the view that Congress or its rulemaking delegate, rather than the Supreme Court, should control the "federal courts' role in our federal system."[33]

Finally, Section IV reviews articles that assess the vigor of class action litigation in the lower federal courts after the Roberts Court's decisions in *Wal-Mart v. Dukes*, *Comcast Corp. v. Behrend*,[34] and the Court's securities class action cases. Professor Selmi and Sylvia Tsakos preface their conclusions regarding employment discrimination class actions that assert intentional discrimination with the observation that certification of this type of class has always been difficult. Proceeding from that premise, Selmi and Tsakos conclude that the *Wal-Mart* decision seems to have led to a significant decrease in the number of such filings, but that the filed cases proceed largely (though not entirely) as they did pre-*Wal-Mart*.[35] Elizabeth Cabraser acknowledges that class certification is, in light of Roberts Court certification decisions, "more rigorous, more protracted, more expensive, and more uncertain,"[36] but she concludes that the class action has survived and that its "core functions" and "fundamental structure" remain largely unchanged.[37] Eric Alan Isaacson concludes that the Court's securities class action decisions provide "extraordinarily good news" for plaintiffs pursuing securities fraud class actions.[38]

II. ASSESSING THE ROBERTS COURT CLASS ACTION DECISIONS IN AGGREGATE

Two articles survey the Roberts Court class action decisions as a

32. Trask, *supra* note 19, at 851-54; *see also infra* notes 89-98 and accompanying text.
33. Moller, *supra* note 19, at 882.
34. Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013).
35. Selmi & Tsakos, *supra* note 4, at 803-05.
36. Cabraser,*supra* note 2 at 800.
37. *Id*. at 800-01.
38. Eric Alan Isaacson, *The Roberts Court and Securities Class Actions: Reaffirming* Basic *Principles*, 48 AKRON L. REV. 923, 925 (2015).

group and draw conclusions based on the body of decisions. Professor Richard Freer analyzes those decisions, concluding that the opinions are not of one piece. Instead, they contain favorable holdings for both plaintiffs and defendants. Professor Freer ultimately concludes, however, that the cases favorable to defendants are broader and will more profoundly affect class action practice. Defense attorneys Paul G. Karlsgodt and Dustin M. Dow concede that a number of Roberts Court class actions decisions favor defendants. They, nevertheless, perceive that the Roberts Court has no philosophical opposition to the class action, concluding instead that the decisions reveal a Court that has declined many opportunities to impose restraints on the class action and that prefers to decide cases on narrow grounds that leave many "gaps to be filled by the work-horse lower courts."[39]

In his article, *Front-Loading, Avoidance, and Other Features of the Recent Supreme Court Class Action Jurisprudence*, Professor Freer surveys thirteen cases that he includes in the Roberts Court's "unprecedented flurry" of class actions decisions.[40] He reaches four general conclusions. First, the Roberts Court class action opinions contain "some very good news for plaintiffs," but, second, the news for defendants is decidedly better.[41] Third, the defendant-friendly decisions reveal a "clear trend toward 'front-loading' class litigation," that is, toward requiring plaintiffs to "do more and prove more" at the class certification stage of a case, which creates higher hurdles to certification and imposes higher earlier expenses.[42] Finally, the Roberts Court's sweeping approval of class action waivers in arbitration agreements permits defendants to avoid many claims entirely, particularly negative-value claims. Absent aggregate action, Professor Freer reminds, these claims will never be asserted.[43]

Professor Freer observes that the Roberts Court class action decisions favorable to plaintiffs, in the main, resolve issues unrelated to the structural elements of Rule 23, thus, limiting their impact.[44] The plaintiff-friendly decisions focus, with one exception, not on Rule 23, but on a litigant's right to her day in court;[45] on fairly narrow

39. Karlsgodt & Dow, *supra* note 31, at 886.

40. Freer, *supra* note 1, at 721.

41. *Id*. at 722-24, 724-54.

42. *Id*. at 737-54. *See also* Linda S. Mullenix, *Dropping the Spear: The Case for Enhanced Summary Judgment Prior to Class Certification*, 43 AKRON L. REV. 1197, 1224-29 (2010).

43. Freer, *supra* note 1, at 742-48.

44. *Id*. at 749-54.

45. *Id*. at 749-53 (discussing Smith v. Bayer Corp., 131 S. Ct. 2368 (2011) *and* Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345 (2013)).

jurisdictional provisions of the Class Action Fairness Act (CAFA) and the Securities Litigation Uniform Standards Act (SLUSA) that permit plaintiffs to maintain their choice of state court over federal;[46] or on the particular, though concededly important, substantive law area of securities fraud class actions, in which the Roberts Court decisions provided major victories for plaintiffs.[47] Recognizing the importance of these decisions, Professor Freer, nevertheless, emphasizes that the decisions do not apply to class actions generally.

Professor Freer notes that the Court's decision in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co*., by contrast, focuses on Rule 23, and the opinion undeniably favors plaintiffs.[48] *Shady Grove* considered the branch of the *Erie* doctrine involving conflicts between a federal rule and state law. Thus, Professor Freer observes that the *Shady Grove* decision, too, has limited application because, although it construes Rule 23, it applies only in vertical choice of law scenarios.[49] In *Shady Grove*, the Court considered whether Federal Rule 23, which permits class action certification if the requirements of Rule 23(a) and (b) are met, conflicted with a state law that banned class actions in some types of statutory claims.[50] In the portion of the opinion that attracted five votes, the Supreme Court concluded, in an opinion by Justice Scalia, that Rule 23 and state law were in conflict.[51] In a portion written for a plurality of four justices and in which Justice Stevens concurred, thus supplying the fifth vote, Justice Scalia concluded that Rule 23(b) is valid (and, thus, controls over the conflicting state law) because it is procedural, i.e., it "'really regulat[es] procedure – the judicial process for justly administering rights and duties recognized by substantive law and

46. *Id*. at 753-54. These cases include *Mississippi ex rel. Hood v. AU Optronics Corp*., 134 S. Ct. 736, 739 (2014), in which the Court held that, in a *parens patriae* action, the state is the only plaintiff, and *Chadbourne & Parke*, 134 S. Ct. 1058 (2014), in which the Court held that SLUSA applies to invalidate state-court class actions only when the challenged fraudulent trading is in "covered securities," not when defendants contend, fraudulently, that the financial instruments at issue are backed by covered securities.

47. In this case, the limited subject matter is the very important area of 10b-5 securities class actions. The good news for plaintiffs filing securities class action is robust. Among other things, the Roberts Court preserved the fraud-on-the-market presumption first articulated in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988). *See* Halliburton Co. v. Erica P. John Fund, Inc. (*Halliburton II*), 134 S. Ct. 2398 (2014). *Halliburton II*, however, does not apply to the panoply of class action decisions, but is limited by substantive law. *Freer*, *supra* note 1, at 737-42.

48. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 400 (2010).

49. Freer, *supra* note 1, at 724-25.

50. *Shady Grove*, 559 U.S. at 398. The New York statute at issue precluded class actions for a statutorily prescribed penalty or minimum payment, unless the authorizing statute expressly permitted a class action. *Id*. at 396 & n.1.

51. *Shady Grove*, 559 U.S. at 405-06.

for justly administering [the] remedy.'"[52] In so concluding, Justice Scalia determined that Rule 23 provides a "categorical, one-size-fits-all formula for determining when a class action may be maintained," irrespective of the requirements of state law.[53] The upshot (based on Justice Scalia's opinion for four justices) is that *Shady Grove* protects plaintiffs by permitting class actions in federal court if the requirements of Rule 23 are met, even if state law would impose additional requirements.[54] Thus, Professor Freer concludes that *Shady Grove* not only favored plaintiffs, it arguably "saved" Rule 23 from "evisceration by state law."[55]

The salvific impact of *Shady Grove* is, however, debatable. It may be that, in class action practice, less is more. Part of the continuing concern regarding class actions is that class litigation is available indiscriminately. Indeed, it is available in some instances in which the aggregation of claims through the class mechanism may be detrimental because, for example, it results in overdeterrence based on the combined effects of statutory minimum penalties and the availability of attorneys' fees in class action litigation. Notions of comparative institutional capacity argue in favor of permitting the primary substantive lawgivers, Congress and state legislatures, to determine whether, as a matter of substantive law, enforcement of statutory claims through the class mechanism is beneficial or detrimental.[56] Moreover, to the extent that legislative bodies do not determine the appropriateness of class action enforcement when creating statutory claims or that their determinations are disregarded, federal courts may impose general limits on all class

52. *Id*. at 407 (Scalia, J., plurality decision) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941) and citing Hanna v. Plumer, 380 U.S. 460, 464 (1965); Burlington N. R.R. Co., 480 U.S. 1, 8 (1987)).

53. Bernadette Bollas Genetin, *Reassessing the Avoidance Canon in* Erie *Cases*, 44 AKRON L. REV. 1067, 1118 (2011).

54. *But see* Helen Hershkoff, Shady Grove*: Duck-Rabbits, Clear Statements, and Federalism*, 74 ALB. L. REV. 1703, 1712-14 (2011) (reviewing subsequent decisions and concluding that, following the "narrowest grounds" rationale, some courts are construing Justice Stevens's concurrence as controlling and are enforcing state restrictions on class actions if there is clear expression by the state legislature that the provisions are substantive); Karlsgodt & Dow, *supra* note 31, at 887, 902-03.

55. Freer, *supra* note 1, at 722, 725 (citing Linda S. Mullenix, *Federal Class Actions: A Near-Death Experience in a* Shady Grove, 79 GEO. WASH. L. REV. 448 (2011)).

56. *See* Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 673-74 (2013) (suggesting that Congress should consider, in each private enforcement framework it creates, "the potential impact of class litigation on the attainment of regulatory goals," including whether "class litigation might yield inefficient over-enforcement," and also suggesting disapproval of *Shady Grove*'s failure to acknowledge state legislative limitations on the class action).

litigation in response to court conceptions of overdeterrence caused by use of class action litigation to pursue particular substantive claims. This would also impede goals of Congress and state legislatures. In the long run, accommodating legislative determinations – at both the federal and state level – regarding when class litigation is appropriate may do more to save the class action than preserving the transsubstantive application of Rule 23.[57] Such deference might also more faithfully reflect the limits on federal rulemaking imposed by the Rules Enabling Act, which provides that federals rules "shall not abridge, enlarge or modify any substantive right."[58]

Notwithstanding the decisions that benefit plaintiffs, Professor Freer concludes that the defendant-favorable decisions are richer. First, many of the defendant-favorable decisions construe provisions of Rule 23 and, thus, apply generally to class actions filed in federal court.[59] Second, these decisions construe certification requirements to create increased obstacles to class certification,[60] and they also "front-load"

57. *See* Genetin, *supra* note 53, at 1126-36 (proposing use of a "serious doubts" model of avoidance in construing potentially conflicting Federal Rules and state law that would privilege separation of powers principles and, as a consequence, protect federalism interests). There have also been inroads on Justice Scalia's conclusion on behalf of a plurality in *Shady Grove* that Rule 23(a) and (b) establish the sole requirements for class certification. Justice Stevens, who provided the necessary fifth vote in support of the validity of Rule 23 in *Shady Grove*, filed a separate concurrence in which he agreed that Rule 23 was valid, but he interpreted the substantive rights limitation of the Rules Enabling Act to preclude Federal Rules from "displac[ing] a state law [regarding class certification] that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right." *Shady Grove*, 559 U.S. at 423 (Stevens, J., concurring in part and concurring in judgment). *See also* Freer, *supra* note 1, at 725 n.25. Though admitting the possibility that sufficiently substantive state class action requirements must be honored notwithstanding Rule 23(a) and (b), Justice Stevens created a fairly high bar to determining that a state limitation on the class procedure is intertwined with substantive law. *See* Genetin, *supra* note 53, at 1122-24; Hershkoff, *supra* note 54, at 1712-14 (concluding that, on the "narrowest grounds" rationale, some courts are construing Justice Stevens's concurrence as controlling and are enforcing state restrictions on class actions if there is clear expression by the state legislature that the provisions are substantive). *See also* Karlsgodt & Dow, *supra* note 31, at 903 (suggesting that Justice Stevens's opinion may, on "narrowest grounds" rationale, ultimately be more influential than that of Justice Scalia).

58. 28 U.S.C. § 2072 (2012); *see also* Genetin, *supra* note 53, at 1135-36.

59. Freer, *supra* note 1, at 723, 734-37, 752-53, 754-55.

60. In *Wal-Mart*, the Court raised the hurdles to class certification (1) by limiting the situations in which plaintiffs may obtain monetary relief in a Rule 23(b)(2) class primarily to situations in which the proposed monetary relief is readily calculable or flows naturally from injunctive relief sought, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2560 (2011); and (2) by creating a higher standard for commonality under Rule 23(a)(2). *See* Freer, *supra* note 1, at 726-35. The majority in *Comcast*, likewise, construed Rule 23 narrowly indicating that Rule 23(b) requirements are subject to the same rigorous proof requirements as Rule 23(a) requirements; that "[if] anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a);" Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013); and that the plaintiff's damages theory

litigation in the class action case "procedurally" by increasing proof and evidentiary requirements for certification and, hence, increasing the cost of obtaining certification.[61] The decisions do so, moreover, through their holdings and also through numerous judicial "hints" that do not rise to the level of holdings, but will likely be treated as authoritative.[62]

These near-holdings, Professor Freer observes, contribute to procedural front-loading by providing that certification is not a question of pleading, but requires "convincing proof" of the Rule 23(a) and (b) requirements; that plaintiffs must provide proof of Rule 23 certification requirements even if there is overlap with merits issues; that expert evidence regarding certification likely must meet *Daubert* requirements;[63] and that defendants may rebut plaintiffs' evidence in support of certification.[64]

Finally, Professor Freer concludes that the "most profound" change wrought by the Roberts Court class action jurisprudence arises from the Supreme Court's uncompromising application of the Federal Arbitration Act (FAA) to enforce waivers of class litigation in arbitration contracts, including contracts of adhesion.[65] In these cases, Professor Freer emphasizes, the Court "relentlessly" protects an individual's right to bargain away – even by contract of adhesion – the ability to pursue class arbitration even when it would be prohibitively expensive to pursue individual arbitration.[66] The results of the *Concepcion* decision at the state level are two-fold, Freer concludes: As a substantive matter, it permits defendants to violate with impunity rights that are enforced only through negative-value claims.[67] As a matter of state authority over local enforcement options, it prevents states from using private enforcement,

must match its theory of liability. *See* Freer, *supra* note 1, at 735-36 (summarizing the "significant pronouncements" of *Comcast*).

61. Freer, *supra* note 1, at 737-42. Professor Freer notes that *Halliburton II* also front-loads litigation "substantively" by requiring that evidence for and against the presumption of fraud-on-the-market be presented at the certification stage.

62. *Id.* at 726.

63. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592-94 (1993).

64. Freer, *supra* note 1, at 732, 734-37. *Wal-Mart*'s judicial "hints" include also that (1) if individual issues predominate, "there is 'the serious possibility' that due process requires that class members be given notice and the opportunity to opt out," *id.* at 728 (quoting *Wal-Mart*, 131 S. Ct. at 2559); and (2) trial-by-formula might run the risk of abridging defendant's substantive rights in violation of the Rules Enabling Act. *Id*. at 729-30 & n.66.

65. *Id*. at 742--48 (discussing AT&T Mobility v. Concepcion, 131 S. Ct. 1740 (2011)).

66. *Id*. at 745, 747-49 (discussing the *Italian Colors* decision). In *Concepcion*, the Court did not reach this issue, *Concepcion*, 131 S. Ct. at 1740, but Professor Freer concludes that the *Concepcion* Court implies that class action waiver will be upheld even if individual claims are not feasible. Freer, *supra* note 1, at 747-48.

67. Freer, *supra* note 1, at 745.

in addition to or instead of, administrative or criminal enforcement to enforce consumer or other statutes.[68] At the level of conflict between substantive federal statutes and the FAA, moreover, Roberts Court class action waiver decisions also elevate the right-to-contract focus of the FAA over substantive policies in other congressional statutes, absent affirmative congressional indication that aggregate litigation is permissible.[69]

Defense attorneys Paul F. Karlsgodt and Dustin M. Dow acknowledge the breadth of the Roberts Court's class action waiver decisions, but they search, in vain, for similar broad and authoritative rulings in the Court's remaining class action decisions.[70] Karlsgodt and Dow perceive, in their review of the Court's class action portfolio, a Court that "has nibbled away at the rough edges of class-action procedure while passing on chances to dictate more drastic reform."[71] In their article, *The Practical Approach: How the Roberts Court Has Enhanced Class Action Procedure by Strategically Carving at the Edges*,[72] Karlsgodt and Dow conclude that the Roberts Court opinions tend (1) to resolve narrow legal issues, rather than create sweeping class action law;[73] (2) to endorse positions previously taken by lower federal courts;[74] and (3) to bypass opportunities to clarify important class action principles, which, they emphasize, include Court decisions to deny certiorari on important class action issues.[75]

Karlsgodt and Dow view the landmark *Wal-Mart v. Dukes* case as illustrative of the Roberts Court's propensity to decide cases narrowly and on grounds previously established in the lower federal courts. They

68. *Id*.

69. *Id*. at 748-49.

70. Karlsgodt and Dow, likewise, agree that the Roberts Court's liberal approval of contractual waivers of the right to proceed in a class format in the arbitration context has impacted the viability of claims in which the defendant contracts directly with the potential plaintiffs, such as in consumer and employment cases. Karlsgodt & Dow, *supra* note 31, at 894, 896-97.

71. *Id*. at 885.

72. *Id*. at 883.

73. Among other examples, Karlsgodt and Dow identify the Court's Class Action Fairness Act (CAFA) cases as providing guidance on narrow legal issues. In *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014), the Court held that *parens patriae* actions are not "mass actions" as defined by CAFA. Similarly, the Court concluded, in *Standard Fire Ins. Corp. v. Knowles*, 133 S. Ct. 1345 (2013), that a plaintiff may not prevent removal of an action by stipulating, before a class is certified, that the class will agree to accept less than the amount in controversy, but the Court failed to address the additional issue of the standard of proof by which the defendant must establish that the plaintiff class seeks more than the amount in controversy. *See* Karlsgodt & Dow, *supra* note 31, at 889-90, 898-900.

74. *See infra* notes 79-82, and accompanying text.

75. *See infra* notes 84-86, and accompanying text.

concede that *Wal-Mart* established a new and "helpful" tone, one that "emphasiz[es] the need for a rigorous analysis to ensure that the plaintiffs can prove common issues through common evidence," and that the Court provided "foundational" language that has served as the basis for many subsequent certification decisions.[76] *Wal-Mart* also raised the commonality requirement of Rule 23(a)(2) from irrelevance to a primary hurdle between plaintiffs and class certification.[77] Karlsgodt and Dow hasten to add, however, that even this change did not significantly alter the practical challenges of defending Rule 23(b)(3) damage actions since Rule 23(b)(3) requires predominance of common issues.[78]

They contend, however, that, except for the heightened commonality requirement of Rule 23(a)(2), neither the holdings nor the "hints" in *Wal-Mart* and *Comcast* broke new ground. Instead, the Supreme Court followed the lead of lower federal courts in holding that monetary relief available in the Rule 23(b)(2) class is limited;[79] that, at the certification stage, courts may assess facts that overlap both certification and merits issues, notwithstanding the *Eisen*[80] decision;[81] that courts must apply a rigorous analysis to Rule 23(a) and (b) requirements, including the Rule 23(b)(3) predominance requirement; that courts must apply heightened scrutiny to expert opinions supporting certification; and that use of trial-by-formula in the class context may not survive scrutiny.[82]

Karlsgodt and Dow conclude that defining features of the Roberts Court class action decisions are the Court's issuance of opinions with limited holdings[83] and its denials of certiorari in cases raising significant class issues. They identify the following as among the issues on which the Roberts Court has denied certiorari and, thus, failed to provide

76. Karlsgodt & Dow, *supra* note 31, at 914, 911-12.
77. *Id*. at 910-12.
78. *Id*. at 910.
79. Karlsgodt & Dow, *supra* note 31, at 909-10.
80. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).
81. Karlsgodt & Dow, *supra* note 31, at 909.
82. *Id*. at 911-15.
83. Karlsgodt and Dow include the following as among the issues that the Supreme Court declined to reach: (1) reliability of expert testimony regarding certification in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); (2) whether an unaccepted Rule 68 offer of judgment that fully satisfies a plaintiff's claim is sufficient to moot the plaintiff's claim in a Fair Labor Standard Act collective action, *see* Genesis HealthCare Corp. v. Symczyk, 133 S. Ct. 1523, 1528-29 (2013); (3) whether the availability of class arbitration under a contract is a question to be determined by the court or the arbitrator, *see* Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2068 n.2 (2013); and (4) the standard of proof by which defendants must establish the amount in controversy for purposes of removing a case pursuant to the Class Action Fairness Act. *See* Karlsgodt & Dow, *supra* note 31, at 911, 890, 898-901, 914-21.

guidance: (1) the propriety of certifying issues classes;[84] (2) standards governing reliability of expert evidence proffered at the certification stage; (3) standards for approval of class settlements; (4) standards for the Fair Labor Standards Act "collective action"; and (5) availability of *cy pres* relief.[85] Thus, Karlsgodt and Dow conclude that the Roberts Court exhibits a tone that encourages class action reform and that it has made some limited changes, but they conclude also that the Roberts Court has restricted its role by declining, in the main, to play an active part in defining the contours of the modern class action.[86]

III. THE ROBERTS COURT, THE ENTITY-AGGREGATE DEBATE, AND FEDERALISM

Two contributors consider less well-known class action decisions of the Roberts Court in the course of providing insights on whether the Roberts Court perceives the class action as an aggregate of individuals or as a separate juridical entity and whether principles of federalism and separation of powers support the Court's narrow construction of class certification standards. Attorney Andrew J. Trask focuses on unanimous decisions of the Roberts Court, including *Smith v. Bayer Corp.*[87] and *Standard Fire Insurance Co. v. Knowles*,[88] to conclude that the Court has made a "definitive shift away from the entity model of class actions" and has accepted that the class action is simply an aggregate of many individual claims.[89] This shift, Trask reminds, will impact the nature and extent of pretrial discovery, resolution of pretrial motions, settlements, and certification decisions.[90] In *The New Class Action Federalism*, Professor Mark Moller observes that the Court's class action cases since

84. Karlsgodt & Dow, *supra* note 31, at 9, 914. *See also* Hines, *supra* note 23, at 723-24, 762-65 (suggesting that the permissible contours of issues classes ought to be determined by the federal rulemakers through the Rules Enabling Act process, rather than by the Supreme Court through case law).

85. Karlsgodt & Dow, *supra* note 31, at 915-21.

86. *Id*. at 921-22.

87. Smith v. Bayer Corp., 131 S. Ct. 2368 (2011).

88. Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345 (2013).

89. Trask, *supra* note 19, at 832. Trask also relies, in concluding that the Roberts Court has adopted an aggregate view of the class action, on a unanimous, non-class action decision of the Roberts Court, *Taylor v. Sturgell*, 553 U.S. 880 (2008), and on the dissenting opinion of Justice Kagan (who was joined in her dissent by Justices Breyer, Ginsburg, and Sotomayor) in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1532-34 (2013) (Kagan, J., dissenting). Trask, *supra* note 19, at 833, 850, 856-57. Professor Mark Moller also construes the *Bayer Corp*. decision to reveal the Roberts Court's perception of the class action as an aggregate of individuals, rather than as a separate entity. Moller, *supra* note 19, at 872-74.

90. Trask, *supra* note 19, at 845-49.

2011 have made certification of nationwide mass tort actions at the federal level much more difficult to obtain, which has resulted in a decentralization of mass tort litigation and the redistribution of resulting cases throughout the federal and state systems.[91] This "accidental federalism" and the separation of powers principles that fuel this federalism are most evident, Professor Moller concludes, in *Smith v. Bayer Corp*., a little-discussed opinion of the Court.[92]

In *The Roberts Court and the End of the Entity Theory*, Trask focuses on what he describes as "largely part of a theoretical debate" regarding whether the class action should be viewed as an entity that is separate and distinct from its members, as asserted in the so-called "entity theory," or whether the class action is simply the largest available joinder device, one that permits aggregation of the claims of the many individuals that comprise the class action.[93] The latter alternative is often referred to as the "joinder theory" or "aggregation theory."[94] He traces the history of the entity theory from its inception in the scholarship of Michigan professor Edward C. Cooper in the 1960s, through the present, noting that the entity/aggregate debate has largely played out through academic commentary.[95] He concludes, however, that the results of the debate are anything but academic.

Courts that conceptualize the class action as a separate juridical entity, rather than as simply a joinder of claims of multiple individuals, rule differently on litigation issues that arise before a class is certified. They tend, Trask notes, to permit greater discovery for plaintiffs than defendants, to be more likely to permit substitution of named plaintiffs, and to be more likely to reject objections to settlements.[96] Trask delves into the academic commentary regarding the entity theory of class actions to explain that these results obtain because the entity model moves the focus from the named plaintiff to class counsel; it provides that controversies arising *before* class certification should be resolved as though the class already exists; and it counsels that courts "should err in favor of certification since that would be best for the entity."[97] Trask then explores a trio of unanimous Roberts Court opinions to conclude that the Roberts Court has disavowed the entity theory, at least to the

91. Moller, *supra* note 19, at 862.
92. *Id*.
93. Trask, *supra* note 19, at 832.
94. *Id*.
95. *Id*. at 835-37.
96. *Id*. at 845-47.
97. *Id*. at 834.

extent that the theory provides for treating a class action as a separate entity prior to class certification.[98] For the Roberts Court, he concludes, the class action remains simply an individual lawsuit until such time as a court certifies a class – a conclusion that will have major impacts on class action litigation.

In *The New Class Action Federalism*, Professor Moller suggests that the Roberts Court cases that narrowly construe class action certification may reveal an "untheorized" or "accidental" federalism that works to redistribute claims that would be encompassed in nationwide classes back to state and federal forums in the nature of smaller class actions and individual suits.[99] Indeed, Professor Moller suggests that federalism principles – implemented through separation of powers constructs that give deference to Congress's authority to control federal lawmaking – may join due process limitations and substantive rights limitations as a third restriction on the federal class action.[100] Professor Moller suggests also that the Court's deference to separation of powers principles, most notably in *Smith v. Bayer Corp.*,[101] may provide a principled way to understand the Roberts Court's restrictive approach to class certification.

In *Bayer*, the Court examined an application of the Anti-Injunction Act (AIA),[102] a congressional statute that generally precludes federal courts from enjoining ongoing state lawsuits, although it has limited exceptions. The district court in *Bayer* had concluded that the "relitigation" exception to the AIA applied, permitting the court to enjoin the parallel state class action, and the Eighth Circuit affirmed.[103] Professor Moller observes that, in reversing, the Roberts Court recurred to interpretive canons that require narrow construction of federal jurisdictional statutes, in deference to Congress's control of federal jurisdiction.[104] In *Bayer*, the Roberts Court emphasized that exceptions to the AIA had been interpreted restrictively for decades and that any ambiguity in applicability of the exceptions should be construed narrowly to prevent encroachment on state authority. The Roberts Court, thus, deferred to Congress's primacy in establishing the extent of the

98. *Id*. at 849. *See also* Moller, *supra* note 19, at 23-24 (citing Diane Wood Hutchinson, *Class Actions: Joinder and Representational Device?*, 1983 SUP. CT. REV. 459).

99. Moller, *supra* note 19, at 2.

100. *Id*. at 20-23. *See also* Mark Moller, *The Checks and Balances of Forum Shopping*, 1 STAN. J. COMPLEX LITIG. 107 (2012).

101. Smith v. Bayer Corp., 131 S. Ct. 2368 (2011).

102. 28 U.S.C. § 2283 (2012).

103. *Bayer Corp.*, 131 S. Ct. at 2374.

104. Moller, *supra* note 19, at 17, 878.

federal court's jurisdiction.[105] Professor Moller suggests that the Roberts Court's narrow interpretations of class certification under Rule 23 may evince a parallel deference to Congress as the primary lawgiver, particularly since broad constructions of the class action rule will displace state autonomy in litigation arising from mass events.[106] Concluding that expansive constructions of Rule 23 are "at the very edge of the rulemaking power conferred under the Enabling Act," Professor Moller suggests that even federal rulemakers ought to act cautiously and ought generally to leave broad constructions of Federal Rule 23 for Congress.[107]

IV. ASSESSING THE PRACTICAL IMPACT OF THE ROBERTS COURT CLASS ACTION DECISIONS

The final three contributions to this symposium assess the impact of the Roberts Court class action decisions on employment discrimination class actions alleging intentional discrimination, on the 23(b)(3) money damages class action, and on open market securities fraud cases. Professor Michael Selmi and Sylvia Tsakos collaborate to conclude that *Wal-Mart* did not sound the death knell of employment discrimination class actions based on claims of intentional discrimination.[108] Plaintiff-side attorney Elizabeth J. Cabraser reaches a similar conclusion in her review of how class action litigation is faring in the federal courts in the post-*Wal-Mart*, post-*Comcast*, and post-*Amgen*[109] era.[110] Finally, in *The Roberts Court and Securities Class Actions: Reaffirming* Basic *Principles*, attorney Eric Alan Isaacson concludes that the Roberts Court decisions on class certification in its open-market securities fraud decisions have been "particularly agreeable" to plaintiffs.[111]

Professor Selmi and Sylvia Tsakos assess the viability of employment discrimination class action cases that allege intentional discrimination five years after the Roberts Court's supposed "game-changer," *Wal-Mart v. Dukes*.[112] In their article, *Employment Discrimination Class Actions After* Wal-Mart v. Dukes, Selmi and Tsakos conclude that *Wal-Mart* appears to have reduced the number of

105. *Id.* at 874, 879.
106. *Id*. at 875.
107. *Id*. at 877-78.
108. Selmi & Tsakos, *supra* note 4, at 803-05.
109. Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184 (2013).
110. Cabraser, *supra* note 2, at 757.
111. Isaacson, *supra* note 38, at 924.
112. Selmi & Tsakos, *supra* note 4, at 803-05.

case filings and that the lower courts' analyses of discrimination cases vary somewhat from pre-*Wal-Mart* decisions.[113] They also conclude, however, that results of the cases that are filed mirror pre-*Wal-Mart* results: Those cases that would have been certified before *Wal-Mart* are likely to be certified in the post-*Wal-Mart* world.[114]

From study of published certification and decertification decisions in the approximately five years since *Wal-Mart*, Selmi and Tsakos identify trends in employment discrimination class litigation, and they also perceive, in three circuit court decisions, a framework for successful assertion of class claims alleging intentional discrimination.[115] The authors report that published decisions suggest there will be fewer nationwide class actions alleging intentional discrimination in cases that do not challenge clear employment practices, perhaps none, and that such suits will, instead, go forward as smaller, regional class actions.[116] Additionally, as before *Wal-Mart*, the likelihood of class certification will depend on the strength of the claim and on the jurisdiction in which the case is filed.[117] Finally, class claims alleging subjective employment practices may still be certified post-*Wal-Mart*, though certification may depend (as pre-*Wal-Mart*) on the court's pre-disposition to employment discrimination cases;[118] on a court's distinguishing *Wal-Mart* based on the unique characteristics of the proposed class in *Wal-Mart*, including its enormous size;[119] and, on the existence of overarching corporate policies that "govern" or frame discretionary employment decisions of local managers.[120] Thus, Selmi and Tsakos conclude that the impacts of *Wal-Mart* on intentional discrimination class actions, which have always been difficult to certify, are tangible, yet modest.[121]

Attorney Elizabeth J. Cabraser similarly assesses the health of Rule 23(b)(3) class actions in the federal courts in light of three Roberts Court class action decisions that impact class certification: *Wal-Mart v. Dukes*,

113. *Id*. at 804-05.

114. *Id.* at 805.

115. *Id*. at 822-28 (discussing *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012) (Posner, J.), *cert. denied*, 133 S. Ct. 338 (2012); *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105 (4th Cir. 2013); and *Stockwell v. City & County of San Francisco*, 749 F.3d 1107 (9th Cir. 2014)).

116. Selmi & Tsakos, *supra* note 4, at 805, 829-30. Selmi and Tsakos trace the prior move to seeking certification of nationwide classes, in part, to the varying reception of employment discrimination classes in different federal circuits. *Id.* at 807-09.

117. *Id*. at 805, 809.

118. *Id*. at 808, 829.

119. *Id.* at 814.

120. *Id*. at 823-30.

121. *Id*. at 821, 830.

Comcast Corp. v. Behrend,[122] and *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*.[123] In her article, *The Class Abides: Class Actions and the "Roberts Court,"* Cabraser concludes that, following these decisions, class certification is "more difficult, more expensive, [and] less predictable, across substantive lines," primarily because of the emphasis on creating an extensive factual record and on providing expert proof in support of class certification.[124] Cabraser also emphasizes that the *Wal-Mart* Court inappropriately imported into "commonality" under Rule 23(a)(2), the more exacting requirement of "predominance" of common questions that is needed to establish a money damages class under Rule 23(b)(3). She, thus, concludes that the Court now requires, for Rule 23(a)(2) commonality, the "more exacting" standard of "predominance" of common questions that should be reserved only for (b)(3) classes.[125] Cabraser also objects to the increasingly insistent arguments of defendants that plaintiffs must establish proof of damages by all class members before certification or that they must establish Article III standing of absent class members in an evidentiary hearing. She concludes, to the contrary, that Article III standing requirements should be "the same for class actions as they are for individual suits" and that "class members, like individual plaintiffs, need not prove the merits of their claims, or the existence or quantum of damages, as a predicate of standing . . . or as [a] prerequisite to class certification."[126]

Nevertheless, Cabraser finds that, post-*Wal-Mart* and post-*Comcast*, some federal circuits are construing the 23(b)(3) requirement that "questions of law or fact common to class members [must] predominate" over issues that affect only individual members in a "practical, functional" manner.[127] Rather than requiring that all or the majority of issues be common, the circuits undertake a pragmatic, holistic assessment of the issues and "focus[] on the utility and superiority of the preclusive classwide trial of important common issues."[128] Cabraser identifies this approach in cases from the First, Fifth, Seventh, and Ninth Circuits,[129] but she concludes that the Seventh

122. Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013).

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

124. Cabraser, *supra* note 2, at 769.

125. *Id*. at 764-65, 768. *See also* Mullenix, *supra* note 16, at 531 (noting that the *Wal-Mart* dissenters "accurately" argued that the Court's new approach to Rule 23(a)(2) "mimicked the more stringent predominance standard of rule 23(b)").

126. Cabraser, *supra* note 2, at 762; *see also id.* at 767, 773-74, 792.

127. *Id*. at 770.

128. *Id*. at 771.

129. *Id*. at 770-75.

Circuit has been particularly influential and has emerged as "a leading class action court, most notably in decisions authored by Judge Richard Posner."[130] Cabraser also discusses contemporary class action decisions from these circuits, noting that many have permitted class actions to proceed and that others have recognized principles favorable to class litigation, including (1) the viability of issues classes;[131] (2) that proof of injury need not be established at certification;[132] and (3) that *cy pres* remedies may be appropriate in some class cases.[133] Cabraser stresses that post-*Wal-Mart* and post-*Comcast*, the path to class certification is "more rigorous, more protracted, more expensive, and more uncertain,"[134] but she concludes that the class action has survived and that its "core functions" and "fundamental structure" remain largely unchanged.[135]

Attorney Eric Alan Isaacson concludes, in *The Roberts Court and Securities Class Actions: Reaffirming* Basic *Principles*, that the Roberts Court has removed all doubts about the validity of the fraud-on-the-market theory and that it has relaxed considerably the degree of market efficiency that plaintiffs must establish.[136] Isaacson acknowledges gains for the open-market securities class action in the Roberts Court's decisions in *Erica P. John Fund, Inc. v. Halliburton, Inc. (Halliburton I)*[137] and *Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds*,[138] before focusing primarily on the Court's 6-3 decision in *Halliburton Corp. v. Erica P. John Fund (Halliburton II)*, in which the Court reaffirmed the fraud-on-the-market theory.[139] Isaacson hales *Halliburton I*, in which the Court unanimously rejected the requirement that plaintiffs establish "loss causation" as a prerequisite to class certification, as a "clear victory" for plaintiffs.[140] He acknowledges also the significance of the *Amgen* decision, in which the Court concluded that "proof of materiality" is not a prerequisite to class certification

130. Indeed, Cabraser identifies decisions of Judge Posner as creating a "21st Century jurisprudence of class certification." *Id.* at 776. *See also id*. (listing pre- and post-*Wal-Mart* and *Comcast* decisions of Judge Posner).

131. *Id*. at 780-83

132. *Id*. at 763, 775-77, 779-84

133. *Id*. at 776, 797-99 (discussing two opinions by Judge Posner, one of which approved and one of which disapproved a *cy pres* remedy).

134. *Id*. at 800.

135. *Id*. at 800-01.

136. Isaacson, *supra* note 38, at 960.

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

138. Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184 (2011).

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

140. Isaacson, *supra* note 38, at 6, 946-47.

because "materiality" presents a common question that will not vary among class members.[141]

Isaacson, however, focuses primarily on *Halliburton II*, in which the Roberts Court, in an opinion by Chief Justice Roberts, reaffirmed adherence to the fraud-on-the-market theory in open-market securities class actions. This permits plaintiffs to use a rebuttable presumption that class members relied on material misrepresentations in publicly available information.[142] The *Halliburton II* Court also, however, permitted defendants to oppose class certification with evidence that the allegedly misleading statements and omissions did not affect the market price. Isaacson concludes that *Halliburton II* is important, first, because it legitimizes the fraud-on-the-market theory and, second, because the Court endorsed a flexible notion of fraud-on-the-market.[143]

The Supreme Court's decision regarding the fraud-on-the-market presumption in *Basic Inc. v. Levinson*[144] was both controversial and ambiguous. Isaacson emphasizes that *Halliburton II* resolves both failings. The *Basic* decision was controversial, Isaacson reminds, because three conservative justices did not participate in the decision.[145] Of the remaining six justices, the four "rather liberal" justices – Justices Blackman, Brennan, Marshall, and Stevens – formed the majority in support of the fraud-on-the-market theory, while two "relatively moderate conservatives," Justices White and O'Connor, dissented.[146] Isaacson concludes that *Halliburton II*, a 6-3 decision authored by Chief Justice Roberts, provides the legitimacy to the fraud-on-the-market theory that eluded the *Basic* decision because *Basic* was decided by a "dubiously liberal" majority of only four justices.[147] Furthermore, Isaacson emphasizes that Chief Justice Roberts's *Halliburton II* opinion is premised on "relatively modest ideas of 'market efficiency'" and that its flexible concept of market efficiency will have significant impacts on securities class actions at the class certification stage, but also at other stages of the litigation, including the pleadings stage, the motion practice

141. *Id*. at 947, 951-52.

142. This presumption obviates the need for plaintiffs to establish the state of mind of individual class members, which might preclude class certification under Rule 23(b)(3) on the basis that individual reliance issues predominated over common issues. *Id.* at 953.

143. *Id*. at 954-60.

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

145. Chief Justice Rehnquist and Justice Scalia recused, and Justice Kennedy was sworn in after the oral argument in the case. Isaacson, *supra* note 38, at 938.

146. *Id*. at 925, 933-34.

147. *Id*. at 948, 954-55, 960-62.

stage, summary judgment, and trial.[148]

Isaacson emphasizes that the *Halliburton II* Court rejected arguments that market efficiency is a "binary, yes or no" decision. It acknowledged the *Basic* Court's conclusion that "markets for some securities are more efficient than the markets for others" and that "even a single market can process different kinds of information more or less efficiently, depending on how widely the information is disseminated and how easily it is understood."[149] Isaacson concludes that the *Halliburton II* Court's "modest" concept of "market efficiency," combined with the Court's rejection of any suggestion that plaintiffs must establish "price impact," should lead to the overturning of many lower court decisions that disposed of plaintiffs' securities class actions as a matter of law, based on requirements that the plaintiffs had to establish "almost perfect efficiency."[150] Indeed, Isaacson concludes that *Halliburton II*'s affirmation of a flexible understanding of market efficiency will result in rejection of court decisions that deny class certification as a matter of law or that dismiss securities class action litigation, as a matter of law, at the pleadings or summary judgment stage.[151] He emphasizes that, under the *Halliburton II* approach to market efficiency, price effects are ultimately questions of fact ill-suited to determination "as a matter of law."[152]

V. CONCLUSION

The Roberts Court has decided more cases regarding the class action in the last ten years than the Supreme Court has decided in any

148. *Id*. at 948. *See infra* note 150-151, and accompanying text.

149. Isaacson, *supra* note 38, at 957 (quoting Halliburton Co. v. Erica P. John Fund, Inc. (*Halliburton II*), 134 S. Ct. 2398, 2410 (2014) (quoting *Basic*, 485 U.S. at 246-47 n.24)).

150. *Id*. at 960-62. Isaacson, thus, foresees that the more flexible definition of efficiency in *Halliburton II* will lead to the following changes in securities class action practice: (1) *Halliburton II* will render invalid lower court definitions regarding market efficiency that require "*all* information to be fully reflected in price at *all* times, *id*. at 962, 966-67; (2) *Hallilburton II* will overrule decisions dismissing claims on the pleadings, if information was available from any source before public statements were made, based on prior lower court conclusions that an efficient market must instantaneously incorporate all information, *id*. at 967-68; (3) *Halliburton II* suggests that courts will begin accepting the fraud-on-the-market presumption in cases involving initial public offerings, *id*. at 968; (4) *Halliburton II* will likely overrule lower court decisions requiring plaintiffs to produce sophisticated statistical models or "event studies" to demonstrate the efficiency of actively traded securities, *id*. at 972-74; and (5) by putting on defendants the burden of disproving price impact, *Halliburton II* shifts the uncertainty produced by "confounding factors" from plaintiffs to defendants and will require defendants to establish that a particular misrepresentation did not affect market price, *id*. at 974-77.

151. *Id*. at 977.

152. *Id*. at 959.

decade since the 1966 overhaul of Rule 23. From the contributions to this symposium on *The Class Action After a Decade of Roberts Court Decisions*, it is clear that the Court's decisions do not uniformly favor the plaintiff or the defendant. Nevertheless, several important themes emerge from close study of the decisions.

The symposium contributors perceive that the Court has construed provisions of Rule 23 to make class certification less available and has heightened the proof required at the certification stage with the result that class certification is much more time-consuming, expensive, and difficult to obtain. As a pragmatic matter, however, the articles reveal that courts are still certifying employment class actions alleging intentional discrimination and Rule 23(b)(3) damage class actions, in general, particularly in circuits that have traditionally favored class litigation. Moreover, although the number of nationwide suits has ebbed, the cases have resurrected as smaller, regional class actions or as individual suits that are filed in multiple federal and state forums. From this result, one commentator suggests a federalism defense for the Roberts Court's narrow construction of class certification under Rule 23 and suggests also that the Supreme Court should perceive the class certification decision as at the limits of its lawmaking authority. To a person, those who commented on the Court's securities class action decisions observed quite hospitable treatment of class actions alleging securities fraud. By contrast, the majority of those commenting on the Roberts Court treatment of class action waivers in arbitration agreements concluded that the decisions liberally enable defendants to avoid negative value claims, which, absent aggregate action, will not be pursued. In other decisions, the Roberts Court provided particularized guidance regarding class action issues.

The decisions, though numerous, provide no overarching theory of the class action, nor should they. A primary lesson to be learned from these decisions – one that is taught repeatedly in the procedural area – is that issues of institutional capacity inevitably come to the fore. The Supreme Court cannot, through the adjudicative process, create a comprehensive framework for class action procedure. It is constrained, instead, to resolve issues presented in the cases before it. More comprehensive policymaking regarding class procedure must come from Congress or the federal rulemakers. The many Roberts Court class action decisions will, nevertheless, have a profound influence on the future of class litigation. While no overarching theory may be extracted from the Roberts Court treatment of Rule 23, observers on both sides of the bar can agree on one issue: The class action remains alive and well.