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Foreword

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

*Therese H. Maynard**

In the spring of 1994, the Supreme Court handed down a bombshell of an opinion in *Central Bank v. First Interstate Bank.*[1] The Court ruled that there is no implied right of action for aiding and abetting a violation of section 10(b) of the Securities Exchange Act of 1934[2] (Exchange Act) or rule 10b-5[3] promulgated thereunder.[4] *Central Bank*'s narrow holding foreshadowed a wide-ranging debate and ushered in a new era of proposals to reform the federal securities laws.[5]

The Supreme Court's *Central Bank* opinion sparked an intense response from all quarters that even addressed issues beyond the Supreme Court's narrow holding. The responses ranged from concern about the implications of the holding itself[6] to much broader

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* Professor of Law, Loyola Law School. I was fortunate to serve as Chair of the Fourth Annual Fritz B. Burns Lecture that took place on the evening of March 13, 1995 at Loyola Law School in Los Angeles. I would like to thank the Fritz B. Burns Foundation for its generous financial support. I also would like to thank my colleague, Professor Kathryn Tate, for her insightful comments and Anastasia Liakas, Loyola Law School, Class of 1997 for her invaluable research assistance.

1. 114 S. Ct. 1439 (1994).
2. 15 U.S.C. § 78j(b) (1994).
3. 17 C.F.R. § 240.10b-5 (1995).
4. *Central Bank*, 114 S. Ct. at 1455.
5. In the 1994 fall elections following the *Central Bank* decision, Republican victories swept both houses of Congress. Robert Shogan & David Lauter, *Republicans Score a Sweeping Victory*, L.A. TIMES, Nov. 9, 1994, at A1. These overwhelming victories changed the face of Congress and further intensified interest in implementing dramatic securities litigation reform proposals. *See* Roger Lowenstein, *House Aims to Fix Securities Laws, But, Indeed, Is the System Broke?*, WALL ST. J., Aug. 10, 1995, at C1.
6. *See, e.g.*, Dennis J. Block & Jonathan M. Hoff, *Securities Law Litigation Following 'Central Bank,'* N.Y. L.J., Nov. 17, 1994, at 5; Edward Brodsky, *Aiding and Abetting*, N.Y. L.J., June 8, 1994, at 3; Thom Weidlich, *Professionals Still at Risk*, NAT'L L.J., July 18, 1994, at A6.

criticisms focusing on the analytical approach the Court used to reach its conclusion.[7]

In the midst of this swirling discussion over *Central Bank*'s implications, it became clear that *Central Bank* would remain the focus of public debate for some time to come. Therefore, in the immediate aftermath of the Court's ruling, the theme of the Fourth Annual Fritz B. Burns Lecture[8] (Lecture) was fixed—"*Central Bank*: The Methodology, the Message, and the Future."

Loyola Law School was quite fortunate to bring two very diverse perspectives to the Lecture, as reflected in the papers presented by our two principal speakers: Professors Melvin Eisenberg and Joseph Grundfest. Simon Lorne, the current General Counsel of the Securities and Exchange Commission (SEC), added insightful commentary from the regulators' perspective. These three well known scholars of rule 10b-5 jurisprudence provided a thorough and penetrating examination of the issues surfacing in the wake of the *Central Bank* decision.

This Symposium issue unfolds as the evening unfolded—presenting Professors Eisenberg and Grundfest's formal articles in which they more thoroughly develop the themes they presented at the Lecture. Simon Lorne followed the presentations with a thought provoking commentary. This issue captures the dynamic quality of the evening by including a transcript of Mr. Lorne's commentary and the spirited panel discussion that followed.

At issue in this debate are not only the scope and contours of the rule 10b-5 remedy, but also its very viability. This most recent ruling on rule 10b-5 has fueled renewed debate over the judiciary's role in interpreting and defining the scope of this implied remedy.[9] Indeed, some commentators have gone so far as to question the very premises of implied causes of action that are based—as rule 10b-5

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7. *See, e.g.*, Patrick J. McNulty, Central Bank of Denver v. First Interstate Bank of Denver: *The End of Aiding and Abetting Liability Under Section 10(b)*, 29 TORT AND INS. L.J. 847, 858 (1994); T. James Lee, Jr., Note, Central Bank v. First Interstate Bank: *Plain Language and the Implied Private Right of Action Under Section 10(b) and Rule 10b-5*, 1995 B.Y.U. L. REV. 269, 284-85; Glen Wallace Roberts II, Note, *10(b) or not 10(b):* Central Bank of Denver v. First Interstate Bank of Denver, 73 N.C. L. REV. 1239, 1265-66 (1995).

8. The Annual Fritz B. Burns Lecture is hosted by Loyola Law School in Los Angeles and financially sponsored by the Fritz B. Burns Foundation.

9. *See, e.g.*, Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394 (1982); Lee, *supra* note 7, at 269; Roberts, *supra* note 7, at 1267.

is—on "exceedingly vague or incomplete statutory language."[10] Thus, the Lecture was delivered at a time when there was renewed reflection over the propriety of this *implied* remedy, a view seemingly reinforced by the Supreme Court's rhetoric in its *Central Bank* opinion.

This controversy does not find its origins in *Central Bank.* The Supreme Court recognized almost twenty years ago the inherent tension in the implied private right of action under rule 10b-5 when it observed that it was being asked to interpret a cause of action that "neither Congress nor the Securities and Exchange Commission (SEC or Commission) ever intended to create."[11]

Professor Grundfest's article presents his plea for viewing rule 10b-5 jurisprudence as an effort to interpret a statutory provision that has all the substance of an inkblot.[12] Professor Grundfest argues that section 10(b) and the implied private remedy under rule 10b-5 can best be viewed as a quintessential example of a legislative inkblot.[13] Seen from this vantage point, the courts then take on the role of "Rorschachian analysts"[14] as they struggle to interpret the statutory inkblot. Their efforts provoke the criticism, from academics and other Monday morning Rorschachian analysts, that the courts misconstrue in some respect the essential meaning of this piece of legislative expression.[15] Professor Grundfest then posits that the *Central Bank* decision provides a classic illustration of section 10(b)'s inkblot characteristics,[16] and offers an explanation for why the Court feels constrained to take a strict-textualist approach to interpreting rule 10b-5.[17]

To support his perspective, Professor Grundfest offers an analysis of the Supreme Court's pattern of decision making in Part II

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10. *See* 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, 41 (1995).

11. *Id.* at 44; *see also* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196 (1976) (In a landmark decision eliminating liability under rule 10b-5 for negligent conduct alone, the Court also observed that § 10(b) "does not by its terms create an express civil remedy for its violation, and there is no indication that Congress, or the Commission when adopting Rule 10b-5, contemplated such a remedy." (footnotes omitted)).

12. *See* Grundfest, *supra* note 10, at 44.

13. *Id.* at 43.

14. *See id.* at 42.

15. *Id.*

16. *See id.* at 43.

17. *See id.* at 44-45.

of his article,[18] positing that if these statutes are inkblots, then we should "observe a higher than normal incidence of sharply split decisions involving the formation of unstable and unusual coalitions."[19] His analysis suggests why "the Court has split 5-4 in cases

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18. Part II of Professor Grundfest's article was not included as part of his oral presentation at the Lecture; therefore, the panel's exchange did not address his analysis of the Court's pattern of decision making.

19. Grundfest, *supra* note 10, at 47. While Professor Grundfest's analysis is interesting, there is at least one other explanation for the evidence of unstable coalitions and the incidence of close votes reflected in the Supreme Court's recent decisions involving the federal securities laws. This alternative explanation of the Supreme Court's decisions rests on two jurisprudential values that go well beyond the scope of interpreting the federal securities laws—the doctrine of implied liability and the principle of stare decisis. Combined, these important values offer a more complete understanding of the evidence presented by Professor Grundfest.

This explanation recognizes that the Supreme Court's decisions over the past twenty years or so have reflected growing hostility towards implied remedies in general and particularly the implied private remedy of rule 10b-5. *See* 2 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION 52-55 (2d ed. 1990). Out of this sense of hostility to implied remedies in general, the Court has seemingly taken advantage of every opportunity to curtail the availability of rule 10b-5, but has stopped short of an outright repudiation of this implied cause of action. *Id.* The Court's refusal to eliminate this remedy could derive from its strong sense of commitment to the doctrine of stare decisis. In other words, the willingness of individual Justices to act on their hostility to this implied remedy could be tempered to some extent by the strength of commitment that each Justice places on stare decisis.

As such, a particular Justice may be hostile to the implied remedy of rule 10b-5 and therefore not inclined to interpret the contours of this remedy broadly. This same Justice nonetheless may feel compelled to give force and effect to the rule 10b-5 remedy in a manner consistent with precedent out of keenly felt jurisprudential considerations grounded in the doctrine of stare decisis. The logical extension of this perspective then focuses on the degree to which each Justice feels bound, not just by the Court's prior pronouncements, but also by lower court precedent that has taken root over a substantial period of time. Indeed, this was the situation presented in the *Central Bank* case, where every single one of the appellate courts to consider the issue had decided that there was an implied cause of action for aiding and abetting a rule 10b-5 violation. Central Bank v. First Interstate Bank, 114 S. Ct. 1439, 1456 & n.1 (Stevens, J., dissenting).

This alternative explanation accounts for much of the evidence of split votes in these decisions, especially since the substance of the *implied* rule 10b-5 remedy was at issue in five of the twelve decisions listed in Table 1 of Professor Grundfest's article in this issue. Central Bank v. First Interstate Bank, 114 S. Ct. 1439 (1994); Musick, Peeler & Garrett v. Employers Insurance, 113 S. Ct. 2085 (1993); Lampf, Pleva, Lipkind, Paupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991); Basic v. Levinson, 485 U.S. 224 (1988); United States v. Carpenter, 791 F.2d 1024 (2d Cir. 1986). A sixth decision related to the implied remedy available under rule 14a-9. Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083 (1991). Two of the decisions dealt with the arbitrability of claims under the federal securities laws. Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477 (1989); Shearson/ American Express v. McMahon, 482 U.S. 220 (1987). Of these two, only *McMahon* involved arbitration of a rule 10b-5 claim. Only four of these twelve decisions dealt with the interpretation of express provisions of the 1933 or 1934 Acts. Gustafson v. Alloyd Co.,

interpreting the federal securities laws with an unusually great frequency."[20] Professor Grundfest concludes that this pattern of split votes is consistent with what you would expect when the nine Justices are forced to decide cases involving interpretation of legislative inkblots, that is, legislative provisions such as rule 10b-5 that have no clear, intrinsic meaning.[21]

Professor Grundfest sets forth seven factors drawn from the Court's efforts to interpret the rule 10b-5 remedy.[22] These seven factors illustrate why the *Central Bank* decision should not have been surprising, but was in fact entirely consistent with the current Supreme Court's intentionalist analysis of the rule 10b-5 remedy. Moreover, Professor Grundfest posits that these factors indicate that the Court *does* treat this implied action as an "inkblot."[23] Finally, Professor Grundfest concludes that *Central Bank*'s holding has not harmed the integrity of our nation's capital markets in any demonstrable way.[24] All of this leads him to observe that the Supreme Court, faced with the daunting task of interpreting the cryptic section 10(b) implied private right of action, has wisely and prudently adopted a narrow, textualist reading of the statute.[25] The Court's "original intent" approach is preferable because it yields far less confusion and

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115 S. Ct. 1061 (1995); Gollust v. Mendell, 501 U.S. 115 (1991); Reves v. Ernst & Young, 494 U.S. 56 (1990); Pinter v. Dahl, 486 U.S. 622 (1988).

Professor Grundfest views this evidence of split votes as reflecting "no clear, collectively shared meaning" in the federal securities laws. Grundfest, *supra* note 10, at 55. Instead, this evidence may reflect considerable disagreement among the Justices over the interpretation of *implied* remedies, or at least the implied private action under rule 10b-5 that has become firmly planted in the modern landscape of the federal securities laws.

As such, there is some difficulty in generalizing the evidence of split votes and unstable coalitions reflected in Table I of Professor Grundfest's article as offering support for his inkblot hypothesis. Moreover, the alternative explanation offered here does not need to implicate the question of whether there is an absence of shared understanding of the federal securities laws among the Justices, nor the issue of whether such an absence is attributable to a fundamental vagueness or ambiguity in the statute, as has been suggested by Professor Grundfest.

20. Grundfest, *supra* note 10, at 45.

21. *See id.* at 46.

22. *Id.* at Part III. These factors were discussed as "canons" during the panel exchange at the Lecture. *Transcript—Panel Exchange: The Fourth Annual Fritz B. Burns Lecture,* Central Bank*: The Message, the Methodology, and the Future*, 29 LOY. L.A. L. REV. 75, 85-86 (1995) [hereinafter *Transcript*].

23. *See* Grundfest, *supra* note 10, at 58.

24. *See id.* at Part IV.

25. *See id.* at 61.

uncertainty than "the inkblot game the Court is forced to play whenever it embarks on a search for meaning that is not there."[26]

Professor Eisenberg's article offers a profoundly different perspective on the Court's use of strict textualism to interpret section 10(b) and the implied private action under rule 10b-5.[27] Professor Eisenberg uses *Central Bank* as a vehicle to show that strict textualism, as employed by the Supreme Court to decide this case, is an "intellectually incoherent" approach to statutory interpretation.[28] His purpose is not to "discuss what the theory of statutory interpretation should be," but rather to examine the weaknesses and inadequacies of the Court's reliance on the strict-textualist approach to interpreting the federal securities laws.[29]

In Part II of Professor Eisenberg's article, he describes the facts of *Central Bank* and reflects that the Court faced an issue that seemed to be "cut-and-dried."[30] In support of this claim, Professor Eisenberg points out that "[a]ll circuit courts of appeals that had considered the question had recognized a private right of action against aiders and abettors under rule 10b-5."[31]

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26. *Id.* at 46.

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

28. *Id.* at 14.

29. *Id.* As to other possible theories of statutory interpretation, see William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990); William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319 (1989); William N. Eskridge, Jr. & Phillip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Phillip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295 (1990); Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353 (1989); Heidi A. Sorensen, Note, *A New Gay Rights Agenda? Dynamic Statutory Interpretation and Sexual Orientation Discrimination*, 81 GEO. L.J. 2105 (1993).

30. Eisenberg, *supra* note 27, at 15-18.

31. *Id.* at 18; *see, e.g.*, Farlow v. Peat, Marwick, Mitchell & Co., 956 F.2d 982, 986 (10th Cir. 1992); K & S Partnership v. Continental Bank, N.A., 952 F.2d 971, 977 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 2993 (1992); Levine v. Diamanthuset, Inc., 950 F.2d 1478, 1483 (9th Cir. 1991); Schatz v. Rosenberg, 943 F.2d 485, 495 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1475 (1992); Fine v. American Solar King Corp., 919 F.2d 290, 300 (5th Cir. 1990), *cert. dismissed sub nom.* Hurdman v. Fine, 502 U.S. 976 (1991); Schlifke v. Seafirst Corp., 866 F.2d 935, 946 (7th Cir. 1989); Schneberger v. Wheeler, 859 F.2d 1477, 1480 (11th Cir. 1988), *cert. denied*, 490 U.S. 1091 (1989); Moore v. Fenex, Inc., 809 F.2d 297, 303 (6th Cir. 1987), *cert. denied*, 483 U.S. 1006 (1987); Cleary v. Perfectune, Inc., 700 F.2d 774, 777 (1st Cir. 1983); IIT v. Cornfeld, 619 F.2d 909, 922 (2d Cir. 1980); Monsen v. Consolidated Dressed Beef Co., 579 F.2d 793, 799 (3d Cir. 1978), *cert. denied*, 439 U.S. 930 (1978).

Although not discussed by the Supreme Court, the great weight of precedent on which the Tenth Circuit relied in its *Central Bank* decision established that the plaintiff had to prove the following elements to prevail on an aiding and abetting claim under rule 10b-5: "(1) the existence of a primary violation of the securities laws by another; (2) knowledge of the primary violation by the alleged aider-and-abettor; and (3) substantial assistance by the alleged aider-and-abettor in achieving the primary violation."[32]

The Tenth Circuit accepted this formulation of aiding and abetting liability and did not address the threshold issue of whether such an implied right of action under rule 10b-5 was available in the first place.[33] Instead, the Tenth Circuit's analysis focused on the question of whether recklessness would satisfy the scienter requirement for aiding and abetting liability under rule 10b-5.[34] The Tenth Circuit held that recklessness sufficed to meet the scienter requirement and defined recklessness as conduct involving " ' "an extreme departure from the standards of ordinary care, and which presents a danger . . . that is either known to the defendant or is so obvious that the actor must have been aware of it." ' "[35] Accepting this standard of recklessness as satisfying the scienter requirement of rule 10b-5, the Tenth Circuit concluded that an aiding and abetting cause of action against the defendant, Central Bank (Bank), could proceed.[36]

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32. First Interstate Bank v. Pring, 969 F.2d 891, 898 & n.13 (10th Cir. 1992), *rev'd sub nom.* Central Bank v. First Interstate Bank, 114 S. Ct. 1439 (1994) (citations omitted). The Tenth Circuit recognized that some circuits had given this three-part test a slightly different formulation. *See id.* at 898-99 n.13. *See generally* 9 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 4479-88 (3d ed. 1989) (discussing standards for establishing aider and abettor liability in civil securities litigation).

33. Harvey L. Pitt, *The Demise of Implied Aiding and Abetting Liability*, N.Y. L.J., May 2, 1994, at 1, 6. "Yielding to 25 years of precedent, the parties assumed aiding and abetting liability existed, but disputed its scope." *Id.* As noted by the dissent in *Central Bank*, there were literally hundreds of lower court decisions that reached the same result. *Central Bank*, 114 S. Ct. at 1456-57 (Stevens, J., dissenting); *see also* Joel Seligman, *The Implications of* Central Bank, 49 BUS. LAW. 1429, 1431-32 (1994); Edward Brodsky, *Aiding and Abetting Claims Under Rule 10b-5*, N.Y. L.J., June 14, 1995, at 3. In light of the considerable body of authority in support of this implied right of action, the Tenth Circuit's reliance on principles of comity and stare decisis is certainly not surprising.

34. *Pring*, 969 F.2d at 903. This issue is a matter of considerable disagreement among the circuits and legal commentators. For a collection of authorities, see *id.* at 901, and 8 LOSS & SELIGMAN, *supra* note 32, at 3653 n.499.

35. *Pring*, 969 F.2d at 903 (quoting Hackbart v. Holmes, 675 F.2d 1114, 1118 (10th Cir. 1982) (citations omitted)).

36. *See id.* at 903-04.

The Bank petitioned for review of the Tenth Circuit's decision on two narrow grounds, including the question of whether aiding and abetting liability could be established by *only* a showing of recklessness.[37] Subsequently, the Supreme Court asked the parties to address a question that even the Bank thought was settled—whether *any* kind of aiding and abetting violated rule 10b-5.[38] The Court then decided that there was *no* implied private remedy for aiding and abetting a rule 10b-5 violation,[39] obviating any need to reach the scienter question that originally formed the basis for the Bank's petition for certiorari.[40] The result stunned the legal community.[41]

Professor Eisenberg's article challenges the reasoning used by the Court's narrow majority,[42] who chose to resolve the issue "solely on the basis of a literal reading of the text."[43] Although the majority's opinion did refer to certain policy considerations,[44] these policy arguments were adduced only to show that the strict-textualist approach on which its decision rested did not lead to "a result 'so bizarre' that Congress could not have intended it."[45] The Court then clouded the matter by expressly stating that its decision did *not* rest on these policy considerations.[46] This set of mixed signals is an apparent indication that the Court will proceed in the future by relying on a strict-textualist approach, at least in matters interpreting rule 10b-5's implied remedy.

As Professor Eisenberg recognizes, an entirely defensible opinion could be written to support the Supreme Court's conclusion

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37. Petition for Writ of Certiorari at i, *Central Bank* (No. 92-854); Eisenberg, *supra* note 27, at 19. The Bank also sought review of the question of whether "an indenture trustee [could] be found liable as an aider and abettor absent a breach of the indenture agreement or other duty under state law." *Id.*

38. *Id.*

39. Central Bank v. First Interstate Bank, 114 S. Ct. 1439, 1455 (1994). The Court did not reach the question of whether a showing of recklessness would satisfy the scienter requirement of rule 10b-5. *Id.* at 1454-55. This question has been open since the Court's 1976 decision in Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193-94 n.12 (1976).

40. Petition for Writ of Certiorari at i. *Central Bank* (No. 92-854).

41. *See supra* notes 6-7 and accompanying text; *see also* Grundfest, *supra* note 10, at 43-44 (describing protests of the securities bar and legal commentators).

42. Justice Kennedy delivered the majority opinion in *Central Bank* and was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas. *Central Bank*, 114 S. Ct. at 1442.

43. Eisenberg, *supra* note 27, at 20.

44. *Central Bank*, 114 S. Ct. at 1453-54.

45. *See id.*; Eisenberg, *supra* note 27, at 22.

46. Eisenberg, *supra* note 27, at 22.

"that there should be no aiding-and-abetting liability in private actions under rule 10b-5."[47] As envisioned by Professor Eisenberg, however, the reasoning of such an opinion would not be predicated on a strict-textualist approach.[48] Instead such an opinion would force the Court to express candidly the factual and policy premises that underlie its reasoning. Professor Eisenberg does not believe the Supreme Court's approach in *Central Bank* reflects that kind of candor.[49]

As part of his critique of the Court's strict-textualist approach, Professor Eisenberg begins by recognizing the problem of identifying the relevant "text" that defines the parameters of the Supreme Court's analysis.[50] Is the relevant text the language of that particular statutory provision at issue in the case?[51] Or, is the relevant text the language of the statute as a whole?[52] Or, is it the group of related statutes,[53] as is the case with the set of statutes commonly referred to by the rubric "the federal securities laws?"[54] Further compounding the matter is the issue of delineating the role of precedent in interpreting the relevant statutory language.[55]

As postulated by Professor Eisenberg, these considerations are made all the more intractable when you consider that liability in *Central Bank* was predicated on the violation of an administrative provision. This raised the threshold question of whether the relevant text was the language of rule 10b-5 or section 10(b).[56] Professor Eisenberg takes issue with the majority's determination to focus on the language of section 10(b).[57] He points out that the Court's analysis failed to recognize that this statutory provision is not self-

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47. *Id.* at 19.
48. *See id.* at 20.
49. *See id.* at 20-22.
50. *Id.* at 22.
51. *Id.*
52. *Id.*
53. *Id.*
54. Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(47) (1994). This section defines "securities laws" to include the following seven acts: Securities Act of 1933, *id.* §§ 77a-77aa; Securities Exchange Act of 1934, *id.* §§ 78a-78*ll*; Public Utility Holding Company Act of 1935, *id.* §§ 79a to 79z-6; Trust Indenture Act of 1939, *id.* §§ 77aaa-77bbbb; Investment Company Act of 1940, *id.* §§ 80a-1 to 80a-64; Investment Advisers Act of 1940, *id.* §§ 80b-1 to 80b-21; and Securities Investor Protection Act of 1970, *id.* §§ 78aaa-78*lll*.
55. Eisenberg, *supra* note 27, at 24.
56. *Id.* at 25.
57. *Id.* at 26.

executing but rather involves the delegation of fairly broad rule-making authority to the SEC.[58]

Assuming that the relevant text can be identified, one must then consider the problem of ambiguity. Professor Eisenberg offers several illustrations of how the strict-textualist approach evades the common sense notion of ambiguity.[59] In so doing, he points out the flaws of this approach to statutory interpretation by showing how it overlooks certain fundamental principles of English.[60]

Professor Eisenberg also challenges the claim that the strict-textualist approach serves to hold the legislature accountable by limiting the focus of statutory interpretation to the language of the statute itself.[61] At another level, Professor Eisenberg posits that *Central Bank* can be viewed as a rather crude effort to dodge the judiciary's responsibilities. As forcefully presented in his remarks during the Lecture and as more fully developed in his article, Professor Eisenberg argues that the Court's rigid adherence to principles of strict textualism can be seen as abdicating its responsibilities—to interpret faithfully and reasonably the instructions it receives in the form of legislation from its master, Congress.[62]

Professor Grundfest, however, questions whether the servant can be faithful in interpreting a provision that was not laid in place by the master.[63] In so framing the dialogue, the speakers have focused our attention on the horns of the dilemma the Supreme Court faces whenever it must resolve a dispute involving the scope of an *implied* right of action: By definition this is *not* a remedy that Congress planted in the landscape of legislation. As Professor Grundfest vigorously points out, the judiciary—in fulfilling its acknowledged role of reasonably and faithfully interpreting the instructions of its master—finds itself hopelessly lost with no reasonable set of directions to follow.[64]

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58. *See id.* at 26, 26-27 n.81. Professor Eisenberg notes that this aspect may raise interesting issues under the *Chevron* analysis, Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), issues which the Court did not fully explore and which were not the focus of the Burns Lecture. Eisenberg, *supra* note 27, at 26-27 n.81.

59. *Id.* at Part V.

60. *Id.*

61. *Id.* at 38.

62. *See id.* at 37.

63. *See* Grundfest, *supra* note 10, at 41-42.

64. *See id.* at 41-42. But note that Professor Eisenberg argues, *supra* note 27, at Part VI, that when courts consider all the contextual circumstances and not just the literal text, they fulfill their well established common-law obligation to interpret statutes so as to

Beyond the impact of *Central Bank*'s narrow holding lie the more profound implications of the Court's reasoning. The ramifications of the Supreme Court's increasing reliance on the strict-textualist approach extend well beyond interpreting rule 10b-5's implied private right of action. The differing perspectives of the Lecture's two principal speakers emphatically highlights the strengths and weaknesses of this approach to statutory interpretation. The insightful observations articulated in these two articles were given further dimension by the commentary of Simon Lorne and the panel's verbal tug-of-war over the impact of the *Central Bank* decision.

As reflected in the contributions of the participants in the Fourth Annual Fritz B. Burns Lecture, the controversy over statutory interpretation imbedded in *Central Bank* rages on.[65] The thoughtful insights offered both in the Lecture and in this Symposium will play a significant and influential role in determining the implications of: "*Central Bank*: The Methodology, the Message, and the Future."

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accomplish legislative objectives by filling in the gaps that inevitably occur, because no legislation can be finetuned so completely as to address every dispute that may arise.

65. On the eve of the Burns Lecture, the Supreme Court decided Gustafson v. Alloyd Co., 115 S. Ct. 1061 (1995), a case involving the scope of the express cause of action available under § 12(2) of the Securities Act of 1933. *Id.* at 1064. In *Gustafson*, the Supreme Court concluded that § 12(2) applied only to initial offerings and not to aftermarket trading. *Id.* at 1071. In reaching this conclusion, the Court's analysis focused in large part on the term "prospectus" as used in § 12(2). *Id.* Rather unexpectedly, however, the Court's analysis did *not* begin with the definition of prospectus contained in § 2 of the statute. Instead, the Court stated first that under § 10 of the 1933 Act, the term prospectus "is confined to a document that, absent an overriding exemption, must include the 'information contained in the registration statement.' " *Id.* at 1067. This 5-4 decision once again reflected a sharply divided Court and provoked two dissenting opinions. *Id.* at 1074-79 (Thomas, J., dissenting), 1079-83 (Ginsburg, J., dissenting). The dissenting Justices criticized both (1) the result, on the grounds that the nature of the transaction—a secondary distribution by control persons—clearly fell within the scope of the statute; and (2) the reasoning, on the grounds that the analytical approach taken in the Court's prior decisions dictated that the starting point of the analysis in *Gustafson* should be the broad definition of prospectus contained in § 2, which the dissenting Justices believed would include the allegedly fraudulent materials at issue on the facts of *Gustafson*. *Id.* at 1074-83. As such, the recent *Gustafson* decision reflects the Court's ongoing struggle with the implications of *Central Bank* as described by the participants in this year's Burns Lecture, although any extended discussion of *Gustafson* was outside the scope of this Symposium.