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The New Face of Implied Right To Sue Jurisprudence and the SEC's Best-Price Rule

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THE NEW FACE OF IMPLIED RIGHT TO SUE JURISPRUDENCE AND THE SEC'S BEST-PRICE RULE

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INTRODUCTION

One common takeover method in corporate finance is the tender offer. The term "tender offer" refers to a public offer by an acquiring company to all stockholders of a publicly traded corporation. The acquiring entity usually offers a price above market value to induce the stockholders to tender their shares, and the offer is contingent on a fixed number of shares being tendered. The shareholders make a profit on their holdings, while the bidder aims for control of the corporation and, consequently, its assets.[1] Any acquiring party who will own more than five percent of the target corporation is subject to a number of requirements set out in the Securities Exchange Act.[2]

An increase in the use of the tender offer as a takeover mechanism in the 1960s raised concerns about shareholder protection.[3] Investors facing a tender offer had to make difficult choices based on poor information about the bidding party. In response, Congress passed the Williams Act in 1968 to provide more adequate disclosure mechanisms for shareholders.[4] One of the provisions of the Williams Act restricted bidders from offering a certain price at the beginning of a tender offer and later increasing the price to encourage more shareholders to tender their shares. This limitation is known as the "best-price" rule. The best-price rule is actually a combination of a statute

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[1] U.S. Sec. & Exch. Comm'n, Tender Offer, http://sec.gov/answers/tender.htm (last visited Jan. 22, 2009).

[2] *Id.*

[3] H.R. REP. NO. 90-1711 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2811, 2812–13.

[4] *Id.* at 2814.

and a regulation. Section 78n(d)(7) of the Securities Exchange Act—originally section 14(d)(7) of the Williams Act[5]—states that a bidder who increases the amount of a tender offer after the initial offering must pay that increase to holders who have already tendered their shares.[6] Enacted in 1986, regulation 14d-10 also prohibits the bidder from decreasing the price of the tender offer after the initial offering due to the fact that the price decrease became a popular takeover tactic.[7]

Shareholders facing a bidder's violation of the best-price rule have traditionally been able to bring their own lawsuits for damages. While there is no specific private right to sue explicitly written into section 14(d)(7), federal courts have read into this section of the Act an implied private cause of action for aggrieved shareholders.[8] The Ninth Circuit recognized such a right in *Epstein v. MCA, Inc.*[9] On appeal, however, the Supreme Court reversed and remanded the case on different grounds.[10] In dicta, the Court expressly declined to rule as to whether section 14(d)(7) afforded plaintiffs a private cause of action.[11] This non-ruling, along with a decades-long shift in the Court's jurisprudence on reading implied private causes of action into statutes, has left serious doubt as to whether plaintiffs should still be able to bring a claim under the best-price rule. While aggrieved shareholders have administrative remedies at their disposal, concluding that they lack a private cause of action for tender offer violations would have a dramatic impact on

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[5] This Note will refer to the statutory best-price rule by its original Williams Act numbering in order to be consistent with the majority of courts and commentary cited herein.

[6] 15 U.S.C. § 78n(d)(7) (2000 & Supp. I 2002).

[7] HENRY LESSER, SECURITIES LAW TECHNIQUES § 72.05 (2008). Another reason for enactment of the regulation was the SEC's stance that implied in the statutory best-price requirement was a mandate of equal treatment of shareholders—even in situations where 14(d)(7) was not applicable (like a decrease in the price of the initial tender offer). Uncomfortable with this requirement existing as a simple gloss on the statute, the SEC enacted the regulatory best-price rule. The requirement that all shareholders be treated equally leads some commentators and courts to refer to this as the all-holders/best-price rule. *Id.*

[8] *See* Epstein v. MCA, Inc., 50 F.3d 644, 651 (9th Cir. 1995), *rev'd sub nom.* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996); Field v. Trump, 850 F.2d 938, 945–46 (2d Cir. 1988); Polaroid Corp. v. Disney, 862 F.2d 987, 996 (3rd Cir. 1988); Katt v. Titan Acquisitions, Ltd., 133 F. Supp. 2d 632, 640 (M.D. Tenn. 2000).

[9] *Epstein*, 50 F.3d at 651.

[10] Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 387 (1996).

[11] *Id.* at 370 n.1.

corporate practices. Despite the relative efficiency of the tender offer as a takeover mechanism (as compared to longer statutory mergers), the potential for protracted litigation and billion dollar damage claims has made this otherwise practical merger tool disfavored.[12] Indeed, often the mere threat of large securities class action lawsuits can push companies into settlement negotiations.[13]

This Note argues that an implied right to sue under the best-price doctrine should no longer be recognized, based on the Court's current attitude toward reading private causes of action into statutes. The Court's present method of finding implied rights to sue is primarily a matter of straightforward statutory interpretation.[14] That being the case, this Note suggests that there is nothing in a plain reading of section 14(d)(7) that gives private parties a right to sue for violations of that section. A thorough analysis of the statute in light of the Court's current stance on implied causes of action has been lacking in judicial opinions involving the best-price rule. Such an analysis would lead to the conclusion that such a right no longer exists—a conclusion that simply has not been reached by any court at this point. Part I of this Note will trace the history of the Court's stance on reading implied rights to sue into statutes over the past forty years. Part II will highlight instances where courts have applied the implied rights doctrine to the best-price rule. Part III will analyze the current state of the Court's approach to

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[12] *See* Eric J. Schwartzman, *What It Takes To Make a Consortium Work*, SMARTCAPITAL (Latham & Watkins, New York, N.Y.), Mar. 2006, at 1, 2, *available at* http://www.lw.com/upload/pubContent/_pdf/pub1544_1.pdf; *see also* Memorandum from Mara L. Ransom, Special Counsel, U.S. Sec. & Exch. Comm'n (Aug. 7, 2006) (providing a chart detailing the decline in U.S. announced tender offers between 2000 and 2006). Note that the chart shows a decline in the use of the tender offer, but does not necessarily point to private lawsuits as a causal factor. There could be many factors leading to the decline—one of the most prominent identified by the Commission and addressed in the 2006 amendments to the best-price rule was uncertainty as to the scope of the rule in relation to employee severance packages. *See* Amendments to the Tender Offer Best-Price Rules, Exchange Act Release No. 34,54684, 71 Fed. Reg. 65,393, at 65,393 (Nov. 8, 2006). While these changes will hopefully alleviate some of the disincentives to structuring a merger as a tender offer, they do not address the larger issue of whether a private right should be recognized under the rule in the first place.

[13] *See* Ben Walther, Note, *Employment Agreements and Tender Offers: Reforming the Problematic Treatment of Severance Plans Under Rule 14d-10*, 102 COLUM. L. REV. 774, 783 (2002).

[14] Alexander v. Sandoval, 532 U.S. 275, 286 (2001).

implied rights and apply it to the best-price rule by arguing that a plain reading of the statute does not support such a right.

I. A SURVEY OF IMPLIED RIGHT TO SUE JURISPRUDENCE

Forty years ago, a private party trying to assert a private right based on a statute had a powerful ally in *J.I. Case Co. v. Borak*.[15] In *Borak*, the Supreme Court affirmed a Seventh Circuit ruling that a stockholder could sue for damages for a violation of section 14(a) of the Securities Exchange Act.[16] While conceding that section 14(a) contained no express rights for private parties to sue for damages, the Court focused instead on the statute's purpose of investor protection. This purpose implied "availability of judicial relief where necessary to achieve that result."[17] The Court's approach to crafting this relief was unmistakably activist, evinced by its statement that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."[18] To the *Borak* Court, the lack of an express and specific private right to sue was an insignificant barrier for aspiring plaintiffs. A statute containing a "general" right to sue empowered federal courts to use any available remedy to grant relief.[19] The Court found such a general right in the language of the statute at issue.[20]

The idea that federal courts should be vigilant in crafting relief based on a statute's underlying purpose retained relevancy

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[15] 377 U.S. 426 (1964).

[16] *Id.* at 435. Section 14(a) makes it unlawful for any person to use false or misleading statements to solicit any proxy in respect to any security registered on any national securities exchange. *Id.* at 427 n.1.

[17] *Id.* at 432.

[18] *Id.* at 433.

[19] Bell v. Hood, 327 U.S. 678, 684 (1946).

[20] *Borak*, 377 U.S. at 433. Section 27 of the Securities Exchange Act granted the district courts jurisdiction over "all suits in equity and actions at law brought to enforce any liability or duty created by this chapter." 15 U.S.C. § 78aa (2000). This was the "general" rights language from which the Court implied a private right to sue. The Court in *Borak* did not invent this reasoning, but rather drew from its earlier decision in *Deckert v. Independence Shares Corp.*, where the Court reasoned:

> The power *to enforce* implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case. If petitioners' bill states a cause of action when tested by the customary rules governing suits of such character, the Securities Act authorizes maintenance of the suit . . . .

311 U.S. 282, 288 (1940).

for approximately a decade.[21] In 1975, the Court changed direction from *Borak*'s liberal inquiry into statutory purpose to a more structured test of congressional intent in *Cort v. Ash*.[22] In *Cort*, the Court laid out a four-part test for determining whether a private right to sue could be read into a statute. The *Cort* test examined (1) whether the plaintiff was a member of a special class for whose benefit the statute was enacted; (2) whether there was legislative intent, implicit or explicit, to create or deny a private remedy; (3) whether it was consistent with the underlying legislative scheme to imply a private remedy; and (4) whether the cause of action was one traditionally relegated to state law.[23] Under this test, *Borak*'s analysis of statutory purpose was just one factor to be considered, which by default, narrowed the scope of the Court's ability to read a private right into a statute's underlying purpose. Even if such a purpose was found, the three other factors listed above still needed to be satisfied.

Standing alone, *Cort* was not necessarily a bad omen for plaintiffs' rights. A statute that previously would have been read as containing a private right under *Borak* might still pass muster under *Cort*—if it displayed a legislative intent to protect a certain class of persons in an area of law not traditionally left to state remedies. Four years later, however, in *Transamerica Mortgage Advisors, Inc. v. Lewis*[24] and *Touche Ross & Co. v. Redington*,[25] the Court fleshed out the contours of *Cort* in a way that significantly curtailed the scope of *Borak*'s underlying purpose inquiry. In *Redington*, the Court held that customers of a securities brokerage firm did not have an implied cause of action under section 17(a) of the Securities Exchange Act.[26] Noting that a stricter standard for finding implied rights to sue was in place at the time of the *Borak* decision, the Court stated that the ultimate question was one of the congressional intent in the

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[21] *See* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971); Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 386 (1970).

[22] 422 U.S. 66, 78 (1975).

[23] *Id.* The Court used the four-part test to deny plaintiffs a private right to sue under the Federal Election Campaign Act. *Id.* at 85.

[24] 444 U.S. 11, 15–19 (1979).

[25] 442 U.S. 560, 575–76 (1979).

[26] *Id.* at 579.

statute itself.[27] In response to plaintiff's argument that the *Cort* test required an analysis of legislative purpose, the Court declared that legislative intent was the crucial issue, and that underlying purpose was simply one factor in determining intent.[28]

In *Transamerica*, the Court ruled that a shareholder of a real estate investment trust did not have a private right for damages under the Investment Advisers Act of 1940.[29] Even though the Investment Advisers Act was intended to benefit a class of persons, which included the plaintiffs,[30] the Court held that plaintiffs had no private damages remedy because (1) the Investment Advisers Act was completely silent on the question of a private right of action; (2) the section in question proscribed certain conduct, but did not create any civil liabilities; and (3) the Investment Advisers Act included specific enforcement provisions for the duties imposed by the section of the Act before the Court.[31] Similar to *Redington*, the Court here lent considerable weight to discerning legislative intent through statutory construction.[32] Regarding the language in *Cort* concerning a class of persons to be protected, the Court stated that "the mere fact that the statute was designed to protect advisers' clients does not require the implication of a private cause of action for damages on their behalf."[33]

This distinction between finding intent to protect a class of persons in a statute and finding an additional private right to sue for damages was well detailed in a third Supreme Court case from the same year, *Cannon v. University of Chicago*.[34] In that case, the petitioner sued a federally funded university under Title IX of the Education Amendments of 1972 for excluding her from medical school programs on the basis of gender.[35] Here, the

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[27] *Id.* at 578.

[28] *Id.* at 575–76.

[29] *Transamerica*, 444 U.S. at 24.

[30] *Id.* at 17.

[31] *Id.* at 18–20. The Court also held that plaintiffs did have a right to contract rescission, since section 215 of the Investment Advisers Act declared investment advisers' contracts void if their formation or performance violates the Act. Such a violation was present here. *Id.* at 18–19.

[32] *Id.* at 15 ("The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction.").

[33] *Id.* at 24.

[34] 441 U.S. 677, 688–717 (1979).

[35] *Id.* at 680.

Court found "an unmistakable focus on the benefited class" as opposed to "simply . . . a ban on discriminatory conduct."[36] The Court analogized other civil rights laws where explicit right-creating language bolstered this "unmistakable focus" on the benefited class. The Court was more willing to infer a private right into a statute that included language such as "[a]ll citizens of the United States shall have the same right,"[37] "no person shall be denied the right to vote,"[38] or "[e]mployees shall have the right to organize."[39] Although the Court did infer a private right based on the *Cort* factors,[40] the discussion of "right-creating language" was *Cannon*'s central contribution to private right jurisprudence.

Notably, *Cannon* buttressed its legislative history analysis with a discussion of the contemporary legal context of the statute's enactment. The Court noted that Title IX was patterned after Title VI of the Civil Rights Act of 1964 and that the two used nearly "identical language to describe the benefited class."[41] This language, as found in Title VI, had already been found by many federal courts to hold a private right of action.[42] Although the Court cautioned that the recent *Cort* line focused on strict statutory construction, it still found that the "evaluation of congressional action in 1972 must take into account its contemporary legal context."[43] So even though *Cort* narrowed the scope of *Borak*'s underlying purpose test, *Cannon*'s allowance for contemporary legal context lent significant weight and flexibility to the purpose prong of the *Cort* test.

During this period, the Court's private right to sue jurisprudence became more limited, although to what extent was

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[36] *Id.* at 691–92. Section 901 of Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (2000).

[37] *Cannon*, 441 U.S. at 690 n.13 (emphasis omitted) (internal quotation marks omitted) (quoting 42 U.S.C. § 1982 (2000)).

[38] *Id.* (internal quotation marks omitted) (quoting 42 U.S.C. § 1973c(a) (2000)).

[39] *Id.* (internal quotation marks omitted) (quoting 45 U.S.C. § 152 (2000)).

[40] *Id.* at 709.

[41] *Id.* at 695.

[42] *See* Bossier Parish Sch. Bd. v. Lemon, 370 F.2d 847, 852 (5th Cir. 1967); Blackshear Residents Org. v. Hous. Auth., 347 F. Supp. 1138, 1146 (W.D. Tex. 1972); Hawthorne v. Kenbridge Recreation Ass'n, 341 F. Supp. 1382, 1383–84 (E.D. Va. 1972).

[43] *Cannon*, 441 U.S. at 698–99.

unclear. Although surely more restrictive than the *Borak* era, it was uncertain whether this Court was announcing a regime change. *Cort* diminished the importance of underlying congressional purpose by making it just one of four factors to be considered.[44] *Redington* refined this test by placing the most weight on the legislative intent prong[45] and by discerning that this intent was primarily a matter of statutory interpretation.[46] *Transamerica* echoed this idea by emphasizing that statutory interpretation was the basic inquiry for finding an implied right to sue.[47] While *Redington* and *Transamerica* seemed to narrow the focus of the discussion to statutory interpretation, *Cannon* still left plaintiffs a fair amount of leeway by taking into account the contemporary legal context of a statute's enactment.[48] Since the move to a more restrictive analysis of implied rights was a recent development, any statute enacted before *Cort*—or as in *Cannon*, a statute *patterned* on a statute enacted before *Cort*[49]—could potentially have a contemporary legal context that would be very favorable for plaintiffs. A true confirmation of the doctrinal change would not come about until 2001 in *Alexander v. Sandoval*[50] when the Court dispelled any doubt as to the scope of inquiry for finding a private right to sue. The Court held that private individuals did not have a right to sue to enforce regulations created under Title VI of the Civil Rights Act.[51] In no uncertain terms, the Court stated that its job was to read the statute and decide if Congress intended to create a private cause of action. On this point, statutory intent is determinative; without it no cause of action may be implied, "no matter how desirable that might be as a policy matter, or how compatible

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[44] Cort v. Ash, 422 U.S. 66, 78 (1975).

[45] Touche Ross & Co. v. Redington, 442 U.S. 560, 577 (1979).

[46] *Id.* at 568; *see also* California v. Sierra Club, 451 U.S. 287, 297 (1981) ("The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide."); Nw. Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 91 (1981) ("In determining whether a federal statute that does not expressly provide for a particular private right of action nonetheless implicitly created that right, our task is one of statutory construction.").

[47] Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 17 (1979).

[48] *Cannon*, 441 U.S. at 698–99.

[49] *Id.* at 680.

[50] 532 U.S. 275 (2001).

[51] *Id.* at 293.

with the statute."[52] The Court here elevated statutory interpretation to such an extent that all other aspects of the *Cort* test became tools of discovering legislative intent: "Having sworn off the habit of venturing beyond Congress' intent, we will not accept respondents' invitation to have one last drink."[53] *Sandoval* also strictly limited the scope of the "contemporary legal context" analysis to clarification of the text, which of course only could be employed if the text itself was ambiguous.[54]

Decided six years ago, *Sandoval* is beginning to reverberate through the lower courts. The Second Circuit, in particular, is taking notice. In *Olmstead v. Pruco Life Insurance Co. of New Jersey*, the Second Circuit drew heavily on *Sandoval*, observing that a statute's failure to expressly state a private right of action creates a presumption that Congress did not intend one.[55] Tracking the Supreme Court's jurisprudence of implied rights, the court found that the other *Cort* factors had been subordinated to statutory text as merely "interpretive sources."[56] Indeed, cases that showed judicial activism to affect underlying statutory purpose belonged to an "*ancien regime*."[57] In *Hallwood Realty Partners v. Gotham Partners*, the Second Circuit again stated that the relevant inquiry has been narrowed to "the single question of whether congressional intent to create a private cause of action can be found in the relevant statute."[58]

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[52] *Id.* at 286–87. It is not surprising that Justice Scalia delivered the opinion of the Court. Eleven years earlier in *Thompson v. Thompson*, he chided the majority for relying on *Cort* "as though its analysis had not been effectively overruled by our later opinions." 484 U.S. 174, 188. (1988) (Scalia, J., concurring). Scalia went so far as to call for a "categorical position that federal private rights of action will not be implied." *Id.* at 191. The opinions Scalia referred to as overruling *Cort* were *Transamerica* and *Redington*. *Id.* at 189. Obviously a majority of the Court did not hold this view in 1988, but it is clear that Scalia was using *Sandoval* thirteen years later as a vehicle to reaffirm the restrictions imposed by *Redington* and *Transamerica*.

[53] *Sandoval*, 532 U.S. at 287.

[54] *Id.* at 288 (internal quotations omitted).

[55] Olmstead v. Pruco Life Ins. Co. of N.J., 283 F.3d 429, 432 (2d Cir. 2002).

[56] *Id.* at 434.

[57] *Id.* (internal quotations omitted) (quoting *Sandoval*, 532 U.S. at 287).

[58] Hallwood Realty Partners v. Gotham Partners, 286 F.3d 613, 619 (2d Cir. 2002); *see also* Susquehanna Area Reg'l Airport Auth. v. Middletown Area Sch. Dist., No. 2005 CV 2052, 2006 Pa. Dist. & Cnty. Dec. LEXIS 95, at *24. (C.P. Ct. Dauphin County, Pa. June 13, 2006), *aff'd*, 918 A.2d 813 (Pa. Commw. Ct. 2007) ("The landmark case that explains how to determine if a private cause of action exists is *Alexander v. Sandoval*. . . . [T]he key to determining if a statute provides a private

There is no doubt that *Sandoval* was almost a total defeat for potential plaintiffs. The Court nearly closed the door for implying a private right into a federal statute. Now, in order for plaintiffs to sue, an implied right would have to be apparent on the face of the statute. Plaintiffs will have a difficult time arguing before a court that Congress intended to imply a remedial right instead of simply writing one expressly into the statute.[59] *Sandoval* is a recent decision, however, and its full weight has not been brought to bear in many areas of law. In securities regulation, and the best-price rule in particular, the implied rights jurisprudence of thirty years ago is still alive and kicking.

II. COURT APPLICATION OF THE IMPLIED RIGHTS DOCTRINE TO THE BEST-PRICE RULE

In 1988, more than a decade before *Sandoval*, the Second Circuit found a private right to sue under the best-price rule. In *Field v. Trump*, the plaintiff shareholder alleged that the defendant varied the terms of its tender offer in violation of the best-price rule during its acquisition of the business Pay'n Save.[60] The court found an implied right to sue under the best-price rule, reversing the dismissal of the plaintiff's claim.[61] The court applied the *Cort* test, finding that (1) the plaintiffs were among an intended class of beneficiaries, (2) the sole purpose of the Williams Act was shareholder protection, (3) a private remedy would be an effective means of enforcing congressional purpose, and (4) a cause of action here was not one traditionally left to state law.[62] The court did not discuss either *Redington* or *Transamerica*, both of which had been good law for nearly a decade at this point. Instead, it relied on its own reasoning in

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cause of action is to interpret the language of the statute itself . . . ." (citation omitted)).

[59] *See* Victorian v. Miller, 813 F.2d 718, 721 (5th Cir. 1987) ("To establish an implied private right of action under a federal statute, a plaintiff bears the relatively heavy burden of demonstrating that Congress affirmatively contemplated private enforcement when it passed the relevant statute.").

[60] Field v. Trump, 850 F.2d 938, 940 (2d Cir. 1988).

[61] *Id.* at 946.

[62] *Id.*

Pryor v. United States Steel Corp., which three years earlier had implied a private right in section 14(d)(6) of the Williams Act.[63]

The Third Circuit was faced with the same issue three years later in *Polaroid Corp. v. Disney*.[64] Polaroid alleged that potential bidder Shamrock violated the all-holders portion[65] of the best-price rule.[66] Instead of following *Cort*—or either *Transamerica* or *Redington*—the Third Circuit used its own test for determining whether to imply a private right of action, a test that included an evaluation of congressional intent.[67] Finding the legislative history of the Williams Act silent as to the intent to create a private remedy, the court turned to the *Cannon* "contemporary legal context" reasoning: "If Congress operated against a background understanding that courts would create private remedies that would further the purposes of the statute, then Congress most likely intended that a statute be enforceable through a private right of action . . . ."[68] Accordingly, the court found congressional intent to create a private right of action for shareholders and also found that the statute passed the Third Circuit's overall test for implying private rights into a statute.[69]

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[63] Pryor v. U.S. Steel Corp., 794 F.2d 52, 58 (2d Cir. 1986). *Pryor* took a more accurate survey of the Court's jurisprudence by discussing the effects of both *Transamerica* and *Redington* on the *Cort* test, but this analysis did not seem to really affect the court's application of *Cort*. Whereas *Transamerica* warned that identification of a right vested in a protected class did not necessarily lead to the implication of a private remedy, *Pryor* held that "[b]oth the identification of beneficiaries and the substantive nature of the right created suggest that Congress intended to create a private right of action under Section 14(d)(6)." *Id.* at 57; *see also* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 24 (1979). *Field* piggybacked *Pryor* by stating that the best-price rule "certainly provides at least as strong a basis for the implication of a private remedy as does Section 14(d)(6)." *Field*, 850 F.2d at 946.

[64] 862 F.2d 987 (3d Cir. 1988).

[65] Regulation 14d-10 includes the all-holders rule, which states that a tender offer must be open to all holders of that class of shares. *See* 17 C.F.R. § 240.14d-10(a)(1) (2008).

[66] *See Polaroid*, 862 F.2d at 990.

[67] *Id.* at 994. The test created by the Third Circuit and used in *Polaroid* posed three questions for a statute-derived rule: (1) "whether the agency rule is properly within the scope of the enabling statute," (2) "whether the statute under which the rule was promulgated properly permits the implication of a private right of action," and (3) "whether implying a private right of action will further the purpose of the enabling statute." Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 947 (3d Cir. 1985). The *Angelastro* test is similar to the *Cort* test in that it examines both congressional intent and underlying legislative purpose.

[68] *Polaroid*, 862 F.2d at 995.

[69] *Id.* at 996–97.

Seven years later, the Ninth Circuit made a similar finding in *Epstein v. MCA, Inc.*[70] As part of Matsushita's acquisition of MCA, Inc.—a $6.1 billion deal—MCA's chief executive officer exchanged his shares for stock in an MCA-owned subsidiary instead of tendering his shares like other holders, while MCA's chief operating officer received an extra $21 million over the price he received for his tendered shares.[71] Some MCA shareholders brought suit alleging violations of the best-price rule.[72] Marshalling the rationales of *Field*, *Pryor*, and *Polaroid*, the court found the statutory language that a bidder "shall pay" any increase in consideration to all shareholders of the same class was "more than adequate under existing Supreme Court case law to support a finding of congressional intent to create a private right of action for violations of section 14(d)(7)."[73] The Ninth Circuit expressly rejected any evidence of a "sea change in the Court's implied right of action jurisprudence," calling it "wishful thinking" on the part of the defendants.[74]

When the Supreme Court granted certiorari in *Epstein*, the opportunity was ripe to settle the question of whether private plaintiffs could sue for violations of the best-price rule. As is often the case, however, the Court did not rule on that which it did not have to. The appeal was not centered on the best-price rule, but rather on whether a federal court could withhold full faith and credit from a state court ruling that approved a class action settlement if the settlement released claims within the exclusive jurisdiction of federal courts.[75] The possible existence of a private remedy under the best-price rule was mentioned only in dicta[76] and left lower courts no closer to an answer. The court stated: "We express no opinion in this case on the existence of a private cause of action under §§ 14(d)(6) and (7) of the [Securities] Exchange Act [of 1934], . . . the statutory authority

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[70] 50 F.3d 644 (9th Cir. 1995), *rev'd sub nom.* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996).

[71] *See id.* at 647–48.

[72] *Id.* at 648.

[73] *Id.* at 652.

[74] *Id.* at 651. The court even took the time to single out Justice Scalia's concurrence in *Thompson* and stated that Scalia was the only justice taking a hard-line, anti-implied rights stance. *See id.* at 651–52.

[75] Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 369 (1996), *rev'g* Epstein v. MCA, Inc., 50 F.3d 644 (9th Cir. 1995).

[76] *See id.* at 370 n.1.

for Rule 14d-10."[77] Given a chance to settle the issue, the Court refused.

Since the Court's express non-ruling on the issue in *Matsushita*, it is not surprising that subsequent lower court decisions have more or less followed the precedents of *Field*, *Polaroid*, and *Epstein*. In *Perera v. Chiron Corp.*,[78] the District Court for the Northern District of California denied dismissal of plaintiff's 14d-10 claim operating on the underlying assumption that this type of private claim was valid in the first place.[79] The implication that the court assumed the validity of the 14d-10 claim is supported by the fact that the court analyzed whether there was a private right under 10b-13;[80] if the court thought there was such an issue for the best-price rule, it most likely would have touched on that in its opinion. The District Court for the Middle District of Tennessee, for example, used the *Cort* test to provide a thorough analysis of the validity of 14d-10 claims and found an implied private right to sue in *Katt v. Titan Acquisitions, Ltd.*[81] Similar to *Perera*, the Second Circuit in *Gerber v. Computer Associates International, Inc.* evaluated the sufficiency of plaintiff's best-price claims on the assumption that the plaintiff could validly bring those claims in the first place.[82] Finally, the District Court for the Eastern District of New York recently affirmed the existence of a private remedy under the best-price rule in *In re Luxottica Group S.p.A.*, citing *Epstein*, *Field*, and *Polaroid*.[83]

Although *Sandoval* was decided before both *Luxottica* and *Gerber*, neither case mentioned *Sandoval* or its ramifications. *Luxottica* offered no analysis of its own; instead, it simply relied on Second, Third, and Ninth Circuit precedent.[84] *Katt* also relied heavily on pre-*Sandoval* precedent by grounding its analysis in the *Cort* test.[85] To date, no court has done an analysis of a private remedy under the best-price rule that takes into account the effect of *Sandoval* on the implied rights doctrine. Part III of

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[77] *Id.*
[78] No. C-95-2075 SW, 1996 U.S. Dist. LEXIS 22503 (N.D. Cal. May 8, 1996).
[79] *Id.* at *12.
[80] *Id.* at *14.
[81] 133 F. Supp. 2d 632, 639–40 (M.D. Tenn. 2000).
[82] Gerber v. Computer Assocs. Int'l, Inc., 303 F.3d 126, 135–36 (2d Cir. 2002).
[83] *In re* Luxottica Group S.p.A., 293 F. Supp. 2d 224, 230 (E.D.N.Y. 2003).
[84] *Id.*
[85] *Katt*, 133 F. Supp. 2d at 639.

this Note will undertake such an analysis to show that a private right should no longer be recognized under the best-price rule.

III. THE STATUTORY FRAMEWORK OF THE BEST-PRICE RULE SHOWS NO CONGRESSIONAL INTENT TO CREATE A PRIVATE RIGHT TO SUE

Sandoval leaves no doubt that finding an implied remedy in a federal statute is a matter of discerning congressional intent through statutory interpretation.[86] The idea that *Sandoval* signaled a regime change is somewhat misleading, since the Court elevated congressional intent above other factors as early as *Transamerica* and *Redington*. Coming four years on the heels of *Cort*, those cases basically turned the four-factor test into a one-factor test of congressional intent.[87] Yet somehow *Cort* retained more credibility than *Redington* and *Transamerica* really afforded it. Federal courts have consistently cited the *Cort* test,[88] and some state courts have adopted *Cort* as the primary test for inferring private remedies from state statutes.[89] Perhaps it is a testament to the staying power of a clearly formulated judicial "test," but regardless, *Sandoval* has reaffirmed the proposition that congressional intent is the determining factor in finding a private right to sue.

A. *Applying* Sandoval *to the Best-Price Rule*

This focus on congressional intent raises the issue of to what extent Congress can "intend" to implicitly write a cause of action into a statute. As the Court has admitted, a focus on whether Congress had in mind a private cause of action and simply forgot to "codify its evident intention" would make the implied cause of action doctrine "a virtual dead letter."[90] On the other hand,

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[86] Alexander v. Sandoval, 532 U.S. 275, 286 (2001).

[87] *See supra* notes 44–48 and accompanying text.

[88] *See* Epstein v. MCA, Inc., 50 F.3d 644, 650 (9th Cir. 1995), *rev'd sub nom.* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996); Field v. Trump, 850 F.2d 938, 946 (2d Cir. 1988); Polaroid Corp. v. Disney, 862 F.2d 987, 996 (3d Cir. 1988); Pryor v. U.S. Steel Corp., 794 F.2d 52, 57 (2d Cir. 1986); *Katt*, 133 F. Supp. 2d at 639.

[89] *See* Machan v. UNUM Life Ins. Co. of Am., 116 P.3d 342, 347 (Utah 2005); Upperman v. Grange Indem. Ins. Co., 135 Ohio Misc. 2d 8, 11 (Ohio Ct. Com. Pl. 2005); Estate of Witthoeft v. Kiskaddon, 733 A.2d 623, 626 (Pa. 1999).

[90] Thompson v. Thompson, 484 U.S. 174, 179 (1988). This was basically the source of Scalia's ire: "I am at a loss to imagine what congressional intent to create a

Sandoval's express restriction of the "contemporary legal context" doctrine[91] limits both the tools available to the judiciary and the scope of their application in seeking out congressional intent beyond the text itself. *Sandoval* stated that contemporary context could only be used to show that (1) Congress enacted a statute patterned on similar language that had previously been held by courts to contain an implied private right of action, or (2) the legal context simply strengthened a conclusion that was already supported by the weight of the text.[92] *Sandoval* makes it clear that any non-textual methods of finding a private remedy must be directly supported by the text of the statute itself.

The text of the statute at issue shows no congressional intent to create a private right of action. Section 14(d)(7) states that "[w]here any person varies the terms of a tender offer . . . such person shall pay the increased consideration to each security holder."[93] The pertinent question is whether Congress intended that this language create a cause of action for plaintiffs; an analysis of the text does not support such a finding. In order to find congressional intent to create an implied right, the Court requires a statute to have "rights-creating language."[94] There is more of a reason to infer a private remedy if Congress drafted the statute with "an unmistakable focus" on the benefited class as opposed to a "ban on discriminatory conduct."[95] By contrast, statutes that focus on the party regulated instead of the class

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private right of action might mean, if it does not mean that Congress had in mind the creation of a private right of action." *Id.* at 188 (Scalia, J., concurring).

[91] *Sandoval*, 532 U.S. at 288.

[92] *Id.* The first possibility is a reference to *Cannon* and the Court's finding there that Title IX was patterned directly on the language of Title VI. Cannon v. Univ. of Chi., 441 U.S. 677, 696 (1979).

[93] 15 U.S.C. § 78n(d)(7) (2000 & Supp. I 2002). Regulation 14d-10, the regulatory part of the all-holders/best-price rule, states that "[n]o bidder shall make a tender offer unless." 17 C.F.R. § 240.14d-10(a) (2008). The primary concern here, however, is with the language of the statute. As the Court has stated on multiple occasions, a regulation can only offer a private remedy if it has first been created by a statute. *See Sandoval*, 532 U.S. at 291 ("[I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself."); Touche Ross & Co. v. Redington, 442 U.S. 560, 577 n.18 (1979) ("[T]he language of the statute and not the rules must control.").

[94] *Sandoval*, 532 U.S. at 288 (internal quotation marks omitted); *see Cannon*, 441 U.S. at 691–93.

[95] *Cannon*, 441 U.S. at 691–92.

protected create "no implication of an intent to confer rights on a particular class of persons."[96]

Admittedly, section 14(d)(7) identifies both a class of persons to be protected and proscribes certain conduct by another class: "Where any person varies the terms of a tender offer . . . such person shall pay the increased consideration to each security holder . . . ."[97] "Any person" is the potential bidder whose conduct is being regulated; "each security holder" is a member of the class of persons being protected. Courts finding a private remedy in the best-price rule have stated that the language "shall pay the increased consideration to each security holder" specifically confers a substantive right on shareholders, and therefore, a private right of action.[98] As the Supreme Court stated in *Transamerica*, however, a conferral of a substantive right on certain parties by a statute "does not require the implication of a private cause of action for damages on their behalf."[99] Even assuming that the statute creates a "right" for shareholders to receive any increase in the tender offer, courts have skipped a step in the analysis to say that this necessarily creates a *private cause of action* as well. The substantive right conferred must be accompanied by clear right-creating language.

The statutory basis for the best-price rule does not contain the necessary right-creating language. While the statute does identify a class of persons to be protected, it lacks the unmistakable focus on that class that is necessary to infer a private remedy.[100] As stated in *Cannon* and discussed in Part I, an unmistakable focus on the benefited class is demonstrated by such language as "[a]ll citizens of the United States shall have the same right,"[101] "no person shall be denied the right to vote,"[102] or "[e]mployees shall have the right to organize."[103] On the other hand, 14(d)(7) places the regulatory emphasis on whether "any

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[96] California v. Sierra Club, 451 U.S. 287, 294 (1981).

[97] 15 U.S.C. § 78n(d)(7) (2000 & Supp. I 2002).

[98] Epstein v. MCA, Inc., 50 F.3d 644, 651 (9th Cir. 1995), *rev'd sub nom.* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996) (emphasis omitted) (internal quotation marks omitted); *see* Field v. Trump, 850 F.2d 938, 946 (2d Cir. 1988); Katt v. Titan Acquisitions, Ltd., 133 F. Supp. 2d 632, 640 (M.D. Tenn. 2000).

[99] Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 24 (1979).

[100] *See Cannon*, 441 U.S. at 691–93.

[101] *Id.* at 690 n.13 (emphasis omitted) (internal quotation marks omitted) (quoting 42 U.S.C. § 1982 (2000)).

[102] *Id.* (internal quotation marks omitted) (quoting 42 U.S.C. § 1973c(a) (2000)).

[103] *Id.* (internal quotation marks omitted) (quoting 45 U.S.C. § 152 (2000)).

person varies the terms of a tender offer"[104]—here the language of the statute is focused on the party being regulated, even if the end result is to confer a right on the protected class. So while courts finding a private remedy have invoked the language that the offeror "shall pay the increased consideration to each security holder,"[105] this reasoning ignores the fact that the right to the consideration is attained through language that primarily centers on banning discriminatory conduct by the offeror.

The best-price rule can also be effectively contrasted with antitrust statutes, which rely heavily on private enforcement: "[A]ny person who shall be injured . . . by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."[106] Conversely, section 14(d)(7) focuses on regulation of the bidding party and its behavior in the tender offer process. It is true that one of the key underlying purposes of this language is minority shareholder protection; however, the test of finding a private remedy is no longer a matter of analyzing the underlying purpose of a statute's enactment. As worded, the statute has a stronger focus on the class regulated than the one protected.

B. The Legislative History of the Williams Act

Additionally, there is nothing in the legislative history of the Williams Act that would lead to a different interpretation of the statute. Legislative history and underlying purpose are available under the current regime as tools of statutory construction to the extent that they can shed light on any ambiguities on the face of the statute. The legislative history of the Williams Act reveals that the primary purpose of the statute was to provide full disclosure of information during the takeover bidding process:

> The bill avoids tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. It is designed to require full and fair disclosure for the

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[104] 15 U.S.C. § 78n(d)(7) (2000 & Supp. I 2002).

[105] *Id.*

[106] 15 U.S.C. § 15 (2000); *see also* 18 U.S.C. § 1964(c) (2000) ("[A]ny person injured . . . by reason of a violation . . . may sue therefor . . . and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . .").

> benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case.[107]

Far from showing intent to create a remedy to aggrieved shareholders, the history of the bill shows that the primary concern was informational in nature. A cash tender offer at the time required that "no information need be filed or disclosed to shareholders," so the bill was "designed to make the relevant facts known so that shareholders have a fair opportunity to make their decision."[108]

The history of the Williams Act stands in stark contrast to the committee reports of section 1988 of Title IX of the Education Amendments of 1972.[109] On the subject of private enforcement, the committee report states that "[a]ll of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain."[110] The congressional record included statements such as "it is essential that private enforcement be made possible by authorizing attorneys' fees in this essential area of the law."[111] Conversely, the house report on section 14(d)(7) stated that "[t]he purpose of this provision is to assure fair treatment of those persons who tender their shares at the beginning of the tender period, and to assure equality of treatment among all shareholders who tender their shares."[112] There is nothing in the record to indicate that Congress

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[107] H.R. REP. NO. 90-1711, at 3 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2811, 2813.

[108] *Id.* This is the language from which courts have drawn the conclusion that the Williams Act's underlying purpose was the protection of shareholders, and therefore, section 14(d)(7) should be read as containing a private remedy. This ignores the express language that the Act was meant to provide an even playing field where neither takeover bidders nor entrenched management could gain an unfair advantage.

[109] Section 1988 comprised the Civil Rights Attorneys Fee Awards Act, which provided that in an action to enforce certain civil rights provisions, the court may award the prevailing party a reasonable attorney's fee as part of its costs. 42 U.S.C. § 1988(b) (2000). This was the provision at issue in *Cannon*, and the express statements in the record in favor of private enforcement contributed heavily to the Court finding a private remedy implicit in the statute. Cannon v. Univ. of Chi., 441 U.S. 677, 701 (1979).

[110] S. REP. NO. 94-1011, at 2 (1976).

[111] 122 CONG. REC. 31472 (1976) (remarks of Sen. Kennedy).

[112] H.R. REP. NO. 90-1711 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2811, 2821.

contemplated private enforcement to achieve this equality of treatment. As the Court stated in *Redington*, "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best."[113]

C. *Policy Considerations*

Nor are there any overriding policy justifications for finding an implied right to sue. Courts that have found a private remedy in the best-price rule argue that without such a remedy, plaintiffs will not be afforded relief. These courts find that the injunctive relief afforded by the SEC needs to be supplemented by a private remedy.[114] Yet, there is nothing to suggest that the SEC's enforcement mechanisms are inadequate to protect aggrieved shareholders. The Commission has the authority to bring an action in federal court to seek injunctive relief "[w]henever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this title."[115] This provision provides appropriate relief when a takeover bidder has increased the amount of his initial tender offer—the Commission can bring an action seeking an injunction from a district court to halt the takeover process until the bidder pays to the aggrieved shareholders the appropriate increase in consideration.[116] This effectively offers the same remedy as a private suit; if the bidding party wants to continue the takeover process, it must pay the increase in consideration. Additionally, the Act authorizes the Justice Department to seek criminal charges for any willful violations of the Act's provisions.[117]

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[113] Touche Ross & Co. v. Redington, 442 U.S. 560, 571 (1979).

[114] *See* Epstein v. MCA, Inc., 50 F.3d 644, 651 (9th Cir. 1995), *rev'd sub nom.* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996); Katt v. Titan Acquisitions, Ltd., 133 F. Supp. 2d 632, 640 (M.D. Tenn. 2000).

[115] 15 U.S.C. § 78u(d)(1) (2000).

[116] The court in *Katt* argued that injunctive relief was inadequate because "any penalties are paid into the Treasury of the United States." *Katt*, 133 F. Supp. 2d at 640. This is a misreading of the provision. The "penalties" alluded to in *Katt* are part of a civil penalty provision that is separate from the injunctive provision. So while it is true that any civil penalties are to be paid into the Treasury, this does not affect relief available under the provision authorizing injunctive relief. *See* 15 U.S.C. § 78u(d)(3) (2000).

[117] 15 U.S.C. § 78ff(a) (2000). Although there has never been an attempt to bring a criminal proceeding for a violation of the best-price rule, the availability of such an

Denying plaintiffs a private right to sue should not place an undue burden on the justifiable expectations of private parties to have a remedy under the best-price rule. Such prudential considerations need to be taken into account during an ideological shift by the Court,[118] but here such considerations are not weighty enough to argue against reading the statute as intended. Eliminating a private remedy should not leave plaintiffs vulnerable to takeover bidders since the SEC can afford effective relief through statutory provisions already in place.[119] While there are legitimate concerns over the resources available to the SEC to pursue enforcement actions,[120] only time and empirical evidence can show the extent to which elimination of a private right to sue might result in aggrieved plaintiffs and non-complying takeover parties. It is logical, however, that reading the best-price rule as originally intended—as primarily a disclosure provision and not a private cause of action for damages—will, by itself, reduce its role as a plaintiff's sword. Without the potential for seven-figure (or larger) settlement value, it is very likely that plaintiffs and their attorneys will be less aggressive in pursuing perceived violations of the best-price rule.

Such deterrence on its face might seem like an open invitation to malfeasance on the part of corporate takeover parties. On closer examination, however, much litigation in this area has stemmed more from longstanding confusion as to the operative scope of what constitutes a tender offer and its effective timeframe than to outright wrongdoing on the part of the bidding party.[121] This uncertainty also suggests that any reasonable

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action demonstrates that the Commission's authority is not as powerless as these courts have made it out to be.

[118] *See* Mackey v. United States, 401 U.S. 667, 677 (1971) ("In adopting a particular constitutional principle, this Court very properly weighs the nature and purposes of various competing alternatives . . . as well as the extent to which justifiable expectations have grown up surrounding one rule or another.").

[119] *See* 15 U.S.C. §§ 78u(d)(1)–(3) (2000).

[120] *See generally* James D. Cox & Randall S. Thomas, *SEC Enforcement Heuristics: An Empirical Inquiry*, 53 DUKE L.J. 737 (2003).

[121] *See* Epstein v. MCA, Inc., 50 F.3d 644, 654 (9th Cir. 1995), *rev'd sub nom.* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996); Field v. Trump, 850 F.2d 938, 943–44 (2d Cir. 1988); *Katt*, 133 F. Supp. 2d at 640–44; *see also* Jason A. Gonzalez, *Sunglasses: The Secret to Making Tender Offers Fashionable*, 1 N.Y.U. J.L. & BUS. 335, 335–36 (2005); Lynn A. Stout, *The Unimportance of Being Efficient: An Economic Analysis of Stock Market Pricing and Securities Regulation*, 87 MICH. L. REV. 613, 691–92 (1988).

reliance by plaintiffs on the provision would be wary and tentative at best. Finally, if prudential issues are to be considered, the chilling effect that expansive readings of the best-price rule have had on the viability of the tender offer as a business mechanism[122] outweighs any threat that elimination of a private remedy poses to shareholders.

There would also be no finality in reading the best-price rule as having no implied remedy. If courts followed this action and Congress disapproved, it could simply amend the statute. In 1994, the Supreme Court in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, reversed a trend in the lower courts that allowed a private party to sue another party for aiding and abetting a Rule 10b-5 violation of the Securities Exchange Act.[123] In response, Congress, a year later, passed the Securities Litigation Reform Act of 1995, which expressly authorized the SEC to enforce exactly the type of aiding and abetting charge that the Court had denied plaintiffs in *Central Bank*.[124] If the Court were to deny plaintiffs a private remedy under the best-price rule, then Congress has the power to supersede the Court's decision.[125]

CONCLUSION

"Obviously, then, when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly."[126] This statement from *Redington* shows the extent to which the Court has retreated from the *Borak* ideology that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."[127] The new regime

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[122] Walther, *supra* note 13, at 780, 808; *see also* Amendments to the Tender Offer Best-Price Rules, Exchange Act Release No. 34,54684, 71 Fed. Reg. 65,393, at 65,394 (Nov. 8, 2006) ("We also intended that the amendments would reduce a regulatory disincentive to structuring an acquisition of securities as a tender offer . . . .").

[123] Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 191 (1994).

[124] *See* 15 U.S.C. § 78t(e) (2000).

[125] Judicial action reading implied private remedies into statutes implicates certain separation of power issues; courts take on a legislative role by finding remedies not expressly created by Congress. For a critical assessment disapproving of this type of judicial activism, see Justice Powell's dissent in *Cannon*. Cannon v. Univ. of Chi., 441 U.S. 677, 730–31 (Powell, J., dissenting).

[126] Touche Ross & Co. v. Redington, 442 U.S. 560, 572 (1979).

[127] J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964).

of judicial restraint in private rights jurisprudence requires courts to reexamine their methodology for finding such rights. Courts that have found private rights under the best-price rule have built their arguments using tools that are less effective after *Sandoval*—like underlying statutory purpose, contemporary legal context, and the practical effects of such a remedy. The new test of private rights jurisprudence, statutory interpretation, leaves plaintiffs claiming a violation of the best-price rule without a foundation. No court has recognized this change with respect to the best-price rule yet, although *Sandoval* is slowly reaching the lower courts, including the Second Circuit. Under a test of congressional intent through statutory interpretation, the best-price rule does not meet the requirements for finding an implied right to sue, nor does the legislative history show any intent on the part of Congress to create a private remedy. Given the Court's current approach to reading implied rights into statutes, it is time for a judicial reexamination of the best-price rule.