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Central Bank of Denver v. First Interstate Bank: Pruning the Judicial Oak by Severing the Aiding and Abetting Branch

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CENTRAL BANK OF DENVER V. FIRST INTERSTATE BANK: PRUNING THE JUDICIAL OAK BY SEVERING THE AIDING AND ABETTING BRANCH

Congress and those charged with enforcement of the securities laws stand forewarned that unresolved questions concerning the scope of [private 10(b)] causes of action are likely to be answered by the Court in favor of defendants[1]

INTRODUCTION

Section 10(b) of the Securities Exchange Act of 1934 makes it unlawful to use deceptive devices or make misleading statements "in connection with the purchase or sale of any security." Under section 10(b), private actions have been said to represent a "judicial oak which has grown from little more than a legislative acorn,"[2] as courts increasingly have accorded leniency to such actions. For nearly three decades, lower federal courts have allowed private parties to bring suit based on aiding and abetting claims pursuant to section 10(b).[3] Over the same time period, the Supreme Court has declined to rule on the validity of such claims.[4] The Supreme Court's silence recently ended with its decision in *Central Bank v. First Interstate Bank*,[5] which held that the conduct proscribed by section 10(b) does not include aiding and abetting a primary violator. Consequently, private parties no longer can maintain suits based on such claims.[6] The Court's holding overrules substantial lower court precedent allowing aiding and abetting liability. This decision illustrates the continuation of the Contraction Era of securities law[7] and for the time being halts causes of action based on aiding and abetting section 10(b) violations.[8]

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1. Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1115 (1991) (Kennedy, J., concurring in part and dissenting in part).

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

3. *See, e.g.*, Monsen v. Consolidated Dressed Beef Co., 579 F.2d 793 (3d Cir.), *cert. denied*, 439 U.S. 930 (1978); Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673 (N.D. Ind. 1966).

4. *See* Herman & MacLean v. Huddleston, 459 U.S. 375, 379 n.5 (1983); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.7 (1976).

5. 114 S. Ct. 1439 (1994).

6. *Id.*

7. The term "Contraction Era" refers to the post-1975 decisions in which courts denied, restricted, and criticized implied private causes of action under the securities laws. *See* Alan R. Bromberg & Lewis D. Lowenfels, *Aiding and Abetting Securities Fraud: A Critical Examination*, 52 ALB. L. REV. 637, 648 n.64 (1988).

8. Senator Christopher Dodd (D-Conn.) and Senator Howard Metzenbaum (D-Ohio) both announced their disapproval of the Court's decision. Senator Dodd declared the Court "has laid down the gauntlet for Congress." *SEC Advocates Legislation to Preserve Section 10(b) Aiding and Abetting Liability*, 26 SEC. REG. & L. REP. (BNA) 691, 691 (May 13, 1994). Senator Metzenbaum, deeming the Court's reasoning "bizarre," introduced the Securities Exchange Act of 1934 Amendment Act of 1994 in response. 140 CONG. REC. S9460 (daily ed. July 21, 1994).

This Comment analyzes the Court's decision in *Central Bank*. Part I examines the historical development of aiding and abetting liability and the judicially conservative trend of recent Supreme Court decisions in the securities law arena. Part II provides the factual background, procedural history, and majority and dissenting rationales of *Central Bank*. Part III analyzes the Court's decision. The analysis praises the majority's judicial restraint, criticizes the dissent's reliance on suspect methods of statutory construction, and discusses possible implications of the decision. The larger policy issue of whether aiding and abetting liability might serve as a valuable addition to section 10(b) is beyond the scope of this Comment. Though aiding and abetting liability may be desirable to some commentators, this Comment takes the position that section 10(b), as it currently reads, cannot and should not be construed to allow such liability.

I. BACKGROUND

In the aftermath of the stock market crash of 1929 and the subsequent economic depression, Congress enacted the Securities Act of 1933 ("1933 Act")[9] and the Securities Exchange Act of 1934 ("1934 Act").[10] Congress passed the Acts to protect investors from fraudulent conduct in connection with securities transactions,[11] thereby substituting a philosophy of full disclosure for the prevailing philosophy of caveat emptor.[12] Together, the Acts create an extensive scheme of liability, with the 1933 Act regulating initial distribution of securities and the 1934 Act regulating post-distribution trading.[13]

The use of aiding and abetting liability by private parties has proliferated in recent years, becoming the most important secondary liability doctrine used in section 10(b) actions.[14] Prior to *Central Bank*, many commentators felt the doctrine had become so established that the Supreme Court would never reject it.[15] Other commentators and courts questioned the validity of private aiding and abetting claims given the Supreme Court's restrictive textual approach to securities law in recent years.[16]

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9. Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1988 & Supp. IV 1992).

10. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78ll (1988 & Supp. IV 1992).

11. Cheryl L. Pollak, Comment, *Rule 10b-5 Liability After* Hochfelder*: Abandoning the Concept of Aiding and Abetting*, 45 U. CHI. L. REV. 218, 218 (1977).

12. Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1972) (citing SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186 (1963)).

13. Central Bank v. First Interstate Bank, 114 S. Ct. 1439, 1445 (1994).

14. Thomas L. Riesenberg, *Supreme Court to Examine Aiding and Abetting Liability Under Rule 10b-5*, 7 INSIGHTS, no. 8, August 1993, at 34. In the past, aiding and abetting liability was used almost exclusively by the SEC. More recently, almost every private § 10(b) action contains an aiding and abetting claim. *Id.*

15. *See, e.g.*, 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, 315-18 (1988).

16. *See* Bromberg & Lowenfels, *supra* note 7, *passim*.

A. *Primary Violations and Aiding and Abetting under Section 10(b)*

Section 10(b) prohibits the use of deception or manipulation, as specified by the Securities and Exchange Commission ("SEC"), in connection with the purchase or sale of any security.[17] Pursuant to the authority granted in section 10(b), the SEC promulgated Rule 10b-5, which requires traders to either disclose inside information or abstain from trading based on such information.[18]

While the text of section 10(b) does not provide for a private right of action, courts have inferred such a right based on the maxim *ubi jus ibi remedium*, which is to say, where there is a right there is a remedy.[19] In a suit based on a section 10(b) violation, a purchaser or seller[20] of any security can bring a claim against any person engaged in manipulation[21] or deception in connection with the purchase or sale of the security.[22] For the claim to succeed, the plaintiff must satisfy three judicially created thresholds. First, the defendant must have engaged intentionally or knowingly in manipulative or deceptive conduct[23] on which the plaintiff re-

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17. Securities Exchange Act § 10, 15 U.S.C. § 78j (1988). Section 10 provides in 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-
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> . . . .
>
> (b) To use or employ, in connection the with purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Id. Section 10 is a catchall provision, "but what it catches must be fraud." Chiarella v. United States, 445 U.S. 222, 234-35 (1980).

18. 17 C.F.R. § 240.10b-5 (1994). The Rule 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,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
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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 upon any person, in connection with the purchase or sale of any security.

Throughout this Comment, the author refers to § 10(b); however, any construction limiting conduct actionable under § 10(b) also limits Rule 10b-5 because the Rule gains its authority from § 10(b). Rulemaking authority granted to an agency gives it the power to adopt regulations to carry into effect the will of Congress, not the power to make law. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-14 (1976).

19. Kardon v. National Gypsum Co., 69 F. Supp. 512, 513 (E.D. Pa. 1946).

20. *See, e.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 731-32 (1975) (illustrating the history of lower federal court holdings allowing only actual purchasers and sellers to sue under § 10(b)).

21. In the securities law context, "manipulation" is a term of art referring to practices such as wash sales, matched orders, or rigged prices, that artificially affect market activity. Santa Fe Indus. v. Green, 430 U.S. 462, 476 (1977).

22. Herman & MacLean v. Huddleston, 459 U.S. 375, 382 (1983).

23. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976). The Court also rejected negligence as a basis for liability. *Id.* at 199; *see also* Chiarella v. United States, 455 U.S. 222, 228 (1980) (holding omissions to be actionable only if defendant had a duty to disclose); Santa Fe Indus. v. Green, 430 U.S. 462 (1977) (limiting the conduct actionable to misstatements or omissions of material facts and manipulation of securities pricing).

lied.[24] Second, the plaintiff must establish that the defendant's conduct proximately caused an injury.[25] Finally, the defendant must have used the United States mail, a national security exchange, or interstate commerce to further the manipulation or deception.[26]

Additional judicial construction of the section eventually expanded liability and allowed for private actions based on a defendant aiding and abetting the primary violator.[27] This construction of the section resulted in defrauded investors suing banks,[28] accountants,[29] lawyers,[30] underwriters,[31] and stock exchanges[32] due to the typical insolvency of the primary violators in the wake of failed securities schemes.[33]

In contrast to the judicially implied private right of action for section 10(b) violations, several sections of the 1933 Act and 1934 Act expressly provide for private remedial measures.[34] However, none of these sections provide for aiding and abetting liability. While none of the sections provide an express private remedy for aiding and abetting, other sections of both the 1933 Act and the 1934 Act provide for secondary liability in the form of "controlling person" liability.[35] The 1934 Act allows the SEC to censure or restrict the activities of persons associated with a broker-

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24. Basic Inc. v. Levinson, 485 U.S. 224, 243 (1988). Along with finding reliance a requirement, the Court also clarified the definition of materiality in regard to reliance as the "substantial likelihood that the disclosure or the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Id.* at 231 (citing TSC Indus. v. Northway, 426 U.S. 438, 449 (1976)); *see also* Affiliated Ute Citizens v. United States, 406 U.S. 128, 153 (1972) (holding plaintiff need not show reliance when basing action on an omission).

25. *See* Cooke v. Manufactured Homes, Inc., 998 F.2d 1256, 1261 (4th Cir. 1993); *In re* Control Data Corp. Securities Litigation, 983 F.2d 616, 618 (8th Cir. 1991); Harris v. Union Elec. Co., 787 F.2d 355, 362 (8th Cir.), *cert. denied*, 479 U.S. 823 (1986).

26. Perez-Rubio v. Wyckoff, 718 F. Supp. 217, 232 (S.D.N.Y. 1989).

27. *See* Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673, 676 (N.D. Ind. 1966).

28. *See, e.g.*, Monsen v. Consolidated Dressed Beef Co., 579 F.2d 793 (3d Cir.), *cert. denied*, 439 U.S. 930 (1978).

29. *See, e.g.*, H.L. Green Co. v. Childree, 185 F. Supp. 95 (S.D.N.Y. 1960).

30. *See, e.g.*, SEC v. Coven, 581 F.2d 1020 (2d Cir. 1978), *cert. denied*, 440 U.S. 950 (1979).

31. *See, e.g.*, IIT v. Cornfeld, 462 F. Supp. 209 (S.D.N.Y. 1978), *aff'd in part and rev'd in part*, 619 F.2d 909 (2d Cir. 1980).

32. *See, e.g.*, Pettit v. American Stock Exch., 217 F. Supp. 21 (S.D.N.Y. 1963).

33. *See* John T. Vangel, Note, *A Complicity-Doctrine Approach to Section 10(b) Aiding and Abetting Civil Damages Actions*, 89 COLUM. L. REV. 180, 180 (1989).

34. *See* 15 U.S.C. § 77k(a) (1988) (creating private cause of action for false statements or omissions in registration statements); 15 U.S.C. § 77*l* (1988) (same for the sale of securities by way of a material misstatement or omission); 15 U.S.C. § 78i(e) (1988) (same for manipulative practices, e.g., wash sales and matched orders); 15 U.S.C. § 78p(b) (1988) (same against owners, officers, and directors who engage in short-swing trading); 15 U.S.C. § 78r(a) (1988) (same for misleading statements in forms filed with the SEC). In contrast to the express rights of action granted in the 1933 and 1934 Acts, the Commodity Exchange Act expressly provides for a private cause of action based on aiding and abetting a violator. 7 U.S.C. § 25(b)(3) (1988).

35. *See, e.g.*, Securities Act of 1933 § 15, 15 U.S.C. § 77o (1988) (providing for "controlling person" liability, unless such person "had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist"); Securities Exchange Act of 1934 § 20, 15 U.S.C. § 78t (1988) (providing for controlling person liability with the same 'good faith' exception).

dealer[36] who willfully aid and abet or otherwise induce a securities violation by another.[37] In addition to the foregoing express provisions for secondary liability, the 1934 Act imposes supervisory duties on exchanges and clearing agencies.[38]

The first case to address aiding and abetting liability in the securities arena, *SEC v. Timetrust*,[39] illustrates its criminal law antecedents. The SEC alleged that Timetrust had engaged in a scheme to defraud purchasers of securities[40] and that Timetrust had done so with the "aid and abetment" of others.[41] In deciding whether the SEC could invoke properly an injunction based on aiding and abetting a securities violation of section 17(a), the court noted that the Criminal Code of the United States provided for aiding and abetting liability in a criminal proceeding.[42] The court then concluded that "no good reason appears why this same rule should not apply in an injunctive proceeding to restrain a violation of the same statute."[43]

The landmark decision allowing civil liability for aiding and abetting a violation of section 10(b) came in *Brennan v. Midwestern United Life Insurance*.[44] The district court relied on tort law principles to allow a private action based on an aiding and abetting theory. In *Brennan*, Dobich Securities Corporation, from whom the plaintiffs had purchased defendant corporation's stock, used a short selling scheme[45] to create an artificially high market price for the stock.[46] The plaintiffs alleged that Midwestern knew of Dobich's conduct but permitted it to continue by failing to report Dobich to the SEC.[47] The plaintiffs argued that by failing to report the improper activity, the defendants "knowingly and purposely encouraged an artificial build-up in the market for its stock."[48] As a result of such aiding and abetting, Midwestern "was allegedly in a more favorable position for potential mergers" being negotiated.[49]

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36. "Broker-dealer" is a term of art referring to a securities brokerage firm. BLACK'S LAW DICTIONARY 193 (6th ed. 1990).

37. 15 U.S.C. § 78o(b)(4)(E) (1988). Pursuant to authority granted by the Investment Advisers Act and the Investment Company Act, the SEC also has authority to discipline investment advisers who aid or abet a securities law violation. 15 U.S.C. §§ 80a-9(b)(3), 80b-3(e)(5) (Supp. IV 1992).

38. 15 U.S.C. §§ 78f, 78q (1988 & Supp. IV 1992).

39. 28 F. Supp. 34 (N.D. Cal. 1939).

40. *Id.* at 37.

41. *Id.* at 43.

42. *Id.*

43. *Id.*

44. 259 F. Supp. 673 (N.D. Ind. 1966).

45. Short selling occurs when a seller contracts for the sale of stock the seller does not own, "so as to be available for delivery at the time when, under rules of the exchange, delivery must be made." BLACK'S LAW DICTIONARY 1379 (6th Ed. 1990). Short selling is not illegal in and of itself, but in *Brennan* Dobich did not cover (buy and deliver) as the rules required. *Brennan*, 259 F. Supp. at 675.

46. *Brennan*, 259 F. Supp. at 675.

47. *Id.*

48. *Id.*

49. *Id.*

Midwestern attacked the complaint by challenging the aiding and abetting theory, contending section 10(b) did not provide authority for the claim and that the legislative history indicated that Congress chose not to proscribe aiding and abetting.[50] The district court rejected Midwestern's contentions, reasoning courts had allowed private section 10(b) actions based on general principles of tort law and that these same principles should guide the construction of section 10(b) with respect to the issue of aiding and abetting liability.[51] The court relied on the Restatement of Torts section 876, stating that principles formulated therein are the "logical and natural complement" to a section 10(b) implied right of action.[52]

Other courts ultimately followed *Brennan*'s rationale and similarly relied on tort law to hold peripheral defendants liable as aiders and abettors.[53]

All federal courts of appeals considering whether aiding and abetting liability exists under section 10(b) have concluded that it does.[54] The majority rule, as represented by the Second, Third, Eighth, and Tenth Circuits, requires: (1) an independent violation of section 10(b); (2) the aider and abettor's knowledge of the violation; and (3) substantial assistance by the aider and abettor in the achievement of the primary violation.[55] The First, Fifth, Sixth, and Eleventh Circuits articulate the elements in a slightly different manner, requiring that the aider and abettor knowingly and substantially assist in the primary violation.[56]

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50. *Id.* at 675-77.

51. *Id.* at 680-82 (citing Crist v. United Underwriters, Ltd., 343 F.2d 902 (10th Cir. 1965); Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946)).

52. *Brennan*, 259 F. Supp. at 680. The Restatement (Second) of Torts, reading substantially the same today as the Restatement of Torts did in 1939, provides:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
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> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

RESTATEMENT (SECOND) OF TORTS § 876 (1977).

53. *See, e.g.*, SEC v. Coffey, 493 F.2d 1304, 1316 (6th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975); Landy v. FDIC, 486 F.2d 139, 162 (3d Cir. 1973), *cert. denied*, 416 U.S. 960 (1974); *see, e.g.*, Daniel R. Fischel, *Secondary Liability Under Section 10(b) of the Securities Act of 1934*, 69 CAL. L. REV. 80, 84 n.29 (1981).

54. Central Bank v. First Interstate Bank, 114 S. Ct. 1439, 1456 & n.1 (Stevens, J., dissenting).

55. *See Landy*, 486 F.2d at 162-63; *see also* National Union Fire Ins. Co. v. Turtur, 892 F.2d 199, 206-07 (2d Cir. 1989); Walck v. American Stock Exch., Inc., 687 F.2d 778, 791 (3rd Cir. 1982), *cert. denied*, 461 U.S. 942 (1983); Stokes v. Lokken, 644 F.2d 779, 782-83 (8th Cir. 1981); Edward J. Mawod & Co. v. SEC, 591 F.2d 588, 595-96 (10th Cir. 1979). The Ninth Circuit also uses this formula but additionally requires actual knowledge of the violation by the aider and abettor. *See* Harmsen v. Smith, 693 F.2d 932, 943 (9th Cir. 1982), *cert. denied*, 464 U.S. 822 (1983).

56. *See, e.g.*, Bane v. Sigmundr Exploration Corp., 848 F.2d 579, 581 (5th Cir. 1988); Moore v. Fenex, Inc., 809 F.2d 297, 303 (6th Cir.), *cert. denied*, 483 U.S. 1006 (1987); Woods v. Barnett Bank, 765 F.2d 1004, 1009 (11th Cir. 1985). Some commentators view the differ-

The Seventh Circuit employs a stricter analysis than the other circuits. Aside from requiring satisfaction of the three-pronged majority rule, the Seventh Circuit requires as a threshold matter that the aider and abettor possess the same level of scienter as the primary violator and that the aider and abettor commit one of the manipulative or deceptive acts.[57] In *Barker v. Henderson, Franklin, Starnes & Holt*,[58] the plaintiffs brought a claim against an accounting firm and a law firm for aiding and abetting. The Seventh Circuit granted summary judgment, stating that an aider and abettor must meet the same standards as a primary violator but need not actually sell the security.[59]

B. *Aiding and Abetting Application Problems*

No clear distinctions exist between primary and secondary liability in the securities law context. Generally, plaintiffs sue the same person as both a primary violator and as an aider and abettor,[60] and courts spend minimal time analyzing the distinction.[61] At times, courts impose liability based on both capacities.[62]

Some courts distinguish between primary liability and aiding and abetting liability by using a direct/indirect participant duality.[63] Under this type of analysis, a primary violator directly participates in the fraud, while a secondary violator only indirectly participates in the fraud. *SEC v. Coffey*[64] illustrates this distinction. In *Coffey*, the State of Ohio purchased notes from an issuing company.[65] The SEC alleged the issuing company made misrepresentations to the state and to a rating agency to achieve a "prime" rating for the notes.[66] The SEC named the company's financial vice-president as one of the defendants, and, in deciding whether to impose primary liability on the officer, the court examined whether the financial vice-president had direct contacts with the misled parties.[67]

Courts occasionally base the distinction between a primary violator and an aider and abettor on the role the person played in the transaction. In *DMI Furniture, Inc. v. Brown, Kraft & Co.*,[68] the court limited primary

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ences between the Second, Third, Eighth, and Tenth Circuits' test and the test applied by the First, Fifth, Sixth, and Eleventh Circuits as inconsequential. *See, e.g.*, Joel S. Feldman, *The Breakdown of Securities Fraud Aiding and Abetting Liability: Can a Uniform Standard be Resurrected?*, 19 SEC. REG. L.J. 45, 73 (1991).

57. Schlifke v. Seafirst Corp., 866 F.2d 935, 947 (7th Cir. 1989); *see* LHLC Corp. v. Cluett, Peabody & Co., 842 F.2d 928, 932 (7th Cir.), *cert. denied*, 488 U.S. 926 (1988); Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490, 495 (7th Cir. 1986).

58. 797 F.2d 490 (7th Cir. 1986).

59. *Id.* at 495.

60. Bromberg & Lowenfels, *supra* note 7, at 640.

61. Kuehnle, *supra* note 15, at 318.

62. *See, e.g.*, Herman & Maclean v. Huddleston, 459 U.S. 375, 379 & n.5 (1983) (recognizing, but not discussing, the dual liability found by the trial court).

63. *See* Smith v. Ayres, 845 F.2d 1360, 1365 (5th Cir. 1988).

64. 493 F.2d 1304 (6th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975).

65. *Id.* at 1308.

66. *Id.*

67. *Id.* at 1315.

68. 644 F. Supp. 1517 (C.D. Cal. 1986).

liability to actual buyers and sellers of securities, persons acting in roles that statutes expressly specify as liable, or persons acting in roles that constitute an integral part of the statutory scheme.[69]

The lines drawn in *DMI* and *Coffey* do not offer valid distinctions because the text of section 10(b) covers "any person."[70] If "any person" can "directly or indirectly" commit a primary violation, the distinctions fail to separate sufficiently aiders and abettors from primary violators.

The Seventh Circuit limits primary liability to those persons otherwise covered by the 1933 and 1934 Acts.[71] Under this view, the court limits primary liability to buyers, sellers, issuers of securities, the board of directors of the issuer, persons signing or preparing a prospectus, and any controlling persons.[72] As noted previously, the Seventh Circuit also requires that the aider and abettor engage in a manipulative or deceptive act. Arguably, under the Seventh Circuit's approach, aiding and abetting liability constitutes a mere label attached to accountants, lawyers, trustees, and such whose actions constitute primary violations of section 10(b).[73]

While some commentators and courts have suggested that no distinction exists between primary and aiding and abetting liability, others have defined secondary liability in terms of duty.[74] Still others beg the question, describing a primary violator as one who commits acts directly proscribed by law and a secondary violator as one upon whom the court imposes liability because of a relationship with the primary violator.[75] In any event, the jurisprudence prior to *Central Bank* provided no clear or meaningful distinction between primary and aiding and abetting liability.[76]

C. *Supreme Court Decisions in the Contraction Era*

Courts developed private remedies and aiding and abetting liability in the Expansion Era of securities law.[77] During this era, courts increasingly

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69. *Id.* at 1519.

70. 15 U.S.C. § 78j (1988).

71. *See* Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490, 494-95 (7th Cir. 1986).

72. *See* Mary T. Doherty, Note, *Aiding and Abetting Securities Fraud*, 25 IND. L. REV. 829, 839-40 (1992) (arguing the Seventh Circuit's distinction is different from other circuits in that it focuses on the defendant's role in the statutory scheme rather than his role in the fraudulent scheme).

73. *See id.* at 852 (suggesting also that aiding and abetting has been all but eliminated in the Seventh Circuit).

74. *See, e.g.*, 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) (classifying persons owing a duty to the public as primary violators).

75. *See* Kuehnle, *supra* note 15, at 318-20.

76. *See, e.g.*, Feldman, *supra* note 56, at 46 (contending that the distinction defies precise definition).

77. Bromberg & Lowenfels, *supra* note 7, at 648; *see also* Lewis D. Lowenfels, *Recent Supreme Court Decisions Under the Federal Securities Laws: The Pendulum Swings*, 65 GEO. L.J. 891, 923 (1977) (arguing the Court has shifted its views on federal securities law from an expansion of implied rights during the Expansion Era to a more recent defendant-oriented construction).

formulated new private actions and remedies.[78] Beginning in 1975, the Supreme Court entered a new phase in which its decisions began to limit the doctrines developed during the Expansion Era.[79] The Court expressed concern over the implications of the expansive liability created in the Expansion Era and began to restrict such liability.[80] The ensuing "contraction" period consequently resulted in courts rejecting new private actions and criticizing the existing private actions.[81]

The Supreme Court's decisions during the Contraction Era demonstrate a recurring trend to look continually to the language of the statute and the statutory scheme to ascertain congressional intent.[82] This textual approach to statutory construction differs dramatically from the original approach used by the courts in recognizing private actions and aiding and abetting claims. The difference in the two approaches caused courts and commentators to question the validity of private actions based on aiding and abetting.[83]

The Court's securities law decisions in the Contraction Era can be grouped roughly into three interrelated categories. The first category consists of cases in which the Court considered whether a particular section implied a private cause of action.[84] Cases in the second category dis-

78. *See, e.g.*, SEC v. National Sec., Inc., 393 U.S. 453, 468-69 (1969) (holding that a merger involves both a purchase and sale and recognizing Rule 10b-5 application in a proxy solicitation situation); J.I. Case Co. v. Borak, 377 U.S. 426, 431-34 (1964) (finding an implied cause of action for violation of Rule 14a-9 and instructing courts to provide effective remedial measures); SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 192 (1963) (holding scienter unnecessary in an SEC injunction proceeding under the Investment Advisors Act of 1940); Marx v. Computer Sciences Corp., 507 F.2d 485, 492 (9th Cir. 1974) (ruling that an earnings forecast constituted a fact and allowing a 10b-5 claim based on such a forecast); White v. Abrams, 495 F.2d 724, 733 (9th Cir. 1974) (finding 10b-5 broad enough to include negligence); A.T. Brod & Co. v. Perlow, 375 F.2d 393, 397 (2d Cir. 1967) (allowing 10b-5 claims for all forms of fraud, not just traditional ones); Vine v. Beneficial Fin. Co., 374 F.2d 627 (2d Cir. 1967) (easing the buyer/seller requirement of 10b-5); Miller v. Bargain City, USA, Inc., 229 F. Supp. 33 (E.D. Pa. 1964) (allowing an open market buyer to maintain a 10b-5 suit based on false statements filed with the SEC); New Park Mining Co. v. Cranmer, 225 F. Supp. 261, 266 (S.D.N.Y. 1963) (allowing a corporation to sue its officers and directors for 10b-5 violations and relaxing privity); Cochran v. Channing Corp., 211 F. Supp. 239, 243-45 (S.D.N.Y. 1962) (recognizing a 10b-5 violation by silence and dispensing with privity requirement).

79. Bromberg & Lowenfels, *supra* note 7, at 648 n.64.

80. *Id.*

81. *Id.*

82. *See* Musick, Peeler & Garrett v. Employers Ins. of Wausau, 113 S. Ct. 2085, 2090 (1993); Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1102-04 (1991); Chiarella v. United States, 445 U.S. 222, 234-35 (1980); Blue Chip Stamps v. Manor Drug Store, 421 U.S. 723, 756 (1975).

83. *See* Akin v. Q-L Inv., Inc., 959 F.2d 521, 525 (5th Cir. 1992); Benoay v. Decker, 517 F. Supp. 490, 495 (E.D. Mich. 1981), *aff'd*, 735 F.2d 1363 (6th Cir. 1984); *see also* Fischel, *supra* note 53, at 91-96.

84. *See generally* Tamar Frankel, *Implied Rights of Action*, 78 VA. L. REV. 553 (1981) (providing a detailed analysis of the Court's decisions involving implied private remedies for securities violations).

cuss issues concerning the extent of the prohibited conduct.[85] Cases in the third category address aspects of the private liability scheme.[86]

During the Expansion Era, the Court followed an enforcement rationale approach in deciding whether a particular section implied a private remedy. Under this rationale, the Court allowed private actions based on the necessity of supplementing SEC enforcement of the statutory scheme.[87] In *Cort v. Ash*,[88] the Court restricted this enforcement rationale and articulated a four part test for deciding whether an implied private remedy existed.[89] Subsequently, the Court further narrowed the test and articulated the dispositive inquiry as whether Congress intended to create a private remedy.[90] This line of cases demonstrates a withdrawal from the earlier tort law rationale of implied private remedies and highlights the Court's focus on statutory construction.[91]

Ernst & Ernst v. Hochfelder[92] illustrates the second category of cases, in which the Court considered the scope of the conduct on which a plaintiff could base a cause of action. In *Hochfelder*, the plaintiffs premised their cause of action on a theory of "negligent nonfeasance."[93] While the plaintiff's complaint alleged the defendant had aided and abetted a violator of section 10(b), the Court declined to address this issue.[94] The Court, relying on the language of the statute, ruled that a section 10(b) claim requires scienter.[95] Finding the language clear in the overall statutory

85. *See, e.g.*, Dirks v. SEC, 463 U.S. 646, 657-58 (1983) (holding that a duty to disclose does not arise from the mere possession of non-public information); Aaron v. SEC, 446 U.S. 680, 691 (1980) (holding that the scienter requirement is the same for SEC injunctive proceedings and private party claims); *Chiarella*, 445 U.S. at 228 (holding that nondisclosure violates § 10(b) only when the defendant owes a disclosure duty to the plaintiff); Santa Fe Indus. v. Green, 430 U.S. 462, 478-80 (1977) (holding that regardless of the fairness of the terms, Delaware short-form mergers do not violate § 10(b) where there is full disclosure); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 201 (1976) (requiring intent to deceive).

86. *See, e.g.*, Musick, Peeler & Garrett v. Employers Ins. of Wausau, 113 S. Ct. 2085, 2091-92 (1993) (recognizing a right of contribution for § 10(b) violations); Basic Inc. v. Levinson, 485 U.S. 224, 243 (1988) (imposing a reliance requirement on the plaintiff); Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 315 (1985) (denying the use of the *in pari delicto* defense to liability); *Blue Chip Stamps*, 421 U.S. at 733 (limiting standing to buyers and sellers).

87. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 430-31 (1964) (implying a private cause of action under § 14(a) in order to supplement enforcement of the statutory scheme).

88. 422 U.S. 66 (1975).

89. The four-part test established in *Cort* for implying a private remedy asks: (1) Is the plaintiff a member of the beneficiary class of the statute?; (2) Is there any explicit or implicit indication that Congress intend a private remedy?; (3) Is a private remedy consistent with the legislative scheme?; and (4) Is the cause of action one of basically state concern typically relegated to state law? *Id.* at 78.

90. "The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction." Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, 15 (1979).

91. *See* Bromberg & Lowenfels, *supra* note 7, at 650-661 (analyzing the validity of aiding and abetting liability under the *Cort* four-part test); Fischel, *supra* note 53, at 90-94 (discussing the validity of § 10(b) secondary liability under the Court's Contraction Era view); Frankel, *supra* note 84, *passim* (discussing the evolution of the Court's implied remedy analysis).

92. 425 U.S. 185 (1976).

93. *Id.* at 190.

94. *Id.* at 193 n.7.

95. *Id.* at 201.

scheme, the Court held that the text of the section controlled the decision.[96]

Musick, Peeler & Garrett v. Employers Insurance of Wausau[97] illustrates the third category of cases, in which the Court faced issues concerning the procedural aspects of the private liability scheme. In *Musick*, the Court considered whether defendants in a private section 10(b) action could seek contribution from other defendants.[98] The Court held in the affirmative, basing its decision on the overall statutory scheme.[99] The Court stated that when faced with questions as to the individual components of an implied private action, it must infer how the 1934 Congress would have addressed the issue had the action been an express provision.[100] In making its inference, the Court announced its continuing goal to avoid "conflict with Congress' own express rights of action, to promote clarity, consistency and coherence for those who rely upon or are subject to 10b-5 liability, and to effect Congress' objectives in enacting the securities laws."[101] *Musick* demonstrates the Court's consistent use of the textual approach, even when it expanded the components of a private right of action.

II. INSTANT CASE

A. *Facts and Procedural History*

Colorado Springs-Stetson Hills Public Building Authority (the "Authority") issued bonds in 1986 and 1988 with a total face value of $26 million.[102] Central Bank, the petitioner, acted as an indenture trustee for the bond issue.[103] Landowner assessment liens secured the bonds.[104] The bonds contained covenants requiring the value of the land subject to

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96. *Id.*

97. 113 S. Ct. 2085 (1993).

98. *Id.* at 2086.

99. *Id.* at 2090-91. The Court looked first to the language of § 10(b), but noted it "provides little guidance." *Id.* at 2090. The Court next turned to sections 9 and 18 of the 1934 Act, stating that the sections were of "particular significance in determining how Congress would have resolved the question" as the sections target the same dangers as § 10(b). *Id.* at 2090. The Court found sections 9 and 18 both to contain nearly identical rights of contribution, and thus inferred a right of contribution for § 10(b) defendants. *Id.* at 2091. In dissent, Justice Thomas asserted that the majority's decision "unfortunately nourishes 'a judicial oak which has grown from little more than a legislative acorn.' " *Id.* at 2092 (Thomas, J., dissenting) (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975)).

100. "Our task is not to assess the relative merits of the competing rules, but rather to attempt to infer how the 1934 Congress would have addressed the issue. . . ." *Id.* at 2089-90.

101. *Id.* at 2090 (citation omitted); *see also Blue Chip Stamps*, 421 U.S. at 737-44 (promoting clarity); *Santa Fe Indus. v. Green*, 430 U.S. 462, 477-78 (effecting Congress's objectives).

102. Central Bank v. First Interstate Bank, 114 S. Ct. 1439, 1443 (1994).

103. *Id.* An indenture, in the context of business financing, refers to a contract that establishes the terms of the bond issuance. BLACK'S LAW DICTIONARY 770 (6th ed. 1990). An indenture trustee performs duties specifically set out in the indenture and is only liable for the performance of those duties. The indenture trustee thus has the duty to examine all evidence to ensure it conforms to the requirements of the indenture. 15 U.S.C. 77ooo(a) (1988 & Supp. IV 1992).

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

the liens to be worth at least 160% of the total outstanding principal and interest.[105]

The covenants additionally required the developer of Stetson Hills, AmWest Development, to provide evidence that the 160% threshold was met each year.[106] The 1988 appraisal, provided in January, contained land values virtually unchanged from the 1986 appraisals.[107] In contrast, property values in the Colorado Springs area generally had declined over the same period of time.[108] Because of the conflict between the appraisal and the general Colorado Springs real-estate market, Central Bank had its in-house appraiser review the 1988 evaluation.[109] The in-house appraiser concluded the 1988 evaluation appeared overly optimistic and recommended hiring an outside appraiser for an independent review of the appraisal.[110]

After a series of letters, Central Bank agreed to postpone the independent evaluation until December 1988.[111] By the time the 1988 bond issue closed in June, First Interstate Bank had bought $2.1 million worth of the 1988 bonds.[112] The independent review began in December, but before completion of the review, the Authority defaulted on the 1988 bonds.[113]

First Interstate sued the Authority, an underwriter, a junior underwriter, and a director of AmWest, alleging that the parties had violated section 10(b).[114] First Interstate also sued Central Bank, alleging Central Bank aided and abetted the other defendants in violating section 10(b).[115]

The district court granted Central Bank's motion for summary judgment on the ground no genuine issue of material fact existed, holding that allegations of recklessness did not satisfy the scienter requirement for aiding and abetting.[116] On appeal, the Tenth Circuit held that recklessness did satisfy the scienter element for an aiding and abetting claim.[117] The court of appeals did not consider the existence or validity of aiding and abetting liability under section 10(b).[118]

Central Bank filed a petition for writ of certiorari, which the Supreme Court granted.[119] The original petition raised two issues: (1) whether an indenture trustee can be liable for aiding and abetting if no duties have

105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *See* First Interstate Bank v. Pring, 969 F.2d 891, 900 (10th Cir. 1992), *rev'd sub nom.* Central Bank v. First Interstate Bank, 114 S. Ct. 1439 (1994).
117. *Pring*, 969 F.2d at 903.
118. *Id.* at 898-904.
119. Central Bank v. First Interstate Bank, 113 S. Ct. 2927 (1993).

been breached; and (2) whether recklessness satisfies the scienter requirement.[120] The Court, sua sponte, directed the parties to brief the issue of whether a private party could bring suit based on a claim of aiding and abetting.[121]

B. *Majority Opinion*

In the majority opinion written by Justice Kennedy, the Court held that section 10(b) proscribes conduct involving manipulation or deception but does not proscribe aiding and abetting a primary violator.[122] The Court considered whether aiding and abetting fell under "the scope of conduct prohibited," or whether it concerned the elements of a private right of action.[123] The Court stated that determining the elements of the section 10(b) private liability scheme poses difficult problems because the statute fails to create expressly a private cause of action and provides no guidance in regard to the elements of such a scheme.[124] With respect to the scope of conduct, however, the Court held that the text of the statute controls any decision.[125]

Concluding that aiding and abetting constitutes conduct, the Court turned to the text of section 10(b) and noted the language did not mention aiding and abetting.[126] The Court explained that it had refused to allow section 10(b) claims based on conduct not expressly proscribed by the text of the statute and emphasized its continued adherence to the language of the statute.[127]

Respondent and the SEC argued the use of the phrase "directly and indirectly" in section 10(b) demonstrated congressional intent to prohibit aiding and abetting.[128] The Court considered the statutory scheme of securities laws and rejected the argument, noting that Congress used such

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120. Central Bank v. First Interstate Bank, 61 U.S.L.W. 3463, 3464 (Jan. 5, 1993) (No. 92-854).

121. *Central Bank*, 113 S. Ct. at 2927.

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

123. *Id.* at 1445. *See generally supra* notes 91-100 and accompanying text (discussing cases that fall under the first and second prong of the analysis). Under the first prong, the text of the statute controls the decision while under the second prong, the Court is required "to infer how the 1934 Congress would have addressed the [private liability scheme] issue" had an express private right of action for aiding and abetting been included in the 1934 Act. *Central Bank*, 114 S. Ct. at 1446.

124. *Central Bank*, 114 S. Ct. at 1446.

125. *Id.*

126. *Id.* at 1446-48. "Our consideration of statutory duties, especially in cases interpreting § 10(b), establishes that the statutory text controls the definition of conduct covered by § 10(b). That bodes ill for the respondents, for 'the language of Section 10(b) does not in terms mention aiding and abetting.' " *Id.* at 1447 (quoting Brief for SEC as Amicus Curiae 8).

127. *Id.* at 1446.

128. *Id.* at 1447.

"directly and indirectly" language numerous times[129] and at no time did such language consequently impose aiding and abetting liability.[130]

After finding that the text of section 10(b) dictated the outcome, the Court concluded that an analysis of the express rights of action granted by the 1934 Act would reach the same result.[131] The Court found that while some of the express causes of action in the securities acts specify categories of possible defendants, none of the express causes of action in the 1934 Act proscribe aiding and abetting.[132] The majority concluded that interpreting section 10(b) to proscribe aiding and abetting would create an anomaly because such liability would not attach to any of the express private rights of action in the Act.[133]

In addition to considering textual analysis, the Court considered post-legislative history and policy arguments.[134] The respondents cited two post-legislative committee reports[135] the Court dismissed as containing only "oblique references to aiding and abetting liability."[136] Moreover, the Court stated the reports were merely an interpretation by a Congress that was not responsible for passing section 10(b).[137] The respondents, invoking the acquiescence doctrine, argued that congressional silence demonstrated approval of aiding and abetting liability.[138] The petitioner pointed out that Congress had rejected three prior proposed amendments that expressly would have incorporated aiding and abetting liability.[139] The majority reasoned that the acquiescence doctrine[140] de-

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129. *See, e.g.*, 15 U.S.C. § 78g(f)(2)(C) (1988) (addressing direct and indirect ownership of stock); 15 U.S.C. § 78i(b)(2)-(3) (1988) (addressing direct or indirect interest in puts, calls, straddles, or options); 15 U.S.C. §§ 78m(d)(1), 78p(a) (1988) (addressing direct or indirect ownership of securities); 15 U.S.C. § 78t (1988) (addressing direct or indirect control of person violating the Act).

130. *Central Bank*, 114 S. Ct. at 1447; *see also* Fischel, *supra* note 53, at 95 n.83 (positing that "[o]ne plausible interpretation of the 'direct or indirectly' language is that it allows liability to be imposed upon a defendant even though such defendant does not himself use the jurisdictional means (i.e., mail a letter in interstate commerce)"). *But see In re* Atlantic Fin. Management, 784 F.2d 29, 32 (1st Cir. 1986) (interpreting the "direct or indirect" language as encompassing principal/agent liability).

131. *Central Bank*, 114 S. Ct. at 1448-49. In undertaking this analysis, the Court essentially concluded that the same outcome would result under either prong of its test. Thus, the Court's holding did not ultimately depend on the framing of the issue as "conduct" or as "an element of the private liability scheme."

132. *Id.* at 1449.

133. *Id.*

134. *Id.* at 1452-54.

135. H.R. REP. No. 910, 100th Cong., 2d Sess. 27-28 (1988), *reprinted in* 1988 U.S.C.C.A.N. 6043, 6044-45; H.R. REP. No. 355, 98th Cong., 2d Sess. 10 (1983).

136. *Central Bank*, 114 S. Ct. at 1452.

137. *Id.*

138. *Id.*

139. *Id.* at 1453.

140. In addition to the "acquiescence doctrine," the Court addressed the "rejected proposal doctrine" and the "reenactment doctrine." *See id.* at 1450-53. "Acquiescence doctrine" refers to a theory according to which judicial gloss obtains the force of legislation by congressional inaction. The "rejected proposal doctrine" posits that rejected proposals indicate that courts cannot construe statutes to resemble the rejected proposals. The "reenactment doctrine" incorporates settled statutory construction when the Congress reenacts the statute without disturbing the settled construction. For a summary of these doctrines as well as an in-depth discussion on the dangers of using congressional inaction as an indication of legisla-

served little weight and that the post-legislative history did not point to any definitive answer.[141]

The Court addressed policy arguments by considering the uncertain and expansive litigation created by aiding and abetting liability and conceded the availability of policy arguments favoring aiding and abetting liability.[142] The Court, however, refrained from basing its decision on policy rationales, stating that "policy considerations cannot override our interpretation of the text and structure of the [1934] Act, except to the extent that they may help to show that adherence to the text and structure would lead to a result 'so bizarre' that Congress could not have intended it."[143]

C. *Dissenting Opinion*

Justice Stevens wrote the dissenting opinion in which Justices Blackmun, Souter, and Ginsburg joined. The dissenters argued that the majority had given "short shrift to a long history of aider and abettor liability under [section] 10(b),"[144] adding that every court of appeals to have considered the issue has upheld such liability.[145] The dissenters argued that if any confusion existed, it concerned the elements of aiding and abetting, not its existence or validity.[146] The dissent further stated that the majority's rationale imperiled other firmly rooted theories of secondary liability not expressly addressed in securities statutes.[147]

In contrast to the majority's approach, the dissenters framed the issue as whether a plaintiff has a right to sue a person who aids and abets a primary violator.[148] The dissent reasoned that because the 1934 Act had been adopted against a backdrop of liberal construction in which "courts regularly assumed . . . that a statute enacted for the benefit of a particular class conferred" the right to sue violators, section 10(b) should confer a right of action against aiders and abettors.[149]

Putting aside the liberal backdrop underlying the passage of the 1934 Act, the dissent argued that the doctrine of aiding and abetting liability

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tive intent, see William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988).

141. *Central Bank*, 114 S. Ct. at 1453. Here the acquiescence doctrine favored allowing aiding and abetting liability, but the rejected proposal doctrine indicated the invalidity of aiding and abetting liability. The Court noted that Congress had not reenacted § 10(b); therefore, the reenactment doctrine did not bolster the respondents arguments. *Id.* at 1452.

142. *Id.* at 1453-54.

143. *Id.* at 1453-54 (quoting Demarest v. Manspeaker, 498 U.S. 184, 191 (1991)).

144. *Id.* at 1456 (Stevens, J., dissenting).

145. *Id.*

146. *Id.* at 1457.

147. *Id.* at 1456, 1460 n.12 (mentioning conspiracy, respondeat superior, and common law agency principles).

148. The dissent argued the Court should uphold "the *private right of action* against aider and abettors . . . [and follow] the traditional common law presumption, that a statute enacted for the benefit of a particular class conferred on the members of that class the *right to sue*." *Id.* at 1456-57 (emphasis added). Thus, the dissent did not concern itself with whether § 10(b) proscribed aiding and abetting, but rather focused on a private plaintiff's right to sue—a distinct and separate issue.

149. *Id.*

had become so well established that the Court should not disturb it.[150] The dissent noted that federal criminal law imposes liability on aiders and abettors of section 10(b) violators[151] and argued that imposing civil liability on aiders and abettors would not place an unfair duty on those who Congress has opted to leave unregulated.[152] While conceding that Congress, not courts, should create rights, the dissent argued that in this case, the long history of aiding and abetting liability provided a secure foundation for the imposition of liability.[153]

III. ANALYSIS

A. *Flaws in the Dissent's Rationale*

The dissent's argument misses the point and ignores the statutory construction goals of the modern Court. The liberal backdrop of the 1934 Act allowed private rights of action against persons engaged in conduct proscribed by statute. Aiding and abetting liability, properly seen, does not hinge on whether a plaintiff has a right to sue; rather, it focuses on whether the defendant has engaged in conduct prohibited by the statute.[154] Implying a private remedy redresses conduct prohibited by the statute, while implying liability for aiding and abetting changes the proscription of the statute by expanding its scope.[155] In the first instance, Congress *has* proscribed the conduct and the Court merely allows a remedy. In the second instance, the Court proscribes conduct *and* implies a remedy. Thus, expanding the scope represents a greater usurpation of Congressional power.

The dissent compounds its misconception of the issue by failing to validate aiding and abetting liability under the rationale of *Musick, Peeler & Garrett v. Employers Insurance of Wausau*.[156] During the Contraction Era,

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150. *Id.* at 1457-58.

151. *Id.* at 1459 (citing 18 U.S.C. § 2 (1988)). In response, the majority noted that the Court has "been reluctant to infer a private right of action from a criminal prohibition alone." *Id.* at 1455. The majority further pointed out the illogic of the dissent's argument by stating "[i]f we were to rely on this reasoning now, we would be obliged to hold that a private right of action exists for every provision of the 1934 Act, for it is a criminal violation to violate any of its provisions." *Id.* (citing 15 U.S.C. § 78ff (1988)).

152. *Id.* at 1459.

153. *Id.* at 1460.

154. *See* Texas & Pacific Ry. v. Rigsby, 241 U.S. 33, 39 (1916). On their own accord, the dissenters contend that the liberal backdrop confers "the right to sue *violators of that statute*." *Central Bank*, 114 S. Ct. at 1457 (Stevens, J., dissenting) (emphasis added).

155. *See* Fischel, *supra* note 53, at 93. The dissent consistently argues in favor of a plaintiff's right, but does not recognize that a private remedy redresses the wrong proscribed by Congress.

156. 113 S. Ct. 2085 (1993). At first blush, one might think the Court's decision in *Central Bank* directly conflicts with *Musick* as the former eliminates a form of secondary liability while the latter provides for the right of contribution among violators of § 10(b). This contention fails to understand that the right of contribution established in *Musick* is the right of contribution between persons jointly liable for the violation. *Id.* at 2086. Thus, the right of contribution established in *Musick* is not dependent on the existence of secondary liability. *See supra* notes 97-101 and accompanying text; WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 50, at 309 (4th ed. 1971) (addressing contribution and the joint tortfeasor); Robert A. Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 136 (1932)

courts have used a textual approach in seeking out congressional intent when implying a private remedy or defining the contours of such a cause of action.[157] The statutory scheme of the 1934 Act weighs heavily against imposing aiding and abetting liability.[158] None of the sections of the 1933 Act or the 1934 Act expressly providing for a private cause of action imposes aiding and abetting liability. Additionally, where Congress did impose controlling person liability, a form of secondary liability, it provided a good faith defense.[159] The dissent undermines its rationale by failing to address congressional intent and the negative implication of the statutory scheme.

Moreover, the dissent erred by relying on the extensive history of aiding and abetting liability in the context of section 10(b) claims. This error consists of two components: relying on congressional silence and relying on settled lower court precedent.

Congressional silence, the passage of time, and agreement among the courts of appeals does not add validity to an erroneous decision.[160] When Congress acts, it does so collectively and in an affirmative manner.[161] Congress creates law by enacting statutes and cannot legislate without such action. Thus, courts cannot reliably use the silence of Congress to infer legislative intent.[162]

(addressing contribution and equality); William L. Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413, 429-43 (1937) (addressing contribution and several liability).

157. *See supra* notes 77-101 and accompanying text (discussing the Supreme Court's Contraction Era decisions).

158. *See* Bromberg & Lowenfels, *supra* note 7, at 653 (asserting that both the negative implication and post legislative history lead to the conclusion that Congress did not intend to impose aiding and abetting liability); Fischel, *supra* note 53, at 94-99 (arguing that both statutory scheme and legislative history indicate that § 10(b) does not impose aiding and abetting liability).

159. *See supra* note 35 and accompanying text.

160. *See, e.g.*, Zuber v. Allen, 396 U.S. 168, 185 (1969) (stating that "[l]egislative silence is a poor beacon to follow"; *see also* Aaron v. SEC, 446 U.S. 680 (1980). *Aaron* presented the issue of whether the SEC had to establish scienter for an injunction to enforce Rule 10b-5. Four years earlier, the Court had held that private parties must establish scienter, but lower courts had interpreted the decision as not compelling a scienter requirement in injunctive proceedings. The SEC built a strong acquiescence argument, but the Court responded by stating, "it is our view that the failure of Congress to overturn the Commission's interpretation falls far short of providing a basis to support a construction of § 10(b) so clearly at odds with its plain meaning." *Id.* at 694 n.11; *see also* Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1104 (1991) (rejecting an acquiescence argument as to § 14(a) of the 1934 Act). *See generally* Eskridge, *supra* note 140 (criticizing the use of congressional inaction as a form of precedent).

161. *See, e.g.*, U.S. CONST. art. I, § 7, cl. 2 (stating that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States"); Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 946 (1983) (stating that bicameral enactment and presentation are "integral parts of the constitutional design for the separation of powers").

162. "It does not follow . . . that Congress's failure to overturn a statutory precedent is reason for this Court to adhere to it." Patterson v. McLean Credit Union, 491 U.S. 164, 175 (1989); *see* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 181 (1975); Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1133 (1983); Ernst Freund, *Interpretation of Statutes*, 65 U. PA. L. REV. 207, 214-15 (1917); John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities"*, 64 B.U. L. REV. 737 (1984); *see also* Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515

The acquiescence of a subsequent Congress does not indicate the intent of the enacting Congress.[163] The Court has often stated that "views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."[164] "[E]ven when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment."[165] If the affirmative statements of a subsequent Congress do not provide a meaningful basis for inferring legislative intent, the silence of a subsequent Congress provides even less.[166]

The parties in *Central Bank* advanced competing arguments based upon post-legislative history. While the respondent argued that acquiescence and reference to secondary liability in committee reports weigh in favor of allowing aiding and abetting liability, the petitioner argued the rejected amendments that would have incorporated aiding and abetting language into section 10(b) weigh against such liability.[167] In favoring the acquiescence doctrine over the rejected proposal doctrine, the dissent fails to support its decision with any reasonable rationale. The post-legislative history of section 10(b), at best, provides an inconclusive answer.

While all previous courts of appeals that considered the question may have agreed that aiding and abetting liability existed, considerable confusion existed among the same courts regarding the proper application of such liability.[168] The confusion among circuit courts may stem from a

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(1982) (approving only limited use of congressional silence as an interpretive tool). The dissent's acquiescence argument would carry more weight if the Supreme Court previously had upheld the validity of aiding and abetting liability, yet the Court had twice reserved for decision the validity of such liability. *See supra* note 4 and accompanying text.

163. *See, e.g.*, Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 186-200 (1989) (contending that ignorance, inertia, interpretational ambiguity, and irrelevance make it difficult to infer congressional approval from congressional inaction); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 809-10 (1983) (suggesting that reliance on post-enactment legislative materials usurps prior Congressional power without "going through the constitutionally prescribed processes for repeal"); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 205 (1983) (stating that "it is particularly risky to draw inferences from subsequent congressional refusals to act").

164. *See* Andrus v. Shell Oil Co., 446 U.S. 657, 666 n.8 (1980) (quoting United States v. Price, 361 U.S. 304, 313 (1960)).

165. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 n.13 (1980).

166. Grabow, *supra* note 162, at 750.

167. *See supra* note 139 and accompanying text.

168. *See, e.g.*, Feldman, *supra* note 56, at 72-73 (claiming that such confusion must eventually be addressed). Additionally, the dissent may have given "short shrift" to lower court questioning of the validity of private actions based on aiding and abetting. *See, e.g., id.* at 72-73 (claiming that such confusion must eventually be addressed). The dissent also may have given "short shrift" to lower court questioning of aiding and abetting liability. *See* Akin v. Q-L Inv., Inc., 959 F.2d 521, 525 (5th Cir. 1992) (stating that there is a "powerful argument that . . . aider and abettor liability should not be enforceable by private parties pursuing an implied right of action"); Congregation of the Passion, Holy Cross Province v. Kidder Peabody & Co., 800 F.2d 177, 183 (7th Cir. 1986) (providing that courts have "frankly acknowledged that, in light of recent Supreme Court cases, there is some ambiguity about the existence of a civil cause of action for aiding and abetting"); Little v. Valley Nat'l Bank, 650 F.2d 218, 220 n.3 (9th Cir. 1981) (providing that "[t]he status of aiding and abetting as a basis for liability

conceptual problem with the use of aiding and abetting in the section 10(b) context. The theory of aiding and abetting developed mainly from criminal law and, to a lesser extent, tort law.[169] These areas of law mainly revolve around physical acts.[170] The aiding and abetting concept in criminal and tort law rests on degrees of physical presence and action, which in the physical context indicate culpability.[171]

In the context of physical torts and crimes, one can rely on physical presence and action to distinguish between primary violators and aiders and abettors. In the securities context this analysis results in confusion.[172] Reliance on these antiquated doctrines results in irreconcilable conceptual problems and uncertainty in application.[173] The confusion and conflicting results in applying the aiding and abetting doctrine evidences this lack of usefulness.

In the spirit of "if it ain't broke, don't fix it," the dissent argued that the majority would stand on firmer footing if aiding and abetting liability interfered with the effective operation of securities laws.[174] Such an approach ignores at least two adverse consequences of aiding and abetting liability. The first problem becomes evident when comparing aiding and abetting liability with "controlling person" liability. Sections 15 of the 1933 Act and 20 of the 1934 Act impose "controlling person" liability.[175] In addition, these sections provide for a good faith defense. To circumvent the use of the good faith defense, plaintiffs sought to impose aiding and abetting liability instead of, or in addition to, controlling person liability.[176] This use of aiding and abetting frustrates congressional purpose by

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under the securities laws is in some doubt"); Benoay v. Decker, 517 F. Supp. 490, 495 (E.D. Mich. 1981) (providing that "[i]t is also doubtful that a claim for 'aiding and abetting' or 'conspiracy' will continue to exist under 10(b) [because *Hochfelder*] implicitly holds that aiding and abetting liability will not exist apart from liability for a direct violation"), *aff'd*, 735 F.2d 1363 (6th Cir. 1984); Seattle-First Nat'l Bank v. Carlstedt, 101 F.R.D. 715, 722-23 (W.D. Okla. 1984) (providing that "[t]he notion that aiding and abetting securities fraud constitutes a justiciable violation of law is itself a questionable assertion"), *rev'd*, 800 F.2d 1008 (10th Cir. 1986). Again, the dissent makes no attempt to validate its reasoning in light of the confusion in the application of aiding and abetting liability.

169. Tort law does not fully embrace the concept of primary and secondary liability; however, the concept of joint tortfeasance is widely accepted. This concept recognizes independent contributions to an indivisible tort, with each tortfeasor equally liable for the entire harm. *See* Pollak, *supra* note 11, at 246-47.

170. *See* RESTATEMENT (SECOND) OF TORTS § 876 (1989) (illustrating only physical harms to the plaintiff or the plaintiff's property). The petitioner directed the Court's attention to this point but the Court did not discuss the difficulties of importing a physical tort concept into the economic arena of securities law. *See* Petitioner's Opening Brief 28 n. 20. Notably, courts do not usually apply § 876 outside the context of physical torts except in § 10(b) cases. 4 BROMBERG & LOWENFELS, *supra* note 7, § 8.5(614)(4); *see* Herman & MacLean v. Huddleston, 495 U.S. 375, 388 (1983) (claiming that securities law is not coextensive with common law).

171. *See* RESTATEMENT (SECOND) OF TORTS § 876 (1989); 2 WAYNE LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW § 6.2, at 495-98 (1979).

172. Ruder, *supra* note 74, at 621-22 (suggesting that tort law offers little or no help in the securities context).

173. Feldman, *supra* note 56, *passim*.

174. *Central Bank*, 114 S. Ct. at 1459.

175. *See supra* notes 34-35 and accompanying text.

176. For a discussion of the distinction between aiding and abetting liability and other forms of secondary liability, see Sally T. Gilmore & William H. McBride, *Liability of Financial*

allowing plaintiffs to prevent defendants' use of a good faith defense. By eliminating the use of aiding and abetting as a basis for a section 10(b) cause of action, the Court rightfully has prevented plaintiffs from circumventing the good faith defense provided by Congress.

A second problem with aiding and abetting liability arises when a private party bases a cause of action on silence. To recover from a primary violator for silence, the plaintiff must show a duty existed and that he relied on that duty.[177] A plaintiff could, however, bring an aiding and abetting claim based on silence and recover without showing either duty or reliance.[178] This functionally allows plaintiffs to side-step the Court's restrictions on section 10(b) liability.

Efficient financial markets, while inherently chaotic, require a stable and predictable legal foundation upon which they can rely. The inconsistent, ad hoc manner in which courts apply aiding and abetting liability frustrates the market system. In the past, the resulting uncertainty has left facilitators of financial markets unsure about the boundaries of permissible conduct and the scope of possible liability.[179] Additionally, the uncertainty has resulted in defendants having to settle even the most frivolous claims.[180] These increased costs eventually flow to the investor.[181] In the

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Institutions for Aiding and Abetting Violations of Securities Laws, 42 WASH. & LEE L. REV. 811, 813-814 (1985).

177. *See, e.g.*, Chiarella v. United States, 445 U.S. 222, 228 & n.9 (suggesting silence is actionable only when a duty exists between the parties).

178. *See, e.g.*, Doherty, *supra* note 72, at 851-52 (concluding that an aider and abettor can be found liable for failure to disclose despite absence of duty). Courts focus on a defendant's intent in a claim based on silence, rather than on duty. Tort law, however, does not require intent as an element of an aiding and abetting claim. Patrick J. McNulty & Daniel J. Hanson, *Liability for Aiding and Abetting by Silence or Inaction: An Unfounded Doctrine*, 29 TORT & INS. L.J. 14, 39-43 (1993).

179. Feldman, *supra* note 56, at 73.

180. Herrick K. Lidstone, Jr. & Michael J. Norton, *Professional Advisors: "Am I My Brother's Keeper?"*, 23 COLO. LAW. 1795, 1795 (1994). Because of the uncertainty surrounding § 10(b) claims, the defendant often chooses to pay a settlement rather than run the risk of an adverse judgment. *See, e.g.*, 2 LOUIS LOSS, SECURITIES REGULATIONS 1792 (2d ed. 1961) (relatively few 10b-5 cases go to trial on the merits); Michael P. Dooley, *Enforcement of Insider Trading Restrictions*, 66 VA. L. REV. 1, 27 n.129 (1980) (plaintiffs have an incentive to bring groundless and contrived claims because of the likelihood of settlement as opposed to adjudication); Thomas M. Jones, *An Empirical Examination of the Resolution of Shareholder Derivative and Class Action Lawsuits*, 60 B.U. L. REV. 542, 545 (1980) (presenting the results of a study showing that only 2.3% of the litigated shareholder claims resulted in judgment for the plaintiffs).

181. *See, e.g.*, Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 DUKE L.J. 945, 962-65 (1993) (discussing the effects of unnecessarily raising the cost of capital). "When a corporation pays a judgment or a settlement, the value of the corporation's stock may fall and its cost of capital rise. In that event, not only do shareholders sustain a loss, but the productivity of the firm may decline—at some cost to the society." Frankel, *supra* note 84, at 577-78.

end, the beneficiary[182] of the statute pays the cost of the uncertainty, a result which frustrates congressional purpose.[183]

B. *Majority's Rationale*

The majority's approach follows the textual analysis laid out in its previous Contraction Era decisions. Instead of treading upon the "quicksand" of the acquiescence doctrine,[184] the majority directs courts to look at the text of the statute and the statutory scheme to ascertain congressional intent. While this approach does not result in absolute precision, it allows participants in the financial market to predict adequately the scope of the statute.[185] This predictability will minimize unnecessary costs in financial markets and thereby benefit investors.

The Court's decision establishes a two-prong analysis for deciding issues presented by the implied private remedy litigation under section 10(b). If the Court faces a question as to the components of a private cause of action, it will decide the issue based on congressional intent as ascertained from the overall statutory scheme. If the Court faces a question as to what conduct a party can base a private cause of action on, it will turn to the text of the section at issue. While the second prong involves a fairly simple analysis, the first prong may cause hesitation because the Court is forced to infer how the enacting Congress would have decided the issue.[186]

This approach will help prevent securities law from becoming loose-jointed because it focuses on consistency and conformity with the overall statutory scheme. The dissent's rationale would allow erroneous lower court precedents to flourish. The majority's statutory construction analysis curbs the growth of unintended secondary liability and leaves policy decisions to Congress.

C. *Possible Ramifications*

Plaintiffs and courts often used aiding and abetting as a "misnomer," labeling the defendant as an "aider and abettor" when "primary violator" would more accurately describe the defendant.[187] Since the inception of

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182. Some economists have concluded that empirical evidence does not support the belief that investors have benefitted from securities regulation. SUSAN M. PHILLIPS & J. RICHARD ZECHER, THE SEC AND THE PUBLIC INTEREST (1981); George J. Benston, *Required Disclosure and the Stock Market: An Evaluation of the Securities Exchange Act of 1934*, 63 AM. ECON. REV. 132 (1973); Greg A. Jarrell, *The Economic Effects of Federal Regulation of the Market for New Security Issues*, 24 J.L. & ECON. 613 (1981); George J. Stigler, *Public Regulation of the Securities Markets*, 37 BUS. LAW. 721 (1964). For a general discussion of the economics of regulation, see STEPHEN BREYER, REGULATION AND ITS REFORM (1982).

183. *See* Akin v. Q-L Inves., 959 F.2d 521, 525 (5th Cir. 1992).

184. *See* Helvering v. Hallock, 309 U.S. 106, 121 (1940).

185. While the textual analysis will not allow participants to predict flawlessly the application of a statute, it does assure participants that courts cannot impose liability for a violation not expressly stated in the statute.

186. In considering the scope of conduct prohibited, "the text of the statute controls our decision." *Central Bank*, 114 S. Ct. at 1446.

187. *Akin*, 959 F.2d at 526.

aiding and abetting liability, courts have seldom sought to make a meaningful distinction between aiders and abettors and primary violators.[188] The majority in *Central Bank* concedes that courts need not apply the scope of primary liability narrowly.[189] As a result, courts and litigants will now begin to flesh out the limits of primary liability.

Opponents of the Court's decision in *Central Bank* claim the decision will permit fraudulent conduct to run rampant.[190] These opponents believe that *Central Bank* will immunize lawyers, accountants, bankers, and other similarly situated parties from liability for fraudulent conduct.[191] This fear ignores the main focus of the Court's decision: to violate section 10(b), the defendant must have committed some fraudulent act. If an accountant, lawyer, banker, or any other party fraudulently provides an investor with false information, the investor can bring suit against that person as a primary violator.[192] Most likely, the Court's decision will act to exonerate only those persons who did no vouching or played no role in the falsifying itself.[193] Thus, the decision does not give the "green light" to fraudulent action but instead forces plaintiffs to allege and subsequently prove fraud on the part of the defendant.

While the Court's decision probably will not disturb the implied private cause of action for violations of section 10(b),[194] it casts doubt on the validity of other forms of judicially imposed secondary liability under section 10(b) such as respondeat superior, agency, and conspiracy.[195] At the outset, it would seem that the Court's decision jeopardizes all of these

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188. *See supra* notes 60-76 and accompanying text.

189. "Any person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5, assuming all of the requirements for primary liability under Rule 10b-5 are met." *Central Bank*, 114 S. Ct. at 1455.

190. Senator Metzenbaum stated that *Central Bank* "gives clearly fraudulent behavior the green light." 140 CONG. REC. S9460 (daily ed. July 21, 1994).

191. *Id.*

192. *See, e.g.*, Breard v. Sachnoff & Weaver, Ltd., 941 F.2d 142, 144-45 (2d Cir. 1991) (finding allegations against preparer of an offering circular sufficient to survive motion for summary judgment without relying on an aiding and abetting analysis); SEC v. Washington County Util. Dist., 676 F.2d 218 (6th Cir. 1982) (holding that primary liability does not require face-to-face contact).

193. However, prior to the *Central Bank* decision courts hesitated to impose aiding and abetting liability when the defendant did "not engage in conduct that intentionally misleads or lulls a victim." IX LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 4486 (3d ed. 1992). Also, aiding and abetting liability remains a potential theory in private actions based on state securities law violations. *See generally* Douglas M. Branson, *Collateral Participant Liability Under State Securities Laws*, 19 PEPP. L. REV. 1027 (1992). Plaintiffs' counsel often may seek remedies in state courts due to the Supreme Court's decisions restricting private actions under the federal securities laws. MARC I. STEINBERG, UNDERSTANDING SECURITIES LAW § 7.03, at 133 (1989).

194. The existence of a private cause of action is "simply beyond peradventure." Herman & MacLean v. Huddleston, 459 U.S. 375, 380 (1983). *But see* Michael J. Kaufman, *A Little "Right" Musick: The Unconstitutional Judicial Creation of Private Rights of Action Under Section 10(b) of the Securities Exchange Act*, 72 WASH. U. L.Q. 287, 297-335 (1994) (arguing that the implied private cause of action under section 10(b) is unconstitutional).

195. *See, e.g.*, A.J. White & Co. v. SEC, 556 F.2d 619, 624 (1st Cir. 1977) (holding a brokerage firm can act only through its agents and is accountable for the actions of its officers); Harrision v. Dean Witter Reynolds, Inc., 715 F. Supp. 1425, 1431 (N.D. Ill. 1989) (discussing respondeat superior liability in the § 10(b) context); Eastwood v. National Bank of Com-

forms of secondary liability, yet a distinction may exist between conspiracy and the two other forms of secondary liability mentioned above. Conspiracy, similar to aiding and abetting, imposes liability based upon conduct (an agreement to engage in proscribed conduct). Respondeat superior and agency represent a more vicarious form of liability based on a relationship between the primary violator and those with the burden of secondary liability.[196] Both respondeat superior and agency are more akin to "controlling person" liability and therefore courts might view them as more consistent with the statutory scheme. If so, conspiracy liability would not survive while respondeat superior and agency would be fertile claims. It appears unlikely, however, that courts would chose to utilize this distinction.[197]

CONCLUSION

The continuing strict textual approach applied by the majority in *Central Bank* injects a degree of certainty and clarity into the complex area of securities law. The Court's rationale provides securities attorneys and their clients with a meaningful basis from which they can determine the scope of permissible conduct and potential liability. Contrary to the opinion of some alarmists, the Court's decision does not give a "green light" to fraudulent conduct but rather forces courts to more carefully consider the culpability of defendants.[198]

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merce, 673 F. Supp. 1068, 1079-81 (W.D. Okla. 1987) (discussing conspiracy liability for a § 10(b) violation).

196. While the terms secondary liability and vicarious liability are often used interchangeably, the notion of vicarious liability would be limited more properly to liability based on relationships rather than liability based on conduct. *See* Kuehnle, *supra* note 15, at 318 n.28.

197. *Central Bank* echoes the substance of Justice Kennedy's concurring-in-part and dissenting-in-part opinion in *Virginia Bankshares*. *See supra* note 1 and accompanying text. Moreover, it would seem more onerous to allow judicially created forms of liability such as respondeat superior and agency to be applied when Congress's intent was to impose controlling person liability. *See* Christoffel v. E.F. Hutton & Co., 588 F.2d 665, 667 (9th Cir. 1978); Rochez Bros., Inc. v. Rhoades, 527 F.2d 880, 884-86 (3d Cir. 1975).

198. No longer will investors be able to "have their cake and eat it, too" as they will not be able to recover from advisors on an aiding and abetting theory if the investment loses money for any reason. *See* Lidstone & Norton, *supra* note 180, at 1796.