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In a series of decisions over the last six years,¹ the United States Supreme Court has effectively restricted the availability of the doctrine of implied rights of action to plaintiffs alleging federal statutory violations.² After proposing a four-part test in *Cort v. Ash*³ as a guide to determine the existence of implied private rights of action within a given statute, the distillate of recent decisions had been to reduce the four-part test into mere indicia of congressional intent.⁴ The practical effect of structuring the inquiry solely to determine legislative intent has been to establish a trend away from finding im-

¹. *See* notes 41 and 78 infra.


³. 422 U.S. 66 (1975). The Court held that an alleged violation of the Federal Election Campaign Act, 18 U.S.C. § 610 (1976), must be brought to the cognizance of the Federal Election Commission. This administrative feature relegated power to act on complaints for injunctive relief for alleged statutory violations to the commission only; thus, no private cause of action was held available. The factors that the Court determined relevant for deciding whether a private remedy is implicit in a statute not expressly providing one were:

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 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 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?

*Id.* at 78 (citations omitted) (emphasis in original).

plied private rights of action.\textsuperscript{5} This pattern clearly is discernible from the recent decision in \textit{California v. Sierra Club},\textsuperscript{6} in which a private right of action was not implied on behalf of those allegedly injured by a claimed violation of Section 10 of the Rivers and Harbors Act of 1899 (the Act).\textsuperscript{7}

This note will summarize briefly the history of implied rights of action. The more recent post-\textit{Cort} cases that evidence the trend away from implied rights of action then will be examined. \textit{Sierra Club}, the culmination of this trend, then will be analyzed. A further avenue also will be pursued: Whether recent decisions of the Court provide a potential option for plaintiffs alleging federal statutory violations, rather than having plaintiffs rely on an implied private right of action. Specifically, the note will discuss whether 42 U.S.C. section 1983\textsuperscript{8} may be used as express authority as a remedial statute to provide a right of action to pursue alleged federal statutory violations. This express provision would provide an alternative access to the courts rather than forcing plaintiffs to rely on private rights of action implied directly from the statutes.\textsuperscript{9}

II. \textit{Sierra Club}: Background

In 1971, two environmental groups, the Sierra Club and Friends of the Earth, together with two private individuals, brought an action to enjoin the allegedly unlawful construction and operation of three

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\textsuperscript{5} Including the note case, six of the last eight cases in which the issue of whether private rights of action may be implied from a given statute have resulted in the denial of that implication. \textit{See} notes 69-77 \textit{infra} and accompanying text.


\textsuperscript{7} 33 U.S.C. § 403 (1976).

\textsuperscript{8} 42 U.S.C. § 1983 (1976) provides:

\textit{Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia; subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.}

\textit{Id.} (emphasis added).

\textsuperscript{9} Section 1983 provides a remedy for deprivation of "any rights, privileges, or immunities secured by the Constitution and laws. . . ." \textit{Id.} The practice of implying a remedy directly from the Constitution began with \textit{Bivens v. Six Unknown Named Agents}, 403 U.S. 388 (1971) (fourth amendment violations); \textit{see also} \textit{Carlson v. Green}, 446 U.S. 14 (1980) (implying a remedy from the eighth amendment). An illustration of the Court's present posture is Justice Rehnquist's dissent in \textit{Carlson}, to the effect that it is beyond the constitutional power of the Court to imply a private civil damage remedy from any constitutional provision. \textit{Id.} at 34 (Rehnquist, J., dissenting).
major facilities at the California Water Project. The California Water Project consisted of both state and federal facilities. It was constructed, in part, as a response to California’s need to distribute water from areas of abundant supply to areas deficient in water supply. To this end, water from winter runoff is stored behind dams in the Sacramento River and then released, as needed, to flow downriver into the Sacramento-San Joaquin Delta (Delta), where it merges with other Delta waters. From the Delta, the water is pumped to more arid regions of central, coastal, and southern California. The pumping capacity of the Delta Pumping Plant is approximately 6,300 cubic feet per second. This capacity could be increased by the installation of additional pumping units. When Sierra Club was initiated, the first of these additional pumps was ex-

10. Sierra Club v. Morton, 400 F. Supp. 610 (N.D. Cal. 1975), aff’d in part, rev’d in part sub nom., Sierra Club v. Andrus, 610 F.2d 581 (9th Cir. 1979), rev’d on other grounds sub nom., California v. Sierra Club, 451 U.S. 287 (1981). The Sierra Club is a nonprofit California corporation. Its express purposes include “the preservation and conservation of the natural resources, fish, and wildlife of the United States, including its rivers, bays, wetlands, deltas, and estuarine areas.” Id. at 619. Plaintiff organization, Friends of the Earth, is a nonprofit New York corporation. Its purposes include the preservation and rational use of the environment. Id.

The private individuals joined as plaintiffs were Hank Schramm and William Dixon. Schramm fishes commercially in the San Francisco Bay area and the Pacific Ocean. Dixon’s interest in the suit was founded on his part ownership of a duck club whose existence depended in large part on sufficient, non-polluted supplies of water. Thus, both Schramm and Dixon provided economic interests that were being injured by the maintenance of the facilities. Id.

11. The federal component is designated the Central Valley Project and comes under the auspices of the U.S. Bureau of Reclamation. The state component, the State Water Project, is administered by the Department of Water Resources which is a department within the Resources Agency of California. The State Water Project was created by the Burns-Porter Act of 1959 and now codified in CAL. WATER CODE §§ 12930-12942 (West 1971). Sierra Club v. Morton, 400 F. Supp. 610, 618 (N.D. Cal. 1975), aff’d in part, rev’d in part sub nom., Sierra Club v. Andrus, 610 F.2d 581 (9th Cir. 1979), rev’d on other grounds sub nom., California v. Sierra Club, 451 U.S. 287 (1981).


13. The federal and state pumping plants are integral elements of the California Water Project. The Tracy Pumping Plant, the principal component of the federal arm of the water project, pumps water from the Delta into the Delta-Mendota Canal, a 115-mile canal leading to the Mendota pool in the Central Valley. The state pumping plant, known as the Delta Pumping Plant, along with the Tracy Pumping Plant, withdraws water from the Delta and pumps it into a canal, where the water is ultimately permitted to flow to its place of use. Id. at 618-21.

14. Stated otherwise, the capacity existed to pump 12,600 acre-feet of water per day. Id. at 621.
pected to be operational in 1980. The district court found that the pumping already being accomplished, combined with the proposed increases in pumping capacity, would create serious effects on the Delta water level. Thus, the backdrop of this action was the alleged harmful effects, not only of the existing operation of the pumping plants but also of the proposed increase in plant facilities and pumping capacities, on the water level of the Delta and surrounding areas.

The pumping had a significant, deleterious effect upon the water levels of the Delta. The district court found:

\[\text{Export pumping by these facilities [Tracy and Delta Pumping Plants] both lowered Delta water levels and at certain times caused net flow reversals in Delta waterways. Although it is true that the exact magnitude of these effects was not precisely established, it is clear that they are far from any sort of } \text{de minimis} \text{ exception.}\]

Plaintiffs moved to enjoin the operation and construction of specific facilities of the California Water Project. The action was based on alleged statutory violations of the Act. The purpose of the injunction was to force the California Water Project to comply

15. Several studies were considered by the district court on the effect of the pumping on Delta water levels. A 1968 study concluded that Delta water levels near the inlet channel of the pumping plant were lowered .1 feet per 1000 cubic feet per second pumped. The effects of the pumping were detectable as far away as the San Joaquin and Sacramento Rivers. Another study measured the combined effects of the Tracy and Delta Plants. The study concluded that diversion of between 9,600 and 12,000 cubic feet per second during both high high and low high tides resulted in a lowered water level of 1.0 to 1.5 feet at one location near the pumping plants and almost .1 foot at a location of the San Joaquin River. \textit{Id.} at 631.

16. \textit{See} note 15 \textit{supra}. The district court found that the figures from studies done in this area, represented the minimum effect of the pumping plants on Delta water levels, and that it was “highly probable if not certain” that an increase in the amount of pumping capacity would result in greater effects. Sierra Club v. Morton, 400 F. Supp. 610, 631 (N.D. Cal. 1975), aff’d in part, rev’d in part sub nom., Sierra Club v. Andrus, 610 F.2d 581 (9th Cir. 1979), rev’d on other grounds sub nom., California v. Sierra Club, 451 U.S. 287 (1981).

17. In 1973, the Delta Pumping Plant withdrew 1,126,120 acre-feet of water from the Delta. The State of California has already entered into contracts providing that at some future time the State Water Project will deliver annually 4,230,000 acre-feet of water, of which 99% will be pumped by the Delta Pumping Plant. With additional pumping units and proposed canals, the potential withdrawal of Delta water by both the Tracy and Delta Pumping Plants will increase to approximately 7,000,000 acre-feet in 1980, and approximately 7,750,000 acre-feet by 2020. \textit{Id.} at 619.

18. \textit{Id.} at 632.

19. \textit{Id.}

with the permit requirements contained within the Act. The district court held in favor of plaintiffs and ordered federal and state defendants to obtain authorization for the operation of their pumping plants from the United States Army Corps of Engineers. Such authorization was required pursuant to section 10 of the Act. The court further held that the Secretary of the Army must prepare an environmental impact statement prior to issuing the authorization. Thus, the merits of the claim were based on whether the court could determine that the impact of the pumping on the Delta water levels fell within the regulatory jurisdiction of the Army Corps of Engineers. Before the district court could reach the merits, however, it first had to determine whether plaintiffs, as private individuals, could judicially enforce the permit requirements of section 10 of the Act.

21. The permit requirements are found specifically in section 10 of the Rivers and Harbors Act of 1899 which provides:

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the court, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuse, or enclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

Id. § 403.


23. Id. at 644-45.

24. Id. at 632.

25. The district court observed that those courts of appeals that had considered the issue had inconsistent holdings. Id. at 622. See Red Star Towing and Transp. Co. v. Department of Transp., 423 F.2d 104, 106 (3d Cir. 1970) (governmental enforcement is exclusive and Congress did not create any civil cause of action in favor of private parties injured by any violation of the Act); Bass Anglers Sportsman's Soc'y v. Scholze Tannery, Inc., 329 F. Supp. 339, 348-49 (E.D. Tenn. 1971); Guthrie v. Alabama By-Products Co., 328 F. Supp. 1140, 1148 (N.D. Ala. 1971), aff'd, 456 F.2d 1294 (5th Cir. 1972) (although section 13 of the Rivers and Harbors Act may create a federally protected right against deposit of refuse that injures navigation or anchorage, the injury of other private rights, even from deposits in violation of section 13, does not give rise to a federal right of action nor does it supply a basis for federal jurisdiction); Bass Angler Sportsman Soc'y v. United States Steel Corp., 324 F. Supp. 412, 416 (N.D. Ala.) aff'd sub nom., Bass Anglers Sportsman Soc'y v. Koppers Co., 447 F.2d 1034 (5th Cir. 1971) (no private right of action exists under section 13 to redress public injuries). Contra Alameda Conservation Ass'n v.
The only express statutory grant of authority to enjoin violations of the Act appears in section 12.26 Section 12 of the Act includes a general and unqualified grant of jurisdiction to the district courts to enjoin violations of section 10 of the Act.27 Although the Act expressly confers jurisdiction on the district courts to enjoin all violations of the Act and also permits the United States Attorney General to seek such relief on behalf of the federal government, it neither affirms nor denies the right of private parties to enforce the equitable remedies that it authorizes the courts to grant.28 Due to this statutory ambiguity, the threshold question for the district court was to determine whether a private right of action could be implied from the statutory language.29 The district court correctly prefaced the issue by noting:

Private rights of action are based on a public policy of allowing injured parties to obtain civil redress for injuries resulting from the violation of statutorily imposed duties where the maintenance of such actions would effectuate the purposes intended to be served by the Act and would not interfere with the operation of the statutory scheme.30

In determining that this threshold inquiry would be answered in the affirmative, the district court relied not only on precedent, which at best was ambiguous,31 but also on a positive satisfaction of an elemental test designed specifically for this kind of inquiry.32

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26. [The removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.


27. Id.

28. Id.


30. Id. at 622.

31. Id. See note 25 supra and accompanying text.

32. See note 33 infra and accompanying text.
Cort, the Supreme Court delineated the relevant four-part inquiry to determine whether a private right of action is implicit in a statute not expressly providing one. In analyzing the pertinent provisions of the Act in light of the four-part Cort test, the Sierra Club district court concluded that a private right of action could be implied to exist under sections 9 and 10 of the Act. The United States Court of Appeals for the Ninth Circuit affirmed this part of the decision. In a unanimous judgment, the Supreme Court reversed the lower courts and held that no private right of action could be implied on behalf of those allegedly injured by a claimed violation of the Act.

III. IMPLIED RIGHTS OF ACTION AND THE ACT

In holding that no private right of action could be implied under the Act, the Court made two definitive statements: one specific, the other, general. The former defined the nature and scope of

33. 422 U.S. 66 (1975). In Cort, an action was brought by a stockholder seeking an injunction and a derivative claim for damages, based on an alleged violation of the Federal Election Campaign Act, 18 U.S.C. § 610 (1976 & Supp. IV 1980). The Supreme Court, in an opinion by Justice Brennan, held, *inter alia,* that a private cause of action was not available with regard to alleged violations under the statute. 422 U.S. at 78. The Court further provided a four-part inquiry to aid in determining whether to recognize a private right of action impliedly from a statute not expressly providing one: (1) is the plaintiff one of the class for whose especial benefit the statute was enacted; (2) is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one; (3) is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; and (4) 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? *Id.*

34. See note 75 infra and accompanying text.


36. Sierra Club v. Andrus, 610 F.2d 581 (9th Cir. 1979), *rev’d on other grounds sub nom.,* California v. Sierra Club, 451 U.S. 287 (1981). The Ninth Circuit reversed a part of the district court decision that went to the merits of the statutory violation. For the purpose of this note, it is unnecessary to qualify the appellate decision any further than citing the court’s affirmation of the implied private right of action under sections 9 and 10 of the Act. *Id.* at 592.


38. Justice Stevens filed a concurring opinion. 451 U.S. at 298. Justice Rehnquist filed an opinion concurring in the judgment which was joined by Chief Justice Burger and Justices Stewart and Powell. *Id.* at 301.

39. *Id.* at 287 (1981). The Court, in holding that no private cause of action could be implied, precluded any need to reach the merits of the claim. *Id.* at 298.
rights of action under the pertinent sections of the Act. The latter reaffirmed the recently manifested trend away from implying private rights of action for federal statutory violations.

Sections 9 and 10 of the Act reflect the late nineteenth century view of the federal commerce power. The broad assertion of federal power and ambiguous delegation of administrative power both have roots in the acts, cases, and theories of commerce and navigation prior to 1899. In the common law of the last century, it was well settled that any obstruction of a navigable stream, if undertaken without specific legal authorization, was a public nuisance. This nuisance could be enjoined by suit of any private party to whom it had caused particular injury. In Pennsylvania v. Wheeling & Belmont Bridge Co., the Supreme Court held that a common-law action for nuisance could result in court ordered abatement of a structure obstructing navigable waters, either by removal or alteration. Later courts, however, did not follow the lead suggested in Wheeling. When the United States or private citizens sought to remove state

40. For a specific reference to the scope of the provisions of the Rivers and Harbors Act of 1899 and how they should be applied, see United States v. Republic Steel Corp., 362 U.S. 482 (1960), advancing a broad definition of the scope of the Act. Specifically "[w]e read the 1899 Act charitably in light of the purpose to be served. The philosophy of the statement of Mr. Justice Holmes . . . that 'A river is more than an amenity, it is a treasure,' forbids a narrow cramped reading either of section 13 or of section 10." 362 U.S. at 491 (quoting New Jersey v. New York, 283 U.S. 336, 342 (1931) (emphasis added)).

41. See Northwest Airlines v. Transport Workers Union, 451 U.S. 77 (1981); Universities Research Ass'n v. Coutu, 450 U.S. 754 (1981). These were the two cases which dealt with the issue just prior to Sierra Club, and in both, the Court denied a request to imply a private right of action. See also Middlesex City Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); Texas Indus. v. Radcliff Materials, 451 U.S. 630 (1981). These cases are the post-Sierra Club cases in which the issue was adjudicated and in both, no implied private right of action was determined to exist.

42. In Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) control over navigation was placed squarely within Congress' commerce power. This broad assertion was qualified in Wilson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 250 (1829) in which the Court held that a legitimate local health concern could justify a state's regulation of commerce. Wilson represented the first Supreme Court case concerning an obstruction to navigable waters.


44. 54 U.S. (13 How.) 518 (1851).

45. Id. at 564.
approved structures, the courts consistently ruled that in the absence of a federal law prohibiting obstructions to navigable waters, no remedy could be granted.\textsuperscript{46} The tenor of the situation was best stated by the Supreme Court in \textit{Willamette Iron Bridge Co. v. Hatch}:\textsuperscript{47}

The power of Congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, is not questioned. But until it does pass some such law, there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers . . . . There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the State.\textsuperscript{48}

In response to \textit{Willamette Iron Bridge}, the Rivers and Harbors Act of 1890\textsuperscript{49} was passed.\textsuperscript{50} The statute stated that "[t]he creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited."\textsuperscript{51} The statute ended a piecemeal approach to federal regulation of obstructions to navigable waters and set the framework for the enactment of sections 9 and 10 to the Act nine years later.\textsuperscript{52}

In \textit{Sierra Club}, the district court believed that the congressional

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\item \textsuperscript{46} See \textit{Willamette Iron Bridge Co. v. Hatch}, 125 U.S. 1 (1888); \textit{Cardwell v. American Bridge Co.}, 133 U.S. 205, 208 (1885) (in the absence of congressional action to the contrary, a bridge obstructing the American River in California was held to be properly authorized by the state legislature); \textit{Escanaba Co. v. Chicago}, 107 U.S. 678, 687 (1882) (in light of no congressional action, an ordinance requiring the closing of draw bridges during rush hour was held not to be an obstruction in navigation); \textit{Pound v. Turck}, 95 U.S. 459, 462-64 (1877) (in the absence of conflicting congressional action, a dam authorization by the state, is not an obstruction to navigation); \textit{Gilman v. Philadelphia}, 70 U.S. (3 Wall.) 713 (1865) (absent contrary congressional action, a bridge spanning the Schuykill River is not an impediment to navigation); \textit{United States v. Beef Slough Mfg., Booming, Log Driving & Transp. Co.}, 24 F. Cas. 1064 (C.C.W.D. Wis. 1879) (in the absence of enabling legislation by Congress, the United States is unable to remove booms blocking the Chippewa River).
\item \textsuperscript{47} 125 U.S. 1 (1888).
\item \textsuperscript{48} \textit{Id.} at 8.
\item \textsuperscript{49} Ch. 907, 26 Stat. 426 (1890).
\item \textsuperscript{50} \textit{Id.} The sponsor of the 1890 Act was U.S. Senator J.M. Dolph, who was counsel for the party opposing the construction of the bridge in \textit{Willamette Iron Bridge Co.}
\item \textsuperscript{51} Ch. 907, § 10, 26 Stat. 426.
\item \textsuperscript{52} For a discussion of the substantive legislative framework preceding the codification of existing laws manifested in the ultimate passage of the River and Harbors Act of 1899, see Comment, \textit{Sections 9 and 10 of the Rivers and Harbors Act of 1899: The Erosion of Administrative Control by Environmental Suits}, 1980 Duke L.J. 170, 176-81.
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response to Willamette Iron Bridge was clear evidence that the Act was enacted not only to allow the United States regulatory control over obstructions to navigable waters, but also to prevent private injuries by obstructions not authorized by the United States. The Supreme Court, however, did not share the view that clear legislative intent was present. The Court instead reviewed the issue of implication of a private right of action in light of its own tests for judicially discerning congressional intent.

IV. IMPLIED RIGHTS OF ACTION

The doctrine of implied rights of action has been traced to an 1854 English case in which the court used the doctrine to effectuate the overall goals of a statute. This justification arguably places the courts in the best position to ensure the effectiveness of remedial legislation. The United States Supreme Court case generally regarded as originating the federal doctrine of implied rights of action is Texas & Pacific Railway v. Rigsby. The Court held that an injured railroad worker had an implied right of action to sue his employer for damages under the Federal Safety Appliance Act.

In the fifty years since Rigsby, courts have found implied rights of action in a number of federal statutes. In J.I. Case Co. v.
Borak and Wyandotte Transportation Co. v. United States, the Supreme Court compiled a liberal set of standards for finding implied rights of action. Within the broad framework of these standards, the inquiry focused on whether the existing liability provisions were adequate to effectuate the congressional purpose. In Borak, the Court emphasized the Securities Exchange Act's (SEA) broad remedial purposes, finding private enforcement to be "necessary to make effective the congressional purpose." In Wyandotte, the Court clarified the essential factors to determine whether to imply a private right of action: (1) Whether the interests of plaintiff were within the class protected by the statute; (2) whether the harm that occurred was of the kind that the statute was intended to prevent; and (3) whether criminal liability was adequate to ensure the effective enforcement of the statute.

Since 1975, however, the Supreme Court has indicated a retreat from the liberal attitude of the Borak-Wyandotte era. In National Railroad Passenger Corp. v. National Association of Railroad Passengers (Amtrak), the Court would not recognize a private right of action under the Rail Passenger Service Act of 1970 (the Amtrak


60. 377 U.S. 426 (1964) (implied right of action found under section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (1976)).

61. 389 U.S. 191 (1967) (Court held criminal sanction of section 15 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 409 (1976), was not the exclusive remedy under the statute, and that the United States could bring a civil action to recover the costs of removing a vessel obstructing navigable waters from the owner).

63. See note 60 supra.
64. 377 U.S. at 433.
Act). In deciding whether to imply a private right of action, the Amtrak Court looked beyond both the harm the Amtrak Act was intended to prevent and the adequacy of existing remedies. The Court stressed the necessity of determining whether Congress specifically intended to grant a private right of action to plaintiffs in those particular circumstances. As a means of ascertaining congressional intent, the Court invoked the doctrine of expressio unius est exclusio alterius and interpreted a section of the Amtrak Act providing for enforcement by the Attorney General as a signal that Congress intended to preclude all other remedies.

This restrictive approach has continued in subsequent decisions. The Court consistently has ignored the question of whether an injured plaintiff has an adequate remedy under a statute. The focus, instead, has been to determine congressional intent at the time of enactment.

This concern for congressional intent became central to the Supreme Court's first comprehensive implication test, expounded in Cort v. Ash. In Cort, four factors were considered in order to de-
termine the existence of a private right of action.

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 plaintiffs? . . . 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?75

The four Cort factors are listed in the conjunctive, not the disjunctive. Thus, a finding that Congress intended to deny a private cause of action disposes of the implication issue.76 In the decisions that have followed Cort, the Supreme Court has relied on discerning the legislative intent as manifested in the statutory language and in the statute's legislative history.77 These decisions indicate that the Court no longer considers the Cort analysis sufficiently restrictive. In several decisions prior to Sierra Club, the Court has turned to its more restrictive Amtrak approach.78

An illustration of the nonuniform, pragmatic approach employed by the Court concerning implied rights of action can be seen by comparing and contrasting three recent cases. In Touche Ross & Co. v. Redington, the Court held that section 17(a) of the SEA requiring broker-dealers and others to keep records and file reports prescribed by the Securities and Exchange Commission, does not

75. Id. at 78 (citations omitted). See note 2 supra and accompanying text. The Court qualified the situations where an implied private right of action had been found by distinguishing the cases on two grounds: (1) Where there is a clearly articulated federal right in the plaintiff, Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (implied remedy found directly from fourth amendment of the Constitution); and (2) where there is a pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard. See J.I. Case Co. v. Borak, 377 U.S. 426 (1974); see also Davis v. Passman, 442 U.S. 228 (1979) (implying a cause of action and a damage remedy directly from the fifth amendment for a sex discrimination suit).

76. 422 U.S. at 82-83.

77. See notes 65-75 supra and accompanying text.

78. E.g., Northwest Airlines v. Transport Workers Union, 451 U.S. 77 (1981) (equitable claims should be addressed to Congress not the courts when interpreting a statute where a private remedy is not provided); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Cannon v. University of Chicago, 441 U.S. 677, 749 (1979) (Powell, J., dissenting) (Cort test permits implication too readily; courts should not condone implication "absent the most compelling evidence that Congress in fact intended such an action to exist").

create a private right of action. The principal basis for the Court's holding was the absence of any language in section 17(a) to indicate that Congress intended to create private rights of action.\textsuperscript{80} The Court also justified its holding by examining section 17(a) within the general statutory framework of the securities laws. Noting that section 17(a) is flanked by provisions of the SEA that expressly grant private causes of action,\textsuperscript{81} the Court found, via \textit{expressio unius}, that the existence of these express remedies militated against implication.\textsuperscript{82}

Notwithstanding the tenor of the reasoning displayed in \textit{Touche Ross}, the Court in \textit{Cannon v. University of Chicago},\textsuperscript{83} implied a right of action under section 901(a) of title IX to the Education Amendments of 1972.\textsuperscript{84} The \textit{Cannon} Court utilized a straight \textit{Cort} analysis to imply the cause of action under title IX.\textsuperscript{85} Further, in dismissing the \textit{expressio unius} argument against implying a cause of action, the Court held that the presence of express remedies in other provisions of a complex statutory scheme is an insufficient reason, by itself, for refusing to imply an otherwise appropriate remedy under a separate section.\textsuperscript{86} In footnotes, the \textit{Cannon} Court attempted to structure the recent history of implied rights of action by advancing a theory of complete dependency on statutory language.\textsuperscript{87} Under this analysis, statutes that were phrased in terms of the persons benefited have been held to imply a private right of action.\textsuperscript{88} In comparison, statutes that create duties on the part of persons for the benefit of the public at large, generally have been held not to confer implied private rights of action. Typically, these are criminal statutes.\textsuperscript{89} Even

\textsuperscript{80} Id. at 568-69.

\textsuperscript{81} Securities and Exchange Act, ch. 404, §§ 16(b), 18(a), 9(e), 48 Stat. 881 (current version at 15 U.S.C. §§ 78p(b), 78r(a), 781(e) (1976 & Supp. IV 1980)).

\textsuperscript{82} 442 U.S. at 571-72. The Court invoked the reasoning it used in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 734 (1975). "When Congress wished to provide a damage remedy, it knew how to do so and did so expressly". \textit{Id.} at 734.

\textsuperscript{83} 441 U.S. 677 (1979).

\textsuperscript{84} 20 U.S.C. § 1681(a) (1976).

\textsuperscript{85} 441 U.S. at 689-90.

\textsuperscript{86} \textit{Id.}

\textsuperscript{87} \textit{Id.} at 690 n.13.


under the historical perspective enunciated in *Cannon*, the Court has recognized deviations from this pattern.\(^{90}\)

This nonuniformity and eventual inconsistency is illustrated further by *Transamerica Mortgage Advisors v. Lewis*.\(^{91}\) In *Transamerica*, the Court never mentioned the *Cort* test; while in *Touche Ross*, the majority held that the four *Cort* factors did not necessarily hold equal weight.\(^{92}\) Thus, if congressional intent is the central inquiry, the first three inquiries of the *Cort* test become the backbone relied upon in the general determination of legislative intent.\(^{93}\) This weighting of the *Cort* factors was part of the parallel reasoning put forth by Justice Brennan in his concurring opinion to *Touche Ross*. There, he stated that satisfaction of two of the *Cort* factors could not be a basis for implying a right of action when the two remaining factors remain unsatisfied.\(^{94}\)

The effect of this malleability of the *Cort* test has been to allow legislative intent to subsume the other factors.\(^{95}\) This scenario was crystallized in *Northwest Airlines v. Transport Worker's Union*,\(^{96}\) decided just prior to *Sierra Club*, in which the issue was before the Court. In *Northwest Airlines*, the Court advanced the notion that unless congressional intent for implying a right of action can be inferred, there will be no predicate for invoking the doctrine. Further, the judiciary may not fashion new remedies that might upset carefully considered legislative programs.\(^{97}\)

**V. ANALYSIS**

**A. Restriction Continued**

It was in this restrictive mood that the Supreme Court heard the appeal of *Sierra Club*. The liberal tenets of the *Borak-Wyandotte* era had been displaced by recent decisions restricting the scope of the doctrine of implied rights of action, albeit in a pragmatic,

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\(^{90}\) See, e.g., Machinists v. Central Airlines, 372 U.S. 682 (1962) (implied cause of action found under Railway Labor Act which created a duty on the part of common carriers to establish boards of adjustment).


\(^{92}\) 442 U.S. at 575-76.

\(^{93}\) See note 33 supra.

\(^{94}\) 442 U.S. at 579-80 (Brennan, J., concurring).


\(^{97}\) Id. at 94-95.
nonuniform manner.98

The Sierra Club Court proceeded through a sequential analysis of the Cort factors, prefacing its procedure with the statement that Cort provided a "preferred approach" for making the threshold determination of whether a private right of action should be implied.99 The Court, however, made it clear that the analysis was aimed at deciding whether Congress intended to create a private right of action under section 10 of the Act.100

Justice White's opinion101 under the Cort analysis, first determined that plaintiffs were not members of the specific class for whose especial benefit the Act had been promulgated.102 Justice White reasoned that the Act was designed to benefit the public at large and thus created no specific class of especial beneficiaries of the Act's proscriptions. The Court added that plaintiffs were not especial beneficiaries merely because they were specially harmed by the alleged statutory violation. Under this reasoning, the Court believed that any victim of any crime would be deemed an especial beneficiary of the criminal statute's proscription.103 This logic, however, is circular and requires a more detailed framework to determine especial beneficiaries. Under this reasoning, the public at large would be considered beneficiaries of a statute's proscriptions. Yet the specific victim of the violation could never alter his status from a mere beneficiary to that of an especial beneficiary. The Court thus precluded those privately and uniquely damaged by a statutory violation from having any federal rights under the statute. It is arguable that the Court claimed to protect everyone, yet did not allow those specifically damaged by a violation to assert that very protection which is provided by the statute.

By defining the word especial in terms of what it is not, in order to avoid mooting the term,104 the Court constructively made it im-

98. See notes 58-66 supra and accompanying text.
100. 451 U.S. at 294.
102. 451 U.S. at 293. See also note 3 supra and accompanying text (determination of membership in an especial class is the first inquiry under Cort).
103. 451 U.S. at 293-94. See also Cannon v. University of Chicago, 441 U.S. at 686 n.7 (1979).
104. The Court states that if the term 'especial' were allowed to apply to any person 'especially harmed' by a statutory violation, the term would become "meaningless." 451 U.S. at 294.
possible for any private plaintiff, except the United States, to achieve especial status.105 This negative definitional procedure was deemed necessary in order to avoid broadening the term especial to a point where it would lose any specific application and thus become ineffective as a limiting factor.106 The Court felt the term would be moot if it could be applied to any member of the general public who specifically was harmed, yet it is now moot because only those plaintiffs specifically delineated by the statutory language can achieve especial status under this definition. This treatment loses the focus and defeats the inquiry, which was to determine if one may imply the provisions of the statute to nonexpress parties. Implication analysis, by its nature, must deal with nonexpress factors. The especial test arose as an aid in this determination. Yet the Court’s sharply defined focus seems to preclude satisfaction of the especial test by nonexpress parties. The factor should no longer be a part of the Court’s inquiry under these restraints, or it should be reevaluated in light of the impossible hurdle it presents to plaintiffs seeking rights by implication.

Sierra Club, after discounting any satisfaction of the first Cort factor, proceeded to deal with the second Cort factor: Whether there is any explicit or implicit indication of legislative intent to create or deny a cause of action.107 Due to the statutory silence on this issue, the Court concluded that there were no indicia to hold definitively either way.108 The Court interpreted this silence on the remedy question as a confirmation that Congress, in enacting the Act, did not concern itself with private remedies but merely was responding to Willamette Iron Bridge109 by designing a statute that enabled the government to respond to obstructions on navigable waterways. The conclusion arguably is fair in light of the paucity of legislative his-

105. A nearly identical statute was before the Court in Allen v. State Bd. of Elections, 393 U.S. 544 (1969) where a private right of action was held to exist under the Voting Rights Act of 1965, 42 U.S.C. § 1973j(f). 393 U.S. at 555. While not couching the plaintiffs there as 'especial' beneficiaries, the right of action was still implied. The Allen plaintiffs, according to the Sierra Club Court, would then be merely beneficiaries of the statute's proscriptions. Thus, the threat of having the term become meaningless is merely an exercise in labels.
106. 451 U.S. at 294.
107. 451 U.S. at 295-96.
108. Id. at 298. The court of appeals indicated that neither they nor the district court could conclusively ascertain intent to create or deny a private right of action from the act. Sierra Club v. Andrus, 610 F.2d 581, 588 (9th Cir. 1979), rev'd sub nom., California v. Sierra Club, 451 U.S. 287 (1981).
109. See notes 46-53 supra and accompanying text.
tory concerning the issue; but the notion that a private action exists cannot be discredited when one realizes that, with this same legislative history available to them, the district and appellate courts in *Sierra Club*, were quite willing to imply a right of action.

With the unwillingness to find that either of the first two *Cort* factors could be satisfied, the inquiry ended, as this failure was held to be dispositive. The opinion, therefore, never reached the third and fourth factors of the *Cort* analysis: Whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; and, whether the cause is one traditionally relegated to state law making a solely federal action inappropriate. This is a further indication of the inconsistency being exhibited by the Court. One is thus presented with a situation in which the factors of *Cort* are analyzed religiously; applied nonuniformly, resulting in unequal weighting of some over others; or disregarded. This pragmatism and apparently result-oriented approach was made apparent by Justice Stevens in his concurring opinion. Although he joined the opinion of Justice White, Justice Stevens wrote a separate concurrence in which he expressed the view that it was more important to adhere to the analytic approach followed by the Court regarding the availability of a private cause of action under section 10 of the Act than to follow his own opinion that Congress intended to imply a private remedy. In another concurring opinion, Justice Rehnquist displayed a near mistrust of the *Cort* factors and stated that the focus of the analysis simply should be to determine legislative intent.

The *Cort* factors, if they exist, at best have become merely an elemental aid to determine congressional intent to answer the implication question, and not a specific analysis to determine the actual

110. 451 U.S. at 295.
111. *See* Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967) (where a right of action was found under the Act, albeit under a different section).
112. 451 U.S. at 298.
113. *See* notes 91-97 *supra* and accompanying text.
117. *See* note 2 *supra* and accompanying text.
118. 451 U.S. at 298-301 (Stevens, J., concurring).
119. *Id.* at 301. *See* note 101 *supra*. This visible mistrust of *Cort* is evidenced by Justice Rehnquist's feeling that too much emphasis was given to the test. The notion is further evidenced by the statement, "the so-called *Cort* factors are merely guides in the central task of ascertaining legislative intent." 451 U.S. at 302 (Rehnquist, J., dissenting).
120. *See* notes 91-97 *supra* and accompanying text.
existence of a right of action. Though the difference ostensibly is a semantic subtlety, its affect has allowed the Court to further its conservative trend in this area of the law. In structuring the inquiry so that the Cort factors are used as an aid in discerning legislative intent, the Court may come down on either side of any statute before it. A determination of legislative intent can effectively reduce to pulling the rabbit out of whatever hat best fits a particular philosophical approach. Structuring the inquiry to legislative intent effectively eliminates three of the four Cort factors. The Cort test had a specific element to accommodate the legislative intent inquiry. The Sierra Club Court allowed that one factor effectively to subsume the other three factors. While it is arguable that the first and third Cort factors are closely related to the legislative intent inquiry, there is no genuine basis for finding factor four to be interwoven with legislative history in order to create or deny a cause of action.

B. Express Statutory Authority as an Alternative to Implied Rights of Action

The district and appellate courts in Sierra Club, after reaching the merits, held that the California Water Project violated the permit requirements of section 10 of the Act. The Supreme Court, however, avoided reaching the merits by its holding. Thus, at the very least, a strong probability existed that a statutory violation had occurred. The Attorney General would not pursue the cause; thus, the Sierra Club was faced with the task of having the case adjudicated on the merits, a task rendered impossible under the implied rights of action doctrine.

A legal avenue available to plaintiffs surfaced in Maine v. Thiboutot. The Court in Thiboutot held that section 1983 provides a remedy for any federal statutory violation, and that the prevailing party in a section 1983 action may recover attorney’s fees. Thus, plaintiffs in Sierra Club ostensibly could have used the

121. See 451 U.S. at 301 (Stevens, J., concurring).
122. Factor two of the Cort test asks whether there is “any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one?” 422 U.S. at 78.
123. Factor four of the Cort test asks whether “the cause of action [is] 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?” Id.
124. See notes 22-25 supra and accompanying text.
125. 448 U.S. 1 (1980).
127. 448 U.S. at 4-8.
128. Id. at 8-11.
express grants of section 1983 as a remedial vehicle for pursuing their alleged statutory violations, an alternative pleading to their attempts at establishing an implied right of action under the Act.129

Thiboutot rendered section 1983 applicable to rights secured by the Constitution and by all federal laws, specifically the Social Security Act (SSA),130 and rejected assertions that it was limited to constitutional and civil rights statutory violations. Congressional intent advocates had defined the scope of section 1983 to confine it to remedies for violations of rights guaranteed by the Constitution or by civil rights statutes.131 Proponents choosing to interpret the plain meaning of the statute construed it to grant a cause of action for deprivation of rights under any federal statute.132 Justice Brennan, writing for the Thiboutot majority, found that because the language of the statute was unambiguous and because no modifiers were attached to the words in question, the meaning of section 1983 should be construed to encompass the protection of all federal statutory rights.133 Finally, the Court held that because the SSA did not pro-

129. When this proposition was suggested to the attorneys who represented the Sierra Club, it was their feeling that Thiboutot's holding went only to establishing the right to attorney's fee via section 1983 and not to that section's providing of a remedial vehicle for alleged federal statutory violations.

The Thiboutot Court, however, could not have reached the attorney's fee issue without first holding that section 1983 did, in fact, provide a cause of action for federal statutory violations. For a discussion of the specific attorney's fee issue under section 1983, see Wolf, Pendent Jurisdiction, Multi-Claim Litigation, and the 1976 Civil Rights Attorney's Fees Awards Act, 2 W. NEW ENG. L. REV. 193 (1979).


131. Those restricting the scope of section 1983 via congressional intent, do so by citing Reconstruction Era legislative history. This view was expounded upon by Justice Powell in his dissent in Thiboutot. See note 132 infra and accompanying text.

132. The dissent took issue with the Court's plain meaning stance by arguing that if section 1983 encompassed all federal statutory violations, the disjunctive "or" should have fallen between "Constitution" and "laws." The dissent further argued, based on Reconstruction Era legislative history, that a natural reading of the statute required that the asserted federal rights be secured by both the Constitution and the laws of the United States, limiting the scope of section 1983 to civil rights or equal protection laws. 448 U.S. at 11 (Powell, J., dissenting).

provide for a private right of action, plaintiff, out of necessity, had to proceed under section 1983.\textsuperscript{134}

In light of \textit{Thiboutot} and the recent unwillingness of the Court to imply private rights of action, it appears that the Sierra Club might have fared better pleading its cause of action under section 1983 as a remedial statute to reach the merits of its allegations under the Act.\textsuperscript{135}

A recent decision may shed some light on the availability of section 1983 in such a situation. In \textit{Middlesex County Sewerage Authority v. National Sea Clammers Association},\textsuperscript{136} a class action was brought by a fisherman and an association of shell fishermen against various federal, state, and local officials for alleged violations of the Federal Water Pollution Control Act of 1972\textsuperscript{137} and the Marine Protection, Research and Sanctuaries Act of 1972.\textsuperscript{138} Justice Powell, writing for the Supreme Court, held that neither statute provided a private right of action, and one would not be implied.\textsuperscript{139} This conclusion was reached following a determination of congressional intent to prohibit judicial implication of a cause of action. The scenario thus far, is familiar and similar to \textit{Sierra Club}. In \textit{Sea Clammers}, however, the Court raised the issue of whether section 1983 would provide a remedial vehicle that would allow express authorization to bring suit under the statutes, \textit{sua sponte}.\textsuperscript{140} The Court reasoned that it was appropriate to reach the issue of the applicability of section 1983 because if section 1983 controlled, it would obviate the need for implication analysis.\textsuperscript{141} The issue was raised \textit{sua sponte}, because \textit{Thiboutot} was decided after the litigation in \textit{Sea Clammers}.\textsuperscript{142}

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\textsuperscript{134} 448 U.S. at 4-8.

\textsuperscript{135} Certiorari for \textit{Sierra Club} was filed, February 13, 1980. \textit{Thiboutot} was handed down on June 25, 1980. Certiorari in \textit{Sierra Club} was granted on October 6, California v. Sierra Club, 449 U.S. 818 (1981), and the case was decided on April 21, 1981. The Sierra Club thus could have moved the Court to have the certiorari petition amended under suggestion to vacate and remand the case in light of \textit{Thiboutot}.

\textsuperscript{136} 453 U.S. 1 (1981).


\textsuperscript{138} \textit{Id.} §§ 1401-1444 (1976).

\textsuperscript{139} 453 U.S. at 14-15.

\textsuperscript{140} \textit{Id.} at 19.

\textsuperscript{141} \textit{Id.}

\textsuperscript{142} \textit{Id.}
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In *Sea Clammers*, the Court reiterated two exceptions to the application of section 1983 to statutory violations. First was "whether Congress had forclosed private enforcement of the statute in the enactment itself, and [second], whether the statute at issue was the kind that (created enforceable rights) under section 1983." Thus, in *Sierra Club*, the focus of the inquiry concerning these exceptions would be the comprehensiveness of the express enforcement mechanisms provided in the Act, and a determination of whether the prohibition of the obstruction of navigable waters put forth in the Act actually secures a right to the maintenance of the navigability of waters.

The Court in *Sea Clammers* held that both statutes provided extensive and comprehensive express enforcement mechanisms and thus came under the first exception in section 1983 analysis. Therefore, no implied right of action was recognized nor was any remedy that otherwise would be available under section 1983 cognizable because such remedies would be supplanted by these comprehensive statutory schemes.

The same reasons that persuaded the Court to raise the section 1983 issue in *Sea Clammers* existed in *Sierra Club*. The Sierra Club had commenced suit prior to *Thiboutot*. Resolving the section 1983 issue as providing an express remedial statute for alleged federal statutory violations, as in *Thiboutot*, also would have obviated the need to proceed through an implied right of action analysis in *Sierra Club*. In light of these factors, the failure of the Court to raise the section 1983 issue *sua sponte* in *Sierra Club* becomes a point of critical interest. This is further highlighted in that *Sierra Club* preceeded *Sea Clammers*.

One plausible explanation, almost unavoidable under the current tenor of the Court, is that the ultimate aim in all of these recent machinations of implied right of action analysis is a basic policy desire to limit access to federal courts. Consistent with this policy is the current constriction of the implied right of action doctrine and the use of standing and justiciability to further limit access to the federal courts. While this policy could be attained readily in *Sea

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143. The two exceptions were recognized in Pennhurst State School and Hosp. v. Haldeman, 451 U.S. 1, 28 (1981).
144. 453 U.S. at 19.
145. *Id*.
146. *Id* at 21.
147. See note 2 *supra* and accompanying text.
148. *Id*.
Clammers, it would have been far more difficult to dismiss the section 1983 issue had it been researched, briefed, and argued in Sierra Club.

Neither of the two exceptions that were set forth in Sea Clammers to preclude proceeding under a section 1983 analysis were readily applicable in Sierra Club. Alternatively, any allegation of their applicability was readily rebuttable. The basic premise established in Thiboutot concerned the applicability of section 1983 as a remedial statute to reach alleged federal statutory violations.¹⁴⁹ The refinement of that doctrine in Sea Clammers placed two categories of limitations on section 1983 analysis in this context.¹⁵⁰ A hindsight view of what might have happened in Sierra Club had section 1983 been pleaded, therefore, is appropriate.

Thiboutot held that section 1983 provides a remedy for colorable state violations of any statutorily secured federal right.¹⁵¹ Sea Clammers emphasized that the limits to a section 1983 action brought pursuant to an alleged federal statutory violation could be found in two exceptions. The first exception was when Congress had foreclosed private enforcement in the enactment itself. The second was whether the statute at issue was one that created enforceable rights under section 1983.¹⁵²

Asserting the basic premise of Thiboutot, plaintiffs in Sierra Club could have pleaded that the California Water Project's actions were in violation of the permit requirements of section 9 and 10 of the Act.¹⁵³ Further, because of this alleged violation by the state and because the Act neither expresses nor denies a private right of action, plaintiffs could have used section 1983 as express statutory authority to redress this "color of state law" action. On the precedent of Thiboutot, the remedial aspects of section 1983 would have provided an avenue of redress allowing the courts to hear the merits of the allegation.

As noted earlier, however, the basic doctrine of Thiboutot has been qualified by two exceptions. These exceptions were used by the Sea Clammers Court to deny the applicability of section 1983 to

¹⁴⁹. See notes 125-33 supra and accompanying text.
¹⁵⁰. See notes 136-46 supra and accompanying text.
¹⁵². See notes 143-46 supra and accompanying text.
¹⁵³. See notes 8-21 supra and accompanying text.
Therefore, it would have been necessary for the Sierra Club to show that the two exceptions were inapplicable to its action. If it could have demonstrated this, the merits of its case would have been reached by the Supreme Court. Moreover, unlike Sea Clammers, the statute in Sierra Club was not amenable to classification in either of the two exceptions. Thus Sierra Club was a much more interesting case than Sea Clammers, which could be adapted summarily to the comprehensiveness exception. That is, Congress had foreclosed private enforcement because of the comprehensiveness of the enactment itself. In Sierra Club, the Act was not comprehensive in the sense of providing an extensive enforcement scheme. The requirements of the enforcement scheme only provided that the Attorney General may enforce the provisions of the permit requirements. There was no administrative procedure to exhaust prior to the commencement of suit. Thus, there were no requirements of a comprehensive enforcement procedure that would have been bypassed if suit had been brought directly under section 1983. Avoidance of comprehensive procedures is the action that the Court tried to prevent in the first exception to the availability of section 1983. Therefore, the principles that underlie the first exception to the availability of section 1983 were not found in Sierra Club.

The Court in Sea Clammers did not reach the second exception to the applicability of section 1983; whether the statute created enforceable rights. Plaintiffs in Sierra Club, however, would have had to prove that the Act did create enforceable rights. This could be accomplished by asserting that plaintiffs had a right not to have navigable waters impeded. This right would stem from the line of cases which gave rise to the enactments finally crystallized by the Act. Arguably, it can be stated that the Act creates a substantive right in the federal government alone to have its navigable waters unimpeded. It is beyond the scope of this note to deal with the full range of substantive rights created by specific legislation. The point simply is that had the Sierra Club pleaded section 1983 as an alternative to implied right of action theory, a detailed analysis of this specific exception may have persuaded the Court that a substantive federal right was created by the Act, thereby removing the excep-


155. Id. at 19.

156. See note 46 supra and accompanying text.

157. A case which seemingly points up the possibility of the Sierra Club's success in pleading section 1983 is Yapalater v. Bates, 494 F. Supp. 1349 (S.D.N.Y. 1980). Refer-
tions as obstacles.

The thrust of this hypothetical simply is that, in light of *Thiboutot* and in spite of the qualifications set forth in *Sea Clammers*, the chances of dismissing a section 1983 action in *Sierra Club* were considerably less than in *Sea Clammers*, wherein the statutes involved were clearly comprehensive in their particularized enforcement mechanisms. Why the Court chose not to deal with the issue in *Sierra Club* is a matter of speculation, but, at the very least, it would have been far more difficult to dismiss the claim in *Sierra Club* than it was in *Sea Clammers*. This further indicates the lack of uniformity in the Court's current attitude toward implied rights of action. Not only is the Court restricting the availability of the doctrine, but it also is discouraging the use of collateral doctrines in which the purpose basically is to accomplish the same objective; to force the Court to reach the merits of alleged statutory violations.

The effect of raising the section 1983 issue, *sua sponte*, in *Sea Clammers*, where it easily could be disposed of is to weaken the cause of action by indicating that section 1983 is not a blanket grant of express statutory authority for reaching all alleged statutory violations. Had the issue been pleaded properly in *Sierra Club*, however, a potential source of access to federal courts may have become available to environmental groups for alleged violation of federal statutes similar to the Act. As this apparently would be contrary to the present posture of the Court concerning access to federal courts, the Court could not have raised the issue in *Sierra Club*, *sua sponte*, due to the tenuous nature of its ability to dismiss the claim. The net effect is to leave plaintiffs in a difficult position on whether section 1983 will be preferable in their efforts at persuading a court to reach the merits of claims based on statutes that contain no real comprehensive enforcement mechanisms nor any discernible legislative intent either to imply or deny a private right of action.

VI. Conclusion

To prevent actions by private citizens to redress statutory violations, because of a pervasive policy of limiting access to federal courts, is to make a serious error. While easy access may encourage

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ring to *Thiboutot*, the court stated: "The precise effect of *Thiboutot* is to create a remedy where . . . injury flows from a state's violation of governing federal law in a joint federal-state cooperative program. If those elements are present, section 1983 provides the private remedy. . . ." *Id.* at 1358. Had Sierra Club pleaded as hypothesized here, its claim would have been on all fours with this interpretation of *Thiboutot* and its private suit would have been allowed.
frivolous suits and certainly will increase the burden upon the federal judiciary, a policy that restricts access through a stricter implication doctrine, combined with a relative unwillingness to extend the remedial provisions of section 1983 beyond civil rights and constitutional challenges,\textsuperscript{158} effectively allows known violators of federal statutes to avoid the proscriptions of those statutes. This was stated emphatically in \textit{California v. Sierra Club}.\textsuperscript{159} \textit{Cort v. Ash}\textsuperscript{160} provided a multifactor balancing test to determine whether to imply a private right of action. By itself, this represents a retreat from the liberal tenets of the \textit{Borak-Wyandotte} era,\textsuperscript{161} and is sufficient to place the Court in the middle ground of making the federal courts available. While \textit{Cort} was not nearly as restrictive as \textit{Sierra Club}, the multifactor balancing test generally tends to produce negative answers. \textit{Cort} thus struck some balance between the earlier liberal decisions and the recent conservative decisions that rely solely on congressional intent. A dangerous restriction occurs when \textit{Cort} can be reduced to merely an indicative test for legislative intent, as it has been done in recent decisions. If the Court continues to give a mere perfunctory nod to the \textit{Cort} factors,\textsuperscript{162} the need for a liberal stance concerning the remedial features of section 1983 is apparent as a counterbalance to the restrictiveness of a legislative intent inquiry. In the final analysis, the courts must follow a basic tenet that, “[i]f there be an admitted wrong, the courts will look far to supply an adequate remedy.”\textsuperscript{163} The result in \textit{Sierra Club} was not an adequate remedy. A district and appellate court both held that a violation of a federal statute had occurred. The Supreme Court’s ability to foreclose the merits of the case through restrictive implied right of action

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  \item \textsuperscript{158} A recent case, however, held that \textit{Cort} was not only alive and well, but in proceeding through the \textit{Cort} analysis, an implied private right of action was found to exist. \textit{Garrity v. Gallen}, 522 F. Supp. 171 (D.N.H. 1981) (implied right of action exists under the Developmentally Disabled Assistance Bill of Rights which enables private persons to compel the termination of federal funds to a state that violates the Bill of Rights' conditions). Despite the fact that the plaintiffs had pleaded section 1983 in the alternative to implying a right of action, the court held that because it was willing to imply a private remedy, it need not approach the section 1983 issue. \textit{Cf.} \textit{Texas Indus. v. Radcliff Materials}, 451 U.S. 630, 639 (1981) (relying on Congressional intent factor but noting the existence of the other \textit{Cort} factors).
  \item \textsuperscript{159} 451 U.S. 287 (1981).
  \item \textsuperscript{160} 422 U.S. 66 (1975).
  \item \textsuperscript{161} See notes 60-68 \textit{supra} and accompanying text.
  \item \textsuperscript{162} \textit{Middlesex County Sewerage Auth. v. National Sea Clammers}, 453 U.S. 1, 25 (1981) (Stevens, J., concurring in part, dissenting in part).
  \item \textsuperscript{163} \textit{DeLima v. Bidwell}, 182 U.S. 1, 176-77 (1900).
\end{itemize}
analysis demonstrates the need for an alternative right of action under section 1983.

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