# THE ROBERTS COURT AND CLASS LITIGATION: REVOLUTION, EVOLUTION, AND WORK TO BE DONE

Richard D. Freer*

## *I. INTRODUCTION*

Since 2005, when John Roberts was appointed Chief Justice, there have been startling changes to the world of class actions. Jurisdictionally, the Class Action Fairness Act of 2005 fundamentally reconfigured the allocation of class litigation between federal and state courts.[1] Federal Rule of Civil Procedure 23, the federal class action provision, has been amended three times in the Roberts years, once in a meaningful way.[2] Our focus, however, is on what the Roberts Court has done in the class action world through its caselaw. On that score, we have a remarkable corpus. From *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co*.[3] in 2010 through *TransUnion LLC v. Ramirez*[4] in 2021, the Court has issued more than two dozen class action decisions,[5] more than in any comparable period.

In a 2015 symposium article, I commented on the Court's class action jurisprudence through the 2014 Term.[6] The Court's interest has

 Charles Howard Candler Professor of Law, Emory University. I am grateful to the *Stetson Law Review* for sponsoring this symposium and to the participants for such lively and insightful discussion.

1. 28 U.S.C. §§ 1332(d), 1453, 1711–1715. The Act went into effect before Roberts became Chief Justice, but in the same year. In addition to the jurisdiction provisions, the Act affects practice in various ways, including awards of attorneys' fees in "coupon" class actions.

2. FED. R. CIV. P. 23. The provision governs class procedures in federal courts. States are free to craft their own class action rules for use in their courts or, as in Mississippi and Virginia, not to recognize the general class action at all. The Court's interpretation of Rule 23 has no direct impact on state class practice. The most significant amendment of Rule 23 came in 2018, with an overhaul of Rule 23(e), which governs settlement of certified class cases.

3. 559 U.S. 393 (2010).

4. 141 S. Ct. 2190 (2021).

5. I say "decisions" as opposed to "cases" to denote opinions in which the Court addressed an issue relevant to class practice. In some cases, the Court addressed a substantive issue that just happened to arise in a class suit but which does not affect the litigation of class actions. *See, e.g*., Nw. Inc. v. Ginsberg, 572 U.S. 273 (2014) (Airline Deregulation Act preempted state-law claims being asserted by a putative class). Although the *TransUnion* holding is based entirely on Article III, it is included here because it has ramifications for class membership.

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

not waned since, with fourteen decisions between 2015 and 2021.[7] My purpose here is not to catalogue each of these newer cases. Rather, the goal is to offer a retrospective on Roberts Court decisions in three quite specific areas: (1) class certification practice under Rule 23,[8] (2) "fraud-on-the-market" securities fraud litigation, and (3) the intersection of class practice and justiciability. These are not the only areas the Court has addressed[9] and, arguably, are not even the most important.[10] I choose them because they show different modes of engagement by the Court: revolution, evolution, and raising topics requiring future attention.

Regarding class certification practice, the Roberts Court has taken a revolutionary approach by mandating notable procedural changes, mostly through the decision of a single case. These changes resulted from interpretation of Rule 23, and thus did not require amendment to Rule 23.[11] In the securities class area, in contrast, the Court has issued a series of decisions that evince evolution rather than revolution. The series culminated in *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System* in June 2021. This case largely closes the circle on issues left open in earlier cases.[12] In the third area, the Court has dipped its toe in the water but not provided guidance (either revolutionary or evolutionary); rather, the cases have framed specific issues for further development.

7. TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021); Goldman Sachs Grp., Inc. v. Ark. Teacher Ret. Syst., 141 S. Ct. 1951 (2021); Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743 (2019); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019); Frank v. Gaos, 139 S. Ct. 1041 (2019); Nutraceutical Corp. v. Lambert, 139 S. Ct. 710 (2019); China Agritech, Inc. v. Resh, 138 S. Ct. 1800 (2018); Epic Syst. Corp. v. Lewis, 138 S. Ct. 1612 (2018); Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund, 138 S. Ct. 1061 (2018); Cal. Pub. Emp.'s Ret. Sys. v. ANZ Sec., Inc., 137 S. Ct. 2042 (2017); Microsoft Corp. v. Baker, 137 S. Ct. 1702 (2017); Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442 (2016); Campbell-Ewald Co. v. Gomez, 577 U.S. 153 (2016); DIRECTV, Inc. v. Imburgia, 577 U.S. 47 (2015).

8. The requirements for class certification in federal court are set forth in Rules 23(a) and (b). FED. R. CIV. P. 23(a)–(b).

9. Among others, the Court has addressed questions of appellate jurisdiction (*Nutraceutical* in 2019 and *Microsoft* in 2017), tolling of statutes of limitation and statutes of repose (*China Agritech* in 2018 and *California Public Employees'* in 2017), and has interpreted specific provisions of CAFA (*Home Depot* in 2019, Mississippi *ex rel.* Hood v. AU Optronics Corp., 571 U.S. 161 (2013), and Standard Fire Ins. Co. v. Knowles, 568 U.S. 588 (2013)).

10. That honor likely belongs to the cases in which the Court has continued the relentless march of the Federal Arbitration Act by holding that various state laws requiring that arbitration claimants be permitted to proceed in the aggregate are pre-empted by the Act. This trend has already received considerable scholarly attention. *See, e.g.*, Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371 (2016).

11. *See* Wal-Mart v. Dukes, 564 U.S. 338, 360 (2011).

12. 141 S. Ct. 1951, 1963 (2021).

Part II explores the revolutionary procedural changes wrought by the Court's interpretation of Rule 23.[13] The monumental case here is *Wal-Mart Stores, Inc. v. Dukes,*[14] decided in 2011. Now, with a decade's experience, the impact of that case can be traced in lower courts' application of the Rule, some through clear commands in the opinion but several through "hints" dropped in *Wal-Mart,* hints lower courts have taken as commands. Overall, the changes in class practice have made the certification process more expensive and protracted, consistent with a larger procedural arc in favor of "front-loading" litigation: requiring litigants to expend greater effort and money at earlier stages of a case.[15]

In Part III, we focus on sequential development of Roberts Court decisions in class actions asserting "fraud-on-the-market" claims under Securities and Exchange Commission Rule 10b-5, which prohibits fraud in the purchase or sale of securities.[16] The Court has had some good news for plaintiffs here, particularly with its continued embrace of a presumption that class members relied on the alleged misstatement or nondisclosure, which satisfies one of the substantive elements of the claim. In addition, the Court rejected various efforts to require class representatives to undertake proof of other elements at the class certification stage.[17] The Court worked itself into a bit of a corner in a 2017 case, which required it to return with considerable clarification in 2021.[18] It did so in a way that tempers some of the good news that plaintiffs had received earlier (and which also contributes to front-loading of litigation).

Finally, in Part IV, we see that the Court has begun wrestling with potentially profound issues at the intersection of class practice and justiciability under Article III.[19] These have come up in three contexts: (1) a clash between statutory and constitutional standing, (2) mootness resulting from settling the class representative's claim, and (3) use of the *cy pres* only class, in which class members do not receive any benefit from a class settlement. The Court's will to recognize these issues has not been matched by a will to decide them but may at least signal specific topics to which the Justices might wish to return.

---

13. *See Wal-Mart*, 564 U.S. at 359–60.
14. *Id.*
15. *See generally* Richard D. Freer, *Exodus from and Transformation of American Civil Litigation*, 65 EMORY L.J. 1491, 1509–13 (2016) (increased front-loading as component of recent trends in civil litigation).
16. 17 C.F.R. § 240.10b-5 (2020).
17. Freer, *supra* note 6, at 722.
18. Goldman Sachs Grp., Inc. v. Ark. Teacher Ret. Sys., 141 S. Ct. 1951, 1963 (2021).
19. *See, e.g.*, Spokeo, Inc. v. Robins, 578 U.S. 330 (2016).

## *II. THE REVOLUTION: CHANGES IN PRACTICE UNDER FEDERAL RULE 23*

Class actions, like any civil suit, commence with the plaintiff's filing of a complaint.[20] Here, however, the plaintiff sues as class representative on behalf of himself or herself and others similarly situated.[21] At that point, the case is a putative class action. Later, usually after discovery on the issues of whether the requirements of Rule 23 are satisfied, the representative moves for certification of the class.[22] If certification is denied, the case proceeds with the representative acting as a sole plaintiff.[23] If certification is granted, the case becomes a class action.[24] Obviously, then, the ruling on class certification is the watershed event in most cases. Denial of certification leaves the defendant subject to potential liability for a single plaintiff's claims. Grant of certification subjects the defendant to potentially devastating aggregate liability, which increases the pressure to forge a settlement, even if the class claims are relatively weak on the merits. The Court has affected the certification process in four significant ways.

### A. Evidence Required at Certification

It has always been true that the representative assumes the burden to plead that the requirements of Rules 23(a) and 23(b) are satisfied.[25] Rule 23(a) lists prerequisites for all class actions, and Rule 23(b) defines the specific types of classes permitted.[26] Beyond pleading, it has long been understood that the representative must make some showing of compliance with Rules 23(a) and (b).[27] Historically, though, courts were not demanding about how the representative went about demonstrating compliance with these requirements.[28] In fact, some courts made the certification decision based upon the pleadings, without requiring evidence.[29] Even those insisting upon evidence often were not particularly rigorous about what evidence might be considered.[30]

20. CHARLES ALAN WRIGHT ET AL., *7B Federal Practice and Procedure § 1798* (3d ed. 2021).
21. CHARLES ALAN WRIGHT ET AL., *7AA Federal Practice and Procedure § 1785* (3d ed. 2021).
22. *Id.*
23. *Id.*
24. WRIGHT ET AL., *supra* note 20.
25. *Id.*
26. FED. R. CIV. P. 23(a)–(b).
27. WRIGHT ET AL., *supra* note 20.
28. *See* Freer, *supra* note 6, at 733–35.
29. *See id.*
30. *See id.*

This easygoing approach was the result of lower courts' misreading of *Eisen v. Carlisle & Jacquelin*.[31] That case did not concern class certification *per se* but focused on whether the cost of providing notice to members of a Rule 23(b)(3) class could be allocated between the representative and the defendant.[32] The district court in *Eisen* permitted allocation, based upon the trial judge's assessment of the likely outcome of the case on the merits.[33] In rejecting this practice (and imposing the entire initial cost of giving notice on the representative), the *Eisen* opinion contained broad language that condemned a "preliminary inquiry into the merits" and suggested that allegations relating to the merits ought to be taken as true.[34]

For thirty-five years, lower courts interpreted this broad language to prohibit them from considering (at certification) any evidence that might bear on the merits of the underlying dispute. *Wal-Mart* properly put an end to this skittishness: *Eisen* was not laying out rules for the presentation of evidence at class certification hearings; it was concerned with the cost of giving notice to class members. Its passing reference to the merits of the dispute was not intended to tie the district judge's hands in ruling on class certification.[35] Thus, *Wal-Mart* makes clear that a district judge may assess evidence relating to whatever facts are necessary to class certification, even if those facts are also relevant to the merits.[36] Indeed, *Wal-Mart* went further: it is not simply proper to engage evidence in deciding certification, it is *mandatory*. Rule 23 does not impose "a mere pleading standard."[37] Rather, the representative must "be prepared to prove that . . . *in fact*" the certification requirements are satisfied.[38] There must be "rigorous analysis,"

31. 417 U.S. 156 (1974).

32. FED. R. CIV. P. 23(b)(3). Rule 23(b) recognizes three types of class actions. The Rule 23(b)(3) class is the only one in which class members are entitled to notice of the pendency of the case and a right to opt out of the class. The Rule 23(b)(1) and Rule 23(b)(2) classes do not require notice or the right to opt out; they are thus called "mandatory" classes.

33. *Eisen*, 417 U.S. at 177.

34. *Id.* at 177–79.

35. Wal-Mart v. Dukes, 564 U.S. 338, 350–51 (2011).

36. *Id.* at 350–52. Of course, the court should not make preliminary inquiries into factual issues that do not relate to class certification.

37. *Id.* at 350. *Wal-Mart* made this clear regarding Rule 23(a). Later, the Court extended the holding to Rule 23(b). Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013) ("The party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b).").

38. *Id.*

"significant proof," and "actual, not presumed, conformance with Rule 23."[39]

Not infrequently, class certification decisions involve the opinions of expert witnesses. The requirement of evidence at the certification hearing raised an obvious issue: must the expert witness be qualified under the Federal Rules of Evidence, including *Daubert v. Merrell Dow Pharmaceuticals*?[40] In *Wal-Mart*, that issue was not part of the Court's grant of *certiorari*[41] and the Court addressed it quite informally.[42] After noting that the Ninth Circuit held that expert witnesses need not be qualified under *Daubert* for certification purposes, the Court simply said: "[w]e doubt this is so."[43]

Lower courts have treated this hint as a command, so there appears to be broad agreement that expert witness testimony on certification must be assessed under *Daubert.* Nonetheless, there is an emerging split of authority over whether a "full *Daubert*" analysis is required or whether some modified form of *Daubert* might be appropriate at certification.[44]

Additionally, there is a broader evidentiary concern: outside the expert witness area, must all evidence considered at certification be assessed for admissibility under the Federal Rules of Evidence? In a case decided before *Wal-Mart*, the Fifth Circuit concluded that rulings on certification must be based "on admissible evidence."[45] The Ninth Circuit reached the opposite conclusion in 2018 and held it error to reject "evidence that likely could have been presented in an admissible form at trial" merely because it was not in an admissible form at the certification hearing.[46] It thus concluded that formal evidentiary objections were

39. *Id.* The latter three quoted phrases came from the earlier case of *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 159–60 (1982), on which the *Wal-Mart* majority relied on throughout its discussion of the need for proof at class certification. *Wal-Mart* can be seen as a command that the earlier language is to be taken seriously.

40. 509 U.S. 579, 597 (1993). *Daubert* set the standard for judging the reliability and relevance of expert testimony. *Id.* at 599. Today, those standards are part of the analysis for admissibility of expert testimony under Federal Rule of Evidence 702. FED. R. EVID. 702.

41. *Wal-Mart*, 564 U.S. at 342.

42. *Id.* at 354.

43. *Id.*

44. *Compare, e.g.*, Am. Honda Motor Co. v. Allen, 600 F.3d 813, 815–16 (7th Cir. 2010) (pre-*Wal-Mart* decision holding that if an expert's opinion is "critical to class certification," the court "must perform a full *Daubert* analysis"), *with In re* Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 612–14 (8th Cir. 2011) (district court did not err in applying a "tailored" *Daubert* approach).

45. Unger v. Amedisys Inc., 401 F.3d 316, 325 (5th Cir. 2005) (rejecting the district court's reliance on internet print-outs in approving certification).

46. Sali v. Corona Reg'l. Med. Ctr., 909 F.3d 996, 1006 (9th Cir. 2018).

relevant only to the weight to be accorded the evidence in the certification motion.[47]

In 2021, the Sixth Circuit sided with the Ninth Circuit on this point and noted that the nature of evidence may shift through the various stages of litigation.[48] In *Lyngaas v. Ag*, the court upheld certification of a class based in part on summary report logs of faxes that had not been formally authenticated.[49] Though such evidence would not be proper on summary judgment or at trial, a court dealing with class certification has greater evidentiary flexibility. Because the plaintiff assured the district court that the summary logs could be authenticated for trial, they were properly considered in support of certification.[50]

These lower-court developments flow from the holding in *Wal-Mart* that Rule 23 requires evidence, and not merely pleadings, concerning whether a class action should be certified.[51] They result in significant front-loading of the litigation. Now, the representative must have his or her evidentiary ducks in a row at certification, which likely requires longer discovery, delay, and greater expense.

### B. Heightened Requirement for Commonality

In all class actions, Rule 23(a)(2) requires "questions of law or fact common to the class."[52] Though the Rule uses the plural word "questions," courts have long agreed that a single common question is sufficient.[53] Historically, commonality was not a difficult requirement. Through the years, the difficult issue about commonality came up not with Rule 23(a)(2), but under Rule 23(b)(3), which requires that common questions *predominate* over individual questions.[54] As a result, the basic existence of a common question under Rule 23(a)(2) was rarely discussed in detail in the cases. If any court ever denied

47. *Id.*

48. Lyngaas v. Ag, 992 F.3d 412, 428 (6th Cir. 2021).

49. *Id.* at 438.

50. The court relied upon the Ninth Circuit decision in *Sali*, as well as the Eighth Circuit in *Zurn Pex,* to make the point that certification is determined before the close of merits discovery. *Sali*, 909 F.3d at 1006; *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d at 612–14. Thus, at the certification stage, one expects some evidentiary uncertainty. *Lyngass*, 992 F.3d at 429. The court also noted that the Supreme Court's decision in *Falcon* had instructed courts to assess evidence relevant to certification but that "[s]ometimes the issues are plain enough from the pleadings." Gen. Tel. Co. v. Falcon, 457 U.S. 147, 160 (1982).

51. Wal-Mart v. Dukes, 564 U.S. 338, 350–51 (2011).

52. FED. R. CIV. P. 23(a)(2).

53. Indeed, the Court in *Wal-Mart* agreed that only a single common question is required. 564 U.S. at 369.

54. FED. R. CIV. P. 23(b)(3) (emphasis added).

certification solely on the basis of lack of commonality, I have never seen the opinion.

*Wal-Mart* changed things. In that case, the Ninth Circuit upheld certification of a class of 1,500,000 female Wal-Mart employees, who alleged gender discrimination in violation of Title VII.[55] Wal-Mart managers enjoy great discretion to set employee compensation (within ranges) and to award promotions.[56] The plaintiffs asserted that the managers exercised this discretion in favor of male employees, which caused an unlawful disparate impact on female employees.[57] The class sought "injunctive and declaratory relief, punitive damages, and back pay."[58] The Court reversed and held, five-to-four, that the class failed to satisfy the commonality requirement of Rule 23(a)(2).[59] Remarkably, to many observers, the Court concluded that the case did not present even a single common question among the class members for purposes of Rule 23(a)(2).[60] Failure to satisfy Rule 23(a)(2) meant there could be no class under any of the provisions of Rule 23(b).[61]

The majority made clear that Rule 23(a)(2) is not read literally.[62] There are always "common questions" in any class action. For instance, whether each class member worked for Wal-Mart or whether the managers had great discretion were "common questions," but not as that term is used in the Rule. Likewise, the assertion that all class members were harmed by a violation of the same federal employment law would not create common questions. The majority said this was because the employment law can be violated in numerous ways, such as intentional discrimination versus policies that result in disparate impacts.[63]

Rather, "common questions" require that class members suffer the "same injury," so that "their claims can productively be litigated at once."[64] *Wal-Mart* shifted the focus from common *questions* to common

55. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010). Title VII is part of the Civil Rights Act, and, inter alia, forbids sex-based discrimination in employment. 42 U.S.C. § 2000(e).

56. *Wal-Mart*, 564 U.S. at 344.

57. *Id.*

58. *Id.*

59. *Id.* at 359–60. The Court also held unanimously that the class should not have been certified under Rule 23(b)(2), which is discussed in the next subsection.

60. *Id.*

61. The dissenting Justices lamented this fact. The Court's holding that the case could not proceed under Rule 23(b)(2), mentioned in footnote 59, did not rule out the possibility of proceeding under Rule 23(b)(3). But the holding that the class failed to satisfy Rule 23(a)(2) ended that possibility. *Id.* at 367–68 (Ginsburg, J., dissenting).

62. *Id.* at 349 (majority opinion) (mentioning the language of Rule 23(a)(2) "is easy to misread").

63. *Id.* at 350.

64. *Id.* at 349–50.

*answers*: there must be a common issue in the case such "that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[65]

On the facts of the case, the plaintiffs' substantive theory required proof of a general policy of discrimination. The plaintiffs alleged the existence of such a policy, but, to the majority, failed to support the allegation with relevant evidence.[66] The class attempted to do so in three ways.[67] First, the plaintiffs presented a sociological "social framework" analysis which concluded that Wal-Mart's structure and corporate culture made the company "'vulnerable' to 'gender bias.'"[68] Fatally, however, the expert witness conceded in his deposition that he could not calculate what percentage of employment decisions might be affected by this "stereotyped thinking."[69] For all he knew, it might be one percent or it might be ninety percent.[70] Accordingly, the majority concluded, a court "can safely disregard what he has to say."[71]

Second, the plaintiffs attempted to show that Wal-Mart's policy of allowing local managers to exercise discretion in making pay and promotion decisions resulted in a discriminatory policy.[72] The effort failed because the plaintiffs never identified a "common mode of exercising discretion that pervades the entire company."[73] Because they could not show an employment practice that "ties all their 1.5 million claims together,"[74] the plaintiffs failed to demonstrate the existence of a common question under Rule 23(a)(2). "Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims will produce a common answer to the crucial question *why was I disfavored*."[75]

Finally, the class relied upon anecdotal evidence to demonstrate a policy of gender-based discrimination.[76] This effort failed on the numbers. The plaintiffs provided only one affidavit for every 12,500 class members and presented proof relating to only 235 of the 3,400

65. *Id.* at 350.
66. *Id.* at 359.
67. *Id.* at 353–56.
68. *Id.* at 354.
69. *Id.*
70. *Id.*
71. *Id.* at 354–55.
72. *Id.* at 342.
73. *Id.* at 356.
74. *Id.* at 357.
75. *Id.* at 351–52.
76. *Id.* at 358.

Wal-Mart stores.[77] The effort was too paltry: "a few anecdotes selected from literally millions of employment decisions prove nothing at all."[78] It is difficult to ignore how deeply the Court delved into evidence relating to the merits of the substantive claim—all to determine that the class failed to present common questions under Rule 23(a)(2).

Lower courts appear to conclude that *Wal-Mart* imposed a heightened commonality requirement.[79] There is some debate, however, over how high that hurdle is. Certainly, the new standard is not insuperable. The requirement that the class members suffer the "same injury" does not mean that their harms cannot vary, even greatly: just that there is a common instance of injurious conduct.[80] And, again, *Wal-Mart* does not require that every question be common; "a single [significant] question of law or fact" suffices.[81]

As the dust settles, perhaps the impact of *Wal-Mart* on the commonality requirement is two-fold: (1) it shifted the focus from trying to name common questions to whether litigation will generate common answers and (2) it forced new attention to a provision that historically had no independent content. The Rule 23(a)(2) issue gets litigated more than it used to and occasionally results in something that was virtually unseen before the Roberts Court: a denial of class certification for lack of commonality.[82]

### C. Limitation On (and Clarity About) Monetary Recovery in Rule 23(b)(2) Classes

The plaintiffs in *Wal-Mart* sought certification under Rule 23(b)(2), which is proper when the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[83] Thus, there are two requirements: one relating to the action or

77. *Id.*

78. *Id.*

79. *See, e.g.*, Brown v. Nucor Corp., 785 F.3d 895, 903 (4th Cir. 2015) ("heightened requirement of commonality"); M.D. *ex rel.* Stuckenberg v. Perry, 675 F.3d 832, 839 (5th Cir. 2012) ("*Wal-Mart* . . . heightened the standards for establishing commonality under Rule 23(a)(2)."); Olney v. Job.com, Inc., No. 1:12–CV–01724–LJO–SKO, 2013 WL 5476813, at *12 (E.D. Cal. Sept. 30, 2013) ("*Wal-Mart* . . . made the commonality hurdle somewhat more difficult for plaintiffs to clear."). *But see* Cunningham v. Multnomah County, No. 3:12–cv–01718–ST, 2014 WL 7664567, at *18 (D. Or. Sept. 11, 2014) ("The commonality standard is not strictly construed.").

80. *See, e.g.*, *In re* Deepwater Horizon, 739 F.3d 790, 810–11 (5th Cir. 2014).

81. 564 U.S. at 369.

82. *See, e.g.*, DL v. District of Columbia, 713 F.3d 120, 126–28 (D.C. Cir. 2013).

83. FED. R. CIV. P. 23(b)(2).

inaction of the defendant and one relating to the relief sought for the class.

The provision was part of the overhaul of class practice accomplished by the 1966 amendments to Rule 23.[84] There is no question that the drafters envisioned that Rule 23(b)(2) would facilitate school desegregation suits,[85] though, it was not restricted to such cases. One typical action under Rule 23(b)(2) is employment discrimination—a good example of cases in which the defendant has treated the class members in a like manner.[86]

As noted, Rule 23(b)(2) speaks only of injunctive and declaratory relief.[87] Can a Rule 23(b)(2) class seek monetary recovery? The question is important because in many cases the plaintiffs will seek both prospective relief (an injunction or declaration) to stop the defendant's improper behavior and retrospective relief (restitution or damages) to compensate them for injuries already inflicted. The Civil Rights Act of 1991 increased this possibility by authorizing Title VII plaintiffs alleging intentional discrimination to recover compensatory and punitive damages.[88] Over time, some courts permitted members in Rule 23(b)(2) classes (Title VII and others) to recover money, at least in limited circumstances.[89]

The courts allowing monetary recovery justified their decisions on one of three theories. First, some courts found that recovery of money was proper if that relief could be characterized as "equitable" relief, as opposed to "legal" relief.[90] The idea was that the Rule's reference to injunctive or declaratory relief could be treated as a reference to "equitable" relief generally. Thus, if a claim for money could be characterized as restitution (an equitable remedy), these courts would permit it.[91] Second, other courts concluded that a Rule 23(b)(2) class could recover money if the class' demand for equitable relief "predominate[d]" over the claim for money.[92]

---

84. WRIGHT ET AL., *supra* note 20.

85. *See* David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 659–61 (2011) ("Rule 23(b)(2) was written for a very specific purpose. Judicial sympathy for racial integration and the 1966 authors' political commitments, rather than some conception of what due process requires, best explain why Rule 23 requires the mandatory class treatment of injunctive relief claims.").

86. *See, e.g.*, *Wal-Mart*, 564 U.S. at 342.

87. FED. R. CIV. P. 23(b)(2).

88. 42 U.S.C. § 1981a(a)(1). Before 1991, Title VII plaintiffs could not seek damages.

89. *See, e.g.*, Moody v. Albemarle Paper Co., 474 F.2d 134, 142 (4th Cir. 1973).

90. Freer, *supra* note 6, at 728.

91. *Id.*

92. *Id.*

Third, other courts allowed recovery of money if it was "incidental" to the injunctive or declaratory relief.[93] This theory requires that (1) the monetary relief "flow automatically" from the requested injunctive or declaratory relief and (2) the amount of money be readily essentially liquidated, or at least easy to calculate. The leading case adopting this third theory was *Allison v. Citgo Petroleum Corp.*, decided by the Fifth Circuit in 1998.[94] We will refer to the third theory as "the *Allison* theory." At one time or another, all three theories were used to justify the recovery of back pay in a Rule 23(b)(2) class for an injunction against future discrimination in violation of Title VII.

In *Wal-Mart,* all nine Justices rejected the first two theories.[95] The first is wrong because Rule 23(b)(2) speaks of "injunctive" and "declaratory" relief, not of "equitable" remedies.[96] If the drafters had intended for the recovery of a broader array of equitable remedies, they could have said so. The second is wrong because Rule 23(b)(2) does not contain any requirement of predominance.[97] That concept is found only in the Rule 23(b)(3) class, in which questions common to the class must predominate over questions that relate to individual members.[98] Accordingly, if the drafters of the Rule had wanted to impose a predominance requirement in Rule 23(b)(2), they could have done so.

*Wal-Mart* did, however, embrace the *Allison* approach.[99] Thus, if the monetary relief is "incidental" to equitable relief, it may be recovered in a Rule 23(b)(2) class.[100] Quoting *Allison,* the Court required that the money remedy "flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief."[101] Suppose, for instance, that a class discriminated against on the basis of age wins an injunction that requires the employer to promote them. That order avoids future harm to the class members. But what about the past discrimination? After all, the class members were denied their rightful promotions for some time and thus were underpaid over that period. Recovery of damages for the past discrimination will remedy that harm. And the *Allison* theory supports that recovery: the damages flow

93. *See, e.g.*, Lemon v. Int'l Union of Operating Eng'rs, Loc. No. 139, AFL-CIO, 216 F.3d 577, 580–81 (7th Cir. 2000); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998).
94. 151 F.3d at 415.
95. Wal-Mart v. Dukes, 564 U.S. 338, 363–65 (2011).
96. *Id.* at 365.
97. *Id.* at 363.
98. FED. R. CIV. P. 23(b)(3).
99. *Wal-Mart*, 564 U.S. at 365–67.
100. *Id.* at 365–67.
101. *Wal-Mart*, 564 U.S. at 366 (emphasis omitted) (quoting Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998)).

automatically from the injunction; the injunction puts the class members at the proper pay level, but they were denied payment at that level for some period before the injunction. Moreover, the monetary relief is easily calculated; the court simply applies a formula based upon the difference between the two pay grades and the length of time each was discriminated against. A good example is a case seeking an injunction against statutory violations that permit a uniform monetary award.[102]

The facts of *Wal-Mart* did not fit this model. Indeed, the Court held (unanimously) that the case would not qualify for class treatment under Rule 23(b)(2) even if the claimants had not sought damages.[103] *Wal-Mart* establishes that the injunctive or declaratory relief sought under Rule 23(b)(2) must be the same for each class member.[104] The Rule "does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant."[105] In other words, a class action cannot be used to vindicate unique individual equitable claims. The circumstances of alleged discrimination against the class members in *Wal-Mart* were unique to each class member.[106] Because of the autonomy enjoyed by each supervisor at each Wal-Mart store, the harms were individualized and not suffered by the class as a whole.[107] Thus, Rule 23(b)(2) could not be satisfied. Similarly, *Allison* could not be satisfied because of the individualized facts: "each class member would be entitled to an individualized award of monetary damages."[108]

Though this holding in *Wal-Mart* was rooted in interpreting Rule 23, the Court hinted that constitutional issues were lurking.[109] The recovery of individualized damages is proper in the Rule 23(b)(3) class only because it requires notice to class members and the right to opt-out of the class.[110] These requirements are mandated, the Court made clear, in due process.[111] Permitting a monetary recovery in the Rule 23(b)(2)

102. *See, e.g.*, Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 169 (2d Cir. 2001).
103. *Wal-Mart*, 564 U.S. at 367.
104. *Id.* at 360–61.
105. *Id.* at 360.
106. *Id.* at 356.
107. *Id.* at 355–56.
108. *Id.* at 361.
109. *Id.* at 363.
110. *Id.* at 362.
111. *Id.* at 362–63.

context (even in the *Allison* situation) may implicate due process and counsels caution.[112]

### D. "Trial by Formula" and Representative Evidence

The insuperable problem in *Wal-Mart* was that class members were harmed in different ways at different times by the alleged acts of different supervisors acting under different standards. The Ninth Circuit avoided the need for individualized hearings of the monetary claims by invoking a plan the Court derided as "Trial by Formula."[113] The plan directed that a subset of cases be tried.[114] After those trial results were known, other members' monetary claims would be extrapolated from those results.[115] The Supreme Court rejected the plan on due process grounds: it would deny Wal-Mart the right under employment law to present defenses to individual claims.[116]

*Wal-Mart* does not stand for the proposition that a class cannot use representative evidence to prove monetary recovery for class members.[117] The Court upheld a class-wide demonstration of damages in *Tyson Foods, Inc. v. Bouaphakeo*.[118] There, employees of a meat-packing plant sued under the Fair Labor Standards Act and state law, claiming that the employer wrongfully denied them compensation for time spent donning and doffing protective garments they were required to wear while working.[119] The suit concerned overtime work, which required the class members to show that they had worked more than forty hours per week, including time spent putting on and taking off the protective gear.[120] The defendant had failed to keep records of employee "donning and doffing" time, which led the class to present representative evidence based upon videotaped observations by an expert witness.[121]

---

112. *Id.* at 363 ("While we have never held that [due process requires notice and the right to opt out] where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here."). *See generally* Alexandra D. Lahav, *Due Process and the Future of Class Actions*, 44 LOY. U. CHI. L.J. 545 (2012).

113. *Wal-Mart*, 564 U.S. at 367.

114. *Id.*

115. *Id.*

116. *Id.*

117. Professor Lahav considers the topic in connection with normative values underlying the American civil justice system and concludes that the use of representative evidence manifests a clash between the goals of liberty and equality. Alexandra D. Lahav, *The Case for "Trial by Formula,"* 90 TEXAS L. REV. 571, 633–34 (2012).

118. 577 U.S. 442, 452 (2016).

119. *Id.* at 446–47.

120. *Id.* at 450.

121. *Id.*

Another expert then used average times spent by various groups of employees to calculate the appropriate amount of overtime.[122]

The Court upheld this use of the representative evidence.[123] Rather than adopt a special rule for class actions, it focused on whether a plaintiff in the same case—if suing as an individual, and not in a class action—would be permitted to rely upon the experts' observations and calculations.[124] The answer was yes: the expert's study "could have been sufficient to sustain a jury finding as to hours worked" in an individual suit.[125] The Court emphasized that in *Wal-Mart* the employees were not similarly situated; their circumstances were unique, so that none could have relied upon evidence adduced by another.[126] The class in *Tyson Foods*, on the other hand, was homogeneous, as it consisted of workers doing the same job at the same plant.[127]

In sum, class certification practice is more evidence-dependent, likely more expensive, and in some ways hinges on different standards than were true before the Roberts Court decisions. The Court brought these changes overnight not by amending Rule 23 but by interpreting it.[128]

## *III. EVOLUTION: "FRAUD-ON-THE-MARKET" CLAIMS UNDER FEDERAL SECURITIES LAW*

To appreciate the Roberts Court's evolutionary process in this area requires a bit of background in securities law. One important basis of securities fraud litigation is Rule 10b-5, promulgated by the Securities and Exchange Commission (SEC) in 1948 pursuant to its statutory authority under § 10(b) of the Securities Exchange Act of 1934.[129] Rule 10b-5 is a criminal provision, under which the SEC can refer cases to the Department of Justice for prosecution.[130] The SEC can also seek civil penalties and injunctions.[131] Though Rule 10b-5 is silent on the issue, the courts have long inferred a private civil right of action under which

122. *Id.* at 450–51.
123. *Id.* at 452.
124. *Id.* at 455.
125. *Id.* at 459.
126. *Id.*
127. *Id.*
128. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 366 (2011).
129. 15 U.S.C. § 78j(b).
130. 15 U.S.C. § 78u(d).
131. *Id.*

defrauded buyers or sellers of securities may sue for damages.[132] The gravamen of a Rule 10b-5 claim is that the plaintiff bought or sold securities based upon a fraudulent misstatement or omission.

The plaintiff in a civil damages suit bears the burden of establishing that the various elements of the claim are satisfied.[133] These include the classic fraud-based elements: materiality (the misstatement or omission must have been such as to be considered important by a reasonable investor), reliance (the plaintiff must have relied on the statement or omission in undertaking the transaction), scienter, and but-for causation.[134] There are other elements, such as a connection between the transaction and interstate commerce and, under the Private Securities Litigation Reform Act, "loss causation."[135] This requires the plaintiff to show that the loss suffered was the result of the fraudulent misstatement or omission and not from some macro-economic cause. For example, suppose a plaintiff purchased stock in a company because of a misleading statement by the corporate managers. That plaintiff can show but-for causation because the fraud was the reason he or she entered into the transaction. Now suppose the stock becomes worthless because the company was driven out of business by the COVID-19 pandemic. That plaintiff could not show "loss causation," because the loss in value of his or her stock was not the result of the fraud, but of external forces.

Not infrequently, potential Rule 10b-5[136] plaintiffs have "negative-value" claims, which means the individual's financial loss is not great enough to justify pursuing in individual litigation. These cases could not be pursued—and the anti-fraud policy of § 10(b)[137] could not be vindicated privately—unless such plaintiffs can seek damages through a class action. And here we encounter a problem: a damages class action is pursued under Rule 23(b)(3),[138] which requires, among other things, that "the questions of law or fact common to class members

132. *See* Basic, Inc. v. Levinson, 485 U.S. 224, 230–31 (1988) ("[Caselaw, congressional] acquiescence, and the passage of time have removed any doubt that a private cause of action exists for a violation of § 10(b) and Rule 10b-5 . . . .").

133. Velasquez v. U.S. Postal Serv., 155 F. Supp. 3d 218, 227 (E.D.N.Y. 2016) (quoting Brown v. Lindsay, No. 08-CV-2182, 2010 WL 1049571, at *12 (E.D.N.Y. Mar. 19, 2010)).

134. *See generally* RICHARD D. FREER & DOUGLAS K. MOLL, PRINCIPLES OF BUSINESS ORGANIZATIONS 459–65 (2d ed. 2018) (catalogue of elements in civil Rule 10b-5 claim).

135. 15 U.S.C. § 78u–4(b)(4) ("[Plaintiff has] the burden of proving that the act or omission of the defendant . . . caused the loss for which the plaintiff seeks to recover damages.").

136. 17 C.F.R. § 240.10b–5 (2020).

137. *Id.*

138. This is especially true after *Wal-Mart*, which, as discussed in Part II Section C, largely rules out recovery of monetary relief in a Rule 23(b)(2) class. 564 U.S. 338, 360 (2011).

predominate over any questions affecting only individual members."[139] Clearly, if the plaintiffs are required to demonstrate various elements of a Rule 10b-5[140] individually, rather than *en masse,* they cannot satisfy Rule 23(b)(3).[141]

This problem comes to a head in "fraud-on-the-market" cases. Here, a public corporation issues a misleading public statement that affects the price of its securities (typically, of course, it is common stock). Based upon that statement, investors buy (or sell) the stock in that company on a public exchange. Later, the misleading nature of the statement is exposed, and the stock price corrects—that is, it goes down if the misleading statement painted too rosy a picture or goes up if the misleading statement painted too bleak a picture.

Now, a group of investors has suffered a loss—either by buying stock that turns out to be worth less than they were led to believe or by selling stock that turns out to be worth more than the price for which they sold it. Can that group sue as a class under Rule 23(b)(3)?[142] Early attention in such cases focused on the substantive element of reliance. Are class members required to demonstrate that they relied on the public misstatement issued by the company? If so, certification under Rule 23(b)(3)[143] is impossible because the individual questions of reliance will swamp the litigation; common questions will not predominate. The only way to proceed is to find a theory under which reliance need not be shown by the individual class members.

The Court established such a theory in 1988, with the landmark *Basic Inc. v. Levinson* case.[144] There, the Court held that reliance will be *presumed* as to all class members, as long as the class claims involve a public misrepresentation and trading of securities on an efficient public market.[145] This "fraud-on-the-market" theory applies, then, only in cases involving misleading public statements concerning large corporations, the securities of which are registered for trading on a national exchange.[146] The theory is based upon economic research that concludes that stock prices on public markets are set based upon an overall mix of available public information.[147] Because this mix includes the company's

139. FED. R. CIV. P. 23(b)(3). The Rule also requires a showing that class litigation would be "superior to other available methods" of adjudicating the matter. *Id.*
140. 17 C.F.R. § 240.10b-5.
141. FED. R. CIV. P. 23(b)(3).
142. *Id.*
143. *Id.*
144. 485 U.S. 224, 246–47 (1988).
145. *Id.* at 247.
146. *Id.*
147. *Id.* at 246.

misleading public statement, the person who buys or sells the stock "relies" on the entire mix information, including the misstatement.

In establishing this rule in *Basic*, the Court expressly noted that a contrary rule would make it impossible to prosecute such cases as class actions, which would thwart the anti-fraud goals of § 10(b).[148] *Basic* requires the class representative, at certification, to demonstrate that the securities are traded on an efficient public market—which is a given with registered securities.[149] If he or she makes the showing, the court will then presume reliance by each class member.[150] The Court made clear, however, that the defendant could rebut this presumption, though the defendant made no such effort in that case.[151]

During the Roberts years, defendants have tried to undercut *Basic* in various ways.[152] The Court has responded in an evolving series of opinions. One defense tactic has been to argue that the class representative in fraud-on-the-market cases must do more at the certification stage than demonstrate that the relevant securities are traded on an efficient public market. Some lower courts were responsive. For example, the Fifth Circuit held that the representative must demonstrate "loss causation" as a prerequisite to certification.[153] A unanimous Court reversed in *Erica P. John Fund, Inc. v. Halliburton Co.*,[154] which has come to be known as *Halliburton I*. There, the Court drew a line between matters that must be demonstrated at class certification and those that present "merits" issues.[155] Though the representative in a fraud-on-the-market case must demonstrate—at certification—that the securities are traded on an efficient public market, loss causation is a merits issue, which need not be proved until the adjudication stage.[156] As the Court said, "[l]oss causation has no logical connection to the facts necessary to establish the efficient market predicate to the fraud-on-the-market theory."[157]

This case would return to the Court, but not before an intervening decision, *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds.*[158]

148. *Id.* at 245.
149. *Id.* at 247–48.
150. *Id.* at 247.
151. *Id.* at 248–50.
152. *See, e.g.*, Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 813–14 (2011) (hereinafter *Halliburton I*); Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 459 (2013).
153. *Halliburton I*, 563 U.S. at 809.
154. *Id.* at 807.
155. *Id.*
156. *Id.* at 813.
157. *Id.*
158. 568 U.S. 455 (2013).

Here, the Court faced a more difficult issue: in attempting to invoke the *Basic* presumption at certification, must the representative demonstrate that the defendant's public misstatement was material?[159] The issue is difficult because though materiality (unlike loss causation) is relevant to the merits (it is an element under Rule 10b-5[160]), it is closely related to whether the presumption of reliance should be applied.[161] After all, who would rely on a misstatement that was not material to the price of the securities?

In *Amgen*, plaintiffs got more good news: the representative is not required to present evidence of materiality at certification.[162] Materiality, like loss causation, is a merits issue to be addressed in the adjudication phase of litigation.[163] Moreover, the Court noted, materiality will be susceptible to aggregate proof.[164] In other words, the requirement will either be met—or not be met—for all class members: if the class fails to demonstrate materiality, every class member will lose on the merits.[165] Thus, the issue can be decided *en masse* at trial or at summary judgment. Accordingly, the Court concluded in *Amgen*, the defendant should not be allowed to attempt to rebut materiality at certification.[166]

The Court was just getting warmed up. Meanwhile, *Halliburton I* was remanded, and the defendant asserted, at certification, that the *Basic* presumption could not apply because its misstatement had had no "price impact" on the facts of the case.[167] The Fifth Circuit rejected the argument and held that the case should proceed to adjudication with the *Basic* presumption intact.[168] The case went back to the Court in *Halliburton Co. v. Erica P. John Fund, Inc.*,[169] known as *Halliburton II*.

During oral argument in *Amgen*, Justice Scalia raised the bombshell question of whether *Basic* and its presumption of reliance ought to be overruled.[170] To the surprise of many, the Court put the issue on the table

159. *Id.* at 459.
160. 17 C.F.R. § 240.10b-5 (2020).
161. *Amgen Inc.*, 568 U.S. at 464.
162. *Id.* at 459.
163. *Id.* at 459–60.
164. *Id.*
165. *Id.*
166. *Id.* at 480–81. The defendant argued that it should be able to rebut the presumption of reliance by showing that its misrepresentation had no effect on stock price because the market clearly understood it to be untrue. *Id.*
167. Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 265 (2014) (hereinafter *Halliburton II*).
168. *Id.* at 266.
169. *Id.*
170. Transcript of Oral Argument at 41:15–25, *Amgen, Inc.*, 568 U.S. 455 (No. 11-1085).

in *Halliburton II.*[171] Halliburton argued, based upon economics studies, that the theory underlying the presumption was flawed.[172] Without question, this constituted an existential threat to private securities class actions. But again, the Roberts Court had good news for plaintiffs: it refused to overrule *Basic.*[173]

But the Court in *Halliburton II*[174] gave something to defendants as well. Yes, materiality is a merits issue, as *Amgen* established, so the representative need not demonstrate at certification that the misstatement was material.[175] But the Court drew a line between materiality and "price impact."[176] Of the three things that the representative must demonstrate at certification (that the misstatement was public, that the class members bought or sold during the relevant period, and that the security was traded on an efficient market), two (the public nature of the misstatement and the efficient market) are relevant to "price impact."[177] That phrase refers to whether the misrepresentation affected the price of the security. Because those two issues are considered at certification, the Court concluded in *Halliburton II* that the defendant must be given the opportunity at that time to demonstrate lack of "price impact."[178]

All this seems rather circular. The argument that there is no "price impact" seems to be that the market discounted the misrepresentation in light of other public information. Arguably, this is simply another way of saying that the misrepresentation was not "material." While it is true that *Halliburton II* does not require the representative to demonstrate materiality at certification (which would violate *Amgen*),[179] it may get to the same point by permitting the defendant to show lack of "price impact."

Consider how a certification hearing could unfold: after the representative shows a public misstatement, an efficient market, and the relevant time frame, the defendant admits the misrepresentation and argues that it had no price impact. For example, in light of other public

171. *Halliburton II*, 573 U.S. at 266.
172. *Id.* at 270–71.
173. *Id.* at 266 (citing that Halliburton failed to make the "special showing" required to overcome doctrine of *stare decisis*). Justice Thomas wrote an opinion concurring the judgment, joined by Justices Scalia and Alito, arguing that *Basic* should be overruled. *Id.* at 300–01 (Thomas, J., concurring).
174. 573 U.S. 258.
175. *Id.* at 282.
176. *Id.*
177. *Id.* at 279.
178. *Id.*
179. *Id.* at 283–84.

evidence, the market understood that the misstatement was inaccurate and discounted it. At that point, the burden would shift to the representative to demonstrate that the misstatement is something that a reasonable investor would consider in making an investment decision. In other words, the representative would be required to prove materiality—but that is exactly what *Amgen* said the plaintiffs need not do at certification.[180] Not only that, but what evidence would suffice to rebut the defendant's evidence of lack of price impact? The deciding issue might be which party has the burden on the issue.

*Halliburton II* thus rejected a frontal assault on *Basic* but left open glaring questions and the possibility of an end-run around *Amgen.*[181] The Court went back into the thicket in *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System,* decided in June 2021.[182] In that case, a class of shareholders sued Goldman Sachs (Goldman) and several executives.[183] The class members argued that various misstatements about the company's conflict-of-interest policy were misleading and served to prop up the price of the company's stock at inflated levels.[184] When the truth emerged that Goldman had engaged in transactions with conflicts of interest, the stock price dropped.[185] Class members had purchased stock at the allegedly artificially high price.[186] They then suffered losses when the price fell.[187] They sought to invoke the *Basic* presumption.[188]

The Court addressed two issues. First, it concluded that "the generic nature of a misrepresentation is relevant to price impact."[189] Goldman contended that its statements about conflicts of interest were so anodyne as to be irrelevant to stock price.[190] The Court agreed; indeed "[t]he generic nature of a misrepresentation often will be important evidence of lack of price impact."[191] The certification decision should be based on "*all* probative evidence . . . regardless of whether the evidence

180. *Id.* at 282 (citing Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 467 (2013)).
181. *Id.* at 283–84.
182. 141 S. Ct. 1951 (2021).
183. *Id.* at 1957.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 1960.
190. Representative statements included: "We have extensive procedures and controls that are designed to identify and address conflicts of interest," and "[o]ur clients' interests always come first." *Id.* at 1959.
191. *Id.* at 1961. This is particularly so, according to the Court, in cases (such as *Goldman Sachs*) involving a charge that misrepresentations maintained an inflated stock price. *Id.*

is also relevant to a merits question like materiality."[192] At certification, "courts may consider expert testimony and use their common sense in assessing whether a generic misrepresentation had a price impact."[193]

Second, the Court addressed the burden of proof regarding price impact.[194] Goldman argued the plaintiffs should be required to demonstrate that the misstatements did affect price.[195] The Court rejected the argument as contrary to *Halliburton II*, which held the plaintiffs were not required to show price impact.[196] It also rejected an argument the defendant need merely present evidence of lack of price impact to defeat the *Basic* presumption.[197] Instead, the defendant must prove—by a preponderance of the evidence—the lack of price impact.[198]

Clearly, the Roberts Court has been active in shaping Rule 10b-5[199] fraud-on-the-market class actions. Though the endorsement of the *Basic* presumption is good news for plaintiffs, these classes face significant new hurdles. *Goldman Sachs* at least clarified some rules of the road but, as noted, the Court seems to ignore the relationship between price impact and materiality.[200] If the defendant presents colorable evidence of lack of price impact, the burden shifts to the representative—at certification—to demonstrate there was a price impact. Again, this is a lot like being required to show materiality.[201] True, the ultimate burden of the issue is on the defendant. But the prospect is clear for full-fledged evidentiary presentations by both sides. The promise of *Amgen*—that representatives need not *prove* materiality at certification—turns out not to be a promise that they do not need to produce evidence and litigate the issue at certification.[202]

One cannot miss the long shadow of *Wal-Mart*: certification motions are based upon evidence (not pleadings), the court must consider evidence relevant to certification notwithstanding its relevance to the merits, and expert testimony—presumably qualified under *Daubert*—is appropriate.[203] Note also the front-loading: the massive expense of such a full-blown evidentiary inquiry—all on the important

192. *Id.* at 1960 (emphasis added).
193. *Id.* at 1960.
194. *Id.* at 1961–62.
195. *Id.* at 1962.
196. *Id.* at 1962–63.
197. *Id.* at 1962.
198. *Id.* at 1963.
199. 17 C.F.R. § 240.10b-5 (2020).
200. *Goldman Sachs Grp., Inc.,* 141 S. Ct. at 1962–63.
201. *Id.*
202. 568 U.S. 455, 459 (2013).
203. 564 U.S. 338, 354–55 (2011).

but preliminary procedural issue of whether the case will proceed as a class.

*Goldman Sachs*[204] largely completes the evolution of Roberts Court decisions on fraud-on-the-market class actions. From saving the *Basic* presumption, to working out the details of who has what burden at certification of such actions took several cases,[205] in which the new law unfolded rather than exploded.

## *IV. WORK TO BE DONE: THE CLASS ACTION AND JUSTICIABILITY*

The Roberts Court class action jurisprudence has touched increasingly on issues of class practice and justiciability under Article III.[206] Two aspects of constitutional justiciability are standing and mootness. Standing requires that the plaintiff suffered a "concrete injury in fact" and sues to remedy that harm.[207] Mootness requires that the plaintiff's claim be "live,"[208] which cannot be satisfied, for example, if the claim has been fully compromised. Both are rooted in the Article III command that federal courts can entertain only "cases" or "controversies."[209]

### A. Statutory Standing and Article III Standing

A new frontier in this area concerns cases in which a class sues for violation of a statute, typified by the Telephone Consumer Protection Act (TCPA),[210] that provides for a private right of action and for statutory damages (often a few hundred dollars). There are hundreds of such statutes covering a host of business activities.[211] Many are concerned with one of two general harms: either (1) intrusion by unauthorized communications such as texts or telephone calls or (2) errors in documents that contain personal data, such as credit reports.[212] Such violations tend to affect hundreds or thousands of people at a time. The

204. 141 S. Ct. 1951.
205. *Id.* at 1963.
206. U.S. CONST. art. III.
207. Lujan v. Defenders of Wildlife, 504 U.S. 555, 555 (1992).
208. Powell v. McCormack, 395 U.S. 486, 496 (1969).
209. U.S. CONST. art. III.
210. 47 U.S.C. § 227.
211. *See generally* Edward Sherman, *"No Injury" Plaintiffs and Standing,* 82 GEO. WASH. L. REV. 834, 848 (2014) ("There are many federal statutes that create both rights and their own standards regarding standing.").
212. The TCPA, *supra* note 210, is an example.

large numbers of *de minimis* claims lead inevitably to a 23(b)(3)[213] class action.

Because these statutes create a private claim, they confer "statutory standing" on persons who were harmed by violations. But plaintiffs in federal court must have more than statutory standing: they must have standing under Article III of the Constitution.[214] If they do not have Article III standing, the litigation does not constitute a "case" or "controversy" over which federal courts can exercise jurisdiction.[215]

Article III standing is a doctrine of surpassing subtlety. We need not delve into the nuances of the doctrine, however, to understand how the issue arises in the sorts of cases we are considering. For example, *Spokeo, Inc. v. Robins*[216] involved class claims that a search engine had violated the Fair Credit Reporting Act (FCRA).[217] Specifically, the representative alleged that the search engine had created a false profile of him.[218] The profile created, however, likely portrayed him in a more favorable light than would an accurate profile.[219] The Court vacated the lower court finding of standing and remanded the case with instructions as to the appropriate standard for Article III standing.[220] It expressed no position, however, on the question of whether the representative adequately stated a concrete injury in fact, though it noted that an allegation of bare procedural violations do not confer standing.[221] On remand, the lower courts upheld standing, and the Court declined to review the case again.[222]

Three years later, the Court had another chance to contrast statutory and constitutional standing, and again the opportunity came to nothing. *Frank v. Gaos* involved class claims against Google for alleged violations of the Stored Communications Act.[223] When a Google user entered an Internet search and Google provided hyperlinks, the company transmitted information about the user to the host of any

213. *See, e.g.*, Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681.
214. U.S. CONST. art. III.
215. *Id.*
216. 578 U.S. 330 (2016).
217. 15 U.S.C. § 1681.
218. *Spokeo, Inc.*, 578 U.S. at 333.
219. *Id.* at 336. Among other things, the profile stated that the representative worked as a professional, had a graduate degree, and had a high level of wealth, none of which was true.
220. *Id.* at 343.
221. *Id.* at 341, 343. Justice Ginsburg dissented on the ground that the Court should have affirmed the finding of constitutional standing without remanding the case. *Id.* at 351, 354 (Ginsburg, J., dissenting).
222. *In re* Google Referrer Header Priv. Litig., 465 F. Supp. 3d 999, 1012–13 (N.D. Cal. 2020).
223. 139 S. Ct. 1041 (2019).

webpage upon which she clicked.[224] We discuss this case below because it involved a settlement invoking the *cy pres* doctrine.[225] The Court granted *certiorari* to review issues raised by that doctrine but ultimately did not reach them.[226] Rather, the Court, in a *per curiam* opinion, remanded the case for consideration of whether the class members had Article III standing under *Spokeo*.[227]

The Court finally wrestled with the merits of Article III standing under such statutes in *TransUnion LLC v. Ramirez,*[228] which was decided in late June of 2021. There, the representative alleged that a credit-reporting service violated the FCRA by including in class members' files a warning, based solely upon the their names, that they were "potential match[es]" for a list of terrorists, drug traffickers, and others accused of serious felonies.[229] The class consisted of 8,185 members, all of whom had this "potential match" notation in their files.[230] However, only 1,853 of the members' files (with the offending notation) were provided to third parties.[231] The Court held that only these 1,853 class members had suffered the "concrete harm" required for standing under Article III.[232] The 6,332 class members whose files (with the offending notation) were never provided to third parties lacked constitutional standing.[233]

Further, though all 8,185 members had received information from the credit-reporting service in an incorrect format, none of them had standing to pursue a claim based upon formatting.[234] The information received was not incorrect in itself, and the fact that it was not formatted properly, while possibly a violation of the statute, did not confer Article III standing.[235] The Court decided the case wholly on Article III grounds, not Rule 23.[236]

224. *Id.* at 1044.
225. *Id.* at 1043–44.
226. *Id.*
227. *Id.* at 1046. Justice Thomas dissented and pointed out the relationship between justiciability and Rule 23: even if class members have Article III standing (he concluded they did), he questioned whether a class can be certified under Rule 23 when the settlement provides no benefit to class members. *Id.* at 1046–48 (Thomas, J., dissenting). This point is discussed in Part IV Section C.
228. 141 S. Ct. 2190 (2021).
229. *Id.* at 2200–01.
230. *Id.*
231. *Id.* at 2200.
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.* at 2213.
236. *Id.* at 2214.

### B. Mootness

Federal courts lack Article III jurisdiction over moot claims. Claims that are compromised in full are moot. Federal Rule 68[237] permits plaintiffs to offer to settle a case on terms stated. If the plaintiff accepts the offer, the clerk enters judgment and the case ends.[238] If the plaintiff rejects the offer, the case continues. What happens, though, in a case in which the plaintiff seeks liquidated damages, if the defendant makes a Rule 68[239] offer of the entire amount the plaintiff could recover, including costs, fees, and interest? Some courts conclude that such an offer of full compensation renders the plaintiff's claim moot under Article III: because the offer makes the plaintiff whole to the full extent of the law, there is arguably no live controversy, even if the plaintiff rejects the offer.[240] As one court said: "You cannot persist in suing after you've won."[241] In the class context, the Rule 68 pick-off takes on another consequence: defeating class certification because the representative whose claim is moot cannot qualify as adequate under Rule 23(a)(4).[242]

There are, then, two related issues: (1) does an unaccepted Rule 68 offer of full compensation render a class representative's claim moot and, (2) if so, does that erstwhile representative nonetheless retain any interest that would permit him or her to argue whether the class should nonetheless be certified?

The Court faced the Rule 68 pick-off in the class context in *Campbell-Ewald Co. v. Gomez*[243] but managed to answer neither question. In that case, class members who had received unwanted text messages sued for alleged violations of the TCPA.[244] The defendant made a Rule 68 offer to the representative to settle his individual claim.[245] He rejected the offer. The Court held that the rejected offer was of no effect and did not moot the representative's claim.[246] The holding was based upon the

237. FED. R. CIV. P. 68 ("Offer of Judgment").
238. FED. R. CIV P. 68(a).
239. *Id.*
240. *See, e.g.*, Warren v. Sessoms & Rogers, P.A., 676 F.3d 365 (4th Cir. 2012) (noting an unequivocal offer of complete relief moots claim); O'Brien v. Ed Donnelly Enters., 575 F.3d 567, 574 (6th Cir. 2009).
241. Greisz v. Household Bank, N.A., 176 F.3d 1012, 1015 (7th Cir. 1999).
242. FED. R. CIV. P. 23(a)(4) (providing representative must "fairly and adequately" represent the interests of the class).
243. 577 U.S. 153 (2016).
244. *Id.* at 157.
245. *Id.* at 157–58.
246. *Id.* at 156.

black-letter contract law principle that an unaccepted offer is a legal nullity and cannot affect one's rights.[247]

The holding is remarkably narrow. The Court did not address the question of whether an unaccepted Rule 68 offer affects constitutional mootness. On the issue of whether a class representative whose claim is moot might nonetheless pursue certification, the opinion stated, "[w]hile a class lacks independent status until certified, a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted."[248] The Court did not attempt to define what might constitute a fair opportunity to present the certification argument.

The Court in *Campbell-Ewald* recognized that a different case might be presented if the defendant actually *deposited* the full amount of plaintiff's claim and the court entered judgment for the plaintiff in that amount.[249] In dissent, the Chief Justice pointed out that the Court "does not say that *payment* of complete relief leads to the same result. For aught that appears, the majority's analysis may have come out differently if Campbell had deposited the offered funds with the District Court."[250] Indeed, the Court itself seems to assume that actual payment of relief to the representative would moot her claim. Further, the Court "does not reach the question whether Gomez's claim for class relief prevents this case from becoming moot."[251]

The Court has more work to do here. *Campbell-Ewald*[252] did not resolve the Article III mootness issue. While courts seem to agree that actual payment of compensation in full renders a claim moot, what does that mean? Is proffering the money sufficient or, as the Ninth Circuit has concluded, must the payment actually be received?[253] If the latter, is it sufficient that the funds be placed in the registry of the court? Is it sufficient that a wire of funds is tendered? Moreover, the Court has given precious little guidance on why a representative whose claim is mooted might have a live claim to argue in favor of certification.

247. *Id.* at 162.
248. *Id.* at 165 (citation omitted).
249. *Id.* at 172. The opinion noted that the Court need not, and would not, address the issue.
250. *Id.* at 184 (Roberts, C.J., dissenting).
251. *Id.* at 178 n.1 (Roberts, C.J., dissenting).
252. *Id.* at 153 (majority opinion).
253. Chen v. Allstate Ins. Co., 819 F.3d 1136, 1144–45 (9th Cir. 2016); s*ee* Rick L. Shackelford, *Offers of Judgment*, *in* AM. BAR ASS'N, A PRACTITIONER'S GUIDE TO CLASS ACTIONS 667, 687 (Mary Hogan Greer ed., 2d ed. 2017) (In the Ninth Circuit, "a claim becomes moot only when a plaintiff *actually receives* all available relief . . . .").

### C. *Cy Pres* Class Actions

A class may seek whatever remedies are permitted by the substantive law, including damages, injunctions, and declaratory judgments. One remedy of long standing in class practice is the *cy pres* distribution. The *cy pres* doctrine developed in the law of trusts and estates to deal with situations in which literal compliance with a document was not possible.[254] For example, suppose a will provided for distribution to a charitable organization but by the time the decedent died that organization no longer existed. Under *cy pres,* which means "as near as possible," the court has the authority to name a different recipient for the gift, one that will accomplish (as near as possible) the intention of the testator.[255]

In class practice, *cy pres* emerged in "common fund" cases.[256] Here, the class litigation resulted (either by judgment or settlement) in a fund of cash to be distributed to class members.[257] After class members made their claims, however, money remained in the fund. A court facing this issue has three choices. First, it can return the funds to the defendant.[258] This result may make sense under the compensatory goal of the law because all class members have been compensated. It makes less sense, however, under the deterrent goal of the law because the court ordered the defendant to pay the full amount. Second, the court can order escheat to the government.[259] Our focus is the third option, under which courts, borrowing the concept of *cy pres*, award the surplus funds to a non-profit organization dedicated to a cause that will advance the goal of the litigation.[260] For example, in litigation for injuries caused by the use of tobacco, the court might order the surplus awarded to an organization dedicated to awareness of the harms of tobacco.

This use of *cy pres* to distribute the residue of a common fund after class members have been compensated does not appear to be controversial. The difficult issue today is the "*cy-pres*-only" class, in which class members receive no recovery and the *entire common fund* created by the litigation (less costs and attorney's fees for the class

254. GEORGE GLEASON BOGERT ET AL., BOGERT'S TRUSTS AND TRUSTEES § 433 (2021).
255. Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV. 97, 114 (2014).
256. *Id.* at 161.
257. *Id.* at 103.
258. *Id.* at 106
259. *Id.* at 107–08.
260. *Id.* at 117.

lawyer) is routed to a non-profit organization.[261] This practice has important defenders[262] but raises significant questions. It is one thing to use *cy pres* to distribute surplus funds after class members have been compensated. There, as we said, the compensatory goal of the law has been satisfied. When class members receive no remedy at all, however, the compensatory goal is not satisfied. The deterrent goal is satisfied, but in a format that does not look at all like our model of civil litigation, in which the plaintiff seeks compensation for harm. Rather, it looks more like some administrative mechanism which, instead of being employed by an agency, is administered by a federal court. Interpreting Rule 23 to permit such a process implicates the Rules Enabling Act, which provides that Federal Rules "shall not abridge, enlarge or modify any substantive right."[263]

More fundamentally, as Professor Redish and others have argued,[264] the *cy pres* only class raises justiciability problems. The most obvious problem is standing, which, as discussed above, requires the plaintiff to seek remedy for some "concrete harm" they have suffered.[265] The beneficiaries (third-party charitable organizations) in *cy pres* only classes, however, have not been harmed by the defendant's conduct. Add to this the fact that most *cy pres* only classes are the results of settlements in which the defendant is given a significant voice over the operation of the organization to which the funds are awarded—and the fact that often the beneficiary of the award may be an *alma mater* of class counsel—and one can understand the concern. One need not be a cynic to fear that such a mechanism is being used to buy global peace for the defendant and to line the pockets of plaintiff's lawyers and pet charities, leaving class members without remedy.

The Court seems intrigued by the topic but, despite opportunities, has done nothing significant. In 2013, Chief Justice Roberts took the unusual step of publishing a statement in a regard to a denial of *certiorari*. The case, *Marek v. Lane,*[266] presented the problems of no remedy for class members, substantial fees to plaintiffs' counsel, and distribution to an entity over which the defendant had considerable

261. *See, e.g.*, Robert G. Bone, *In Defense of the Cy-Pres-Only Class Action*, 24 LEWIS & CLARK L. REV. 571, 571 (2020).

262. *Id.*

263. 28 U.S.C. § 2072(b).

264. Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 634–38 (2010).

265. *See* pt. IV.A.

266. 571 U.S. 1003, 1003 (statement of Roberts, C.J.). The case challenged the "Beacon" program instituted by Facebook, which permitted dissemination of members' private information, allegedly in violation of federal and state privacy laws.

sway. The lower courts had approved the class settlement as "fair, reasonable, and adequate" under Rule 23(e).[267] Chief Justice Roberts agreed that the Court should not hear that particular case because the issues raised by those objecting to the settlement were so narrow that the Court would not have a chance to comment on the broader themes.[268] But he urged the Court to "clarify the limits" on the use of *cy pres* remedies in a suitable case.[269] And he listed as "fundamental concerns" the following:

> when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy; how closely the goals of any enlisted organization must correspond to the interests of the class. [270]

Many *cy pres* only cases involve violations of the types of statutes discussed in Section A of this Part: those that create statutory standing and provide for a statutory monetary recovery. There we saw that cases arising under such statutes may raise significant Article III standing problems. For present purposes, even if class members have Article III standing, can a case that gives no remedy to class members be certified as a class action under Rule 23(a) and 23(b)? Can a settlement on terms such as those in *Marek v. Lane* be approved as "fair, reasonable, and adequate" under Rule 23(e)?

The Court had a chance to address the Rule 23 issues in *Frank v. Gaos,* discussed in Section A of this Part. The facts were similar to those in *Marek v. Lane*, with the class members accorded no part of the settlement proceeds. The Court refused to consider the class action issues, however, and remanded the case for consideration of standing. Justice Thomas dissented and argued that even if the class members had standing, "the lack of any benefit for the class rendered the settlement unfair and unreasonable under Rule 23(e)."[271]

267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*
271. Frank v. Gaos, 139 S. Ct. 1041, 1047 (2019) (Thomas, J., dissenting).

## *V. CONCLUSION*

The Roberts Court has been remarkably active in a broad swath of issues relating to class action practice under Rule 23. In the three areas on which we focused, we saw the Court assume different levels of engagement. It wrought a revolution in certification practice by interpreting Rule 23 in new ways; lower courts have interpreted some of the Court's hints as commands to require more robust presentation of evidence at the class certification stage. The Court evolved in its approach to certification of fraud-on-the-market Rule 10b-5 cases, raising and finally resolving various issues in a way that makes the law clearer than it was. And with regard to class actions and justiciability, it has staked out some topics on which its real work has yet to begin.