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Marc I. Steinberg*

I. Introduction

In Touche Ross & Co. v. Redington,1 the Supreme Court held that a private right of action could not be implied under section 17(a) of the Securities Exchange Act of 1934.2 Although the Court's decision certainly has significance for those litigants who sought to invoke that provision, the ultimate impact of the holding reaches far beyond the confines of section 17(a). Analysis of the opinion reveals that the Redington Court has markedly altered the four-prong test of Cort v. Ash3 in determining whether a private cause of action should be implied under a federal statute.4

The Court's decision in Redington, however, cannot be viewed in isolation. A short time prior to that holding, in Cannon v. University of Chicago,5 the Court implied a private cause of action under Title IX of the Education Amendments of 1972.6 In so ruling, however, the Court's opinion was colored by one concurring opinion and two dissenting opinions which foreshadowed the coming of Redington.7

The purpose of this article is to assess the implication of private rights of action under federal law. First, for background purposes, Cort and its progeny will be discussed. The article will then examine the Court's decisions in Cannon and Redington. In conclusion, the article will suggest how the federal courts should confront the issue of the implication of private rights of action.

* Attorney, Securities and Exchange Commission (Division of Enforcement). Adjunct Professor, Georgetown University Law Center. A.B., University of Michigan; J.D., University of California, Los Angeles; LL.M., Yale University. Member, California and District of Columbia Bars.

2 15 U.S.C. § 78q(a) (1976); 99 S. Ct. at 2485. In general terms, § 17(a) requires brokers-dealers and other persons to maintain such records and file such reports "as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors." 15 U.S.C. § 78q(a)(1) (1976). The Redington decision, particularly when viewed in conjunction with the Court's decision in United States v. Naftalin, 99 S. Ct. 2077 (1979), may have significant impact on the future judicial interpretation of § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1976). That section, which is similar in language to rule 10b-5, 17 C.F.R. § 240.10b-5 (1979), forbids fraudulent or deceptive conduct or the making of material misstatements or nondisclosures in an offer or sale of securities. See Steinberg, Section 17(a) of the Securities Act of 1933 After Naftalin and Redington, 68 Geo. L.J. 163 (1979).
3 422 U.S. 66 (1975).
4 Id. at 78.
6 20 U.S.C. §§ 1681-1686 (1976). The pertinent provision in Cannon was § 901(a) which, in relevant part, provides: "No 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 . . . ." Id. § 1681(a).
7 The concurring opinion was authored by Justice Rehnquist who was joined by Justice Stewart, and the dissenting opinions were written by Justice White with whom Justice Blackmun joined and by Justice Powell. These opinions are discussed later in the article. See notes 43-61 infra and accompanying text.
II. The Four-Prong Cort Test and Its Progeny

Until the Supreme Court’s decision in Redington, both courts and commentators applied the four-prong test of Cort v. Ash as the appropriate standard by which to determine whether a private cause of action should be implied under a federal statute. Cort involved the question of whether a private damage remedy was to be implied in favor of a stockholder against corporate directors under section 610 of the Federal Election Campaign Act. Answering this question in the negative, the Court declared four broad principles that should be employed when determining whether a private cause of action for damages is implicit in a statute not expressly providing such an action. As phrased by the Court, these principles are:

First, is the plaintiff “one of the class for whose especial benefit the statute was enacted,”—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Within these four broad principles, the Court recognized other facts which courts should consider. First, in those situations where a private remedy is to be implied, there should exist, in favor of the plaintiff, a clearly articulated federal right, or, in the alternative, a pervasive legislative framework which governs the interaction between the plaintiff and defendant classes in a particular regard. Second, where federal law clearly provides the plaintiff with certain rights, proof of congressional intent to create a private remedy is not necessary although an express congressional intent to deny such a remedy would be controlling. And third, in regard to causes of action sought to be inferred under federal corporate law, the Court asserted: “Corporations are
creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation. 15

This last principle was applied by the Court in Santa Fe Industries, Inc. v. Green. 16 In Santa Fe, the Court held that section 10(b) of the Securities Exchange Act of 1934 17 and rule 10b-518 promulgated thereunder were not violated by management's alleged breach of its fiduciary obligations to the corporation's minority stockholders unless misrepresentation or lack of disclosure could be proven. 19 As a basis for its holding, the Santa Fe Court, citing Cort, concluded that "[a]bsent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden." 20

An application of the four-prong Cort test is evident in the Court's decision in Piper v. Chris-Craft Industries, Inc., 21 where it held that a defeated tender offeror has no implied cause of action for damages under section 14(e) of the Williams Act. 22 The Court's analysis began with an examination of the statutory language. 23 After finding the statute to be silent on the question, the Court noted that a private remedy may be implied on behalf of the particular class designed to be protected by the statute if such a result is necessary to effectuate the congressional purposes underlying the statute. 24 Subsequently, the Court turned to the four-prong Cort test. Observing that because the intended

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15 422 U.S. at 84.
19 "[T]he cases do not support the proposition . . . that a breach of fiduciary duty by majority stockholders, without any deception, misrepresentation, or nondisclosure, violates the statute and the Rule." 430 U.S. at 476.
20 Id. at 479. See Burks v. Lasker, 99 S. Ct. 561 (1979). Subsequently, a number of courts have applied the Santa Fe principles to § 14(e) of the Williams Act, 15 U.S.C. § 78n(e) (1976), on the premise that the language of that section (which in part prohibits any material misrepresentation or nondisclosure in connection with a tender offer) is patterned after rule 10b-5. See, e.g., Berman v. Gerber Prod. Co., 454 F. Supp. 1310 (W.D. Mich. 1978); Halle & Stieglitz, Filor, Bullard, Inc. v. Empress Int'l Ltd., 442 F. Supp. 217 (D. Del. 1977); Altmann v. Knight, 431 F. Supp. 309 (S.D.N.Y. 1977). This is so even if the target corporation's defensive tactics preclude or impede the shareholders from considering the bidder's offer. What these courts are neglecting to consider is that the Williams Act was intended to protect the shareholder's right to make the investment decision. As such, any defensive tactic that precludes or materially impedes a shareholder from having the opportunity to decide whether to tender his stock violates the Act. See Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1276 (5th Cir. 1978), reversed on other grounds, 47 U.S.L.W. 4844 (1979); Lynch & Steinberg, The Legitimacy of Defensive Tactics in Tender Offers 64 CORNELL L. REV. 901 (1979).
22 15 U.S.C. § 78n(e) (1976); 430 U.S. at 42.
beneficiaries of the Williams Act were the target corporation’s shareholders, Chris-Craft, as a tender offeror, was not “one of the class for whose especial benefit the statute was enacted.” 25 Second, the legislative history, as read by the Court, evinced an intent to police the unregulated conduct of tender offerors. To provide such parties with a private damage remedy without any accompanying benefits in implying such a remedy to the protected shareholder class would be incongruous with Congress’ intent. 26 Third, implying a private cause of action in favor of offerors would be inconsistent with the legislative scheme. As stated by the Court, “[a]s a disclosure mechanism aimed especially at protecting shareholders of target corporations, the Williams Act cannot consistently be interpreted as conferring a monetary remedy upon regulated parties, particularly where the award would not redound to the direct benefit of the protected class.” 27 And, in reference to the last element of the Cort analysis, relegating a tender offeror, at least where it seeks monetary damages, to whatever remedies that exist under state law, is entirely appropriate in light of the legislative framework created by Congress. 28 Accordingly, by invoking the four-prong Cort test, the Court concluded that a tender offeror does not have an implied cause of action for damages under section 14(e).

After Piper, the Court had other occasions to reevaluate the analysis by which a private right of action should be implied under a federal statute. 29 It was not until Cannon v. University of Chicago, 30 however, that the Court

25 Id. at 37 (quoting 422 U.S. at 78 (emphasis in original)). The Court paid particular attention to the legislative history which overwhelmingly indicated that investor protection was the fundamental objective of the Act. See 430 U.S. at 26-35.

26 430 U.S. at 38. Note the following comment by Professor Hayes who testified at the Senate hearings on the bill:

The two major protagonists—the bidder and the defending management—do not need any additional protection, in our opinion. They have the resources and the arsenal of moves and countermoves which can adequately protect their interests. Rather, the investor—who is the subject of these entreaties of both major protagonists—is the one who needs a more effective champion . . . .

Id. at 29 (quoting Proposed Amendments to the Securities Exchange Act of 1934: Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 57 (1967) (statement of Professor Hayes)).

27 430 U.S. at 39. In holding that a tender offeror does not have an implied damage remedy under § 14(e), the Court arguably inferred that such an offeror may have an implied right to sue for injunctive relief: “In short, we conclude that shareholder protection, if enhanced at all by damage awards such as Chris-Craft contends for, can more directly be achieved with other, less drastic means more closely tailored to the precise congressional goal underlying the Williams Act.” Id. at 40. A number of lower courts have granted a tender offeror an implied right of action for injunctive relief under § 14(e). See, e.g., Humana, Inc. v. American Medicorp, Inc., [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,298, at 92,871 (S.D.N.Y. 1978); Applied Digital Data Systems, Inc. v. Milgo Elec. Corp., 425 F. Supp. 1145, 1152 (S.D.N.Y. 1977).

28 430 U.S. at 41. See Pitt, Standing to Sue under Williams Act after Chris-Craft: A Leaky Ship on Troubled Waters, 34 Bus. Law. 117 (1978). See Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975), which was decided prior to Cort. In that case, the Court held that customers of financially failing brokers-dealers did not have an implied cause of action under the Securities Investor Protection Act of 1970 (SIPA), 15 U.S.C. §§ 78aaa-78lll (1976), to compel the Securities Investor Protection Corp. (SIPC) to act for their benefit, thereby leaving the SEC, with its plenary authority, the exclusive party to compel the SIPC to discharge its statutory obligations. In so holding, while noting that investor protection was the primary purpose underlying Congress’ enactment of the SIPA, the Court stated: “It does not follow, however, that an implied right of action by investors who deem themselves to be in need of the Act’s protection, is either necessary to or indeed capable of furthering that purpose.” Id. at 421.


thoroughly analyzed the Cort test. The Cannon opinion disclosed that at least some members were dissatisfied with the Cort standard.

III. Cannon v. University of Chicago

In Cannon, the Court implied a private cause of action under Title IX of the Education Amendments of 1972. Title IX prohibits discrimination based on sex under any education program or activity receiving federal financial assistance. The Court held that Title IX impliedly granted the plaintiff a right of action against the defendant universities which allegedly had denied her admission to their medical schools because of her sex. In its holding, the Court indicated that, in cases involving the implication of a private cause of action under a federal statute, the Cort test remained viable: “[a] court must carefully analyze the four factors that Cort identifies as indicative of such an intent.”

In applying this four-prong test to the case before it, the Cannon Court declared that each of the factors had been satisfied, hence disposing of the need to “weigh” the various factors. The Court’s decision, moreover, recognized other principles, namely, that an implied remedy may be inferred even where the legislative history is silent or ambiguous on the question, that when the remedy is necessary or at least beneficial to the accomplishment of the statutory objective, the Court is “decidedly receptive” to implying such a remedy and that, even though other provisions of a complex legislative framework may create express remedies, that fact is not “sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section.”

The Court’s support for the implication of private remedies under the Cort test, however, was tempered by language contained in the opinion’s last section. There, the Court stated that the far better course is for Congress to create an express cause of action when it desires to afford private litigants redress to support their statutory rights. However, “under certain limited cir-

32 99 S. Ct. at 1966. The defendant private universities were the University of Chicago and Northwestern University.
33 Id. at 1953. The Court implied that although these four factors may be indicative of a congressional intent to infer a private remedy, they are not conclusive. In certain cases, they may be overborne by countervailing arguments.
34 Id. at 1964. The question whether each of the four factors is to be weighed equally was definitively answered in the negative by the Redington Court. See 99 S. Ct. at 2489; notes 69-70 infra and accompanying text.
35 Relying on Cort, the Cannon Court noted “that the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question.” 99 S. Ct. at 1956 (citing Cort v. Ash, 422 U.S. at 82).
36 99 S. Ct. at 1961. In various decisions, the Court has waivered on the question whether implication must be “necessary” to the accomplishment of the legislative objective or merely “consistent” with or “beneficial” to that objective. Compare Touche Ross & Co. v. Redington, 99 S. Ct. at 2486 (“necessary”); Chrysler Corp. v. Brown, 99 S. Ct. at 1713 (“necessary”); with Cannon v. University of Chicago, 99 S. Ct. at 1961 (“necessary or at least helpful”); Santa Clara Pueblo v. Martinez, 436 U.S. at 79 (White, J., dissenting) (“consistent with”); Piper v. Chris-Craft Indus., Inc., 430 U.S. at 39 (“consistent with”); Cort v. Ash, 422 U.S. at 78 (“consistent with”). This issue is discussed later in the article. See notes 100-107 infra and accompanying text.
37 99 S. Ct. at 1965. The Court apparently limited this principle in Redington. See 99 S. Ct. at 2490; note 77 infra and accompanying text. For support of this principle, the Cannon Court cited J. I. Case Co. v. Borak, 377 U.S. 426 (1964), where a private damage remedy was implied under § 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (1976), even though that Act contains a number of express remedies. See, e.g., §§ 9(a), 16(b), 18(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(a), 78p(b), 78r(a) (1976).
cumstances," such failure by Congress is not inconsistent with its intent to have the court imply an appropriate private remedy.\textsuperscript{38} Since the issue before the Court presented "the atypical situation in which all of the [Cort] circumstances that the Court has previously identified as supportive of an implied remedy are present," the majority concluded that an implied cause of action could properly be inferred.\textsuperscript{39}

The Court's limiting language in \textit{Cannon} may suggest that the four-prong \textit{Cort} test is not, in fact, a balancing test; rather, all four elements of the \textit{Cort} analysis must be present to imply a private cause of action.\textsuperscript{40} On the other hand, the Court's restrictive language contained in an otherwise far-reaching decision may have been added at the insistence of Justices Stewart and Rehnquist who, while joining the Court's opinion, concurred in a separate opinion. Without these Justices joining the Court's opinion, the \textit{Cannon} Court would have had no majority opinion.\textsuperscript{41} Hence, the adding of the restrictive language may have been necessary to induce Justices Stewart and Rehnquist to concur in what otherwise would have been a plurality opinion.\textsuperscript{42}

The concurring opinion, authored by Justice Rehnquist and joined by Justice Stewart, emphasized that the question of determining whether to imply a private cause of action is fundamentally one of statutory construction.\textsuperscript{43} Noting that the recent cases, such as \textit{Cort}, approach the implication of private remedy issue more stringently than the Court previously did,\textsuperscript{44} Justice Rehnquist apprised Congress "that the ball, so to speak, may now be in its court."\textsuperscript{45} From now on, he reasoned, the Court should be extremely reluctant to imply private remedies without sufficient specificity by Congress.\textsuperscript{46}

The two dissenting opinions in \textit{Cannon} are also significant. The first dis-

\begin{itemize}
\item \textsuperscript{38} 99 S. Ct. at 1967-68.
\item \textsuperscript{39} Id. at 1968 (emphasis in original).
\item \textsuperscript{40} See notes 110-13 infra and accompanying text.
\item \textsuperscript{41} Chief Justice Burger concurred in the Court's judgment but not in its opinion. Justices White, Blackmun, and Powell dissented. Hence, if Justices Stewart and Rehnquist had not joined in the Court's opinion, the plurality would have been composed of Justices Brennan, Marshall, and Stevens.
\item \textsuperscript{42} But see 99 S. Ct. at 1981 n.14 (Powell, J., dissenting), where Justice Powell surmises that Justice Rehnquist may have concurred in the Court's opinion because he perhaps considered himself temporarily bound by his concurrence in Justice Stevens' separate opinion in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 408-21 (1978) (Stevens, J., concurring and dissenting). In \textit{Bakke}, Justice Stevens addressing the implication of remedy issue under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-6 (1976), which Title IX was patterned after, stated that "[t]he conclusion that an individual may maintain a private cause of action is amply supported in the legislative history of Title VI itself." 438 U.S. at 420.
\item \textsuperscript{44} Justice Rehnquist referred expressly to J.I. Case Co. v. Borak, 377 U.S. 426 (1964), where the Court implied a cause of action under § 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (1976), in order to effectuate the congressional purpose underlying the statute. Quoting Bell v. Hood, 327 U.S. 678 (1946), the \textit{Borak} Court stated:
\begin{quote}
It is for the federal courts "to adjust their remedies so as to grant the necessary relief" where federally secured rights are invaded. "And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."
\end{quote}
\textsuperscript{377} U.S. at 433 (quoting 327 U.S. at 684).
\item \textsuperscript{45} Id. at 1968 (Rehnquist, J., concurring).
\item \textsuperscript{46} Id. (Rehnquist, J., concurring). Justice Rehnquist, therefore, was notifying Congress that, in his view, the Court, absent specific direction from the legislative branch, should be disinclined to imply private rights of action in the future. His view is somewhat akin to that of Justice Powell's. See notes 53-59 infra and accompanying text. It also suffers from the same deficiencies. See notes 60-61, 114-19 infra and accompanying text.
\end{itemize}
sent, written by Justice White and joined by Justice Blackmun, declares that the controlling issue in determining whether to imply a private cause of action is the congressional intent as shown by the legislative history and the statutory scheme. As such, Justice White's dissent implicitly suggests that the Court factors are merely guideposts for answering the ultimate question, namely, whether Congress intended to create a private remedy. Applying this principle to the pending case, Justice White concluded that Congress did not intend to provide a private cause of action for discrimination perpetrated, not under color of state law, but rather by private persons and institutions.

Justice White's dissent, however, should not be viewed as disfavoring judicial implication of private rights of action. Simply, under the particular statute construed in *Cannon*, he reasoned that Congress did not intend to create a private remedy. Indeed, as the lone dissenter in *Santa Clara Pueblo v. Martinez*, Justice White concluded, after ascertaining the legislative intent and applying the Court four-prong test, that the Indian Civil Rights Act of 1968 impliedly authorized a private cause of action for enforcing its provisions. He contended that such a private remedy was necessary to effectuate Congress' intent. Otherwise, the statute may be rendered a virtual nullity.

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47 99 S. Ct. at 1968 (White, J., dissenting). It is significant to note, however, that *Cort* was among the three cases cited by Justice White for the proposition that prior decisions of the Court make clear that congressional intent is the controlling issue in determining whether to imply a private cause of action. The other cases cited were Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975); National R.R. Passenger Corp. v. National Assoc. of R.R. Passengers, 414 U.S. 453 (1974). See 99 S. Ct. at 1968 n.1 (White, J., dissenting).

48 Responding to the Court's implication of a private remedy under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1686 (1976), Justice White argued:

> Congress decided in Title IX, as it had in Title VI, to prohibit certain forms of discrimination by recipients of federal funds. Where those recipients were acting under color of state law, individuals could obtain redress in the federal courts for violation of these prohibitions. But, excepting post-Civil War enactments dealing with racial discrimination in specified situations, these forms of discrimination by private entities had not previously been subject to individual redress under federal law, and Congress decided to reach such discrimination not by creating a new remedy for individuals, but by relying on the authority of the Federal Government to enforce the terms under which federal assistance would be provided. Whatever may be the wisdom of this approach to the problem of private discrimination, it was Congress' choice, not to be overridden by this Court.

49 436 U.S. 49 (1978). The issue presented in that case involved whether an implied cause of action for declaratory and injunctive relief existed under Title I of the Indian Civil Rights Act of 1968. 25 U.S.C. §§ 1301-1303 (1976). Section 102(8) of the Act, 25 U.S.C. § 1302(8) (1976), provides in relevant part that “[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws . . . .” The Act's only express remedial provision grants any person detained by order of an Indian tribe the writ of habeas corpus to challenge the legality of his confinement in a federal court. 25 U.S.C. § 1303 (1976). While noting that a central purpose of the Act was to protect individual Indians from capricious actions by tribal governments, the Court was unpersuaded that a judicially sanctioned intervention into tribal sovereignty was required to effectuate the Act's objectives. Rather, the Act's legislative history, as read by the Court, suggests "that Congress' failure to provide remedies other than habeas corpus was a deliberate one." 436 U.S. at 61.


51 436 U.S. at 72-83 (White, J., dissenting). Note particularly the following: "Given Congress' concern about the deprivations of Indian rights by tribal authorities, I cannot believe, as does the majority, that it desired the enforcement of these rights to be left up to the very tribal authorities alleged to have violated them." Id. at 82.

52 Id. at 79-83 (White, J., dissenting). Responding to the Court's assertion that the implication of a private remedy would interfere with tribal sovereignty, Justice White responded:

> The extension of constitutional rights to individual citizens is intended to intrude upon the authority of government. And once it has been decided that an individual does possess certain rights vis-à-vis his government, it necessarily follows that he has some way to enforce those rights. Although creating a federal cause of action may "constitut[e] an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself," in my mind, it is a further step that must be taken; otherwise, the change in the law may be meaningless.

Id. at 83 (White, J., dissenting) (emphasis in original) (citation omitted) (quoting 436 U.S. at 59).
The second dissenting opinion in Cannon, written by Justice Powell, takes an extreme position. In his view, the four-prong Cort test must be abandoned not only for policy reasons but because Cort's mode of analysis does not comport with the doctrine of the separation of powers. As stated by Justice Powell, "[T]he "four factor" analysis of that case is an open invitation to federal courts to legislate causes of action not authorized by Congress. It is an analysis not faithful to constitutional principles and should be rejected. . . ."53

Of the four factors enumerated in Cort, only the second factor, according to Justice Powell, expressly relates to Congress' intent. The other three prongs invite independent judicial lawmaking.54 As "conclusive" support for this assertion, he points out that although the Supreme Court has consistently rebuked attempts to create private actions,55 there has been a "flood of lower court decisions" since Cort which have implied private remedies from federal statutes.56 These decisions demonstrate, Justice Powell argues, that "Cort allows the Judicial Branch to assume policymaking authority vested by the Constitution in the Legislative Branch."57 It also permits Congress to avoid the difficult task of resolving the often controversial issue of whether a private cause of action should accompany the enactment of a regulatory statute.58 Because Cort fails to solve, and in fact perpetuates, these problems, it must be abandoned. Henceforth, Justice Powell concludes that the Court should imply a private cause of action from a federal statute only where there exists the most compelling evidence of affirmative legislative intent.59

Although there may well exist strong policy reasons why Congress rather than the federal judiciary should be the proper branch to authorize private actions, Justice Powell's assertion that the courts are pursuing an unconstitutional course is premised on unduly strict notions of judicial restraint. The extreme position taken by Justice Powell is amplified by the observation that the

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53 99 S. Ct. at 1975 (Powell, J., dissenting). From a policy standpoint, Justice Powell argued that the determination of whether to provide a private damage remedy under Title IX "should have been resolved by the elected representatives in Congress after public hearings, debate, and legislative decision. It is not a question properly to be decided by relatively uninformed federal judges who are isolated from the political process." Id. (Powell, J., dissenting).

54 Id. at 1980 (Powell, J., dissenting).


57 99 S. Ct. at 1981 (Powell, J., dissenting). Referring to these appellate decisions, Justice Powell contends that "[i]t defies reason to believe that in each of these statutes Congress absentmindedly forgot to mention an intended private action." Id.

58 Id.

59 Id. at 1985 (Powell, J., dissenting). Justice Powell is particularly hostile to implying a private remedy when the statute in question expressly provides an alternative mechanism for enforcing its provisions. In that regard, Justice Powell voiced his displeasure with the Court's holding in J.I. Case Co. v. Borak, 377 U.S. 426 (1964). In Borak, the Court implied a private remedy under § 14(a) of the Securities Exchange Act, 15 U.S.C. § 78n(a) (1976), even though the statute provides an administrative mechanism for enforcement. Referring to Borak, Justice Powell viewed the decision as "both unprecedented and incomprehensible as a matter of public policy." 99 S. Ct. at 1977. It is interesting to note, however, that despite the presence of strict constructionist Justices, such as Justices Harlan and Stewart, the Borak decision was unanimous.
twenty federal appellate decisions he cites as unconstitutionally implying private rights of action are not products of the liberal Warren Court era. Rather, a substantial number of judges who decided these cases were appointed by Presidents Nixon and Ford. To argue that these strict constructionist judges, as many of them undoubtedly may fairly be categorized, are engaging in judicial legislation is an overstatement. In essence, Justice Powell's opinion suggests that he may be unfamiliar with the legislative process. He wants Congress to speak loudly and clearly whenever it seeks to effectuate a legislative objective. Although the implementation of this practice would be desirable, it is unrealistic. Legislation is often ambiguous, not because ambiguity is desirable, but because compromise, with the attendant loss of clarity, is required for passage of the legislation. Such a result may be unfortunate, but at least frequently in our system, it is the nature of the legislative process.

The Court's decision in Cannon, with its accompanying concurrence and dissents, constituted the first step in modifying the four-prong Cort test. The second, and perhaps final, step was completed when the Court handed down its decision in Touche Ross & Co. v. Redington.

IV. Touche Ross & Co. v. Redington

In Redington, the Court held that a private cause of action could not be implied under section 17(a) of the Securities Exchange Act of 1934. That section requires brokers-dealers and others to keep such records and file such reports as the Commission "may prescribe as necessary or appropriate in the public interest or for the protection of investors." The facts in Redington involved the filing of a lawsuit against Touche Ross by the Securities Investor Protection Corporation and the trustee in liquidation of Weis Securities. The suit alleged, inter alia, that in auditing and certifying Weis' financial statements, in preparing the firm's answers to New York Stock Exchange financial questionnaires, and in issuing opinion letters for Weis, Touche Ross' dereliction prevented the disclosure of Weis' true financial condition until it was too late to take action to


61 As stated by Chief Justice Traynor:
Legislators are under no compulsion to disclose the reasons for a rule, let alone to keep a chronicle of its origins. Sometimes a statute is enveloped in a history so voluminous or ambiguous as to be more confusing than revealing. A statute may be dubious because those who sponsored it were not motivated to do so in the public interest or because those who enacted it did so without adequate knowledge or consideration of its objects or implications. .


forestall liquidation or to lessen the adverse financial impact of bankruptcy on the firm’s customers.\(^{65}\)

In seeking monetary damages against Touche Ross, the plaintiffs were unable to invoke the express remedy provided by section 18(a) of the Securities Exchange Act.\(^{66}\) Section 18(a) imposes liability upon persons who make material misleading statements in reports or other documents filed with the Commission. Use of the section is limited, however, to those persons who, relying on the misrepresentation, "shall have purchased or sold a security at a price which was affected by such statements."\(^{67}\) In Redington, however, Weis’ customers were neither purchasers nor sellers. Rather, the claim asserted on the customers' behalf by the Securities Investor Protection Corporation and the trustee in liquidation was that they did not receive the remedial assistance they otherwise would have if Touche Ross had not been derelict in its examinations of Weis' section 17(a) reports.\(^{68}\) Hence, the plaintiffs were left with no alternative federal private recourse than to seek monetary relief pursuant to section 17(a).

Writing for the Court, Justice Rehnquist emphasized that its task in deciding whether to imply a private right of action in the instant case was limited "solely" to a determination of Congress’ intent.\(^{69}\) In its holding, the Court rejected the notion that each of the four Cort principles is to be weighed equally. Rather, if the statute at issue does not provide private rights to any identifiable class, does not prohibit any conduct as unlawful, and its legislative history is silent or ambiguous on the existence of private remedies, then Congress’ intent, either expressly or by implication, to create a private remedy has been conclusively answered in the negative. In such a case, a court is obligated not to consider the third and fourth factors of the Cort test, namely, whether the implication of a private remedy is necessary to effectuate the statute’s purpose and whether the action is one traditionally relegated to state law.\(^{70}\)

In essence, the Redington Court expanded the first two steps of the Cort test into a three-prong analysis. The other two steps of the Cort test become ap-
Applicable only if one of the new three prongs is satisfied. At the same time, however, prior case law mandates that even where the statute confers private rights in certain individuals or proscribes certain conduct as illegal, a clear congressional intent to preclude a private cause of action must be deemed controlling.71 As a practical matter, then, Redington's modification of Cort comes into play when the legislative intent on implying a private remedy under a given statute is silent or ambiguous. Such a situation necessitates a consideration of whether the statute creates federal rights in favor of certain persons or prohibits certain conduct. Only if one of these two questions is answered in the affirmative do the third and fourth factors of Cort become relevant.72

A similar suggestion is that Redington modifies only the first step of the Cort test and makes that step an almost essential condition for implying a private right of action. No longer should courts faced with the implication issue consider whether the plaintiff was "one of the class for whose especial benefit the statute was enacted."73 Rather, courts should assess whether the statute creates a private right on behalf of the plaintiff or proscribes certain conduct as illegal.74 Unless one of these two factors is met in a case in which the legislative history is silent or ambiguous, there can be no implication of a private cause of action.

The Redington Court enunciated other principles to aid in ascertaining Congress' intent in the implication of private remedy dilemma when the legislative history is silent or ambiguous. First, the fact that a statute's primary focus is to prevent or forestall future harm rather than to provide recompense after a violation has occurred militates against implication.75 Second, when a statute is surrounded by other sections of the same Act which expressly provide private remedies, the inference arises that "when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly."76 This

71 See, e.g., Cannon v. University of Chicago, 99 S. Ct. at 1956; Cort v. Ash, 422 U.S. at 82. Somewhat related to this principle is that "the fact of a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." 99 S. Ct. at 1953. See Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975); note 28 supra. Also, although a criminal statute does not necessarily preclude implication of a private damage remedy, such a statute apparently must have available some type of civil enforcement, such as declaratory, injunctive, or other form of civil relief. 422 U.S. at 79-80. See Wyandotte Transp. Co. v. United States, 389 U.S. 191, 201-02 (1967); notes 94-95 infra and accompanying text.

72 If the legislative history of a statute clearly evidences that Congress desired the courts to imply a private remedy, query whether the other factors of the modified Cort test are relevant. The answer should be that such an expression of congressional intent should be deemed controlling. The failure of Congress to expressly provide a remedy in such a situation may be due to its inclination to provide the courts with adequate flexibility to equitably administer the statute on an ad hoc basis. See notes 84-92 infra and accompanying text.

73 Cort v. Ash, 422 U.S. at 78 (emphasis in original). quoting Texas & Pacific Ry. v. Rigsby, 241 U.S. 33, 39 (1916). As noted earlier, Justice Brennan evidently believes that this Cort factor remains applicable. See note 70 supra. However, the Redington Court ignores this factor and substitutes for it the inquiry whether the statute creates a federal right in some person, or in lieu thereof, proscribes certain conduct as unlawful.

74 Regardless of whether Redington may be viewed as modifying one or two steps of the Cort test, the focus of the altered test is not whether the plaintiff is within the especial class to be protected by the statute but whether the statute confers rights in the plaintiff or legally proscribes the defendant's actions vis-a-vis the plaintiff.

75 99 S. Ct. at 2486. In the case of § 17(a) of the Securities Exchange Act, the Court held that, by its terms, it "is forward-looking, not retrospective; it seeks to forestall insolvency, not to provide recompense after it has occurred." Id.

76 Id. at 2487. Without deciding the issue, the Redington Court remarked that there is evidence to support the view that § 18(a) of the Securities Exchange Act contains the exclusive remedy for misstatements made in reports filed with the Commission, including those reports filed pursuant to § 17(a). See note 67 supra and accompanying text; note 78 infra and accompanying text.
principle appears inconsistent with the Court's holding in Cannon where it con-
cluded "that other provisions of a complex statutory scheme create express
remedies has not been accepted as a sufficient reason for refusing to imply an
otherwise appropriate remedy under a separate section." Finally, if the prin-
cipal express civil remedy is directed at essentially the same type of misconduct
as the statute at issue and if the two provisions were passed contemporaneously
by Congress, the Court will be "extremely reluctant to imply a cause of action
in [the statute in question] that is significantly broader than the remedy that
Congress chose to provide."

There can be little doubt that the Court's decision in Redington is a limiting
one for implying private causes of action under federal law. The decision not
only significantly alters the Cort test, thereby making it more difficult to imply a
federal remedy, but also enunciates other restrictive principles under the im-
modation doctrine. At the same time, however, Redington in no way mandates or
even suggests that federal causes of action should not be implied in the future
either because of constitutional or policy reasons. In addition, certain restric-
tive propositions advanced by the Redington Court conflict with the more expan-
sive principles enunciated in Cannon. The end result is that the proper
analysis that courts should employ when determining whether to imply a
private cause of action under a federal statute is open to debate. The following
discussion proposes an approach that courts should adopt when confronted
with the implication of private remedy issue.

V. Implied Causes of Action Under Federal Law—
A Recommended Approach

As alluded to in the preceding discussion, although a restrictive decision,
Redington should not be viewed as a death knell to judicial implication of federal
causes of action. Rather, in light of that holding, courts should be aware that
the flexible four-prong Cort test has been substantially altered. In its stead is a
modified version of Cort which is more stringent but nevertheless receptive to
the implication of private remedies in appropriate circumstances.

The thrust of the modified test is directed at statutory construction for the
purpose of ascertaining Congress' intent. Policy reasons are relegated to secon-
dary status, if they are to be considered at all.\textsuperscript{81} Supposedly, such a rationale furnished the underpinning for the Court’s adoption of \textit{Cort’s} four factors.\textsuperscript{82} However, the weighing process of these factors on an \textit{ad hoc} basis, when considered along with the threshold question of whether the aggrieved plaintiffs were the intended beneficiaries of the statutory scheme, allegedly induced courts to consider factors other than those related to statutory interpretation.\textsuperscript{83}

The starting point of the modified \textit{Cort} test, as in any case of statutory construction, is to examine "the language of the statute itself."\textsuperscript{84} The concomitant inquiry is that of ascertaining the statute’s legislative history. This latter inquiry lies at the heart of the test.\textsuperscript{85} If the legislative history indicates that Congress definitely considered and reached a conclusion on whether a private remedy should be provided, the other aspects of the test become irrelevant.\textsuperscript{86} Note, however, that although Congress usually provides an express remedy when it desires to afford an injured party private redress, this may not always be the case. In certain instances, Congress may intend to have the federal judiciary devise appropriate private remedies to enable the courts to interpret

\textsuperscript{81} See note 69 \textit{supra} and accompanying text. \textit{But see} Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), where the Court weighed “considerations of policy” in holding that a nonpurchasing offeree does not have a private cause of action for damages under § 10(b) of the Securities Exchange Act and rule 10b-5 promulgated thereunder. \textit{Id.} at 749. The key policy rationale prompting the Court to reject nonpurchasing offeree standing was the fear of vexatious litigation. This concern was based on two grounds. First, in securities litigation, a complaint, even if it has little possibility of success at trial, has a distinct settlement value so long as the plaintiff can prevent the action from being dismissed at the summary judgment stage. For this reason for the leverage, according to the Court, is that the presence of a lawsuit may hamper the defendant’s normal business activities. \textit{Id.} at 740-43. Second, abolishing the purchaser standing requirement would open the floodgates to the bringing of actions involving hazy issues of historical fact which could be resolved by the trier of act only through oral testimony. \textit{Id.} at 743. In such a situation, the plaintiff's testimony could be based on uncorroborated oral evidence and yet be sufficient for his case to go to the jury:

The very real risk in permitting [a nonpurchasing offeree] to sue under Rule 10b-5 is that the door will be open to recovery of substantial damages on the part of one who offers only his own testimony to prove that he ever consulted a prospectus of the issuer, that he paid any attention to it, or that the representations contained in it damaged him.

\textit{Id.} at 746. On this basis, the Court concluded that the Birnbaum rule, Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), cert. denied, 343 U.S. 956 (1952), which limits a private cause of action for damages under § 10(b) and rule 10b-5 to purchasers and sellers of securities, should be affirmed. See Murdock, Birnbaum Revitalized: \textit{New Life for Motions to Dismiss in 10b-5 Actions for Damages}, 1975 \textit{Utah L. Rev.} 663.

In \textit{Blue Chip Stamps}, the Court noted that one of the justifications for implying a private right of action under § 10(b) lies in § 29(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(b) (1976), which provides that contracts made in violation of any provision of the Act are voidable at the election of the innocent party, 421 U.S. at 735. Although rarely invoked since its enactment, the possible implications of § 29(b) are massive. See Eastside Church of Christ v. National Plan, Inc., 391 F.2d 357 (5th Cir.) (Bell, J.), cert. denied, 393 U.S. 913 (1968); Gruenbaum & Steinberg, \textit{Section 29(b) of the Securities Exchange Act of 1934: A Viable Remedy Awakened}, 48 Geo. Wash. L. Rev. 1 (1979).

\textsuperscript{82} See 422 U.S. at 82-84.

\textsuperscript{83} See \textit{Cannon} v. University of Chicago, 99 S. Ct. at 1980 (Powell, J., dissenting): “Of the four factors mentioned in \textit{Cort} only one refers expressly to legislative intent. The other three invite independent judicial lawmaking.”

Perhaps it should be noted that the Court has adopted an \textit{ad hoc} balancing test on other occasions. \textit{See}, e.g., \textit{Barker} v. \textit{Wingo}, 407 U.S. 514 (1972), where the Court identified four factors that courts should weigh on a case-by-case basis to determine whether a defendant has been denied his constitutional right to a speedy trial: “[l]ength of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.” \textit{Id.} at 530. See \textit{Godbold, Speedy Trial — Major Surgery for a National Ill}, 24 \textit{Ala. L. Rev.} 265, 274-88 (1972), where Judge Godbold thoroughly analyzes these four factors.


\textsuperscript{85} See \textit{Touche Ross & Co. v. Redington}, 99 S. Ct. at 2489; \textit{Cort} v. \textit{Ash}, 422 U.S. at 82.

\textsuperscript{86} See note 85 \textit{supra}.
equitably the statute as the circumstances of the particular case and other relevant factors may require. 87

It must be emphasized that a clear expression of legislative intent to provide or not to provide private cause of action is generally controlling. There may be exceptions, however, to this broad principle. One exception is where Congress desires the courts to imply a private remedy but such implication would violate the Constitution. For instance, in National League of Cities v. Usery, 88 the Court declared unconstitutional 1974 amendments to the Fair Labor Standards Act which extended statutory minimum wage and maximum hour requirements to the States and their political subdivisions. 89 Had Congress intended that the federal courts imply a private remedy on behalf of disgruntled employees against their employer-state governments, the courts presumably would be constitutionally obligated not to effect Congress' intent. To hold otherwise could well violate not only fundamental notions of federalism but also the tenth and eleventh amendments. 90

Another possible exception arises when Congress had previously enacted a statute in which it did not intend to provide a private damage remedy. This intent may have been due to a number of factors, for example, that injunctive relief was deemed sufficient, that the damage remedy, for reasons of comity, should be left to the States, or that the statutorily imposed workmen's compensation schedule, in the area of admiralty law, for instance, was adequate. 91 Through the passage of time, however, it becomes evident that Congress' rationale, although once supportable, no longer remains plausible. Rather than

87 As Justice Powell asserted in Cannon, such inaction by Congress may constitute an abdication of its constitutional duties. See 99 S. Ct. at 881 (Powell, J., dissenting). On the other hand, it may be argued that such inaction is the inherent consequence of our political system. Rather than criticizing Congress for its refusal to act, the judiciary should recognize that this abstention is a natural by-product of our legislative process. See notes 114-19 infra and accompanying text.


89 As for the basis of its holding, the Court stated that the statute afflicted the tenth amendment to the Constitution because it "operate[d] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." Id. at 852. For commentary on National League of Cities, see Beaird & Ellington, A Commerce Power Seesaw: Balancing National League of Cities, 11 GA. L. REV. 35 (1976); Lay, States' Rights: The Emergence of a New Judicial Perspective, 22 S.D.L. REV. 1 (1977); Percy, National League of Cities v. Usery: The Tenth Amendment Is Alive and Doing Well, 51 TUL. L. REV. 95 (1976); Comment, The State Sovereignty Doctrine Since National League of Cities v. Usery: A New Constitutional Interpretation Under the Commerce Clause, 81 DICK. L. REV. 599 (1977).

90 Clearly, an analysis based on the tenth amendment and the concept of constitutional federalism is inextricably intertwined. Although each serves to protect state sovereignty, they accomplish this objective through different approaches: "The tenth amendment analysis concentrates on powers implicitly 'reserved' to the states by the constitution; the federalism analysis, emphasizing relationships between specific constitutional provisions and the structure of the constitution itself, focuses on the autonomy possessed by the states as governmental entities." Steinberg & Koneck, Federalism, the Tenth Amendment and the Legal Profession: The Power of a Federal Judge to Restrain a Convicted Attorney, as a Condition of Probation, from Practicing in the State Courts, 56 NEB. L. REV. 783, 793 n.42 (1977). Compare C. Black, PERSPECTIVES IN CONSTITUTIONAL LAW 40 (1963), with Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543 (1954).

91 See, e.g., the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251 (codified in scattered sections of 33 U.S.C.). Prior to 1972, the Act had not been amended since 1961, and before that in 1956, 1948, and 1927. In order to adequately protect the injured worker, significant increases in benefits were imperative. Impatient with Congress' inaction and dissatisfied with the obsolete benefits of the compensation statute, the Court decided to provide longshoremen with third-party actions against shipowners under the seaworthiness doctrine and to transfer the ultimate liability for these damages to the party best able to bear the cost, the stevedore-employers. See Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953); Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp., 342 U.S. 282 (1952); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).
legislating to correct the injustice, Congress unfortunately declines to act. Such inaction may be traced to Congress' heavy legislative calendar, its lack of knowledge that the deficiency exists, the lobbying efforts of special interest groups, or its expectation that the judiciary will construe the statute so as to alleviate the problem. In such a situation, a strong argument can be made that the federal judiciary should imply a private damage remedy rather than to permit gross injustices to continue. Implication of a private right of action in this situation arguably involves basic principles of human justice that warrant the creation of a remedy that Congress has neglected to provide.  

More often than not, however, when the implication of private remedy issue arises, the applicable statute's legislative history will be silent or ambiguous. Under Redington, the critical inquiry is whether the statute, by its terms, grants certain rights to the plaintiff or proscribes certain conduct as unlawful. Only if this inquiry is answered in the affirmative are the third and fourth factors of the Cort test deemed relevant. Where, however, the statute in question prohibits certain conduct and provides solely for a criminal penalty, extraordinary circumstances must be present for a court to infer a private remedy. On the other hand, where a criminal statute also provides for some form of civil relief, such as declaratory or injunctive relief, the other two factors of the Cort test become fully applicable.  

Before proceeding to discuss the third and fourth factors of the Cort test in light of Cannon and Redington, a further question exists: whether the availability of express remedies in other provisions of the same Act should create a negative inference for implying a private remedy in the statute at issue. Statements in Cannon and Redington appear irreconcilable on this point. Nevertheless, the two decisions can be harmonized. As Redington implicitly recognizes, it is one thing to create a negative inference for implication solely because other sections of the Act contain express remedies and quite another when the express remedies are directed at the same type of conduct, are intended to benefit the same identifiable class, and are passed contemporaneously with the statute in question. As to the former, no negative inference should be drawn. To do so would create the presumption that the implication of private rights of action are disfavored in all circumstances. Without clear guidance from Congress, such an interpretation would be erroneous. There can be little question that in appropriate circumstances Congress is aware of and is supportive of future judicial implication of private remedies. To deny a private right of action in this situation would not only undermine Congress' intent but would also inflict

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92 See generally O.W. Holmes, The Common Law 35 (1881): "The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned."

93 99 S. Ct. at 2489. See notes 71-74 supra and accompanying text.

94 See Cort v. Ash, 422 U.S. at 79-80; note 71 supra.


96 See notes 76-77 supra and accompanying text.

97 See 99 S. Ct. at 2488; note 78 supra and accompanying text.
needless injustices upon aggrieved parties. As to the latter, however, a negative inference can properly be drawn. In this instance, Congress expressly focused on the conduct in question and the class to be afforded recompense. Before drawing such an inference, however, courts should assure themselves that the focus of the statute providing the express remedy is directed at the same type of conduct and is intended to benefit the same identifiable class as the statute which the plaintiff seeks to invoke. If the answer to the foregoing is in the affirmative, then for the courts to implicitly expand the scope of this express remedy may well represent judicial legislation in the face of clear congressional intent.

At first sight, it appears that Cannon and Redington left the third and fourth elements of the Cort analysis untouched. More exacting scrutiny indicates, however, that such is not the case. Indeed, the inconsistency between these two decisions is amplified by their references to the third step of Cort. As stated in Cort, the third factor considers whether it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff." As viewed by Justice White, dissenting in Santa Clara Pueblo v. Martinez, this step is "[t]he most important consideration." In decisions subsequent to Cort, however, the Court stated in Piper and Santa Fe that a private damage remedy is to be implied only when it is "necessary to effectuate Congress' goals." In this regard, though, the Court was not referring to the third prong of the Cort test in particular but rather, as a general proposition, to the feasibility of the implication doctrine.

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98 See, e.g., § 14(e) of the Williams Act, 15 U.S.C. § 78n(e) (1976), which proscribes the making of any material misstatement or nondisclosure in connection with a tender offer. That statute does not expressly provide for a private cause of action on behalf of injured investors. However, because § 14(e)'s language is patterned after rule 10b-5 and because Congress was aware that the courts had implied a private right of action under § 10(b) and rule 10b-5 in favor of purchasers and sellers, § 14(e) was adopted for the purpose of protecting the target corporation's shareholders in situations where § 10(b) was inapplicable, i.e., in cases where the target shareholders had been defrauded or subjected to material misrepresentations or nondisclosures during the course of a tender offer but had not purchased or sold stock. In this situation, it is apparent that, although Congress did not legislate on the subject, it anticipated that the courts would imply a private remedy in favor of the target corporation's shareholders. See Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1276-78 (5th Cir. 1978), reversed on other grounds sub nom. LeRoy v. Great W. United Corp., 99 S. Ct. 2710 (1979); Spielman v. General Host Corp., 402 F. Supp. 190 (S.D.N.Y. 1975), aff'd, 538 F.2d 39 (2d Cir. 1976); Smallwood v. Pearl Brewing Co., 489 F.2d 579 (5th Cir.), cert. denied, 419 U.S. 873 (1974); McCloskey v. Epko Shoes, Inc., 391 F. Supp. 1279 (E.D.P.A. 1975); Petersen v. Federated Dev. Co., 387 F. Supp. 355 (S.D.N.Y. 1974); note 20 supra.

99 See generally TVA v. Hill, 437 U.S. 153, 194-95 (1978): "Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.

100 422 U.S. at 78.

101 436 U.S. at 79-80 (White, J., dissenting). For a discussion of Martinez and Justice White's dissenting opinion in that case, see notes 49-52 supra and accompanying text.


103 See note 102 supra. Thus, in Piper, after applying all four factors of Cort, the Court stated "judicially creating a damages action in favor of Chris-Craft [as a tender offeror] is unnecessary to ensure the fulfillment of Congress' purposes in adopting the Williams Act." 430 U.S. at 41. In Santa Fe, the Court, quoting the above language in Piper, held that an alleged breach of corporate fiduciary duty does not give rise to a private cause of action for damages under § 10(b). 430 U.S. at 477. Citing Mills v. Electric Auto-Lite Co., 396 U.S. 375, 381-85 (1970) (which involved the alleged use of defective proxy materials to procure shareholder approval of a proposed merger), the Court stated that "once full and fair disclosure has occurred, the fairness of the terms of the transaction is at most a tangential concern of the statute." 430 U.S.
That the Court continued to adhere to the third prong of the Cort test was evidenced by its decision in Cannon. In reference to that factor, the Cannon Court stated that when a private "remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute."\(^{104}\) The Court’s possible departure from this language occurred in Redington. Justice Rehnquist, writing for the Court and referring specifically to the third prong, remarked that in view of the fact that the plaintiffs failed to satisfy their initial burden under the modified Cort test, the Court need not consider whether implication of a private remedy is "necessary" to effectuate the section’s purpose.\(^{105}\) Hence, the question arises whether Cort’s third factor has been modified from requiring that implication be consistent with or helpful to the legislative objective to the far more onerous requirement that it be necessary to effectuate the statute’s purpose.

An overly strict construction of Cort’s third factor can all but eliminate the future implication of private remedies. Under this stringent approach, a court, under practically any given set of circumstances, can plausibly conclude that implication is unnecessary to effectuate the statute’s objective. On the other hand, an analysis premised on whether implication is "consistent" with the legislative purpose encourages the courts to engage in a policy-oriented appraisal which Redington was intended to prevent.\(^{106}\) Perhaps, the better approach is for the judiciary to recognize that, regardless whether implication of a private remedy is merely consistent with, rather than necessary to, the effectuation of a statute’s purpose, the ultimate determination is one of congressional intent. This inquiry, however, may raise more questions than it answers. No doubt, in many circumstances, Congress’ intent will be unknown. When this occurs, the courts should attempt to abide by the strictures of Redington and not partake in a policy analysis. At the same time, courts should not invoke such a strict application of Cort’s third prong so as to conclusively foreclose the implication of private causes of action.\(^{107}\)

Turning to Cort’s fourth factor, which relates to whether the remedy sought to be implied is one traditionally relegated to state law, neither Cannon nor Redington explicitly cultivates new ground in this area. However, a primary focus of Redington is directed at the relationship between the federal judiciary and Congress. In this regard, private remedies should be judicially implied only after a determination that such implication effectuates Congress’ intent in

\(^{104}\) 99 S. Ct. at 1961 (emphasis added).
\(^{105}\) 99 S. Ct. at 2489. See note 36 supra.
\(^{106}\) See 99 S. Ct. at 1980. (Powell, J., dissenting): "Determining whether a private action would be consistent with the 'underlying purposes' of a legislative scheme permits a court to decide for itself what the goals of a scheme should be, and how these goals should be advanced."
\(^{107}\) In determining whether implication of a private remedy would be consistent with or necessary to the underlying purposes of the legislative scheme, courts should examine such variables as the Act’s legislative history, the applicable statute’s legislative history, the language of the other provisions of the same Act, the legislative history of those provisions that provide for express remedies on the basis of similar conduct as the statute in question, the availability and sufficiency of existing civil and criminal sanctions, including administrative sanctions, and the existence and adequacy of state remedies.
enacting the statute in question.\textsuperscript{108} In another light, \textit{Redington} implicitly recognizes that a similar relationship should be reinforced between the state and federal governments. Fundamental notions of comity, federalism, and the tenth amendment demand that the branches of the federal government not usurp functions traditionally and fundamentally within the purview of the States.\textsuperscript{109} Such, of course, was the law long prior to \textit{Redington}. The \textit{Redington} opinion, however, implicitly underscores that the federal courts should be particularly aware that implication of private rights of action may displace functions traditionally within the scope of the States.

In view of the modified \textit{Cort} test, the question arises whether the test involves a balancing process or whether all factors must be met in order for a private remedy to be implied. Prior Supreme Court cases evidence that a clear expression of legislative history is almost always controlling.\textsuperscript{110} Otherwise, as \textit{Redington} points out, the initial step of the altered \textit{Cort} test must be satisfied as a prerequisite to considering the other factors. Therefore, if the applicable statute grants rights in certain persons or proscribes certain conduct as illegal, then a court should inquire whether implication of a private right of action is consistent with the underlying purposes of the statute and is not a remedy that has been traditionally relegated to state law.\textsuperscript{111} Upon examination, both of these inquiries should be answered in the affirmative in order to imply a private right of action. As Justice White noted, the third \textit{Cort} factor is often vital for construing the legislative history in such a manner so as to assure that the congressional intent underlying the statute is effectuated.\textsuperscript{112} And, as discussed above, the fourth factor is essential to the federal judiciary’s adherence to fundamental principles of comity, federalism, and the tenth amendment.\textsuperscript{113} Further, for the courts to apply a balancing process may induce them to engage in a policy analysis that \textit{Redington} sought to forbid. Accordingly, the better view is to require that all the factors of the modified \textit{Cort} test must be met.

In conclusion, an additional issue must be addressed. Concurring in \textit{Cannon}, Justice Rehnquist, joined by Justice Stewart, warned Congress that, with respect to the recognition of private rights of action, “the ball, so to speak, may

\begin{itemize}
  \item \textsuperscript{108} Some commentators have argued that the implication test, as applied in \textit{Piper} and \textit{Santa Fe}, has an additional requirement of necessity: whether implying a private remedy is necessary to effectuate the statute’s purpose. I J. CORP. LAW, supra note 9, at 391; 73 NW. U.L. REV., supra note 9, at 1141. See \textit{Santa Fe Indus., Inc. v. Green}, 430 U.S. at 477; \textit{Piper v. Chris-Craft Indus., Inc.}, 430 U.S. at 26, 41; notes 102-03 supra and accompanying text. However, in \textit{Cannon}, the Court stated that it “has long been recognized that under certain limited circumstances the failure of Congress to [provide an express remedy] \textit{is not inconsistent with an intent} on its part to have such a remedy available to the persons benefited by its legislation.” 99 S. Ct. at 1967-68 (emphasis added). In light of these decisions, regardless of whether the final determination to imply a private right of action is based on necessity as opposed to consistency with the legislative scheme, such implication must be at least helpful to the effectuation of Congress’ intent.
  \item \textsuperscript{110} \textit{See Cannon v. University of Chicago}, 99 S. Ct. at 1956; \textit{Cort v. Ash}, 422 U.S. at 82; notes 71, 85-87 supra and accompanying text.
  \item \textsuperscript{111} \textit{See} 99 S. Ct. at 2489; notes 71-74, 93 supra and accompanying text.
  \item \textsuperscript{112} \textit{See Santa Clara Pueblo v. Martinez}, 436 U.S. at 79-83 (White, J., dissenting); notes 49-52, 101 supra and accompanying text.
  \item \textsuperscript{113} \textit{See} notes 88-90, 109 supra and accompanying text.
\end{itemize}
now be in its court." 114 From now on, he cautioned, without sufficient specificity on Congress’ part, the Court should be "extremely reluctant" to imply private remedies.115 Justice Rehnquist, however, does not distinguish whether the Court’s potential reluctance to imply private rights of action should extend to already enacted federal statutes as well as to those passed in the future. Surely, in all practicality, he cannot expect Congress to engage in the onerous task of reevaluating its previously enacted legislation to determine whether private remedies should be provided. Further, Justice Rehnquist’s views, as shared and expanded by Justice Powell’s dissent in Cannon,116 even when applied solely to prospective legislation, are not an accurate reflection on congressional policy-making.117 When Congress legislates on a particular subject, it often has several difficult issues before it. One of these issues may well be whether a private right of action should be provided to injured parties under the prospective statute. Although Congress frequently elects to answer this question, it may decline to do so for a number of reasons. These reasons may include that Congress desired to leave the issue open for future judicial development, that, from previously enacted statutes with similar import where private remedies had been implied by the courts, Congress presumed that such a remedy would be inferred in the statute in question, or that Congress simply neglected the issue. In one sense, this abdication by Congress of its legislative function is unfortunate. In practice, however, to expect legislators, whose incumbency often depends on avoiding the controversial issues and whose distaste for addressing complicated legal matters is legendary, to address these issues because the Court has advised them that "the ball is in their court" is unrealistic.118 It may well be true that Congress, at times, declines to act in its legislative capacity as the Founders envisioned. Such a result may be unfortunate but it is the nature of our political system. For the courts to become oblivious to this fact of the legislative process, and refuse to imply private rights of action on this basis, would cause needless injustices to injured parties who would be left without adequate redress.119

114 99 S. Ct. at 1968 (Rehnquist, J., concurring).
115 Id. See notes 40-46 supra and accompanying text.
116 99 S. Ct. at 1975 (Powell, J., dissenting). Justice Powell asserted that implication of a private cause of action is constitutionally permissible only where there exists the most compelling evidence of affirmative legislative intent. See notes 53-59 supra and accompanying text.
117 See notes 60-61 supra and accompanying text.
118 See Traynor, supra note 61, at 424. Addressing the criticism that judges do not have adequate fact-finding information to make enlightened policy decisions, Dean Wellington, who often favors judicial restraint, remarked:

While there can be no question that the fact-finding facilities available to legislatures through committee hearings and investigations are frequently helpful and are facilities that a court cannot command, this advantage is less than meets the eye. On many issues more than enough factual information is generated without hearings; legislative facts abound and for every expert there is his equal and opposite number. Each has published widely; each researched extensively. Judges, then, often have as many useful legislative facts as do legislators. Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 Yale L.J. 221, 240 (1973).
119 See generally TRAYNOR, LEGAL INSTITUTIONS TODAY AND TOMORROW 52 (M. Paulsen ed. 1959): "[T]he real concern is not the remote possibility of too many creative decisions but their continuing scarcity. The growth of the law, far from being unduly accelerated by judicial boldness, is unduly hampered by a judicial lethargy that masks itself as judicial dignity . . . ." See O.W. HOLMES, supra note 52, at 35. See also Cannon where it was noted that ascertaining the congressional intent underlying the enactment of a particular statute, the Court "must take into account its contemporary legal context." 99 S. Ct. at 1958. Thus, the contemporary legal context was far different after Borak was decided in 1964 than when Cort was handed down in 1972. As to the former, the legal climate indicated that the Court was receptive to the implication of
VI. Conclusion

Judicial implication of private rights of action under federal law raises fundamental issues underlying the relationship between the federal judiciary and Congress on one hand, and, to a lesser extent, between the federal government and the States. To resolve these difficult questions of separation of powers and federalism in a manner that comports with the Constitution and which at the same time fulfills the congressional intent underlying the applicable statute, at times, can be a burdensome process. To complicate matters, the needs of aggrieved persons who otherwise may have no legal recourse to redress their injuries, absent implication of a private remedy, remain a continual problem for courts that are concerned with construing the applicable statute in an equitable manner. Thus, the task confronting the federal courts in determining whether to imply a private right of action under a particular statute is by no means an easy one. While the courts should acknowledge that implication of federal rights of action is subject to a somewhat stringent standard, they also should recognize that such implication in appropriate circumstances is wholly consistent with the Constitution and with the effectuation of Congress' intent underlying the applicable statute.

private remedies. After Cort, however, the Court, embarking on a different approach, has become more reluctant, nevertheless, "has continued to give careful attention to claims that a private remedy should be implied in statutes which omit any express remedy." Id. at 1958 n.24.