SECURITIES LAW—IMPLIED RIGHTS OF ACTION—PRIVATE PLAINTIFFS MAY NOT BRING AIDING AND ABETTING SUITS UNDER § 10(B) OF THE 1934 SECURITIES EXCHANGE ACT—*Central Bank v. First Interstate Bank*, 114 S. Ct. 1439 (1994).

In response to widespread abuses in the United States financial markets that resulted, at least in part, in the 1929 market crash,[1] the Seventy-third Congress enacted the Securities Act of 1933[2] (the 1933 Act) and the 1934 Securities Exchange Act (the 1934 Act).[3] In particular, Congress enacted § 10(b) as the an-

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[1] The general feeling among the United States public was that investor speculation and leverage buying were the two practices that raised the nation's financial markets to unnatural heights and then precipitated the 1929 market collapse. *See* Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 410-11 (1990). Accordingly, the legislation enacted after the 1929 crash was designed to control market speculation and manipulation. *Id.* at 425 n.176 (citing *Stock Exchange Regulation, Hearings on H.R. 7852 and H.R. 8720 Before the House Interstate and Foreign Commerce Committee*, 73d Cong., 2d Sess. 44-46, 86 (1934)) (other citations omitted).

[2] 15 U.S.C. §§ 77a to 77bbbb (1988).

[3] 15 U.S.C. §§ 78a to 78ll (1988). Since the mid-1970's, the United States Supreme Court has interpreted the securities laws narrowly. Daniel R. Fischel, *Secondary Liability Under Section 10(b) of the Securities Act of 1934*, 69 CAL. L. REV. 80, 81 (1981). *See, e.g.*, Chiarella v. United States, 445 U.S. 222, 230 (1980) (holding that silence cannot be the basis for a § 10(b) violation in the absence of an affirmative duty of disclosure); Santa Fe Indus. v. Green, 430 U.S. 462, 473-74 (1977) (representing the court's unwillingness to extend the scope of § 10(b) liability beyond instances where one commits a "manipulative" or "deceptive" act); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 201 (1976) (foreclosing negligence as a basis for § 10(b) liability). Dissenting opinions, however, accused the Court of "stultifying" recovery for victims of securities fraud with restrictive interpretations of § 10(b). *Id.* at 216 (Blackmun J., dissenting); *see Chiarella*, 445 U.S. at 248-49 (Blackmun J., dissenting) (asserting that "rigid" construction of the antifraud provisions did not serve the congressional expectations of the securities statutes). In *Ernst & Ernst*, Justice Blackmun wrote that expansive readings of § 10(b) are "consistent with Congress' intent, repeatedly recognized by the Court, that securities legislation enacted for the purpose of avoiding frauds be construed 'not technically and restrictively, but flexibly to effectuate its remedial purposes.'" 425 U.S. at 217 (Blackmun J., dissenting) (citing SEC v. Capital Gains Research Bureau, 375 U.S. 180, 195 (1963); Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 12 (1971); Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1972)).

ONE AUTHOR TAKES EXCEPTION WITH THE COURT'S CONCEPTION OF THE BASIS FOR THE 1933 AND 1934 ACTS, IN TERMS OF WHETHER OR NOT THEY RESULTED FROM THE SEVERE ECONOMIC IMPACT OF THE 1929 MARKET CRASH. THEL, *supra* note 1, at 409. Thel saw a clear connection between the 1929 crash and the 1933 and 1934 Acts. *Id.* at 408. As noted by Thel, Roosevelt wrote to the chairman of the House Commerce Committee at the time Congress enacted securities legislation:

> [t]he people of this country are, in overwhelming majority, fully aware of the fact that unregulated speculation in securities and in commodities was one of the most important contributing factors in the artificial

tifraud provision of the 1934 Act.[4] Under the authority granted to

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and unwarranted "boom" which had so much to do with the terrible conditions of the years following 1929.

Id. at 408 n.97 (citing Letter from President Franklin D. Roosevelt to Hon. Sam Rayburn (Mar. 26, 1934), *in* H.R. Rep. No. 1383, 73d Cong., 2d Sess. 3 (1934)). This interpretation calls for an expansive construction of the securities statutes in order to reach the remedial purposes of the 1934 Act, as intended by Congress. Elizabeth Sager, Comment, *The Recognition of Aiding and Abetting in the Federal Securities Laws*, 23 HOUS. L. REV. 821, 833 (1986). The Supreme Court, in contrast, viewed the act not as legislation designed to prevent a recurrence of the 1929 market crash, but as a more general method for substituting "a philosophy of full disclosure for the philosophy of *caveat emptor*." *Capital Gains Research Bureau*, 375 U.S. at 186.

In 1975, for example, in *Ernst & Ernst*, the Supreme Court explained that the 1933 Securities Act was:

> designed to provide investors with full disclosure of material information concerning public offerings of securities in commerce, to protect investors against fraud and, through the imposition of specified civil liabilities, to promote ethical standards of honesty and fair dealing. . . . The 1934 Act was intended principally to protect investors against manipulation of stock prices through regulation of transactions upon securities exchanges and in over-the-counter markets, and to impose regular reporting requirements on companies whose stock is listed on national securities exchanges.

425 U.S. at 195 (citing S. Rep. No. 792, 73d Cong., 2d Sess., 1-5 (1934); H.R. Rep. No. 85, 73d Cong., 1st Sess., 3-4 (1933)).

Similarly, in *Blue Chip Stamps v. Manor Drug Stores*, then-Justice Rehnquist characterized the 1933 and 1934 securities legislation as landmark, stating that Congress enacted the 1933 Act to "provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes," while Congress intended the 1934 Act "to provide for the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce and through the mails, to prevent inequitable and unfair practices on such exchanges and markets and for other purposes." 421 U.S. 723, 727-28 (1975) (citation omitted in text).

[4] 15 U.S.C. § 78j(b) (1988). Section 10(b) of the 1934 Securities Exchange Act reads:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . (b) To use or employ, in the connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Id. In contrast to the specific provisions contained in the 1934 Act, § 10(b) represents a more broadly conceived framework to provide civil remedies for defrauded investors. Notes and Comments, *Civil Liability Under 10b and Rule 10b-5: A Suggestion for Replacing the Doctrine of Privity*, 74 YALE L.J. 658, 660 (1965). The Court, however, has restricted § 10(b) cases to situations of misconduct specifically involving misrepresentation and non-disclosure. *See supra* note 1 (providing instances where the Court has restricted the scope of § 10(b)).

Thel, however, presented an alternative conception of § 10(b): that the 1934 Act

the Securities and Exchange Commission (SEC)[5] by § 10(b), the SEC subsequently promulgated Rule 10b-5.[6] Together, § 10(b)

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has little to do with disclosure objectives, but is focused on credit provisions and market regulations. Thel, *supra* note 1, at 390 (citations omitted). According to Thel:

> Instead of limiting section 10(b) to intentional misconduct, the words "manipulative or deceptive device or contrivance" may encompass any practice that affects securities prices, and section 10(b) may authorize the Commission to regulate any practice that tends to defeat the fundamental purpose of the Act: to protect the public's interest in the integrity of security prices.

Id. at 392 (citing Aaron v. SEC, 446 U.S. 680, 705 (1980)).

[5] As an independent federal regulatory agency, the SEC administers and enforces federal securities laws. HAROLD S. BLOOMENTHAL, SECURITIES LAW HANDBOOK § 1.01, at 1-1 (1994). The SEC derives its rulemaking authority from specific statutory provisions, such as § 10(b), in addition to general rulemaking authority. *Id.* Congress created the SEC in 1934, under 15 U.S.C. § 78d (1988), to administer existing and subsequent securities legislation such as "the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Public Utility Holding Company Act of 1935, the Investment Adviser's Act of 1940 and the Investment Company Act of 1940." BLACK'S LAW DICTIONARY 1354 (6th ed. 1990). The 1934 Act charged the SEC with the formidable task of protecting public interest by delegating plenary powers for regulation of a wide variety of conduct. Thel, *supra* note 1, at 461. SEC prosecution of offenses of the federal securities laws is also statutorily authorized. 15 U.S.C. 78u (1988).

[6] BLOOMENTHAL, *supra* note 5, § 14.01 (2), at 14-2. Rule 10b-5, promulgated by the SEC in 1942, states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1993).

One commentator examined Supreme Court decisions with respect to Rule 10b-5 litigation. David M. Phillips, *An Essay: The Six Competing Currents of Rule 10b-5 Jurisprudence*, 21 IND. L. REV. 625, 627 (1988). Phillips identified six "competing currents" in Supreme Court opinions: "'idealism,' 'traditionalism,' 'economic behaviorism,' 'paradigm case analysis,' 'literalism' and 'textual structurism.'" *Id.* at 627. "Idealism" focuses on promoting equality of information among those participating in securities transactions, basing securities law on ethical standards and protecting the investing public. *Id.* at 629. The "traditional" approach endorses a deference to state law over federal 10b-5 suits and is, in general, more sympathetic towards the defendants named in 10b-5 suits. *Id.* at 637. "Economic behaviorism" focuses on insider trading and weighs the economic benefits of procuring advantageous information for the purposes of securities trading. *Id.* at 648. "Paradigm case analysis" is geared towards discovering the legislative and administrative intent of the securities laws. *Id.* at 653. "Literalism" is an approach of statutory construction that does not focus on congressional intent, but rather on the plain meaning of the statutory text. *Id.* at 656-57. Finally, Phillips identified the trend of "textual structuralism," which views specific statutory sections in conjunction with applicable legislative acts as a whole. *Id.* at 660.

and Rule 10b-5 were designed to curtail fraudulent practices by buyers and sellers[7] of securities.[8]

Where parties directly contravene provisions of § 10(b) and Rule 10b-5, the SEC has the authority to bring express suits against such violations.[9] In addition to the express suits, federal courts

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See infra note 15 (discussing the use of the latter three "currents" by the Supreme Court).

[7] The restrictions found in Rule 10b-5 attach to both buyers and sellers of securities, as opposed to the express remedies contained in the 1933 Act which only provide relief for defrauded investors. BLOOMENTHAL, *supra* note 5, § 15.01, at 15-1. In Blue Chip Stamps v. Manor Drug Stores, addressing privity and standing for § 10(b) and Rule 10b-5 suits, then-Justice Rehnquist affirmed that the plaintiff class for private suits under § 10(b) and Rule 10b-5 is limited to actual sellers and purchasers of securities. 421 U.S. 723, 730 (1975) (citing Birnbaum v. Newport Steel Corp., 193 F.2d 461, 464 (2d Cir. 1952), *cert. denied* 343 U.S. 956 (1952)); *see generally* Notes and Comments, *supra* note 4 (describing a divergence by the circuit courts from the doctrine of privity in § 10(b) suits).

[8] Thel, *supra* note 1, at 387 n.10. Thel further discussed two conceptions of § 10(b). *Id.* at 386, 389-90. Thel's first perspective stated that § 10(b) proscribes knowing and intentional misconduct by securities dealers, while the second premise reached any practice that affects the securities markets, whether "knowing" or not. *Id.* at 389-90.

According to the 1934 Act, "security" applies to "any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit . . . ." 15 U.S.C. § 78c(a)(10) (1988). *See generally*, BLOOMENTHAL, *supra* note 5, §§ 2.01-05, at 2-1 to 2-39 (providing an overview of various types of securities less readily identifiable than conventional securities such as stocks and bonds). The Supreme Court stated that "an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." SEC v. W.J. Howey Co., 328 U.S. 293, 298-99 (1946). *See infra* note 55 (discussing whether, per the Fifth Circuit, a bank note constitutes a security).

[9] 15 U.S.C. § 78u(e) (1988). The statute provides:

> Upon application of the Commission the district courts of the United States and the United States courts of any territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus, injunctions, and orders commanding (1) any person to comply with the provisions of this chapter, the rules, regulations, and orders thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or person associated with a member, . . . the rules of the Municipal Securities Rulemaking Board . . . .

Id. Express suits brought under the 1933 and 1934 Acts are those based on practices expressly outlawed by the Acts' statutory provisions, or rules promulgated thereunder. Fischel, *supra* note 3, at 89. Other statutes that expressly prohibit fraud in the securities markets include § 17(a) of the 1933 Act (pertaining to fraud in the sale of securities) and § 14(a) of the 1934 Act (relating to proxy solicitation). BLOOMENTHAL, *supra* note 5, § 14.01, at 14-1 to 14-2. When a violation of the federal securities laws occurs, the SEC may bring criminal prosecution, civil actions for injunction, or administrative suits. *See id.* § 1.01, at 1-1. *See generally supra* note 5 (delineating the responsibilities of

have recognized private rights of action implied by the 1933 and 1934 Acts.[10] For example, federal circuit courts found aiding and

the SEC in enforcing the federal securities laws). *See infra* note 16 (providing information on the Municipal Securities Rulemaking Board and the trading of municipal securities).

[10] Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 477 (1977). In *Santa Fe*, the United States Supreme Court held that an act must be deceptive or manipulative to violate § 10(b) or Rule 10b-5. *Id.* at 474. Justice White acknowledged that many of the civil suits brought under § 10(b) are not expressly authorized by statute, yet the Court allowed such suits as implied rights of action. *Id.* at 477.

The first case that established private rights of action under § 10(b) and Rule 10b-5 was *Kardon v. National Gypsum Co.*. Fischel, *supra* note 3, at 89 (citing 69 F. Supp. 512 (E.D. Pa. 1946)). In *Kardon*, stockholders brought suit against a corporation that allegedly induced stockholders to sell their stock for less than true value. *Kardon*, 69 F. Supp. at 513. The district court conceded that a strict statutory construction would provide no private remedy for the plaintiffs. *Id.* at 514. Instead, the court deferred to notions of tort principles and allowed the private remedies. *Id.* The court did not believe that the omission of an express private remedy in the statute was sufficient to negate the 1934 Act's intent. *Id.* *See infra* note 11 (discussing tort principles as bases for establishing aiding and abetting liability).

For example, *Cort v. Ash* dealt with shareholders that sued a corporation for violating a federal criminal statute prohibiting corporations from making presidential campaign contributions. 422 U.S. 66, 71-72 (1975). Plaintiffs brought suit under a statute that contained no express private right of action. *Id.* at 74 (citation omitted). Professor Fischel recounted the Supreme Court's method for determining the existence of implied private rights of action in *Cort*: "(1) whether the plaintiff is a part of a class for whose benefit the statute was enacted; (2) whether there is any relevant legislative intent; (3) whether the implication of a remedy is consistent with the legislative scheme; and (4) whether the cause of action is traditionally relegated to state law." Fischel, *supra* note 3, at 90 & n.62 (citing *Cort*, 422 U.S. at 78). Fischel argued that such methods evidence "judicial lawmaking" wherein courts create statutory remedies absent legislative intent. *Id.* at 90-91.

David Phillips wrote that *Cort* signalled a change in the Supreme Court's attitude toward private actions based on implied suits under federal law. Phillips, *supra* note 6, at 638. Phillips asserted that the application of the four-part test in *Cort* evinced a desire to restrict, rather than further implied remedies. *Id.* at 639. Supporting this view, an approach suggested by *Blue Chip Stamps* is that § 10(b) is a "catch-all" provision and serves as a basis for liability in situations where no express provisions are applicable, so that § 10(b) would not interfere with the express liability sections. James D. Cox, Ernst & Ernst. v. Hochfelder*: A Critique and an Evaluation of Its Impact upon the Scheme of the Federal Securities Laws*, 28 HASTINGS L.J. 569, 594-95, (1977). Conversely, a comparison of § 10(b) with other sections of the 1934 Act favors the assumption that Congress did not intend to provide civil liabilities under § 10(b). David S. Ruder, *Civil Liability Under Rule 10b-5: Judicial Revision of Legislative Intent?*, 57 Nw. U. L. REV. 627, 649 (1963).

Initially, plaintiffs chose to bring suits under the implied rights of action contained in § 10(b) and Rule 10b-5, as opposed to sections of the 1934 Act that provide express civil remedies, due to the short statute of limitations and other procedural disadvantages associated with express suits. *See generally* BLOOMENTHAL, *supra* note 5, § 15.01, at 15-1. The Supreme Court later dispensed with the statute of limitations advantage. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773, 2781 (1991). In *Lampf*, the Court determined that the applicable statute of limitations for § 10(b) violations is one year from discovery of the facts of the violation and three years from the violation. *Id.* Previously, statutes of limitations for § 10(b) and

abetting suits to be among the private rights of action implied by § 10(b) and allowed recovery in instances where defendants aided and abetted securities fraud.[11]

Rule 10b-5 suits were determined according to the particular state jurisdictional approach. BLOOMENTHAL, *supra* note 5, § 30.02, at 30-3. Consequently, after *Lampf*, the main advantage associated with implied rights of action is that suits under § 10(b) are available to defrauded sellers of securities, whereas the express rights of action are limited to purchasers of securities. *Id.* § 15.01, at 15-1. *See generally id.* (detailing the five separate opinions issued by the Supreme Court in *Lampf*).

[11] Sager, *supra* note 3, at 823 n.16. With slight variations in determining specific standards for liability, all of the United States circuit courts endorsed aiding and abetting suits as implied rights of action under § 10(b). *Id. First Interstate Bank v. Pring*, subsequently overturned by *Central Bank v. First Interstate Bank*, provided a comprehensive list of the different approaches of the 11 federal appellate courts. *Pring*, 969 F.2d 891, 898 & n.13 (10th Cir. 1992). In *Pring*, the Tenth Circuit noted that to establish liability for aiding and abetting a securities violation, a plaintiff must demonstrate "(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." *Id.* at 898 (footnote omitted) (citations omitted). The appellate court noted that some circuit courts, with respect to the latter two elements, required that an aider and abettor have "a general awareness . . . that his or her role was part of an overall activity that was improper; and [that] the alleged aider-and-abettor knowingly and substantially assisted the primary violation." *Id.* at 898 n.13 (citations omitted).

The *Pring* Court added that the Third Circuit utilized both formulations to establish aider and abettor liability under § 10(b). *Id.* Additionally, *Pring* noted that the Seventh Circuit required all three elements, in addition to the alleged aider-and-abettor having knowingly committed a proscribed manipulative or deceptive act. *Id.* (citation omitted). Finally, although the Ninth Circuit generally subscribed to the commonly held "knowing" standard, the court in *Pring* pointed to one case that included a reckless standard in place of knowing conduct. *Id.* (citing Levine v. Diamanthuset, 950 F.2d 1478, 1483 (9th Cir. 1991)).

Jeffrey Keller suggested an alternate method for determining aiding and abetting liability that incorporates the tri-part test of the circuit courts. Jeffrey F. Keller, *Aiding and Abetting Liability Under Securities Exchange Act Section 10(b) and SEC Rule 10b-5: The Infusion of a Sliding-Scale, Flexible-Factor Analysis*, 22 LOY. L.A. L. REV. 1189, 1219-24 (1989). Keller's proposed standard focuses on:

> (1)the existence of the aider-abettor's knowledge of the violation and role in the fraudulent scheme; (2) the type and degree of participation or assistance; (3) the type of relationship among the parties and whether the relationship resulted in the plaintiff reasonably relying upon the representations or omissions of the aider-abettor; (4) the existence and type of economic benefit derived from the relationship by the aider-abettor; and (5) the nature of the security that is the object of the transaction.

Id. at 1220 (footnote omitted). Keller's flexible analysis does not require a fixed knowing standard for aiding and abetting liability, but permits liability for reckless conduct coupled with high levels of assistance. *Id.* at 1220-21.

The Restatement of Torts contains the common law liability standard for secondary defendants, stating that:

> [f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows

In April 1994, however, in *Central Bank v. First Interstate Bank*,[12] the United States Supreme Court directly confronted the question of whether private plaintiffs can bring aiding and abetting suits under § 10(b) and Rule 10b-5.[13] The Court held that private plaintiffs may not bring such suits.[14] Relying on statutory construction, the Court determined that Congress did not intend to hold parties liable for aiding and abetting primary violations of § 10(b).[15]

Central Bank involved municipal bonds that were issued to finance residential and commercial land development in Colorado.[16] Petitioner, Central Bank, acted as indenture trustee[17] for

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that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

RESTATEMENT (SECOND) OF TORTS § 876 (1979).

David Ruder recounted that, although § 10(b) contains no express provision for private suits, the section nonetheless has an impact on private rights. Ruder, *supra* note 10, at 632. Congress, knowing that the legislation would have an impact on private rights, enacted § 10(b) under general tort common-law principles. *Id.* Ruder, however, did not agree that the Acts, which were enacted to prevent fraudulent and deceitful conduct, would allow causes of action grounded in negligent behavior. *Id.* at 632-33. *See also* Fischel, *supra* note 3, at 111 (arguing that secondary liability based on common-law doctrine is improper). *See generally infra* note 98 and accompanying text (discussing Justice Kennedy's dismissal of the argument that § 10(b) was enacted with an understanding by Congress that general tort principles would supplement the statutory text).

12 114 S. Ct. 1439 (1994).

13 *Id.* at 1444. *See infra* note 40 and accompanying text (citing examples of cases in which the Court did not directly confront the question of aiding and abetting actions under § 10(b) and Rule 10b-5).

14 *Central Bank*, 114 S. Ct. at 1455. *See infra* notes 85, 109 and accompanying text (describing how the Supreme Court set aside years of circuit precedent and decided that private plaintiffs may not bring aiding and abetting suits under § 10(b) of the 1934 Act).

15 *Central Bank*, 114 S. Ct. at 1449. The Supreme Court, in assessing the relevant securities statutes, engaged in the latter three "currents" enumerated by David Phillips in his analysis of Rule 10b-5 litigation. *See* Phillips, *supra* note 6, at 627. The Court utilized "paradigm case analysis" inasmuch as the majority related to notions of legislative intent, with respect to overriding notions of tort principles. *Central Bank*, 114 S. Ct. at 1450. *See infra* notes 98-99 and accompanying text. The "literalism" approach is similarly evident in Justice Kennedy's statement that the statutory text determines conduct covered by § 10(b). *Central Bank*, 114 S. Ct. at 1447. *See infra* note 92 and accompanying text. Lastly, "textual structuralism" was utilized by the Court when it analyzed the existence of aiding and abetting with respect to the express liability sections of the 1934 Act. *Central Bank*, 114 S. Ct. at 1448-49. *See infra* notes 94-95 and accompanying text.

16 *Central Bank*, 114 S. Ct. at 1443. Municipal securities are those issued by states, state agencies or municipalities. BLOOMENTHAL, *supra* note 5, § 1.04, at 1-5. Neither the federal requirements for registering new bonds nor subsequent reporting regulations apply to issuers of municipal securities. Christopher Ethan Hitchens, *Approaches*

the bond issues by the Colorado Springs-Stetson Hills Public Building Authority (Stetson Hills) in 1986 and 1988.[18] The land subject to the assessment liens securing the bond issues had to be worth at least 160% of the outstanding principal and interest, as mandated by the bond's covenant.[19] AmWest Development,[20] the developer of Stetson Hills, was required to provide Central Bank with annual reports confirming that the 160% test was being satisfied.[21]

In 1988, AmWest provided Central Bank with a report of the land intended to secure the 1988 bond issue.[22] The appraisal con-

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to Increasing Disclosure from Municipal Issuers, *in* CONTEMPORARY ISSUES IN SECURITIES REGULATION 175, 175 (Marc I. Steinberg ed., 1988). As a result, municipalities benefit from liberal disclosure standards that lessen issuing costs. *Id.* Municipal issues also carry a tax-exempt status and are therefore attractive to private investors. *Id.* In 1975, Congress took steps to increase regulations of municipal brokers by enacting legislation that required such dealers to register with the SEC. BLOOMENTHAL, *supra* note 5, § 1.04, at 1-5 through 1-6. The legislation also created the Municipal Securities Rulemaking Board, an agency with authority to promulgate rules relating to municipal securities, but not to enforce them. *Id.* § 1.04, at 1-6.

Hitchens explained that there are four main types of municipal securities. Hitchens, *supra*, at 177. General obligation bonds are financed through general taxes assessed by the municipality and require authorization from voters to issue. *Id.* Revenue bonds are paid from the proceeds of certain municipally-owned projects. *Id.* Special obligation bonds, in contrast to general obligation bonds, are not funded by general taxes, but by temporary municipal revenues. *Id.* Lastly, industrial development bonds are issued when municipal facilities are built with bond proceeds and then leased to commercial entities who, with their lease payments, provide the funding for paying the bondholders. *Id.* at 177-78.

17 Trust Indenture Act of 1939, 15 U.S.C. § 77aaa (1988), amended in the Trust Indenture Reform Act of 1990, Pub. L. No. 101-550, 104 Stat. 2721 (1990), applies to sales of debt securities, such as the bond issues involved in this case, and regulates the conduct of trust indenture. BLOOMENTHAL, *supra* note 5, § 8.01, at 8-1. *Central Bank*, as stated by Justice Stevens in dissent, was on appeal to the Supreme Court only for the "subsidiary questions whether an indenture trustee could be found liable as an aider and abettor absent a breach of an indenture agreement or other duty under state law, and whether it could be liable as an aider and abettor based only on a showing of recklessness." *Central Bank*, 114 S. Ct. at 1457. *See infra* notes 111-12 and accompanying text (discussing Justice Steven's derision of the Court's decision which circumvented the principle issue and foreclosed aiding and abetting liability as a private right of action).

18 *Central Bank*, 114 S. Ct. at 1443. Both the 1986 and 1988 bonds were issued to reimburse AmWest developers for the cost of improvements in residential and commercial developments in Colorado Springs. First Interstate Bank v. Pring, 969 F.2d 891, 893 (10th Cir. 1992). Defendant Roy Pring was an original owner of the properties under development and was a director of AmWest. *Id.*

19 *Central Bank*, 114 S. Ct. at 1443.

20 AmWest Development Limited Partnership was Stetson Hill's developer and AmWest Development Corp., of which Pring, David Powers, and Gregory Timm were the sole officers, was the sole partner of AmWest L.P. *Pring*, 969 F.2d at 893.

21 *Central Bank*, 114 S. Ct. at 1443.

22 *Id.* Originally, Joseph Hastings, the appraiser for AmWest, submitted an appraisal that combined both the properties securing the 1986 and 1988 appraisals.

tained land values that were virtually unchanged from the appraisals submitted in 1986.[23] As a result, the 1986 bond underwriter advised Central Bank that declining property values suggested that the 1988 appraisal was not up-to-date.[24] It was therefore questionable whether the land subject to the assessment liens was worth 160% of the 1988 bond's outstanding principal and interest.[25]

Central Bank subsequently instructed its in-house appraiser to review AmWest's 1988 report.[26] The in-house appraiser concluded that the decline in real-estate market values rendered AmWest's report sufficiently questionable to warrant an independent review by an outside appraiser.[27] After an exchange of communications[28] with AmWest, Central Bank agreed to delay the independent review of the 1988 appraisal until six months after the closing on the 1988 bond issue.[29] Stetson Hills defaulted on the bonds, however,

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Pring, 969 F.2d at 894 & n.4. This was rejected and Mr. Hastings then separated the two appraisals. *Id.* at 894 n.4.

23 *Central Bank*, 114 S. Ct. at 1443. Central Bank contacted Timm, a representative of AmWest, and inquired why the land values were virtually unchanged from the 1986 appraisals despite declines in property values. *Pring*, 969 F.2d at 894 n.6. Timm explained that $10 million had been added in improvements to the property and therefore any concerns over discrepancies between estimates contained in the 1988 appraisal and those reflected by current property values were "unfounded." *Id.*

24 *Central Bank*, 114 S. Ct. at 1443.

25 *Id.* The letter sent to Central Bank by the bond underwriter concluded:

> At this date we are operating on an appraisal that is over 16 months old. In light of the declining property values in Colorado Springs and the foreclosure sales, many of which have occurred within the vicinity of the collateral, an appraisal that reflects property values similar to those utilized for the 1986 appraisal of record should be suspect and not relied on without further independent check. As Trustee, you have the authority to name an independent appraisal if you are not satisfied.
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> It appears that the officers of the Stetson Hills Building Authority have failed to conform to the Bond Covenants to which they agreed. In the interest of the bondholders I call upon you to the [sic] enforce the covenants or Invoke the Remedies. It is our opinion that, based on your statement to us and based on the project analysis, in addition to a reserve fund deficiency the Stetson Hills Public Building Authority is not meeting either the 110% or the 160% Test.

Pring, 969 F.2d at 894 n.5 (citation omitted).

26 *Central Bank*, 114 S. Ct. at 1443.

27 *Id.*

28 On March 31 a vice-president of Central Bank, Ken Buckius, met with Timm, as well as representatives from AmWest's underwriter. *Pring*, 969 F.2d at 895 n.7. Timm assured the Central Bank vice-president that the Hastings appraisal had considered recent sales in the area and was essentially accurate. *Id.* Timm expressed a willingness to "add approximately $2 million worth of property to the 1986 assessment lien to bring the 160% test into compliance." *Id.* Central Bank then agreed that an independent appraisal would need only to be completed "within ninety days of December 1, 1988." *Id.* (citation omitted).

29 *Id.* at 895.

before completion of the independent review.[30]

After the default, First Interstate Bank and Jack Naber,[31] a private investor, sued Stetson Hills, an AmWest director, two underwriters, and Central Bank.[32] The complaint named the first four defendants as primary violators of the express provisions of § 10(b).[33] Because the bank agreed to delay the independent appraisal, however, plaintiffs relied on § 10(b)'s implied right of action and alleged that Central Bank aided and abetted the securities fraud.[34]

The federal district court in Colorado granted Central Bank's motion for summary judgment on the grounds that the bank's silence and inaction were insufficient to establish the "substantial assistance"[35] required to impose aiding and abetting liability when a fiduciary duty of disclosure does not exist.[36] Reversing the lower

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30 *Id.* at 895 n.7. Timm objected to Central Bank's intention to conduct an independent review of the property appraisal and, instead, offered to have another appraiser conduct a separate appraisal at the end of 1988. *Id.* Central Bank's trust committee met to consider this offer from Timm. *Id.* Central Bank agreed to the December appraisal. *Id.* After this later appraisal had begun, AmWest refused to complete it. *Id.* at 895. This refusal constituted a technical default, of which the 1988 bondholders were notified. *Id.* The Authority then defaulted on the bond payments. *Id.*

31 First Interstate and Naber had together purchased $2.1 million worth of the 1988 bond issues. *Central Bank*, 114 S. Ct. at 1443.

32 *Id.* Plaintiffs alleged:

> that the 1988 bonds were sold as part of a fraudulent scheme[,] . . . that the official statement for the 1988 bonds was materially false and misleading by, inter alia, (1) representing the Hastings updated appraisal as being reliable, prudent, and correct; and (2) failing to disclose certain facts, including that Pring had refused to extend additional credit to AmWest, that Pring would receive almost $2 million from the bond proceeds, that serious concerns had been raised about the accuracy of the Hastings updated appraisal, that Central Bank had required an independent review of the appraisal, that the developer had refused to provide it, and that Central Bank later had agreed to delay the independent review until December 1988.

Pring, 969 F.2d at 895.

33 *Central Bank*, 114 S. Ct. at 1443.

34 *Id.*

35 *See supra* note 11 (quoting the Restatement (Second) of Torts, § 876, stating that aiding and abetting liability occurs when "substantial assistance" is given in furtherance of a tortious act). *See also supra* note 11 (providing a survey of circuit court decisions on the topic of whether "silence and inaction" is sufficient to constitute the "substantial assistance" necessary to impose aiding and abetting liability).

36 *Pring*, 969 F.2d at 899. One reason for imposing duties of disclosure on certain members of the securities trade is reflected in the "shingle theory," which provides that a broker or securities dealer who "hangs out his shingle" represents, by implication, that his dealings with the public will be fair. Brennan v. Midwestern United Life Ins. Co., 286 F. Supp. 702, 707 (1968). The shingle theory serves to prohibit a wide range of potential abuses by brokers-dealers, including "the sale of securities at a price

court,[37] the Tenth Circuit ruled that silence and inaction may be

not reasonably related to market value, the effecting of unauthorized transactions, or the recommendation of unsuitable investments without full disclosure." Fischel, *supra* note 3, at 102 n.123.

Other professions that carry duties of disclosure with respect to the securities laws are lawyers and accountants. *See generally* Theodore Sonde, *The Responsibility of Professionals Under the Federal Securities Laws—Some Observations*, 68 Nw. U. L. REV. 1 (1973-74) (discussing duties of disclosure for accountants and attorneys in the securities trade).

Duties of disclosure similarly exist for corporate insiders with knowledge of forthcoming takeover bids. *See* Chiarella v. United States, 445 U.S. 222, 227 (1980). In *Chiarella*, Justice Powell quoted an SEC administrative ruling, stating that there is:

> an affirmative duty to disclose material information[, which] has been traditionally imposed on corporate "insiders," particularly officers, directors, or controlling stockholders. We, and the courts have consistently held that insiders must disclose material facts which are known to them by virtue of their position but which are not known to persons with whom they deal and which, if known, would affect their investment judgment.

Id. (quotation omitted).

One commentator addressed the increase in professional liability litigation in the securities trade during the 1980's recession. Timothy M. Metzger, Comment, *Abandoning Accountants' Liability for Aiding and Abetting 10b-5 Securities Fraud*, 87 Nw. U. L. REV. 1374, 1374-75 (1993). Metzger argued that because the activities usually giving rise to Rule 10b-5 suits against accountants are essentially either situations of primary liability or no liability, aiding and abetting in accountant liability serves no useful purpose and should, therefore, be abandoned. *Id.* at 1414. Metzger asserts that "[a]ny standard requiring accountants to police their clients beyond the scope of the financial statements amounts to no more than unwarranted 'judicial creativity.'" *Id.* (quotation omitted).

Harold Bloomenthal points out that both the 1933 and 1934 Acts contain disclosure requirements. BLOOMENTHAL, *supra* note 5, § 3.01, at 3-1. The 1933 Act, for example, requires that all public offerings be registered with the SEC and that registration statements be made available to the public. 15 U.S.C. §§ 77f-g (1988). Bloomenthal noted two deficiencies with the disclosure requirements contained in the 1933 Act. BLOOMENTHAL, *supra* note 5, § 3.01, at 3-1. First, the requirement for disclosure would only arise if there was a public offering of a security issue, and second, there was no mechanism for updating the information contained on the registration statement. *Id.* § 3.01, at 3-1 through 3-2. Bloomenthal further notes that the 1934 legislation attempted to correct the shortcomings of the 1933 Act by requiring registration of securities for all companies that listed securities on a national exchange and by mandating that updated reports be filed periodically with the SEC. *Id.* § 3.01, at 3-2.

[37] *Pring*, 969 F.2d at 898. The court of appeals held that "[t]o establish aider-and-abettor liability a plaintiff must prove (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." *Id.* (footnote omitted). The court of appeals began a review of the district court ruling by addressing plaintiff's claim that Pring was liable as a controlling person. *Id.* at 896. Under § 20(a) of the 1934 Act, a controlling person is:

> Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent

sufficient to establish aider-and-abettor liability, if there was conscious intent by the defendant to assist the primary violation.[38] Construing the facts in a manner most favorable to plaintiff, the court of appeals determined that the district court erred in granting summary judgment and remanded the case.[39]

The Supreme Court granted certiorari to decide whether civil liability under § 10(b) extends to those who do not directly engage in a manipulative or deceptive act but who, instead, aid and abet the primary violation.[40] The Court, noting that § 10(b) does not

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> as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

15 U.S.C. § 78t(a) (1988). The court of appeals held that the district court erred by ruling that plaintiff had the burden of proving that defendant Pring actually participated in the primary violation. *Pring*, 969 F.2d at 898. Rather, the court of appeals stated that the defense carried the burden of proof that there was no participation in the acts "inducing or constituting the primary violation . . . ." *Id.* The counterpart to § 20(a) in the 1933 Act is § 15 which establishes liability under §§ 11 & 12 for controlling persons, "unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist." 15 U.S.C. § 77o (1988). *See generally* William H. Kuehnle, *Secondary Liability Under the Federal Securities Laws—Aiding and Abetting, Conspiracy, Controlling Person, and Agency: Common-Law Principles and The Statutory Scheme*, 14 J. CORP. L. 313 (1988) (presenting an extensive overview of the common-law associated with controlling person liability in the 1933 and 1934 Acts).

The Tenth Circuit also addressed prior circuit opinions with regard to the second and third elements of the tri-part test (knowledge of the primary violation and "substantial assistance" by the alleged aider-and-abettor). *Pring*, 969 F.2d at 898 & n.13. *See supra* note 11 and accompanying text (discussing the split among the circuit courts as to whether silence and inaction constitute "substantial assistance" for the purpose of imposing § 10(b) liability for aiding and abetting).

38 *Pring*, 969 F.2d at 899 (citations omitted). In *Metge v. Baehler* the Eighth Circuit held that for aider-abettor liability to be imposed based on the inaction of the secondary party, without a duty to disclose, a high standard of intent must exist. 762 F.2d 621, 625 (8th Cir. 1985). The court of appeals in *Pring* noted that Pring had a significant personal financial stake in the 1988 bond issue. *Pring*, 969 F.2d at 900. The court reasoned, therefore, that a trier of fact could conclude that Pring had adequate intent to further the securities fraud so that his inaction could be considered aiding and abetting. *Id.*

Justice Stevens, dissenting in *Central Bank*, points to the fact that the Court ignored the true issue for certiorari—the determination of whether Central Bank's silence and inaction constituted substantial assistance—and, instead, addressed, *sua sponte*, whether or not § 10(b) allows private parties to bring civil aiding and abetting suits. *Central Bank*, 114 S. Ct. at 1457 (Stevens, J., dissenting).

39 *Pring*, 969 F.2d at 898.

40 *Central Bank*, 114 S. Ct. at 1443, 1444. The Supreme Court indicated that the Court had twice reserved judgment on this issue. *Id.* at 1443 (citing Herman and MacLean v. Huddleston, 459 U.S. 375, 379 n.5 (1983); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 191-92 n.7 (1976)). *See infra* notes 62-72 and accompanying text (providing an expanded discussion of *Ernst & Ernst*).

expressly prohibit aiding and abetting, declined to recognize an implied right of action.[41] Justice Kennedy, writing for the majority, determined that the text of § 10(b) does not indicate congressional intent to impose civil liability on aiders and abettors of § 10(b) violations.[42]

Prior to *Central Bank*, although the Supreme Court twice reserved judgement on whether private aiding and abetting suits could be brought under § 10(b) and Rule 10b-5, lower courts continually allowed such actions.[43] For example, in 1969, the Seventh Circuit, in *Brennan v. Midwestern United Life Insurance Co.*,[44] affirmed a district court's ruling that imposed liability on a corporate defendant for aiding and abetting a primary violation of § 10(b).[45] In this case, Tora C. Brennan, a member of a plaintiff class, sued Dobich Securities Corporation for a primary violation of § 10(b).[46] Brennan also sued Midwestern United Life Insurance Company (hereinafter MULIC) as an aider and abettor after purchasing shares of MULIC's common stock in the secondary market.[47]

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41 *Central Bank*, 114 S. Ct. at 1455.

42 *Id.*

43 *Id.* at 1443, 1444. *See supra* notes 40 (citing cases in which the Court reserved judgment on the § 10(b) aiding and abetting issue) and 11 (providing a survey of the various circuit holdings regarding § 10(b) aiding and abetting liability).

44 417 F.2d 147 (7th Cir. 1969), *aff'g* 286 F. Supp. 702 (N.D. Ind. 1968), *cert. denied*, 397 U.S. 989 (1970).

45 *Id.* at 148, 155. Previously, the federal district court in *Brennan* denied

> inter alia, the defendant's motion to dismiss plaintiff's complaint for failure to state a claim upon which relief could be granted. . . . At that time the court, considering only the complaint and motion to dismiss, held, first, that it could not be said that civil liability could never under any circumstances be imposed upon persons who do no more than aid and abet a violation of Section 10(b) and Rule 10b-5. The court held, second, that there might be circumstances under which a person or corporation may, by merely failing to take action, give the requisite assistance or encouragement to a wrongdoer so as to constitute an aiding and abetting.

286 F. Supp. at 703-04 (citing Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673, 681-82 (1966)).

46 *Id.* at 703, 704. Michael Dobich, the sole proprietor of Dobich Securities Corporation, established a pattern of conducting "short sales" of stock in life insurance companies. *Id.* at 705. He would sell stock in a given company to customers without actually being in possession of the stock. *Id.* Dobich would then invest the funds in stock and commodities ventures for his own gain and payment of operating expenses for his corporation. *Id.* Dobich was unsuccessful in his market speculations, however, and amassed debts of up to $2,700,000. *Id.* *See supra* note 36 (discussing the implied standard of fair dealing attributed to brokers in the form of a fiduciary duty).

47 *Brennan*, 286 F. Supp. at 704. The court described the secondary market as "the market for shares already issued and outstanding." *Id.* In the secondary market, MULIC served as its own transfer agent for the stock sales. *Id.* A transfer agent is defined as:

Brennan never received the stock and Dobich went bankrupt.[48]

The district court first determined that it was not necessary to decide whether silence and inaction constituted aiding and abetting because MULIC engaged in affirmative conduct meeting the standards of aiding and abetting liability under § 10(b).[49] The court found sufficient evidence to indicate that MULIC's decision not to report Dobich's violations of § 10(b) reflected a course of action intended to preserve the high market value of its own stock.[50] Furthermore, the court, in dicta, stated that even if MULIC had not encouraged Dobich with the affirmative act of mailing letters expressing tacit approval of Dobich's primary violations, MULIC's failure to report Dobich's conduct to the Indiana Securities Commission was sufficient to constitute aiding and abetting.[51] The Seventh Circuit affirmed the district court's ruling.[52]

> An organization, usually a bank, that handles transfers of shares for a publicly held corporation. Generally, a transfer agent assures that certificates submitted for transfer are properly endorsed and that there is appropriate documentation of the right to transfer. The transfer agent issues new certificates and oversees the cancellation of the old ones. Transfer agents also usually maintain the record of shareholders for the corporation and mail dividend checks.

BLACK'S LAW DICTIONARY 1497 (6th ed. 1990).

48 *Brennan*, 286 F. Supp. at 704.

49 *Id.* at 727. MULIC received inquiries from several of Dobich's customers, questioning why they had not received the MULIC shares they purchased from Dobich. *Id.* at 709. Due to Dobich's misrepresentations, MULIC contacted the Indiana Securities Commission. *Id.* The Commission immediately warned Dobich and instructed MULIC to recontact them if they received additional evidence of suspect dealings by Dobich. *Id.* Despite further evidence that Dobich was not dealing properly with his customers, MULIC notified Dobich that they would report his actions to the Commission unless he immediately forwarded the MULIC shares to his clients. *Id.* at 711. MULIC was involved in attempted mergers and feared that disclosure of their knowledge of Dobich's practices would negatively affect the market value of MULIC shares and threaten their merger bids. *Id.* at 716.

50 *Id.* at 718, 719.

51 *Id.* at 727. The court stated that "[a]lthough not strictly necessary for the disposition of this case, it is appropriate to observe that even if MULIC had not encouraged Dobich by its communications to him . . . MULIC also aided and abetted Dobich by its failure to report its knowledge of his fraudulent activities . . . ." *Id.* *See supra* note 11 (identifying the circuit courts that hold silence and inaction, minus a fiduciary duty of disclosure, sufficient to constitute aiding and abetting under § 10(b)).

52 Brennan v. Midwestern United Life Ins. Co., 417 F.2d 147, at 155. The Seventh Circuit ultimately reserved judgment on whether silence and inaction alone could constitute aiding and abetting under § 10(b), but did agree with the lower court decision that MULIC's actions amounted to a tacit agreement with Dobich to prevent complaints from reaching the commission, thus allowing Dobich's fraudulent conduct to continue for MULIC's benefit. *Id.* The court termed MULIC's failure to report "more than omission; it was a signal to Dobich that further inquiries would not be handled as earlier threatened, and that Dobich would be given an opportunity to cover his non-deliveries." *Id.* at 154-55.

Although the Seventh Circuit accepted the availability of aiding and abetting suits under § 10(b) and Rule 10b-5, the specific elements of these implied rights of action were not well-defined.[53] In 1975, however, the Fifth Circuit focused on the specific elements of aiding and abetting liability in *Woodward v. Metro Bank*.[54] In *Woodward*, a loan co-signer sued Metro Bank for aiding and abetting securities fraud because the bank issued the loan on which the primary violator defaulted.[55]

The Fifth Circuit Court of Appeals relied primarily on a Sixth Circuit decision which detailed three elements for aiding and abetting liability under § 10(b).[56] First, the court recounted, there must be a primary violation of the statute's express provisions.[57] Second, the court of appeals required an awareness that the accused's role was part of an improper overall activity.[58] Finally, the court listed the need for knowing and substantial assistance of the

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David Ruder analyzed *Brennan* in conjunction with another case, *Wessel v. Buhler*, 437 F.2d 279 (9th Cir. 1971). Ruder, *supra* note 10, at 642-44. Ruder concluded that inaction alone should not give rise "to liability under Rule 10b-5 in the absence of an independent duty to make disclosure of the primary wrong. If such a duty does exist, liability for nondisclosure will be based upon direct breach of a duty to disclose rather than upon an aiding and abetting theory." *Id.* at 644.

53 Woodward v. Metro Bank, 522 F.2d 84, 94 (5th Cir. 1975). *See infra* note 86 (discussing instances where the Court has focused on issues of both the elements and scope of § 10(b)).

54 522 F.2d at 94-95. Elizabeth Sager stated that the *Woodward* court was the first to use a "flexible duty analysis" which recognizes varying standards of culpability depending on the activity constituting the alleged aiding and abetting. Sager, *supra* note 3, at 841. Sager asserted that such a sliding scale for establishing aiding and abetting liability "is no more than a recognition that, according to the tenor of the circumstances and the expectation of the relationships, a degree of good faith and fair dealing is presumed." *Id.* at 842. *See supra* note 36 (discussing implied representations of good faith and fair dealing associated with the securities trade).

55 *Woodward*, 522 F.2d at 88, 89. E. Trine Starnes, a businessman, made misrepresentations to Billie Jean Woodward, an investor. *Id.* at 87, 88. Woodward bought shares of Starnes's company and Starnes induced her to cosign on a loan on which he later defaulted. *Id.* at 88. Starnes filed for bankruptcy and Metro Bank turned to Woodward, as co-signer, to repay the loan. *Id.* at 89. In addressing Woodward's § 10(b) aiding and abetting suit against Metro Bank, the court avoided the threshold issue of whether a bank loan can be considered a security. *Id.* at 92. *See supra* note 8 (defining "securities"). The court drew a distinction between sales of stocks and common loan transactions with respect to constituting "substantial assistance." *Woodward*, 522 F.2d at 97, 96. The court noted that the routine nature of bank loans produces low levels of scienter, and an accused aider and abettor is therefore less likely to be aware of improper activities. *Id.* *See supra* note 54 (identifying the sliding scale for aiding and abetting liability with respect to duty, knowledge, and action).

56 *Woodward*, 522 F.2d at 94-95 (citing SEC v. Coffey, 493 F.2d 1304, 1316 (6th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975)).

57 *Id.* at 94.

58 *Id.* at 95.

primary violation by the accused aider and abettor.[59] Addressing the third element, the court of appeals noted the conflict among the jurisdictions as to whether silence and inaction fulfills the requirement of knowing and substantial assistance.[60] The Fifth Circuit concluded that Metro Bank's actions did not satisfy the requirement for knowing and substantial assistance because the bank owed no duty of disclosure to Woodward.[61]

A year later, in *Ernst & Ernst v. Hochfelder*,[62] the United States Supreme Court granted certiorari to address the scope of conduct prohibited by § 10(b).[63] Respondents in *Ernst & Ernst* were cus-

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[59] *Id.* The Fifth Circuit also cited a Third Circuit decision, *Landy v. Federal Deposit Insurance Corp.*, which referred to "'an independent wrong' instead of a securities law violation and knowledge of the wrong's existence instead of awareness of a role in improper activity. 486 F.2d 139, 162-63 (3d Cir. 1973), *cert. denied*, 416 U.S. 960 (1974). Finally, Landy omits the 'knowing' requirement for the substantial assistance aspect." *Woodward*, 522 F.2d at 95. The Fifth Circuit believed that the scienter requirement encompassed in the term "knowing" was essential because one could know that a wrongful act exists without awareness of participation in the scheme. *Id.*

[60] *Woodward*, 522 F.2d at 96-97 (citing *Coffey*, 493 F.2d at 1317; Strong v. France, 474 F.2d 747, 752 (9th Cir. 1973)) (other citations omitted). *See supra*, note 11 (identifying the holdings of the circuit courts with respect to whether silence and inaction can constitute an aiding and abetting). In analyzing whether silence and inaction suffices to impose aiding and abetting liability under § 10(b), the *Woodward* court suggested a combination of *Coffey* (which advanced that liability be imposed only where the silence and inaction was intended to aid the violation of the securities laws) and *Strong* (which held that only when there is a duty of disclosure will silence and inaction support liability). *Woodward*, 522 F.2d at 97. According to *Woodward*:

> When it is impossible to find any duty of disclosure, an alleged aider-abettor should be found liable only if scienter of the high "conscious intent" variety can be proved. Where some special duty of disclosure exists, . . . then liability should be possible with a lesser degree of scienter. . . . In a case combining silence/inaction with affirmative assistance, the degree of knowledge required should depend on how ordinary the assisting activity is in the business involved. . . . If the evidence shows no more than transactions constituting the daily grist of the mill, we would be loathe to find 10b-5 liability without clear proof of intent to violate the securities laws. Conversely, if the method or transaction is atypical or lacks business justification, it may be possible to infer the knowledge necessary for aiding and abetting liability.

Id. (footnotes omitted) (citations omitted).

[61] *Woodward*, 522 F.2d at 100. Additionally, the court intimated that the bank loan was a common and unassuming business activity and should require clear intent to further the primary wrong on behalf of the alleged aider and abettor. *Id.* at 97. *See supra* note 60 (quoting *Woodward*'s emphasis that an activity constituting the "daily grist of the mill" will not suffice as aiding and abetting, unless accompanied by a high degree of intent).

[62] 425 U.S. 185 (1976).

[63] *Id.* at 193. In *Ernst & Ernst* the Court granted certiorari to "resolve the question whether a private cause of action for damages will lie under § 10(b) and Rule 10b-5 in the absence of any allegation of 'scienter'—intent to deceive, manipulate, or defraud." *Id.* Reversing the Seventh Circuit, the Court held that aiding and abetting

tomers of First Securities Brokerage Company of Chicago.[64] First Securities retained Ernst & Ernst, an accounting firm, to periodically audit the brokerage house's books.[65] The brokerage house subsequently engaged in fraudulent activities using their customers' capital.[66] When the fraud was discovered, the customers, including Hochfelder, filed suit against Ernst & Ernst based on § 10(b) aiding and abetting liability.[67] The customers asserted that

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liability cannot be imposed if it is determined that duties of inquiry and disclosure were breached and acts constituting fraud under Rule 10b-5 would have been prevented or discovered but for the breach. *Id.* at 191. In *Dirks v. S.E.C.*, Circuit Judge Skelly Wright wrote that in *Ernst & Ernst*:

> the Supreme Court expressly reserved the question whether the Rule 10b-5 scienter standard includes recklessness. But the overwhelming rule in the Courts of Appeals—including the Fifth Circuit, whose *Metro Bank* language this circuit borrowed in *Investors Research*—is that recklessness satisfies the Rule 10b-5 scienter requirement. . . . *Investors Research* and *Metro Bank* do not imply that "knowingly . . . assist" or "general awareness" require a higher standard for aiding or abetting liability than the general scienter standard required by *Ernst & Ernst* . . . . Recklessness would have been enough.

Dirks v. S.E.C., 681 F.2d 824, 844-45 (D.C. Cir. 1982) (footnotes omitted).

James Cox stated that "the only conclusion which can safely be drawn from the Supreme Court's resolution of *Ernst & Ernst* is that a negligence standard in a section 10(b) action for damages has been rejected without qualification." Cox, *supra* note 10, at 628. Cox wrote that "the Court's fresh and unqualified concern that the elements of section 10(b) not disrupt the statutory scheme, as well as the great concern that section 10(b)'s scope must be consistent with the probable intent of Congress, should cause a reconsideration of a variety of permissive developments that have occurred under section 10(b)." *Id.* at 629. In *Central Bank*, the Court, in fact, restricted the scope of § 10(b) to conform to the statutory scheme, thus curtailing the "permissive developments" that emanated from the statute. Central Bank v. First Interstate Bank, 114 S. Ct. 1439, 1448 (1994). *See also id.* at 1444 (noting Professor Fischel's forecast that due to recent Court decisions, the scope of the federal securities laws will be restricted).

64 *Ernst & Ernst*, 425 U.S. at 189. Leston B. Nay, First Securities president and 92% stockholder, induced the customers into a fraudulent securities scheme. *Id.* *See infra* note 66 and accompanying text (providing a more detailed explanation of the primary violation of § 10(b) in *Ernst & Ernst*).

65 *Ernst & Ernst*, 425 U.S. at 188. The requirement that securities dealers and brokers keep records of transactions and financial books is set forth in Rule 17a-5. 17 C.F.R. § 240.17a-5 (1993). See *infra* note 80 for the text of Rule 17a-5.

66 *Ernst & Ernst*, 425 U.S. at 189. Leston B. Nay represented to respondents that he was using their money to purchase high yield escrow accounts, when, in fact, he was converting respondent's money for his own use. *Id.* There was no record of the escrow accounts in any of the financial statements that Ernst & Ernst audited. *Id.* Nay committed suicide and petitioner brought the aiding and abetting action. *Id.*

67 *Id.* at 189-90. The Seventh Circuit reversed the district court's granting of summary judgment in favor of Ernst & Ernst. Hochfelder v. Ernst & Ernst, 503 F.2d 1100, 1104 (7th Cir. 1974). The Seventh Circuit held that aiding and abetting could be established under § 10(b) on the basis of negligence if it was shown:

> (1) that the defendant had a duty of inquiry; (2) the plaintiff was a beneficiary of that duty of inquiry; (3) the defendant breached the duty

Ernst & Ernst failed to conduct proper audits that would have uncovered the brokerage house's deception.[68]

Justice Powell, writing for the majority, concluded that the text of § 10(b), coupled with the legislative intent of the 1934 Act, compelled a statutory construction that foreclosed liability for mere acts of negligence.[69] Rather, the Justice determined that the statute prohibits only intentional conduct undertaken to defraud investors and artificially affect the securities markets.[70] Because the Court focused on § 10(b)'s "scienter"[71] requirement, the majority

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> of inquiry; (4) concomitant with the breach of duty of inquiry the defendant breached a duty of disclosure; and (5) there is a causal connection between the breach of duty of inquiry and disclosure and the facilitation of the underlying fraud; that is, adequate inquiry and subsequent disclosure would have led to the discovery of the underlying fraud or its prevention.

Id. at 1104.

68 *Ernst & Ernst*, 425 U.S. at 190. At First Securities, only Nay could open mail addressed to his attention. *Id.* Respondents contended that Ernst & Ernst should have discovered Nay's "mail rule" and should have reported it to the SEC as having prevented an effective audit. *Id.*

69 *Id.* at 199. *See supra* note 4 (providing the text of § 10(b)). *See also supra* note 63 (asserting that the primary result of *Ernst & Ernst* was that the Court rejected the § 10(b) negligence standard without qualification).

70 *Ernst & Ernst*, 425 U.S. at 199. Justice Powell, in an analysis of the relevant legislative developments associated with the enactment of § 10(b) wrote:

> in commenting on the express civil liabilities provided in the 1934 Act, the Report explains: "[I]f an investor has suffered loss by reason of illicit practices, it is equitable that he should be allowed to recover damages from the guilty party. . . . [T]he bill provides that any person who unlawfully manipulates the price of a security, or who induces transactions in a security by means of false or misleading statements, or who makes a false or misleading statement in the report of a corporation, shall be liable in damages to those who have bought or sold the security at prices affected by such violation or statement . . . ."
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> The report therefore reveals with respect to the specified practices, an overall congressional intent to prevent "manipulative and deceptive practices which . . . fulfill no useful function" and to create private actions for damages stemming from "illicit practices," where the defendant has not acted in good faith.

Id. at 205-06 (citing S. Rep. No. 792, 73d Cong., 2d Sess., 16 (1934); H.R. Rep. No. 1383, 73d Cong., 2d Sess., 10-11, 20-21 (1934)). *See supra* notes 9-10 and accompanying text (discussing the express and implied causes of action contained in § 10(b)).

In a case decided by the Court a year after *Ernst & Ernst*, *Santa Fe Industries v. Green*, Justice White strictly adhered to the statutory text of § 10(b), similar to Justice Powell in *Ernst & Ernst*. Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 472 (1977). The *Santa Fe* Court held that a claim of fiduciary breach by majority shareholders towards minority shareholders, in an attempt to eliminate the minority interest in a Delaware short-form merger transaction, will only lie if the action of the majority "can be fairly viewed as 'manipulative or deceptive' within the meaning of the statute." *Id.* at 473-74.

71 Black's Law Dictionary defines scienter "as applied to conduct necessary to give

did not consider the viability of aiding and abetting as a private right of action.[72]

In 1983, the First Circuit Court of Appeals, in *Cleary v. Perfectune, Inc.*,[73] reaffirmed the acceptance of aiding and abetting as a private implied right of action under § 10(b).[74] In 1976 a promoter of a chain of car tune-up centers, Perfectune, gave perspective stockholders an offering memorandum[75] listing three individuals as directors without the individuals' knowledge or consent.[76] The Perfectune business venture proved unsuccessful, and the plaintiffs, two stockholders, sued the promoter for disseminating a fraudulently prepared offering memorandum.[77] In addition, the stockholders sued the individuals erroneously listed as directors for aiding and abetting the promoter's primary violation by

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rise to an action for civil damages under the Securities Exchange Act of 1934 and Rule 10b-5 refers to a mental state embracing [the] intent to deceive, manipulate or defraud." BLACK'S LAW DICTIONARY, *supra* note 5, at 1345 (citing *Ernst & Ernst*, 425 U.S. at 194 n.12).

72 *Ernst & Ernst*, 425 U.S. at 192 n.7. Professor Fischel suggested that although *Ernst & Ernst* ultimately reserved judgment on § 10(b) aiding and abetting actions, the Court's decision portended that such liability would not be recognized. Fischel, *supra* note 3, at 88. Fischel stated that the Court's decision alluded to the fact that other forms of secondary liability may also be threatened after *Ernst & Ernst*. *Id.* at 87. Another commentator supported the proposition that the Court's ruling in *Ernst & Ernst* augured an end to judicial expansion of § 10(b). Cox, *supra* note 10, at 570. James Cox similarly argued that the *Ernst & Ernst* decision transcended the case's immediate "scienter" holding and portends a reconsideration of expansive readings of § 10(b). *Id.* at 571.

73 700 F.2d 774 (1st Cir. 1983).

74 *Id.* at 780. Affirming the district court, the First Circuit found no basis for aider and abettor liability under § 10(b), Rule 10b-5, or § 17(a). *Id.* at 775. The court clarified that the holding reserved final judgment on the existence of aiding and abetting liability under § 17(a). *Id.* at 780. The court did not reach the issue in this case because plaintiffs failed to demonstrate that they should benefit from an implied right of action under § 17(a). *Id.* *See infra* note 80 (providing the text of § 17(a)).

75 The 1933 Act defines "prospectus" as "any prospectus, notice, circular, advertisement . . . or communication . . . which offers any security for sale . . . ." 15 U.S.C. § 77b(10) (1988). Therefore, an offering memorandum or prospectus, used interchangeably, is defined as: "A document published by a corporation . . . setting forth the nature and objects of an issue of shares, debentures, or other securities created by the company or corporation, the investment or risk characteristics of the security and inviting the public to subscribe to the issue . . . ." BLACK'S LAW DICTIONARY, *supra* note 5, at 1222.

76 *Perfectune*, 700 F.2d at 775-76. Although the defendants had not consented to being listed as directors of Perfectune, they were aware of the venture and had invested in it. *Id.* at 776. The defendants, subsequent to the release of the offering memorandum, received copies of the prospectus and did not object to being listed as directors. *Id.*

77 *Id.* Although a tune-up center opened in 1976, by 1978 the Internal Revenue Service conducted a sale of the company's assets. *Id.* The Perfectune stockholders subsequently brought suit to recover the purchase price of their stock. *Id.*

failing to notify the SEC of the memorandum's inaccuracy.[78]

In the decision, the court of appeals relied on a three-part test, also noted in *Woodward*, to establish the existence of aiding and abetting liability under § 10(b).[79] As a result, the First Circuit upheld the district court's granting of summary judgment in favor of the named directors.[80] The court reasoned that summary judgment was appropriate because the stockholders failed to raise questions of material fact regarding the directors' awareness of their role in the allegedly fraudulent scheme.[81]

In April of 1994, however, in *Central Bank v. First Interstate Bank*,[82] the United States Supreme Court, in a five to four decision,[83] held that § 10(b) of the 1934 Act does not extend a private

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78 *Id.* Primarily, the stockholders asserted that because the listed directors stood to gain from third party investments, their silence and inaction was sufficient to establish § 10(b) aider and abettor liability. *Id.*

79 *Id.* at 777 (citations omitted). *See supra* notes 56-60 and accompanying text (containing the test set forth in *Woodward* to determine aiding and abetting liability under § 10(b)).

80 *Perfectune*, 700 F.2d at 775. The Perfectune stockholders brought aiding and abetting suits under both § 10(b) and § 17(a). *Id.* Section 17(a) states:

> It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—(1) to employ any device, scheme, or artifice to defraud, or (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a) (1988). The *Perfectune* Court reserved judgment on whether § 17(a) provides a private cause of action because the methods used by the court to rule out aiding and abetting under § 10(b) were sufficient to foreclose similar liability under § 17(a). *Perfectune*, 700 F.2d at 780.

81 *Perfectune*, 700 F.2d at 778-79. Judge Peck, writing for the First Circuit, called the tri-part aiding and abetting standard for § 10(b) liability "well settled." *Id.* at 777. *See supra* notes 56-60 and accompanying text (noting the Sixth Circuit's holding in *Coffey* regarding the tri-part standard). In *Perfectune*, the court found it unnecessary to determine which of the jurisdiction's standards applied to decide whether silence and inaction establishes aiding and abetting liability. *Perfectune*, 700 F.2d at 778. Even if the most liberal test was used, the court determined, the stockholders failed to produce evidence sufficient to infer that the directors' failure to act was intended to further the promoter's allegedly fraudulent scheme. *Id.* at 778-79 (citing Brennan v. Midwestern United Life Ins. Co., 286 F. Supp. 702 (N.D. Ind. 1968), *aff'd*, 417 F.2d 147 (7th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970)).

82 114 S. Ct. 1439 (1994).

83 *Id.* at 1442. Chief Justice Rehnquist sided with Justice Kennedy, as did Justices O'Connor, Scalia, and Thomas. *Id.* Justice Stevens wrote a dissenting opinion, in which Justices Blackmun, Souter, and Ginsburg joined. *Id. See generally infra* notes 110-17 and accompanying text (discussing Justice Stevens' dissenting opinion).

right of action for aiding and abetting securities fraud.[84] Justice Kennedy, writing for the majority, acknowledged the consensus among the various circuits[85] regarding the availability of aiding and abetting suits as implied causes of action under § 10(b).[86]

Providing an historical backdrop for the 1933 and 1934 Acts, the Court explained that the Acts and accompanying rules contained both express and implied rights of action.[87] The Court identified the general antifraud provision, § 10(b), as the source of most suits based on implied rights of action.[88] Justice Kennedy detailed the two main issues the Court previously addressed with respect to cases involving § 10(b) and Rule 10b-5.[89] First, the Justice recounted that the Court had determined the scope of conduct

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84 *Central Bank*, 114 S. Ct. at 1455. The Court did not foreclose the possibility that secondary actors in the securities trade could be primarily liable for § 10(b) violations. *Id.* Professor Fischel, basing his statements on notions of reliance, asserted that secondary actors such as accountants or lawyers can be found liable for primary § 10(b) violations through acts of deception or intentional misrepresentation. Fischel, *supra* note 3, at 107-08.

85 *Central Bank*, 114 S. Ct. at 1444 (citations omitted). *See generally supra* note 11 (listing holdings from the circuit courts with respect to silence and inaction constituting "substantial assistance" for purposes of imposing aiding and abetting liability under § 10(b)). Justice Kennedy acknowledged the lower courts' reasoning that the absence of legislative expression mandated a flexible interpretation of § 10(b) "so as to implement its policies and purposes." *Central Bank*, 114 S. Ct. at 1444 (quoting Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673, 680-81 (N.D. Ind. 1966)). *See supra* notes 44-52 and accompanying text (detailing the *Brennan* ruling).

86 *Central Bank*, 114 S. Ct. at 1444. The Court identified two pivotal cases that limited the scope of the statutory text of § 10(b). *Id.* (citing Santa Fe Indus. v. Green, 430 U.S. 462 (1977); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976)). The two decisions, according to Justice Kennedy, cast doubt on the availability of aiding and abetting as an implied private right of action under § 10(b). *Id.* (citing Fischel, *supra*, note 3, at 80, 82). Professor Fischel contended that in light of the Court's holding in *Ernst & Ernst*, the various forms of secondary liability may no longer represent valid theories of recovery. Fischel, *supra* note 3, at 82, 87. *See also supra* notes 62-72 and accompanying text (detailing the Court's decision in *Ernst & Ernst*).

87 *Central Bank*, 114 S. Ct. at 1445. The Court characterized the federal securities laws as "two landmark pieces of . . . legislation." *Id.* While the 1933 Act dealt primarily with initial securities distributions, the Court explained, the 1934 Act regulated post-distribution trading. *Id.* (citations omitted). Together, Justice Kennedy articulated, "the Acts 'embrace a fundamental purpose . . . to substitute a philosophy of full disclosure for the philosophy of *caveat emptor*.'" *Id.* (citation omitted). *See supra* note 3 (detailing the separate purposes of the two federal securities Acts).

88 *Central Bank*, 114 S. Ct. at 1445. The majority recounted that §§ 10(b) & 14(a) provided the two sources for implied rights of action in the federal securities laws. *Id.* *See generally* James C. Lockwood, *Corporate Acquisitions and Actions Under Sections 10(b) and 14 of the Securities Exchange Act of 1934*, 23 BUS. LAW. 365 (1968) (comparing §§ 10(b) and 14 with respect to their value as methods for challenging corporate acquisitions).

89 *Central Bank*, 114 S. Ct. at 1445-46.

prohibited by § 10(b).[90] Second, in cases where a defendant violates § 10(b), the majority clarified elements of Rule 10b-5's private liability scheme.[91] Regarding the scope of conduct proscribed by § 10(b), the Court proclaimed that the text of the 1934 statute is controlling.[92]

Besides strict statutory construction of § 10(b), Justice Kennedy offered an alternative analysis that similarly foreclosed the possibility of an interpretation of Rule 10b-5 that allows private aiding and abetting suits.[93] The majority theorized that, had Congress included civil liability under § 10(b) as an express action, the provision would have been structured in the same manner as other pri-

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90 *Id.* at 1445 (citations omitted).

91 *Id.* With respect to determining the elements of an implied § 10(b) action, Justice Kennedy explained that Congress had not expressly legislated such causes of action. *Id.* at 1446. The Court, therefore, considered how Congress would have dealt with liability issues, had Rule 10b-5 been among the 1934 Act's express provisions. *Id.*

The elements of a private § 10(b) action require the determination of "whether there is a right to contribution, what the statute of limitations is, whether there is a reliance requirement, and whether there is an *in pari delicto* defense." *Id.* at 1445-46 (citations omitted). *See generally* David S. Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy,* In Pari Delicto, *Indemnification, and Contribution,* 120 U. PA. L. REV. 59 (1972) (focusing on multiple defendants in securities litigation).

92 *Central Bank,* 114 S. Ct. at 1446. The majority suggested that adhering to statutory text in identifying conduct proscribed by the federal securities laws is consistent with prior Court decisions. *Id.* at 1447 (citing Pinter v. Dahl, 486 U.S. 622, 641 (1988)). *See, e.g.,* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976); Santa Fe Indus. v. Green, 430 U.S. 462, 472 (1977) (quotation omitted); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring). In stressing the need to conform to the language of the statute, the Court quoted *Chiarella,* stating, "not every instance of financial unfairness constitutes fraudulent activity under § 10(b)." *Id.* at 1446 (quoting Chiarella v. United States, 445 U.S. 222, 232 (1980)).

93 *Central Bank,* 114 S. Ct. at 1448-49. *See supra* note 4 (providing the text of § 10(b)). Justice Kennedy postulated that when the statutory text is insufficient, the Court must infer how the issue would have been addressed by Congress, had Congress expressly legislated the right of action. *Central Bank,* 114 S. Ct. at 1446 (citation omitted).

An amicus brief submitted by the SEC, for example, proposed that the language of § 10(b)—regarding "directly or indirectly"—portends that "Congress . . . intended to reach all persons who engage, even if only indirectly, in proscribed activities connected with securities transactions." *Id.* at 1447 (citation omitted). The Court, however, identified the problem with this argument. *Id.* According to the majority, "aiding and abetting liability extends beyond persons who engage, even indirectly, in a proscribed activity; aiding and abetting liability reaches persons who do not engage in the proscribed activities at all, but who give a degree of aid to those who do." *Id.* The Court pointed to a second problem with First Interstate Bank's expansive interpretation of the "directly or indirectly" language inasmuch as there are several statutes in the securities laws that do not impose aiding and abetting liability by their use of the term "directly or indirectly." *Id.* at 1447-48 (citing 15 U.S.C. § 78g(f)(2)(C) (1988); 15 U.S.C. § 78i(b)(2)-(3)(1988); 15 U.S.C. § 78m(d)(1) (1988)) (other citations omitted).

vate express rights of action in the 1933 and 1934 Acts.[94] Because none of the other express private causes of action include liability for aiding and abetting, the majority concluded that such liability would not attach to § 10(b).[95] Additionally, Justice Kennedy asserted, allowing aiding and abetting liability under § 10(b) would circumvent the requirement that the plaintiff rely on the defendant's omission or misstatement—a requirement mandated by prior case law.[96]

The majority next addressed First Interstate's assertion that the statutory silence regarding aiding and abetting was tantamount to an implied legislative intent to impose such liability.[97] Justice Kennedy dispelled the notions of general intent[98] by pointing to

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94 *Id.* at 1448. For example, the Court noted that § 11 of the 1933 Act imposes liability on those who make false statements or omissions, but does not impose liability on those who aid and abet the violation. *Id.* at 1449. Section 11 imposes liability upon "[e]very person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable . . . ." 15 U.S.C. § 78t(a) (1988).

95 *Central Bank*, 114 S. Ct. at 1449. Justice Kennedy, suggesting that the express suits contained in the 1933 and 1934 Acts do not impose liability for aiding and abetting, stated:

> This survey of the express causes of action in the securities Acts reveals that each (like § 10(b)) specifies the conduct for which defendants may be held liable. Some of the express causes of action specify categories of defendants who may be liable; others (like § 10(b)) state only that "any person" who commits one of the prohibited acts may be held liable. The important point for present purposes, however, is that none of the express causes of action in the 1934 Act further imposes liability on one who aids or abets a violation . . . .
>
> From the fact that Congress did not attach private aiding and abetting liability to any of the express causes of action in the securities Acts, we can infer that Congress likely would not have attached aiding and abetting liability to § 10(b) had it provided a private § 10(b) cause of action.

Id. (citations omitted).

96 *Id.* at 1449-50 (citation omitted).

97 *Id.* at 1450, 1451, 1452.

98 First Interstate argued that Congress legislated with an understanding of the general principles of tort law and that aiding and abetting was well-accepted at the time of the 1934 Act. *Id.* at 1450 (citation omitted). The Court offered three possibilities for interpreting First Interstate's reliance on implied congressional intent. *Id.* at 1451. First, the Court surmised that "aiding and abetting should attach to all federal civil statutes, even laws that do not contain an explicit aiding and abetting provision." *Id.* Second, the Court proffered that Congress intended to only include aiding and abetting in § 10(b). *Id.* Finally, the Court understood that the "73d Congress intended to impose aiding and abetting liability for all of the express causes of action contained in the 1934 Act—and thus would have imposed aiding and abetting liability in § 10(b) actions had it enacted a private § 10(b) right of action." *Id.* at 1451-52. The Court dispelled all of the possible interpretations. *Id.*

Congress's statute-by-statute approach to civil liability for aiding and abetting.[99] Additionally, the Court highlighted that Congress expressly legislated secondary liability when it enacted "controlling person" liability in § 20 of the 1934 Act.[100]

Justice Kennedy next confronted the parties' competing arguments regarding post-1934 legislative developments that supported their separate interpretations of § 10(b).[101] The majority concluded that congressional interpretations of laws enacted by a prior legislative body is of little help in determining the statute's original intent.[102] Moreover, the Court asserted that congressional failure

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Justice Kennedy's opinion is consistent with *Touche Ross & Co. v. Redington*. Fischel, *supra* note 3, at 81. In *Touche Ross*, the Court characterized reliance on tort law principles to justify implied private rights of action as "misplaced, because the central inquiry is whether Congress intended to create, either expressly or by implication, a private cause of action." 442 U.S. 560, 568 (1979) (footnotes omitted). Fischel qualified reliance on tort common law, inasmuch as:

> [t]ort law, or other common law doctrines, can be relied upon to define the scope of prohibited conduct under a statute if it appears from the language, structure, and legislative history that the statutory prohibition is coextensive with a prohibition at common law. If, for example, § 10(b) expressly prohibited aiding and abetting a violation by another defendant, the scope of aiding and abetting liability at common law would be relevant in determining the scope of liability under the statute.

Id. at 93 n.81 (citation omitted).

99 *Central Bank*, 114 S. Ct. at 1451. Justice Kennedy imparted that:

> Congress has not enacted a general civil aiding and abetting statute—either for suits by the Government (when the Government sues for civil penalties or injunctive relief) or for suits by private parties. Thus, when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors.

Id. at 1450-51 (citation omitted).

100 *Id.* at 1451-52. *See supra* note 37 (containing the statutory definition of "controlling person"). *See* Sager, *supra* note 3, at 825 & n.22 (citing H.R. Rep. No. 152, 73d Cong., 1st Sess. 5 (1933) (concluding that the controlling person provisions imposed liability when control was exerted by one party over another, even absent a relationship of agency)); Ruder, *supra* note 91, at 601 (terming controlling person liability "the most obvious approach" to secondary liability contained in the security statutes).

The Court postulated that § 20 underscored the fact that Congress was capable of imposing secondary liability when it wished to do so. *Central Bank*, 114 S. Ct. at 1452 (quoting Pinter v. Dahl, 486 U.S. 622, 648 (1988)). The Court also emphasized that Congressional failure to legislate § 10(b) aiding and abetting liability, when it recognized other avenues of secondary liability, reflected "a deliberate congressional choice with which the courts should not interfere." *Id.*

101 *Id.* *See* Fischel, *supra* note 3, at 98 n.103 (discussing congressional failure to pass amendments expressly prohibiting liability for aiding and abetting § 10(b) violations).

102 *Central Bank*, 114 S. Ct. at 1452 (quoting Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 168 (1989)).

to adopt subsequent amendments precluding aiding and abetting liability cannot be conclusively construed as legislative acquiescence to judicial permissiveness of § 10(b) aiding and abetting suits because there can be numerous bases for congressional failure to amend a statute.[103] Justice Kennedy used the same reasoning to strike down Central Bank's contentions that if Congress wished to recognize aiding and abetting liability for § 10(b), Congress would have amended the 1934 Act to render it unlawful to aid and abet a securities fraud.[104]

Finally, the Court weighed the policy argument advanced by the SEC.[105] The majority declared that Central Bank's interpretation would not render a result clearly misrepresenting congressional intent.[106] Therefore, the majority decided that policy considerations will not override the Court's rigid interpretation of the statutory text.[107]

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103 *Id.* at 1453 (citations omitted). The Court also quoted Justice Frankfurter, stating that jurists "walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." *Id.* (quoting Helvering v. Hallock, 309 U.S. 106, 121 (1940)).

104 *Id.* Justice Kennedy recounted Central Bank's argument that in 1957, 1959, and 1960, certain bills were introduced that would have amended the 1934 Act to make it unlawful to aid or abet violations of § 10(b). *Id.* (citing S. 2545, 85th Cong., 1st Sess. § 20 (1957); S. 1179, 86th Cong., 1st Sess. § 22 (1959); S. 3770, 86th Cong., 2d Sess. § 20 (1960)).

105 *Id.* The central policy considerations focused on the value of allowing aiding and abetting suits under § 10(b) in terms of deterring wrongful conduct by potential aiders and abettors. *Id.* (citation omitted).

106 *Id.* at 1453-54. Justice Kennedy asserted that policy considerations are significant in a situation where "adherence to the text and structure would lead to a result 'so bizarre' that Congress could not have intended it." *Id.* at 1454 (citing Demarest v. Manspeaker, 498 U.S. 184, 191 (1991)) (other citations omitted). In *Demarest*, Chief Justice Rehnquist allowed payments of witness fees to prisoners based on the Court's interpretation of 28 U.S.C. § 1821. *Demarest*, 498 U.S. at 191. The Chief Justice stated that "[w]e do not believe that this is one of those rare cases where the application of the statute as written will produce a result 'demonstrably at odds with the intentions of its drafters.'" *Id.* at 191-92 (citation omitted).

Justice Kennedy addressed the fact that allowing § 10(b) aiding and abetting suits may not ultimately serve the Act's statutory objectives. *Central Bank*, 114 S. Ct. at 1454. The Court noted that secondary liability for aiders and abettors "exacts costs that may disserve the goals of fair dealing and efficiency in the securities markets." *Id.* *See* Pinter v. Dahl, 486 U.S. 622, 652 (1988) (stating that the rules for such liability are uncertain in "an area that demands certainty and predictability"). Additionally, the Court pointed to the burdensome costs associated with securities litigation. *Central Bank*, 114 S. Ct. at 1454. Justice Kennedy also addressed the possibility that professionals would be hesitant to advise smaller companies on business issues, for fear that the companies would not survive and the professionals would then face aiding and abetting suits brought on the basis of their advice. *Id.* (citations omitted).

107 *Central Bank*, 114 S. Ct. at 1453-54. Justice Kennedy, while finding merit with the competing policy arguments, decided that "it is far from clear that Congress in

Reversing the Fifth Circuit, the majority affirmed the district court's ruling in favor of Central Bank.[108] Because First Interstate did not allege that Central Bank committed a manipulative or deceptive act under § 10(b), and because the statutory text of § 10(b) does not prohibit aiding and abetting, the Supreme Court ruled that Central Bank did not violate the federal securities laws.[109]

Justice Stevens, dissenting, refuted the majority's strict reliance on the language of § 10(b), declaring it to be an insufficient basis for reversal of the Fifth Circuit.[110] The Justice highlighted the fact that the majority overturned the substantial body of precedent *sua sponte*.[111] Justice Stevens admonished that the Court needed

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1934 would have decided that the statutory purposes would be furthered by the imposition of private aider and abettor liability." *Id.* at 1454.

108 *Id.* at 1455. Justice Kennedy addressed the SEC's oral argument on behalf of First Interstate Bank, which suggested that if § 10(b) does not in itself authorize aiding and abetting suits, then such liability should be found in the general aiding and abetting statute for criminal conduct, 18 U.S.C. § 2. *Id.* at 1454-55 (citation omitted). Section 2 of the criminal conduct statute provides that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a) (1988). Because aiders and abettors are punishable as principal offenders under § 2, case law has imposed a requirement that to be found liable it must be shown that an aider and abettor "'shared in the criminal intent of the principal.'" Hernandez v. United States, 300 F.2d 114, 123 (1962) (quotation omitted).

In *Central Bank*, Justice Kennedy recognized that First Interstate sought to impose liability on the basis of recklessness and not intentional wrongdoing. *Central Bank*, 114 S. Ct. at 1455. Therefore, according to the Court, the allegations do not meet the standards for liability set forth under 18 U.S.C. § 2. *Id.* Further, the majority was reluctant to expand the scope of § 2, dealing with criminal conduct, to the civil § 10(b) action before the Court. *Id.* The Court identified as the natural consequence of such a statutory expansion, that the Supreme Court would be "obliged to hold that a private right of action exists for every provision of the 1934 Act, for it is a criminal violation to violate any of its provisions." *Id.* (citing 15 U.S.C. § 78ff (1988)).

109 *Id.* Although the Court affirmed the district court's granting of summary judgment, it was for a different reason. The district court relied on the fact that there was not sufficient evidence of anything other than inaction on behalf of Central Bank and therefore, minus a fiduciary duty of disclosure, there was no basis for establishing aider and abettor liability under § 10(b). *See supra* note 36 and accompanying text (discussing duties of disclosure associated with the securities trade). *See infra* note 112 (providing the holding of the *Pring* court vis à vis the duty of disclosure of trust indentures).

110 *Central Bank*, 114 S. Ct. at 1455-56 (Stevens, J., dissenting). The dissent was joined by Justices Blackmun, Souter, and Ginsburg. *Id.* at 1455 (Stevens, J., dissenting). Justice Stevens accused the majority of giving "short shrift to a long history of aider and abettor liability under § 10(b) . . . ." and additionally criticized the majority because their rationale "imperils other well established forms of secondary liability not expressly addressed in the securities laws . . . ." *Id.* at 1456 (Stevens, J., dissenting). Justice Stevens stressed that all federal circuit courts had recognized the attachment of aiding and abetting liability to § 10(b) and noted that courts espoused such liability closer to the prevailing climate of the 73rd Congress. *Id.* (citations omitted).

111 *Id.* at 1457 (Stevens, J., dissenting). *See supra* note 38 (addressing the majority's

only to decide whether an indenture trustee, absent a fiduciary duty, could be found liable for aiding and abetting based solely on recklessness, because Central Bank conceded the existence of aider and abettor liability under § 10(b).[112]

The dissenting Justice suggested that the majority's restrictive interpretation of § 10(b)'s implied rights of action could be "anachronistic," because earlier courts read statutes more broadly to conform the text to the Act's remedial purposes.[113] Justice Stevens further maintained that even if liberal statutory construction was not taken into consideration, the longstanding acceptance by federal courts[114] of aiding and abetting liability, coupled with congressional failure to legislate amendments restricting such liability, was sufficient to retain the implied right of action.[115] The dissent cautioned that the majority's decision exceeded the realm of private implied rights of action for aiding and abetting and potentially foreclosed the SEC's enforcement of such liability under § 10(b).[116] Finally, the Justice warned that the Court's decision casts serious doubt on future SEC actions and private suits for

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avoidance of what Justice Stevens characterized as the true issue before the Court in *Central Bank*).

112 *Central Bank*, 114 S. Ct. at 1457. The Trust Indenture Act of 1939 relates to the sale of debt securities and requires that securities subject to federal law must be issued under a trust indenture. BLOOMENTHAL, *supra* note 5, § 8.02, at 8-2 (citation omitted). This requirement applies to securities, such as municipal bonds, which are not subject to the registration regulations of the federal securities laws. *Id.* The court of appeals affirmed the district court's finding that Central Bank, serving as indenture trustee for the municipal issues, owed plaintiffs no duty of disclosure. First Interstate Bank v. Pring, 969 F.2d 891, 900 (10th Cir. 1992). The *Pring* court, however, determined that such a finding was not dispositive of the issue. *Id.* at 901. Absent a fiduciary obligation of disclosure, the court stipulated that Central Bank could still be held liable for aiding and abetting a § 10(b) violation. *Id.* at 900-01 (citations omitted).

113 *Central Bank*, 114 S. Ct. at 1457 (Stevens, J., dissenting) (citing Piedmont & Northern Ry. v. Interstate Commerce Comm'n, 286 U.S. 299, 311 (1932)). According to the Court in *Piedmont*, the remedial legislation of the 1933 and 1934 Acts required "a broader and more liberal interpretation than that to be drawn from mere dictionary definitions of the words employed by Congress." *Piedmont*, 286 U.S. at 311.

114 *See supra* note 11 (providing a survey of the varying approaches of the federal circuit courts with respect to aiding and abetting liability under § 10(b)).

115 *Central Bank*, 114 S. Ct. at 1457-58 (citations omitted) (Stevens, J., dissenting).

116 *Id.* at 1460 (Stevens, J., dissenting). The impact of the Court's *Central Bank* decision on SEC enforcement actions was referred to as a "bizarre result" inasmuch as the SEC can now "revoke a broker's license for aiding and abetting a Rule 10b-5 violation, but it cannot obtain an injunction against the broker for the same conduct. It can obtain a civil money penalty against the broker in an administrative proceeding, but it cannot seek a civil penalty against him in federal court." Arthur F. Mathews & W. Hardy Callcott, *Tightening Securities Laws*, 137 N.J.L.J., Aug.22, 1994 (Supp.) at 1759.

Professor Fischel argued that there should not be any difference between SEC enforcement actions and private implied rights of action with respect to the lack of secondary liability under § 10(b). Fischel, *supra* note 3, at 99. *See also* BLOOMENTHAL,

other types of secondary liability, judicially recognized but not expressly stated in the statutory text.[117]

The Court's *Central Bank* decision evidences judicial prudence in narrowing the scope of the federal securities laws.[118] *Central Bank* is uncontroversial inasmuch as the textual references to § 10(b) and Rule 10b-5 support the notion that the 1934 Congress did not intend to allow aiding and abetting suits for private investors.[119] Although the Court's decision will impact SEC enforce-

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supra note 5, § 1.01, at 1-1 (addressing SEC enforcement actions of the federal securities laws).

117 *Central Bank*, 114 S. Ct. at 1460 (Stevens, J., dissenting). *See infra* note 120 (quoting Justice Steven's dissenting view that the majority's *Central Bank* decision casts doubt on future SEC enforcement actions).

118 In general, the Supreme Court's § 10(b) decisions focused on statutory text and were reluctant to expand the scope of the antifraud provision of the 1934 Act. *See, e.g.*, Chiarella v. United States, 445 U.S. 222, 234-35 (1980) (setting aside a criminal conviction on the grounds that silence and inaction only constitutes aiding and abetting if a fiduciary duty of disclosure exists); Santa Fe Indus. v. Green, 430 U.S. 462, 477-78 (1977) (rejecting the contention that Rule 10b-5 extends to Delaware "short-form mergers" takeover bids); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 214 (1976) (refusing to include negligent conduct within the ambit of the § 10(b) liability scheme); Blue Chips Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (affirming the *Birnbaum* rule which restricts § 10(b) plaintiffs to buyers and sellers of securities); *but see* Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 12 (1971) (using liberal statutory construction to reverse a lower court dismissal of a § 10(b) corporate fraud suit). The Court's *Central Bank* decision, when viewed in conjunction with two prior Court decisions, further reflects an appreciable narrowing of available causes of action against secondary participants in securities transactions. Mathews & Callcott, *supra* note 116, at 1759 (citing O'Melveny & Myers v. FDIC, 114 S. Ct. 2048 (1994); Reves v. Ernst & Young, 113 S. Ct. 1163 (1993)).

Perhaps the best argument for limiting the scope of the federal securities laws may be found in *Blue Chips Stamps*, wherein then-Justice Rehnquist wrote of the benefits of narrow interpretations of § 10(b). *Blue Chips Stamps*, 421 U.S. at 739. In *Blue Chips Stamps*, the Court specifically dealt with the requirement that the plaintiff class in § 10(b) suits be limited to actual buyers and sellers of securities. *Id.* at 731-32. The Court recognized that many commentators viewed such a restriction as arbitrary and unreasonably preventing plaintiffs from seeking remedies for harm caused to them by § 10(b) violations. *Id.* at 738 (citation omitted). The then-Justice pointed out, however, that "litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Id.* at 739. The majority asserted that securities claims possessing minimal chance of success at trial have disproportionate settlement value in favor of plaintiffs. *Id.* at 740. Additionally, then-Justice Rehnquist noted that in the end, if the scope of litigation under § 10(b) and Rule 10b-5 is broadened, private investors will be forced to bear the costs brought on by speculators and their attorneys. *Id.* at 739 (quotation omitted).

Justice Kennedy in *Central Bank* addressed the need for certainty in § 10(b) litigation inasmuch as a lack of fixed standards will cause secondary liability defendants to abandon defenses and settle to avoid risks of expansive interpretations of § 10(b) in plaintiff's favor. *Central Bank*, 114 S. Ct. at 1454. The *Central Bank* Court also pointed to the exorbitant legal fees incurred by secondary actors for litigating and settling § 10(b) suits. *Id.* (citation omitted).

119 *Central Bank*, 114 S. Ct. at 1455. *See supra* notes 4 and 6 (providing the text of

ment actions,[120] any such adverse effect is not reason enough to disregard the § 10(b) statutory text and rely solely on an arguably improvident lower court expansion of the federal securities laws.

The apparent reason why the Court agreed to hear *Central Bank* was to resolve the conflict regarding silence and inaction in the aiding and abetting liability scheme.[121] Central Bank did not contest that they could be named as civil defendants for aiding and abetting a primary violation of § 10(b), but rather whether their silence and inaction were sufficient to impose liability under the statute.[122] Instead of clarifying the standard for § 10(b) aiding and abetting liability, however, the Supreme Court set aside years of

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§ 10(b) and Rule 10b-5). A ruling against the imposition of § 10(b) aiding and abetting liability is supported by the instances where Congress specifically authorized such liability in express statutory causes of action. *See, e.g.*, Fischel, *supra* note 3, at 98 n.103 (discussing congressional failure to pass amendments expressly prohibiting liability for aiding and abetting § 10(b) violations). Congressional declination to include express aiding and abetting liability provisions, when presented with the opportunity, clearly demonstrates that the endorsement of such secondary liability is not universally supported by the legislature. *See supra* notes 101-04 and accompanying text (discussing the argument that post-1934 legislative developments demonstrate an unwillingness on behalf of Congress to expressly impose § 10(b) aiding and abetting liability).

120 As Justice Stevens pointed out in his dissent:

> The majority leaves little doubt that the Exchange Act does not even permit the *Commission* to pursue aiders and abettors in civil enforcement actions under § 10(b) and Rule 10b-5. . . . Aiding and abetting liability has a long pedigree in civil proceedings brought by the SEC under § 10(b) and Rule 10b-5, and has become an important part of the Commission's enforcement arsenal. . . . Moreover, the majority's approach to aiding and abetting at the very least casts serious doubt, both for private and SEC actions, on *other* forms of secondary liability that, like the aiding and abetting theory, have long been recognized by the SEC and the courts but are not expressly spelled out in the securities statutes.

Central Bank, 114 S. Ct. at 1460 (footnotes omitted) (emphasis in original).

Mathews and Callcott stated that the *Central Bank* decision has already impacted SEC actions. Mathews & Callcott, *supra* note 116, at 1759. For example, courts have dismissed many cases in which the SEC sought to hold defendants liable for aiding and abetting Rule 10b-5 violations. *Id.* Professor Fischel argued that consistent standards should apply to private liability suits under § 10(b) and SEC enforcement actions with respect to the imposition of secondary liability. Fischel, *supra* note 3, at 99. Therefore, the Court's *Central Bank* decision should, according to Fischel, curtail the SEC's right to bring aiding and abetting suits as well. *See id.* (advocating equal standards for the SEC and private litigants under § 10(b)).

121 Mathews & Callcott, *supra* note 116, at 1758. Mathews and Callcott related that when the Court asked the parties to include material in their briefs on the viability of aiding and abetting actions under § 10(b), practitioners believed that the Court was going to dispose of the question as a threshold issue. *Id.* at 1761. The majority, instead, focused solely on this question and put an end to aiding and abetting suits under § 10(b). *Id.*

122 *Central Bank*, 114 S. Ct. at 1457.

circuit precedent and put a clear end to private aiding and abetting suits under § 10(b).[123]

Defrauded private investors may have one potential avenue for litigation foreclosed as a result of the Court's *Central Bank* decision. If such a situation is unacceptable, however, the remedy lies in the hands of Congress and not in the hands of the courts. The United States Supreme Court, in squarely confronting the aiding and abetting question, accomplished the goal of resolving the split among the jurisdictions—but in a more definitive manner than expected.[124] The Court reaffirmed that the securities laws must be construed on the basis of clear legislative intent. If the public does not believe that the original purpose of the 1934 Act is served by the Court's *Central Bank* holding, legislators may enact a statute that more definitively grants private investors the right to bring aiding and abetting suits under § 10(b) of the 1934 Exchange Act.

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123 *See supra* note 11 (providing a survey of circuit courts allowing aiding and abetting suits under § 10(b)). *Kardon v. National Gypsum Co.*, the first court to establish private rights of action under § 10(b), did so with the recognition that such suits were not expressly authorized by the statutory text. 69 F. Supp. 512, 514 (E.D. Pa. 1946). *See supra* note 10 (discussing *Kardon*, with respect to the case's reliance on common law tort principles). Professor Fischel claimed that such an unwillingness to conform the scope of § 10(b) liability to express statutory provisions is improper. Fischel, *supra* note 3, at 111. Fischel's contention that many implied rights cease to exist when courts rely on strict statutory construction instead of common law tort principals, is supported by the Court's decision in *Central Bank*. *See Id.* at 82. When, in fact, the Court focused on the text of § 10(b), the Court foreclosed aiding and abetting as an implied private right of action. *See Central Bank*, 114 S. Ct. at 1455.

124 *See supra* note 40 (concerning the Supreme Court's reservation of judgment in Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), and Herman and MacLean v. Huddleston, 459 U.S. 375 (1983), on the issue of private § 10(b) aiding and abetting suits). Although the Court's decision surprised some, others predicted that the Court would, when presented with the opportunity, eliminate aiding and abetting as an implied right of action under § 10(b). *Central Bank*, 114 S. Ct. at 1444. Recent decisions by the Court, according to Justice Kennedy, caused many to question whether aiding and abetting was still available as an implied right of action under § 10(b). *Id.* (citing Akin v. Q-L Invs., Inc., 959 F.2d 521, 525 (5th Cir. 1992)) (other citations omitted); SEC v. Seaboard Corp., 677 F.2d 1301, 1311 n.12 (9th Cir. 1982); Benoay v. Decker, 517 F. Supp. 490, 495 (E.D. Mich. 1981), *aff'd*, 735 F.2d 1363 (6th Cir. 1984); Fischel, *supra* note 3, at 82). The Supreme Court in *Central Bank* answered that a civil § 10(b) action for aiding and abetting is not available for defrauded securities plaintiffs. *Id.* at 1455. *See supra* note 120 (addressing *Central Bank*'s impact on SEC enforcement actions).