Tender Offers: Whether Section 14(e) of the Williams Act No Longer Implies a Private Right of Action

“We are unaware of any situation, involving any other law, where the Court has rejected a private right of action that has become so entrenched for so long, without any hint of dissent or disapproval from the courts or political branches.”

I. INTRODUCTION

In 1968, Congress passed the Williams Act to regulate the purchase of publicly held companies via cash tender offers. The Williams Act protects shareholders in cash tender offer acquisitions that were previously unregulated because of statutory gaps. To help shareholders make informed investment decisions, the antifraud provisions of section 14(e) of the Williams Act (Section 14(e)) are broad and cover all communications related to a tender offer.

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3. See Mark C. Stevens, Comment, An Implied Private Right of Action Under the Williams Act: Tradition vs. Economic Reality, 77 NW. U. L. REV. 316, 316, 347 nn.3 & 6 (1982) (observing need for tender offer regulation because of cash tender offers’ increasing popularity). While there were only 8 tender offers in 1960, 1966 saw 107 cash tender offers. See id. at 347 n.3. At the time, the Securities and Exchange Commission (SEC) only regulated proxy contests and stock tender offers, leaving cash tender acquisitions ripe for abuse. See id. at 347 n.6.

4. See Mark L. Berman, Note, SEC Takeover Regulation Under the Williams Act, 62 N.Y.U. L. REV. 580, 584, 586-87 (1987) (stating Section 14(e) antifraud measures cover communications made in connection to any size tender offer). Congress focused on ensuring that covert takeover bidders made proper disclosures to protect shareholders and provide them with adequate information before responding to tender offers. See id. at 586-87. Consequently, Section 14(e) is worded broadly to cover “any untrue statement of material fact, any omission tending to make statements misleading, and any ‘fraudulent, deceptive, or manipulative’ act” related to any size tender offer. Id (quoting 15 U.S.C. § 78m(e)).
On April 20, 2018, the Ninth Circuit decided in *Varjabedian v. Emulex Corp.* that the mens rea standard under Section 14(e) was no longer scienter but mere negligence to defraud. The Ninth Circuit’s decision created a circuit split, breaking away from five other circuit courts that held scienter—not negligence—was the proper standard. Seeking harmony among the nations’ courts, the petitioners submitted a petition for a writ of certiorari asking the Supreme Court to decide whether Section 14(e) “supports an inferred private right of action based on a negligent misstatement or omission made in connection with a tender offer.” The Court granted the petition for a writ of certiorari on January 4, 2019.

The petitioners, however, argued that the broader issue beyond the mens rea debate was whether Section 14(e) even implied a private right of action. Respondents argued that the petitioners were raising a new issue that the Ninth Circuit had not previously considered. After oral arguments, the Court dismissed the petition as “improvidently granted” on April 23, 2019. Thus, the looming question in securities law is whether the once undisputed implied private right of action still exists under Section 14(e).

5. 888 F.3d 399 (9th Cir. 2018), cert. granted, 139 S. Ct. 782 (mem.), and cert. dismissed, 139 S. Ct. 1407 (2019) (mem.).
11. See Frankel, supra note 10 (stating petitioners previously conceded challenging implied private right of action).
12. See *Varjabedian*, 139 S. Ct. 1407 (dismissing certiorari); see also Ronald Mann, *Justices Pass on Opportunity to Define Liability for Inadequate Disclosures About Tender Offers*, SCOTUSBLOG (Apr. 23, 2019, 2:50 PM), https://www.scotusblog.com/2019/04/justices-pass-on-opportunity-to-define-liability-for-inadequate-disclosures-about-tender-offers/ [https://perma.cc/GY3N-4Q9L] (discussing why justices dismissed certiorari despite majority’s interest in holding no implied private right). The Court likely passed on the broad question of whether there is an implied private right of action because defendants did not raise the issue in the lower courts. See Mann, supra (noting Court did not explain its reason for denying petition).
13. See Mann, supra note 12 (suggesting Court dismissed petition to postpone decision on implied private rights until properly raised). In the twenty-first century, however, the Supreme Court has typically disfavored implying a private right of action and thus may want to decide the issue later. See id.; see also, e.g., Casey’s Gen. Stores, Inc. v. Alimination Couche-Tard, Inc., No. 4:10-CV-00265, 2010 WL 3604097, at *10 n.12 (S.D. W. Cal. 2010).
This Note analyzes the competing arguments surrounding whether courts should continue to imply a private right of action under Section 14(e) despite the modern trend favoring restraint in inferring implied private rights.14 This Note further discusses how tender offers have evolved over time, providing context for why Congress saw a need to protect shareholders.15 This Note will then discuss the legislative history of the Williams Act to provide insight into Congress’s intent, which is essential in determining if a private right of action is implied under Section 14(e).16 Part II then concludes with a history of the evolution of how the Supreme Court determines if an implied private right of action exists.17 In Part III, this Note outlines the most compelling arguments the Court will encounter if asked to decide whether to imply private rights of action under Section 14(e).18

II. History

A. Historical Background on Tender Offer Basics, Use, and Regulation

1. Basic Tender Offer Mechanics

Tender offers are not defined within the ‘34 Act.19 A tender offer, however, is understood as a solicitation to purchase stock directly from the shareholders of a corporation.20 A tender offer is made by either a third party or the company itself, known respectively as a third-party tender offer and an issuer tender offer.21 Third-party tender offers are used to acquire target companies in either

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15. See infra Section II.A.
16. See Cannon v. Univ. of Chicago, 441 U.S. 677, 717 (1979) (Rehnquist, J., concurring) (providing “existence of a private right of action is basically one of statutory construction”); infra Section II.B.
17. See infra Section II.C.
18. See infra Section III.A-C; see also Cannon, 441 U.S. at 717 (Rehnquist, J., concurring).
19. See Berman, supra note 4, at 587 n.50 (noting lack of tender offer definition in Williams Act); TENDER OFFERS: OVERVIEW, PRACTICAL LAW CORPORATE & SECURITIES ITEM 1-382-7403 (West 2020) [hereinafter TENDER OFFERS: OVERVIEW] (describing tests for determining if acquirer made tender offer because no statutory definition exists). The Wellman test and the Hanson test determine whether an acquirer made a tender offer. See id. The Wellman test relies upon eight factors. See id. The Hanson test relies upon whether the court believes shareholders need the protections called upon in the ‘34 Act. See id.
20. See TENDER OFFER DEFINITION, supra note 2 (noting tender offers use cash, stock, or both to purchase shares directly from shareholders).
21. See Tender Offer, INVESTOR.GOV, https://www.investor.gov/additional-resources/general-resources/glossary/tender-offer [https://perma.cc/5DGT-UNWQ] (defining third-party tender offer and issuer tender offer). In both third-party and issuer tender offers, the purchaser solicits a widespread group of shareholders to obtain a substantial percentage of the target company’s stock. See id.
negotiated or hostile acquisitions, while issuer tender offers are used to buy back stock to defend from takeovers or for other business aims.22

Tender offers are active for a limited duration and expire after a set period of time, legally a minimum of twenty days.23 The acquirer fixes the purchase price, usually set above the current market price to induce shareholders to sell.24 Under the SEC’s best-price rule, tender offers have a single offer price that is made to every shareholder, and offerors cannot solicit different shareholders with different prices.25 An offeror can structure a tender offer so that the offeror is not obligated to purchase any shares unless shareholders tender a specified minimum amount of shares.26 If, however, the tender offer will result in the acquirer owning less than 5% of the target company’s stock—known as a “mini-tender offer”—offerors are subject to fewer rules and regulations.27

Acquirers complete a hostile takeover via a third-party tender offer or a proxy contest.28 Third-party tender offers quickly allow offerors to obtain a majority of a company’s shares—as soon as six weeks—and thus gain effective control over the company’s corporate affairs.29 On the other hand, a proxy contest can

22. See Tender Offer Definition, supra note 2 (stating reasons for using tender offer); see also David Carnes, Friendly Takeover vs. Hostile Takeover, ZACKS, https://finance.zacks.com/friendly-takeover-vs-hostile-takeover-2731.html [https://perma.cc/2NE6-GWBB] (describing difference between hostile and negotiated takeovers). Hostile takeovers occur when a corporation’s board of directors does not approve the acquisition. See Carnes, supra. Conversely, when the board of directors approves a negotiated takeover, it is known as a friendly takeover. See id. Both can be completed via a tender offer or a merger agreement—if the deal is hostile, however, a proxy contest is required to replace a reluctant board of directors with a willing board. See id.

23. See 17 C.F.R. § 240.14e-1(a) (2020) (containing requirements of legal tender offer practices); Tender Offer, supra note 21 (explaining tender offers only open for acceptance for limited time); see also Richard Hall, Cravath, Swaine & Moore LLP, United States of America Takeover Guide 4 (2014), https://www.ibanet.org/Document/Default.aspx?DocumentUid=CC7A67D0-7602-44AC-9CA4-17DC83951481 [https://perma.cc/W5VN-W8MY] (stating tender offers must stay open for twenty days minimum). If there is a change to the price or quantity, the tender offer must also remain open for ten more days. See Hall, supra, at 4.

24. See Tender Offer, supra note 21 (stating pricing terms fixed).

25. See id. (noting tender offers subject to various SEC rules and regulations). All tender offers, regardless of size, are subject to antifraud provisions. See id. Other requirements include: adequate notice of shareholders, the disclosure of documents including specific terms to the SEC, and providing withdrawal rights to shareholders. See id. Withdrawal rights allow a shareholder to revoke their acceptance and withdraw their tender of shares within a certain period. See id.


28. See Tender Offers: Overview, supra note 19 (noting two acquisition methods include tender offers and proxy contests). After a proxy contest, a merger agreement or tender offer is necessary to complete the acquisition. See id.

29. See What’s Market: Tender Offers, PRACTICAL LAW CORPORATE & SECURITIES ITEM 2-500-8392 (West 2020) [hereinafter What’s Market: Tender Offers] (recognizing acquirers quickly gain control if majority of stockholders sell their stock). Parties in corporate takeovers typically prefer deals to close quickly because financial markets fluctuate, making tender offers attractive for their speed. See id. Accordingly, the owner
take numerous months to complete because the acquirer must lobby shareholders to authorize the acquirer to vote on their behalf, vote to replace the current directors with those in favor of acquisition, and then gain 100% ownership by using a merger agreement or subsequent tender offer.30

Negotiated corporate takeovers are accomplished through either a third-party tender offer or a merger agreement.31 The main advantage tender offers provide over merger agreements is speed in closing a deal.32 A merger agreement fuses one legal entity into another in a one-step process.33 Generally, a merger agreement, once approved by the board, requires approval by 50% of the shareholders, resulting in the acquirer receiving 100% ownership and control of the company.34 A tender offer, on the other hand, will usually result in the acquirer having control but does not guarantee 100% ownership because not every shareholder accepts the tender offer.35 Therefore, tender offers require a two-step process to

of one share above 50% can outvote all the combined shareholders, and in largely held corporations, less than 50% ownership may grant an owner a controlling interest if the other shareholders cannot combine their votes. See Carnes, supra note 22 (noting corporations operate on “one share, one vote”). Shareholders manifest control by voting for members of the board of directors. See id. The board of directors controls the company and in turn appoints officers to manage the company’s day-to-day affairs. See id.

30. See Carnes, supra note 22 (noting corporations operate on “one share, one vote”). Shareholders manifest control by voting for members of the board of directors. See id. The board of directors controls the company and in turn appoints officers to manage the company’s day-to-day affairs. See id.


32. See Offenberg & Pirinsky, supra note 31, at 332 (noting regulations result in tender offer deals completing quicker than merger agreements).

33. See Latham & Watkins LLP, GUIDE TO ACQUIRING A U.S. PUBLIC COMPANY 3 (2015), https://www.lw.com/thoughtLeadership/lw-acquiring-a-us-public-company-for-the-non-us-acquirer [https://perma.cc/V4QB-X7MU] (describing one-step merger process). The board of directors must approve the merger agreement; therefore, if the board resists, a merger agreement alone cannot effectuate a hostile takeover. See id. After board approval, both sides must file statements with the SEC and receive approval before submitting the merger agreement to a shareholder vote. See id. at 4. The merger agreement then requires approval by a majority of the shareholders, and the entire process generally takes ten to twelve weeks after the board approves the merger agreement. See id. at 6.

34. See Solomon, supra note 31 (recognizing merger voting requirements in addition to other requirements).

35. See id. (describing how tender offers result in quicker control but not necessarily quicker ownership). After a successful tender offer, the acquirer will generally have achieved a majority, controlling stake in the company but likely not 100% ownership because often, some shareholders do not accept the offer. See id. Merger agreements are slower in process but provide complete ownership; while tender offers have the potential to be done faster but face additional steps to achieve complete ownership if not enough shareholders agree to sell their shares. See id. Most state statutes allow immediate mergers when tender offers result in a minimum of 90% ownership. See id. Acquirers want 100% ownership not only to accelerate the process, but also to avoid dealing with minority shareholders who can vote for directors. See Tender Offer vs. Merger, WALL ST. PREP, https://www.wallstreetprep.com/knowledge/tender-offer-vs-merger/ [https://perma.cc/U269-8S2H] (acknowledging acquirers prefer not to deal with minority shareholders). Additionally, some financing terms can be contingent upon 100% ownership. See DealThink: Doing the Two-Step (or the One-Step): A Look at One-Step and Two-Step Mergers, HAYNES BOONE (Aug. 17, 2012), https://www.haynesboone.com/alerts/dealthink-doing-the-
complete full acquisition, which can take as little as six weeks to complete, yet a one-step merger agreement can take several months due to increased regulatory requirements.  

2. Use of Tender Offers in the Markets

Although effective, acquirers seldomly used tender offers prior to 1960. Still, because tender offers fell in a statutory gap, acquirers began using tender offers to take advantage of shareholders by not disclosing pertinent information. Leading up to the passage of the Williams Act in 1968, tender offers had become a popular tool for corporate takeovers. Tender offers remained popular until the SEC adopted the best-price rule in 1986, which resulted in bidders avoiding tender offers due to uncertainty surrounding how courts would apply the new rule. In December 2006, the SEC amended the language of the
best-price rule, which clarified its application, and tender offers rebounded, increasing in use from less than 10% of deals in 2006 to more than 24% in 2008.41 In 2013, Delaware also adopted section 251(h) of the Delaware General Corporation Law, which made tender offers more attractive for acquirers and more relevant in the market.42

3. Regulation of Tender Offers

Today, tender offers are regulated by the SEC and the ‘34 Act.43 State corporate laws generally do not establish additional regulations for tender offers.44 Preventing deceptive and manipulative conduct during tender offers is an important feature of tender offer regulations.45 Tender offer regulation is built upon the two major federal securities statutes passed in the wake of the Great Depression—the Securities Act of 1933 (‘33 Act) and the ‘34 Act.46 The two Acts require disclosure of information to investors to and “integral part” results in uncertainty surrounding whether a court would apply the best-price rule to the deal. See id.; see also SEC Amendments to Tender Offer “Best-Price” Rule Effective Today, GIBSON DUNN (Dec. 8, 2006), https://www.gibsondunn.com/sec-amendments-to-tender-offer-best-price-rule-effective-today/ [https://perma.cc/W468-C49T] (reiterating uncertain application of best-price rule to compensation agreements results in fewer tender offers).


43. See Tender Offer, supra note 21 (stating ‘34 Act governs tender offers while SEC rules and regulations application depend on factors). All tender offers must comply with Section 14(e)’s antifraud provisions. See id. SEC rules and regulations may apply if the tender offer seeks debt or equity interests or other “registered” securities. See id.

44. See TENDER OFFERS: OVERVIEW, supra note 19 (acknowledging no state filings needed to complete tender offer and no state statuses dictate behavior).

45. See WHAT’S MARKET: TENDER OFFERS, supra note 29 (explaining antifraud provisions important to tender offer regulation).

enable them to make informed, independent investment decisions. The ‘33 Act is intended to protect investors from fraud by imposing civil liabilities and promoting standards of fair dealing concerning public offerings of securities. The ‘34 Act protects investors from stock price manipulations by regulating securities’ transactions and establishing reporting requirements for publicly-held companies. The ‘34 Act also created the SEC, which is equipped with flexible enforcement powers to promote efficient regulation of securities trading.

The SEC has general rule-making authority and is authorized to “make such rules and regulations as may be necessary or appropriate to implement the provisions of [the ‘34 Act].”

Until the passage of the Williams Act, however, tender offers were not regulated because they fell within a “significant gap” in the statutory framework of the ‘33 Act and the ‘34 Act. The Williams Act amended the ‘34 Act and now mandates certain disclosures when acquirers initiate a tender offer. The Williams Act focuses on disclosure to provide investors with sufficient information when faced with a tender offer. Notably, the Williams Act does not address whether the tender offer is fair; it merely requires sufficient information disclosures to enable the investors to make that fairness determination.

The Williams Act thus closed the statutory gap and created a regulatory scheme for tender offers.

47. See Lederman, supra note 46, at II-123 (stating ‘33 Act and ‘34 Act require information disclosure to improve market conditions).
48. See Ernst & Ernst, 425 U.S. at 195 (noting design and purpose of ‘33 Act).
49. See id. (acknowledging reasons for enacting ‘34 Act).
50. See id. (recognizing statutory system alone inefficient in regulating securities trading). The ‘34 Act also “contains numerous carefully drawn express civil remedies and criminal penalties.” Id.
52. See Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 Before the Subcomm. on Sec. of the S. Comm. on Banking & Currency, 90th Cong. 1 (1967) (statement of Sen. Harrison A. Williams, Jr., Chairman, S. Subcomm. on Sec.) (observing stock offerings and proxy contests regulated under ‘34 Act but not tender offers); Stevens, supra note 3, at 347 n.6 (underlining significant gap in statutory scheme).
53. See Stevens, supra note 3, at 316 (stating Congress intended to regulate tender offers by amending ‘34 Act). Congress wanted to protect investors and increase market efficiency. See id. at 317 (asserting tender offers maximize value by transferring business entities to more efficient management).
54. See Berman, supra note 4, at 584-85 (highlighting sufficient disclosure main aim of Williams Act); see also Piper v. Chris-Craft Indus., 430 U.S. 1, 27 (1977) (recognizing Congress designed Williams Act “as a disclosure provision”).
55. See Schreiber v. Burlington N., Inc., 472 U.S. 1, 9 n.8 (1985) (stating Williams Act’s development indicates its focus on disclosure and not fairness); Berman, supra note 4, at 584 (pointing to Congress’s market approach in enacting Williams Act).
56. See Tyson, supra note 38, at 243-44 (explaining scheme regulating tender offers based on proxy regulation). The detailed and elaborate regulations for proxy regulations stood in contrast to the absent regulations for tender offers. See id. at 242-43.
Congress enacted the Williams Act because of the increased number of tender offers used to obtain control of public companies in the 1960s. Without regulation, during a tender offer, the identity of the offeror seeking corporate control could remain secret and the information needed for assessing the value of an offer could remain undisclosed. Prior to the Williams Act, these secret tender offers were known as “Saturday night specials” because neither the intent nor identity of the offeror was disclosed and the offer was only valid for a few days. When passing the Williams Act, Senator Harrison Williams remarked, “[t]oday, the public shareholder . . . possesses limited information. No matter what he does, he acts without adequate knowledge to enable him to decide rationally what is the best course of action. This is precisely the dilemma which our securities laws are designed to prevent.” After the enactment of the Williams Act, offerors must now disclose material information, including whether the purchase price of the stock represents a fair valuation compared to the current market price. The Williams Act also instituted additional protections for shareholders including withdrawal rights and the best-price rule.

The Williams Act amended the ‘34 Act by adding four sections that regulate tender offers. Section 13(d) requires disclosure of the tender offeror’s identity and intentions. Section 14(d) provides more disclosure requirements and explicitly prohibits tender offers that do not comply with disclosure requirements if the tender offer will result in the offeror owning more than 5% of company shares. Section 13(e) provides regulations for issuer tender offers. Section 13(d) requires disclosure of the tender offeror’s identity and intentions. Section 14(d) provides more disclosure requirements and explicitly prohibits tender offers that do not comply with disclosure requirements if the tender offer will result in the offeror owning more than 5% of company shares. Section 13(e) provides regulations for issuer tender offers.

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57. See Berman, supra note 4, at 584 (proffering increasing use of tender offers prompted Congress to enact Williams Act); see also Smith, supra note 2, at 193 n.21 (highlighting only 8 tender offers used in 1960 versus 107 in 1966).


59. See NAGEL ET AL., supra note 40, at 5 (illustrating how unregulated tender offers failed to protect investors).

60. 113 CONG. REC. 24664 (1967).

61. See Lederman, supra note 46, at II-124 (noting design of Williams Act to protect investors from coercive acts during tender offers).

62. See Cordero, supra note 58, at § 2[a] (explaining additional benefits of Williams Act beyond disclosure requirements). Shareholders who tender their shares can withdraw their shares within seven days of tendering or any time after sixty days from the initial offer date, if the deal is still ongoing. See id. Another benefit of the Williams Act is that the offeror is required to accept tendered shares on a pro rata basis in the first ten days if more shares are tendered than the number of shares asked for. See id. Finally, the Act ensures that shareholders receive the best price; if the offeror increases the offer price, the new price must be extended to all shareholders. See id.

63. See Berman, supra note 4, at 585-87 (describing four sections Williams Act added to ‘34 Act).

64. See id. at 585 (noting section 13(d)’s design).

65. See id. at 586 (stating unlawful to use tender offer without disclosing necessary information).

66. See id. at 587-88 (recognizing section 13(e)’s purpose in regulating tender offers for repurchasing company shares).
14(e), which applies to all tender offers, is the broad antifraud provision that requires disclosure of all material information and prohibits any “fraudulent, deceptive, or manipulative” act, including omission of information that makes statements misleading.67

B. Section 14(e)’s Legislative History

1. Williams Act Origins and Intent

The precursor to the Williams Act was Senate Bill 2731.68 Introduced by Senator Harrison Williams in 1965, Senate Bill 2731 sought to close the statutory gap that allowed acquirers to abuse tender offers by requiring offerors to make disclosures prior to commencing a tender offer.69 Senator Williams purposely constructed Senate Bill 2731 as pro-management, disfavoring corporate takeover actions.70 Senate Bill 2731, however, was met with opposition from the SEC.71 As a result of the SEC’s opposition, Congress took no action on Senate Bill 2731.72

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67. See 15 U.S.C. § 78n(e); Berman, supra note 4, at 586-87 (stating Section 14(e) broadly empowers SEC to define fraudulent acts and implement preventative rules).
68. See NAGEL ET AL., supra note 40, at 6 (providing date Senate Bill 2731 introduced); Tyson, supra note 38, at 250 (stating Senate Bill 2731 introduced to regulate tender offers but no action taken on bill).
69. See Tyson, supra note 38, at 250 (explaining Senate Bill 2731 utilized precommencement disclosure requirements for tender offerors); see also NAGEL ET AL., supra note 40, at 6 (observing Senate Bill 2731 required twenty days’ notice before offers if seeking over 5% ownership).
70. See NAGEL ET AL., supra note 40, at 6-7 (recognizing Senator Williams considered Senate Bill 2731 openly antitakeover). Senator Williams remarked:

In recent years we have seen proud old companies reduced to corporate shells after white-collar pirates have seized control with funds from sources which are unknown in many cases, then sold or traded away the best assets, later to split up most of the loot among themselves . . . [Senate Bill 2731] would obviously work to the disadvantage of any corporate takeover specialists . . . [t]ighter controls will penalize the raiders, not the legitimate businessman with legitimate methods and legitimate goals.

111 CONG. REC. 28257-58 (1965).
71. See NAGEL ET AL., supra note 40, at 6 (discussing SEC opposition to Senate Bill 2731). See generally 112 CONG. REC. 19003-06 (1966) (containing SEC’s memorandum concerning Senate Bill 2731). The SEC issued a memorandum stating:

The Commission is in accord with the overall objectives of S. 2731. There are, however, certain areas in which we believe it could be improved both from the standpoint of providing a practical, effective means of accomplishing those objectives and from the standpoint of making the operation of the bill less burdensome to those who would become subject to its provisions.

112 CONG. REC. 19003 (1966).
72. See NAGEL ET AL., supra note 40, at 6 (explaining Senate Bill 2731 dropped after facing SEC’s disapproval).
Senator Williams thus substantially revised Senate Bill 2731 and reintroduced the bill as Senate Bill 510 on January 18, 1967.73 Unlike its predecessor, Senate Bill 510 was not pro-management, but instead reflected a neutral policy toward shareholders, offerors, and targets.74 While still promoting disclosure of information, Senate Bill 510 did not include antitakeover bias after recognizing tender offers provided a useful check on the inefficient management of target companies.75 Compared to Senate Bill 2731, Senate Bill 510 included restrictions for those opposed to the tender offer and reduced constraints on tender offerors.76 Senator Williams stressed:

I have taken extreme care with [Senate Bill 510] to balance the scales equally to protect the legitimate interests of the corporation, management, and shareholders without unduly impeding cash takeover bids. Every effort has been made to avoid tipping the balance of regulatory burden in favor of management or in favor of the offeror.77

After minor modifications, Congress enacted Senate Bill 510—commonly known as the Williams Act—in 1968, without any bias toward tender offerors or their intended targets.78

2. Section 14(e)’s Language

Section 14(e) regulates the conduct of a broad range of people—including both the offerors, the target, and those opposed to the offer—and seeks to

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73. See Tyson, supra note 38, at 250 (noting Senate Bill 2731 revised with SEC assistance); NAGEL ET AL., supra note 40, at 6 (stating revised bill reintroduced on January 18, 1967). The neutral approach of Senate Bill 510 resulted from numerous discussions that Senator Williams had with the SEC, the New York Stock Exchange, private industry, and other interested parties when revising Bill 2731. See 113 Cong. Rec. 854 (1967) (explaining revised Senate Bill 510 resulted from these discussions).

74. See S. 510, 90th Cong. (as passed by Senate, Aug. 30, 1967) (containing original text of Senate Bill 510); 113 Cong. Rec. 854 (1967) (stressing “extreme care” taken to balance interests); Tyson, supra note 38, at 251 (highlighting Senate Bill 510’s neutral approach reflected shift from Senate Bill 2731).

75. See Tyson, supra note 38, at 251 (noting commitment to disclosure and describing benefits tender offers provide).

76. See id. (describing how Senate Bill 510 reflected neutral approach); see also NAGEL ET AL., supra note 40, at 6 (pointing to differences between Senate Bill 2731 and Senate Bill 510). Senate Bill 510 increased the proposed disclosure threshold from 5% to 10% and required notice within seven days. See NAGEL ET AL., supra note 40, at 6. Senate Bill 2731 required notice twenty days prior to obtaining a 5% interest. See id. In 1970, Senator Williams passed an amendment lowering the threshold for disclosure from 10% to 5% because, in practice, a 10% stake in certain large corporations is a controlling stake and disclosure is needed to protect investors. See id. at 7.

77. 113 Cong. Rec. 854 (1967).

78. See NAGEL ET AL., supra note 40, at 7 (explaining modifications to Senate Bill 510); Tyson, supra note 38, at 252 (describing objectives of Williams Act stemming from Senate Bill 510). The Williams Act sought to protect investors through disclosure of information, while preserving the viability of tender offers. See Tyson, supra note 38, at 252. The Williams Act is neutral and treats tender offerors and their targets evenhandedly. See id.
influence the decision of investors or the outcome of a tender offer.79 The broad antifraud prohibition was modeled after the antifraud provisions of section 10(b) of the ‘34 Act (Section 10(b)) and SEC Rule 10b-5 (Rule 10b-5).80 The result is that Section 14(e) is “little more than a replica of parts of rule 10b-5.”81

3. Amendments to the Williams Act and Securities Law Since 1968

The Williams Act saw its first and only direct amendment in 1970, just two years after Congress enacted the initial legislation.82 The amendment added the second sentence of Section 14(e), which grants the SEC rulemaking authority to create rules “reasonably designed to prevent such acts and practices as are fraudulent, deceptive, or manipulative.”83 The amendment also lowered the disclosure threshold of section 13(d) of the Williams Act from 10% ownership of the equity of a public company to 5%.84

In 1988, Congress sought stronger insider-trading prohibitions and enacted the Insider Trading and Securities Fraud Enforcement Act (1988 Amendment), which amended the ‘34 Act.85 The 1988 Amendment created an express private right of action against insider trading, while preserving all existing “express or implied rights of action.”86 When passing the 1988 Amendment, Congress

79. See 15 U.S.C. § 78n(e) (regulating conduct of tender offers); Piper v. Chris-Craft Indus., 430 U.S. 1, 24 (1977) (clarifying Section 14(e)’s purpose). Section 14(e) makes it unlawful to “make any untrue statement of material fact or omit to state any material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices.” 15 U.S.C. § 78n(e).
80. See 17 C.F.R. § 240.10b-5 (2020) (outlining broad antifraud protections); Schreiber v. Burlington N., Inc., 472 U.S. 1, 10-11 (1985) (comparing Section 14(e) with ‘34 Act and Rule 10b-5); Panter v. Marshall Field & Co., 646 F.2d 271, 283 (7th Cir. 1981) (stating Section 14(e) “modeled after SEC Rule 10b-5”); see also Oral Argument, supra note 10, at 17 (discussing how Congress “transplanted the text from Rule 10(b) into Section 14(e)”).
81. See Alan J. Ross, Note, Cash Tender Offers: Judicial Interpretation of Section 14(e), 23 CLEV. ST. L. REV. 262, 268 (1974) (explaining use of legislative history to interpret Section 14(e)); see also Lederman, supra note 46, at II–132 (noting “the Court has been explicit about textual parallels between Rule 10b-5 and Section 14(e).”)
84. See NAGEL ET AL., supra note 40, at 7 (describing practical reasons for lowering threshold).
86. See 15 U.S.C. § 78t-1(d); Respondent Brief, supra note 1, at 41 (summarizing provision of amendment to ‘34 Act). The amendment preserved all other existing private rights of action, stating “[n]othing in this section shall be construed to limit or condition the right of any person to bring an action to enforce a requirement of this chapter or the availability of any cause of action implied from a provision of this chapter.” 15 U.S.C. § 78t-1(d).
recognized that other sections of the ‘34 Act—including Section 14(c)—already prohibited insider trading, but sought to create an express private right.87

The last major amendment to the securities laws was the Private Securities Litigation Reform Act of 1995 (PSLRA).88 The PSLRA sets substantive and procedural controls to curtail abusive litigation stemming from private rights under Section 10(b) and Rule 10b-5 while preserving meritorious claims.89 The PSLRA also limits a person’s liability for “any private action arising under this chapter . . . based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading.”90 The PSLRA, however, specifically carves out an exception for forward-looking statements “made in connection with a tender offer.”91

C. History of Implied Private Rights

I. Expansive Era of Implied Private Rights

The Supreme Court first recognized implied private rights under a federal statute in 1916 in Texas & Pacific Railway Co. v. Rigsby.92 In Rigsby, a railroad employee was injured and sought relief under a federal law, which required railroad cars to maintain ladders and handbrakes but did not contain an express private right.93 The Court held that the common law provided the employee with a remedy—an implied private right.94 Rigsby marked the transition into an

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87. See H.R. Rep. No. 100-910, at 26 (1988) (recognizing implied private right of actions already existed while codifying express private right of actions); see also Tyson, supra note 38, at 357 (noting 1988 Amendment creates express private right applicable to insider trading violations).
91. See 15 U.S.C. § 78u-5(b)(2)(C) (providing PSLRA tender offer exception); see also Respondent Brief, supra note 1, at 42 (noting PSLRA’s tender offer protection “covers the core subject-matter of Section 14(e)”).
92. See 241 U.S. 33, 39 (1916); William F. Schneider, Imposing Private Rights and Remedies Under the Federal Securities Acts, 62 N.C.L. REV. 853, 853 (1984) (defining earliest recognition of private party’s right to relief without express statutory right); see also Caroline Bermeo Newcombe, Implied Private Rights of Action: Definition, and Factors to Determine Whether a Private Action Will Be Implied from a Federal Statute, 49 LOY. U. L.J. 117, 120 (2017) (distinguishing implied private right from express private right). A private right permits a plaintiff to bring an action by directly relying on a statute or common law. See Newcombe, supra, at 120. Only Congress can create an express private right by including one in the statute. See id. An implied private right is created by a court that finds a private right to exist within the statute. See id. An implied private right provides relief to private plaintiffs seeking to enforce a statute without an express private right. See id. at 120-21. A right of action is conceptually different from a cause of action; the latter referring to the elements a plaintiff must prove in her complaint. See Cordero, supra note 58, at § 3[a] (differentiating between right and cause of action). Both are separate threshold issues that do not concern the final merits of the case. See id.
93. See Rigsby, 241 U.S. at 36, 37 (identifying federal law employee sought relief under and case facts); Newcombe, supra note 92, at 124 (presenting Rigsby’s issues and facts).
94. See Rigsby, 241 U.S. at 40 (holding inferred private right of action present); see also Newcombe, supra note 92, at 124 (recognizing common law supports creating remedies when legal duties present). But see Schneider, supra note 92, at 853 n.3 (noting Rigsby cited for creating implied private right but lacks unanimous
expansive era where courts began readily inferring implied private rights from federal statutes.\(^95\)

In 1946, during the expansive era, the court in *Kardon v. National Gypsum Co.*\(^96\) first recognized an implied private right under securities law.\(^97\) The *Kardon* court implied a private right arising under Section 10(b) and Rule 10b-5.\(^98\) The court applied tort methodology, finding that breaching a statutory duty creates liability to any class that the statute was designed to protect.\(^99\) The *Kardon* court further emphasized that unless a clear legislative intent exists to deny a private right, a remedy should be implied.\(^100\)

In 1966, the expansive era reached its apex when the Supreme Court unanimously decided *J.I. Case Co. v. Borak.*\(^101\) The Court held private parties have a clear right to bring suit for violations of section 14(a) of the ‘34 Act.\(^102\) To support their decision, the Court partly relied on *Kardon’s* tort theory and implied a private right because, without one, section 14(a) of the ‘34 Act would not meet its legislative objectives.\(^103\) Moreover, the Court believed the judiciary had a “duty . . . to be alert to provide such remedies as are necessary to make effective the congressional purpose[,]” if doing nothing would not right a wrong.\(^104\) Thus, *Borak* cemented the height of the expansive era by recognizing wide-

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\(^95\) See Newcombe, *supra* note 92, at 124 (defining transitional era and expansive era).


\(^98\) See *Kardon*, 69 F. Supp. at 513 (discussing applicable securities law for basis of implied private right); *Tyson*, supra note 38, at 265 (identifying specific securities law). The court also noted that section 29(b) of the ‘34 Act could be the basis for implying a private right. See *Kardon*, 69 F. Supp. at 514.

\(^99\) See *Tyson*, supra note 38, at 265 (describing *Kardon* court’s reasoning and tort theory of implied private rights).

\(^100\) See id. at 265-66 (noting court favors implying private right unless contrary to legislative intent); see also Maher, *supra* note 97, at 791-92 (discussing *Kardon*’s finding). The ‘34 Act imposed a burden on the defendant to show a clear legislative intent to deny private rights of action. See Maher, *supra* note 97, at 792. The court stated that “the mere omission of an express provision for civil liability is not sufficient to negative what the general law implies.” *Kardon*, 69 F. Supp. at 514.

\(^101\) 377 U.S. 426 (1964); see Newcombe, *supra* note 92, at 124 (ascribing height of expansive era to *Borak*).

\(^102\) See *Borak*, 377 U.S. at 430-31 (noting Congress made no express private rights but implied private rights). The Court held that “[w]hile this language makes no specific reference to a private right of action, among its chief purposes is ‘the protection of investors,’ which certainly implies the availability of judicial relief where necessary to achieve that result.” *Id.* at 432.

\(^103\) See id. at 433 (declaring implied private right necessary to effectuate congressional purpose); *Tyson*, supra note 38, at 267 (explaining rationale of *Kardon* tort theory).

\(^104\) See *Borak*, 377 U.S. at 433 (justifying Court’s holding and stating implied right exists).
ranging judicial authority to create implied private rights, if private rights suit broadly stated legislative objectives.\(^\text{105}\)

2. **Beginnings of a Restrictive Era of Implied Private Rights**

The expansive era, marked by courts readily implying private rights, ended in 1975 when the Supreme Court established a more restrictive approach in *Cort v. Ash*.\(^\text{106}\) When asked whether a criminal statute barring corporate contributions to presidential elections afforded a private right, the Court’s unanimous decision established a four-factor test to determine if a court can imply a private right.\(^\text{107}\)

The first factor asks whether the legislature enacted the statute to benefit the plaintiff’s class; in the second factor, the court looks for explicit or implicit legislative intent to create or deny a private right; the third factor asks whether the legislative purpose is consistent with implying a private right; and the fourth factor asks whether the law is typically reserved for the states.\(^\text{108}\) While *Cort* did not expressly overrule *Borak*, it established the four-factor test to constrain expansive implied private rights and notably shifted the presumption of legislative intent.\(^\text{109}\) Thus, *Cort* represents the Court’s effort to contain overenthusiasm for inferring private rights during the expansive era without repudiating *Borak* entirely.\(^\text{110}\)

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\(^\text{105}\) See Newcombe, *supra* note 92, at 124-25 (noting *Borak* represents extraordinary decision). The Court’s duty and ability to create private rights based on broad, legislative objectives demonstrates the enormity of judicial lawmaking power that *Borak* sanctions. See *id.* at 125.

\(^\text{106}\) See 422 U.S. 66, 69-70 (1975) (holding no cause of action); Newcombe, *supra* note 92, at 124-25 (describing Supreme Court’s restrictive approach towards implying private rights after *Borak*); see also Tyson, *supra* note 38, at 269-70 (explaining reasons Supreme Court shifted to restricting application of implied private rights). The makeup of the Court shifted in the mid-1970s; the Burger Court represented a new conservative judicial philosophy in comparison to the prior liberal Warren Court. See Tyson, *supra* note 38, at 269. The conservative Court’s philosophy favored restricting access to federal courts and shrinking the role of the federal judiciary. See *id.* The Court diminished its liberal approach to finding new private rights and adopted a conservative framework when implying private rights. See *id.* at 269.

\(^\text{107}\) See *Cort*, 422 U.S. at 68 (stating issue presented); Newcombe, *supra* note 92, at 125 (acknowledging new four-factor test).

\(^\text{108}\) See *Cort*, 422 U.S. at 78 (describing four-factor test).

\(^\text{109}\) See Tyson, *supra* note 38, at 270 (explaining presumption shift in legislative intent analysis). Under *Borak*, courts could freely imply a private right, assuming there was no legislative intent to prohibit private rights. See *id.* Under *Cort*, however, courts could only imply a private right if the legislative intent permitted implied private rights. See *id.* The shift in *Cort* placed the burden on the plaintiff to demonstrate congressional intent supporting an implied private right; under *Borak* the defendant had the burden to demonstrate congressional intent prohibiting private rights. See *id.*

\(^\text{110}\) See Maher, *supra* note 97, at 796 (articulating *Cort*’s dual purpose of restraining implied private rights while not explicitly overturning *Borak*); see also Tyson, *supra* note 38, at 270 (noting *Cort*’s analysis separates from *Borak* and borrows *Kardon*’s tort theory). The Court’s analysis in *Borak* also utilized a version of *Kardon*’s tort theory in its justification of implying private rights. See Tyson, *supra* note 38, at 267 (highlighting Court’s reliance on tort theory rather than legislative history).
Two years after *Cort*, the Court reinforced its newly-found restraint by refusing to imply a private right. In *Piper v. Chris-Craft Industries, Inc.*, the unsuccessful tender offeror (Chris-Craft Industries) sought a private right to enforce Section 14(e). The Court began its analysis under the *Borak* framework by analyzing Section 14(e)’s legislative intent to determine if an implied right is necessary to effectuate Section 14(e)’s legislative purpose. The Court concluded that the legislative history demonstrated that “the sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer.” The Court then noted that Congress did not contemplate providing a private right for tender offerors. Thus, under the *Borak* framework, the Court in *Piper* held that the legislative history prohibited implying a private right under Section 14(e) for—specifically—tender offerors.

The *Piper* Court, however, did not rest its analysis on *Borak* alone, and confirmed its conclusion by using *Cort*’s four-factor test. The Court determined that tender offerors, as a class, did not satisfy any of the four *Cort* factors. Using *Cort*’s holding to justify *Piper*’s *Borak* analysis, the Court demonstrated

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111. *See Piper v. Chris-Craft Indus.*, 430 U.S. 1, 37 (1977) (acknowledging four-factor test); *Tyson*, supra note 38, at 275-76 (mentioning two important ways *Piper* reinforced end of liberally implying private rights). *Piper*’s analysis utilizes both *Borak* and *Cort* principles, laying the support for *Cort*’s ascendancy. *See Tyson*, supra note 38, at 275-76 (analyzing relationship among *Piper*, *Cort*, and *Borak*). For the first time, the Court refused to imply private rights under securities law. *See id.*

112. *See Piper*, 422 U.S. at 4 (outlining facts and issue presented).

113. *See id.* at 25-26 (explaining relevance of *Borak*’s framework to determine if Section 14(e) permits implied private rights). Building on the *Borak* analysis, which established implying private rights when congressional purposes would otherwise be undermined, the Court clarified that first, the legislative purpose must be identified before the judiciary can imply a private right under Section 14(e). *See id.* Second, the Court must determine if the implied right is needed to “effectuate Congress’ goals.” *See id.* at 26.

114. *Id.* at 35; *see Stevens*, supra note 3, at 336-37 (describing Court’s decision). An unsuccessful tender offeror was not an intended beneficiary of Section 14(e) because Congress strived for neutrality between offerors and targets. *See Stevens*, supra note 3, at 336-37 (recognizing implied private rights can tip balance of power between tender offer parties). The Court noted that the policy of neutrality, which shaped the Williams Act, is different than the purpose of the Williams Act and Section 14(e), which is the protection of investors. *See Piper*, 430 U.S. at 29-30 (explaining legislators’ policy of neutrality separate from final purpose of enacted legislation); *Tyson*, supra note 38, at 273-74 (explaining Court’s application of *Borak* analysis).

115. *See Piper*, 430 U.S. at 35 (declaring Court found “no hint in the legislative history”).

116. *See id.* at 42 (holding no implied cause of action for tender offeror). The Court’s holding is limited and only applies to tender offerors, leaving open whether tender offer targets and shareholders have a private right. *See id.* at 42 n.28. The Court stated, “[o]ur holding is a limited one. Whether shareholder-offerees . . . have an implied cause of action under [Section 14(e)] is not before us, and we intimate no view on the matter. Nor is the target corporation’s standing . . .” *Id.*

117. *See Piper v. Chris-Craft Indus.*, 430 U.S. 1, 37 (1977) (stating “[o]ur conclusion as to the legislative history is confirmed by the analysis in [*Cort*]”).

118. *See id.* at 37-41 (demonstrating differences between *Cort* and tender offerors in case at hand). First, tender offerors were not “an intended beneficiary of the Williams Act.” *Id.* at 37. Second, there was “no indication that Congress intended to create a damages remedy in favor of the loser in a [tender offer].” *Id.* at 38. Third, the Court concluded that a private right for tender offerors was not consistent with the underlying legislative purposes of Section 14(e). *See id.* at 39. And fourth, tender offerors were appropriately suited to seek damages at the state level. *See id.* at 40-41.
that the two holdings produce the same results and allowed future courts to use the narrower Cort factor-based test.\textsuperscript{119}

3. Further Narrowing Implied Private Rights

In 1979, two years after Piper, the Court took further steps to narrow the application of implied private rights in Touche Ross & Co. v. Redington.\textsuperscript{120} The Court held that section 17(a) of the ‘34 Act (Section 17(a)) does not provide an implied private right.\textsuperscript{121} The Court opined that whether a private right exists is a question “of statutory construction” and “our task is limited solely to determining whether Congress intended to create the private right.”\textsuperscript{122} The Court harkened to Cort’s burden-shifting analysis that disfavors implied private rights and held that the absence of legislative intent to imply private rights favors no private rights at all.\textsuperscript{123} The Court, while not overturning Borak’s actual holding, overturned Borak’s broad analysis, noting, “since Borak we have adhered to a stricter standard for the implication of private causes of actions, and we follow that stricter standard today.”\textsuperscript{124}

In Transamerica Mortgage Advisors, Inc. v. Lewis,\textsuperscript{125} the Court unanimously agreed that Borak was not the proper test, but differed on how to determine

\textsuperscript{119} See Tyson, supra note 38, at 276 (explaining purpose of employing both Borak and Cort analyses in Piper); see also Jonathan A. Masur and O. Marcantel, Abolishing Implied Private Rights of Action Pursuant to Federal Statutes, 39 J. LEGIS. 251, 257 (2013) (stating “[t]he confusion that exists regarding the framework for implied-right cases stems from [Piper]).

\textsuperscript{120} 442 U.S. 560, 562 (1979); see Tyson, supra note 38, at 276 n.174 (noting reluctance of Court to imply private rights). Justice Rehnquist opens the Touche Ross opinion stating, “[o]nce again, we are called upon to decide whether a private remedy is implicit in a statute not expressly proving one. During this Term alone, we have been asked to undertake this task no fewer than five times in cases in which we have granted certiorari.”

\textsuperscript{121} See Touche Ross, 442 U.S. at 571 (articulating Courts’ holding). The plaintiff sought a private right to damages stemming from an accountant’s alleged violation of Section 17(a). See id. at 565-66. The Court held that Section 17(a) provided no basis to imply a private right for anyone. See id. at 571.

\textsuperscript{122} See id. at 568; see also Louis E. Ebinger, Note, Sarbanes-Oxley Section 501(a): No Implied Private Right of Action, and a Call to Congress for an Express Private Right of Action to Enhance Analyst Disclosure, 93 Iowa L. Rev. 1919, 1936 (2008) (observing main dispositive question surrounds congressional intent). The Court, while applying one of the Cort factors, determined there was no implied private right without analyzing the other three factors and consequentially strengthened the determinative importance of congressional intent. See Ebinger, supra, at 1937 (noting Court found no implied private right after failure to satisfy congressional intent factor). Although not discussed and possibly weakened, the other three Cort factors did survive, but congressional intent remains the central test. See Newcombe, supra note 92, at 125.

\textsuperscript{123} See Touche Ross, 442 U.S. at 571 (holding silence coupled with no legislative intent disfavors implying private rights); see also Ebinger, supra note 122, at 1937 (acknowledging no congressional intent to deny implied private rights not dispositive for implying private rights).

\textsuperscript{124} Touche Ross, 442 U.S. at 577-78 (upholding implied private right under section 14(a) while dismissing standard relied upon). The Court, drawing upon Piper, elaborated, “[w]e decline to read [Borak] so broadly that virtually every provision of the ‘33 Act and ‘34 Act] gives rise to an implied private cause of action.” See id. at 577. Distinguishing Borak further, the Court noted that in cases where they implied a private right the “statute in question at least prohibited certain conduct or created federal right in favor of private parties . . . [b]y contrast, [Section 17(a)] neither confers rights on private parties nor proscribes any conduct as unlawful.” See id. at 569.

\textsuperscript{125} 444 U.S. 11 (1979).
congressional intent—and if private rights are implied. The majority exclusively considered congressional intent by examining the language, history, and enforcement of the statute, while the minority applied *Cort’s* four-factor test.

The dispute over whether to apply all four *Cort* factors, even when congressional intent disfavors implying private rights, is not settled, but over time the remaining *Cort* factors have weakened.

Modern assessments have further narrowed implied private rights as denoted by the Court’s decision in *Alexander v. Sandoval*.

While not addressing securities law, *Sandoval* forcefully narrowed the implied private rights analysis by holding that “[w]ithout [statutory intent], a cause of action does not exist and courts may not create one, no matter how desirable . . . or how compatible with the statute.” *Sandoval* asserted that analysis of congressional intent begins and ends with the statutory text and structure. The Court only assigns dispositive weight to the text, and other factors are only relevant “to the extent [they] clarify[] [the] text.” The Court emphasized that private rights to enforce federal laws exist only if Congress creates that right, and Congress creates rights through text. Further, common-law principles granting courts equitable remedies are not available to federal courts; federal courts cannot imply private rights to effectuate a law’s purpose unless Congress intended to create a private right.

Additionally, *Sandoval* clarified that contemporary legal context matters only when statutes reuse verbatim statutory text that prior courts held created a private

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126. See id. at 12-13 (stating issue concerned whether Investment Act of 1940 implied private rights); Stevens, supra note 3, at 332 & n.111 (discussing conflicting analysis). The decision in *Transamerica* was not unanimous, but neither the majority nor the minority argued that *Borak* was the proper framework. See Stevens, supra note 3, at 332 n.111.

127. See Stevens, supra note 3, at 332 (examining differences between majority and minority reasoning).

128. See id. at 333-34 (discussing inconsistent application of *Cort* factors since *Transamerica*; Newcombe, supra note 92, at 125 (opining *Cort’s* four factors still relevant yet weakened compared to congressional intent).


130. Id. at 286-87; see Ebinger, supra note 122, at 1939 (summarizing *Sandoval’s* holding).

131. See *Sandoval*, 532 U.S. at 288 (emphasizing text only relevant factor for congressional intent). Respondents urged the Court to consider *Borak*, which would create a remedy to effectuate congressional intent, but the Court declined, having “abandoned that understanding in *Cort.*” See id. at 287. When determining congressional intent, the Court refused to analyze the contemporary legal context of when the statute was enacted or give weight to congressional inaction. See id. at 287-88, 292.

132. See id. at 288 (holding text alone dispositive of congressional intent). The Court did recognize, however, that contemporary legal context is relevant when the text enacted had previously been interpreted to create a private right. See id.

133. See id. at 286, 291 (stating Congress creates statutes, which grant rights, and courts only interpret statutes).

134. See id. at 286-87 (noting only common-law courts can grant remedies without statutory basis); Lampf v. Gilbertson, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in judgment) (asserting federal courts cannot create private rights but common law courts can). Federal courts cannot freely create rights that Congress did not intend; private rights are generated only when Congress intended a private right and private remedy. See *Sandoval*, 532 U.S. at 286-87.
right of action. The Sandoval Court relied on its previous holding and analysis in Cannon, which stated that a private right existed under Title IX because, prior to Title IX’s enactment, six lower courts had recognized an implied private right under Title VI, and Congress modeled Title IX after Title VI. Thus, reusing text previously held to create private rights illuminates Congress’s intent to currently create private rights.

Further, Sandoval rejected the relevance of congressional inaction. The Court in Central Bank, which held Section 10(b) did not provide a private right for aiding and abetting claims, established that Congress’s failure to overturn statutory precedents when amending statutes deserves little weight. The Sandoval Court reinforced Central Bank’s holding that congressional inaction does not amend a statute and thus provides little weight when assessing Congress’s statutory intent.

III. Analysis

A. The Current Implied Private Rights Test

To determine whether a statute contains an implied private right, courts first look to congressional intent, as outlined in Sandoval, and then should apply the four-factor Cort test. Courts have recognized that a tort-like theory is no longer relevant because courts have repudiated Borak’s analysis, which focused...
on statutory purpose. Instead, the implied private rights test asks whether Congress intended to create private rights. After determining Congress’s intent to create an implied private right, as required by both Sandoval and the Cort factors, courts should then analyze the remaining three Cort factors, because Cort’s analysis has not been overturned and is still relevant. For example, Congress may have intended an implied private right, yet a court may deny creating private rights if the area of law is normally regulated by state law—the fourth Cort factor. Furthermore, the current implied private rights test is not retrospective: The test does not overturn prior Supreme Court decisions that created private rights under Borak or another outdated framework.

Congressional intent is determined by analyzing the text and structure of the statute. Contemporary legal and legislative context is largely irrelevant in an implied private rights analysis. After courts have implied private rights in a statute, congressional silence or inaction is also irrelevant to informing congressional intent.

142. See Sandoval, 532 U.S. at 287 (noting Court no longer applies Borak’s methodology). The Court emphasized that “[a]s long as the statute’s purpose can still be achieved after screening out the Cort factors, we will not accept respondents’ invitation to have one last drink.” Id.; see Newcombe, supra note 92, at 136 (noting statutory purpose alone insufficient to support implied private rights).

143. See supra note 141 and accompanying text (outlining importance of congressional intent in implied private rights analysis).

144. See Ehinger, supra note 122, at 1939 (noting Sandoval’s focus on one Cort factor merely narrows Cort’s application); Newcombe, supra note 92, at 125 & n.41 (recognizing survival of all four Cort factors and their use to imply private rights). But see Loewenstein, supra note 82, at 1317 (highlighting some courts recognize implied private rights without analyzing all four Cort factors); Marcantel, supra note 119, at 266 (observing inconsistent use of all four Cort factors by lower courts).

145. See Newcombe, supra note 92, at 134-35 (acknowledging instances where courts may not create private rights despite affirmative congressional intent).

146. See Tyson, supra note 38, at 280 & n.186 (elucidating Borak’s section 14(a) implied private right holding unaffected by subsequent decisions); Touche Ross & Co. v. Redington, 442 U.S. 560, 577 (1979) (opining Borak’s holding unquestioned but overturning Borak’s analytical framework); see also Oral Argument, supra note 10, at 41, 43 (noting Court neither overruling prior holdings creating private rights nor expanding private rights).


148. See Sandoval, 532 U.S. at 287-88 (dismissing relevance of contemporary legal context). The Court held contemporary legal context that suggests Congress expected implied private rights is not relevant to whether the enacting Congress intended to create a private right. See id. The Court has rejected the “time traveler” argument that implied private rights should exist because courts, at the time of passing the statute, were readily implying private rights to effectuate congressional purpose under Borak. See Oral Argument, supra note 10, at 48-49.

149. See supra note 140 and accompanying text (discussing irrelevance of congressional acquiescence for illuminating congressional intent to create implied private rights). The Supreme Court has held that when courts imply private rights and Congress acquiesces, the acquiescence is not evidence that Congress intended to create private rights. See Newcombe, supra note 92, at 139-40 (illustrating Court’s acquiescence doctrine). Without congressional intent, private rights cannot exist. See id. at 139.
of the statute, at the time enacted, was previously held to create private rights because transplanting specific text informs Congress’s intent.150

B. Arguments Disfavoring Section 14(e)’s Implied Private Rights

Section 14(e)’s text, plainly read, does not contain express private rights nor clear rights-creating language.151 Relying on Sandoval, if Section 14(e)’s text does not illuminate a congressional intent to create private rights, then courts cannot create rights Congress did not intend.152 Thus, implying private rights to enforce Section 14(e) turns on whether Congress intended to allow private enforcement.153

Congress intended Section 14(e) to provide shareholders with accurate information to evaluate the merits of tender offers but did not mention private enforcement.154 Section 14(e) gives the SEC—not private individuals—the power to “prescribe means reasonably designed to prevent” fraud.155 Thus, under Cort, congressional silence to create or deny private rights disfavors creating implied private rights.156

Moreover, private enforcement may effectuate Section 14(e)’s purpose, but the enacting Congress must have intended private rights to exist for courts to imply them.157 In Piper, the Court held that “the sole purpose of the Williams Act” and Section 14(e) was protection of investors by requiring information

150. See Sandoval, 532 U.S. at 288 (noting verbatim statutory text previously interpreted to create private rights relevant to congressional intent).
151. See Oral Argument, supra note 10, at 43 (reaffirming Section 14(e) does not contain rights creating language); Loewenstein, supra note 82, at 1311 (explaining entire Williams Act contains no express private rights); Stevens, supra note 3, at 330 (recognizing Williams Act’s silence on private rights).
152. See Sandoval, 532 U.S. at 286 (opining private rights exist only if Congress creates private rights); Oral Argument, supra note 10, at 44 (questioning judicial authority to create law when implying private rights). Common law courts can create private rights, but federal courts cannot; only Congress can create the right to privately enforce federal laws. See Sandoval, 532 U.S. at 286-87; Lampf v. Gilbertson, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in judgment).
154. See 15 U.S.C. § 78n(e) (prohibiting fraud and untrue statements in connection with any tender offer); Piper v. Chris-Craft Indus., 430 U.S. 1, 34 (1977) (discussing congressional intent to provide investors with adequate information).
155. See 15 U.S.C. § 78n(e) (allocating enforcement powers to SEC to create rules and regulations without mention of private rights); supra note 82 and accompanying text (highlighting SEC enforcement provision added by later amendment).
156. See supra note 123 and accompanying text (noting to imply private rights, burden exists to prove congressional intent recognizing private rights).
157. See Sandoval, 532 U.S. at 286-87 (holding implied rights rest upon congressional intent analysis and statutory purpose analysis irrelevant); see also Newcombe, supra note 92, at 136 & n.118 (noting statutory purpose alone cannot create implied private rights today). Congressional intent is not the same as congressional purpose; under Sandoval the sole question is whether Congress intended to create private rights, and not whether private rights effectuate the statute’s purpose. See Sandoval, 532 U.S. at 286-87 (distinguishing between intent and purpose when implying private rights).
Specifically, the Williams Act sponsors “made it clear that the [Williams Act] was designed solely to get needed information to the investor” while striking a neutral balance between management and offerors. The Piper Court held that tender offerors did not have implied private rights under Section 14(e) partly because there was “no indication that Congress intended to create a damages remedy” for unsuccessful tender offerors. Piper noted Congress’s narrow intent was “to curb the unregulated activities of tender offerors.” Thus, Section 14(e) should not have implied private rights for shareholders because there is no congressional intent to create private rights; Congress only intended to curb unregulated activities, which the text and structure of the Williams Act and Section 14(e) accomplish by regulating tender offers and authorizing the SEC to prevent abuses.

Additionally, the fact that courts were frequently implying private rights under the Borak framework when Congress enacted Section 14(e) bears no relevance in determining congressional intent. Congress is well aware of the ever-changing legal landscape and would be ill-advised to leave private rights susceptible to change if it intended otherwise. Further, congressional inaction to revoke Section 14(e)’s implied private rights when amending the securities laws does not represent congressional intent to create private rights. Congressional inaction or acquiescence bears little on the interpretive process, and does

158. See Piper, 430 U.S. at 26-27, 35 (stating purpose of Williams Act and Section 14(e)).
159. See id. at 30-31 (detailing history of neutrality in Williams Act); supra note 77 and accompanying text (noting Williams Act’s sponsors strove for neutrality between management and bidders).
160. See Piper v. Chris-Craft Indus., 430 U.S. 1, 38 (1977) (tracing history of congressional intent behind Section 14(e)).
161. See id.
162. See 15 U.S.C. § 78n(e) (granting SEC enforcement authority to prevent “fraudulent, deceptive, or manipulative” acts and practices); Piper, 430 U.S. at 38 (noting narrow intent to curb unregulated activities).
163. See Alexander v. Sandoval, 532 U.S. 275, 287 (2001) (deeming Borak’s effective purpose framework of implied private rights analysis preempted and irrelevant); Newcombe, supra note 92, at 124 (recognizing Borak marks apex of expansive era of implied private rights); Tyson, supra note 38, at 264-65 (stating courts readily implied private rights when Williams Act enacted).
164. See Sandoval, 532 U.S. at 288 (refusing to weigh Congress’s expectations of legal context when assessing congressional intent); see also Oral Argument, supra note 10, at 50 (describing congressional expectations argument).
165. See Sandoval, 532 U.S. at 292 (pointing to futility of congressional inaction in determining congressional intent); Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 187 (1994) (criticizing dependence on congressional inaction to support implied private rights). The Court has stated that congressional inaction “[a]s a general matter . . . deserve[s] little weight in the interpretative process.” See Cent. Bank of Denver, 511 U.S. at 187. The courts, however, have had “fifty years of unbroken precedent” recognizing implied private rights under Section 14(e). See Oral Argument, supra note 10, at 51 (noting Court’s longstanding tradition of recognizing implied private rights). Additionally, Congress amended the securities laws three times during that span and never removed Section 14(e)’s judicially recognized private rights. See id. at 53. But, congressional inaction does not create rights, only statutes do. See supra note 134 and accompanying text (emphasizing Congress alone creates federal laws and rights to enforce those laws); supra notes 139-41 and accompanying text (establishing congressional inaction irrelevant when implying private rights).
not represent congressional approval of judicial interpretations of Section 14(e).

C. Arguments Supporting Section 14(e)’s Implied Private Rights

Although Section 14(e) lacks express private rights, some evidence suggests Congress intended Section 14(e) to have implied private rights. First, Section 14(e)’s text is a verbatim replica of Rule 10b-5’s text, which, prior to the Williams Act’s enactment, courts had held contained implied private rights. Second, Congress preserved all existing implied private rights with the 1988 Amendment. Third, Congress preserved Section 14(e)’s private rights stemming from forward-looking statements with the PSLRA. Accordingly, if Congress intended Section 14(e) to contain implied private rights, courts should imply such private rights.

Section 14(e)’s verbatim text of Rule 10b-5 indicates congressional intent to create implied private rights. In 1946, the court in Kardon found Rule 10b-5 contained implied private rights. By 1961, Rule 10b-5’s implied private rights were upheld by four courts of appeals and several district courts; only one district court did not imply private rights under Rule 10b-5. By 1969, ten of eleven circuit courts of appeals recognized implied private rights under Rule 10b-5.

166. See Sandoval, 532 U.S. at 292 (opining congressional inaction useless to determine congressional intent); Cent. Bank of Denver, 511 U.S. at 187 (assigning “little weight” to congressional inaction when interpreting congressional intent to imply private rights); see also Newcombe, supra note 92, at 139-40 (stating congressional inaction does not create implied private rights).

167. See supra note 151 and accompanying text (asserting Section 14(e) lacks express private rights). Additionally, the Supreme Court noted Section 14(e)’s legislative history was silent regarding congressional intent to deny private rights. See Piper v. Chris-Craft Indus., 430 U.S. 1, 38 (1977). But see Oral Argument, supra note 10, at 51 (asserting courts have unbroken precedent recognizing Section 14(e)’s private rights). Despite courts implying private rights for over fifty years, Congress has yet to revoke those private rights even when amending the securities laws. See id. at 51, 53.

168. See Kardon v. National Gypsum Co., 69 F. Supp. 512, 514 (E.D. Pa. 1946) (finding Rule 10b-5 contains implied private rights); supra note 81 and accompanying text (detailing similarities between Rule 10b-5 and Section 14(e)). Four appeals courts and several district courts recognized Kardon’s findings by 1961 even though Kardon was a district court case. See Herman & MacLean v. Huddleston, 459 U.S. 375, 380 n.10 (1983) (outlining history of courts recognizing Rule 10b-5’s implied private rights). Moreover, ten appeals courts recognized implied private rights in Rule 10b-5 by 1969. See id.

169. See supra note 86 and accompanying text (explaining 1988 Amendment expressly preserved implied private rights).

170. See supra note 91 and accompanying text (explaining PSLRA, which reforms pleading standards, not applicable to forward-looking statements related to tender offers).

171. See Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979) (noting “ultimate question is one of congressional intent”).

172. See Alexander v. Sandoval, 532 U.S. 275, 288 (2001) (recognizing reuse of verbatim statutory text relevant to implied private rights analysis); supra notes 81, 135 and accompanying text (noting Section 14(e)’s similarities with Rule 10b-5 and reuse of statutory text illuminates congressional intent).

173. See supra note 98 and accompanying text (stating Kardon found implied private rights in Rule 10b-5).


175. See id. (setting forth history of implied public rights).
Thus, the verbatim replica of Rule 10b-5 in Section 14(e) enacted in 1968 is relevant to the implied private rights analysis and illustrates congressional intent to create private rights in Section 14(e).\textsuperscript{176}

Additionally, the original Section 14(e) text did not provide the SEC with explicit enforcement powers to prescribe and prohibit fraudulent acts.\textsuperscript{177} The contemporary legal context—that Rule 10b-5’s text sufficiently creates private rights because courts were implying private rights under Rule 10b-5—coupled with no SEC enforcement provision prior to the 1970 amendment are relevant to assessing Congress’s intent and ultimately suggest Congress intended Section 14(e) to have private rights.\textsuperscript{178} In \textit{Cannon}, the Court held implied private rights existed because the underlying statute was based on another statute that lower courts had held contained implied rights.\textsuperscript{179} Congress carefully crafted the Williams Act with input from the SEC; the explicit verbatim adoption of Rule 10b-5’s text is relevant in clarifying that Congress intended to create implied private rights.\textsuperscript{180}

Finally, preserving implied private rights of action with the 1988 Amendment and PSLRA indicates congressional intent to recognize and preserve implied private rights in Section 14(e).\textsuperscript{181} Congressional inaction does not create implied private rights, but here Congress has acted to preserve implied private rights via the 1988 Amendments and PSLRA.\textsuperscript{182} Because Congress and courts recognized that Section 14(e) is privately enforceable, Congress has effectuated an intent to

\textsuperscript{176} See \textit{Sandoval}, 532 U.S. at 288 (recognizing reuse of verbatim statutory text relevant to implied private rights analysis). \textit{But see} Oral Argument, supra note 10, at 48-49 (discussing relevance of “patterned after” argument). Justice Kavanaugh indicates that the reuse of statutory text is insufficient for determining congressional intent because the Court needs to presume what “Congress would have thought based on the state of the law . . . [which] was rejected in Sandoval.” See id. While Sandoval rejects using legal context to inform congressional intent and focuses on textual analysis, the Court notes that verbatim statutory reuse of text can clarify the text and Congress’s intent. See \textit{Sandoval}, 532 U.S. at 287-88 (presenting justifications underlying implied right-of-action cases).

\textsuperscript{177} See supra note 82 and accompanying text (highlighting SEC rulemaking authority to prevent and prescribe prohibited actions added by later amendment).

\textsuperscript{178} See \textit{Alexander v. Sandoval}, 532 U.S. 275, 288 (2001) (noting “legal context matters only to the extent it clarifies text”); \textit{supra} text accompanying notes 174-76 (outlining state of implied private rights when Congress enacted Section 14(e)); \textit{supra} text accompanying note 82 (describing expansion of SEC rulemaking and enforcement authority); \textit{Tyson}, \textit{supra} note 38, at 261 (acknowledging 1970 amendment provided SEC with rulemaking authority).

\textsuperscript{179} See \textit{supra} note 136 and accompanying text (explaining \textit{Cannon}’s holding recognizing implied private rights because of similarities in text and structure).

\textsuperscript{180} See \textit{supra} note 73 and accompanying text (noting Williams Act’s careful creation); \textit{Sandoval}, 532 U.S. at 288 (recognizing relevance of verbatim statutory text previously held to create private rights).

\textsuperscript{181} See \textit{supra} note 86 and accompanying text (outlining 1988 Amendment’s preservation of existing implied private rights); \textit{supra} note 91 and accompanying text (specifying PSLRA’s explicit tender offer exception); \textit{supra} note 140 and accompanying text (explaining futile nature of congressional inaction to support implied private rights).

\textsuperscript{182} See \textit{supra} notes 86, 91 and accompanying text (discussing how 1988 Amendment and PSLRA preserved existing implied private rights).
create private rights by preserving already existing private rights.\textsuperscript{183} Preserving rights in statutory amendments is an action, not an inaction or acquiescence.\textsuperscript{184}

IV. CONCLUSION

This Note analyzes the current landscape of Section 14(e)’s implied private rights after the novel challenge to their existence in \textit{Varjabedian}. During Section 14(e)’s enactment, courts readily implied private rights of action under the \textit{Borak} framework. No court has disturbed Section 14(e)’s implied private rights—yet.

Section 14(e)’s broad antifraud prohibition is essential to ensure shareholders are protected from abuse and receive necessary disclosures during tender offers. Today, tender offers are still widely used to purchase companies or change ownership interests. A sudden change by the courts to no longer recognize implied private rights would immediately impact securities law and the enforcement landscape.

Nevertheless, it is unclear if Section 14(e)’s implied private rights will withstand judicial scrutiny. Modern precedent disfavors implying private rights absent clear congressional intent to create private rights. Section 14(e)’s text essentially replicates Rule 10b-5, suggesting Congress intended Section 14(e) to also be privately enforceable. But otherwise, the record lacks conclusive evidence whether Congress intended Section 14(e) to be privately enforceable. Congress has not sought to clarify its intent, neither removing Section 14(e)’s implied private rights, nor statutorily cementing private rights.

The question remains as to how the Supreme Court would rule on the issue if a challenge was properly before the Court. Currently, the Court will not overturn its prior decisions respecting implied private rights and refuses to expand implied private rights. The Court has not yet ruled on Section 14(e)’s implied private rights for shareholders and the Court will likely show restraint when implying private rights when it does.

How much restraint will the Court show? Will the Court be satisfied that Congress intended to create implied private rights because Section 14(e) employs verbatim text from Rule 10b-5, which at the time had judicially recognized implied private rights? Or will the Court show more restraint, viewing the verbatim text as inconclusive of congressional intent? The decision likely will be five-to-four regardless of whether the Court does or does not affirm Section 14(e)’s implied private rights because strong arguments exist on each side. But if the Court

\textsuperscript{183} See \textit{supra} note 140 and accompanying text (discussing how inaction and acquiescence cannot create implied private rights). The argument in \textit{Central Bank} failed because Congress did not take any action regarding aiding and abetting. See \textit{Newcombe}, \textit{supra} note 92, at 140. Here, however, Congress explicitly preserved existing implied private rights in the 1988 Amendment and the PSLRA. \textit{See supra} notes 86, 91 and accompanying text (noting how those two statutes preserved Section 14(e)’s perceived existing private rights). There is fifty years of unbroken precedent that Section 14(e) contains an implied private right. \textit{See Oral Argument, supra} note 10, at 51.

\textsuperscript{184} See \textit{supra} notes 86, 91 and accompanying text (highlighting congressional actions).
cannot be persuaded that Congress intended implied private rights under Section 14(e), then the Court will not hesitate to expel Section 14(e)’s implied private rights, upsetting years of lower court precedent and affecting the securities law landscape.

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