Central Bank v. First Interstate Bank: Plain Language and the Implied Private Right of Action Under Section 10Ch) and Rule 10b-5

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I. INTRODUCTION

For nearly three decades, most federal courts implied a private right of action against aiders and abettors of securities fraud under section 10(b) of the Securities and Exchange Act of 1934 and Securities and Exchange Commission (SEC) Rule 10b-5. However, applying a plain language analysis, the Supreme Court recently held in Central Bank v. First Interstate Bank that this private right of action does not exist, because section 10(b) does not expressly mention aiding and abetting. This decision creates an analytical inconsistency, since the Court continues to recognize a private right of action against primary section 10(b) violators even though a private right is not express in the statute. Furthermore, the Court's decision is contradicted by lower court precedent, legislative intent, and policy, all of which support a private right of action against aiders and abettors.

This Note argues that the Court's plain language approach, though appropriate in other contexts, is too restrictive for interpreting a civil statute created to provide a broad remedial scheme. In particular, when applied to section 10(b), the approach frustrates the statute's intended purpose and if taken to its logical conclusion would further disarm investors of a potent antifraud weapon—the implied section 10(b) private right of action. Central Bank demonstrates the unsuitability of the Court's approach in interpreting section 10(b).

Part II of this Note briefly discusses the securities acts, section 10(b), Rule 10b-5, and the interpretive case law that followed. Part III outlines the facts in Central Bank and the Supreme Court's plain language reasoning. Part IV analyzes...

4. See infra note 103.
5. It has been suggested elsewhere that Central Bank may have the positive effect of causing a realignment of federal powers. See The Supreme Court, 1993 Term—Leading Cases, 108 Harv. L. Rev. 139, 370-71 (1994).
this reasoning in light of statutory precedent, congressional intent, and policy. Part V examines the potential effects of Central Bank on the defrauded investor, public section 10(b) enforcement, and the implied private right of action for primary violations of section 10(b). Part VI concludes that the Court's plain language approach stifles the broad remedial purpose of section 10(b), and that the Court's ruling in Central Bank is analytically inconsistent with implying a private right of action, but that the implied private right for primary violations of section 10(b) is probably secure.

II. BACKGROUND

A. Securities Fraud Legislation

The early 1930s marked the beginning of dramatic political and fiscal change for a nation weary of economic disaster. With the effects of the 1929 stock market crash still lingering, legislators passed two landmark enactments.6 The first of these acts, the Securities Act of 1933 (1933 Act),7 requires, inter alia, full disclosure of material information regarding first-time public offerings8 and their registration with the Federal Trade Commission (FTC).9 Congress' intent was to deter fraud—a major contributor to the 1929 crash10—and to promote fair dealing.11

The second enactment, the Securities Exchange Act of 1934 (1934 Act),12 is more "omnibus," affecting all aspects of public securities trading.13 It was enacted "to provide for the regula-

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6. At times, this Note will refer to these enactments together as the "securities acts." For a general discussion of the securities acts, see Milton H. Cohen, "Truth in Securities" Revisited, 79 HARV. L. REV. 1340, 1340-66 (1966).
10. See HAZEN, supra note 9, § 1.2, at 7.
11. See H.R. REP. NO. 85, at 1-5.
tion of securities exchanges and of over-the-counter markets..., to prevent inequitable and unfair practices on such exchanges and markets, and for other purposes.\textsuperscript{14} In essence, Congress wanted to bar all manipulative and deceptive conduct in the securities arena. Section 10(b) of the 1934 Act empowers the Securities and Exchange Commission (SEC) to establish rules to meet this objective.\textsuperscript{15}

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—

\textbf{(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 manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.\textsuperscript{16}

In 1942, under the auspices of section 10(b), the SEC adopted what Professor Thomas Lee Hazen has characterized as "its most encompassing antifraud prohibition" in Rule 10b-5:\textsuperscript{17}

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The SEC was established because Congress felt the FTC would not be able to handle the new administrative and enforcement burdens being proposed in the 1934 Act. As a result, all reporting is now made to the SEC. Id. at 7-8.


A basic philosophy of the Securities Exchange Act of 1934 is disclosure and is directed toward the creation and maintenance of a post-issuance securities market that is free from fraudulent practices. The investor's protection is the paramount consideration of much of the federal securities legislation and, in particular, of the 1934 Act here involved.

\textit{Id.}


17. HAZEN, supra note 9, § 13.2, at 669. Rule 10b-5 is so identified "because
It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce,. . .

(a) To employ any device, scheme, or artifice to defraud,
(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
in connection with the purchase or sale of any security.18

That the SEC intended Rule 10b-5 to deter fraudulent acts is clear from the plain language of the rule; however, neither section 10(b) nor Rule 10b-5 expressly creates a civil remedy.19 Furthermore, as Hazen observes, “[N]ot much can be gleaned from the history of [Rule 10b-5,] although the courts frequently refer to the legislative history behind the statute.”20 Nevertheless, statutory precedent and some historical fragments provide insight into congressional reasoning and intent regarding section 10(b).

18. 17 C.F.R. § 240.10b-5.
B. Federal Common Law Regarding Section 10(b) and Rule 10b-5

Patterned after section 17(a) of the 1933 Act, Rule 10b-5 has become a powerful antifraud vehicle. Much of this power results from federal court interpretation finding a private right of action based on general tort principles. Courts have justified this expansion on the broad remedial nature of section 10(b). Additionally, prior to 1994, federal courts had found an SEC action and an implied private action against aiders and abettors.

1. The implied section 10(b) private right of action

A Pennsylvania federal district court in 1946 was the first court to find a private action implied under section 10(b). In Kardon v. National Gypsum Co., two shareholders brought an action against defendants for fraudulent misrepresentations and for suppression of information regarding a conspiracy to induce the shareholders to sell their company stock for less than its fair market value. The district court recognized that neither section 10(b) nor Rule 10b-5 expressly permits an injured investor to bring a civil suit against one who has violated

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21. See HAZEN, supra note 9, § 13.2, at 669 (noting that § 17(a) was expanded in Rule 10b-5 to cover misstatements and omissions intended to defraud in connection with both purchases and sales). Section 17(a) declares:

It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.


25. Id.

26. Id. at 513.
either provision. However, the court relied on the *Restatement of Torts*, section 286, to find an implied private right of action:

The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another if; [sic] (a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and (b) the interest invaded is one which the enactment is intended to protect. . . .27

The court concluded that "[t]he disregard of the command of a statute is a wrongful act and a tort,"28 and that "the [private] right is so fundamental and so deeply ingrained in the law that where it is not expressly denied the intention to withhold it should appear very clearly and plainly."29

Other federal courts, including the circuit courts of appeal, followed the *Kardon* reasoning.30 In 1971 the United States Supreme Court effectually ratified the *Kardon* result in *Superintendent of Insurance v. Bankers Life & Casualty Co.*,31 where conspirators used a company's bond assets to purchase company stock from the sole stockholder. The Court without analysis recognized "a private right of action . . . implied under § 10(b)."32

2. **Implied actions against aiders and abettors**

Before *Kardon* and the promulgation of Rule 10b-5, in *SEC v. Timetrust*,33 a California federal district court recognized an SEC action to enjoin aiders and abettors under section 10(b).34 Noting that other sections of the 1934 Act provided for an in-

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27. Id. (quoting *RESTATEMENT OF TORTS* § 286 (1934)).
28. Id.
29. Id. at 514. The court further justified its decision by referring to the maxim *ubi jus ibi remedium*. Id. at 513. That is, "Where there is a right, there is a remedy." BLACK'S LAW DICTIONARY 1520 (6th ed. 1990).
31. 404 U.S. 6, 7 (1971). Allegedly, conspirators deceived a Board of Directors into selling the company's bond assets and used the proceeds to purchase stock. Id. at 7-8 & n.1. However, the company's books indicated that the bond proceeds were represented by a certificate of deposit. In reality, the conspirators had employed a deceptive device to secure a loan and used the loan funds to acquire the certificate of deposit. Id. at 8-9.
32. Id. at 13 n.9.
33. 28 F. Supp. 34 (N.D. Cal. 1939), *appeal dismissed per stipulation*, 118 F.2d 718 (9th Cir. 1941).
34. Id. at 43.
junction against aiders and abettors, the *Timetrust* court concluded that "no good reason appears why [section 10(b)] should not apply in an injunctive proceeding to restrain a violation of the [1934 Act]." Other courts soon adopted the *Timetrust* reasoning.

Twenty-seven years after *Timetrust*, in *Brennan v. Midwestern United Life Insurance Co.*, a United States district court in Indiana acknowledged an implied private action under section 10(b) and Rule 10b-5 against aiding and abetting a section 10(b) violation. In *Brennan*, plaintiffs brought a class action against an insurance company "for aiding, abetting, and assisting" an alleged violation of the 1934 Act. Plaintiffs believed they had purchased the insurance company's stock through a brokerage firm. Instead of carrying out the transaction, the brokerage firm used the investors' money for speculative purposes and misrepresented the reason that the stock had not been delivered. The insurance company, though aware of the brokerage firm's activities, failed to inform the SEC. Plaintiffs alleged that the scheme put the insurance company in an enhanced position for potential mergers under negotiation and that the scheme substantially benefited its directors and officers, who sold their company stock during the period of artificial demand.

The court in *Brennan* examined various cases finding an SEC action against aiding and abetting a section 10(b) violation and then addressed legislative history and policy arguments for implying a private right against the secondary violators.


40. Id. at 675.

41. Id.

42. Id. at 677-80; see infra part IV.B.1.
timately, the court based its decision on section 876 of the Restatement of Torts:

For harm resulting to a third person from the tortious conduct of another, a person is liable if he

(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.*

The court concluded, "In the absence of a clear legislative expression to the contrary, the statute must be flexibly applied so as to implement its policies and purposes." This rationale, based on tort doctrine and the court's analysis of congressional intent, became the standard for Brennan's progeny until Central Bank.45

III. CENTRAL BANK V. FIRST INTERSTATE BANK

A. The Facts

In 1986 and 1988, a Colorado public housing authority issued bonds to fund public improvements at a private development. Under the bond covenants, landowner assessment liens valued at 160% of the outstanding bond debt were to be used as security. Central Bank of Denver, N.A. (Central Bank) was named the indenture trustee.46

After a 1988 appraisal, the senior underwriter for the 1986 issue contacted Central Bank, questioning compliance with the 160% requirement. Central Bank's in-house appraiser reviewed the 1988 appraisal and, fearing the underwriter's suspicions


might be well-founded, recommended independent review. After corresponding with the developer, Central Bank decided to delay review until late 1988, well after the second issue closed. The public housing authority defaulted on the 1988 bonds before the review was finished.47

First Interstate Bank of Denver, N.A. (First Interstate Bank) and Jack Naber sued the housing authority, Central Bank, and others for section 10(b) violations. The allegations against Central Bank were limited to aiding and abetting.48 At the district court level, summary judgment was granted for Central Bank.49 The Tenth Circuit reversed,50 finding "a genuine issue of material fact as to the scienter"51 and "substantial assistance"52 elements. The United States Supreme Court granted certiorari on the question of whether recklessness is sufficient to prove aider and abettor liability under Rule 10b-5. However, the Supreme Court also directed the parties "first to brief and argue the following question: whether there is an implied private right of action for aiding and abetting violations of Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5."53

B. The Supreme Court's Reasoning

In a five-to-four decision, the Supreme Court held "that a private plaintiff may not maintain an aiding and abetting suit under § 10(b)."54 In support of its conclusion, the majority set forth three main arguments. First, within the statute's plain language, aiding and abetting is not mentioned; hence, a private right of action against it does not exist.55 Second, congressional silence and inaction are inconclusive of legislative intent.56 Third, policy is not the overriding issue; rather, the

47. Id.
48. Id.
49. Id.
51. Id. at 904.
52. Id.
55. Id. at 1447-48.
56. Id. at 1449-52.
issue is whether a private cause of action against aiders and abettors exists under section 10(b) and Rule 10b-5.57 The following discussion addresses each argument.

1. Plain language of the statute governs

Historically, courts reviewing implied private rights of action under section 10(b) had focused on the elements that would establish Rule 10b-5 private liability.58 However, in Central Bank, the Supreme Court scrutinized the “scope of conduct prohibited by § 10(b)” and set forth a plain language approach to statutory interpretation.59 According to the majority, when evaluating a statute’s scope of liability, a court must look first at the plain language of the statute.60 If the meaning of a word or phrase is ambiguous, the court must defer to the common meaning, absent legislative history evidencing an alternative meaning.61 Further clarifying, the Court stated that “ascertainment of congressional intent with respect to the

57. Id. at 1453-54.
58. See, e.g., Dirks v. SEC, 463 U.S. 646, 653-54 (1983) (recognizing “the two elements . . . for establishing a Rule 10b-5 violation: (i) the existence of a relationship affording access to inside information intended to be available only for a corporate purpose, and (ii) the unfairness of allowing a corporate insider to take advantage of that information by trading without disclosure” (citation omitted)); Aaron v. SEC, 446 U.S. 680, 701-02 (1980) (holding “that the [Securities and Exchange] Commission is required to establish scienter as an element of a civil enforcement action to enjoin violations of . . . § 10(b) of the 1934 Act, and Rule 10b-5 promulgated under that section of the 1934 Act”).
60. Id. at 1446-47.
61. Id. The Court supported its method of analysis with several prior cases. For example, in Santa Fe Industries v. Green, the Court held that § 10(b) did not reach a breach of a fiduciary duty against minority stockholders absent charges of misrepresentation or nondisclosure. Central Bank, 114 S. Ct. at 1446 (citing Santa Fe Indus. v. Green, 430 U.S. 462, 470 (1977)). It further emphasized, “The language of § 10(b) gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception.” Id. (quoting Santa Fe, 430 U.S. at 473).

In Chiarella v. United States, the Court found that “the 1934 Act cannot be read more broadly than its language and the statutory scheme reasonably permit,” and clarified that § 10(b) is a “catchall” only as to catching fraud. Chiarella v. United States, 445 U.S. 222, 234-35 (1980), quoted in Central Bank, 114 S. Ct. at 1447.

Additionally, in Ernst & Ernst v. Hochfelder, the Court rejected the SEC’s argument that negligence satisfied Rule 10b-5’s scienter requirement, concluding that the SEC’s interpretation did not conform to the statute’s “commonly accepted meaning.” Ernst & Ernst v. Hochfelder, 425 U.S. 185, 198-99 (1976), quoted in Central Bank, 114 S. Ct. at 1446.
scope of liability created by a particular section of the Securities Act must rest primarily on the language of that section.62

In its analysis of section 10(b), the majority found no express mention of aiding and abetting.63 It also rejected the SEC’s argument (presented in an amicus brief) that the “directly or indirectly” language of the statute encompasses aiding and abetting.64 The Court based its rationale on two points: (1) the traditional doctrine of aiding and abetting “extends beyond persons who engage, even indirectly, in a proscribed activity,”65 and (2) other 1934 Act provisions use the “directly or indirectly” language in a manner that does not include liability for aiding and abetting.66 In addition, the majority asserted that Congress knows how to promulgate aiding and abetting legislation when it wants to do so.67 The Court reasoned that if Congress truly intended to create aiding and abetting liability, it would have explicitly said so in the statute.68

According to the Court’s plain language approach,69 it did not need to examine the legislative history, since the Court found the remaining language to be unambiguous and controlling.70 Nevertheless, the Court examined Respondents’ historical arguments and concluded “that Congress likely would not have attached aiding and abetting liability to § 10(b) had it provided a private § 10(b) cause of action.”71 Relying on its methodology in Musick, Peeler & Garrett v. Employers Insur-

62. Central Bank, 114 S. Ct. at 1447 (emphasis added) (quoting Pinter v. Dahl, 486 U.S. 622, 653 (1988)). In Pinter v. Dahl, the Court rejected an expansive definition of the term “seller” as used in § 12(1) of the 1934 Act. 486 U.S. at 649-50. Although tort doctrine recognizes this definition, the Court held that one must “look first at the language of [the statute].” Id. at 641.

63. Central Bank, 114 S. Ct. at 1447.

64. The SEC stated, “[W]e think that when read in context [§ 10(b)] is broad enough to encompass liability for such ‘indirect’ violations.” Id. (alterations in original) (quoting Brief for Securities and Exchange Commission as Amicus Curiae at 8, Central Bank (No. 92-854)).

65. Id. (emphasis added). The Court continues by stating that “aiding and abetting liability reaches persons who do not engage in the proscribed activities at all, but who give a degree of aid to those who do.” Id.

66. Id. (citations omitted).

67. Id. at 1448 (citations omitted).

68. Id.; cf. Pinter v. Dahl, 486 U.S. 622, at 650 (“When Congress wished to create such liability, it had little trouble doing so.”).

69. See supra notes 60-62 and accompanying text.

70. Central Bank, 114 S. Ct. at 1448 (stating that “the statute itself resolves the case”).

71. Id. at 1449 (citing Musick, Peeler & Garrett v. Employers Ins. of Wausau, 113 S. Ct. 2085, 2091 (1993)).
 ance" and Blue Chip Stamps v. Manor Drug Stores, the Court looked to other express private actions in the securities acts to see whether any imposed civil liability on aiders and abettors. It found none. Accordingly, the Court determined that to find such liability under section 10(b) and Rule 10b-5 would be inconsistent with the context of the 1934 Act.

2. Congressional silence and inaction are inconclusive as to legislative intent

The majority also addressed Respondents' arguments regarding congressional silence and inaction. Respondents and the SEC argued "that Congress legislated with an understanding of general principles of tort law, and that aiding and abetting liability was 'well established in both civil and criminal actions by 1934.'" Therefore, the argument continued, "Congress intended to include 'aiding and abetting liability in the 1934 Act." The majority rejected this argument, contending that Congress has never passed a general civil statute prohibiting aiding and abetting, and hence the Court may not merely presume such a cause of action exists. The Court argued that Congress recognizes liability for aiding and abetting on a "statute-by-statute" basis, and thus statutory silence is not equivalent to legislative intent.

72. 113 S. Ct. 2085 (1993).
73. 421 U.S. 723 (1975).
74. Central Bank, 114 S. Ct. at 1448-49.
75. Id. at 1449. However, 18 U.S.C. § 2 imposes criminal liability for aiding and abetting federal crimes. See infra note 94.
76. Central Bank, 114 S. Ct. at 1449. In Musick, the Court determined that "consistency requires [the Court] to adopt a like contribution rule for the right of action existing under Rule 10b-5." 113 S. Ct. at 2091 quoted in Central Bank, 114 S. Ct. at 1449. Likewise, in Blue Chip Stamps, the Court stated, "It would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action." 421 U.S. at 736, quoted in Central Bank, 114 S. Ct. at 1449.
77. Central Bank, 114 S. Ct. at 1450 (quoting Brief for Securities and Exchange Commission as Amicus Curiae at 10, Central Bank (No. 92-854)).
78. Id. (quoting Brief for Securities and Exchange Commission as Amicus Curiae at 11, Central Bank (No. 92-854)).
79. Id. at 1450-51.
80. Id. at 1451. The majority further argued that because the 1929 Uniform Sale of Securities Act created an aiding and abetting cause of action, and because several states likewise used this language, it is "not plausible to interpret the statutory silence as tantamount to an implicit congressional intent to impose
In addition, Respondents set forth arguments regarding congressional inaction.81 Quoting from *Patterson v. McLean Credit Union*,82 the Court replied:

It does not follow . . . that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it. It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the [courts'] statutory interpretation. . . . Congressional inaction cannot amend a duly enacted statute.83

The Court conceded that its opinions have treated congressional inaction arguments inconsistently,84 but concluded nonetheless that these arguments "deserve little weight in the interpretive process."85

3. Policy is not the overriding issue

Early in its analysis the Court declared that "[t]he issue . . . is not whether imposing private civil liability on aiders and abettors is good policy."86 In an amicus brief, the SEC argued that a private cause of action for aiding and abetting should be implied because it "deters secondary actors from contributing to fraudulent activities and ensures that defrauded plaintiffs are made whole."87 Acknowledging that policy justifications exist on both sides, the Court focused on the "certainty and predictability" required in this area of legal analy-

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81. *Id.* at 1449-52. These arguments were substantially similar to those presented in Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673 (N.D. Ind. 1966). See infra part IV.B.1.
82. 491 U.S. 164 (1989).
83. *Central Bank*, 114 S. Ct. at 1453 (first omission and alteration in original) (internal quotation marks and citations omitted) (quoting *Patterson*, 491 U.S. at 175 n.1). Note that the holding in *Patterson* was subsequently superseded by statute. See *Mojica v. Gannett Co.*, 779 F. Supp. 94 (N.D. Ill. 1991), rev'd, 7 F.3d 552 (7th Cir. 1993), cert. denied, 114 S. Ct. 1643 (1994).
84. *Central Bank*, 114 S. Ct. at 1453.
85. *Id.*. Likewise, the Court found "oblique references" to § 10(b) liability for aiding and abetting in congressional committee reports unpersuasive. *Id.* at 1452 (citing Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 168 (1989)). Note that the holding in *Betts* was subsequently superseded by statute. See *EEOC v. Westinghouse Elec. Corp.*, 925 F.2d 619 (3d Cir. 1991).
86. *Central Bank*, 114 S. Ct. at 1453 (emphasis added). The Court continued, explaining that the issue is "whether aiding and abetting is covered by the statute." *Id.*
87. *Id.* (citing Brief for Securities and Exchange Commission as Amicus Curiae at 16-17, *Central Bank* (No. 92-854)).
siss, and the need to avoid "decisions 'made on an ad hoc basis.'" It then presented its own policy arguments against implying a section 10(b) private right of action against aiders and abettors.

The Court suggested that while a Rule 10b-5 extension to those who aid and abet securities fraud may make the statute more far-reaching, it does not necessarily serve the statute's objectives: "Secondary liability for aiders and abettors exacts costs that may disserve the goals of fair dealing and efficiency in the securities market." Reiterating its argument in Blue Chip Stamps, the Court stated, "[L]itigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general," referring to the excessive costs to secondary actors during even the pretrial stages of a suit.

Additionally, the Court feared "ripple effects" of secondary liability under Rule 10b-5, believing that professionals are less willing to give advice to new or small companies in light of possible securities litigation if the companies go under. The Court speculated that, in such a case, professionals' "increased costs . . . may be passed on to their client companies" and ultimately to investors—those whom the statute purports to protect. But as a rule, the Court declared: "Policy considerations cannot override our interpretation of the text and structure of the 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."
IV. ANALYSIS

The majority's focus on whether the action was sustainable diluted what many thought—indeed, what the four Supreme Court dissenters and the parties thought—were the real issues presented for certiorari: (1) "whether an indenture trustee could be found liable as an aider and abettor absent a breach of an indenture agreement or other duty under state law," and (2) "whether [a trustee] could be liable as an aider and abettor based only on a showing of recklessness." As the dissent pointed out, even Central Bank had presumed that a private right existed under section 10(b) against one who aids and abets. However, rather than upholding a wealth of lower
federal court precedent,100 the majority deferred to the reasoning of Professor Daniel R. Fischel in his 1981 article,101 Secondary Liability Under Section 10(b) of the Securities Act of 1934.102

Borrowing from the doctrine of strict construction103 and from recent case law,104 the Court tailored a plain language approach. The Court purported to look first at the statutory language and then, if necessary, at legislative history to resolve ambiguities as to the scope of liability, resting its “ascertainment of congressional intent . . . primarily on the language of that section” of the statute.105 However, the majority did not precisely follow this pattern of interpretation; it examined legislative history not strictly tied to the ambiguous statutory words and looked to other sections of the securities acts for further interpretive guidance.106

Indeed, the Court should examine legislative history and policy in spite of its purportedly strict approach.107 A plain language analysis is far too restrictive for interpreting a civil

100. See infra part IV.A.
102. Fischel, supra note 43. Fischel argues that “the theory of secondary liability is no longer viable in light of recent Supreme Court decisions strictly interpreting the federal securities laws. . . . [L]iability for all defendants must be determined by the language, structure, and legislative history of the relevant statutes.” Id. at 82. However, he also says that “[d]eceptive conduct by attorneys and accountants, whether previously analyzed as aiding and abetting or as a direct violation, should continue to be prohibited by [§ 10(b)] and [Rule 10b-5], provided the other elements of liability . . . are satisfied.” Id. at 108.
103. See Central Bank, 114 S. Ct. at 1445-48 (1994); Karmel, supra note 95, at 3. Strict construction is that method of statutory interpretation that “refuses to expand the law by implications or equitable considerations, confining the law’s operation to cases which are clearly within the letter of the statute as well as within its spirit or reason.” BLACK’S LAW DICTIONARY 1422 (6th ed. 1990) (citation omitted). In modern practice, however, a strict construction argument is typically accompanied by legislative history and strong policy favoring the result. See, e.g., Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 734-37 (1975) (demonstrating this practice). The doctrine of strict construction is commonly applied to criminal statutes, see Matthews v. Powers, 425 P.2d 479, 482 (Okla. Crim. App. 1967), although courts have used it in interpreting civil statutes as well. See, e.g., Blue Chip Stamps, 421 U.S. at 734-36. However, in the civil context its rigidity can stifle the effectiveness of a statute with an underlying broad remedial purpose. See Harvey Gelb, Implied Private Actions Under SEC Rules 14a-9 and 10b-5: The Impact of Virginia Bankshares, Inc. v. Sandberg, 76 MARQ. L. REV. 363, 378 (1993).
104. See supra notes 61-62.
106. See id. at 1447-48.
107. See supra note 103.
statute intended to provide a broad remedial scheme. However, the Court's deviation failed to go far enough—in examining congressional intent it gave inadequate credence to the full historical backdrop, much of which arguably supports finding secondary liability. Furthermore, what little policy the majority addressed was speculative and unpersuasive in light of contrary arguments. Additionally, the Court slighted long-standing lower court precedent. Although one of these shortcomings, by itself, may be insufficient to justify a contrary ruling, the aggregate makes the Central Bank decision at least questionable, and demonstrates the Court's struggle to justify its conclusions in light of contrary lower court precedent, congressional intent, and policy considerations.

A. Precedent Applying Tort Law Principles to Section 10(b) and Rule 10b-5 Finds a Cause of Action Against Aiders and Abettors

As Justice Stevens argued in his dissent, a large body of precedent finds aider and abettor liability under section 10(b) and Rule 10b-5. Based on tort law principles, eleven circuit courts had found an implied right of action against aiding and abetting a section 10(b) violation. Before Central Bank, 114 S. Ct. at 1436 n.1, the Board of Directors of First Interstate Bank of Los Angeles v. Board of Directors of Laclede Commerce Bank, 772 F.2d 1040, 1045 (8th Cir. 1985), cert. denied, 475 U.S. 1008 (1986), recognized aider and abettor liability. The Court in Central Bank, 114 S. Ct. at 1449-53, n.8, cited eleven circuit court decisions in support of its conclusion. For a list including cases from each circuit, see id. at 1456 n.1. The dissent noted that the D.C. Circuit had "not . . . squarely recognized aiding and abetting in private § 10(b) actions" in Dirks v. SEC, 681 F.2d 824, 844 (D.C. Cir. 1982), rev'd on other grounds, 463 U.S. 646 (1983), but that the same circuit "ha[d] suggested that such a claim was available in private actions" in Zoelsch v. Arthur Andersen & Co., 824
Bank, such an action generally required three elements: "(i) the existence of a primary violation of § 10(b) or Rule 10b-5, (ii) the defendant's knowledge of (or recklessness as to) that primary violation, and (iii) 'substantial assistance' of the violation by the defendant." The Seventh Circuit also required that the defendant have committed a primary violation.

Early in its opinion, the majority referred to a "continuing confusion," due, inter alia, to the Seventh Circuit's variation and Fifth Circuit dicta: "There is a powerful argument that . . . aider and abettor liability should not be enforceable by private parties pursuing an implied right of action." One might question, however, whether two doubting circuits constitute a "confusion" of such great magnitude as to justify a review upending nearly thirty years of lower court precedent. Since the Seventh Circuit's review of the aiding and abetting claim in Brennan, most circuits have continually found a section 10(b) private cause of action against aiders and abettors. Even though this precedent was never formally approved by the Supreme Court, the Court had opportunity to review and rule otherwise. Although a denial of review is not approval per se, it has the effect of downplaying any question as to the existence of the particular cause of action that has progressed through the lower courts. Accordingly, in the minds of most


In addition, the dissent recognized that the Seventh Circuit would only find liability for aiding and abetting under § 10(b) if the alleged aider and abettor was also a primary violator. Id.; see infra note 116.

115. Central Bank, 114 S. Ct. at 1457 (Stevens, J., dissenting) (citing Cleary, 700 F.2d at 776-77; IIT, An Intl Inv. Trust v. Cornfeld, 619 F.2d 909, 922 (2d Cir. 1980)).

116. Id. at 1456 n.1. When the Seventh Circuit reviewed Brennan v. Midwestern United Life Ins. Co., 286 F. Supp. 702 (N.D. Ind. 1968), aff'd, 417 F.2d 147 (7th Cir. 1969), cert. denied, 397 U.S. 989 (1970), in which the district court decided in favor of the merits of plaintiffs' aiding and abetting claim, the Seventh Circuit's analysis was evidentiary and did not question the 10b-5 elements. See Brennan v. Midwestern United Life Ins. Co., 417 F.2d 147, 150 (7th Cir. 1969), cert. denied, 397 U.S. 989 (1970). Later, the Seventh Circuit began requiring that the alleged aider and abettor also have committed a primary violation before a cause of action for aiding and abetting could be sustained. See Robin v. Arthur Young & Co., 915 F.2d 1120, 1123 (7th Cir. 1990), cert. denied, 499 U.S. 923 (1991).

117. Central Bank, 114 S. Ct. at 1444 (omission in original) (quoting Akin v. Q-L Invs., 959 F.2d 521, 525 (5th Cir. 1992)).

118. See supra note 114 and accompanying text.

federal court judges, a private right against aiding and abetting clearly existed. Justice Stevens commented, "If indeed there has been 'continuing confusion' concerning the private right of action against aiders and abettors, that confusion has not concerned its basic structure, still less its 'existence.'"

Moreover, "settled construction of an important federal statute should not be disturbed unless and until Congress so decides." The majority acknowledged the lower court precedent and its basis in tort theory only to counter that not all states clearly recognize aiding and abetting liability in tort. That point, however, is analytically weak. Lower court precedent has derived a private right of action against aiding and abetting from general tort law principles, not those recognized by any one state. For several decades most federal courts have recognized an implied section 10(b) cause of action against aiding and abetting. The fact that a few states do not recognize aiding and abetting in tort should have no bearing on federal precedent concerning federal statutory law, especially when the statute was created during an era when Congress and the courts recognized a federal common law. Furthermore, none of the majority's supporting cases involved a settled course of lower court precedent. In essence, the Court failed to give adequate credence to long-standing precedent and justified this omission with an analytically weak argument.

120. See supra note 114 and accompanying text.
121. Central Bank, 114 S. Ct. at 1457 (Stevens, J., dissenting) (citation omitted).
123. Central Bank, 114 S. Ct. at 1450 (citing cases from Maine, Pennsylvania, Virginia, and Montana).
125. See discussion infra note 144.
126. See supra notes 61-62.
B. Congressional Intent Supports Finding an Aiding and Abetting Action Under Section 10(b)

In its analysis, the Court dismissed significant elements of legislative history that support finding a right of private action for aiding and abetting under section 10(b).\(^{128}\) Though legislative and administrative history alone should not always be conclusive of congressional intent, such history should be given substantial consideration when the Court examines provisions enacted over a half century earlier. Furthermore, in its analysis of the "directly or indirectly" language,\(^{129}\) the Court analogized incompatible sections of the securities acts to conclude that such language should not be construed to reach aiders and abettors.

1. Historical context

"[T]he Legislature's failure to reject a consistent judicial or administrative construction counsels hesitation from a court asked to invalidate it."\(^{130}\) Justice Stevens points out that "judges closer to the times and climate of the 73d Congress than [the contemporary Court] concluded that holding aiders and abettors liable was consonant with the 1934 Act's purpose to strengthen the antifraud remedies of the common law."\(^{131}\) Indeed, the district court in *Brennan v. Midwestern United Life Insurance Co.* found such liability a "logical and natural complement to the [implied section 10(b) private right of action]."\(^{132}\) A brief examination of the legislative intent arguments presented in *Brennan* helps to establish the historical context surrounding section 10(b) and Rule 10b-5.\(^{133}\) Specifically, the *Brennan* court looked at congressional inaction, commentary, and SEC memoranda. Its reasoning is further supported by the validity of certain legislative assumptions and the appropriate interpretation of congressional silence.

\(^{128}\) See *Central Bank*, 114 S. Ct. at 1452-53.
\(^{129}\) See id. at 1447-48.
\(^{130}\) Id. at 1458 (Stevens, J., dissenting).
\(^{131}\) Id. at 1456 (footnote omitted); see also *Brennan v. Midwestern United Life Ins. Co.*, 417 F.2d 147, 155 (7th Cir. 1969) ("A basic philosophy of the [1934] Act is ... directed toward the creation and maintenance of a post-issuance securities market that is free from fraudulent practices. The investor's protection is the paramount consideration.")", cert. denied, 397 U.S. 989 (1970).
\(^{133}\) For a brief recitation of the facts in *Brennan*, see supra part II.B.2.
a. Congressional inaction, commentary, and SEC memoranda. The defendant in Brennan contended that because a proposed amendment to section 10(b) that would have expressly provided a private remedy against aiders and abettors was never adopted, Congress evidently did not believe the section would apply to aiders and abettors. However, the Brennan court pointed out that this particular amendment was packaged with other items and, therefore, dismissal of the entire package did not conclusively indicate congressional intent regarding the proposed aiding and abetting amendment. The court noted that, like the aiding and abetting proposal, other items in the rejected package already benefited from judicial recognition but were seeking explicit statutory expression. The congressional committee, nevertheless, categorically excluded the other proposed items because it deemed codification unnecessary.

The Brennan court suggested that Congress may have declined to ratify the aider and abettor portion for the same reason. In further addressing this congressional inaction, the court quoted Justice Jackson, writing for the Supreme Court in an earlier opinion: "We draw, therefore, no inference in favor of either construction of the Act—from the Department's request for legislative clarification, from the congressional committee's willingness to consider it, or from Congress' failure to enact it." The Supreme Court in Central Bank quoted a similar statement in refuting the Respondents' argument that the Court should follow statutory precedent unless Congress has abrogated it: "It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the [courts'] statutory interpreta-

135. Id. at 677-78. The court also related that in 1960 an aiding and abetting amendment had passed in the Senate, but that the House never acted upon it. Id.
136. See id. at 678 (construing S. REP. NO. 1757, 86th Cong., 2d Sess. 9 (1960)).
137. See id. The Brennan court also pointed out that "at the time these amendments were being considered, Congress was convened in special session late in the summer of a Presidential election year and much proposed legislation fell victim to a lack of time." Id. at 679-80.
138. Id. at 679 (quoting Wong Yang Sung v. McGrath, 339 U.S. 33, 47-48 (1950), modified, 339 U.S. 908 (1950)).
The Court in Central Bank conceded, however, that its opinions have been inconsistent on this point. More persuasive was the Brennan court’s finding, based on a Senate report, that "legislative history does indicate that the purpose of the unadopted aider and abettor amendments was to strengthen and clarify the injunctive power" rather than to add a new element to the power of the SEC. The court noted also that General Counsel for the SEC issued a memorandum explaining "that the amendment would 'make manifest' the responsibility of aiders and abettors, and 'remove the ambiguity' since 'there may exist some doubt as to the Commission's authority to obtain an injunction, or impose administrative sanctions, against persons aiding or abetting violations of the act.'" 

b. Legislative assumptions. The Brennan court inferred that Congress recognized the SEC's injunctive power in the aiding and abetting context from the fact that Timetrust and its progeny had already been decided when the clarifying amendment came before Congress. In fact, courts of that time "regularly assumed . . . that a statute enacted for the benefit of a particular class conferred on members of that class the right to sue violators of that statute." For example, immediately

139. Central Bank, 114 S. Ct. at 1453 (internal quotation marks omitted) (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 175 n.1. (1989)).
140. Id. Hence, the inaction argument seems to fail when, as in Wong Yang Sung and Patterson, a court seeks a result otherwise denounced by a congressional inaction argument.
141. Brennan, 259 F. Supp. at 678 (quoting S. REP. NO. 1757, 86th Cong., 2d Sess. 8 (1960)).
142. Id. (quoting Hearings on S. 1178-1182 Before a Subcomm. of the Senate Comm. on Banking and Currency, 86th Cong., 1st Sess. 335 (1959)). The defendant, however, countered with a second SEC memorandum stating that the New York Stock Exchange (NYSE) desired aiders and abettors of § 10(b) violations to be subject only to SEC actions. Id. The memo further indicated SEC satisfaction with such a limitation. The court speculated as to motives behind the memo and the resulting inconsistency, ultimately stating that neither the [NYSE]'s intent nor the SEC's acquiescence necessarily demonstrates congressional intent. Id. at 679. Note, however, that if the Brennan court were to extend this rationale to its examination of the first memo, its assertion based on the first memo would be moot.
143. Central Bank, 114 S. Ct. at 1457 (Stevens, J., dissenting). In support of this conclusion, the dissent in Central Bank refers the reader to Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 374-78 (1982). For additional supporting cases, see Central Bank, 114 S. Ct. at 1457 n.5 (Stevens, J., dissenting).
before the securities acts were passed, the Supreme Court instructed in *Piedmont & Northern Railway Co. v. ICC* that "a broader and more liberal interpretation than that to be drawn from mere dictionary definitions of the words employed by Congress" should be used to analyze "remedial legislation." In contrast, the modern Court has set forth in *Ernst & Ernst v. Hochfelder* that one must look to the language's "commonly accepted meaning."

The modern Court's plain language approach differs radically from the Court's interpretive approach in 1934. Since the 73d Congress would have expected the judiciary to interpret its legislation according to the practice of the judiciary of that time, the modern Court should follow the then-current interpretive methods if it wishes to be faithful to the original legislation. By applying a plain language analysis, the modern Court reaches a result opposite of that achieved by earlier courts and of that likely expected by the enacting Congress.

c. Legislative competence and silence. The majority in *Central Bank* suggested also that Congress knew how to include aiding and abetting in a statutory scheme when it intended to do so, and, thus, Congress' silence indicates intent for the statute to reach only primary violators. However, using this same rationale, Congress' failure to enact a statute to abrogate the widespread judicial understanding could imply that Congress agreed with the rulings recognizing an aiding and abetting cause of action. Because legislative
silence may be inconclusive of legislative intent, one should question whether a plain language approach, which often interprets silence as an expression of intent, is desirable in constructing a statute with broad remedial scope.\textsuperscript{151}

The weight of legislative history supports a reasonable inference that Congress approved of aiding and abetting liability under section 10(b).\textsuperscript{152} Even though the statute does not expressly provide for a cause of action against aiders and abettors, there is legislative commentary clearly recognizing such a right. Furthermore, the statute's broad reference to fraud, the expansive nature of both the 1934 Act and section 10(b), and the common practice at the time of enactment of broadly interpreting a remedial statute all combine to support the reasonableness of the interpretation.

2. Statutory language: "directly or indirectly"

Both section 10(b) and Rule 10b-5 contain the language, "It shall be unlawful for any person, directly or indirectly" to commit fraud in the disclosure of, or relating to, securities transactions.\textsuperscript{153} Respondents and the SEC in Central Bank suggested that the term "indirectly" could be construed to encompass aiders and abettors since they are indirect defrauders.\textsuperscript{154} Applying Professor Fischel's reasoning,\textsuperscript{155} the Supreme Court rejected this argument, deciding that such a finding would be inconsistent with the use of "directly or indirectly" in other provisions of the 1934 Act:

\begin{itemize}
  \item 15 U.S.C. \textsection 78g(f)(2)(C) (direct or indirect ownership of stock);
  \item 15 U.S.C. \textsection 78i(b)(2)-(3) (direct or indirect interest in put, call, straddle, option or privilege);
  \item 15 U.S.C. \textsection 78m(d)(1) (direct or indirect ownership);
  \item 15 U.S.C. \textsection 78p(a) (direct or indirect ownership);
\end{itemize}

\textsuperscript{151} See Gelb, supra note 103, at 378; see also supra note 14.
\textsuperscript{152} See Central Bank, 114 S. Ct. at 1458 (Stevens, J., dissenting).
\textsuperscript{153} 15 U.S.C. \textsection 78j (emphasis added); 17 C.F.R. \textsection 240.10b-5 (emphasis added).
\textsuperscript{154} Central Bank, 114 S. Ct. at 1447.
\textsuperscript{155} See Fischel, supra note 43, at 94 n.83.
U.S.C. § 78t (direct or indirect control of person violating Act).\textsuperscript{156}

The Court cited these provisions to illustrate its argument that to the 73d Congress, "indirect violations" did not imply the aiding and abetting of violations.

On its face, the majority’s argument would seem to have merit: Because "numerous provisions of the 1934 Act . . . use the term ['indirectly'] in a way that does not impose aiding and abetting liability,"\textsuperscript{157} its usage in section 10(b) was probably not intended to impose such liability. The argument would be stronger, however, if the "numerous provisions" were of a nature that could give rise to liability for aiding and abetting. For example, three of the cited provisions involve a question of "direct or indirect" securities ownership,\textsuperscript{158} but liability for aiding and abetting has no meaning in the context of ownership.\textsuperscript{159} The other provisions using this language apply the terms to interests in derivatives and control over a violator.\textsuperscript{160} None of these contexts would typically support an aiding and abetting construction because none of them involve an act that could inherently give rise to the existence of an aider and abettor.\textsuperscript{161} However, section 10(b) does. Specifically, its Rule 10b-5 prohibits fraudulent acts, misstatements, and omissions.\textsuperscript{162} In this context, there can be aiders and abettors to the conduct of a primary violator. Hence, arguably the Court

\textsuperscript{156} Central Bank, 114 S. Ct. at 1448.

\textsuperscript{157} Id. at 1447. Consider, however, the language of 18 U.S.C. § 2(b): "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." Id. (emphasis added). Although § 2 is a criminal statute and not a part of the 1934 Act, one should note that the term "directly" in § 2(b) is used to describe a primary violator. Hence, one could logically infer "indirectly" to mean a peripheral violator in an analogous context. Arguably, however, a private civil action under § 10(b) is not analogous to a federal criminal action. See Central Bank, 114 S. Ct. at 1455. Furthermore, 18 U.S.C. § 2(a) deems an aider and abettor liable as a principal for criminal acts without employing the term "indirectly."


\textsuperscript{159} How does one aid and abet ownership of property?


\textsuperscript{161} Perhaps the provision addressing direct or indirect control over a primary violator could give rise to the existence of aider and abettor liability (for example, aiding and abetting control over a primary violator). However, aiding and abetting a § 10(b) violation is a reasonably conceivable act, and liability for it is a "logical and natural complement to the [implied § 10(b) private right]." Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673, 680 (N.D. Ind. 1966).

\textsuperscript{162} 17 C.F.R. § 240.10b-5.
analogized incompatible statutes, yielding an unsubstantiated conclusion. Moreover, in previous years the High Court typically read the language of the securities legislation aimed at protecting against fraud "not technically and restrictively, but flexibly to effectuate its remedial purposes."163

C. The Policy Justifying an Implied Private Right of Action Against Primary Section 10(b) Violations
Also Justifies an Implied Section 10(b) Aiding and Abetting Right of Action

The implied private right of action against primary section 10(b) violators has received much criticism.164 Nevertheless, when properly supported by the SEC and adjudicated by the federal courts, the implied section 10(b) private right plays a valuable role in the securities arena.165 The implied private right primarily serves three functions: deterrence, restitution, and SEC enforcement support.166 It deters fraud by judicially reaching section 10(b) violators. It restores by helping to return fraudulently lost investment capital to the defrauded investors, as well as to the market. It supports SEC enforcement by incidentally relieving the SEC of many complaints that would oth-

163. Central Bank v. First Interstate Bank, 114 S. Ct. 1439, 1459 (Stevens, J., dissenting) (quoting Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1972)). But cf. Aaron v. SEC, 446 U.S. 680, 695 (1980) ("The Court has also noted that generalized references to the remedial purposes of the securities laws will not justify reading a provision more broadly than its language and the statutory scheme reasonably permit." (internal quotation marks omitted)).


165. "Properly circumscribed private rights of action serve as a valuable adjunct to an agency's own enforcement program . . . ." Harvey L. Pitt & Karen L. Shapiro, Securities Regulation by Enforcement: A Look Ahead at the Next Decade, 7 YALE J. ON REG. 149, 183 (1990). "[P]rivate actions have become increasingly important as an enforcement tool in light of the dramatic growth of fraud and corruption in the Nation's capital markets and financial institutions." Securities Hearings, supra note 14, at 124 (Prepared Statement of Mark J. Griffin, Securities Division, Department of Commerce, Salt Lake City, UT). Furthermore, allegations regarding a current "litigation explosion" due to securities litigation are unsubstantiated. "[S]ecurities litigation accounted for less than one percent of all cases filed in Federal courts in fiscal 1991 . . . ." Id. at 123 (Prepared Statement of Mark J. Griffin, Securities Division, Department of Commerce, Salt Lake City, UT) (footnote omitted).

166. See Securities Hearings, supra note 14, at 124 (Prepared Statement of Mark J. Griffin, Securities Division, Department of Commerce, Salt Lake City, UT); id. at 111 (Testimony of William R. McLucas, Director, Division of Enforcement, United States Securities and Exchange Comm.).
otherwise come to the Commission and further increase its heavy workload.  

Professor Joseph A. Grundfest argues, however, that the private right has several detrimental effects, one of which is encouraging frivolous private suits. Grundfest asserts that the SEC rejects cases with a "relatively low probability of success," and that such cases may be among those brought by private plaintiffs. Thus, the partial alleviation of the SEC's burden may be somewhat illusory. However, even if Grundfest's observation is valid, such an effect may be beneficial, since the SEC's rejection of a particular case may rest more upon budgetary constraints in gathering evidence than upon the merits of the case. If so, then the private right has further justification.

In Central Bank, the majority set aside policy arguments favoring the private right against aiding and abetting and focused instead on its own policy rationale—in essence, predictability and deterrence of vexatious litigation. These policy arguments, however, are inconsistent with the probable effect of the Court's holding and "are inapposite to SEC enforcement, because the SEC can clarify the rules of conduct that it enforces through the promulgation of regulations ... ." Like the implied private right of action against primary section 10(b) violations, an implied section 10(b) right of action against aiding and abetting promotes good policies: (1) protecting investors by prohibiting all manipulative and deceptive conduct in the securities arena, (2) providing investors a remedy to restore their defrauded funds, and (3) relieving the SEC of

167. See infra notes 190-192 and accompanying text.  
168. Grundfest, supra note 164, at 969-70.  
169. Id.  
170. See Securities Hearings, supra note 14, at 113 (Testimony of William R. McLucas, Director, Division of Enforcement, United States Securities and Exchange Comm.).  
171. See Central Bank, 114 S. Ct. at 1454; see also discussion supra part III.B.3.  
172. Developments in the Law, supra note 111, at 1621.  
173. But cf. Aaron v. SEC, 446 U.S. 680, 695 (1980) ("[If] the language of a provision of the securities laws is sufficiently clear in its context and not at odds with the legislative history, it is unnecessary 'to examine the additional considerations of policy ... that may have influenced the lawmakers in their formulation of the statute.'" (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 214 n.33 (1976)) (internal quotation marks omitted)). As previously demonstrated, however, the language is not clear (see supra part IV.B.2.); thus, policy should be examined here.  
174. See Central Bank, 114 S. Ct. at 1453 (citing Brief for Securities and Ex-
the complaints that could otherwise overwhelm the Commission.175 Most significant are the deterrence and restitution elements.

Before the Court's decision in Central Bank, aiding and abetting actions under section 10(b) and Rule 10b-5 had commonly been brought against professional and service organizations such as accounting firms, law firms, broker-dealer firms, investment banking firms, and banks. Issuers and other players need the services offered by these entities to enter the marketplace and accomplish securities transactions. As gatekeepers of the marketplace, these organizations may be influenced by potential liability as an aider and abettor and thus be deterred from assisting fraudulent activities of primary players.176 In addition, these gatekeepers are typically solvent and may carry malpractice or omissions insurance, or both. Primary violators, however, are typically insolvent.177 Thus, an organization that chooses to assist fraudulent activities would help provide restitution to defrauded investors who would otherwise have little or no remedy against primary violators.178

175. See infra notes 190-192. Even if Central Bank denies SEC civil enforcement actions against aiding and abetting § 10b) violations, complaints addressing other causes of action (for example, a § 20(a) action against a control person) may increase, serving as alternative outlets for investor relief. See infra part V.A.

176. See Developments in the Law, supra note 111, at 1621-22. Note that the gatekeepers might also be liable as primary violators. See Central Bank, 114 S. Ct. at 1455 (referring to Fischel, supra note 43, at 107-08).


178. Notice, however, that malpractice premiums and damage awards are at least partly passed on to clients as a cost of doing business. To more accurately determine the strength of these policy considerations, a cost-spreading analysis would seem appropriate. Such an analysis, however, will not be attempted here since its conclusion would only be tangential to the argument presented herein.
V. IMPLICATIONS

The ramifications of this decision are somewhat disturbing. Investors must now look to other alternatives to be made whole when primary defrauders are insolvent. Although so-called aiders and abettors may possibly be recharacterized as primary violators under section 10(b), the difficulty of showing 10b-5 primary liability nevertheless decreases the restitution potential of a private suit. Within recent months, the SEC has dismissed numerous cases alleging aiding and abetting under section 10(b), believing (or at least fearing) that the *Central Bank* ruling extends to SEC enforcement actions.179 Even if the ruling does not prohibit SEC actions, it places a substantially greater enforcement burden upon the agency. Further, if the ruling is a trend toward relying solely on the strict statutory wording of section 10(b), one must ask whether it also threatens the validity of implying a section 10(b) private right of action.

A. Investor Rights

Although the holding in *Central Bank* may produce some desirable effects, such as partially shielding professionals from frivolous secondary liability suits,180 defrauded investors must look to new avenues for restitution from true aiders and abettors. Options include applying state blue-sky laws, bringing common law fraud actions,181 arguing an alternative action, arguing that the aider and abettor is really a primary violator,182 or pursuing new federal legislation that, if adopt-

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179. See Arthur F. Mathews & W. Hardy Callcott, * Tightening Securities Laws*, 137 N.J. L.J. 1758, 1759 (1994) (“As a result of *Central Bank*, the SEC has dismissed most of its cases seeking to hold defendants liable as aiders and abetters of Rule 10b-5 violations.”). But, for a “hypothetical opinion of some future Supreme Court” holding that the *Central Bank* ruling is limited to private actions, see Simon M. Lorne, *Central Bank of Denver v. SEC*, 49 BUS. LAW. 1467, 1467 (1994).

180. See Alan M. Slobodin, *Justices Weigh in on Business*, NAT'L LJ., Aug. 15, 1994, at C6, C10 (“[M]any securities fraud claims against professionals traditionally have been based on aiding and abetting theories.”).

181. Mathews & Callcott, supra note 179, at 1761.

182. “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. 1439, 1455 (1994) (referring to Fischel, supra note 43, at 107-08).
ed, would restore a private right against aiders and abettors.183

B. SEC Enforcement

From a public-enforcement standpoint, the result of this decision may be more serious. If, as the dissent suggested, Central Bank applies to SEC actions as well as private actions,184 the SEC is likewise left to other means to establish secondary liability, or else it must, as it has recently done, simply let go of alleged aiders and abettors.185 This erosion of enforceability leads to a "bizarre" result:186 "The commission can revoke a broker's license for aiding and abetting a Rule 10b-5 violation, but it cannot obtain an injunction against the broker for the same conduct."187 Additionally, many aiders and abettors previously charged and sanctioned will likely move for removal under Federal Rule of Civil Procedure 60(b)(6), which allows relief "from a final judgment, order, or

183. See Mathews & Callcott, supra note 179, at 1761. These authors assert, however, that early legislation is unlikely in light of pressing legislative concerns, such as welfare, crime, and health reform. Id.
184. See Central Bank, 114 S. Ct. at 1460 (Stevens, J., dissenting).
185. See supra note 179 and accompanying text. In 1992, 15% of the SEC's civil enforcement proceedings were aiding and abetting claims. In an amicus brief, the SEC stated that to eliminate this "liability would 'sharply diminish the effectiveness of Commission actions.'" Central Bank, 114 S. Ct. at 1460 n.11 (Stevens, J., dissenting) (quoting Brief for Securities and Exchange Commission as Amicus Curiae at 18 n.15, Central Bank (No. 92-854)).
186. Mathews & Callcott, supra note 179, at 1759. Consider the majority's own statement in Central Bank: "Policy considerations cannot override our interpretation of the text and structure of the 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. Central Bank, 114 S. Ct. at 1453-54 (quoting Demarest v. Manspeaker, 498 U.S. 184, 191 (1991)) (emphasis added).
187. Mathews & Callcott, supra note 179, at 1759. [The commission] can obtain a civil money penalty against that broker in an administrative proceeding, but it cannot seek a civil penalty against him in federal court. It may (arguably) be able to impose liability . . . for aiding and abetting in cases of insider trading, where it rarely needs such a theory, but it cannot use this theory in cases involving fraudulent financial statements, manipulation, or penny-stock fraud, where secondary liability has been crucial to its enforcement program. Id. at 1759, 1761 [The text cited is scattered over two pages in the original due to an apparent publication error; I have indicated the break with the ellipses]. The dissent in Central Bank also assumed that this decision encompasses SEC actions: "The majority leaves little doubt that the [1934] Act does not even permit the Commission to pursue aiders and abettors in civil enforcement actions under § 10(b) and Rule 10b-5." Central Bank, 114 S. Ct. at 1460 (Stevens, J. dissenting) (internal reference omitted).
proceeding for ... any other reason justifying relief from the operation of the judgment."^{188}

If Central Bank does not extend to SEC actions, as SEC General Counsel Simon M. Lorne argues,^{189} the agency is still left with a heavy enforcement burden.^{190} As the Commission has asserted in the past, it has neither the human resources nor the financial capital sufficient to bring aiding and abetting suits arising from all nonfrivolous complaints received.^{191} Hence, regardless of whether Central Bank extends to SEC civil enforcement, the agency now faces increased enforcement challenges that may be remedied only by additional legislation.^{192} Because of the Court's plain language approach, any

188. FED. R. CIV. P. 60(b)(6). For a brief discussion on this prediction, see Mathews & Callcott, supra note 179, at 1761 ("Surely an injunction ... should not remain in place against conduct the 1934 Act does not ... reach." (internal quotation marks omitted)).

189. See Lorne, supra note 179, at 1467 (arguing that a five-to-four decision can only be taken for the explicit holding pertaining to an implied private right of action against aiders and abettors). Lorne's article presents a "hypothetical opinion of some future Supreme Court" dealing with the issue. Id. The hypothetical holding, finding that an SEC action against aiding and abetting a § 10(b) violation is maintainable, is based on "persuasive statutory authority and policy arguments." Id. at 1477.

190. "Private rights of action have always served as a necessary supplement to the Commission's own enforcement program." Pitt & Shapiro, supra note 165, at 293 (1990) (citing J.I. Case Co. v. Borak, 377 U.S. 426 (1964)).

191. "[G]iven the limited enforcement resources of the Commission, the private right of action is vital to effective enforcement of Section 10(b)." Grundfest, supra note 164, at 969 (quoting Brief for Securities and Exchange Commission as Amicus Curiae In Support of Partial Affirmance at 6, Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) (Nos. 81-680 & 81-1076)). But see id. at 963, 969-71 (arguing several disadvantages of implied private rights of action and that the Commission has the authority to "disimply" them).

192. To merely increase the SEC's budget would not be sufficient. The SEC needs investors to have a § 10(b) private right of action against aiders and abettors available to them. See Securities Hearings, supra note 14, at 113 (Testimony of William R. McLucas, Director, Division of Enforcement, United States Securities and Exchange Comm.). But see Grundfest, supra note 164, at 969-71. Furthermore, [T]he SEC's position from the outset has been that Central Bank should be overturned by Congress. Speaking before the Senate's Securities Subcommittee during a special hearing concerning Central Bank, Chairman Levitt proclaimed that "[i]n the absence of any legislation expressly providing that the Commission can seek injunctions and other relief against aiders and abettors, . . . Legislation to restore aiding and abetting liability in private action is also necessary in order to preserve the benefits of private actions as a source of deterrence."

resulting legislation will likely be hit and miss, since such statutes are now to be construed strictly. As the SEC and legislator know, drafting a statute to encompass the ingenuity of future peripheral defendants is very difficult. This is one reason why section 10(b) was drafted in such broad remedial terms: "Section 10(b) of the [1934] Act was designed as a 'catchall' anti-fraud provision to enable the [SEC] to handle novel and unforeseen types of securities fraud..." In effect, the High Court's plain language approach in Central Bank has stifled the broad remedial scheme that section 10(b) was designed to provide.

C. Future of the Implied Private Right Under Section 10(b)

The Central Bank ruling suggests an analytical inconsistency: Although a private cause of action against aiding and abetting is not sustainable under section 10(b) because the statute does not expressly mention aiding and abetting, a private cause of action against a primary section 10(b) defrauder is sustainable even though a private right of action is not expressly mentioned. If the Court is to be consistent, it must "disimply" the section 10(b) private right of action. However, the Court is unlikely to do so since precedent supporting the implied private right is entrenched even deeper than that supporting an aiding and abetting action under section 10(b).194

One commentator discusses a potential threat to the implied 10(b) cause of action arising from another source: the Commission itself. Professor Joseph A. Grundfest's article, Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority,195 argues, inter alia, that implying private rights has created many adverse effects196 and that the SEC has the authority to "disimply"
them. 197 His article is an indication of the current trend among scholars and in recent case law to narrow the federal securities laws.198 If the private right can be administratively "disimplied," as Professor Grundfest asserts, its stability comes into question.199 Notwithstanding the Court's present tenor of strictly construing securities statutes,200 the implied private right is probably secure. Even if the Court or the SEC were to "disimply" it, Congress would likely create an express private right of action under section 10(b). Congress often reacts to judicial and administrative uprootings that incite contrary public opinion.201 The private right has probably become too entrenched to simply be swept away without creating significant public and administrative unrest.

VI. CONCLUSION

The Court's plain language approach stifles the broad remedial purpose of section 10(b). The Supreme Court's message in Central Bank seems to be that Congress must legislate with great specificity—broad references to deterring fraud in the securities markets will not suffice. However, the Court struggled to justify its conclusions in light of the lower federal court precedent, historical context, and policy that support a private action against aiding and abetting. The Court's employment of a plain language analysis is an effective means of avoiding judicial overreaching in statutory interpretation in many con-

(discussing overdeterrence and its implications).

197. See Grundfest, supra note 164, at 976-99.
198. For a discussion of this trend, see Alan R. Bromberg, Aiding and Abetting: Sudden Death and Possible Resurrection, 27 REV. SEC. & COMMODITIES REG. 133 (1994); and see also Mathews & Calcott, supra note 179, at 1761-63 (suggesting a "return of a trend" toward "narrowing . . . the federal securities laws").
199. But cf. Peloso & Sarnoff, supra note 192, at 7 (quoting as the SEC's position, "Legislation to restore aiding and abetting liability in private action is . . . necessary in order to preserve the benefits of private actions as a source of deterrence.").
200. See supra notes 59-62 and accompanying text.
texts. Nevertheless, it would seem that, when Congress uses broad legislative construction and clearly sets forth its far-reaching intent, the judiciary should feel free to interpret the statutory language accordingly. *Central Bank*, however, demonstrates the modern Court’s unwillingness to do so with regard to civil aiding and abetting liability under section 10(b).

Furthermore, the ruling is analytically inconsistent with the implied private right of action under section 10(b), since the plain language of the statute does not create a private right of action. However, the implied section 10(b) private right is probably not in danger of extinction, since it has been deeply entrenched by decades of precedent. Even if the Court or the SEC were to “disimply” it, Congress would likely legislate an express private right of action against section 10(b) violators to effectuate the remedial intent underlying the 1934 Act.

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