SUPREME COURT OF THE UNITED STATES

No. 92–34

MUSICK, PEELER & GARRETT, ET AL., PETITIONERS *v.* EMPLOYERS INSURANCE OF WAUSAU ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 1, 1993]

JUSTICE THOMAS, with whom JUSTICE BLACKMUN and JUSTICE O'CONNOR join, dissenting.

In recognizing a private right to contribution under §10(b) of the Securities Exchange Act of 1934[1] and Securities and Exchange Commission Rule 10b–5,[2] the Court unfortunately nourishes "a judicial oak which has grown from little more than a legislative acorn." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 737 (1975). I respectfully dissent from the Court's decision to cultivate this new branch of Rule 10b–5 law.

I agree with the Court's description of its mission as an "attempt to infer how the 1934 Congress would have addressed the issue had the 10b–5 action been included as an express provision in the 1934 Act." *Ante*, at 7–8. However, I do disagree with the Court's chosen method for pursuing this difficult quest. The words of §10(b) and Rule 10b–5 scarcely "suggest that either Congress in 1934 or the Securities and Exchange Commission in 1942 foreordained" the existence of a private 10b–5 action. *Blue Chip Stamps*, 421 U. S., at 737. Despite our conceded inability "to divine from the language of §10(b) the express `intent of Congress,'" *ibid.*, we acquiesced in the lower courts' consensus that an implied right of action existed under §10(b) and Rule 10b–5.

[1] 15 U. S. C. §78j(b).

[2] 17 CFR §240.10b–5 (1992).

Superintendent of Ins. of New York v. *Bankers Life & Casualty Co.*, 404 U. S. 6, 13, n. 9 (1971); *Affiliated Ute Citizens of Utah* v. *United States*, 406 U. S. 128, 150–154 (1972). See *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (ED Pa. 1946). Such acquiescence was "entirely consistent" with *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964), which may have suggested a relatively permissive approach to the recognition of implied rights of action.[3] *Blue Chip Stamps*, *supra*, at 730. Although we later "decline[d] to read *[Borak]* so broadly that virtually every provision of the securities Acts gives rise to an implied private cause of action," *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 577 (1979), we never repudiated the 10b–5 action.

[3]In *Borak*, we recognized a private party's right "to bring suit for violation of §14(a) of the [1934] Act" even though "Congress made no specific reference to a private right of action in §14(a)." 377 U. S., at 430–431.

We again have no cause to reconsider whether the 10b–5 action should have been recognized at all. In summarizing its rationale, the Court states that: "Having made no attempt to define the precise contours of the private cause of action under §10(b), Congress had no occasion to address how to limit, compute, or allocate liability arising from it." *Ante*, at 8–9. Though this statement is an adequate description of how we came to infer the private right of action, it is not an adequate defense of the Court's reasoning. Unlike the majority, I do not assume that courts should accord different treatment to implied rights of action whose recognition may have been influenced by *Borak*. How a particular private cause of action may have emerged should not weaken our vigilance in the subsequent interpretation and application of that action. Our inquiries into statutory text, congressional intent, and legislative purpose remain intact. We have consistently declined to recognize an implied private cause of action "under the antifraud provisions of the Securities Exchange Act . . . where it is `unnecessary to ensure the fulfillment of Congress' purposes' in adopting the Act." *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462, 477 (1977) (quoting *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 41 (1977)). Accordingly, the 10b–5 action must be "judicially delimited one way or another unless and until Congress addresses the question." *Blue Chip Stamps*, *supra*, at 749. In the absence of any compelling reason to allow contribution in private 10b–5 suits, we should seek to keep "the breadth" of the 10b–5 action from "grow[ing] beyond the scope congressionally intended." *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U. S. ___, ___ (1991) (slip op., at 17).

The Court's abandonment of this restrained approach to implied remedies stems from its mistaken assumption that a right to contribution is a mere "elemen[t] or aspec[t]" of Rule 10b–5's private

liability apparatus. *Ante*, at 8. Unlike a statute of limitations, a reliance requirement, or a defense to liability, however, contribution requires a wholly separate cause of action. This case does not require us to define the elements of a 10b–5 claim or to clarify some other essential aspect of this liability scheme. Rather, we are asked to determine whether a 10b–5 defendant enjoys a distinct right to recover from a joint tortfeasor.

The recent decision in which we established a limitations period for 10b–5 actions, *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. ___ (1991), illustrates the difference that I find decisive. A limitations period is almost indispensable to a scheme of civil liability; even when federal law prescribes no express statute of limitations, we will not ordinarily assume that Congress intended no time limit. *DelCostello* v. *Teamsters*, 462 U. S. 151, 158 (1983). Rather, "we `borrow' the most suitable statute or other rule of timeliness from some other source." *Ibid.* Contribution, by contrast, was generally unavailable at common law. See *Union Stock Yards Co. of Omaha* v. *Chicago, B. & Q. R. Co.*, 196 U. S. 217, 224 (1905). Those jurisdictions that have seen fit to provide contribution have usually done so by resort to legislation. *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U. S. 77, 87–88, and n. 17 (1981); *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 634 (1981). A court that recognizes an implied right to contribution must endorse a remedy contrary to the common law and perhaps even the legislative policy of the relevant jurisdiction.

Lampf, Pleva and like cases thus offer scant guidance when the question is not whether a right to contribution is an appropriate incident of the 10b–5 action, but whether congressional intent or federal common law justifies an expansion of the class entitled to enforce §10(b) and Rule 10b–5 through

private lawsuits. In conducting this inquiry, we cannot safely rely on Congress' design of distinct statutory provisions. Indeed, inappropriate extension of 10b–5 liability would "nullify the effectiveness of the carefully drawn . . . express actions" that Congress has provided through other sections of the 1934 Act. *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 210 (1976). However proper it may be to examine related portions of the Act when fleshing out details of the core 10b–5 action, see *Lampf, Pleva*, *supra*, at ___ (slip op., at 8); *id.*, at ___ (slip op., at 2) (SCALIA, J., concurring in part and concurring in judgment), the Court errs in placing dispositive weight on the existence of contribution rights under §§9 and 18 of the Act. See *ante*, at 9–11.

The proper analysis flows from our well-established approach to implied causes of action in general and to implied rights of contribution in particular. When deciding whether a statute confers a private right of action, we ask whether Congress—either expressly or by implication– intended to create such a remedy. *Touche Ross*, 442 U. S., at 575; *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 15–16, 24 (1979). Where Congress did not expressly create a contribution remedy, we may infer that Congress nevertheless intended by clear implication to confer a right to contribution. *Texas Industries*, *supra*, at 638; *Northwest Airlines*, *supra*, at 90. Through the exercise of their power to craft federal common law, federal courts may also fashion a right to contribution. *Texas Industries*, *supra*, at 638; *Northwest Airlines*, *supra*, at 90.

Application of this familiar analytical framework compels me to conclude that there is no right to contribution under §10(b) and Rule 10b–5. With respect to fashioning a common-law right to contribution, the Court readily and correctly concludes that the right to contribution recognized in *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U. S.

106 (1974), has no bearing on the availability of contribution under the elaborate federal statutory scheme governing purchases and sales of securities. *Ante*, at 3–4. See also *Texas Industries*, *supra*, at 640–646; *Northwest Airlines*, *supra*, at 95–98. This case therefore depends exclusively on the interpretation of §10(b) and Rule 10b–5.

"`The starting point in every case involving construction of a statute is the language itself.'" *Ernst & Ernst*, *supra*, at 197 (quoting *Blue Chip Stamps*, 421 U. S., at 756 (Powell, J., concurring)). Nothing in the words of §10(b) and Rule 10b–5 suggests that joint tortfeasors should enjoy a right to contribution. Section 10(b) makes it

> "unlawful for any person . . . . .
>
> "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 for the protection of investors." 15 U. S. C. §78j(b).

Rule 10b–5 recasts this proscription in similar terms:

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

security." 17 CFR §240.10b–5 (1992).

The sweeping words of §10(b) and Rule 10b–5 ban manipulation, deception, or fraud in the purchase or sale of securities. "[A]ny person" who engages in such activity merits condemnation under the statute and the rule. Far from being entitled to seek the protection of §10(b) and Rule 10b–5, joint tortfeasors must confess that these provisions were "expressly directed . . . to regulate their conduct for the benefit" of others. *Northwest Airlines*, *supra*, at 92. Neither enactment suggests that Congress or the SEC intended to "softe[n] the blow on joint wrongdoers" by permitting contribution. *Texas Industries*, *supra*, at 639. Quite the contrary: As private actors "whose activities Congress [and the SEC] intended to regulate for the protection and benefit of an entirely distinct class," joint tortfeasors "can scarcely lay claim to the status of `beneficiary'" under §10(b) and Rule 10b–5. *Piper* v. *Chris-Craft Industries*, 430 U. S., at 37.

The "underlying . . . structure of the [1934 Act's] statutory scheme" also negates the existence of a 10b–5 contribution action. *Northwest Airlines*, 451 U. S., at 91. The Court notes the presence of express contribution rights under §§9 and 18 of the Act, but it misconstrues the significance of these provisions. See *ante*, at 9–11. The ability to legislate express contribution remedies under the 1934 Act applies with no less force to §10(b) than to §§9 and 18. "When Congress wished to provide a [contribution] remedy . . . it had little trouble in doing so expressly." *Blue Chip Stamps*, *supra*, at 734. Nor has Congress lacked opportunities to modify the 10b–5 action. Within the last five years, Congress has both preserved and altered the 10b–5 action through amendments to the 1934 Act. Compare Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. 100–704, §5, 102 Stat. 4681 (stating that nothing in a new provision prohibiting insider

trading "shall be construed to limit or condition . . . the availability of any cause of action implied from a provision of this title"), with 15 U. S. C. §78aa–1 (Supp. III) (altering the retroactive effect of the 10b–5 limitations period that we adopted in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. ___ (1991)). See generally *ante*, at 6–7. Had Congress intended 10b–5 defendants to sue joint tortfeasors, a single enactment could have given effect to this policy. Congress' failure to act does not justify further judicial elaboration of the 10b–5 action.

Moreover, contribution is inconsistent with our established views of the 10b–5 action. In *Blue Chip Stamps* v. *Manor Drug Stores*, *supra*, we held that only actual purchasers and sellers of securities are entitled to press private 10b–5 suits. We based this conclusion largely on the language of §10(b) and Rule 10b–5, which by their terms govern only "the purchase or sale of any security." See 421 U. S., at 731–732; *id.*, at 756–757 (Powell, J., concurring). The merits of a contribution action in this case would turn on whether "the attorneys and accountants involved in [a] public offering" bore "joint responsibility for . . . securities violations." *Ante*, at 2. Even if a court were to acknowledge respondents' status as the subrogees of securities sellers, the contribution action would be at least one level removed from the underlying exchange of securities. *Blue Chip Stamps*' requirement of actual purchase or sale would virtually evaporate in a contribution dispute embroiling only separate groups of professionals who had merely advised or facilitated a tainted securities transaction. The rule adopted today thus undermines not only the discernable intent of Congress and the SEC, but also our own elaboration of this regulatory scheme. Such are the risks that inhere in the "hazardous enterprise" of recognizing a private right of action despite congressional silence. *Touche Ross*, 442 U. S., at 571.

Once again we have been invited to join a "vigorous debate over the advantages and disadvantages of contribution and various contribution schemes." *Texas Industries*, 451 U. S., at 638. Consistent with our prior practice, I would adhere to the task of resolving the "dispositive threshold question: whether courts have the power to create . . . a cause of action absent legislation." *Ibid.* Whether the answer to that question is "most unfair" to those who litigate private 10b–5 actions, *ante*, at 6, is irrelevant. Courts should not treat legislative and administrative silence as a tacit license to accomplish what Congress and the SEC are unable or unwilling to do. In their current condition, §10(b) and Rule 10b–5 afford no right to contribution. Congress has been and remains free to alter this state of affairs. Accordingly, I respectfully dissent.