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Transcript—Panel Exchange the Fourth Annual Fritz B. Burns Lecture Central Bank: The Methodology, the Message, and the Future

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TRANSCRIPT—PANEL EXCHANGE
THE FOURTH ANNUAL
FRITZ B. BURNS LECTURE
CENTRAL BANK:
THE METHODOLOGY, THE MESSAGE,
AND THE FUTURE

*Therese H. Maynard, Moderator**

*Melvin Aron Eisenberg, Panelist***

*Joseph A. Grundfest, Panelist****

*Simon Lorne, Commentator*****

I. INTRODUCTION¹

PROF. MAYNARD: Welcome. I am Therese Maynard, and I am on the faculty at Loyola Law School. This year I was honored to serve as the Chair of the Fourth Annual Fritz B. Burns Lecture.

You probably don't recognize me. I have the great distinction of being among the very few Loyola faculty yet to offer up commentary on the O.J. Simpson trial. But I haven't given up hope! I still think that securities fraud is a possible line of defense—and I may yet have a chance!

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** Professor Melvin Aron Eisenberg is the Koret Professor of Law at Boalt Hall School of Law. He recently concluded service as Chief Reporter of the American Law Institute's Principles of Corporate Governance, published in 1994.

*** Professor Joseph A. Grundfest is on the Stanford University School of Law faculty. He served as a Commissioner of the United States Securities and Exchange Commission from 1985 to 1990.

**** Simon Lorne is currently serving as the General Counsel of the United States Securities and Exchange Commission. Mr. Lorne formerly practiced law in Los Angeles at Munger, Tolles & Olson, where he specialized in corporate securities law.

1. The commentary and panel exchange reproduced here are based on Professors Eisenberg and Grundfest's presentations on the evening of the Burns Lecture. Their articles published in this issue expand on the papers delivered that evening and are therefore not identical to their presentations.

In any case, securities fraud is the theme of the Fourth Annual Fritz B. Burns Lecture. Before moving into the substance of tonight's lecture, I first would like to acknowledge the support of the Fritz B. Burns Foundation. We are indeed quite fortunate to have two of the Foundation's trustees here with us this evening. Without the Foundation's generous financial support, we would not all be gathered together tonight. So I would like to take this opportunity to acknowledge these gentlemen and thank the Foundation for its continued support.

Turning to the theme of tonight's lecture—when we first started to plan this lecture during the summer of 1994, *Central Bank v. First Interstate Bank*² was hot. Everybody's phone was ringing off the hook. Members of the Securities Bar were intrigued by the Court's reasoning and its holding, as were members of other practice areas within the legal profession.

Of course, I worried very much that a topic built around *Central Bank* would not last well into the spring of 1995 and continue to be of current interest. But I got lucky! The Supreme Court decided *Gustafson v. Alloyd Co.*³ a couple of weeks ago, and securities fraud is back in the headlines again. So as they say in show business: Timing is everything!

For those of you who are not securities lawyers, *Gustafson* is a case involving section 12(2) of the Securities Act of 1933,⁴ and as my colleague Joe Grundfest has dubbed me, I am the "Queen of 12(2)." Indeed, Joe has even offered to install an "800" phone number for me: "1-800-12-2-12-2-12-2!" That generous offer was made, however, *before* the Supreme Court handed down its opinion in *Gustafson*. In that decision, the Supreme Court decided that section 12(2) relief is *not* available in the context of the private resale of securities.⁵

This Lecture is *not* about the *Gustafson* decision. However, this recent decision reflects how the teachings of *Central Bank* are continuing to play themselves out. Our panel tonight is here to discuss *Central Bank* and the Court's decision to deny an implied cause of action for aiding and abetting liability under the rule 10b-5⁶

2. 114 S. Ct. 1439 (1994).

3. 115 S. Ct. 1061 (1995).

4. 15 U.S.C. § 77l(2) (1994).

5. *Gustafson*, 115 S. Ct. at 1064-65.

6. 17 C.F.R. § 240.10b-5 (1995).

remedy.⁷ And I am sure that the Court's recent decision in *Gustafson* will be of interest to our speakers and will crop up during the course of their remarks.

I now would like to introduce tonight's panel of speakers. However, their reputations precede them, and they really need no introduction at all. So I will keep it brief.

Our first speaker tonight is Professor Melvin Eisenberg. He is the Koret Professor of Law at Boalt Hall Law School and has written extensively on corporations and contract law as part of his distinguished teaching career. I know that several of you are here because you were fortunate enough to have Professor Eisenberg as a teacher when you were students at Boalt. He recently concluded his service as Chief Reporter of the American Law Institute's Principles of Corporate Governance, which was published in its final form in 1994. I am honored that he is with us tonight.

Our second speaker is Professor Joseph Grundfest of Stanford University School of Law. He joined the Stanford faculty after serving from 1985 to 1990 as a Commissioner of the United States Securities and Exchange Commission (SEC or Commission). Professor Grundfest is trained both as an attorney and an economist. Before joining the SEC, he served as Senior Economist for Legal and Regulatory Matters on the President's Council of Economic Advisors. Professor Grundfest has also published widely on securities law topics, including articles in the *Stanford*, *Harvard*, and *Yale Law Reviews*.

Our commentator this evening is Simon Lorne. He is currently serving as the General Counsel of the United States Securities and Exchange Commission. Before going off to Washington, D.C., Mr. Lorne practiced law here in Los Angeles at Munger, Tolles & Olson, where his practice was principally in the areas of general corporate and securities law. I first became acquainted with Mr. Lorne when I came to teach mergers and acquisitions here at Loyola Law School; I found his treatise⁸ on this complex area of law to be authoritative and very helpful. We are quite fortunate that he was able to arrange his schedule to be with us tonight.

In conclusion, let me explain the format for tonight's Lecture. Professor Eisenberg will be our first speaker. He will sketch out the

7. *Central Bank v. First Interstate Bank*, 114 S. Ct. 1439, 1448 (1994).

8. SIMON M. LORNE, *ACQUISITIONS AND MERGERS: NEGOTIATED AND CONTESTED TRANSACTIONS* (1985).

Central Bank decision, and more importantly, describe the methodology that the Court used to reach the result.⁹

Then Professor Grundfest will offer his somewhat different perspective,¹⁰ incorporating, I hope, his observations about the recent *Gustafson* case.¹¹

After our two principal speakers have made their presentations, Mr. Lorne will provide us with his observations on *Central Bank* and the continuing fallout from the Court's decision, including his comments on our speakers' presentations.

We are taping tonight's proceedings. We will publish the Burns Lecture—including the panel exchange—in the *Loyola of Los Angeles Law Review* later this year.

So without any further delay, let me turn over the podium to Professor Mel Eisenberg.

II. [PROFESSOR EISENBERG'S COMMENTS ARE REPLACED BY HIS ARTICLE, *Strict Textualism*, IN THIS ISSUE AT PAGE 13.]

III. [PROFESSOR GRUNDFEST'S COMMENTS ARE REPLACED BY HIS ARTICLE, *We Must Never Forget That It Is an Inkblot That We Are Expounding: Section 10(b) As a Statutory Rorschach Test*, IN THIS ISSUE AT PAGE 41.]

[After Professors Eisenberg and Grundfest presented their papers, Simon Lorne offered his commentary on their presentations. Then the panelists engaged in an exchange over the themes sounded during the evening. The text of Mr. Lorne's commentary and the panel's discussion is reprinted here.]

9. Melvin Aron Eisenberg, *Strict Textualism*, 29 LOY. L.A. L. REV. 13 (1995).

10. Joseph A. Grundfest, *We Must Never Forget That It Is an Inkblot We Are Expounding: Section 10(b) As Rorschach Test*, 29 LOY. L.A. L. REV. 41 (1995).

11. *Id.* at 52-54, 54-55 n.64.

IV. MR. LORNE'S COMMENTARY

PROF. MAYNARD: As our introduction to the panel exchange on tonight's topic, I am going to ask Simon Lorne to offer up his observations.

MR. LORNE: Thank you, Therese.

Let me start out with the standard disclaimer that when I speak, I speak *only* for myself, and not for the Commission, not for anybody at the Commission, or for anybody who knows me.

It seems to me that Professor Eisenberg, and to a lesser degree also Professor Grundfest, are perhaps less than kind to the Supreme Court of the United States. Not having the advantage of tenure, and being in a governmental position—notwithstanding my disclaimer—it seems to me appropriate to offer up more in defense of the Court.

It seems to me to be important to recognize—and in doing so, you may see some degree of concurrence with Joe Grundfest's seven¹² theses—that the Supreme Court is in a very difficult position when faced with *Central Bank*.

The Court is looking at a statute which, by its terms, as we all know, does not purport to create a private right of action, and that probably originated with a Congress that did not intend at the time—in 1934—to create a private right of action.¹³ But over a period of sixty years, and with about sixty years of congressional inaction and a variety of intervening lower court decisions, section 10(b) and rule 10b-5 have been read to include a private right of action.¹⁴

Then recognize that we have a Court that—properly, in the view of many—sees its role, as Mel Eisenberg has suggested, to some degree as that of a faithful “servant”¹⁵ to the intent of Congress. But trying to figure out the intent of the intervening Congresses that at some point accepted the notion of a private right of action is, as Joe Grundfest has pointed out, virtually impossible.¹⁶

So what's a Court to do? I am reminded a little bit of the time I was in a negotiation here in Los Angeles some years ago in a case

12. *Id.* at Part III.

13. *Central Bank v. First Interstate Bank*, 114 S. Ct. 1439, 1446 (1994).

14. *See, e.g., id.* at 1456 & n.1 (Stevens, J., dissenting) (Justices Blackmun, Souter, and Ginsburg joining the dissent).

15. Eisenberg, *supra* note 9, at 37.

16. *See Grundfest, supra* note 10, at 57-58.

that touched on the area of bankruptcy. During the negotiations, I made a long and, I thought, quite forceful argument to opposing counsel in support of my client's point of view. Then opposing counsel looked at me and said, "Your argument has impeccable logic. But we're in the bankruptcy courts, and logic doesn't apply!"

Taking that admonition, I didn't know what to say next. In other words, if logic does not apply, where do we go to try to make the point? The sun may come up, so I should win? I simply don't know how to make the argument. Similarly, if the Court wants to defer to congressional intent but cannot find that intent anywhere, it is impossible for the Court to find a hook upon which to hang its hat.

Now we find ourselves with *Central Bank* as the recently established law, and then two weeks ago, we were given *Gustafson*. In *Gustafson*, as both Professors Grundfest and Eisenberg seem to agree, the Court purports to follow a literalist view, but really has a very hard time getting there. Indeed, we speak of the Court, but let's be clear on this point. While *Central Bank* was a 5-4 case, as was the *Gustafson* decision, there were only three Justices, including the author of the two opinions, that were part of both majorities: the Chief Justice, and Justices O'Connor and Kennedy.¹⁷

Justice Scalia and Justice Thomas were consistent, in my view, both having adopted a literalist—or somewhat literalist—approach in *Central Bank*.¹⁸ They subsequently used the same approach to interpret section 12(2) in *Gustafson*.¹⁹ Under the reasoning of the earlier *Central Bank* decision, they felt compelled to apply section 12(2) to secondary and private sales as well as to public offerings.²⁰ Therefore, Justices Scalia and Thomas would have affirmed the Seventh Circuit decision that a cause of action could be maintained on the facts of *Gustafson*.²¹ As I say, theirs was a dissenting opinion, but in my view a fairly persuasive dissenting opinion.

17. The majority in *Central Bank* comprised Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas. *Central Bank*, 114 S. Ct. at 1442. The majority in *Gustafson* comprised Chief Justice Rehnquist and Justices Kennedy, Stevens, O'Connor, and Souter. *Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1064 (1995).

18. 114 S. Ct. at 1448.

19. 115 S. Ct. at 1074 (Thomas, J., dissenting) (Justices Scalia, Ginsburg, and Breyer joining the dissent).

20. *Id.* at 1077 (Thomas, J., dissenting) (Justices Scalia, Ginsburg, and Breyer joining the dissent).

21. *See id.* (Thomas, J., dissenting) (Justices Scalia, Ginsburg, and Breyer joining the dissent).

I would agree with Joe Grundfest that the likely practical impact of *Central Bank* is not great over the next twenty years. I would argue very strongly, as Professor Eisenberg has suggested—and, indeed, I have argued and will argue again—that *Central Bank* does not preclude Commission actions against those who aid or abet violations of the federal securities laws, and of rule 10b-5 in particular. This argument is fundamentally premised on section 21(d)(1) of the 1934 Act—which provides for injunctive relief against anyone who commits acts constituting a violation of the 1934 Act²²—together with the general aiding and abetting provisions of 18 U.S.C. § 2—which provides that anybody who commits an offense against the United States, or aids and abets such an offense, is punishable as a principal.²³

It seems to me that the language of 18 U.S.C. § 2 makes it a violation of the 1934 Act itself to aid and abet another's violation of the 1934 Act and not a violation of 18 U.S.C. § 2. A violation of the Act, of course, then brings into play section 21(d)(1), and makes the violator subject to an SEC enforcement proceeding. In that context, I would say that *Central Bank* applies to implied rights of action, but the SEC action is not implied. It is an express cause of action.

Now, having said that, I do recognize that there is some difficulty with that position. After all, the dissent in *Central Bank* said, as the majority failed to say, that the majority's opinion precludes SEC enforcement actions.²⁴ To which my only response can be that the dissent in Supreme Court decisions is, by definition, wrong.

We will see ultimately how that one comes out. To date, we have had the issue presented in only one appeal, which was remanded without decision by the Eleventh Circuit,²⁵ and there is another case pending, *SEC v. Fehn*,²⁶ here in the Ninth Circuit. Given the Ninth Circuit's record in the Supreme Court of late, I am not quite sure how I want the Ninth Circuit to come out, but I will take a win anywhere I can get it.

We did, by the way, win a case last week, for those who don't think we ever win these cases in the Supreme Court. I am referring,

22. 15 U.S.C. § 78u(d)(1) (1994).

23. 18 U.S.C. § 2 (1988).

24. *Central Bank v. First Interstate Bank*, 114 S. Ct. 1439, 1460 (1994) (Stevens, J., dissenting).

25. *SEC v. Scherm*, Case No. 93-9266 (11th Cir. Oct. 25, 1994).

26. *SEC v. Fehn*, Case No. 94-16136 (9th Cir. filed May 6, 1994).

of course, to *Mastrobuono v. Shearson Lehman Hutton, Inc.*,²⁷ dealing with arbitration of broker-dealer disputes with their customers. Tallying the votes of all the Justices in *Central Bank*, *Gustafson*, and *Mastrobuono* together, the SEC is winning 16-11.²⁸

It seems to me that there is another point that needs to be made about the Supreme Court's decisions in *Central Bank* and *Gustafson*. Professor Grundfest expressed concern that there is no organizing principle in *Gustafson*. Let me suggest something that is perhaps more troubling in some ways, and that is the difficulty of dealing with decisions of this sort. Both decisions, handed down within a year of each other, were decided by a five-justice majority, and only three of the justices were in the majority on both cases.²⁹ There was one consistent point in those two opinions, and that is: Access by private plaintiffs to the federal courts under the securities laws was denied. In one case, an *implied* right of action was denied;³⁰ in the other case, an *express* right of action was denied.³¹ But I think one has to recognize there is some hostility on the part of the Court to the utilization of the courts by private plaintiffs, and to the excesses of the litigation process.

That problem was discussed quite a bit by the Court in the *Central Bank* majority.³² It seems to me that this concern may be the reason why the SEC can and should prevail on its argument that it can bring enforcement actions. To the extent that we move away from allowing private plaintiffs into the federal courts—as private attorneys general, if you will, to enforce the federal securities laws—we have all the more need for the SEC to be able to enforce those laws and to keep the securities laws straight.

Having said that, perhaps I ought to yield now to Mel Eisenberg to offer his response to Joe Grundfest.

27. 115 S. Ct. 1212 (1995):

28. *Id.* at 1214; *Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1064 (1995); *Central Bank*, 114 S. Ct. at 1442.

29. *See supra* note 17 and accompanying text.

30. *Central Bank*, 114 S. Ct. at 1448.

31. *Gustafson*, 115 S. Ct. at 1065-66. In *Mastrobuono*, by contrast, in which the SEC's position was sustained, the decision facilitated the utilization of arbitration, rather than courts, by offering the availability of punitive damages, *Mastrobuono*, 115 S. Ct. at 1215, and thus also may be viewed as reducing access to the federal court system.

32. *Central Bank*, 114 S. Ct. at 1454.

V. PANEL EXCHANGE

PROF. EISENBERG: I agree with a lot of what Joe said. I agree, for example, that *Central Bank* is not an earthshaking case. First, because rule 10b-5 is not earthshaking—let's face it, we are not thinking about race relations or the First Amendment. Second, because I think that there will be a lot of ways to get around the result in *Central Bank*. So I want to get back to the methodology issues. I think Joe's view of the world is romantic, which I respect. I am somewhat romantic myself.

But the idea that you can discipline Congress into writing a clear statute . . . that is, as I say, a romantic view. Congress—or for that matter, any legislator who is writing a purposive rule—has trouble understanding all the implications of what he or she is saying. And anyone who has ever written a statute, even the most simple statute, will find that it is a very difficult job; often you did not do what you thought you did.

In fact, for any students in the audience, if you do not already know it, teachers do not know what kind of exam they are writing. That is to say, you write an exam, and you get back answers which are perfectly good answers, but they are not what you were expecting! The students found issues that you thought you did not have in there. Why? Because there is an objective aspect to any purposive or, in fact, nonpurposive language.

So—it doesn't work! It is impossible to say to the Court, "From now on, write clearly." Would it were so! It would be lovely.

I'd like to go back to the master-servant issue. It is not for the servant to discipline the master and tell the master: "If you don't write clearly, if you don't give me a clear instruction, I won't follow it." You all know in ordinary life what we do with such servants.

Now, I would just say a few other things. I think Joe is correct in saying—at least partially correct under the current methodology—that under the current methodology for implying private rights of action practiced by some members of the Court, and perhaps even by a majority of the Court, there would not be an implied right of action under rule 10b-5 today. But I do not think that is a good methodology, nor do I think the methodology is clear. I disagree, for example,

with Joe that it is obvious what the result in *Central Bank* would be under the so-called *Cort* test.³³

I also think it is the wrong view of a statute to go back to what people had in mind when they enacted it. In fact, that is sort of a psychoanalytical view. A statute is a growing mechanism. It is not exactly like a constitution, but nevertheless a statute must grow over time.

And, yes, it may be true that the legislature did not specifically have in mind that there would be a private right of action; but it probably did not specifically have in mind that there would be no private right of action either. But, if they were students of the law at all—even if they were the least educated in the law, which perhaps they were not—they would know that courts since *Marbury v. Madison*³⁴ and even before, back to Coke,³⁵ had been implying private rights of action.

So you can play this game any way you want to. You can say that the legislators did not intend to provide a private cause of action because they did not say so. Or you can say they must have intended to provide a private cause of action because they knew the background legal rules against which they were legislating, and under those rules private causes of action were to be implied. And I do not think it advances the ball to play the game either way. I think it advances the ball to ask: How do you best effectuate the policy of the statute?

Now, Joe says there is no rationale for implying a private right of action under rule 10b-5. I think there is a very obvious rationale. I think it is very clear. I think you find it in the cases. That is: Is this, or is this not, an area in which private attorneys general—the appointment of private attorneys general, or the self-appointment of private attorneys general—will promote the objectives of the

33. *Cort v. Ash*, 422 U.S. 66, 78 (1975). The *Cort* test addresses whether a statute may provide an implicit right to a private remedy where it does not expressly provide for one. The factors of the *Cort* test are: 1) the plaintiff is a member of the "class for whose *especial* benefit the statute was enacted," 2) the presence of any indication, explicit or implicit, of legislative intent to create or deny such a remedy, and 3) whether it is consistent with legislative purpose to imply such a remedy. *Id.*

34. 5 U.S. (1 Cranch) 49 (1803).

35. See 2 EDWARD COKE, SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 54 (reprinted by Professional Books, Ltd., 1986) (1817) ("[E]very Act of parliament made againft any injury, mifchiefe, or grievance doth either exprefsly, or impliedly give a remedy to the party wronged, or grieved.").

Securities Acts, which are to get a flourishing capital market and a reduction in the amount of fraud in the securities market?³⁶

You can say no; you can say yes. But those courts that implied a private right of action clearly thought the answer was yes. Rightly or wrongly, that's the rationale.

MR. LORNE: But Mel, let me just ask you, if I can: If you have a Court that wants to defer to congressional intent, but cannot figure out what that intent is, and wants to reach a result based on policy, but does not want to announce it as a policy-based result—how is such a Court to get there? How is this Court to get to this policy-based result in a way consistent with this Court's leanings—with its desire to defer to Congress when deciding statutory questions?

PROF. EISENBERG: The Court's leanings—that's another thing that I was thinking about. When Joe characterized the four Justices who formed the dissent in *Gustafson*, it may be an accurate statement, but it is also a very sad statement.³⁷

It is very sad that we identify the Justices in so strongly a political way. I do not disagree with the accuracy of what Joe says, but it is sad that we remark on the fact that the two newest Clinton appointees³⁸ to the Court are joining with Justices Scalia and Thomas.

What this means is that we are taking the Court as a purely political institution. As I say, I am not quarreling with Joe about that, but I am quarreling with the fact that the Court has become that. And again, now, that is where I am a romantic. I like to think of a judicial methodology which, of course, is affected by policy, but not driven by it to all other costs. On the other hand, I do say when you have a relevant policy, then the law has to be shaped by that policy. There is no question about that.

But those policy issues should be put on the table where people can then say: "Look, it was right. Or, it was wrong. Here is why it was right; here is why it was wrong." When you have a covert policy, when you put all the policy issues—which I am sure drove the Court

36. See, e.g., *Long v. Abbott Mortgage Corp.*, 424 F. Supp. 1095, 1098-99 (D. Conn. 1976).

37. Grundfest, *supra* note 10, at 52.

38. Since taking office in January 1992, President Clinton has appointed two Justices to the Supreme Court: Ruth Bader Ginsburg in August 1993, Sam Fulwood III, *Ginsburg Confirmed as 2nd Woman on Supreme Court*, L.A. TIMES, Aug. 4, 1993, at A1; and Stephen Breyer in August 1994, Associated Press, *Breyer Sworn in as High Court Justice in a Private Ceremony*, L.A. TIMES, Aug. 4, 1994, at A11.

in *Central Bank*—into covert form in Part IV(C) of the Court's opinion,³⁹ then I think you are doing a disservice to lawyers. You are doing a disservice to the community of the law, which is unable to get at what is really—and, in a sense, properly—driving the Court's opinion.

I just have one other very minor footnote. Joe, I might have misunderstood you, but I thought that your sixth canon, the one I happen to agree with . . .

PROF. GRUNDFEST: Mel, if you agree with anything I've said, I've obviously made a mistake. I don't know how that could have happened, and I promise to be more careful next time.

PROF. EISENBERG: I thought your sixth canon was that you should not draw inferences from legislative inaction, and that your seventh canon was that Congress, on three occasions, did not adopt aiding and abetting liability, and therefore, there should be none.

Now, it seems to me that there is a conflict in those canons, but perhaps I am missing something.

MR. LORNE: And did you agree with both?

PROF. EISENBERG: No. Only the first. I told you there was one canon that I agreed with.

PROF. GRUNDFEST: Well, that is my point. If you are going to draw an inference from inaction, then you are quickly lost to confusion and contradiction. Those who support the vigorous interpretation and application of the implied rule 10b-5 right of action argue that Congress has known about the aggressive interpretation of this right by the lower courts, and it has done nothing. Therefore, it has acceded to the courts' view and the courts must be right. By the same token, refusing to adopt a position that has thrice been put forward as legislation supports the inference that Congress did not want aiding and abetting liability. Three strikes and you're out.

PROF. EISENBERG: I do not agree with that. I mean, I agree with your position on the sixth canon—that it is insignificant and meaningless and counts for nothing that Congress has three times rejected it.

PROF. GRUNDFEST: I agree entirely that it is impossible to infer from silence, but the point is that people who take that position just cannot have it both ways. They cannot argue that some silence supports them while other silence must be ignored.

39. *Central Bank v. First Interstate Bank*, 114 S. Ct. 1439, 1453-54 (1994).

PROF. EISENBERG: Right.

PROF. GRUNDFEST: Right. So we do agree on that.

PROF. EISENBERG: Absolutely.

PROF. GRUNDFEST: So I still have to fix it!

MR. LORNE: Let me suggest, Mel—and I hate to keep coming back to the same point—but the only way the Court could write the opinion, coming to the conclusion it does in *Central Bank*, in a way that would satisfy your needs, is to say that this rule 10b-5 cause of action was created out of whole cloth over the years, and we are now forced, against our wishes by and large, to admit that it exists. And given that this cause of action has been created the way it has, we have no benchmarks to look to in defining how far it goes. Therefore, we are forced as a matter of policy to address the issue, and we will go no further than we have to.

PROF. GRUNDFEST: That is my opinion.

PROF. EISENBERG: Well, first of all, I certainly would have preferred that opinion to the one that was written. It would have been candid. And I think you probably have described the subtext of the opinion.

And if that is what is driving the opinion, then get it out on the table. I mean, I think there are very occasional times when judicial insincerity may possibly be justified, although I am hard pressed to think of one. I will grant you there might be some times when it is justified, but such occasions are very rare. And I think judicial sincerity is a very important value. If that is what is driving the opinion, I think it should be laid on the table.

Now, however, there is another opinion that could have been written, consonant with my views, and that is that we think that rule 10b-5 private liability has a valued place on the basis of a private attorney general's action. On the other hand, we do not want to set up rules ancillary to the basic private rule 10b-5 action that can lead to abusive litigation. Therefore, we will carve away all of those ancillary rules—all except the core cases. So, for example, we might carve away aiders and abettors; we might even carve away other secondary actors; whatever is necessary.

So you could write an opinion which upheld the core implied right of action, and yet limited it as well, on a perfectly consistent basis.

MR. LORNE: And in some ways, the opinion that was written was not too far from that subtext.

PROF. EISENBERG: Well, not on the face of it. Because on the face of it, as I said, the only way the Court got into policy issues was in Part IV(C) of its *Central Bank* opinion.⁴⁰ It mentioned in Part IV(C) that there are three policy reasons against aiding and abetting liability.⁴¹ But the Court in Part IV(C) said it was just pointing those policy reasons out; they are not driving our opinion.⁴² That's all the Court said.

MR. LORNE: Now, Joe, you commented that in *Gustafson*, the opinions of both the majority and the dissent purported to be following a literalist view.

PROF. GRUNDFEST: Literally, yes, but the majority and minority were reading different texts. Perhaps it is particularly appropriate in this institution to draw an analogy to biblical exegesis. One group of Justices is literally interpreting the Old Testament, and the other is literally interpreting the New Testament. Each is true and literal to the version of the Book that they are reading, but it is just that one group of Justices is focused on section 2(10)⁴³ and says the answer is found there, while the other group of Justices is focused on section 10⁴⁴ and says the answer is found there.

MR. LORNE: But the question is: What is the definition of a prospectus? And section 2(10) is entitled "Definitions"⁴⁵ and section 10 is not so titled.⁴⁶

PROF. GRUNDFEST: Well, as Professor Fish would tell you, that just means you are not reading the text with sufficient care.⁴⁷

MR. LORNE: I would argue that somebody is not.

40. *Id.* at 1453-54.

41. Eisenberg, *supra* note 9, at 20-21.

42. *Central Bank*, 114 S. Ct. at 1453-54 (stating that "[p]olicy considerations cannot override our interpretation of the text and structure of the Act, except to the extent that they may help to show that adherence to the text and structure would lead to a result 'so bizarre' that Congress could not have intended it.").

43. 15 U.S.C. § 77b(10) (1994).

44. *Id.* § 77j.

45. *Id.* § 77b.

46. *Id.* § 77j.

47. This is a reference to the work of Professor Stanley Fish, a well-known scholar who holds a joint appointment at Duke University in the English department and the law school. His works include: Stanley Fish, *The Law Wishes to Have a Formal Existence*, in *THE FATE OF LAW* 159 (Austin Sarat & Thomas R. Kearns eds., 1991); Stanley Fish, *Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes without Saying, and Other Special Cases*, 4 *CRITICAL INQUIRY* 625 (Summer 1978) [hereinafter Fish, *Normal Circumstances*].

PROF. GRUNDFEST: Obviously somebody is not. And here is a perfectly good deconstructionist approach that Professor Stanley Fish could take to reach the Supreme Court's conclusion in *Gustafson*.

Now, I don't know if this is going to hurt Stanley Fish's feelings more than the Supreme Court's, but I guess somebody will walk away hurt from this analogy: Consider section 12(2).⁴⁸ It is a liability provision that goes to the application of liability for a false or misleading statement made in the context of some form of conduct.⁴⁹ In contrast, section 2(10) does not, in and of itself, describe a form of conduct.⁵⁰ Instead, it describes a thing—called a “prospectus.”⁵¹ Section 10, however, describes a form of conduct, that is, the public offering in which a thing called a prospectus is used.⁵²

And if you are looking to an application of the term prospectus that relates to a course of conduct that is to be proscribed, you look at a description of the course of conduct, not at a description of a thing. The fact that one has a label that says definition, and the other does not, is then irrelevant. That is a defensible position. It is not what I would do, but you can defend it.

MR. LORNE: Not very well.

PROF. EISENBERG: The problem is, section 12(2) says “a prospectus or oral communication.”⁵³

Now, the Court said that the parties had conceded—for some unexplained reason—that “oral communication” in the statute only referred to oral communications about prospectuses.⁵⁴ Again, the construction that the Court gave in *Gustafson* may have been right, but the strict language of section 12(2) says, “prospectus or oral communication.”⁵⁵

There was an oral communication that was false, and yet the Court said it did not give rise to section 12(2) liability⁵⁶—perhaps correctly, but not because of . . .

48. 15 U.S.C. § 77l(2) (1994).

49. *Id.*

50. *Id.* § 77b(10).

51. *Id.*

52. *Id.* § 77j.

53. *Id.* § 77l(2).

54. *Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1066 (1995).

55. 15 U.S.C. § 77l(2) (1994).

56. *Gustafson*, 115 S. Ct. at 1067.

PROF. GRUNDFEST: Sure. But as Professor Fish could tell you, going back to the popcorn example,⁵⁷ you need to know more about the context.

PROF. EISENBERG: Oh, I agree, Joe, but . . .

MR. LORNE: But we know all about the context.

PROF. GRUNDFEST: Well, the point is, we do not know. We do not know which prospectus the statute has in mind. The section 2(10) prospectus or the section 10 prospectus.

MR. LORNE: I do not think you can rationally look at section 10 here—unless you are really reaching. I think that if one wants to call it the “soft literalist approach” of *Central Bank*, I think this approach forces Justices Thomas and Scalia—against perhaps their instincts—to dissent from the majority and to say, instead, that this case presents a section 12(2) cause of action—even though we do not like such causes of action too much.

PROF. EISENBERG: Yes. Absolutely. That is what happened there.

PROF. GRUNDFEST: I agree, and the truly interesting feature of the split in *Gustafson* is that the split suggests that the Court is involved in a debate about statutory interpretation, and not a debate about the merits of securities fraud litigation and the vexatious burden it imposes on society.

PROF. EISENBERG: Well, I do not think that is right, Joe. It shows that for Justices Scalia and Thomas, maybe it is; but it shows that for Justice Kennedy, it is just the other way around.

PROF. GRUNDFEST: Not necessarily. Recall that Justice Kennedy was in the minority in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*⁵⁸ and in *Virginia Bankshares, Inc. v. Sandberg*,⁵⁹ taking pro-plaintiff positions in both cases.

PROF. MAYNARD: I am afraid we are out of time. And we have very delicious food that is getting cold. The speakers are going to accompany us to the Reception, which is straight down the hall, and I am sure they would be happy to answer any questions.

Thank you all for coming. I really do appreciate it. And my warmest thank you to our speakers.

[*The Fourth Annual Fritz B. Burns Lecture concluded.*]

57. Fish, *Normal Circumstances*, *supra* note 47, at 639.

58. 501 U.S. 350, 374 (1991) (Kennedy, J., dissenting).

59. 501 U.S. 1083, 1112 (1991) (Kennedy, J., dissenting in part).