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AN OAK IS AN OAK IS AN OAK IS AN OAK: THE DISAPPOINTING ENTRENCHMENT IN *HALLIBURTON CO. V. ERICA P. JOHN FUND* OF THE IMPLIED PRIVATE RIGHT OF ACTION UNDER SECTION 10(B) AND RULE 10B-5

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I. INTRODUCTION

In *Sacred Emily*, Gertrude Stein famously wrote, "Rose is a rose is a rose is a rose."[1] Although the first instance of the word "Rose" is a person's name, the next three instances appear to be mere repetition about this person. Stein contended, however, "I

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[1] GERTRUDE STEIN, *Sacred Emily*, *in* GEOGRAPHY AND PLAYS 178, 187 (1922).

never repeat that is while I am writing."[2] She believed this because "It is not repetition if it is that which you are actually doing because naturally each time the emphasis is different just as the cinema has each time a slightly different thing to make it all be moving."[3] Each time Stein wrote the same thing again she intended to convey new meaning and transform importance.[4]

On June 23, 2014, the Supreme Court of the United States arguably repeated itself when it issued *Halliburton Co. v. Erica P. John Fund*.[5] Although the Court offered a minor clarification regarding the procedures to be used in class actions brought based upon the implied private right of action under section 10(b) and Rule 10b-5,[6] the Court essentially reaffirmed the existence of an implied private right of action and the use of a "fraud-on-the-market" presumption of reliance for purposes of allowing class action certification under that private right of action.[7] The Court also continued to usurp Congress's role as the body defining the scope and contours of the implied private right of action and did so without demanding that Congress fulfill its proper role in defining or extinguishing the implied private right of action.

Similar to Stein, however, the Court does not really repeat itself. *Halliburton* represents a deeper entrenchment of the implied private right of action that never should have existed and a deeper

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[2] GERTRUDE STEIN, *Portraits and Repetition*, *in* LECTURES IN AMERICA 163, 179 (1935).

[3] *Id.*

[4] *Id.*

[5] Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014).

[6] *Id.* at 2414-17 (holding that in an action brought under the implied right of action under section 10(b) and Rule 10b-5, defendants may introduce evidence at the class certification stage rebutting the presumption of reliance under the fraud-on-the market theory by showing that the alleged misrepresentation did not impact the price of the security).

[7] *Id.* at 2407-13 (declining to overrule the fraud-on-the-market presumption of reliance in an action brought under the implied right of action under section 10(b) and Rule 10b-5).

of entrenchment of the "fraud-on-the-market" theory, which in no way reflects the intent of the 1934 Congress that promulgated section 10(b) of the Securities Exchange Act of 1934, nor the intent of the United States Securities and Exchange Commission ("SEC") when it promulgated Rule 10b-5.[8]

In *Blue Chip Stamps v. Manor Drug Stores*,[9] Justice Rehnquist, writing for the Court, famously stated: "When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn."[10] Justice Rehnquist wrote these words because section 10(b) has grown far beyond what the 1934 Congress intended when it promulgated Exchange Act. *Halliburton* represents a disappointment because the Court had a valid opportunity to chop down or significantly prune that improperly cultivated judicial oak. Although the private right of action under section 10(b) and Rule 10b-5 should probably exist in some form, Congress should have been forced to speak on this issue, rather than the Court continuing its encroachment into the powers delegated to Congress under the Constitution.[11]

This Essay will briefly review the case and discuss its significance. Ultimately this Essay argues that the continued existence and modification of the implied private right of action under section 10(b) and Rule 10b-5 is an affront to Article I, section 7 of the Constitution, which gives Congress the power to pass laws, not courts. This Essay also argues that every opinion by the Supreme Court should include a direct call for Congress to address the implied private right of action under section 10(b) and Rule 10b-5 and

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[8] *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196 (1976) (holding 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").

[9] 421 U.S. 723 (1975).

[10] *Id.* at 737.

[11] *See generally* Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014).

either codify or extinguish it. In short, further entrenchment of the private right is not desirable and should not be permitted.

II. THE CASE

The Court in *Halliburton* reaffirmed for purposes of class certification a presumption of reliance based upon the belief that the price of stock in an efficient market reflects all material, public information.[12] The Court also held that this presumption could be rebutted at the class certification stage upon a showing that an alleged misrepresentation did not create a price impact.[13]

A. THE FACTUAL AND PROCEDURAL HISTORY

In *Halliburton*, Erica P. John Fund, Inc. (Fund) attempted to certify a class and to become the lead plaintiff in a class action against Halliburton and one of its executives (collectively Halliburton) for alleged violations of section 10(b) and Rule 10b-5.[14] When the Fund initially attempted to certify the class, the United States District Court for the Northern District of Texas denied class certification on the ground that the Fund had failed to meet the threshold requirement of "loss causation," *i.e.*, a causal link between the alleged misrepresentation and the alleged economic loss.[15] Based on its own precedent, the United States Court of Appeals for the Fifth Circuit affirmed the denial of class certification.[16] On June 6, 2011, in a unanimous opinion written by Chief Justice John Roberts, the Court held that plaintiffs do not need to prove loss causation to obtain class certification under section 10(b) and Rule 10b-5, and the Court vacated and remanded the case for further proceedings.[17]

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[12] *Id.* at 2407-13.
[13] *Id.* at 2414-17.
[14] *Id.* at 2405-06.
[15] *Id.* at 2406.
[16] *Id.*
[17] *See generally* Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179 (2011).

On remand, Halliburton claimed class certification was improper because the evidence that it had initially offered to disprove loss causation also disproved that any of the alleged misrepresentations had any impact on the price of the stock.[18] Halliburton asserted that the fraud-on-the-market presumption had been rebutted because the alleged misrepresentations were not reflected in the stock price, and that as a result, investors would have to prove reliance on an individual basis.[19] The District Court rejected Halliburton's arguments and certified the class, and the Fifth Circuit affirmed.[20]

The Supreme Court granted certiorari for two reasons. First, the Court "accepted Halliburton's invitation to reconsider the presumption of reliance for securities fraud claims" brought as class actions.[21] Second, the Supreme Court wanted to resolve a dispute among the Circuit Courts of Appeals over whether the presumption of reliance can be rebutted at the class certification stage based upon evidence of lack of price impact by the alleged misrepresentation.[22]

B. THE MAJORITY OPINION

Chief Justice Roberts authored the majority opinion, which was joined by Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan.[23] The Court reiterated its position that the existence of an implied private right of action under section 10(b) and Rule 10b-5 is beyond question, holding: "Although section 10(b) does not create an express private cause of action, we have long recognized an im-

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[18] Halliburton Co. v. Erica P. John Fund, Inc., 134 S.Ct. 2398, 2406 (2014).
[19] *Id.*
[20] *Id.* at 2406-07.
[21] *Id.* at 2407.
[22] *Id.*
[23] *Id.* at 2405.

plied private cause of action to enforce the provision and its implementing regulation."[24]

The Court also declined to overrule the "fraud-on-the-market" theory announced in *Basic Inc. v. Levinson*.[25] In *Basic*, the Court held that a presumption of reliance exists for purposes of class actions brought under section 10(b) and Rule 10b-5,[26] and after holding that reliance is a required element of the implied private right of action,[27] the Court held that reliance can be presumed in instances in which a plaintiff purchased or sold in a well developed, impersonal market.[28] This is based upon the theory that the price of stock in an efficient market reflects all material, public information.[29] Justice Blackman, writing for the Court in *Basic*, also stated, "Any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance."[30]

In *Halliburton*, the Court refused to overrule *Basic* because the Court held that it will only overrule "long-settled precedent" when a "special justification" is present, not just an assertion that the precedent was erroneously established.[31] The Court dismissed an argument that the implied private right of action is being defined inconsistently in relation to the express cause of action under section 18(a) of the Exchange Act because such an argument was made by the dissenting Justices in *Basic*.[32] The Court also dismissed concerns that the "efficient market hypothesis" on which the fraud-on-

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[24] *Id.* at 2407.
[25] *Id.* at 2407-13.
[26] Basic Inc. v. Levinson, 485 U.S. 224, 241-49 (1988).
[27] *Id.* at 243.
[28] *Id.* at 241-242.
[29] *Id.*
[30] *Id.* at 248.
[31] Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2407 (2014).
[32] *Id.* at 2408-09.

the-market theory is founded has been in part discredited,[33] and it also dismissed concerns that investors might not invest based on the integrity of the market price.[34] The Court ignored these concerns based in large part upon the presumption of reliance being rebuttable, which suggests that the Court in *Basic* already took these concerns into account.[35] In regard to applying *stare decisis*, the Court stated it has "special force" because "Congress may overturn or modify any aspect of our interpretations of the reliance requirement, including the *Basic* presumption itself."[36] The Court viewed the presumption as maintaining the original scope of the implied private right of action.[37] The Court also dismissed concerns about the presumption of reliance "allow[ing] plaintiffs to extort large settlements for defendants for meritless claims; punish[ing] innocent shareholders, who end up having to pay settlements and judgments; impos[ing] excessive costs on businesses; and consum[ing] a disproportionately large share of judicial resources."[38] The Court did so because Congress addressed these concerns in other ways, including by passing the Private Securities Litigation Reform Act of 1995 and the Securities Litigation Uniform Standards Act of 1998.[39]

Halliburton also offered two alternatives to overruling *Basic*.[40] The Court rejected the first alternative and adopted the second.[41] The first alternative was to require plaintiffs to prove that the alleged misrepresentation had a "price impact" by demonstrating that the alleged misrepresentation actually affected the price of

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[33] *Id.* at 2409-10.
[34] *Id.* at 2410-11.
[35] *Id.* at 2408-11.
[36] *Id.* at 2411.
[37] *Id.* at 2412.
[38] *Id.* at 2413.
[39] *Id.*
[40] *Id.*
[41] *Id.* at 2413-17.

the security.[42] The Court rejected this alternative, claiming "the proposal would radically alter the required showing for the reliance element of the Rule 10b-5 cause of action."[43] The Court believed that this proposal would be the equivalent of overruling at least part of the *Basic* presumption because, "if a plaintiff shows that the defendant's misrepresentation was public and material and that the stock traded in a generally efficient market, [the plaintiff] is entitled to a presumption that the misrepresentation affected stock price."[44]

The second alternative, which the Court decided to adopt, was to allow defendants to introduce evidence at the class certification stage rebutting the *Basic* presumption by showing that the alleged misrepresentation did not impact the price of the security.[45] The Court was willing to allow this evidence at the class certification stage because *Basic* provides for wide latitude to defeat the presumption of reliance.[46] In addition, according to the Court, allowing the presumption to be challenged at the class certification stage makes sense because the presumption is inherently related to the certification of the class.[47] As a result of this clarification, the Court vacated the judgment of the Fifth Circuit and remanded the case for proceedings consistent with the Court's opinion.[48]

C. THE GINSBURG CONCURRENCE

The concurrence authored by Justice Ginsburg and joined by Justices Breyer and Sotomayor, which is embodied in a single relatively short paragraph, is little more than a reinforcement of the

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[42] *Id.* at 2413-14.
[43] *Id.* at 2414.
[44] *Id.*
[45] *Id.* at 2414-17.
[46] *Id.* at 2414.
[47] *Id.* at 2414-17.
[48] *Id.* at 17.

majority opinion.[49] The concurrence reiterates that "it is incumbent upon the defendant to show the absence of price impact."[50] The concurrence also asserts that this "should impose no heavy toll on securities-fraud plaintiffs with tenable claims."[51] This assertion was likely viewed as controversial by some members of the majority, which is likely why it was relegated to this concurrence and why this concurrence was authored.

D. THE THOMAS CONCURRENCE

The concurrence authored by Justice Thomas and joined by Justices Scalia and Alito unabashedly argues that *Basic* should be overruled and that the "fraud-on-the-market" theory should be discarded.[52] Justice Thomas begins the opinion by noting that the implied private right of action under section 10(b) and Rule 10b-5 is a "relic" of a time which has passed when the Court usurped "the authority to fashion private remedies to enforce federal law [that] belongs to Congress alone."[53] Next, Justice Thomas informs that reliance is an element of the private right of action under section 10(b) and rule 10b-5,[54] and he faults the majority in *Basic* for reimagining this reliance requirement.[55] He views the Court's reaffirmation of the holding in *Basic* as a "mistake" because it is based "on a questionable understanding of disputed theory and flawed intuitions about investor behavior,"[56] because it is contrary to the Court's precedent on class certification that requires plaintiffs seek-

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[49] Halliburton Co. v. Erica P. John Fund, Inc., 134 S.Ct. 2398, 2417 (2014) (Ginsburg, J., concurring).

[50] *Id.*

[51] *Id.*

[52] Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2417-18 (2014) (Thomas, J., concurring).

[53] *Id.* at 2417.

[54] *Id.* at 2418-19.

[55] *Id.* at 2419-20.

[56] *Id.*

ing certification under Rule 23 to "affirmatively demonstrate" the certification requirements,[57] and because the presumption of reliance is "largely irrebuttable" in practice.[58] Justice Thomas did not believe that *stare decisis* requires the Court to preserve the presumption created in *Basic*.[59] He reaches this conclusion because the Court is dealing with an implied private right of action, rather than express statutory language.[60] He writes: "[W]hen we err in areas of judge-made law, we ought to presume that Congress expects us to correct our own mistakes—not the other way around."[61] He also believes that Congressional silence in the Private Securities Litigation Reform Act of 1995 and the Securities Litigation Uniform Standards Act of 1998 regarding the reliance requirement cannot be viewed as an endorsement of the presumption created in *Basic* because silence alone should not be as viewed an endorsement of the presumption.[62] In Justice Thomas's words, "*Basic's* presumption of reliance remains our mistake to correct."[63]

III. ANALYSIS

In 1946, in *Kardon v. National Gypsum Co.*,[64] the United States District Court for the Eastern District of Pennsylvania became the first court to recognize an implied private right of action under section 10(b) and Rule 10b-5.[65] Remarkably, the Supreme Court did not even take the opportunity to interpret section 10(b) and Rule 10b-5 until 1969, and that case did not even addressing the implied

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[57] *Id.* at 2423.
[58] *Id.* at 2424.
[59] *Id.* at 2425.
[60] *Id.* at 2425-26.
[61] *Id.* at 2426.
[62] *Id.* at 2426-27.
[63] *Id.*at 2426.
[64] Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946).
[65] *Id.* at 514 (establishing the implied private right of action under section 10(b) and Rule 10b-5).

private right of action.[66] Finally, in 1971, twenty-five years after *Kardon*, the Supreme Court declared in a single sentence in a footnote in *Superintendent of Insurance v. Bankers Life & Casualty Co.*: "It is now established that a private right of action is implied under section 10(b)."[67] As a result of this single sentence, the Supreme Court has issued dozens of opinions regarding the scope and the contours of the implied private right of action, and the lower courts have issued hundreds, if not thousands, of opinions struggling with how the implied private right should be applied.[68] All of these problems of interpretation come down to single immutable fact: As Justice Scalia wrote in his concurrence to *Lampf, Pleva, Prupis & Petigrow v. Gilberson* while speaking about defining the contours of the implied private right, "We are imagining here."[69]

In *Halliburton*, the Court refused to overrule *Basic* because the Court held that it will only overrule "long-settled precedent" when a "special justification" is present, not just an assertion that the precedent was erroneously established.[70] Although arguments exist to the contrary when the Supreme Court speaks, saying something is a fact does not make it a fact. The notion that the presumption of reliance announced in *Basic* is "long-settled precedent" is

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[66] *See* SEC v. Nat'l Sec., Inc., 393 U.S. 453, 465 (1969) ("Although § 10(b) and Rule 10b-5 may well be the most litigated provisions in the federal securities laws, this is the first time this Court has found it necessary to interpret them.").

[67] Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971).

[68] *See* Jill E. Fisch, *As Time Goes By: New Questions About the Statute of Limitations for Rule 10b-5*, 61 FORDHAM L. REV. S101, S101 (1993) ("There are dozens of Supreme Court decisions and perhaps thousands of lower court opinions addressing problems of statutory interpretation that arise in connection with private rights of action under section 10(b) of the Securities Exchange Act of 1934 . . . and Rule 10b-5 . . . ."); James D. Gordon III, A*corns and Oaks: Implied Rights of Action Under the Securities Acts*, 10 STAN. J.L. BUS. & FIN. 62, 62 (2004) (reporting that "federal courts have issued thousands of decisions defining the scope of that private right of action" under section 10(b) and Rule 10b-5).

[69] Lampf, Pleva, Prupis & Petigrow v. Gilberson, 501 U.S. 350, 366 (1991) (Scalia, J., concurring).

[70] Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2407 (2014).

troubling at best. First, Congress did not include a private right of action under section 10(b) in the Securities Exchange Act of 1934.[71] Second, Congress has never codified the private right of action under section 10(b) and Rule 10b-5. Third, Congress has never spoken on the presumption of reliance that was announced in *Basic*. Fourth, *Basic* has generated extensive litigation regarding when and how it should be applied. Fifth, *Halliburton* demonstrates that *Basic* is not "long-settled precedent" because otherwise, the Court would have refused to grant certiorari. Sixth, *Halliburton* demonstrates that *Basic* is not "long-settled precedent" because the Court was resolving a split among the Circuit Courts of Appeals as to how to apply the presumption under *Basic.* Seventh, *Halliburton* demonstrates that *Basic* is not "long-settled precedent" because otherwise, the Court would have had no need to effectively reverse the opinion of both the Northern District of Texas and the Fifth Circuit. Eighth, the Court has relatively broad discretion as to what it characterizes as "long-settled precedent" and could have determined *Basic* to be "unsettled precedent" in this case.

Halliburton is especially disturbing because it represents a continued usurpation of Congressional and Presidential power. As Justice Thomas writes, "Our Constitution . . . demands that laws be passed by Congress and signed by the President."[72] Simply put, the continued existence and modification of the implied private right of action under section 10(b) and Rule 10b-5 is an affront to Article I, section 7 of the Constitution.

In *Halliburton*, the Court did arguably narrowly construe the implied private right of action because the Court held that the

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[71] *See* Gordon, *supra* note 68, at 65 ("Neither section 10(b) nor Rule 10b-5 contains a private right of action. Indeed, Congress could not have intended a private right of action under Rule 10b-5 when it passed the Securities Exchange Act of 1934, because Rule 10b-5 was not even promulgated until 1942.").

[72] Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. at 2426 (2014) (Thomas, J., concurring).

presumption created in *Basic* could be rebutted at the class certification stage upon a showing that an alleged misrepresentation did not create a price impact.[73] This is a narrow construction because it reduces the number of classes that can be certified and proceed to trial, which will arguably limit the ability of those bringing strike suits to obtain undeserved settlement value. What is missing from the majority opinion, however, is a clear and direct call for Congress to address the presumption created by *Basic* and to codify or extinguish the private right of action.

This is especially disappointing because Congress has recently shown a willingness to listen when the Court calls for reform in regard to federal securities regulation. For example, on June 24, 2010, the Supreme Court decided *Morrison v. National Australia Bank Ltd.*,[74] holding that a presumption exists against extraterritorial application of the federal securities laws, except in instances in which a "clear indication" of such application is stated in the particular statute.[75] Writing for the majority, Justice Scalia stated: "Rather than guess anew in each case we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects."[76] In essence, the Court did not want to create "unsettled precedent" and interfere with Congress's Constitutional mandate to legislate. Congress moved swiftly in response. On July 21, 2010, President Barack Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act into law.[77] In section 929P of the Act, Congress clarified the scope of the United States Securities and Exchange Commission's extraterritorial jurisdiction by adopting a conduct and effects test for when the SEC

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[73] *Id.* at 2414-17 (Roberts, C.J., majority opinion).

[74] Morrison v. National Australia Bank Ltd., 561 U.S. 247 (2010).

[75] *Id.* at 255.

[76] *Id.* at 261.

[77] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

has power to act.[78] In section 929Y, Congress also mandated that the SEC solicit public comment and conduct a study regarding extending the extraterritorial application of the private rights of action under the Securities Exchange Act of 1934.[79] The SEC has issued the study,[80] and Congress may choose to act on it. Even if Congress does not, the Court's opinion in *Morrison* and Congress's response in the Dodd-Frank Act demonstrate that Congress does pay attention when the Court asks for Congress to legislate in regard to the federal securities laws.

The Court should have demanded that Congress legislate in *Halliburton* as well, rather than usurping that role and declaring "Congress may overturn or modify any aspect of our interpretation."[81] The Court's notion that Congress may be incapable of affirmatively legislating in regard to the implied private right of action is troublingly unconstitutional.

III. THE PATH FORWARD

In *Herman & MacLean v. Huddleston*,[82] the Supreme Court declared the existence of the implied right of action under section

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[78] *See* Dodd-Frank Act, § 929P(b), 124 Stat. at 1864-65. ("strengthening and clarifying the United States Securities and Exchange Commission's power to extraterritorially enforce the United States securities laws").

[79] *Id.* § 929Y(a), 124 Stat. at 1871.

[80] U.S. SEC. & EXCH. COMM'N, STUDY ON THE CROSS-BORDER SCOPE OF THE PRIVATE RIGHT OF ACTION UNDER SECTION 10(B) OF THE SECURITIES EXCHANGE ACT OF 1934 (2012), *available at* http://www.sec.gov/news/studies/2012/929y-study-cross-border-private-rights.pdf; *but see* Luis A. Aguilar, *Dissenting Statement Regarding the Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934 as Required by Section 929Y of the Dodd-Frank Wall Street Reform and Consumer Protection Act* (Apr. 11, 2012), *available at* http://sec.gov/news/speech/2012/spch0411121aa.htm (arguing that the SEC has failed to meet its Congressional mandate under Section 929P to provide a recommendation regarding the extraterritorial application of the private rights of action).

[81] Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2411 (2014).

[82] Herman & MacLean v. Huddleston, 459 U.S. 375 (1983)

10(b) and Rule 10b-5 "simply beyond peradventure."[83] With *Halliburton*, the Court has now declared yet another aspect of the implied private right of action is "simply beyond peradventure" as well, *i.e.*, the presumption of reliance that was announced in *Basic*.

In a certain regard, the Court gets it right in *Halliburton*. Although the private right of action and the presumption of reliance announced in *Basic* should not have been imagined into existence, Congress has repeatedly acquiesced to this presumption by failing to address it in subsequent legislation. The Court also acted sensibly in holding that this presumption can be rebutted at the class certification stage upon a showing that an alleged misrepresentation did not create a price impact because this serves as a check against strike suits and other nuisance litigation. The private right of action under section 10(b) and Rule 10b-5 is a necessary component of policing securities markets in the United States, and it should continue to exist in some fashion.

The problem is that the Court has forgotten that the implied private right of action should never have existed in the first place, and the Court has come to excitedly embrace legislating the contours of that right, rather than demanding that Congress do its job and codify the private right of action. The Court has too often affirmed the existence of this "judicial oak which has grown from little more than a legislative acorn."[84] In holding, "There is an oak; there is an oak; there is an oak; there is an oak," the Court has allowed the roots of that oak to grow deeper than they ever should have been allowed to grow, and the Court has become convinced that pruning and caring for that oak is the Court's charge.

Going forward, the Court should remind Congress in each opinion that it issues about the implied private right of action under section 10(b) and Rule 10b-5 that Congress should act to codify or

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[83] *Id.* at 381.

[84] Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975).

extinguish the right of action, rather than the Court usurping Congress's power or at best being improperly delegated Congress's power. Hopefully, Congress will act to codify the private right of action. But imagining that Congress will act seems more fanciful than believing that the 1934 Congress intended a private right of action under section 10(b) with a fraud-on-the-market theory of reliance. At minimum, however, the Court has a duty to try.