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Private Plaintiffs May Not Maintain Aiding and Abetting Suits under Securities Exchange Act Section 10(b) and Securities and Exchange Commission Rule 10b-5.

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SECURITIES—Fraud—Private Plaintiffs May Not Maintain Aiding and Abetting Suits Under Securities Exchange Act Section 10(b) and Securities and Exchange Commission Rule 10b-5.

Central Bank v. First Interstate Bank,
___ U.S. ___, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994).

> When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn.[1]

In 1986 and 1988, Central Bank of Denver served as indenture trustee for bond issues sold by the Colorado Springs-Stetson Hills Public Building Authority (the Authority).[2] In January 1988, Central Bank received a requisite updated appraisal of land values (the Hastings appraisal)[3] from the developer covering both the 1986 and 1988 bond issues.[4] Soon thereafter, Central Bank became aware of concerns that the Hastings appraisal was inaccurate.[5] As a result, Central Bank's in-house appraiser con-

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1. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975) (opinion by then-Justice Rehnquist).

2. Central Bank v. First Interstate Bank, ___ U.S. ___, ___, 114 S. Ct. 1439, 1443, 128 L. Ed. 2d 119, 126 (1994). The Authority issued the bonds to finance public improvements on a local planned residential and commercial development. *Id.* The bond issues, of which First Interstate Bank purchased $2.1 million, totalled $26 million. *Id.* The bond covenants were secured by landowner assessment liens. *Id.* The covenants mandated that the Authority cover the liens at all times with land having an appraised value of at least 160% of the outstanding principal and interest. *Id.*

3. *Id.* at ___, 114 S. Ct. at 1443, 128 L. Ed. 2d at 126. Joseph Hastings, working for the developer, conducted the original appraisal of the property securing the 1986 bonds. First Interstate Bank v. Pring, 969 F.2d 891, 894 (10th Cir. 1992), *rev'd*, Central Bank v. First Interstate Bank, ___ U.S. ___, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994).

4. *Central Bank*, ___ U.S. at ___, 114 S. Ct. at 1443, 128 L. Ed. 2d at 126. The bond covenants required the Stetson Hills developer, AmWest Development Corporation, to give Central Bank an annual report evidencing the developer's compliance with the 160% test. *Id.* In concluding that the 160% test was satisfied, Hastings based his report on the belief that the 1988 land values for the property in question were virtually unchanged from those reported in 1986. *Id.*

5. *Id.* at ___, 114 S. Ct. at 1443, 128 L. Ed. 2d at 126. The senior underwriter of the 1986 bonds sent Central Bank a letter expressing concern that the developer had not complied with the 160% test. *Id.* The letter also noted decreasing property values and increased foreclosure sales in Colorado Springs. *Id.* Finally, the letter noted that Central Bank was then operating on a 16-month-old appraisal. *Id.*

ducted a review of the Hastings appraisal.[6] Concluding that the Hastings appraisal appeared overly optimistic,[7] Central Bank's appraiser encouraged the bank to obtain an independent review of the Hastings appraisal regarding the 1988 bonds.[8] After several communications with the developer[9], Central Bank agreed to defer the independent review until December, 1988[10]—six months after the closing on the bond issue.[11] However, prior to completion of the independent review, the Authority defaulted on the 1988 bonds.[12]

First Interstate Bank brought suit against Central Bank in the United States District Court for the District of Colorado.[13] The complaint specifically alleged that Central Bank was secondarily liable under Section 10(b) of the Securities Exchange Act of 1934[14] for its conduct in aiding

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6. *Id.*

7. *Id.* Central Bank's in-house appraiser, Cheryl Crandall, calculated that the land values had fallen to 131% of the outstanding principal and interest. Brief for Petitioner at 3–4, Central Bank v. First Interstate Bank, ___ U.S. ___, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994) (No. 92-854). Moreover, both Crandall and the 1986 senior underwriter expressed concern regarding the methodology Hastings employed. *See id.* (noting that Hastings used comparable sales statistics from 1985 and 1986 despite several foreclosure sales in 1987).

8. *Central Bank*, ___ U.S. at ___, 114 S. Ct. at 1443, 128 L. Ed. 2d at 126.

9. *Id.* In a letter to the developer, Central Bank explained its reasons for requiring an independent review of the appraisal: (1) the age of the comparable sales data rendered the appraisal of questionable use as a valid basis for valuation and raised questions regarding why more recent sales were not utilized for this purpose; (2) Hastings confirmed that his discounting methods did not consider a bulk sale in a forced liquidation context, as was specifically required by the indenture; and (3) based on Central Bank's review and investigation, the values determined by the Hastings appraisal appeared to be unjustifiably optimistic, given the current economic conditions in the residential and commercial real estate markets in the Colorado Springs area. Letter from Central Bank, Indentured Bond Trustee, to AmWest L.P., Developer of Stetson Hills Residential Community (Mar. 22, 1988), *quoted in* Petitioner's Brief at 4-6, *Central Bank* (No. 92-854).

10. *Central Bank*, ___ U.S. at ___, 114 S. Ct. at 1443, 128 L. Ed. 2d at 126. In return for Central Bank's forbearance, AmWest pledged another $2 million in property as security for the 1986 bonds. *First Interstate Bank*, 969 F.2d at 895 n.7. The pledge covered the 1986 bonds, but the developer allocated no additional property to cover the 1988 bonds. Brief for the Securities and Exchange Commission as Amicus Curiae in Support of Respondents at 2–3, Central Bank v. First Interstate Bank, ___ U.S. ___, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994) (No. 92-854).

11. *Central Bank*, ___ U.S. at ___, 114 S. Ct. at 1443, 128 L. Ed. 2d at 126.

12. *Id.*

13. *Id.*

14. Section 10(b) provides:

> 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—
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> . . . .
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> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipu-

and abetting the fraud.[15] The district court granted summary judgment in favor of Central Bank.[16] In reversing the district court judgment, the United States Court of Appeals for the Tenth Circuit agreed with the lower court's conclusion that Central Bank had no duty to disclose, but determined that recklessness fulfills the scienter requirement for aiding and abetting even absent a duty to disclose.[17] The United States Supreme Court granted certiorari to determine whether recklessness satisfies the scienter requirement for aiding and abetting when the defendant has no duty to disclose.[18] However, the Court instructed the parties to first brief the issue of whether a private right of action exists for aiding and abetting a violation of Section 10(b) and Securities and Exchange Commission Rule 10b-5[19] under the Securities Exchange Act of 1934.[20]

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lative or deceptive device or contrivance in contravention of such rules and 22 regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78(j) (1988).

15. *Central Bank*, ___ U.S. at ___ , 114 S. Ct. at 1443, 128 L. Ed. 2d at 126. First Interstate also alleged primary liability against the Authority, the 1988 underwriter, a junior underwriter, and an AmWest director for violations of § 10(b) of the Securities Exchange Act of 1934. *Id.*

16. *Id.* The district court concluded that First Interstate failed to prove that Central Bank had a duty to disclose. *First Interstate Bank*, 969 F.2d at 900. Consequently, the court held that, without a duty to disclose, recklessness does not meet the scienter element in aider and abettor liability. *Id.* The court granted the summary judgment motion on the ground that First Interstate failed to raise a genuine issue of material fact with respect to the scienter requirement. *Id.*

17. *Central Bank*, ___ U.S. at ___ , 114 S. Ct. at 1443, 128 L. Ed. 2d at 126. The Tenth Circuit held that Central Bank had no duty to disclose; however, the court found that reckless action—as opposed to mere silence or inaction—which assists a fraud may fulfill the scienter element for aiding and abetting even without a duty to disclose. *First Interstate Bank*, 969 F.2d at 903. Concluding that Central Bank exhibited more than mere inaction by "affirmatively agreeing to delay the independent review of the 1988 appraisal," the court held that Central Bank's acquiescence to the delay could support a finding of recklessness. *Id.* The court remanded the case on that issue. *Id.* at 903–05; *see also* Rolf v. Blyth, Eatman, Dillon & Co., 570 F.2d 38, 47 (2d Cir.) (finding that recklessness of aider and abettor owing fiduciary duty to defrauded party satisfied § 10(b) scienter requirement), *cert. denied*, 439 U.S. 1039 (1978).

18. *Central Bank*, ___ U.S. at ___ , 114 S. Ct. at 1439, 128 L. Ed. 2d at 119.

19. 17 C.F.R. § 240.10b-5 (1994). In 1942, the Securities and Exchange Commission (SEC), pursuant to the authority granted by Congress in § 10(b), promulgated Rule 10b-5. Rule 10b-5 provides:

> 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,
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> (a) To employ any device, scheme, or artifice to defraud,
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> (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,

HELD—*Reversed.*[21] Private plaintiffs may not maintain aiding and abetting suits under Securities Exchange Act Section 10(b) and Security and Exchange Commission Rule 10b-5.[22]

The federal legislative scheme for securities regulation consists of seven acts.[23] Congress enacted the first two federal securities laws in 1933 and 1934.[24] In adopting the Securities Act of 1933 (the 1933 Act) and the Securities Exchange Act of 1934 (the 1934 Act), Congress intended to restore faith in the nation's economy by preventing the circumstances that led to the 1929 stock market crash.[25] Although little evidence exists

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(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit on any person, in connection with the purchase or sale of any security.

Id.

20. *Central Bank*, ___ U.S. at ___ , 114 S. Ct. at 1457, 128 L. Ed. 2d at 143 (Stevens, J., dissenting).

21. *Id.* at ___, 114 S. Ct. at 1455, 128 L. Ed. 2d at 141.

22. *Id.*

23. *See* LOUIS LOSS, FUNDAMENTALS OF SECURITIES REGULATION 38-54 (1983) (chronicling codification of securities laws in United States). The federal legislative provisions governing securities are: Securities Act of 1933, § 1, scheds. A, B, 15 U.S.C. §§ 77a-77aa (1988); Trust Indenture Act of 1939, §§ 301-328, 15 U.S.C. §§ 77aaa-77bbbb (1988); Securities Exchange Act of 1934, §§ 1-35, 15 U.S.C. §§ 78a-78kk (1988); Securities Investor Protection Act of 1970, §§ 1(a)-12, 15 U.S.C. § 78aaa-78*lll* (1988); Public Utility Holding Company Act of 1935, §§ 1-33, 15 U.S.C. §§ 79 to 96-z (1988); Investment Company Act of 1940, §§ 1-65, 15 U.S.C. §§ 80a-1 to 80a-64 (1988); Investment Advisers Act of 1940, §§ 201-222, 15 U.S.C. §§ 80b-1 to 80b-21 (1988).

24. Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (1988); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78kk (1988); *see* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976) (tracing history of 1933 and 1934 Acts). Federal courts have original jurisdiction concerning most of the other federal securities laws. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 199 (Kermit L. Hall ed., 1992). In 1932 and 1933, Justice William Douglas, then a professor at Yale Law School, and Professor George E. Bates, of the Harvard Business School, expressed views largely adopted in the 1933 and 1934 Acts. *See* Richard W. Jennings, *Mr. Justice Douglas: His Influence on Corporate and Securities Regulation*, 73 YALE L.J. 920, 929 (1964) (explaining that Justice Douglas and Professor Bates wrote articles presenting their beliefs on various securities issues which courts later employed in interpreting 1933 and 1934 Acts).

25. *Hochfelder*, 425 U.S. at 194; *see* SENATE COMM. ON BANKING AND CURRENCY, FEDERAL SECURITIES EXCHANGE ACT OF 1934, S. REP. NO. 792, 73d Cong., 2d Sess. 4-6, 10-11 (1934) (describing purposes of 1934 Act as protection of investors through: (1) creation of corporate reporting requirements; (2) creation of remedies for stock fraud and manipulation; and (3) regulation of over-the-counter markets), *reprinted in* 1 FEDERAL SECURITIES LAWS: LEGISLATIVE HISTORY 1932-1982 at 708, 711-13, 717-18 (1983); CLARENCE F. LEA & SCHUYLER MERRITT, FEDERAL SUPERVISION OF TRAFFIC IN INVESTMENT SECURITIES IN INTERSTATE COMMERCE, H.R. REP. NO. 85, 73d Cong., 1st Sess. 2 (1933) (discussing purposes of 1933 Act as protection of investors as well as promotion of standards of good faith and fair dealing), *reprinted in* 1 FEDERAL SECURITIES LAWS: LEGISLATIVE HISTORY 1932-1982 at 138, 139 (1983); *see also* LOUIS LOSS, FUNDAMENTALS OF

illustrating the exact legislative intent behind the 1933 and 1934 Acts, the general view holds that Congress's overriding goals included maintaining the integrity of the stock market and protecting investors by mandating (1) equal access to information and bargaining power, (2) full disclosure, and (3) effective enforcement.[26] Congress specifically designed many of the Acts' provisions to prevent fraud; however, not all of the provisions expressly conferred private rights of action to parties injured by security fraud.[27]

SECURITIES REGULATION 39 (1983) (listing various themes of 1934 Act, including prevention of fraud and manipulation); Carlos J. Cuevas, *The Misappropriation Theory and Rule 10b-5: Deadlock in the Supreme Court*, 13 J. CORP. L. 793, 795 (1988) (calling 1929 stock market crash "catalyst" for creation of federal securities laws).

26. *Hochfelder*, 425 U.S. at 194-95; MICHAEL J. KAUFMAN, SECURITIES LITIGATION: DAMAGES § 5.07, at 27 (1989 & Supp. 1993); *see* 78 CONG. REC. H7862 (1934) (statement of Rep. Lea) (asserting that "[t]his measure . . . goes a good deal further than the regulation of stock exchanges. . . . It proposes the protection of the investor against fraud, to give more integrity to securities listed on the exchange"), *reprinted in* 1 FEDERAL SECURITIES LAWS: LEGISLATIVE HISTORY 1932-1982 at 823, 853 (1983). The 1934 Act's preamble specifically states that the Act is designed to prevent inequitable and unfair practices in the securities markets. SECURITIES EXCHANGE ACT OF 1934, 15 U.S.C. § 78b (1988). In addition, Congress openly discussed the necessity of regaining the trust of investors lost during the market crash. COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, SECURITIES EXCHANGE BILL OF 1934, H.R. REP. NO. 1383, 73d Cong., 2d Sess. 2-3 (1934), *reprinted in* 1 FEDERAL SECURITIES LAWS: LEGISLATIVE HISTORY 1933-1983 at 794, 795–96 (1983). Furthermore, upon release of Rule 10b-5, the SEC stated that "the new rule closes a loophole in the protections against fraud administered by the Commission by prohibiting individuals or companies, not just brokers and dealers, from engaging in fraud in the purchase of securities." Securities Exchange Act of 1934, Exchange Act Release No. 3230 (May 21, 1942), *available in* LEXIS, FedSec Library, Secrel File.

27. *See, e.g.*, *Hochfelder*, 425 U.S. at 195 (alleging that Congress believed successful regulation of securities trading could not be realized under rigid statutory program); Kardon v. National Gypsum, 73 F. Supp. 798, 800 (E.D. Pa. 1947) (recognizing implied private right of action under § 10(b)); David S. Ruder, *The Future of Aiding and Abetting and Rule 10b-5 After* Central Bank of Denver, 49 BUS. LAW. 1479, 1480 (1994) (noting that, although some provisions in 1933 and 1934 Acts confer express private rights of action, § 10(b) of 1934 Act does not); *see also* Securities Act of 1933, §§ 8, 19, 20, 15 U.S.C. § 77h, s, t (1988) (providing specific enforcement powers to SEC, but failing to provide for private rights of action); Securities Exchange Act of 1934, §§ 9, 19, 21, 15 U.S.C. §§ 78i, s, u (1988) (conferring specific enforcement rights to SEC, but containing no express mention of rights for private plaintiffs). In discussing federal securities law, "a private right of action means that a private, nongovernmental party can file a lawsuit alleging violations" of any provisions of the 1933 or 1934 Acts. Matthew J. Barrett, *Does SEC Rule 10b-5 Provide an Implied Private Right of Action for Aiding and Abetting Securities Fraud?*, ABA, PREVIEW OF UNITED STATES SUPREME COURT CASES 109 (Nov. 29, 1993), *available in* LEXIS, Aba Library, Pre-vu File.

Congress and the courts view Section 10(b) of the 1934 Act as a "catch-all antifraud provision"[28] that makes the use of "any manipulative or deceptive device or contrivance" in contravention of the provision a violation of Securities and Exchange Commission (SEC) rules if such acts occur during the purchase or sale of securities.[29] Pursuant to the 1934 Act, the SEC promulgated Rule 10b-5 to codify the prohibitions espoused in Section 10(b).[30] Rule 10b-5 is substantially the same as Section 10(b).[31] However, neither Section 10(b) nor Rule 10b-5 contain language

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28. Herman & MacLean v. Huddleston, 459 U.S. 375, 382 (1983); *see, e.g.*, Aaron v. SEC, 446 U.S. 680, 690 (1980) (describing § 10(b) as all-encompassing manipulative fraud provision); Chiarella v. United States, 445 U.S. 222, 234-35 (1980) (calling § 10(b) "catchall provision"); Douglas E. Abrams, *The Scope of Liability Under Section 12 of the Securities Act of 1933: "Participation" and the Pertinent Legislative Materials*, 15 FORDHAM URB. L.J. 877, 898 (1987) (noting broad scope of § 10(b)).

29. Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78(j) (1988); *see* Matthew J. Barrett, *Does SEC Rule 10b-5 Provide an Implied Private Right of Action for Aiding and Abetting Securities Fraud?*, ABA PREVIEW OF UNITED STATES SUPREME COURT CASES 109 (Nov. 29, 1993) (describing workings of § 10(b) and Rule 10b-5), *available in* LEXIS, Aba Library, Pre-vu File. *See generally* Holmes v. Securities Investor Protection Corp., 112 S. Ct. 1311, 1316–22 (1992) (determining that Securities Investor Protection Corporation did not have right to recover under Racketeer Influenced and Corrupt Organizations Act's treble damage provision because alleged § 10(b) manipulation was too remote); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24–25 (1991) (holding that statutory claims, including those asserted under § 10(b), may be subject of arbitration agreement); *In re* Glenfed, 11 F.3d 843, 847 (9th Cir. 1993) (finding that Rule 10b-5 complaints must be pleaded with particularity).

30. *E.g.*, Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78(j) (1988); 17 C.F.R. § 240.10b-5 (1994); Securities Exchange Act of 1934, Exchange Act Release No. 3230 (May 21, 1942), *available in* LEXIS, Fedsec Library, Secrel File; *see* Basic Inc. v. Levinson, 485 U.S. 224, 230 (1988) (basing decision on intent of Rule 10b-5, which Court said SEC adopted pursuant to § 10(b) of 1934 Act); Carlos J. Cuevas, *The Misappropriation Theory and Rule 10b-5: Deadlock in the Supreme Court*, 13 J. CORP. L. 793, 796 (1988) (noting that SEC created Rule 10b-5 so that both purchasers and sellers could be liable for using manipulative or deceptive devices in connection with sale or purchase of securities); *see also* Sally T. Gilmore & William H. McBride, *Liability of Financial Institutions for Aiding and Abetting Violations of Securities Laws*, 42 WASH. & LEE L. REV. 811, 827 (1985) (repeating that SEC promulgated Rule 10b-5 under § 10(b) of 1934 Act). *See generally* 2 THOMAS L. HAZEN, THE LAW OF SECURITIES REGULATION § 13.2, at 59-66 (2d ed. 1990 & Supp. 1994) (exploring development of Rule 10b-5 under § 10(b)).

31. *Compare* Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78(j) (1988) (prohibiting use of manipulative devices in connection with sale or purchase of securities) *with* 17 C.F.R. § 240.10b-5 (1994) (delineating manipulative and deceptive acts that violate rule). As noted earlier, § 10(b) provides in pertinent part:

> 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,

expressly providing for private rights of action against violators.[32] Despite this omission, the United States Supreme Court and the lower federal courts have consistently held that Section 10(b) implies a private right of action.[33] Similarly, neither Section 10(b) nor Rule 10b-5 contain

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. . . .

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange . . . any manipulative or deceptive device . . .

15 U.S.C. § 78(j) (1988). Similarly, Rule 10b-5 reads in relevant part:

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

(c) To engage in any act, practice, or course of business which operates . . . 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 (1994).

32. *Aaron*, 446 U.S. at 696; *accord* Merrill Lynch v. Curran, 456 U.S. 353, 395 (1982) (noting lack of express language, but adopting well-established implied private right of action); *see* David S. Ruder, *The Future of Aiding and Abetting and Rule 10b-5 After* Central Bank of Denver, 49 BUS. LAW. 1479, 1480 (1994) (explaining that § 10(b) does not expressly provide for private causes of action); Linda Greenhouse, *High Court Ruling Sharply Curbs Suits on Securities Fraud*, N.Y. TIMES, Apr. 20, 1994, at A1 (explaining that § 10(b) does not expressly provide for aiding and abetting liability).

33. *See Huddleston*, 459 U.S. at 380 n.10 (announcing that implied private right of action under § 10(b) "is simply beyond peradventure"). The first case to establish the implied right to private action under § 10(b) was *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946). In that case, the issue of a private right of action pursuant to § 10(b) arose under an analysis of the federal court's personal jurisdiction. *Kardon*, 69 F. Supp. at 512–13. The court relied upon § 286 of the Restatement of Torts and applied its maxim *ubi jus ibi remedium*—"where there is a right there is a remedy"—to conclude that the right existed through implication. *Id.* at 513-14; *see* RESTATEMENT (SECOND) OF TORTS § 286 (1977) (describing when standard of conduct defined by legislation will be adopted). The court's reliance on § 286 indicates that it focused on the issue of whether § 10(b)'s language evidenced congressional intent to "wipe out a liability which, normally, by virtue of basic principles of tort law, accompanies the doing of the prohibited act." *Id.* at 514. Ultimately, the court was unwilling to infer such intent from congressional silence since the general intent of the 1934 Act was to protect investors. *Id.*; *see, e.g.*, Affiliated Ute Citizens v. United States, 406 U.S. 128, 150-54 (1972) (refusing to read Rule 10b-5 restrictively so as to preclude implied private cause of action); Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 12 (1971) (advocating broad reading of statutes to effectuate their remedial purposes). The Supreme Court, validating the judicially implied private cause of action under § 10(b), said that its decision to do so was consistent with its earlier recognition that "private enforcement of Commission rules may '[provide] a necessary supplement to Commission action.'" Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975) (quoting J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964)). The lower federal courts' creation of the implied private action for aiding and abetting allows investors to seek compensation from various business entities and professionals providing services in connection with fraudulent securities transactions. Matthew J. Barrett, *Does SEC Rule 10b-5 Provide*

express language establishing a private right of action against parties who may be secondarily liable for aiding and abetting.[34] Nevertheless, the lower federal courts have unanimously adopted the implied private cause of action for aiding and abetting securities fraud in violation of Section 10(b) and Rule 10b-5.[35]

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an Implied Private Right of Action for Aiding and Abetting Securities Fraud?, ABA PREVIEW OF UNITED STATES SUPREME COURT CASES 109 (Nov. 29, 1993), *available in* LEXIS, Aba Library, Pre-vu File. Lower federal courts have determined that accountants, lawyers, appraisers, geologists, engineers, actuaries, banks, and rating agencies all fall under the aiding and abetting liability umbrella. *Id.* Moreover, plaintiffs, utilizing class-action suits, have taken advantage of the judicially created private action for aiding and abetting to claim enormous damages—often termed "deep-pocket" litigation. Harvey L. Pitt, *The Demise of Implied Aiding and Abetting Liability*, 211 N.Y. L.J. 1, 1 (1994). The threat of deep-pocket litigation against secondary parties allegedly has caused secondary defendants to routinely settle large class-action suits for huge sums because of the fear that they would otherwise be held liable for the entire amount claimed. *Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 2d Sess. (1994) (statement of David S. Ruder, Professor of Law, Northwestern University School of Law), *available in* LEXIS, Legis Library, Cngtst File; *see also* Dennis J. Block & Jonathan M. Hoff, *Liability for Aiding, Abetting Securities Fraud*, 210 N.Y. L.J. 5, 5 (1993) (calling aiding and abetting liability "the hook by which deep-pocket defendants . . . have been brought into securities fraud cases").

34. HAROLD S. BLOOMENTHAL, SECURITIES LAW HANDBOOK § 15.01, at 15-38 (1994). *See generally* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13 (1981) (making congressional intent alone sufficient to establish implied private right); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 15 (1980) (explaining that congressional intent is paramount consideration in determining whether private right of action exists); Maine v. Thiboutot, 448 U.S. 1, 9-11 (1980) (relying on legislative history to establish congressional intent to create federal right).

35. *Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 2d Sess. (1994) (statement of David S. Ruder, Professor of Law, Northwestern University School of Law), *available in* LEXIS, Legis Library, Cngtst File. The first case to expressly recognize the implied private cause of action against parties deemed to be aiders and abettors was *Brennan v. Midwestern United Life Insurance Co.*, 259 F. Supp. 673 (N.D. Ind. 1966), *aff'd*, 417 F.2d 147 (7th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970). The *Brennan* court used tort theories taken from the Restatement (Second) of Torts § 876. *Id.* at 708. The court also looked to the 1934 Act's broad intent and remedial nature to analyze the securities law doctrine of aiding and abetting. *Id.* at 678. In so doing, the court rejected the theory that Congress excluded § 10(b) actions for aiding and abetting activities by not expressly providing for them when it specifically granted such actions in other sections of both the 1933 and 1934 Acts. *Id.* at 680. *But see, e.g.*, Akin v. Q-L Invs., Inc., 959 F.2d 521, 525 (5th Cir. 1992) (recognizing argument that § 10(b) does not encompass aider and abettor liability); Congregation of the Passion v. Kidder Peabody & Co., 800 F.2d 177, 183 (7th Cir. 1986) (raising question regarding existence of aiding and abetting liability, but nevertheless determining that it was viable cause of action); Little v. Valley Nat'l Bank, 650 F.2d 218, 220 n.3 (9th Cir. 1981) (noting doubt regarding existence of aiding and abetting liability under federal securities laws); Benoay v. Decker, 517 F. Supp. 490, 495 (E.D. Mich. 1981) (predicting that aiding and abetting actions would not be option in future based on Supreme Court's suggestions in *Hochfelder*),

Secondary liability is defined as liability a person acquires pursuant to another's wrongdoing.[36] Secondary parties who directly or indirectly assist a primary wrongdoer in violating the law are jointly and severally liable for any resulting harm.[37] Secondary liability has roots in criminal

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aff'd, 735 F.2d 1363 (6th Cir. 1984). *See generally* Alan R. Bromberg & Lewis D. Lowenfels, *Aiding and Abetting Securities Fraud: A Critical Examination*, 52 ALB. L. REV. 637, 650–51 (1988) (enumerating factors that Supreme Court often considers when determining whether implied private action exists under securities provision).

36. 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. 597, 600 (1972); *see* Seiffer v. Topsy's Int'l, Inc., 487 F. Supp. 653, 667 (D. Kan. 1980) (agreeing with Professor Ruder's definition of secondary liability); Brief for Petitioner at 25, Central Bank v. First Interstate Bank, ___ U.S. ___, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994) (No. 92-854) (quoting Professor Ruder's definition of secondary liability in securities law); *see also* Elizabeth Sager, Comment, *The Recognition of Aiding and Abetting in the Federal Securities Laws*, 23 HOUS. L. REV. 821, 821 n.3 (1986) (defining secondary liability). In other words, the primary violator commits the main act described in the statute, and the secondary violator assists the primary violator or incurs liability pursuant to a relationship with the primary violator. 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, 318 (1989). However, as will be discussed later in this Casenote, the distinction between primary and secondary liability is not altogether clear in the securities fraud context. *See Hearings Concerning the* Central Bank of Denver *Decision Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 2d Sess. (1994) (statement of Donald Langevoort, Professor of Law, Vanderbilt Law School) (explaining that few courts have discussed the distinction between primary and secondary liability and, therefore, recharacterization of aiders and abettors as primary wrongdoers may be viable enforcement alternative after *Central Bank*), *available in* LEXIS, Legis Library, Cngtst File; *infra* notes 117-124 and accompanying text.

37. White v. Moran, 134 Ill. App. 480, 491-92 (1907); Virtue v. Creamery Package Mfg. Co., 142 N.W. 930, 939 (Minn. 1913); *see* 1 THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT § 85, at 273 (4th ed. 1932) (declaring that "[a]ll who actively participate in any manner in the commission of a tort, or who command, direct, advise, encourage, aid or abet its commission are jointly and severally liable therefore"); 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, 321 (1989) (explaining roots of joint and several liability for aiders and abettors). *See generally* 74 AM. JUR. 2D *Torts* § 66 (2d ed. 1974) (stating that "in order to be a 'participant' in a tortious act, one need not be the person who *actually commits such act*; one who commands, directs, advises, encourages, procures, instigates, promotes, controls, aids, or abets a wrongful act by another has been regarded as being as responsible as the one who commits the act") (emphasis added). Federal securities laws allow for compensatory damages only; multiple, punitive, or exemplary damages are not permissible. *Hearings on H.R. 417 Before the Subcomm. on Telecommunications and Finance Securities Litigation of the House Comm. on Energy*, 103d Cong., 2d Sess. (1994) (statement of Arthur R. Miller, Professor of Law, Harvard Law School), *available in* LEXIS, Legis Library, Cngtst File. Professor Miller opined that joint and several liability represents a public policy stance

law,[38] the common law of torts,[39] and the common law of agency.[40] In particular, the secondary liability theory of aiding and abetting may be

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which dictates that it is better for *any* guilty party to bear the burden of noncompensation than to make the innocent party bear the burden. *Id.* (emphasis added). Professor Miller further stated that "[e]liminating joint and several liability would be a sea of change in the compensatory purpose of private securities actions and would weaken their effectiveness." *Id.*

38. *See, e.g.*, Standefer v. United States, 447 U.S. 10, 15 (1980) (explaining intricacies of common-law concept of accessories to crime, including aiders and abettors); United States v. Parekh, 926 F.2d 402, 408 n.11 (5th Cir. 1991) (noting well-established rule that criminal accomplices may be liable despite acquittal of primary wrongdoer); United States v. Edmond, 924 F.2d 261, 264 (D.C. Cir.) (discussing early common law of aiding and abetting relating to criminal matters), *cert. denied*, 112 S. Ct. 125 (1991); 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, 318–19 & n.32 (1989) (explaining that secondary liability has roots in criminal law including conspiracy and party theories); *cf.* 18 U.S.C. §§ 2–3 (1982 & Supp. 1994) (attaching criminal liability to aiders and abettors); TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 1994) (mandating that party is liable for aiding another's criminal offense). *See generally* GERALD S. REAMEY, CRIMINAL OFFENSES AND DEFENSES IN TEXAS 349-53 (1993) (discussing basics of criminal parties and attendant liability).

39. 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. 597, 600 (1972). Several courts have utilized the Restatement (Second) of Torts § 876 to create secondary liability for defendants. *Id.* at 620; *see* RESTATEMENT (SECOND) OF TORTS § 876 (1977) (describing liability of persons acting in concert). Generally, courts apply § 876 to physical torts; however, courts have consistently applied aiding and abetting liability to the nonphysical realm of § 10(b) securities fraud. *See* 4 ALAN R. BROMBERG & LEWIS D. LOWENFELS, SECURITIES FRAUD & COMMODITIES FRAUD § 8.5, at 8-15 (1989) (noting that "apart from 10b-5 cases, Restatement (Second) § 876 has been applied mainly to physical torts"). *Brennan v. Midwestern United Life Insurance Co.* was the first case to employ the § 876 tort theory of aiding and abetting as applied to a § 10(b) and Rule 10b-5 violation. *Brennan*, 259 F. Supp. at 680. Thereafter, the majority of lower federal courts adopted *Brennan*. *See, e.g.*, SEC v. Coffey, 493 F.2d 1304, 1316 (6th Cir. 1974) (noting well-established tenet that § 876 aiding and abetting liability applies to securities law violations), *cert. denied*, 420 U.S. 908 (1975); Odette v. Shearson, Hammill & Co., 394 F. Supp. 946, 960 (S.D.N.Y. 1975) (adopting § 876 definition of aiding and abetting).

40. *Coffey*, 493 F.2d at 1316 n.27; *see* Johns Hopkins Univ. v. Hutton, 297 F. Supp. 1165, 1212-13 (D. Md. 1968) (holding broker liable for material misstatements and omissions of employee under "controlling person" provision in § 15 of 1933 Act), *aff'd in part, rev'd in part, and remanded*, 422 F.2d 1124 (4th Cir. 1970); *see also* Anderson v. Abbott, 321 U.S. 349, 356 (1944) (holding bank's shareholders liable for subsidiary bank's stock); *cf.* PHILIP BOBBITT, CONSTITUTIONAL FATE 182 (1982) (describing contract law as "a system of allocating the transaction costs of market decisions"). *See generally* William J. Fitzpatrick & Ronald T. Carman, *Respondeat Superior and the Federal Securities Laws: A Round Peg in a Square Hole*, 12 HOFSTRA L. REV. 1, 27-28 (1983) (laying historical foundation for respondeat superior).

traced to the mid-1800s.[41] Of the three most frequently encountered forms of common-law secondary liability—aiding and abetting, conspiracy, and respondeat superior—allegations of securities fraud most often utilize aider and abettor liability.[42] Aider and abettor liability under the securities laws contains three general prerequisites: (1) a primary party must have violated a securities law; (2) the secondary party must know of the violation; and (3) the secondary party must have provided "substantial assistance" to the party committing the primary violation.[43]

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41. *See, e.g.*, Clark v. Bales, 15 Ark. 452, 458 (1855) (finding defendant liable for trespass since he aided person who actually committed trespass); Northern Trust Co. v. Palmer, 49 N.E. 553, 555 (Ill. 1898) (explaining how doctrine of trespass makes all persons "anywise concerned" in trespass jointly liable); Prince v. Flynn, 12 Ky. (2 Litt.) 240, 243–44 (1822) (deeming defendant liable for aiding in wrongful taking of plaintiff's boat); Brief for Respondents at 16 n.10, Central Bank v. First Interstate Bank, ___ U.S. ___ , 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994) (No. 92-854) (stating elements of aiding-abetting doctrine descend from tort law); *see also* 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, 316 (1988) (recognizing well-established notion of secondary liability, including aiding and abetting, under civil common law).

42. *See* MICHAEL J. KAUFMAN, SECURITIES LITIGATION: DAMAGES § 5.01, at 5-1 (1993) (calling Rule 10b-5 aider and abettor liability "most potent implied remedy"); *cf.* David S. Ruder, *Securities Law Secondary-Liability Theories*, 14TH INST. ON SEC. REG. 331, 333 (Stephen J. Friedman et al. eds., 1983) (re-emphasizing well-established aiding and abetting liability theories in federal securities law). *But see* Musick, Peeler & Garrett v. Employers Ins. of Wausau, 113 S. Ct. 2085, 2090 (1993) (emphasizing that, when Congress explicitly provides remedy, courts should not employ federal common law to render different conclusion); Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 354–61 (1991) (directing that federal and state common law will not preempt explicit statutory remedies); Petitioner's Brief at 32-33, *Central Bank* (No. 92-854) (asserting that judicial reliance upon tort law in realm of federal securities law is misplaced because "tort law in general, and aiding and abetting liability in particular, is an area traditionally relegated to states").

43. *Hearings Before the Subcomm. of the Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 2d Sess. (1994) (statement of David S. Ruder, Professor of Law, Northwestern University School of Law), *available in* LEXIS, Legis Library, Cngtst File; David S. Ruder, *Securities Law Secondary-Liability Theories*, 14TH INST. ON SEC. REG. 331, 334 (Stephen J. Friedman et al. eds., 1983); *see, e.g.*, Rudolph v. Arthur Andersen & Co., 800 F.2d 1040, 1045 (11th Cir. 1986) (stating that 10b-5 liability for aiding and abetting applies "if some other party has committed a securities law violation, if the accused [had] general awareness that his role was part of an over all activity that [was] improper, and if [he] knowingly and substantially assisted the violation" (citing Woods v. Barnett Bank, 765 F.2d 1004, 1009 (11th Cir. 1985))), *cert. denied*, 480 U.S. 946 (1987); SEC v. Falstaff Brewing Corp., 629 F.2d 62, 72 (D.C. Cir. 1980) (writing that "[t]o hold that a defendant aided and abetted another's violation, a court must conclude that a wrongful act occurred, that the defendant was aware of it, and that he knowingly and substantially participated in it" (citing Gould v. American-Hawaiian S.S. Co., 535 F.2d 761, 779 (3d Cir. 1976))), *cert. denied*, 449 U.S. 1012 (1980); Woodward v. Metro Bank, 522 F.2d 84, 93-94

Although all lower federal courts have ratified the implied private cause of action against aiders and abettors under Section 10(b) and Rule 10b-5, the Supreme Court did not reach the issue until *Central Bank v. First Interstate Bank.*[44]

As judicial interpretation of Rule 10b-5 continued to develop, the Supreme Court increasingly placed restrictions on its use.[45] In the 1975

(5th Cir. 1975) (listing Rule 10b-5 elements); Fischer v. Kletz, 266 F. Supp. 180, 197 (S.D.N.Y. 1967) (discussing "knowledge" requirement under Rule 10b-5 and its relation to Restatement (Second) of Torts § 876). While these three prerequisites are generally accepted, the definition and application of the knowledge element has been the subject of an ongoing debate. *See* 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, 322–39 (1988) (discussing various standards employed by different circuit courts in ascertaining knowledge element of aiding and abetting liability).

44. *See, e.g.*, *Huddleston*, 459 U.S. at 379 n.5 (refusing to determine issue of whether § 10(b) provides aiding and abetting liability); *Hochfelder*, 425 U.S. at 191–92 n.7 (reserving decision on aider and abettor liability under § 10(b) and Rule 10b-5); MARC I. STEINBERG, SECURITIES REGULATION: LIABILITIES AND REMEDIES § 10.02, at 10-2 (1989) (explaining that, although Supreme Court twice withheld determination on whether § 10(b) aider and abettor liability actually exists, lower federal courts unanimously adopted such liability); *cf.* Pinter v. Dahl, 486 U.S. 622, 648–49 n.24 (1988) (refusing to expressly address aiding and abetting liability issue under § 12 of 1933 Act). However, several commentators and lower courts previously questioned whether the implied private action for aiding and abetting under § 10(b) existed. Daniel R. Fischel, *Secondary Liability Under Section 10(b) of the Securities Act of 1934*, 69 CAL. L. REV. 80, 102–11 (1981); William J. Fitzpatrick & Ronald T. Carman, *Respondeat Superior and the Federal Securities Laws: A Round Peg in a Square Hole*, 12 HOFSTRA L. REV. 1, 11–27 (1983); *see, e.g.*, Renovich v. Kaufman, 905 F.2d 1040, 1045 n.7 (7th Cir. 1990) (citing cases in which 7th Circuit questioned propriety of implying aiding and abetting liability); SEC v. Seaboard Corp., 677 F.2d 1301, 1311 n.12 (9th Cir. 1982) (finding that Supreme Court's use of strict interpretation at that time may support Professor Fischel's belief that aiding and abetting does not exist under § 10(b) and Rule 10b-5). *But see* Harmsen v. Smith, 693 F.2d 932, 944 (9th Cir. 1982) (determining that aider and abettor liability would remain viable action under § 10(b) absent express contrary authority), *cert. denied*, 464 U.S. 822 (1983).

45. *See, e.g.*, Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1101–04 (1991) (tracing shift in implication inquiry); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979) (holding that courts may imply remedies when presented with clear evidence of congressional intent); Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 471-74 (1977) (rejecting 10b-5 claim because alleged conduct was not specifically prohibited by statute); William F. Schneider, *Implying Private Rights and Remedies Under Federal Securities Acts*, 62 N.C. L. REV. 853, 854 (1984) (stating that Court has applied increasingly restrictive interpretation when determining whether implied right of action exists); *see also Hearings on H.R. 417 Before the Subcomm. on Telecommunications and Finance Securities Litigation of the House Comm. on Energy*, 103d Cong., 2d Sess. (1994) (statement of Arthur R. Miller, Professor of Law, Harvard Law School) (noting significant judicial change toward constricting securities liability and "erecting substantial procedural obstacles"); Daniel R. Fischel, *Secondary Liability Under Section 10(b) of the Securities Act of 1934*, 69 CAL. L. REV. 80, 82 (1981) (stating that because of Supreme Court's increasingly strict interpretation of

landmark case of *Blue Chip Stamps v. Manor Drug Stores*,[46] the Court ushered in the era of narrow interpretation of federal securities laws.[47] In *Blue Chip Stamps*, the Court confined Rule 10b-5 civil remedies to defrauded purchasers and sellers.[48] One year later, in *Ernst & Ernst v. Hochfelder*,[49] the Court declared that plaintiffs may not bring a private cause of action under Section 10(b) and Rule 10b-5 unless they specifically allege and prove that the defendant intended to "deceive, manipu-

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federal securities laws, "secondary liability is no longer viable"); *cf.* Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, 18-19 (1979) (refusing to imply private damage remedy under § 215 of Investment Advisors Act of 1940). As further discussed below, one reason for the Court's change in interpreting § 10(b) may be related to Justice Douglas's resignation from the Court in 1975. *See* DOUGLAS OF THE SUPREME COURT: A SELECTION OF HIS OPINIONS 9–30 (Vern Countryman ed., 1959) (tracing how addition of different Justices shifts Court's constitutional interpretation); *infra* notes 99-116 and accompanying text.

46. 421 U.S. 723 (1975).

47. *See* LARRY D. SONDERQUIST, UNDERSTANDING THE SECURITIES LAWS 256 (2d ed. 1990) (explaining that *Blue Chip Stamps* constituted turning point in federal securities regulation); *see also* Carlos J. Cuevas, *The Misappropriation Theory and Rule 10b-5: Deadlock in the Supreme Court*, 13 J. CORP. L. 793, 801–03 (1988) (delineating *Blue Chip Stamps* as landmark case representing Burger Court's switch to restrictive interpretation of securities laws). The Court has rendered a plethora of decisions concerning securities laws since mid-1975. The cases that follow in the text of this Casenote represent only a few of the most important. For a more exhaustive discussion, see generally Paul D. Freeman, *A Study in Contrasts: The Warren and Burger Courts' Approach to the Securities Laws*, 83 DICK. L. REV. 183 (1979) and Lewis D. Lowenfels, *Recent Supreme Court Decisions Under the Federal Securities Laws: The Pendulum Swings*, 65 GEO. L.J. 891 (1977), both of which analyze all of the federal securities cases rendered by the Supreme Court between 1973 and 1977.

48. *Blue Chip Stamps*, 421 U.S. at 730-31. The *Blue Chip Stamps* Court first considered the express language of § 10(b) and Rule 10b-5, stating that "the starting point is the statutory language itself." *Id.* at 730. Second, the Court analyzed the congressional intent behind the formation of the 1933 and 1934 Acts and concluded that, because Congress expressly provided civil remedies for nonpurchasers and sellers in other provisions of the Acts, it must not have intended to grant such a remedy in § 10(b). *Id.* at 734. The provisions the Court cited include: Securities Exchange Act of 1934, § 28(a), 15 U.S.C. § 78bb(a) (1988) (limiting recovery of private damages to "actual damages"); Securities Exchange Act of 1934, § 18, 15 U.S.C. § 78r (1988) (confining its express remedy to persons who have bought or sold securities based on false or misleading statements in reports or other documents that 1934 Act requires to be filed); and Securities Act of 1933, § 12, 15 U.S.C. § 77*l* (1988) (providing express remedy only to persons buying securities). *Id.* at 734-36. The *Blue Chip Stamps* Court relied largely on a Second Circuit case, *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952). The *Birnbaum* court (consisting of Chief Judge Thomas Swan, Judge Learned Hand and Judge Augustus Hand) determined that, because Rule 10b-5 expressly described fraud only "in connection with the purchase or sale of securities" and since no congressional intent was apparent concerning extension of § 10(b) private remedies to nonpurchasers or nonsellers of securities, actions pursuant to Rule 10b-5 should be confined to actual buyers and sellers. *Birnbaum*, 193 F.2d at 463-64.

49. 425 U.S. 185 (1976).

late, or defraud" the plaintiff—otherwise known as "scienter."[50] In 1979, the Court extended the *Hochfelder* holding in *Touche Ross & Co. v. Redington,*[51] rejecting an implied cause of action for civil damages pursuant to Section 17(a) of the 1934 Act.[52] Finally, in *Herman & MacLean v. Huddleston,*[53] the Supreme Court held that the explicit civil remedy provided in Section 11 of the 1933 Act does not prevent defrauded securities purchasers from bringing an action under Section 10(b) of the 1934 Act.[54]

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50. *Hochfelder*, 425 U.S. at 193-215. Once again, the Court was concerned with express statutory language and congressional intent. *Id.* Importantly, the Court observed that every section of both the 1933 and 1934 Acts which specifically created civil liability for private plaintiffs did so by enumerating whether recovery could be based on "knowing or intentional conduct, negligence, or entirely innocent mistake." *Id.* at 207-08; *see* Securities Act of 1933, §§ 11, 12, 15, 15 U.S.C. §§ 77k, 77*l*, 77o (1988) (including specific language pertaining to knowledge and intentional conduct); Securities Exchange Act of 1934, §§ 9, 18, 20, 15 U.S.C. §§ 78i, 78r, 78t (1988) (delineating various acts of intentional conduct that constitute violations); *see also* Aaron v. SEC, 446 U.S. 680, 690–91 (1980) (requiring scienter in lawsuits brought by SEC). In its decision on the case, the United States Court of Appeals for the Tenth Circuit focused primarily on the scienter requirement. *See* First Interstate Bank v. Pring, 969 F.2d 891, 899–904 (10th Cir. 1992), *rev'd*, Central Bank v. First Interstate Bank, ___ U.S.___, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994). The scienter requirement constituted one of the two issues upon which the Supreme Court granted certiorari. Brief for Petitioner at i, Central Bank v. First Interstate Bank, ___ U.S. ___, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994) (No. 92-854).

51. 442 U.S. 560 (1979).

52. *Touche Ross*, 442 U.S. at 567-80; *see* 2 THOMAS L. HAZEN, THE LAW OF SECURITIES REGULATION, § 13.1, at 54 & n.18, 56-57 (1990) (listing *Touche Ross* as one of five named cases in which Supreme Court denied implied relief); Paul D. Freeman, *A Study in Contrasts: The Warren and Burger Courts' Approach to Securities Laws*, 83 DICK. L. REV. 183, 209–10 (1979) (classifying *Touche Ross* as belonging to category of "narrow holdings" cases). At the time the Court decided *Touche Ross*, § 17(a) of the 1934 Act provided in relevant part:

> Every national securities exchange, every member thereof, . . . and every broker or dealer registered pursuant to . . . this title, shall make, keep, and preserve for such periods, such accounts, correspondence, . . . and other records, and make such reports, as the Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Touche Ross, 442 U.S. at 562 n.2. Based on this language, the Court determined that § 17(a) did not represent an express right to a private cause of action. *Id.* at 568 (citing version of Securities Exchange Act of 1934 then in effect).

53. 459 U.S. 375 (1983).

54. *Huddleston*, 459 U.S. at 380-88; LARRY D. SONDERQUIST, UNDERSTANDING THE SECURITIES LAWS 218 (2d ed. 1990). The *Huddleston* Court also determined that private plaintiffs seeking damages under § 10(b) need show only a preponderance of the evidence to prevail; the plaintiff's burden is not the clear and convincing evidence standard. *Huddleston*, 459 U.S. at 387-91. Section 11 of the 1933 Act reads in pertinent part:

> (a) In case any part of the registration statement . . . contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security . . . may . . . sue—

In its many visits to the area of securities law, the Supreme Court has emphasized repeatedly that interpretation of federal securities laws requires the Court to look primarily toward the statutory language itself.[55] However, when the statutory language is not dispositive, the Court has mandated that the next level of analysis occur within the realm of congressional intent.[56] As noted above, the generally recognized purpose of the 1933 and 1934 Acts was to protect investors and re-instill faith in the

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(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement. . . .

Securities Act of 1933, § 11, 15 U.S.C. § 77k(a) (1988). The Court noted that the crux of the issue was that the two provisions (§ 10(b) of the 1934 Act and § 11 of the 1933 Act) address distinct causes of action and were intended to apply to different forms of wrongdoing. *Huddleston*, 459 U.S. at 381. This distinction became the focal point because of the well-established maxim that the 1933 and 1934 Acts "constitute interrelated components of the federal regulatory scheme governing transactions in securities." *Id.* at 380 (citing *Hochfelder*, 425 U.S. at 206). In reaching its ultimate conclusion, the Court reasoned that, although § 11 of the 1933 Act allowed private causes of action for fraudulent registration statements, no need existed to create an exception to § 10(b) for the same remedies. *Id.* at 382-83; *cf.* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 390-91 (1970) (determining that enumerated remedies for attorney fees in §§ 9(e) and 18(a) of 1934 Act do not prohibit recovery of same fees under § 14(a) of same Act).

55. *See, e.g.*, *Touche Ross*, 442 U.S. at 568 (citing well-established construct that statutory interpretation should begin with statutory text itself); International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 558 (1979) (determining whether 1933 and 1934 Acts apply to noncontributory, compulsory pension plans by looking primarily at definitional text of § 2(1) of 1933 Act and § 3(a)(10) of 1934 Act); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 24 (1977) (beginning analysis with statutory language); *Blue Chip Stamps*, 421 U.S. at 756 (Powell, J., concurring) (stating that "starting point in every case involving construction of a statute is the language itself"). *But see Huddleston*, 459 U.S. at 386–87 (interpreting securities laws "not technically and restrictively, but flexibly to effectuate [their] remedial purposes" (quoting SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963))). *See generally* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 35 (Kermit L. Hall ed., 1992) (explaining problems arising from legislators' use of ambiguous language in statutes).

56. Alan R. Bromberg & Lewis D. Lowenfels, *Aiding and Abetting Securities Fraud: A Critical Examination*, 52 ALB. L. REV. 637, 654 (1988); *see* Musick, Peeler, & Garrett v. Employers Ins. of Wausau, 113 S. Ct. 2085, 2090 (1993) (holding that, when text does not resolve issue, court should determine how 73d Congress would decide whether Rule 10b-5 was express part of 1934 Act); HAROLD S. BLOOMENTHAL, SECURITIES LAW HANDBOOK § 15.01, at 15-10 (1994) (noting that courts should examine congressional intent at time statute in question was enacted); *see also Hochfelder*, 425 U.S. at 200-07 (reviewing congressional history pertaining to § 10(b) to determine legislative intent); Cort v. Ash, 422 U.S. 66, 78 (1975) (creating four-part test to determine whether implied cause of action exists, second part of which requires court to consider legislative intent).

stock market.[57] Yet, the legislative history does not clearly indicate whether the Seventy-third Congress intended for Section 10(b) to encompass private causes of action against aiders and abettors.[58] Since the original enactment of Section 10(b) of the 1934 Act, Congress has considered amendments that would have directly addressed the scope and application of Section 10(b).[59] In each instance, however, Congress failed to enact the proposed amendments.[60] Some courts and commentators have stated that congressional inaction is tantamount to congressional intent to limit the scope to that which is expressly mentioned.[61] This view is fre-

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57. *See supra* note 25 and accompanying text.

58. Central Bank v. First Interstate Bank, ___ U.S. ___, ___, 114 S. Ct. 1439, 1451, 128 L. Ed. 2d 119, 136 (1994); *see* Daniel R. Fischel, *Secondary Liability Under Section 10(b) of the Securities Act of 1934*, 69 CAL. L. REV. 80, 98 (1981) (finding no legislative history indicating specific congressional intent to provide cause of action for aiding and abetting under § 10(b)); *cf.* David S. Ruder, *The Future of Aiding and Abetting and Rule 10b-5 After* Central Bank of Denver, 49 BUS. LAW. 1479, 1480 (1994) (explaining that some provisions of 1933 and 1934 Acts give express remedy for aiding and abetting, but others, like § 10(b), do not). *But see* COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, SECURITIES EXCHANGE BILL OF 1934, H.R. REP. NO. 1383, 73d Cong., 2d Sess. 7 (1934) (statement of Sen. Samuel Rayburn) (arguing that 1934 Act vests "broad discretionary powers" in administrative agencies such as SEC), *reprinted in* 1 FEDERAL SECURITIES LAWS: LEGISLATIVE HISTORY 1933-1983 at 794, 800 (1983).

59. *Central Bank*, ___ U.S. at ___, 114 S. Ct. at 1452, 128 L. Ed. 2d at 137–38; Daniel R. Fischel, *Secondary Liability Under Section 10(b) of the Securities Act of 1934*, 69 CAL. L. REV. 80, 98 n.103 (1981). On several occasions, Congress has rejected attempts to amend the 1934 Act to specifically forbid § 10(b) aiding and abetting liability. *Id.* In 1959, Congress proposed the express inclusion of aiding and abetting liability in the 1933 Act. *Id.* Congress also attempted to add language making aiders and abettors subject to sanctions in 1960. *Id.*

60. Daniel R. Fischel, *Secondary Liability Under Section 10(b) of the Securities Act of 1934*, 69 CAL. L. REV. 80, 98 n.103 (1981); *see Huddleston*, 459 U.S. at 384-86 (noting breadth of 1975 amendments to 1934 Act, but that amendments left § 10(b) intact, suggesting congressional approval of well-established judicial interpretation of that section); Brief for the Securities and Exchange Commission as Amicus Curiae in Support of Respondents at 12, Central Bank v. First Interstate Bank, ___ U.S. ___, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994) (No. 92-854) (citing historical review undertaken in *Huddleston*). As noted in both the petitioners' and respondents' briefs, on numerous occasions Congress considered legislation that would have specifically created aider and abettor liability. Petitioner's Brief at 22–23, *Central Bank* (No. 92-854); Respondents' Brief at 20-21, Central Bank v. First Interstate Bank, ___ U.S. ___, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994) (No. 92-854). For various reasons, however, Congress never enacted the proposed amendments; none of Congress's reasons illustrated explicit rejection of a private cause of action for aiding and abetting under § 10(b). *See* Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673, 677–80 (N.D. Ind. 1966) (speculating that Congress's inaction was because of belief that such codification was unnecessary), *aff'd*, 417 F.2d 147 (7th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970).

61. *See, e.g.*, *Aaron*, 446 U.S. at 695, 697 (explaining that, when Congress has made no affirmative expression of its intent, statutes should not be interpreted in manner contrary

quently termed "negative implication."[62] Others have proposed that congressional inaction constitutes congressional approval of the judicial interpretation of Section 10(b).[63] As the Supreme Court increasingly

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to plain language of text); SEC v. Sloan, 436 U.S. 103, 116 (1978) (refusing to construe § 12(k) of 1934 Act more broadly than its language permits); *Green*, 430 U.S. at 475-78 (denying recognition of implied cause of action for breach of corporate fiduciary duty under Rule 10b-5 because Congress did not explicitly create cause of action); *see also* Petitioner's Brief at 22, *Central Bank* (No. 92-854) (stating that Congress's inaction illustrates its intent to exclude aiders and abettors from scope of § 10(b)); Douglas E. Abrams, *The Scope of Liability Under Section 12 of the Securities Act of 1933: "Participation" and the Pertinent Legislative Materials*, 15 FORDHAM URB. L.J. 877, 920 n.254 (1987) (listing cases in which Court stated that remedial legislation should not be read "more broadly than its language and the statutory scheme reasonably permit").

62. *See* SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 351 n.8 (1943) (refusing to use negative implication when to do so would conflict with Act's general purpose); Springer v. Government of Philippine Islands, 277 U.S. 189, 206 (1927) (rejecting contention that enumeration of remedies inevitably precludes implication of others); United States v. Barnes, 222 U.S. 513, 518–19 (1911) (treating expression *unius est exclusio alterius* as merely aid to construction, not absolute); *see also* Douglas E. Abrams, *The Scope of Liability Under Section 12 of the Securities Act of 1933: "Participation" and the Pertinent Legislative Materials*, 15 FORDHAM URB. L.J. 877, 908-11 (1987) (reviewing past application of negative implication to interpretation of securities laws); Alan R. Bromberg & Lewis D. Lowenfels, *Aiding and Abetting Securities Fraud: A Critical Examination*, 52 ALB. L. REV. 637, 653 (1988) (discussing Court's application of negative implication to securities laws); Peter J. Skalaban, Jr., *Implied Rights of Action,* Borak *Breathes: Implying a Private Right of Action to Enforce SEC Rule 14a-8*, 61 GEO. WASH. L. REV. 1514, 1522–33 (1993) (noting decrease in implication jurisprudence); *cf. Lewis*, 444 U.S. at 20 (noting high degree of improbability that Congress failed to include private right of action as result of absentmindedness).

63. Brief for the Securities and Exchange Commission as Amicus Curiae at 12-13, *Central Bank* (No. 92-854); *see Huddleston*, 459 U.S. at 386 (opining that Congress's inaction concerning specific addition of aiding and abetting language in 1975 amendments to 1934 Act constitutes congressional approval of judicial interpretation of § 10(b) at that time); Respondents' Brief at 20–21 & 2A, *Central Bank* (No. 92-854) (contending that Congress effectively ratified long-standing judicial interpretation which allows private causes of action against aiders and abettors pursuant to § 10(b)); *see also* Bruce A. Hiler, *The* Central Bank of Denver *Decision and the SEC: Effects of the Decision and the SEC's Possible Response*, 23 CORP. COUNS. REV. 31, 33–34 (1994) (explaining why lower courts generally believed that Congress intended for § 10(b) to include liability for aiders and abettors). The Supreme Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991) and Congress's subsequent approval of legislation that overturned part of *Lampf* illustrate the view that congressional inaction constitutes congressional approval. MICHAEL J. KAUFMAN, SECURITIES LITIGATION: DAMAGES § 5:12 (1990 & Supp. 1993). The *Lampf* Court ruled on the applicability of statutes of limitations to private individuals versus the SEC. *Lampf*, 501 U.S. at 352. The controversial aspect of the decision was the Court's instruction that lower courts apply its holding retroactively. *Id.* at 370–71 (O'Connor, J., dissenting). The SEC and many other private organizations were so outraged by the *Lampf* decision that they asked Congress to enact legislation mitigating *Lampf*'s effects. MICHAEL J. KAUFMAN, SECURITIES LITIGATION: DAMAGES § 5:12

narrowed its statutory construction of federal securities laws, it preferred to adhere to the former line of reasoning.[64]

In *Central Bank v. First Interstate Bank*, the Court, with Justice Kennedy delivering the majority opinion, held that aider and abettor liability suits are not an option for private plaintiffs under Section 10(b).[65] The majority reasoned that Section 10(b) and Rule 10b-5 do not expressly impose aiding and abetting liability; similarly, the Court deduced that none of the express private causes of action in the 1933 and 1934 Acts impose such liability.[66] Citing statutes in other substantive areas that provide aider and abettor liability, the Court concluded that, if Congress intended Section 10(b) to include liability for aiding and abetting, Congress

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(1990 & Supp. 1993). Congress created specific legislation that made the Court's ruling inapplicable to cases already pending. *Id.*; *see* Joseph A. Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Law: The Commission's Authority*, 107 HARV. L. REV. 963, 997 (1994) (pointing to Congress's adoption of § 27A, which specifically mandated that *Lampf* apply prospectively). *Lampf* and the subsequent legislation illustrate that, when Congress is unhappy with a judicial decree, it enacts legislation to effectively overrule that decision. *See* J.I. Case Co. v. Borak, 377 U.S. 426, 441 (1964) (concluding unanimously that congressional silence instructed approval of implied private right of action under § 14(a)). In contrast, when it conducted a comprehensive review of the 1934 Act in 1975, Congress took no action to overturn the 13 years of judicial precedent that allowed implied causes of action for aiding and abetting. *Huddleston*, 459 U.S. at 384–85. The enactment of the 1975 amendments, therefore, effectively conferred approval on the well-established judicial interpretation of § 10(b) as providing aider and abettor liability. Respondents' Brief at 24-25, *Central Bank* (No. 92-854).

64. Douglas E. Abrams, *The Scope of Liability Under Section 12 of the Securities Act of 1933: "Participation" and the Pertinent Legislative Materials*, 15 FORDHAM URB. L.J. 877, 908-11 (1987); Peter J. Skalaban, Jr., *Implied Rights of Action*, Borak *Breathes: Implying a Private Right of Action to Enforce SEC Rule 14a-8*, 61 GEO. WASH. L. REV. 1514, 1520–33 (1993); *see Huddleston*, 459 U.S. at 381–83 (construing § 11 narrowly and stating that it addresses fraud only in connection with registration of securities, whereas § 10(b) is interpreted as "catchall" provision); *Touche Ross*, 442 U.S. at 567 (concluding that no implied private right of action exists under § 17(a) of 1933 Act); *Blue Chip Stamps*, 421 U.S. at 731–55 (declaring that private actions brought pursuant to Rule 10b-5 are valid only against actual purchasers or sellers of securities).

65. Central Bank v. First Interstate Bank, ___ U.S. ___, ___, 114 S. Ct. 1439, 1455, 128 L. Ed. 2d 119, 141 (1994).

66. *Id.* at ___, 114 S. Ct. at 1448-49, 128 L. Ed. 2d at 132, 134; *cf.* Mertens v. Hewitt Assoc., 113 S. Ct. 2063, 2067 (1993) (refusing to apply common law of trusts to "knowing participation" cause of action under Employee Retirement Income Security Act of 1974 since that legislation contains no express provision requiring nonfiduciaries to "avoid participation (knowing or unknowing) in fiduciary's breach of fiduciary duty"). *But see* Brief for Respondents at 15, Central Bank v. First Interstate Bank, ___ U.S. ___, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994) (No. 92-854) (arguing that § 10(b) phrase "directly or indirectly" encompasses aider and abettor liability).

would have expressly provided for such liability.[67] Furthermore, the Court utilized the doctrine of negative implication to deny that congressional inaction concerning Section 10(b) and Rule 10b-5 constitutes congressional approval of judicial interpretation and creation of aider and abettor liability.[68] The Court opined that aider and abettor liability includes costs that may run contrary to the underlying goals of the 1934 Act.[69] Prior to its conclusion, however, the Court specifically noted that secondary actors often make material misstatements or use manipulative devices to defraud the purchaser or seller.[70] In those situations, the Court concluded, the actor may be deemed a primary violator pursuant to Rule 10b-5 so long as the Rule 10b-5 requisites for primary liability are satisfied.[71]

Justice Stevens, joined by Justices Blackmun, Souter, and Ginsburg in a dissenting opinion, criticized the majority for giving "short shrift to a long history of aider and abettor liability under Section 10(b) and Rule 10b-5."[72] Discussing the distinctions between the Court's past and present statutory constructions, Justice Stevens admonished the majority for committing the "anachronistic error" of applying the Court's current, narrow standard of statutory construction to a provision enacted at a time when the Court utilized broader, more liberal interpretations.[73] Nevertheless, Justice Stevens also rejected the majority's reliance on the doctrine of negative implication.[74] Instead, Justice Stevens found that Congress's recent considerations of Section 10(b) demonstrate congressional approval of aider and abettor liability under Section 10(b) and Rule 10b-5.[75] Finally, according to Justice Stevens, the majority erred in determining the aiding and abetting issue sua sponte when both the petitioner and respondent had accepted the well-established action for aiding and abetting

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67. *Central Bank*, ___ U.S. at ___, 114 S. Ct. at 1449, 1452, 128 L. Ed. 2d at 133–34, 137; *see* Pinter v. Dahl, 486 U.S. 622, 650 (1988) (suggesting that Congress knows how to impose secondary liability when such liability is specifically intended).

68. *Central Bank*, ___ U.S. at ___, 114 S. Ct. at 1452, 128 L. Ed. 2d at 137–38.

69. *Id.* at ___, 114 S. Ct. at 1454, 128 L. Ed. 2d at 139–40; *see Pinter*, 486 U.S. at 652 (warning that requisites for aider and abettor liability are relatively unclear, and as such, lead to ad hoc decisions). The court specifically cited the goals of fair dealing and efficiency and also warned of the dangers of "vexatious" litigation. *Central Bank*, ___ U.S. at ___, 114 S. Ct. at 1454, 128 L. Ed. 2d at 140.

70. *Central Bank*, ___ U.S. at ___, 114 S. Ct. at 1455, 128 L. Ed. 2d at 141.

71. *Id.*

72. *Id.* at ___, 114 S. Ct. at 1456, 128 L. Ed. 2d at 141 (Stevens, J., dissenting).

73. *Id.* at ___, 114 S. Ct. at 1457, 128 L. Ed. 2d at 144.

74. *Central Bank*, ___ U.S. at ___, 114 S. Ct. at 1457-58, 128 L. Ed. 2d at 144 (Stevens, J., dissenting).

75. *Id.*

under Rule 10b-5.[76] Justice Stevens warned that the majority's holding creates serious doubt regarding whether other types of implied 10b-5 secondary liability will be available to private plaintiffs and the SEC in the future.[77]

The majority opinion in *Central Bank v. First Interstate Bank* constitutes the anachronistic error that Justice Stevens discussed: The Supreme Court erred in applying its current negative implication approach to a provision promulgated during an era of broad statutory construction.[78] The Court's decision creates a host of problems, such as confusion with respect to whether the holding applies to the SEC, and raises the question of whether Congress should now enact legislation to nullify the Court's decision by amending Section 10(b) and Rule 10b-5 to expressly prohibit the aiding and abetting of securities fraud.[79]

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76. *Id.* at ___, 114 S. Ct. at 1457, 128 L. Ed. 2d at 143. The issue the parties sought to have resolved was the question of whether recklessness satisfies the scienter requirement of § 10(b) and Rule 10b-5. *Id.*; Brief for Petitioner at i, Central Bank v. First Interstate Bank, ___ U.S. ___, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994) (No. 92-854); Respondents' Brief at i, *Central Bank* (No. 92-854).

77. *Central Bank*, ___ U.S. at ___, 114 S. Ct. at 1460, 128 L. Ed. 2d at 146 (Stevens, J., dissenting).

78. Central Bank v. First Interstate Bank, ___ U.S. ___, ___, 114 S. Ct. 1439, 1457, 128 L. Ed. 2d 119, 144 (1994) (Stevens, J., dissenting); *see, e.g.*, Bruce A. Hiler, *The* Central Bank of Denver *Decision and the SEC: Effects of the Decision and the SEC's Possible Response*, 23 CORP. COUNS. REV. 31, 34 (1994) (noting Court's departure from previous interpretation of securities laws based on their remedial purposes); Gene Ramos, *Levitt Urges Hill to Allow Investor Suits: Legislation Would Reverse Court Ruling*, WASH. POST, May 13, 1994, at F2 (quoting SEC Chairman Arthur Levitt as stating that "judicial decisions of this type are blunt instruments reaching results that affect broad categories of cases without regard to their merit"); *see also* Harvey L. Pitt, *The Demise of Implied Aiding and Abetting Liability*, 211 N.Y. L.J. 1, 2 (1994) (stating that "[t]he Court offered a medley of its greatest restrictive themes of the 1970s and 1980s"); Sharon Walsh, *Congress, SEC Ponder Shareholder Lawsuits*, WASH. POST, May 11, 1994, at D1 (quoting representative of National Association of Securities and Commercial Law Attorneys, who labelled Court's decision "terrible"); *cf.* William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171, 176 (1933) (predicting problems with interpretation of Act because Congress's intentions were unclear); Richard W. Jennings, *Mr. Justice Douglas: His Influence on Corporate and Securities Regulation*, 73 YALE L.J. 920, 930 (1964) (noting that Justice Douglas warned rigid enforcement of Act would be Act's demise).

79. *See Hearing on H.R. 417 Before the Subcomm. on Telecommunications & Finance Securities Litigation of the House Comm. on Energy* (1994) (statement of Arthur R. Miller, Professor of Law, Harvard University Law School) (opining that exclusion of aider and abettor liability creates "gaping hole"), *available in* LEXIS, Legis Library, Cngtst File; Sharon Walsh, *Congress, SEC Ponder Shareholder Lawsuits*, WASH. POST, May 11, 1994, at D1 (reporting *Central Bank* decision as stunning to investment and legal communities); *cf.* Harry Shulman, *Civil Liability and the Securities Act*, 43 YALE L.J. 227, 253 (1933) (warning that 1933 Act's ambiguities may lead to questions concerning who may be liable under 1933 Act). *See generally* COMMISSIONER GEORGE C. MATHEWS, ADDRESS BEFORE THE

The Court mistakenly applied its current, strict mode of statutory interpretation rather than relying on the broad, liberal statutory construction afforded remedial measures in the past.[80] Prior to 1975, courts routinely construed securities laws broadly to effectuate their remedial purposes.[81] As recently as 1983, the Court recognized that it has repeatedly combatted fraud by interpreting securities laws flexibly, not technically or restrictively.[82] Indeed, the Seventy-third Congressional House Committee on Interstate and Foreign Commerce specifically discussed the importance of flexibility and discretionary enforcement by administrative agencies in the 1934 Act.[83] While the Committee expressly noted that the bill's first

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ILLINOIS SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS (answering questions regarding 1934 Act), *reprinted in* 1 FEDERAL SECURITIES LAW AND ACCOUNTING 1933-1970: SELECTED ADDRESSES 20–57 (Gary J. Previts & Alfred R. Roberts eds., 1986).

80. *See* SEC v. National Sec., Inc., 393 U.S. 453, 465–68 (1969) (representing Supreme Court's expansive philosophy at time toward securities regulation, especially § 10(b)); MARC I. STEINBERG, SECURITIES REGULATION: LIABILITIES AND REMEDIES § 9.02, at 9-3 (1990) (noting that Court regularly implied rights of action for remedial measures prior to 1975); *cf.* THE DOUGLAS OPINIONS xii (Vern Countryman ed., 1977) (opining that, after President Roosevelt's "court packing" plan, Court employed less restrictive constitutional interpretation for several decades). *Compare* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 442 (1976) (narrowly construing § 14(a) and SEC rule 14a-9) *with* Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (announcing that "remedial legislation should be construed broadly to effectuate its purposes" and that "[t]he Securities Exchange Act quite clearly falls into the category of remedial legislation").

81. *Central Bank*, ___ U.S. at ___, 114 S. Ct. at 1457, 128 L. Ed. 2d at 143–44 (Stevens, J., dissenting); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 217 (1976); *cf.* Merrill Lynch v. Curran, 456 U.S. 353, 374–82 (1982) (refusing to follow pre-1975 precedent to determine whether implied private cause of action existed under Commodity Exchange Act); HAROLD S. BLOOMENTHAL, SECURITIES LAW HANDBOOK § 15.01, at 15-9 (1994) (discussing how Court, in *Merrill Lynch*, explained its "departure from pre-1975 precedents relating to implied claims").

82. Herman & MacLean v. Huddleston, 459 U.S. 375, 386-87 (1983); HAROLD S. BLOOMENTHAL, SECURITIES LAW HANDBOOK § 15.01, at 15-11 (1994); *see* Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 12 (1971) (denoting specifically that § 10(b) should be "read flexibly, not technically or restrictively"); Eason v. General Motors Acceptance Corp., 490 F.2d 654, 659 (7th Cir. 1973) (basing broad interpretation of § 10(b) and Rule 10b-5 on Supreme Court's repeated announcement that remedial provisions should be construed flexibly), *cert. denied*, 416 U.S. 960 (1974); Young v. Seaboard Corp., 360 F. Supp. 490, 494-95 (D. Utah 1973) (following Supreme Court's lead in giving § 10(b) broad interpretation).

83. COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, SECURITIES EXCHANGE BILL OF 1934, 1 H.R. REP. NO. 1383, 73d Cong., 2d Sess. 6-7 (1934), *reprinted in* 1 FEDERAL SECURITIES LAWS: LEGISLATIVE HISTORY 1933-1982, at 794, 799-800 (1983). In the House Report's general analysis section, Chairman Samuel Rayburn wrote:

> [This] bill seek[s] effectively to control and regulate the securities markets [and] therefore [it] necessarily covers a wide field. . . . The constitutional significance of the wide delegation of powers to the Federal Reserve Board and to the Federal Trade Commission, which would administer the act, has been considered with particular care—and

draft "dealt very specifically and definitely with a number of admitted abuses," Congress made the remedial provisions of the 1934 Act less specific and ultimately vested the administrative agencies with wide discretion.[84]

> the delegation made only with the indication of such maximum standards for discretion as, in the considered judgment of the Committee, the technical character of the problems to be dealt with would permit. The bill legislates specifically just as far as the Committee feels it can. The original bill submitted to the Committee dealt very specifically and definitely with a number of admitted abuses. In many cases, however, the argument was made that while the solutions offered might be correct, their effects were so far-reaching as to make it inadvisable to put these solutions in the form of statutory enactments that could not be changed in case of need without Congressional action. Representatives of the stock exchanges constantly urged a greater degree of flexibility in the statute and insisted that the complicated nature of the problems justified leaving much greater latitude of discretion with the administrative agencies than would otherwise be the case. It is for that reason that the bill in dealing with a number of difficult problems singles out these problems as matters appropriate to be subject to restrictive rules and regulations, but leaves to the administrative agencies the determination of the most appropriate form of rule or regulation to be enforced. In a field where practices constantly vary and where practices legitimate for some purposes may be turned to illegitimate and fraudulent means, broad discretionary powers in the administrative agency have been found practically essential, despite the desire of the Committee to limit the discretion of the administrative agencies so far as compatible with workable legislation.

Id; *see, e.g.*, Richard N. Sheldon, *The Pujo Committee of 1912* (explaining that Congress purposefully designed weak regulations to win approval), *in* 3 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY 1792-1974 at 2269 (Arthur Schlesinger, Jr. & Richard Burns eds., 1975); JOSEPH P. LASH, DEALERS AND DREAMERS: A NEW LOOK AT THE NEW DEAL 159-62 (1988) (illustrating how 1934 Act's drafters substituted rigid provisions with flexible ones). *But see* Daniel R. Fischel, *Secondary Liability Under Section 10(b) of the Securities Act of 1934*, 69 CAL. L. REV. 80, 98 (1981) (claiming that no legislative history exists concerning Congress's intent to prohibit aiding and abetting).

84. *See* MICHAEL E. PARRISH, SECURITIES REGULATION AND THE NEW DEAL 128 (1970) (noting that, while some sections remained unchanged, Congress revised others to provide for greater administrative discretion and enforcement); Donald A. Ritchie, *The Pecora Wall Street Exposé 1934* (explaining how 1934 Act's drafters engaged in tug-of-war over its flexibility), *in* 4 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY 1792-1974, at 2575–76 (Arthur M. Schlesinger, Jr. & Richard Burns eds., 1975). While Congress initially discussed some degree of flexibility, its ultimate grant of wide discretion and flexibility was largely in response to those individuals and entities who supported the Act's basic goals, but found its framework too rigid. *See* Memorandum from National Association of Manufacturers to Members (Feb. 21, 1934) (on file with the *St. Mary's Law Journal*) (claiming that Act's mechanics were "unrealistic" and "unmanageable"); *see also* Letter from Richard Whitney, President of the New York Stock Exchange, to Members of the Exchange (Feb. 14, 1934) (on file with the *St. Mary's Law Journal*) (complaining that, while proposed solutions may be correct, they were too far-reaching and, as such, inadvisable). *Contra* William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171, 171–72 (1933) (claiming that 1933 Act was not far-reaching enough). Richard Whitney specifically stated:

Like Congress, the executive branch also intended for the 1934 Act to be a remedial and flexible piece of legislation.[85] While encouraging the passage of the 1934 Act, President Franklin Roosevelt expressly noted that it was "but one step in our broad purpose of protecting investors and depositors."[86] Taken to its logical conclusion, aider and abettor liability constitutes another "step" toward fulfillment of the broad goal of protecting investors.[87] Therefore, by failing to expressly include aiding and abetting language in Section 10(b), Congress did not necessarily foreclose the

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> [T]he Exchange is in hearty sympathy with the purpose of the bill insofar as it seeks to prevent manipulation of security prices and unwise or excessive speculation. . . . We feel, however, that in seeking to achieve these sound purposes the bill has, unfortunately, included a number of rigid and inflexible provisions which would prove unworkable in practice and which may result in freezing all organized security markets.

Press Release of Richard Whitney, President, New York Stock Exchange (Feb. 14, 1934) (on file with the *St. Mary's Law Journal*).

85. *See, e.g.*, COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, SECURITIES EXCHANGE BILL OF 1934, H.R. REP. NO. 1383, 73d Cong., 2d Sess. 1-2 (1934) (containing President Roosevelt's messages to Congress and Senator Rayburn), *reprinted in* 1 FEDERAL SECURITIES LAW: LEGISLATIVE HISTORY 1933-1982, at 794, 794–95 (1983); RAYMOND MOLEY, AFTER SEVEN YEARS 84, 176-77 (1939) (stating that President Roosevelt firmly backed securities legislation); MICHAEL E. PARRISH, SECURITIES REGULATION AND THE NEW DEAL 3 (1970) (outlining President Roosevelt's plan to remedy "grave abuses" with New Deal policy making); LARRY D. SONDERQUIST, UNDERSTANDING THE SECURITIES LAWS 1 (2d ed. 1990) (describing Act as outgrowth of Roosevelt's 1932 presidential campaign); *see also* Letter from Franklin Roosevelt, President of the United States, to Samuel Rayburn, Chairman of the Interstate and Foreign Commerce Committee, United States House of Representatives (Mar. 26, 1934) (re-emphasizing President Roosevelt's commitment to legislation regulating securities and commodities), *reprinted in* 1 FEDERAL SECURITIES LAW: LEGISLATIVE HISTORY 1933-1982, at 795, 795 (1983).

86. 78 CONG. REC. S2264 (1934) (message from President Franklin Roosevelt), *reprinted in* 1 FEDERAL SECURITIES LAWS: LEGISLATIVE HISTORY 1933-1982, at 637 (1983); *see* MICHAEL E. PARRISH, SECURITIES REGULATION AND THE NEW DEAL 43-44 (1970) (relating President Roosevelt's insistence on need for securities regulation); Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 415 n.130, 417, 425 (1990) (recounting how President Roosevelt promoted securities regulation); *see also* James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 33–39 (1959) (discussing how President Roosevelt and others drafted regulation to protect investors).

87. *Central Bank*, ___ U.S. at ___, 114 S. Ct. at 1456 n.2, 128 L. Ed. 2d at 142 (Stevens, J., dissenting); *cf.* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 197-99 (1963) (declaring that lack of express language providing for nondisclosure in Investment Advisors Act of 1940 was not meant to affect its general antifraud provisions). *Contra* Bruce A. Hiler, *The* Central Bank of Denver *Decision and the SEC: Effects of the Decision and the SEC's Possible Response*, 23 CORP. COUNS. REV. 31, 34 (1994) (calling Court's reasoning in *Central Bank* "unequivocal rejection" of liberal interpretation of securities laws and their general antifraud provisions). *See generally Hochfelder*, 425 U.S. at 194-99 (tracing goals and history of 1933 and 1934 Acts).

use of aider and abettor liability.[88] Rather, the Seventy-third Congress may have merely assumed that aiding and abetting liability was always a viable option and, as such, did not need to be expressly enumerated in the 1934 Act.[89]

Basic concepts of communication and statutory interpretation further support the aforementioned proposition: When people, including legislators, expressly convey one idea, that does not necessarily mean they intend to exclude all others.[90] Thus, the Court should have considered that

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88. *See Central Bank*, ___ U.S. at ___, 114 S. Ct. at 1458, 128 L. Ed. 2d at 144 (Stevens, J., dissenting) (reasoning that Congress's recent endeavors concerning § 10(b) actions suggest congressional approval of aiding and abetting liability); Daniel R. Fischel, *Secondary Liability Under Section 10(b) of the Securities Act of 1934*, 69 CAL. L. REV. 80, 98 n.103 (1981) (noting that congressional inaction is often construed to imply congressional approval of statutes); *cf.* Neuberger v. Commissioner, 311 U.S. 83, 88 (1940) (stating that expression *unius est exclusio alterius* is interpretive device, but not rule of law; therefore, expression cannot supplant evidence of contrary congressional intent). *But cf.* Charles P. Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407, 415–16 (1950) (proposing that better theory of legal interpretation would urge Supreme Court to determine intent of present and future Congresses, not those of past). *See generally* Paul H. Sanders & John W. Wade, *Legal Writings on Statutory Construction*, 3 VAND. L. REV. 569, 569–84 (1950) (listing and reviewing seminal books and treatises on statutory interpretation). The lower federal courts assumed that aiding and abetting was a viable option under § 10(b) and Rule 10b-5 as evidenced by their unanimous adoption of the implied right. Dennis Block & Jonathan M. Hoff, *Liability for Aiding, Abetting Securities Fraud*, 210 N.Y. L.J. 5, 6 (1993).

89. *See* Brief for Petitioner at 23–24, Central Bank v. First Interstate Bank, ___ U.S. ___, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994) (No. 92-854) (claiming presumption that 73d Congress was aware of common-law secondary liability and, therefore, found it unnecessary to include secondary liability in 1933 or 1934 Acts); Bruce A. Hiler, *The* Central Bank of Denver *Decision and the SEC: Effects of the Decision and the SEC's Possible Response*, 23 CORP. COUNS. REV. 31, 33–34 (1994) (describing backdrop in which 73d Congress enacted 1934 Act and claiming that, as result, lower federal courts assumed that Congress meant to include aiding and abetting liability); *cf.* Peter J. Skalaban, Jr., *Implied Rights of Action,* Borak *Breathes: Implying a Private Right of Action to Enforce SEC Rule 14a-8*, 61 GEO. WASH. L. REV. 1514, 1514 (1993) (stating that federal statutes often are ambiguous regarding whether their provisions apply to private parties). *See generally* Robert H. Jackson, *The Meaning of Statutes—What Congress Says or What the Court Says*, 16 I.C.C. PRAC. J. 41, 41–46 (1948–49) (opining that ambiguous drafting makes statutory interpretation difficult, confusing, and inconsistent).

90. Douglas E. Abrams, *The Scope of Liability Under Section 12 of the Securities Act of 1933: "Participation" and the Pertinent Legislative Materials*, 15 FORDHAM URB. L.J. 877, 909 (1987). In a 1930 law review article, Professor Max Radin explained this position as follows:

> The rule that the expression of one thing is the exclusion of another is in direct contradiction to the habits of speech of most persons. To say that all men are mortal does not mean that all women are not, or that all other animals are not. There is no such implication, either in usage or in logic, unless there is a very particular emphasis on the word men. . . . The question will accordingly be in every case, not whether or not

negative implication works as an "aid to construction" whose applicability depends greatly on contextual support.[91] However, rather than considering Section 10(b) and Rule 10b-5's contextual support, the Court applied negative implication to infer that express omissions should be interpreted as purposeful exclusions.[92]

In addition, Justice Stevens correctly asserted that the well-established construction of Section 10(b) and Rule 10b-5 should not be overturned

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the expression of one thing excludes everything else, but whether we are to deny or affirm this rule in this particular case.

Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 873–74 (1930). Furthermore, the Supreme Court itself has expressly noted:

> When Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights. But the Court has long recognized that under certain limited circumstances the failure of Congress to do so is not inconsistent with an intent on its part to have such a remedy available to the persons benefitted by its legislation.

Cannon v. University of Chicago, 441 U.S. 677, 717 (1979); *cf.* SEC v. Rind, 991 F.2d 1486, 1491 (9th Cir.) (using negative implication in conjunction with inquiry into practicality of securities fraud investigation to determine whether statute of limitations applied to SEC), *cert. denied*, 114 S. Ct. 439 (1993); Brian F. McDonough, *Significant 1993 Case Law Developments*, 49 BUS. LAW. 991, 1009 (1994) (discussing cases concerning statutes of limitations as applicable to SEC when not specifically provided).

91. SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 351 n.8 (1943). The *Joiner* Court wrote:

> [C]ourts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.

Id. at 350-51; *accord National Sec., Inc.*, 393 U.S. at 466; *see* Douglas E. Abrams, *The Scope of Liability Under Section 12 of the Securities Act of 1933: "Participation" and the Pertinent Legislative Materials*, 15 FORDHAM URB. L.J. 877, 909 (1987) (stating that *Joiner* Court emphasized negative implication as aid to construction); *cf.* Nathan Isaacs, *The Securities Act and the Constitution*, 43 YALE L.J. 218, 218 (1933) (asserting that literalism is antithetical because Constitution was meant to be vague). *See generally* Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1259 (1947) (labelling statutory interpretation as "art," not science); Felix Frankfurter, *A Symposium on Statutory Interpretation—Foreword*, 3 VAND. L. REV. 365, 365 (1950) (declaring that "the problems of rendering what has been written are as old as composition itself").

92. *Central Bank*, ___ U.S. at ___, 114 S. Ct. at 1452, 128 L. Ed. 2d at 137; *see id.* at ___, 114 S. Ct. at 1459, 128 L. Ed. 2d at 146 (Stevens, J., dissenting) (stating that majority incorrectly used restrictive interpretation on Act meant to be interpreted flexibly); David S. Ruder, *The Future of Aiding and Abetting and Rule 10b-5 After* Central Bank of Denver, 49 BUS. LAW. 1479, 1486 (1994) (contending that Supreme Court only looked at language, not context, in deciding issue in *Central Bank*); *see also Bankers Life & Casualty Co.*, 404 U.S. at 12 (mandating flexible, not restrictive, reading of § 10(b)). *See generally* Ernst Freund, *Interpretation of Statutes*, 65 U. PA. L. REV. 207, 208–16 (1917) (discussing various rules and principles concerning statutory interpretation).

unless Congress so legislates.[93] Justice Stevens concluded that Congress's failure to reject judicially implied aider and abettor liability actually demonstrates congressional approval of Section 10(b) and Rule 10b-5 actions based on aider and abettor liability.[94] For example, in 1975, when Congress conducted a comprehensive revision of the 1934 Act, it left untouched many cases that approved private actions for aider and abettor liability under Section 10(b) and Rule 10b-5.[95] On the other hand, when

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93. *Central Bank*, ___ U.S. at ___, 114 S. Ct. at 1458, 128 L. Ed. 2d at 144 (Stevens, J., dissenting) (citing Reves v. Ernst & Young, 494 U.S. 56, 74 (1990) (Stevens, J., concurring)); *see* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 733 (1975) (contending that combination of historical acceptance by courts and congressional inaction favors retention). "Even when there is no affirmative evidence of ratification, the Legislature's failure to reject a consistent judicial or administrative construction counsels hesitation from a court asked to invalidate it." *Central Bank*, ___ U.S. at ___, 114 S. Ct. at 1458, 128 L. Ed. 2d at 144 (Stevens, J., dissenting); *cf.* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (suggesting that Court should generally observe stare decisis). Justice Stevens aptly noted that none of the cases on which the majority relied in *Central Bank* involved settled construction of securities laws by lower courts. *Central Bank*, ___ U.S. at ___ n.6, 114 S. Ct. at 1458 n.6, 128 L. Ed. 2d at 144 n.6 (Stevens, J., dissenting). *But see* Bruce A. Hiler, *The* Central Bank of Denver *Decision and the SEC: Effects of the Decision and the SEC's Possible Response*, 23 CORP. COUNS. REV. 31, 34 (1994) (noting Court's statement in *Central Bank* that, if Congress intended to allow actions for aiding and abetting, it would have expressly done so); Harvey L. Pitt, *The Demise of Implied Aiding and Abetting Liability*, 211 N.Y. L.J. 1, 3 (1994) (reporting Court's finding in *Central Bank* that Congress did not intend to imply aiding and abetting liability pursuant to § 10(b)).

94. *Central Bank*, ___ U.S. at ___, 114 S. Ct. at 1458, 128 L. Ed. 2d at 144 (Stevens, J. dissenting); *see* HAROLD S. BLOOMENTHAL, SECURITIES LAW HANDBOOK § 15.01, at 15-17 to 15-19 (1994) (noting various cases in which Court found that congressional silence amounts to congressional approval of judicial statutory interpretation); *cf. Cannon*, 441 U.S. at 688 n.9 (indicating that implicit legislative intent constitutes one factor when determining whether to imply private cause of action); Lorillard v. Pons, 434 U.S. 575, 580 (1979) (opining that it is fair to presume congressional approval of judicial interpretation when Congress amends statute without significant change).

95. *Central Bank*, ___ U.S. at ___ & n.8, 114 S. Ct. at 1458 & n.8, 128 L. Ed. 2d at 144-45 & n.8 (Stevens, J., dissenting); *see* Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97 (1975) (codified as amended in scattered sections of 15 U.S.C.) (amending many sections of 1934 Act, but failing to change § 10(b)); *Huddleston*, 459 U.S. at 384-86 (explaining that, at time Congress passed 1975 amendments to 1934 Act, lower courts consistently allowed plaintiffs to elect § 10(b) causes of action when § 11 provided express remedies); Brief for the Securities and Exchange Commission as Amicus Curiae in Support of Respondents at 12, Central Bank v. First Interstate Bank, ___ U.S. ___, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994) (No. 92-854) (arguing that Congress's inaction toward affirmatively changing judicial interpretation of § 10(b) in 1975 amendments signalled congressional approval of courts' statutory construction); *see also* MARC I. STEINBERG, SECURITIES REGULATION: LIABILITIES AND REMEDIES § 9.02, at 9-8 to 9-9 (1990) (calling 1975 amendments to 1934 Act "most substantial and significant" and noting Congress's inaction with respect to § 10(b)).

the Supreme Court mandated retroactive application of its ruling in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*,[96] Congress demonstrated its disapproval by enacting specific legislation making that ruling strictly prospective in its effect.[97] In comparing prior congressional inaction with Congress's affirmative action after *Lampf*, Justice Stevens correctly reasoned that Congress's failure to reject the well-established judicial interpretation of Section 10(b) and Rule 10b-5 signalled its approval of that interpretation.[98]

The majority's decision raises the question of why the Supreme Court misconstrued Congress's inaction on aiding and abetting liability under Section 10(b) and Rule 10b-5.[99] The answer lies in the makeup of the

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96. 501 U.S. 350 (1991).

97. *Central Bank*, ___ U.S. at ___ n.7, 114 S. Ct. at 1458 n.7, 128 L. Ed. 2d at 144 n.7; *see* Securities Exchange Act 1934, § 27A, 15 U.S.C. § 78aa-1 (Supp. 1994) (mandating that *Lampf* decision apply prospectively and not to pending cases); HAROLD S. BLOOMENTHAL, SECURITIES LAW HANDBOOK § 15.01, at 15-19 to 15-20 (1994) (reviewing *Lampf* decision and opining that Congress's reaction indicated approval of implied private causes of action under Rule 10b-5); *see also* McCool v. Strata Oil Co., 972 F.2d 1452, 1458 (7th Cir. 1992) (discussing Congress's action to make *Lampf* ruling strictly prospective); *In re* Rospatch Sec. Litig., 802 F. Supp. 110, 113 (W.D. Mich. 1992) (noting Congress's amendment to 1934 Act prohibiting retroactive application of *Lampf*). While a few courts have held that Congress's action in response to *Lampf* violated the separation of powers doctrine, most deem the amendment constitutional. *See* Axel Johnson Inc. v. Arthur Andersen & Co., 6 F.3d 78, 81–82 (2d Cir. 1993) (deciding that § 27A is constitutional and does not violate separation of powers); Pacific Mut. Life Ins. Co. v. First RepublicBank Corp., 997 F.2d 39, 53 (5th Cir. 1993) (following other circuits in declaring that amendment does not violate separation of powers).

98. *See Central Bank*, ___ U.S. at ___, 114 S. Ct. at 1458, 128 L. Ed. at 144 (Stevens, J., dissenting) (noting "longstanding acceptance" of § 10(b)'s implied private cause of action against aiders and abettors and discussing Congress's refusal to reject that right). Interestingly, Justice Stevens discussed Congress's recent considerations of the various securities provisions and suggested that those considerations further illustrate congressional approval of aiding and abetting liability in § 10(b) and Rule 10b-5 actions:

> The House Report accompanying an aiding and abetting provision of the 1983 Insider Trading Sanctions Act . . . contains an approving reference to "judicial application of the concept of aiding and abetting liability to achieve the remedial purposes of the securities laws," . . . and notes with favor . . . [a Second Circuit decision] . . . which affirmed a judgment against an aider and abettor in a private action under § 10(b) and Rule 10b-5. Moreover, § 5 of the Insider Trading and Securities Fraud Enforcement Act of 1988 . . . contains an express "acknowledgement" of causes of action "implied from a provision of this title."

Id. at ___ n.8, 114 S. Ct. at 1458–59 n.8, 128 L. Ed. 2d at 145 n.8 (citations omitted).

99. *See id.* at ___, 114 S. Ct. at 1460, 128 L. Ed. 2d at 148 (Stevens, J., dissenting) (criticizing majority for "lopping off" well-established rights of action); *see also* Sharon Walsh, *Supreme Court Limits Whom Defrauded Investors Can Sue*, WASH. POST, Apr. 20, 1994, at A1 (quoting attorney Joseph Cotchett calling *Central Bank* "'a tragic day for investors'"). Walsh also interviewed and quoted Arthur Bryant, the executive director of Trial Lawyers for Public Justice, who stated:

Court itself.[100] In 1939, President Roosevelt appointed Justice William Douglas to replace Justice Louis Brandeis on the Court.[101] Prior to his appointment to the Court, Justice Douglas assisted in the formulation of the 1933 and 1934 Acts, and in 1937, he became the third chairman of the SEC.[102] These factors combined to make Justice Douglas a living history

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"The decision is a travesty . . . that effectively cripples the ability of victims to sue the unscrupulous accountants, lawyers and other professionals who played such key roles in the savings and loan, BCCI and Drexel Burnham scandals. . . . The ruling has taken us back to the days of the [1920s]. . . in the sense that there is no protection for investors."

Id. See generally William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171, 176 (1933) (warning of future interpretive problems because of 1933 Act's ambiguous language); Gene Ramos, *Levitt Urges Hill to Allow Investor Suits: Legislation Would Reverse Court Ruling*, WASH. POST, May 13, 1994, at F2 (reporting that Supreme Court's ruling shocked many people and urging Congress to enact legislation re-establishing investor rights).

100. *See* THE DOUGLAS OPINIONS at xiii (Vern Countryman ed., 1977) (tracing how addition of different Justices shifts Court's constitutional interpretation); DOUGLAS OF THE SUPREME COURT: A SELECTION OF HIS OPINIONS 17-27 (Vern Countryman ed., 1975) (noting sudden change in constitutional interpretation after President Roosevelt's "court packing" attempt); *see also* Richard W. Jennings, *Mr. Justice Douglas: His Influence on Corporate and Securities Regulation*, 73 YALE L.J. 920, 930 (1964) (discussing Justice Douglas's fear that strict enforcement of 1933 Act would undermine its basic goals); Interview with Michael Ariens, Professor of Law, St. Mary's University School of Law, in San Antonio, Tex. (Sept. 30, 1994) (agreeing that personalities and experiences of Justices affect Court's determinations). *Compare* Schecter Poultry Corp. v. United States, 295 U.S. 495, 542–51 (1935) (rejecting application of National Industrial Recovery Act to in-state slaughter house owners because such application would exceed scope of Commerce Clause) *with* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391–92 (1937) (allowing right of freedom to contract, even though Constitution does not expressly confer such right). The Court ruled on *Schecter* prior to President Roosevelt's court packing attempt, and it rendered it's decision on *West Coast Hotel* afterward. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 178-81 (Richard A. Epstein et al. eds., 2d ed. 1991) (explaining New Deal legislation and Court's statutory interpretation). In *West Coast Hotel*, Justice Roberts switched from his prior interpretive stance. *Id.* at 180–81. This change became known as the "switch in time that saved nine." Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 187 HARV. L. REV. 620, 625–29 (1994).

101. *E.g.*, "HE SHALL NOT PASS THIS WAY AGAIN": THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS at xv (Stephen L. Wasby ed., 1990); OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 233 (Kermit L. Hall ed., 1992); THE DOUGLAS OPINIONS at ix (Vern Countryman ed., 1977); *see* WILLIAM O. DOUGLAS, THE COURT YEARS 1939-1975 at 3-7 (1980) (discussing Justice Douglas's first years on Supreme Court). At 41 years, Justice Douglas was the second youngest appointee to the Court. OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 234 (Kermit L. Hall ed., 1992). Justice Joseph Story, appointed at age 32, was the youngest appointee. *Id.*

102. *E.g.*, DOUGLAS OF THE SUPREME COURT: A SELECTION OF HIS OPINIONS 12-14 (Vern Countryman ed., 1977); Letter from William Douglas, Professor of Law, Yale University Law School, to Felix Frankfurter, Professor of Law, Harvard University Law School (Dec. 8, 1933), *reprinted in* THE DOUGLAS LETTERS 77–78 (Melvin I. Urofsky ed., 1987);

of federal securities law; he was the securities "point man" on the Supreme Court.[103] Justice Douglas's greatest achievements on the Court concerned the regulation of business and securities.[104] On December 31, 1974, Justice Douglas suffered a debilitating stroke that left him partially paralyzed, and on November 12, 1975, he resigned from the Court.[105]

THE DOUGLAS OPINIONS at x-xi (Vern Countryman ed., 1977); Richard W. Jennings, *Mr. Justice Douglas: His Influence on Corporate and Securities Regulation*, 73 YALE L.J. 920, 922–27 (1964). *See generally* WILLIAM O. DOUGLAS, GO EAST, YOUNG MAN: THE EARLY YEARS 257-96 (1974) (discussing Justice Douglas's work at and with SEC).

103. *See* Richard W. Jennings, *Mr. Justice Douglas: His Influence on Corporate and Securities Regulation*, 73 YALE L.J. 920, 922–29 (1964) (discussing Justice Douglas's influence on teaching method of business law and explaining that Congress essentially adopted his views in 1933 and 1934 Acts); *cf.* HOWARD BALL & PHILLIP J. COOPER, OF POWER AND RIGHT 213–76 (1992) (tracing Justice Douglas's progression from Yale to SEC to Supreme Court); MICHAEL E. PARRISH, SECURITIES REGULATION AND THE NEW DEAL 181 (1970) (naming Justice Douglas as "architect" of SEC's ideology). Although Justice Felix Frankfurter was extremely knowledgeable in securities matters, he departed from the Court long before Justice Douglas's stroke in 1974, which was well before the Court began implementing its stricter interpretation of securities laws. *See* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 314 (Kermit L. Hall ed., 1992) (noting that Justice Frankfurter's service on Court ended in 1962); *see also* Letter from William Douglas, Professor of Law, Yale University Law School, to Felix Frankfurter, Professor of Law, Harvard University Law School (Feb. 19, 1934) (continuing ongoing debate with Frankfurter over scope of securities regulation), *reprinted in* THE DOUGLAS LETTERS 78-80 (Melvin I. Vrofsky ed., 1987). When Congress enacted the 1933 Act, Douglas warned that the legislation was not far-reaching enough. William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171, 171, 210–11 (1933). Douglas further stated that the Act's ambiguities would cause interpretive problems in the future. *Id.* at 211. *See generally* William O. Douglas, *Protective Committees in Railroad Reorganizations*, 47 HARV. L. REV. 565, 565–66 (1934) (proposing several ideas on securities regulation, some of which Congress later adopted).

104. OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 234 (Kermit L. Hall ed., 1992); Richard W. Jennings, *Mr. Justice Douglas: His Influence on Corporate and Securities Regulation*, 73 YALE L.J. 920, 967 (1964); *see* THE DOUGLAS OPINIONS at ix (Vern Countryman ed., 1977) (stating that Justice Douglas's first specialty was studying relationship between business and law). Justice Douglas wrote several important opinions concerning corporate and securities law. *See, e.g.*, Melrose Distillers, Inc. v. United States, 359 U.S. 271, 274 (1959) (delivering majority opinion, Justice Douglas held that complaining corporations were "existing" corporations under § 8 of Sherman Act and, therefore, dissolution of those corporations did not abate proceedings against them for "conspiring and attempting to monopolize commerce"); Pepper v. Litton, 308 U.S. 295, 310 (1939) (writing for majority, Justice Douglas found that bankruptcy court correctly disallowed prior judgment claim as either secured or unsecured claim).

105. OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 235 (Kermit L. Hall ed., 1992); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW at lxi (Richard A. Epstein et al. eds., 2d ed. 1991); *see* HOWARD BALL & PHILLIP J. COOPER, OF POWER AND RIGHT 298, 316-17 (1992) (discussing Justice Douglas's declining health); *cf.* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1722 (2d ed. 1988) (charting arrival and departure of Supreme Court Justices).

Blue Chip Stamps v. Manor Drug Stores,[106] which initiated the Court's trend toward increasingly strict construction of federal securities laws, was argued in March 1975 and decided in June of the same year.[107] At that time, Justice Douglas was incapacitated as a result of his stroke and was largely unable to conduct his duties; therefore, he joined the dissent but did not write the opinion.[108] In *Central Bank*, the Court relied primarily upon cases it decided after Justice Douglas's resignation.[109]

Justice Douglas's absence from the Court explains much concerning the Court's shift to a narrow interpretation of federal securities laws.[110]

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106. 421 U.S. 723 (1975).

107. *See* Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 386 n.3 & n.5 (1990) (citing *Blue Chip Stamps* as one seminal case on Court's current conception of § 10(b)); *cf.* Paul D. Freeman, *A Study in Contrasts: The Warren & Burger Courts' Approach to the Securities Laws*, 83 DICK. L. REV. 183, 183 (1979) (noting that since 1975, Court has employed restrictive view in interpreting securities laws). Professor Freeman correctly identified the time period from mid-1975 to the present as the "most active" period concerning securities regulations. *Id.* at n.1. He also noted that the restrictive view of the current Court is contrary to the view held by the Warren Court of 1964-72. *Id.*; *see* David M. Phillips, *An Essay: Six Competing Currents of Rule 10b-5 Jurisprudence*, 21 IND. L. REV. 625, 631 (1988) (declaring that "the heyday of idealism occurred prior to 1975, after which traditionalism gained the upper hand").

108. *See Blue Chip Stamps*, 421 U.S. at 723 (indicating that Justice Douglas joined dissent but did not write opinion); HOWARD BALL & PHILLIP J. COOPER, OF POWER AND RIGHT 316-17 (1992) (describing Justice Douglas's weakened condition and day of resignation); *see also* Warren Weaver, *Illnesses Cloud Court Operation*, N.Y. TIMES, Feb. 16, 1975, at 25 (acknowledging Justice Douglas's absence from his duties); Warren Weaver, *Justice Douglas Suffers Stroke*, N.Y. TIMES, Jan. 2, 1975, at 31 (reporting Justice Douglas's stroke); Letter from William O. Douglas, Associate Justice, to the Brethren (Nov. 14, 1975) (containing Justice Douglas's official resignation), *reprinted in* THE DOUGLAS LETTERS 417–18 (Melvin I. Urofsky ed., 1987).

109. *See Central Bank*, ___ U.S. at ___, 114 S. Ct. at 1444-52, 128 L. Ed. 2d at 129-37 (citing to and relying on several post-1975 cases). The cases the Court relied on include: Dirks v. SEC, 463 U.S. 646 (1983); Herman & MacLean v. Huddleston, 459 U.S. 375 (1983); Aaron v. SEC, 446 U.S. 680 (1980); Chiarella v. United States, 445 U.S. 222 (1980); and Santa Fe Industries Inc. v. Green, 430 U.S. 462 (1977). *Id.*; *cf.* David M. Philips, *An Essay: Six Competing Currents of Rule 10b-5 Jurisprudence*, 21 IND. L. REV. 625, 639–44 (1988) (tracing increasingly strict interpretation of § 10(b) and Rule 10b-5 since *Blue Chip Stamps*).

110. *See* Interview with Barbara Bader Aldave, Dean, St. Mary's University School of Law, in San Antonio, Tex. (Sept. 30, 1994) (opining that Justice Douglas's absence from Court had significant effect, particularly with regard to rulings on securities matters); *cf.* THE DOUGLAS OPINIONS at xiii (Vern Countryman ed., 1977) (tracing how addition of different Justices shifts Court's constitutional interpretation); DOUGLAS OF THE SUPREME COURT: A SELECTION OF HIS OPINIONS 22–23 (Vern Countryman ed., 1975) (noting sudden change in constitutional interpretation after President Roosevelt's court packing scheme). *Compare Banker's Life & Casualty Co.*, 404 U.S. at 12–13 (holding that courts must read § 10(b) flexibly, not technically or restrictively) *with Central Bank*, ___ U.S. at

As the securities expert, Justice Douglas was able to convey the Seventy-third Congress's intent to his fellow Justices; because he played an integral role in the enactment and administrative enforcement of the 1934 Act, he could ably ascertain and explain the Act's meaning when securities issues came before the Court.[111] Since his resignation, however, no Justice of the Court has possessed the depth of experience and knowledge of federal securities laws that Justice Douglas possessed.[112] That is not to say that the Justices are unable to render decisions on matters of law in which they possess no particular expertise; rather, in the particularly complex realm of federal securities, the Justices' lack of expertise may detri-

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___, 114 S. Ct. at 1449-55, 128 L. Ed. 2d at 139–41 (using strict statutory construction to find that no implied private cause of action exists for aiding and abetting).

111. *See* HOWARD BALL & PHILLIP J. COOPER, OF POWER AND RIGHT 44 (1992) (acknowledging that 1934 Act largely adopted Justice Douglas's views on securities regulation); Richard W. Jennings, *Mr. Justice Douglas: His Influence on Corporate and Securities Regulation*, 73 YALE L.J. 920, 951–52 (1964) (describing how Justice Douglas's views concerning securities were largely adopted by Congress in promulgating 1933 and 1934 Acts, and noting that SEC later used Justice Douglas's opinions in enforcing Acts). *See generally* Smith v. Sperling, 354 U.S. 91, 92–98 (1957) (delivering majority opinion, Justice Douglas reversed lower court decision, finding that diversity jurisdiction existed in stockholder's derivative suit between New York citizen and two Delaware corporations); United States v. W.T. Grant Co., 345 U.S. 629, 636 (1953) (Douglas, J., dissenting) (analyzing interlocking directorates under § 15 of Clayton Act); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 557 (1949) (Douglas, J., dissenting) (opining that New Jersey statute in question was purely procedural, and as such, need not be applied according to doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)); Anderson v. Abbott, 321 U.S. 349, 357–58 (1944) (writing for majority, Justice Douglas decided that shareholders of bank-stock holding company were liable for assessment on shares of national bank in portfolio of holding company). Justice Douglas wrote many books and articles on corporate and securities law. *E.g.*, WILLIAM O. DOUGLAS, DEMOCRACY AND FINANCE (1969); WILLIAM O. DOUGLAS & CARROL M. SHANKS, CASES AND MATERIALS ON THE LAW OF FINANCE AND BUSINESS (1931); William O. Douglas, *Protecting the Investors*, 23 YALE L. REV. 521 (1934); William O. Douglas, *Some Effects of the Securities Act upon Investment Banking*, 1 U. CHI. L. REV. 283 (1933).

112. *See* Interview with Barbara Bader Aldave, Dean, St. Mary's University School of Law, in San Antonio, Tex. (Sept. 30, 1994) (describing Justice Douglas's thorough understanding of securities regulation); *see also* OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 483 (Kermit L. Hall ed., 1992) (noting that Justice Kennedy's specialization appears to be separation of powers, minority, and gender discrimination issues); GEOFFREY L. STONE ET AL., CONSTITUTIONAL LAW at lxviii (1992) (listing Justice O'Connor's areas of specialty as federalism issues and church-state cases); Richard W. Jennings, *Mr. Justice Douglas: His Influence on Corporate and Securities Regulation*, 73 YALE L.J. 920, 929 (1964) (describing Justice Douglas's vast influence on creation and enforcement of Securities Acts of 1933 and 1934 as well as his special knowledge of general corporate and business law). *See generally* Paul D. Freeman, *A Study in Contrasts: The Warren and Burger Courts' Approach to the Securities Laws*, 83 DICK. L. REV. 183, 183–84 (1979) (illustrating how interpretation of securities law changed as members of Supreme Court varied).

mentally affect the Court's approach to statutory interpretation, leading to unjust results.[113]

Having employed a narrow interpretation in *Central Bank*, the Court has cast doubt on whether the SEC has authority to bring Section 10(b) and Rule 10b-5 actions for aiding and abetting.[114] Justice Stevens specifically addressed this issue in his dissent, declaring that it seemed almost certain that the SEC will no longer be permitted to bring Section 10(b) and Rule 10b-5 actions sounding in aider and abettor liability.[115] Although many agree with Justice Stevens's analysis, much discussion has

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113. *See* David M. Phillips, *An Essay: Six Competing Currents of Rule 10b-5 Jurisprudence*, 21 IND. L. REV. 625, 628 (1988) (explaining how Justices' different approaches to statutory interpretation affects emphasis they place on text when determining scope of statutes); Interview with Michael Ariens, Professor of Law, St. Mary's University School of Law, in San Antonio, Tex. (Sept. 30, 1994) (explaining that because Justices are vested with discretion to determine which mode of statutory interpretation they will employ, the Justices' knowledge and experience, or lack thereof, certainly factors into equation). In author Charles Reich's opinion:

> The mark of Justice Douglas's work on the Court is the great sophistication he showed about abuses of power by organized society and their threat to freedom. In contrast, most members of the Court were naively and uncritically deferential to government and large organizations, as if these giant agglomerations of power could do no wrong. All too often, a majority of the Court could not see the threats to freedom that Douglas correctly perceived.

CHARLES A. REICH, "HE SHALL NOT PASS THIS WAY AGAIN": THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS at xi (Stephen L. Wasby ed., 1990). *See generally* Arthur W. Phelps, *Factors Influencing Judges in Interpreting Statutes*, 3 VAND. L. REV. 456, 456–69 (1950) (presenting list of various influences that often affect judicial construction of statutes).

114. *Central Bank*, ___ U.S. at ___, 114 S. Ct. at 1460, 128 L. Ed. 2d at 146–47 (Stevens, J., dissenting); Roberta S. Karmel, *Implications of the* "Central Bank of Denver" *Case*, 211 N.Y. L.J. 3, 3–4 (1994); *see Hearings on H.R. 417 Before the House Subcomm. on Telecommunications and Finance Securities Litigation of the House Comm. on Energy*, 103d Cong., 2d Sess. (1994) (statement of Joel Seligman, Author and Professor of Law, University of Michigan Law School) (opining that *Central Bank* will be applied to SEC), *available in* LEXIS, Legis Library, Cngtst File; Harvey L. Pitt, *The Demise of Implied Aiding and Abetting Liability*, 211 N.Y. L.J. 1, 1 (1994) (reporting that *Central Bank* forecloses future aiding and abetting actions by SEC); *see also* 140 CONG. REC. S9460 (daily ed. July 21, 1994) (statement of Sen. Metzenbaum) (declaring that *Central Bank* creates doubt concerning SEC's ability to pursue aiders and abettors). Senator Metzenbaum warned that several large securities defense law firms have been advising clients that *Central Bank* abolishes all secondary liability under the federal securities laws. *Id.*

115. *Central Bank*, ___ U.S. at ___, 114 S. Ct. at 1460, 128 L. Ed. 2d at 146–47 (Stevens, J., dissenting); *see* Bruce A. Hiler, *The* Central Bank of Denver *Decision and the SEC: Effects of the Decision and the SEC's Possible Response*, 23 CORP. COUNS. REV. 31, 35 (1994) (writing that dissenting Justices are "resigned" to believing that majority's holding applies equally to SEC); Lewis D. Lowenfels, *Recent Supreme Court Decisions Under the Federal Securities Laws: The Pendulum Swings*, 65 GEO. L.J. 891, 921 (1977) (predicting that Court's decisions after *Blue Chip Stamps* will limit SEC's power); Paul M. Barrett,

taken place regarding whether the application of *Central Bank*'s holding to the SEC will be as disastrous to federal securities enforcement and deterrence as some have predicted.[116]

The SEC has noted that, regardless of *Central Bank*'s effect on aider and abettor liability, alternative means are available by which it may prosecute securities law violations.[117] Many actions formerly pursued by the SEC under Section 10(b) and Rule 10b-5 aiding and abetting liability theories will now be filed as primary liability claims.[118] Thus, as a general

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Justices Deal Investors a Blow in Certain Suits, WALL ST. J., Apr. 20, 1994, at A2 (reporting doubt regarding whether *Central Bank* applies to SEC).

116. *See Hearings on H.R. 417 Before the Subcomm. on Telecommunications and Finance Securities Litigation of the House Comm. on Energy*, 103d Cong., 2d Sess. (1994) (statement of Joel Seligman, Author and Professor of Law, University of Michigan Law School) (claiming that private actions for aiding and abetting necessarily supplement SEC enforcement, but that *Central Bank* will not otherwise significantly restrict SEC because agency can employ other options against aiders and abettors), *available in* LEXIS, Legis Library, Cngtst file; Harvey L. Pitt, *The Demise of Implied Aiding and Abetting Liability*, 211 N.Y. L.J. 1, 2 (1994) (intimating that *Central Bank* is not disastrous to SEC because of SEC's successful settlement through use of alternative dispute resolution); *see also* Joel Seligman, *The Implications of* Central Bank, 49 BUS. LAW. 1429, 1435 (1994) (stating that it is unclear how *Central Bank* will restrict SEC's enforcement of federal securities laws); Linda Greenhouse, *High Court Ruling Sharply Curbs Suits on Securities Fraud*, N.Y. TIMES, Apr. 20, 1994, at A1 (quoting SEC General Counsel Simon Lorne as stating that *Central Bank* decision is "'not likely to affect fundamentally the Commission's enforcement program'"). *But see* Christi Harlan, *SEC Voluntarily Dropping Charges in Certain Cases*, WALL. ST. J., May 6, 1994, at C10 (reporting that SEC, as result of *Central Bank*, is voluntarily withdrawing allegations of securities violations). Eugene Goldman, a partner in the Washington law firm of McDermott, Will & Emory, stated: "'In my years of practicing before the commission, this is a rare event indeed when the SEC staff, on its own initiative, drops charges.'" *Id.*

117. *See* LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 3404-3421 (3d ed. 1992) (listing and analyzing various "weapons in the federal antifraud arsenal"); Roberta S. Karmel, *Implication of the* "Central Bank of Denver" *Case*, 211 N.Y. L.J. 3, 3 (1994) (recognizing that Rule 10b-5 was only way for SEC to impose secondary liability); Gene Ramos, *Levitt Urges Hill to Allow Investor Suits: Legislation Would Reverse Court Ruling*, WASH. POST, May 13, 1994, at F2 (reporting SEC Chairman Arthur Levitt's statement that SEC will adjust to *Central Bank* ruling through use of alternative enforcement measures). *But see SEC Discussing Possible Legislation in Wake of Aiding, Abetting Decision*, 62 Banking L. Rep. (BNA) No. 16, at 575 (Apr. 22, 1994) (reporting that SEC General Counsel Simon Lorne claims *Central Bank* does not necessarily preclude SEC's use of aiding and abetting liability). The Supreme Court has specifically noted that when Congress mandated the creation of the SEC as an administrative enforcement agency, it gave the fledgling agency an "arsenal of flexible enforcement powers." *Hochfelder*, 425 U.S. at 195.

118. Telephone interview with Eric Summergrad, Principal Assistant General Counsel of the Division for Appellate Litigation, Securities and Exchange Commission (Sept. 23, 1994) (confirming that SEC will recharacterize some of its aiding and abetting claims as primary liability actions); *see* David S. Ruder, *The Future of Aiding and Abetting and Rule 10b-5 After* Central Bank of Denver, 49 BUS. LAW. 1479, 1483 (1994) (declaring that pri-

rule, the SEC could prosecute the same violators.[119] Moreover, the *Central Bank* Court itself implied that the distinction between Rule 10b-5 primary liability and secondary liability often constitutes a gray area.[120]

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vate plaintiffs and SEC are likely to recharacterize aiders and abettors as primary wrongdoers); Lisa K. Wager & John E. Failla, Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.—*The Beginning of an End, Or Will Less Lead to More?*, 49 BUS. LAW. 1451, 1456 (1994) (noting that *Central Bank* is likely to lead to attempted expansion of primary liability under § 10(b)); *see also Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 2d Sess. (1994) (statement of Donald C. Langevoort, Professor of Law, Vanderbilt University Law School) (discussing uses of primary liability and stating that primary liability is actually better description of violations in many cases), *available in* LEXIS, Legis Library, Cngtst File. Several commentators have stated that the primary-secondary distinction is not altogether clear because it never had to be clear. *Id.* Because courts generally accepted aider and abettor liability, hardly anyone discussed the distinction between primary and secondary liability. *Id.* Furthermore, many commentators now believe that the distinction, at least with respect to aider and abettor liability under Rule 10b-5, is erroneous and that the SEC will be able to proceed against aiders and abettors as primary wrongdoers. *Id.* However, for the SEC to recharacterize an aider and abettor as a primary violator, it must fulfill the requirements for primary liability by showing that (1) a primary violation occurred and (2) the violator acted willfully. *See* Ratzlaf v. United States, 114 S. Ct. 655, 660 (1994) (reemphasizing elements required in securities cases alleging primary liability).

119. Telephone Interview with Steve DeTore, Assistant Chief Counsel for the Division of Enforcement, Securities and Exchange Commission (Sept. 23, 1994) (confirming that SEC refiled many of its aiding and abetting suits as primary liability suits under Rule 10b-5, but stating that each case is highly fact specific and that not all cases are easily recharacterized); *see* Harvey L. Pitt, *The Demise of Implied Aiding and Abetting Liability*, 211 N.Y. L.J. 1, 2 (1994) (predicting that SEC must employ "statute-by-statute approach" when determining when civil aider and abettor liability applies); Sharon Walsh, *Congress, SEC Ponder Shareholder Law Suits*, WASH. POST, May 11, 1994, at D1 (reporting that lawyers and accountants may face continued litigation if plaintiffs amend cases to charge primary liability). *But see* Floyd Norris, *A Victory for Accountants and Lawyers in Securities Fraud Cases*, N.Y. TIMES, Apr. 20, 1994, at D8 (stating that *Central Bank* will make SEC enforcement more difficult). *See generally* Linda Greenhouse, *High Court Ruling Sharply Curbs Suits on Securities Fraud*, N.Y. TIMES, Apr. 20, 1994, at A1 (explaining that SEC General Counsel Simon Lorne believes *Central Bank* will not affect SEC's enforcement ability).

120. *See Central Bank*, ___ U.S. at ___, 114 S. Ct. at 1455, 128 L. Ed. 2d at 141 (acknowledging that secondary actors may be prosecuted as primary violators if they meet Rule 10b-5 requisites for primary liability); *see Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 2d Sess. (May 12, 1994) (statement of Arthur Levitt, Chairman, Securities and Exchange Commission) (opining that outward boundaries of primary liability are still unknown), *available in* LEXIS, Legis Library, Cngtst File; *see also* Sally T. Gillmore & William H. McBride, *Liability of Financial Institutions for Aiding and Abetting Violations of SEC Laws*, 42 WASH. & LEE L. REV. 811, 811–12 (1985) (attempting to clarify primary-secondary liability distinction); Joel Seligman, *The Implications of* Central Bank, 49 BUS. LAW. 1429, 1439 (1994) (predicting that *Central Bank* will force lower courts to better define "murky" primary-secondary distinction). *But see* Harvey L. Pitt, *The Demise of Implied Aiding and Abetting*

Indeed, the few courts that have considered the primary-secondary distinction concluded that primary liability may have a fairly broad scope.[121]

In addition to taking advantage of the muddied primary-secondary liability distinction, the SEC has an arsenal of other alternatives it may use to prosecute secondary violators.[122] Pursuant to the 1934 Act, for example, the SEC may use Section 15(c)(4) for persons causing false filings or Section 15(b)(4)(E) covering brokers and dealers who aid and abet fraud.[123] The SEC may also bring actions pursuant to Section 20(a), which imposes liability upon any person who "controls" another unless

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Liability, 211 N.Y. L.J. 1, 2 (1994) (opining that courts will grant motions to dismiss based on argument that primary liability "is nothing more than the 'wolf' of a charge of aiding and abetting liability in sheep's clothing").

121. *See, e.g.,* Breard v. Sachnoff & Weaver, Ltd., 941 F.2d 142, 144 (2d Cir. 1991) (holding that silence may, in proper circumstances, lead to primary liability); Arthur Young & Co. v. Reves, 937 F.2d 1310, 1329-31 (8th Cir. 1991) (deciding that accounting firm which remained silent while knowing of their client's fraud owed duty to disclose, and as such, could be primarily liable), *cert. denied*, 112 S. Ct. 1165 (1992); Molecular Technology Corp. v. Valentine, 925 F.2d 910, 917-18 (6th Cir. 1991) (finding that attorney who reviewed and edited his client's disclosure materials was primary actor in alleged wrongdoing); SEC v. Washington County Util. Dist., 676 F.2d 218, 223 (6th Cir. 1982) (explaining that primary liability does not demand "face-to-face contact"). *But see* LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 4486 (3d ed. 1992) (commenting that, when secondary actors do not employ conduct that purposefully misleads or pacifies victim, courts generally refrain from imposing liability).

122. HAROLD S. BLOOMENTHAL, SECURITIES LAW HANDBOOK § 15.08, at 15-38 to 15-39 (1994); *see* Telephone Interview with Steve DeTore, Assistant Chief Counsel for the Division of Enforcement, Securities and Exchange Commission (Sept. 23, 1994) (confirming that numerous alternatives are available to SEC to prosecute those defendants formerly characterized as aiders and abettors); *see also Levitt Calls For Restoration of Legal Tool Against Fraud*, N.Y. TIMES, May 13, 1994, at D15 (reporting Chairman Levitt's assertion that SEC has other legal means to prosecute securities violators); *cf.* Harvey L. Pitt, *The Demise of Implied Aiding and Abetting Liability*, 211 N.Y. L.J. 1, 1–2 (1994) (predicting that SEC will need to employ "novel" causes of action to compensate for loss of private litigation). *But see* Bruce A. Hiler, *The* Central Bank of Denver *Decision and the SEC: Effects of the Decision and the SEC's Possible Response*, 23 CORP. COUNS. REV. 31, 36 (1994) (warning that *Central Bank* decision will adversely affect SEC's use of other sections to allege secondary liability).

123. Securities Exchange Act of 1934, §§ 15(b)(4)(E), (c)(4), 15 U.S.C. §§ 78o(b)(4)(E), (c)(4) (1988); HAROLD S. BLOOMENTHAL, SECURITIES LAW HANDBOOK § 15.08, at 15-37 (1994); *see Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 2d Sess. (1994) (statement of Donald Langevoort, Professor of Law, Vanderbilt University Law School) (suggesting use of § 15 as alternative), *available in* LEXIS, Legis Library, Cngtst File. *See generally* 3 SECURITIES LAW ADMINISTRATION, LITIGATION & ENFORCEMENT 106-136 (Franklin E. Gill ed., 1991) (providing comprehensive examination of § 15(c)(4) of 1934 Act); William R. McLucas & Laurie Romanowich, *SEC Enforcement Proceedings Under Section 15(c)(4) of the Securities Exchange Act of 1934*, 41 BUS. LAW. 145, 145–74 (1985) (delineating all applications of § 15(c)(4)).

the controlling person "acted in good faith and did not directly or indirectly induce the violation."[124]

One of the most frequently discussed options is the SEC's administrative cease and desist authority under the 1990 Securities Enforcement Remedies and Penny Stock Reform Act.[125] Cease and desist actions concern liability for persons who act as a "cause" of another's securities violation.[126] If a person receives a cease and desist order and thereafter violates the order, the SEC may pursue civil damages in federal district

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124. Securities Exchange Act of 1934, § 20(a), 15 U.S.C. § 78t(a) (1988); David S. Ruder, *Securities Law Secondary-Liability Theories*, 14TH INST. ON SEC. REG. 331, 346-48 (Stephen J. Freidman et al. eds., 1983); *see In re* Atlantic Fin. Management Inc., 784 F.2d 29, 32–35 (1st Cir. 1986) (allowing imposition of secondary liability in certain circumstances under §§ 10(b) and 20(a) when no bad faith is present), *cert. denied*, 481 U.S. 1072 (1987); Sharp v. Coopers & Lybrand, 649 F.2d 175, 181–86 (3d Cir. 1981) (deciding that, among other issues, § 20(a) does not hinder simultaneous use of secondary liability theories under § 10(b)), *cert. denied*, 455 U.S. 938 (1982). Section 20(a) is available to both the SEC and private plaintiffs. *See id.* at 185 (discussing application and construction of § 20(a)). Under SEC Rule of Practice 2(e), the SEC may also deny an aider or abettor the right to practice before the agency. 17 C.F.R. § 201.2(e) (1994); Alan R. Bromberg & Lewis D. Lowenfels, *Aiding and Abetting Securities Fraud: A Critical Examination*, 52 ALB. L. REV. 637, 752 (1988). The issue of whether § 15 of the 1933 Act and § 20(a) of the 1934 Act broaden or narrow the secondary liability doctrine of respondeat superior remains unclear. Roberta S. Karmel, *Implications of the* "Central Bank of Denver" *Case*, 221 N.Y. L.J. 3, 4 (1994). Because *Central Bank* foreclosed the main secondary liability cause of action, arguments concerning the scope and applicability of respondeat superior undoubtedly will resurface. *Id.*

125. Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 (1990) (codified as amended in scattered Sections of 15 U.S.C.); *see* Bruce A. Hiler, *The* Central Bank of Denver *Decision and the SEC: Effects of the Decision and the SEC's Possible Response*, 23 CORP. COUNS. REV. 31, 37 (1994) (defining SEC's cease and desist enforcement powers); *see also* 1 FEDERAL SECURITIES LAW, GLOBAL CAPITAL MARKETS AND THE DISTRIBUTION OF SECURITIES at xvii (Franklin E. Gill ed., 1991) (agreeing that SEC's cease and desist ability can be powerful); Harvey L. Pitt, *The Demise of Implied Aiding and Abetting Liability*, 211 N.Y. L.J. 1, 1–2 (1994) (discussing SEC's ability to charge aiders and abettors under its cease and desist powers).

126. Securities Enforcement Remedies and Penny Stock Reform Act of 1990, § 203, 15 U.S.C. § 78u-3 (Supp. IV 1993); Bruce A. Hiler, *The* Central Bank of Denver *Decision and the SEC: Effects of the Decision and the SEC's Possible Response*, 23 CORP. COUNS. REV. 31, 37 (1994); *see* Harvey L. Pitt, *The Demise of Implied Aider and Abettor Liability*, 211 N.Y. L.J. 1, 2 (1994) (explaining SEC cease and desist powers, particularly meaning of "cause"). Section 21c of the 1933 Act, and similar provisions in other acts, permit the SEC to prosecute any "person that is, was, or would be a cause of a violation of the securities laws or rules, due to an act or omission the person knew or should have known would contribute to such violation." Securities Act of 1933, § 21c, 15 U.S.C. § 78u (1988). *See generally* SEC v. Sahley, No. 92-8842, 1994 WL 9682, at *1 (S.D.N.Y. Jan. 10, 1994) (awarding SEC summary judgment pursuant to its cease and desist powers under Penny Stock Reform Act of 1990).

court.[127] Although the scope of liability for "cause" is generally believed to be as broad as aiding and abetting liability, it may raise deterrence and efficiency problems.[128]

Having expressly noted its enforcement alternatives, the SEC has informed Congress that it will not waste its limited resources in litigating the question of whether *Central Bank* applies to the SEC unless the right case is presented.[129] Rather, the SEC has chosen to spearhead a move-

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127. *Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 2d Sess. (1994) (statement of Arthur Levitt, Chairman, Securities and Exchange Commission), *available in* LEXIS, Legis Library, Cngtst File; *see Hearings on H.R. 417 Before the Subcomm. on Telecommunications and Finance Securities Litig. of the House Comm. on Energy*, 103d Cong., 2d Sess. (1994) (statement of Eugene I. Goldman, Partner, McDermott, Will & Emery) (emphasizing SEC's cease and desist injunctive ability), *available in* LEXIS, Legis Library, Cngtst File; *see also* Christi Harlan, *SEC's Levitt Seeks to Reverse Fraud Ruling*, WALL ST. J., May 3, 1994, at B4 (reporting that SEC states it will pursue transgressors with administrative actions); *SEC Discussing Possible Legislation in Wake of Aiding, Abetting Decision*, Sec. Reg. & L. Rep. (BNA) No. 17, at 627 (Apr. 29, 1994) (recounting SEC Enforcement Director George McLucas's discussion on Commission's cease and desist powers).

128. *See Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 2d Sess. (1994), *available in* LEXIS, Legis Library, Cngtst File (statement of Arthur Levitt, Chairman, Securities and Exchange Commission) (discussing pros and cons of cease and desist enforcement as alternative to prior aiding and abetting lawsuits); Bruce A. Hiler, *The* Central Bank of Denver *Decision and the SEC: Effects of the Decision and the SEC's Possible Response*, 23 CORP. COUNS. REV. 31, 37 (1994) (noting apparent broad scope of Act's "causing" language). Chairman Levitt noted "the absence of the availability of penalties in SEC cease and desist actions and the drain on Commission resources that will result from having to pursue aiders and abettors in two forums in order to obtain penalties or other ancillary relief such as an asset freeze . . . . " *Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 2d Sess. (1994) (statement of Arthur Levitt, Chairman, Securities and Exchange Commission), *available in* LEXIS, Legis Library, Cngtst File. These problems are especially relevant, the Chairman further stated, "in cases where primary violators may also be involved and would be only pursued in the Federal court action." *Id.*

129. *Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 2d Sess. (1994), *available in* LEXIS, Legis Library, Cngtst File; *id.* (statement of Arthur Levitt, Chairman, Securities and Exchange Commission) (declaring that SEC will not devote "substantial resources" to litigating whether *Central Bank* does indeed apply to SEC); *see also* Telephone Interview with Steve DeTore, Assistant Chief Counsel for the Division of Enforcement, Securities and Exchange Commission (Sept. 23, 1994) (confirming contents of Chairman Levitt's testimony and stating that SEC is currently pursuing avenues Chairman Levitt discussed); *cf. Hearings on H.R. 417 Before the Subcomm. on Telecommunications and Finance Securities Litigation of the House Comm. on Energy*, 103d Cong., 2d Sess. (1994) (statement of Arthur R. Miller, Professor of Law, Harvard Law School) (agreeing with Chairman Levitt that Congress should explicitly create aiding and abetting liability under § 10(b)), *available in* LEXIS, Legis Library, Cngtst File; *id.* (statement of Leonard B. Simon, Partner, Milberg, Weiss, Bershad, Hynes & Lerach) (sympathizing with Chairman Levitt's plea for congres-

ment to convince Congress to amend Section 10(b) and Rule 10b-5 to specifically provide for aiding and abetting liability.[130] Senators Christopher Dodd (D-Conn.), Pete Domencini (R-N.M.), and Howard Metzenbaum (D-Ohio), along with Representative Edward Markey (D-Mass.), have answered the SEC's call by leading the movement toward congressional action in response to *Central Bank*.[131] Both the Senate Subcommittee on Securities and the House Subcommittee on Telecommunications and Finance have heard testimony from a variety of securities law experts.[132] Although some witnesses advised Congress to wait and see

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sional action to overrule *Central Bank*). Interestingly, the SEC unexpectedly may have found the perfect test case. Telephone Interview with Eric Summergrad, Principal Assistant General Counsel for the Division for Appellate Enforcement, Securities and Exchange Commission (Sept. 23, 1994). *SEC v. Scherm* was filed in the Eleventh Circuit prior to the *Central Bank* ruling. *Id.* After *Central Bank*, one of the appellants, Robert Zimmerman, moved to dismiss the case, claiming that *Central Bank* applies to the SEC. *Id.* The SEC filed a response: (1) arguing that *Central Bank* does not apply to the SEC; (2) asking the court to affirm the trial court decision based on primary liability theories; and (3) cross-moving to remand the case so that the SEC may amend its complaint. *Id.* On October 25, 1994 the Eleventh Circuit denied all pending motions as moot and remanded the case. SEC v. Scherm, No. 93-9266, 1994 U.S. App. LEXIS 30340, at *1 & n.1 (11th Cir. Oct. 25, 1994).

130. *SEC Advocates Legislation to Preserve Section 10(b) Aiding and Abetting Liability*, 26 Sec. Reg. & L. Rep. (BNA) No. 19, at 691 (May 13, 1994); *see* Sharon Walsh, *Congress, SEC Ponder Shareholder Lawsuits*, WASH. POST, May 11, 1994, at D1 (reporting that lawyers are recommending that clients who have settled past cases dealing with Rule 10b-5 aiding and abetting seek release from injunctions quickly, before SEC asks for legislative fix); Sharon Walsh, *Supreme Court Limits Whom Defrauded Investors Can Sue*, WASH. POST, Apr. 20, 1994, at A1 (indicating that Congress could add aider and abettor language to § 10(b)); *see also Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 2d Sess. (1994) (statement of Arthur Levitt, Chairman, Securities and Exchange Commission) (asking Congress to consider amending § 10(b) to include language providing for aiding and abetting liability), *available in* LEXIS, Legis Library, Cngtst File.

131. *See, e.g., Hearings on H.R. 417 Before the Subcomm. on Telecommunications and Finance Securities Litigation of the House Comm. on Energy*, 103d Cong., 2d Sess. (1994) (statement of Arthur R. Miller, Professor of Law, Harvard Law School) (discussing aspects of Dodd-Domencini bill), *available in* LEXIS, Legis Library, Cngtst File; *id.*(statement of Leonard B. Simon, Partner, Milberg, Weiss, Bershad, Hynes & Lerach) (commenting on H.R. 417, which was introduced by Representative Markey to add aiding and abetting liability to § 10(b)); *SEC Advocates Legislation to Preserve Section 10(b) Aiding and Abetting Liability*, 26 Banking L. Rep. (BNA) No. 19, at 691 (May 13, 1994); *see also* Gene Ramos, *Levitt Urges Hill to Allow Investor Suits: Legislation Would Reverse Court Ruling*, WASH. POST, May 13, 1994, at F2 (noting Senator Metzenbaum's criticism of *Central Bank* ruling); Sharon Walsh, *Congress, SEC Ponder Shareholder Lawsuits*, WASH. POST, May 11, 1994, at D1 (mentioning proposed Dodd-Domencini bill).

132. *See, e.g., Hearings on H.R. 417 Before the Subcomm. on Telecommunications and Finance Securities Litigation of the House Comm. on Energy*, 103d Cong., 2d Sess. (1994) (statement of Arthur R. Miller, Professor of Law, Harvard Law School) (calling for legisla-

what *Central Bank*'s actual effects will be, the majority of witnesses advocated immediate congressional action.[133]

Since the last hearing on August 10, 1994, Congress has taken no action on any of the proposed legislation in which legislators suggested, among other things, the addition of aiding and abetting language to Section 10(b) and Rule 10b-5.[134] Senator Metzenbaum's Bill, Senate Bill 2306, was very narrow in scope, consisting only of one provision to expressly

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tion in response to *Central Bank*, but noting shortcomings of H.R. 417), *available in* LEXIS, Legis Library, Cngtst File; *Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 2d Sess. (1994) (statement of Arthur Levitt, Chairman, Securities and Exchange Commission) (testifying on predicted effects of *Central Bank* and asking Congress for legislation to overrule decision), *available in* LEXIS, Legis Library, Cngtst File; *id.* (statement of Donald Langevoort, Professor of Law, Vanderbilt University Law School) (discussing probable results of *Central Bank*); *id.* (statement of Eugene Goldman, Partner, McDermott, Will & Emery) (testifying about views on *Central Bank* decision and effect ruling will have on SEC).

133. *See Hearings on H.R. 417 Before the Subcomm. on Telecommunications and Finance Securities Litigation of the House Comm. on Energy*, 103d Cong., 2d Sess. (1994) (statement of Leonard B. Simon, Partner, Milberg, Weiss, Bershad, Hynes & Lerach) (agreeing that Congress should act quickly in response to *Central Bank*, but warning that proposed H.R. 417 has several problems), *available in* LEXIS, Legis Library, Cngtst File; *Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 2d Sess. (1994) (statement of David S. Ruder, Professor of Law, Northwestern University School of Law) (urging Congress to create legislation immediately to overrule *Central Bank*, but warning that Congress should specifically set forth elements that will constitute violation), *available in* LEXIS, Legis Library, Cngtst File; *id.* (statement of Harvey Goldschmid, Professor of Law, Columbia University School of Law) (urging Congress to enact legislation "fixing" *Central Bank* decision and suggesting that such legislation include litigation reforms). *Contra Hearings on H.R. 417 Before the Subcomm. on Telecommunications and Finance Securities Litigation of the House Comm. on Energy*, 103d Cong., 2d Sess. (1994) (statement of Joel Seligman, Author and Professor of Law, University of Michigan Law School) (opining that legislative changes are unnecessary at this time), *available in* LEXIS, Legis Library, Cngtst File; *Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 2d Sess. (1994) (statement of Stuart Kaswell, Senior Vice President and General Counsel, Securities Industry Association) (applauding Court's decision and suggesting that Congress continue to review *Central Bank* before hastily resorting to "quick fix"), *available in* LEXIS, Legis Library, Cngtst File.

134. *See, e.g.*, Telephone Interview with Courtney Ward, Aide to Senator Christopher Dodd, Office of Senate Banking Committee (Nov. 9, 1994) (confirming that no legislation concerning *Central Bank* was passed prior to conclusion of congressional session); Telephone Interview with George Kramer, Aide to Senator Christopher Dodd, Office of Senate Banking Committee (Sept. 29, 1994) (describing conflicts between Senator Dodd's supporters and Senator Metzenbaum's supporters over scope of proposed legislation as primary reason for congressional inaction regarding *Central Bank*). However, action by the 104th Congress may be imminent, as the House is currently considering two bills that would reinstate aider and abettor liability. *See* H.R. 555, 104th Cong., 1st Sess. (1995); H.R. 681, 104th Cong., 1st Sess. (1995).

create aider and abettor liability in Section 10(b).[135] Although Senator Metzenbaum could have immediately tacked his bill onto bills pending on the Senate floor in April, he withheld it because several senators preferred to take more time to review the impact of *Central Bank*.[136] Senator Metzenbaum's proposal is now dead because the second session of the One Hundred Third Congress ended on December 1, 1994, and Senator Metzenbaum is not returning to Congress.[137] Senator Dodd's office

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135. *See* S. 2306, 103d Cong., 2d Sess. (1994) (including language that would specifically create aider and abettor liability in § 10(b) of 1934 Act); *see* Telephone Interview with Mike Lenett, Aide to Senator Howard Metzenbaum (Sept. 23, 1994) (opining that Senate Bill 2306 is probably one of smallest and most concise bills ever presented to Congress); *cf. Hearings on H.R. 417 Before the Subcomm. on Telecommunications and Finance Securities Litigation of the House Comm. on Energy*, 103d Cong., 2d Sess. (1994) (statement of Leonard B. Simon, Partner, Milberg, Weiss, Bershad, Hynes & Lerach) (explaining that SEC and state regulators have urged Congress to refrain from broad legislative changes out of fear that such changes may eliminate many meritorious claims), *available in* LEXIS, Legis Library, Cngtst File. SEC Enforcement Director William McLucas specifically stated: "There is a substantial danger that legislative reform targeted at frivolous litigation will also have an unintended effect on valid claims." *Id.* (testimony of William McLucas, Enforcement Director, Securities and Exchange Commission). The bill literally contains only 15 lines of text, including:

> Section 10(b) of the Securities Exchange Act of 1934 . . . is amended by inserting, "or to aid and abet the use or employ of any manipulative or deceptive device or contrivance," before "in contravention" . . . . The amendment made by this Act shall be deemed to have taken effect on the date of enactment of the Securities Exchange Act of 1934.

S. 2306, 103d Cong., 2d Sess. (1994).

136. *See SEC Advocates Legislation to Preserve Section 10(b) Aiding and Abetting Liability*, Sec. Reg. & L. Rep. (BNA) No. 19, 691 (May 13, 1994) (reporting that Senator Metzenbaum drafted legislation, but would wait to offer it as amendment to pending legislation until other members could investigate *Central Bank*); Telephone Interview with Mike Lenett, Aide to Senator Howard Metzenbaum (Sept. 23, 1994) (confirming that Senator Metzenbaum chose to withhold his proposed amendment until Congress had more time to review effect of *Central Bank*); *see also* 140 CONG. REC. S9460 (daily ed. July 21, 1994) (statement of Sen. Metzenbaum) (calling for immediate action to amend § 10(b) of 1934 Act to preserve SEC's ability to convict aiders and abettors of securities fraud). Senator Metzenbaum warned that *Central Bank* gives "clearly fraudulent behavior the green light." *Id.*

137. *See* H.R. Con. Res. 315, 103d Cong., 2d Sess. (1994) (enacted) (calling for congressional adjournment on December 1, 1994, unless members are directed or reassemble); *Congressional and Presidential Activity*, Daily Rep. for Executives (BNA), at 231 (Dec. 5, 1994) (reporting that Congress adjourned and that 104th Congress will commence on January 4, 1995); Telephone Interview with Brad Stephenson, Aide to Senator Kay Bailey Hutchison (December 5, 1994) (confirming that 103d Congress adjourned on December 1, 1994). On June 24, 1993, Senator Metzenbaum formally announced that he would not seek re-election in November 1994. Press Release of Senator Howard Metzenbaum (June 29, 1993) (on file with the *St. Mary's Law Journal*); *see* Telephone Interview with Mike Lenett, Aide to Senator Howard Metzenbaum (Nov. 14, 1994) (confirming Senator Metzenbaum's retirement from Congress).

predicts that the new Republican majority in Congress will propose legislation targeting litigation reform; this legislation, similar in part to that offered last session by Senators Dodd and Domencini in Senate Bill 1976, will be the most likely avenue for addressing the *Central Bank* ruling.[138]

The *Central Bank v. First Interstate Bank* decision constitutes a significant departure from the overriding intent of the 1934 Securities Exchange Act. The absence of Justice Douglas since 1975 left a vacuum on the Court that has not been filled. Consequently, the Court embarked on a journey of strict statutory construction of securities laws that disserves defrauded investors. The Court should refrain from imposing its currently narrow standard of interpretation on statutes enacted for remedial purposes in an era of liberal construction. Fortunately for investors, it appears that the SEC still retains many weapons with which to combat securities fraud. However, that arsenal may be further depleted in the future if the Court takes *Central Bank* to its logical conclusion by amelio-

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138. Telephone Interview with Courtney Ward, Aide to Senator Christopher Dodd, Office of Senate Banking Committee (Nov. 9, 1994) (explaining that Senator Dodd plans to rekindle his efforts to examine litigation reform in conjunction with possible solutions to problems created by *Central Bank*). Ward opined that Senator Dodd's efforts should be well-received in the January session because of the new Republican majority. *See id.* (noting that more Republicans supported Senate Bill 1976 than Democrats, and predicting that some form of aider and abettor liability will be reinstated in § 10(b) within framework of broader litigation reform); *see also Republicans Win Control of U.S. House and Senate: Dominate Congress for First Time in 40 Years*, 54 FACTS ON FILE WORLD NEWS DIGEST, at 825, 827, Nov. 10, 1994 (providing full text of Republicans' new "Contract with America," which within its proposed "Common Sense Legal Reform Act" calls for "'[l]oser pays' laws, reasonable limits on punitive damages and reform of product liability laws to stem the endless tide of litigation"). *See generally American Survey: Incoming! Incoming!*, THE ECONOMIST, Nov. 12, 1994, at 29, 29 (discussing sweeping electoral victory of Republicans on November 8th); Richard Morin, *Voters Repeat Simple Message to Politicians: Less is Better*, WASH. POST, Nov. 13, 1994, at A1, A1 & A6 (reporting Republican victory and voter perceptions of outcome). Senators Dodd and Domencini promulgated Senate Bill 1976 in an effort to address litigation reform concerns. Telephone Interview with George Kramer, Aide to Senator Christopher Dodd, Office of Senate Banking Committee (Sept. 29, 1994). Senators Dodd and Domencini proposed Senate Bill 1976 prior to the *Central Bank* decision, and as such, the proposed legislation assumed the existence of aiding and abetting liability under § 10(b). Telephone Interview with George Kramer, Aide to Senator Christopher Dodd, Office of Senate Banking committee (Sept. 29, 1994). After *Central Bank*, Senator Dodd convened the Senate Subcommittee on Securities to hear testimony on the effects of *Central Bank* and suggestions on ways in which Congress may craft legislation so as to reinstate some form of aiding and abetting liability while maintaining proposed litigation reform. *See Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 2d Sess. (1994) (statement of Senator Christopher Dodd, Chairman, Subcommittee on Securities) (calling aiding and abetting liability "critically important," but cautioning that legislation that does not address potential "abuses of the private litigation system" will likely be ineffective and irresponsible), *available in* LEXIS, Legis Library, Cngtst File.

rating other implied causes of action under the 1933 and 1934 Acts. Congress should respond quickly by enacting legislation that specifically provides for aiding and abetting liability under Section 10(b) and Rule 10b-5 in conjunction with some type of litigation reform. This prospect appears more likely with the recent Republican sweep of both the House and Senate. Until such action occurs, however, private plaintiffs have lost a major cause of action, and many questions concerning the scope of the SEC's enforcement capabilities will remain unresolved.

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