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Middlesex County Sewerage Authority v. National Sea Clammers Association

101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981).

INTRODUCTION

One question that the Supreme Court considered in *Middlesex County Sewerage Authority v. National Sea Clammers Association*¹ was whether a private group of fishermen could recover damages under federal law for business injuries allegedly caused by pollution of New York Harbor and adjacent waters. Plaintiffs argued, among other theories of recovery, that a private cause of action should be implied from the Federal Water Pollution Control Act (FWPCA)² and from the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA).³ The Supreme Court concluded, however, that the comprehensive private enforcement remedies of these Acts precluded implied private remedies for their violation.⁴ Although the plaintiffs had not sought to state a cause of action under 42 U.S.C. § 1983—which authorizes private damages actions for intrusions on federal constitutional and statutory rights committed under color of state law⁵—the Court went on to consider the availability of such a remedy, holding that it also was precluded by the public and private enforcement remedies of the Acts.⁶ The *Sea Clammers* opinion reflects the development of two important trends: the Court's increasing reluctance to find that a private cause of action should be implied from a federal statute,⁷ and the ascendancy of

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1. 101 S. Ct. 2615 (1981).

2. 33 U.S.C. §§ 1251-1376 (1976 & Supp. III 1979).

3. 33 U.S.C. §§ 1401-1444 (1976 & Supp. III 1979).

4. 101 S. Ct. at 2626.

5. Section 1983 provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States . . . 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.

42 U.S.C. § 1983 (1976).

6. 101 S. Ct. at 2627.

7. See notes 36-54 *infra* and accompanying text.

the view that 42 U.S.C. § 1983 should be limited in scope.⁸ The Court's continued reluctance to find implied rights of action and the shift in its view of § 1983 availability may give long-term significance to the *Sea Clammers* decision.

I

THE PROCEEDINGS BELOW

The National Sea Clammers Association is a group of fishermen that harvest the coastal waters off New York and New Jersey.⁹ In 1977, the Association and an individual fisherman joined to sue various federal, state, and local officials and agencies in federal district court¹⁰ for allegedly discharging or permitting the discharge of sewage, sewage sludge, and other waste materials into New York Harbor and the Hudson River.¹¹ The complaint alleged that discharges caused a massive "bloom" of algae in coastal waters, which eventually died, settled to the bottom, and created an oxygen deficiency ("anoxia") in the waters near the ocean floor.¹² This condition allegedly killed shellfish, bottom dwellers, and large numbers of other marine organisms.¹³ The fishing, clamming, and lobster industries in the affected areas subsequently collapsed,¹⁴ and plaintiffs claimed the collapse was largely attributable to the effects of the pollution defendants had either caused or allowed to occur.¹⁵

Plaintiffs invoked several theories for relief. They sought to recover for alleged violations of FWPCA and MPRSA, and claimed damages under the federal common law of nuisance.¹⁶ Plaintiffs also sought injunctive relief, damages, mandamus to compel compliance with statutory duties, imposition of fines and penalties, award of half of any fines assessed, and attorneys' fees.¹⁷

The New Jersey District Court granted summary judgment for defendants on all counts of the complaint, and the judge dismissed with

8. See notes 55-68 *infra* and accompanying text.

9. 101 S. Ct. at 2618.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 2618 n.4.

14. *Id.* at 2619.

15. *Id.* at 2618-19.

16. *Id.* at 2619 n.6. Plaintiffs also based their claims on alleged violations of the National Environmental Policy Act, 42 U.S.C. §§ 4321-4361 (1976 & Supp. III 1979); the Rivers and Harbors Act, 33 U.S.C. § 407 (1976); the fifth, ninth, and fourteenth amendments to the United States Constitution; the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (1976 & Supp. III 1979); admiralty and maritime jurisdiction, 46 U.S.C. § 740 (1976); New York and New Jersey environmental statutes; and state tort law. *Id.*

17. *National Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1225 (3d Cir. 1980).

prejudice all claims arising under federal law.¹⁸ The court refused to hear the claims arising under FWPCA and MPRSA because plaintiffs had failed to comply with the sixty day notice requirement of the private enforcement provisions of the acts.¹⁹ The court rejected plaintiffs' nuisance claim on the ground that a private cause of action is not available under the federal common law of nuisance.²⁰

The Court of Appeals for the Third Circuit reversed the district court on each of these issues.²¹ First, it found an implied private remedy under both FWPCA and MPRSA.²² The court applied the four-factor analysis set forth by the Supreme Court in *Cort v. Ash*,²³ finding that (1) the Acts were enacted to protect the class of individuals likely to suffer actual injury from pollution, (2) the provisions of the savings clauses of the Acts—which provide that “[n]othing in [the citizen suit provision] shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief . . .”²⁴—demonstrate a legislative intent to allow private remedies in addition to those afforded by the citizen suit provisions, (3) a private remedy would be consistent with the Acts' goals of protecting marine life, and (4) water pollution is predominantly a federal concern, so that federal jurisdiction would not encroach on an area traditionally governed by

18. *Id.*

19. *Id.* at 1225. For the citizen suit provisions, see 33 U.S.C. § 1365(b)(1)(A) (1976 & Supp. III 1979), 33 U.S.C. § 1415(g)(2)(A) (1976 & Supp. III 1979).

Under the “citizen-suit” clauses of both FWPCA and MPRSA, a private citizen may commence a civil action against governmental bodies for an injunction to enforce standards established under the Acts. *Id.* Federal district courts are granted jurisdiction over such suits, regardless of the amount in controversy or the citizenship of the parties, but no action may be commenced prior to sixty days from the time plaintiffs originally give notice of their complaints to the appropriate government officials and to the alleged violators of the Acts. *Id.*

20. 616 F.2d at 1233.

21. *Id.* at 1231-1235.

22. *Id.*

23. 422 U.S. 66 (1975). In *Cort v. Ash*, the Court stated the test as follows:

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?

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

24. The quoted language is from the savings clause of FWPCA, § 505(e), 33 U.S.C. § 1365(e) (1976 & Supp. III 1979). Section 105(g)(5), of MPRSA contains similar language:

The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation to seek any other relief (including relief against the Administrator, the Secretary, or a State agency).

33 U.S.C. § 1415(g)(5) (1976 & Supp. III 1979).

state law.²⁵

The appeals court also held that in bringing such a private action, plaintiffs were not bound by the sixty-day notice requirement of the citizen suit provisions.²⁶ The court reasoned that the citizen suit provisions apply only to "private attorneys general"—uninjured members of the public who sue to promote the general welfare—and not to private parties seeking to recover for individual injuries.²⁷ Hence these provisions do not limit the right of private parties to seek damages in a private action. Finally, the court also held that a remedy under the federal common law of nuisance is available to private parties who have suffered sufficient individual damages.²⁸

Various state and federal defendants filed petitions for a writ of certiorari.²⁹ The Supreme Court, in granting the petitions, limited its review to three questions: (1) whether private rights of action apart from those provided in the citizen-suit provisions may be implied in FWPCA and MPRSA; (2) whether FWPCA and MPRSA preempt the federal common law of nuisance in the area of ocean pollution; (3) if there is no preemption, whether a private citizen has standing to sue for damages under the federal common law of nuisance.³⁰ Though neither briefed nor argued by the parties, or referred to by the lower courts,³¹ the Supreme Court also discussed the question of the availability of a cause of action under 42 U.S.C. § 1983.³² At the same time, the Court disposed summarily of the second of the above questions,³³ and found it unnecessary to address the third.³⁴

25. *National Sea Clammers Ass'n v. City of New York*, 616 F.2d at 1228-31. The court discussed each of these factors in light of FWPCA, see *id.*, but later stated that, since the court found the statutory provisions and legislative histories of MPRSA and FWPCA to be "virtually indistinguishable," *id.* at 1232, it applied its finding of an implied right of action to both statutes, *id.* at 1231-32.

26. *Id.* at 1230-32. See note 19 *supra* and accompanying text.

27. *Id.* at 1227.

28. *Id.* at 1233-34.

29. 101 S. Ct. at 2621.

30. *Id.* at 2621.

31. *Id.* at 2625.

32. *Id.* at 2625-27.

33. The Court devoted only three paragraphs at the end of its opinion to this question. The Court adverted to its very recent decision in *City of Milwaukee v. Illinois*, 101 S. Ct. 1784 (1981) (*Illinois I*), in which the Court held that the federal common law of nuisance in the area of water pollution is entirely preempted by the comprehensive remedies of FWPCA. The *Illinois II* decision disposed entirely of the *Sea Clammers* federal common law claims, the Court said, since "there is no reason to suppose that the pre-emptive effect of the FWPCA is any less when pollution of coastal waters is at issue." 101 S. Ct. at 2627.

34. 101 S. Ct. at 2621 n.17.

II

THE SUPREME COURT OPINION

The Supreme Court ruled against plaintiffs on all the federal claims it had granted certiorari to review, and remanded the case to the Circuit Court for further consideration.³⁵

A. Implied Cause of Action

The Supreme Court rejected the Circuit Court's application of the *Cort* test, concluding that neither FWPCA nor MPRSA creates an implied private cause of action.³⁶ Following a trend away from the *Cort* analysis established by several cases since *Cort*, the majority focused on only one of the four *Cort* factors, legislative intent, in its inquiry into the availability of a private right of action.³⁷ The majority analyzed statutory language and legislative history to conclude that Congress intended to limit private causes of action to those set forth in the citizen suit provisions.³⁸ In its study of the statutory language, the Court first construed the savings clauses more narrowly than had the circuit court,³⁹ limiting their protection to remedies arising under statutes other than FWPCA and MPRSA.⁴⁰ Thus under the Court's reading of the savings clauses, they do not operate to protect private actions based on alleged violations of their own statutes. Second, the Court looked to the statutory definition of "citizen" as used in the citizen suit provision of FWPCA⁴¹ to determine that these provisions apply to all persons who have suffered tangible economic injury, and not just to private attorneys general.⁴² The Court further noted that, in concluding that implied remedies exist for violations of FWPCA and MPRSA, the circuit court failed to take account of other aspects of the private enforcement scheme provided by Congress.⁴³ As to legislative intent, the Court noted that "[the] Senate Reports on both Acts placed particular

35. *Id.* at 2615, 2627.

36. In several cases coming after *Cort v. Ash*, the Supreme Court has rejected a rigid application of the four factors, and has looked to legislative intent alone in determining whether private rights of action should be implied. These cases include *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979) (the factors serve as mere guides to the basic question of statutory construction); *Touche Ross v. Redington*, 442 U.S. 560 (1978) (the factors are not of equal weight, and legislative intent is the sole determining factor); and *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 101 S. Ct. 2061 (1981) (the absence of reference to a cause of action in the legislative history makes consideration of the other factors unnecessary).

37. 101 S. Ct. at 2627.

38. *Id.* at 2622-25.

39. See text accompanying note 24 *supra*.

40. 101 S. Ct. at 2624 n.26.

41. FWPCA § 505(g) defines "citizen" as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g) (1976 & Supp. III 1979).

42. 101 S. Ct. at 2624.

43. *Id.* at 2624-25.

emphasis on the limited nature of the citizen suits being authorized,"⁴⁴ and concluded that the legislative history demonstrated "that Congress intended that private remedies in addition to those expressly provided should not be implied."⁴⁵

The Court's decision to limit private remedies to those provided under the Acts' citizen suit provisions, and to adopt a narrow view of the savings clauses, demonstrates its reluctance to expand implied private rights of action.⁴⁶ This reluctance may help to explain the Court's increasingly cursory application of the *Cort* test.⁴⁷ In fact, Justice Powell—who wrote the majority opinion in *Sea Clammers*—had argued earlier for abandonment of the *Cort* analysis. Dissenting in *Cannon v. University of Chicago*,⁴⁸ where the majority held that a private cause of action may be implied from Title IX of the Civil Rights Act of 1964,⁴⁹ Justice Powell stated that he would find an implied cause of action only in the face of "the most compelling evidence of affirmative congressional intent."⁵⁰ Justice Powell also criticized the *Cort* test as an invitation to "legislate causes of action not authorized by Congress."⁵¹ In *Sea Clammers*, Justice Powell gained majority support for at least a more moderate statement of these views.⁵²

Although the *Sea Clammers* Court did not specify the criteria to be employed in determining whether legislative intent to imply a cause of action can be found, the opinion seems to require a clear demonstration of such intent as a prerequisite to a finding of implied remedies.⁵³ When a federal statute contains no express remedy, a finding of implied private actions may not be impossible, even under *Sea Clammers*, but the decision seems entirely to preclude the possibility of finding an implied remedy where the statute provides some express remedy, no matter how minimal. The Court seemed to presume that Congress, once it provides some express private remedy, intends no other.⁵⁴ Be-

44. *Id.* at 2625 n.27.

45. *Id.* at 2625.

46. Justice Stevens observed that "a Court that is properly concerned about the burdens imposed upon the Federal Judiciary, the quality of the work product of Congress, and the sheer bulk of new federal legislation, has been more and more reluctant to open the courthouse door to the injured citizen." 101 S. Ct. at 2628-29 (Stevens, J., concurring in part and dissenting in part).

47. *Id.* at 2629 (Stevens, J., concurring in part and dissenting in part).

48. 441 U.S. 677 (1979).

49. *Id.* at 709.

50. *Id.* at 731 (Powell, J., dissenting).

51. *Id.* (Powell, J., dissenting).

52. Justice Powell was also able to gain majority support for views on the application of section 1983. 101 S. Ct. at 2625-27.

53. 101 S. Ct. at 2625.

54. "In the absence of strong indicia of a contrary Congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Id.* at 2623.

cause implications, by definition, are not expressed, it will be a rare plaintiff who can overcome the *Sea Clammers* presumption that no private cause of action should be implied from a federal statute that expressly provides for some form of private remedy.

B. Section 1983

Although the parties apparently had neither briefed nor argued the issue,⁵⁵ the *Sea Clammers* majority went on to consider the question of whether a remedy might be afforded plaintiffs under 42 U.S.C. § 1983. In a recent case, *Maine v. Thiboutot*,⁵⁶ the Court held that section 1983 authorizes private actions to redress violations by state officials of federal statutory rights.⁵⁷ Under this rationale, plaintiffs could have sought to recover under section 1983 for the alleged violations of FWPCA and MPRSA.⁵⁸

Justice Powell had dissented in *Thiboutot*, arguing that section 1983 should be given a narrow scope.⁵⁹ His views gained some support in *Sea Clammers*. The majority held that, although section 1983 would otherwise have been available to plaintiffs, the comprehensive enforcement schemes of FWPCA and MPRSA evinced a congressional intent to preclude the availability of a section 1983 remedy.⁶⁰ To support a foreclosure-by-comprehensive-remedy analysis, Justice Powell relied on two recent cases.⁶¹ First, Justice Powell noted that the Court had earlier recognized the possibility that Congress may foreclose a section 1983 remedy; in *Pennhurst State School and Hospital v. Halderman*,⁶² the Court remanded certain claims for consideration of whether Congress, in enacting the statute at issue, had intended to foreclose a section 1983 remedy.⁶³ Second, Justice Powell cited a dissenting opinion in *Chapman v. Houston Welfare Rights Organization*⁶⁴ in which Justice Stewart had argued that when "a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983."⁶⁵ *Sea Clammers* was, however, the first case that precluded a section 1983 remedy because of the statute on which the section 1983 claim was based.

55. *Id.* at 2625.

56. 448 U.S. 1 (1979) (discussed in *Sea Clammers*, 101 S. Ct. at 2625-27).

57. *Id.* at 11.

58. 101 S. Ct. at 2625-26.

59. 448 U.S. at 21-22 (Powell, J., dissenting).

60. 101 S. Ct. 2626-27.

61. *Id.*

62. 101 S. Ct. 1531 (1981).

63. *Id.* at 1545-46.

64. 441 U.S. 600 (1979).

65. *Id.* at 673 n.2 (Stewart, J., dissenting).

Applying this analysis to FWPCA and MPRSA, the *Sea Clammers* Court found that Congress intended "to supplant any remedy that otherwise would be available under § 1983"⁶⁶ by enacting these statutes. The Court observed that the private enforcement mechanisms of the two statutes are "quite comprehensive,"⁶⁷ and commented that "[i]t is hard to believe that Congress intended to preserve the § 1983 right of action when it created so many specific statutory remedies"⁶⁸

In raising the issue of section 1983 availability *sua sponte*, the Supreme Court may have been overly eager to limit the scope of section 1983. The next question is whether the Court's action was proper; the Court may not have been wise to decide a question of such importance in the absence of briefing and oral argument by the parties; it should have waited for a case that actually presented the legal issue.

The Court's dismissal of a section 1983 action in *Sea Clammers* may not be consistent with the savings clauses of FWPCA and MPRSA.⁶⁹ To find that a section 1983 remedy was not preserved by the savings clauses, the Court would have to find that (1) FWPCA and MPRSA do not create "rights . . . secured by the Constitution and laws" so as to be protected by section 1983; or (2) the preservation of rights arising under "any statute" does not include those arising under section 1983 (that is, that section 1983 does not fall within the meaning of the phrase "any statute" in the savings clause); or (3) that in preserving rights under any statute "to seek enforcement of any effluent standard or limitation,"⁷⁰ the savings clauses do not refer to standards and limitations arising under FWPCA and MPRSA themselves. In concluding that the savings clauses did not preserve the section 1983 remedy, the Court relied on the third of these rationales.⁷¹ The Court reasoned:

there is little reason to believe that Congress intended to [preserve section 1983 remedies] when it made reference [in the savings clause of FWPCA] to "any right which any person . . . may have under any statute or common law or to seek any other relief." The legislative history makes clear Congress' intent to allow further enforcement of anti-pollution standards arising under *other* statutes. . . .⁷²

66. 101 S. Ct. at 2627.

67. *Id.* at 2626.

68. *Id.*

69. See note 24 *supra* and accompanying text.

70. 33 U.S.C. § 1365(e) (1976 & Supp. III 1979) (FWPCA, § 505(e)). The savings clause of MPRSA is so similar as to make the analysis based on FWPCA's savings clause equally applicable to MPRSA. See note 25 *supra* and accompanying text.

71. 101 S. Ct. at 2626 n.31.

72. *Id.* (emphasis in original). The Court in the quoted passage was discussing only the FWPCA savings clause, but the majority applied the analysis also to the MPRSA savings clause. *Id.*

Unfortunately, this passage incorrectly quotes the savings clause of FWPCA. After "common law," the Court failed to insert the clause "to seek enforcement of any effluent standard or limitation."⁷³ Although the Court correctly quotes FWPCA's savings clause elsewhere in the opinion,⁷⁴ its failure to do so in this passage is regrettable in that it obscures a necessary step in the Court's narrow construction of the savings clause.

In an earlier footnote supporting its refusal to find an implied cause of action in FWPCA,⁷⁵ the Court reasoned as follows:

It might be argued that the phrase "any effluent standard or limitation" in [FWPCA's savings clause] necessarily is a reference to the terms of the FWPCA. We, however, are unpersuaded that Congress necessarily intended this meaning. The phrase *also* could refer to state statutory limitations, or to "effluent limitations" imposed as a result of court decrees under the common law of nuisance.⁷⁶

The word "also" is ambiguous. Does the Court mean that the phrase "any effluent standard or limitation" refers exclusively to statutes other than FWPCA? Or, rather, does "also" indicate only that the phrase "any effluent standard or limitation" could refer to *both* FWPCA and non-FWPCA standards? The latter reading is all that the Court's response to the footnoted argument logically requires, since any construction other than "exclusively-FWPCA" standards destroys the straw man the Court is addressing.⁷⁷ This reading, being more moderate than the former, is arguably the more natural interpretation of the word "also" in this passage.

The apparently insignificant question of what "also" means in this context becomes important in the Court's discussion of the section 1983 remedy. Since section 1983 is clearly a "non-FWPCA" statute, the Court's prior argument that the savings clause only preserves rights arising under *other* (i.e., non-FWPCA) statutes⁷⁸ will not be sufficient to remove the section 1983 remedy from the savings clause's protection.

73. See text accompanying note 24 *supra*.

74. 101 S. Ct. at 2620 n.10.

75. *Id.* at 2624 n.26.

76. *Id.* (emphasis added).

77. The argument which the Court suggests and answers in this passage probably would run as follows: if the phrase "any effluent standard or limitation" in FWPCA's savings clause refers *only* to FWPCA standards and limitations, then the Court's conclusion that the savings clause does not preserve FWPCA remedies, but only preserves remedies arising under *other* statutes, drains the savings clause of nearly all effect, and hence is a questionable construction. The savings clause so construed would still preserve a section 1983 suit to enforce FWPCA standards, but such hybrid suits, deriving right-to-sue and standard-to-enforce from different sources, would presumably be rare, and it seems unlikely that the savings clause meant to preserve only such suits. In any case, to avoid this unlikely construction the Court need argue only that the phrase "any effluent standard or limitation" refers to both FWPCA and non-FWPCA standards.

78. 101 S. Ct. at 2624 n.26.

Instead, the Court must hold that the effluent *standards* sought to be enforced via section 1983 must also have a non-FWPCA source. Such a holding would logically require that the syntactic ambiguity in the Court's earlier construction of the phrase "any effluent standard or limitation"⁷⁹ be resolved retroactively in favor of the narrower (i.e., "exclusively-non-FWPCA") reading.⁸⁰

The Court recognized the necessity for this narrow construction of the savings clause in its discussion of section 1983: "We are convinced that the savings clauses do not refer at all to a suit for redress of a violation of [FWPCA and MPRSA]—regardless of the source of the right-of-action asserted."⁸¹ This conclusion, necessary to the Court's disposition of the section 1983 claim it raised *sua sponte*, is without authority. The Court referred back to its earlier ambiguous construction of the phrase "any effluent standard or limitation,"⁸² but no authority is there cited to support either possible reading of that phrase.⁸³

The Court also referred to the legislative history of both acts.⁸⁴ But this history does not support such a narrow construction of the savings clauses. While the Senate Reports cited might be read to limit the protection offered by the savings clauses to rights or remedies arising under other (i.e., non-FWPCA) statutes,⁸⁵ it would take a creative reading of the Reports to support the conclusion that Congress intended the savings clause of FWPCA to preserve only non-FWPCA rights to enforce non-FWPCA *standards*. Under close scrutiny such statutory construction appears strained. The Court's presumably inadvertent misquotation of FWPCA's savings clause, in the same passage in which the Court construes that clause so narrowly, compounds the difficulty a careful reader will have following and endorsing the Court's analysis.⁸⁶

79. See text accompanying note 76 *supra*.

80. If "any effluent standard or limitation" could refer to *both* FWPCA and non-FWPCA standards, then a section 1983 suit to enforce FWPCA standards would presumably be preserved by FWPCA's savings clause.

81. 101 S. Ct. at 2626 n.31.

82. See text accompanying note 76 *supra*.

83. 101 S. Ct. at 2624 n.26.

84. *Id.*

85. S. REP. NO. 414, 92d Cong., 2nd Sess. (1971) *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3668, for instance, states that the savings clause of FWPCA "would specifically preserve any rights or remedies under any *other law*." *Id.* at 81, 1972 U.S. CODE CONG. & AD. NEWS at 3746 (emphasis added). Although the quoted language demonstrates that the writer of the Senate Report had in mind the preservation of rights under other statutes, it does not establish that Congress would necessarily not have extended the savings clause to rights under FWPCA itself had it considered this possibility. Also, the quoted language may have been mere oversight, or it may not have accurately reflected the intent of the legislators who approved the bills.

86. Even accepting the Court's narrow construction of the savings clauses of FWPCA and MPRSA, FWPCA's savings clause should be read to preserve rights arising under MPRSA, and similarly MPRSA's savings clause should be read to preserve rights arising

In concluding that plaintiffs could not recover under section 1983 the Court, in effect, found that FWPCA and MPRSA had impliedly repealed section 1983 insofar as it might provide a remedy for violations of those statutes. The Court discreetly did not use the language of implied repeal,⁸⁷ thereby avoiding the "cardinal principle of statutory construction that repeals by implication are not favored."⁸⁸ In *Posadas v. National City Bank*,⁸⁹ for example, the Court held that an implied repeal should be found only in extreme situations:

- (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act.⁹⁰

The *Posadas* Court further emphasized that "in either case, the intention of the legislature to repeal must be clear and manifest . . ."⁹¹

The *Sea Clammers* Court did draw attention to the comprehensiveness of FWPCA and MPRSA enforcement schemes and reasoned that these schemes demonstrated a congressional intent to limit remedies to those expressly provided.⁹² The Court, however, did not attempt to satisfy the requirements of the *Posadas* rule, perhaps because it could not do so. FWPCA and MPRSA are hardly in "irreconcilable conflict" with section 1983, and they do not cover the "whole subject" of that section. Thus the majority seems to abandon the *Posadas* requirements and to base its conclusion on intuition alone. The Court thus found an implied repeal by being overly expansive and blithely ignoring its own precedent. Yet this same Court managed to require that an implied cause of action be supported by a clear legislative intent that must survive unusual interpretation and misquotation.⁹³ The Court has thus strained or even warped the rules of statutory construction to achieve a desired result.

under FWPCA. Unfortunately, the double-barreled holdings of the *Sea Clammers* Court—that the comprehensive remedial schemes of FWPCA and MPRSA precluded finding implied causes of action and also foreclosed section 1983 remedies—meant that neither FWPCA nor MPRSA offered a cause of action (apart from the citizen suit provisions with their notice requirements) that the savings clause of the other could preserve. Under the Court's construction of FWPCA's savings clause equally applicable to MPRSA, the clause presumably would preserve remedies arising under MPRSA and section 1983, if such remedies existed. But *Sea Clammers* decided that such remedies do not exist and therefore cannot be preserved.

87. The Court stated that Congress did not intend "to preserve" the section 1983 remedy. 101 S. Ct. at 2626.

88. *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1975).

89. 296 U.S. 497 (1935).

90. *Id.* at 503.

91. *Id.*

92. See notes 66-68 *supra* and accompanying text.

93. See note 53 *supra* and accompanying text.

CONCLUSION

In his opinion, Justice Stevens charged the majority with an overly narrow interpretation of the statutory language and legislative history of FWPCA and MPRSA, and with failure to uncover a Congressional mandate to withdraw a section 1983 remedy.⁹⁴ Justice Stevens stated that "the statutory language and legislative history reveal the exact opposite: a clear Congressional mandate to preserve all existing remedies, including a private right of action under § 1983."⁹⁵

The actual language of the savings clauses supports this view.⁹⁶ The *Sea Clammers* Court casts doubt on the integrity of its process of statutory construction by a questionable construction of the language and legislative history of the Acts. In light of its continuing reluctance to imply private rights of action in federal statutes and its apparent goal of restricting the availability of the section 1983 remedy,⁹⁷ it is evident that the *Sea Clammers* Court forced a square peg of anti-private rights doctrine through a round hole of statutory construction.

Cameron Mileham Smith

94. *Id.* at 457 (Stevens, J., concurring in part and dissenting in part).

95. *Id.* (Stevens, J., concurring in part and dissenting in part).

96. See note 24 *supra* and accompanying text.

97. See notes 46-68 *supra* and accompanying text.