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The Section 1983 Remedy and Purely Statutory Federal Rights: *Ryans v. New Jersey Commission for the Blind and Visually Impaired*

The Civil Rights Act of 1971,[1] formerly referred to as the Ku Klux Klan Act and today known as section 1983, provides a remedy for violation under the color of state law of rights "secured by the Constitution and laws."[2] For some time there was a question whether the "and laws" language of the statute provided a section 1983 remedy for violation of federal statutes generally or only for equal rights legislation passed by Congress.[3] In recent years the availability of section 1983 as a remedy for violations of purely statutory federal rights has seen two major changes. Just two years ago, in *Maine v. Thiboutot*,[4] the Supreme Court seemingly resolved the confusion by holding that a cause of action exists under section 1983 to enforce all federally created rights whether they be of constitutional or statutory origin.[5] Subsequent decisions by the Court, however, were quick to limit the broad holding in *Thiboutot*. Specifically, in *Pennhurst State School & Hospital v. Halderman*[6] and in *Middlesex County Sewerage Authority v. National Sea Clammers Association*,[7] the Court created two exceptions to section 1983's availability to enforce statutory rights.[8]

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1. 42 U.S.C. § 1983 (Supp. III 1979).

2. *Id.* Section 1983 provides:

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

Id. For a discussion of the historical development of section 1983, see generally Note, *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977).

3. *See* Maine v. Thiboutot, 448 U.S. 1, 11-34 (1980) (Powell, J., dissenting). *See generally* Note, *supra* note 2.

4. 448 U.S. 1 (1980).

5. *Id.* at 4.

6. 451 U.S. 1 (1981).

7. 453 U.S. 1 (1981).

8. *Id.* at 19. The two exceptions are "(i) whether Congress had foreclosed private

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Courts have struggled in determining whether, under the *Pennhurst* and *Sea Clammers* exceptions, section 1983 is available to enforce various federal statutes.[9] In *Ryans v. New Jersey Commission for the Blind and Visually Impaired,*[10] the United States District Court for the District of New Jersey held that section 1983 was available to remedy violations of Title I of the Rehabilitation Act of 1973.[11] This case was the first to address the issue of whether section 1983 is available to remedy violations of Title I.

I. THE *Ryans* CASE

Gerald Ryans had received services from the New Jersey Commission for the Blind and Visually Impaired for several years. Beginning in 1978, Ryans received vocational training and assistance in seeking employment until a dispute arose during the summer of 1981.[12] The Commission's Executive Director, also a defendant in the suit, notified Ryans that unless he met certain conditions—including releasing his medical records to the Commission, adhering strictly to the recommendations of his professional counselors, and ceasing his requests for help from others in dealing with the Commission—he would not be allowed to continue his participation in the program.[13]

The Commission sent a letter to Ryans on September 17, 1981, which informed him that he was entitled to a "fair hearing" if he received an adverse decision from the Commission after an upcoming "administrative review."[14] On October 1, 1981, Ryans was given his "administrative review" to discuss the conditions the Commission had established. Ryans indicated that he did not intend to comply with the conditions, and, conse-

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enforcement of that statute in the enactment itself, and (ii) whether the statute at issue there was the kind that created enforceable 'rights' under § 1983." *Id.*

9. *See, e.g.,* Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1382 (10th Cir. 1981) (§ 1983 provides a remedy for violation of § 504 of the Rehabilitation Act of 1973); Turillo v. Tyson, 535 F. Supp. 577, 581 (D.R.I. 1982) (§ 1983 not available under EAHCA); Ruth Anne M. v. Alvin Indep. School Dist., 532 F. Supp. 460, 475-76 (S.D. Tex. 1982) (§ 1983 not avilable under § 504); Tatro v. Texas, 516 F. Supp. 968, 983-84 (N.D. Tex. 1981) (§ 1983 available under EAHCA if administrative remedies exhausted).

10. 542 F. Supp. 841 (D.N.J. 1982).

11. 29 U.S.C. §§ 720-750 (1976 & Supp. V 1981).

12. 542 F. Supp. at 843-44.

13. *Id.*

14. *Id.* at 844. Title I requires each state to establish procedures to review decisions made by the rehabilitation counselor upon the request of a handicapped individual. 29 U.S.C. § 722(d) (1976 & Supp. V 1981).

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quently, the Commission later determined not to work with him further until he complied with the conditions that had been established.[15]

Ryans did not request his "fair hearing," and by a letter sent on October 15, 1981, the Executive Director informed him that because of his failure to cooperate, his file had been closed and he would receive no further services. On November 4, 1981, Ryans filed suit claiming that the defendants had violated his rights under Title I of the Rehabilitation Act of 1973.[16]

Since Title I of the Rehabilitation Act of 1973 does not expressly provide a right of action for individuals claiming that their rights under the statute have been violated,[17] the court first considered whether an implied private right of action could be asserted under Title I.[18] The court stated that the key question was "whether the nature of Title I and the circumstances under which it was passed indicate an intention on the part of Congress to permit handicapped individuals to assert a private right of action directly under the Act."[19]

The court found persuasive evidence which suggested that Congress intended not to include a judicial remedy in Title I's enforcement scheme. The legislative history of the 1978 amendments to the Rehabilitation Act indicates that Congress considered, but did not adopt, a provision that would have provided for judicial review under Title I. Because of this evidence of congressional intent not to include a judicial remedy, the court concluded that Ryans could not assert his claims under Title I by way of an implied right of action.[20]

The court next considered whether his Title I claims could be brought under section 1983. Since *Thiboutot* had held that section 1983 broadly encompasses violations of any federal statute, the court had to determine if the section 1983 claim was precluded by either the *Pennhurst* or the *Sea Clammers* exceptions. According to the *Ryans* court, these cases preclude a section 1983 remedy if "(1) the federal statute in question creates no enforceable 'rights,' or (2) Congress has created exclusive remedies for the enforcement of the statute which explicitly or

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15. 542 F. Supp. at 843-44.
16. *Id.* at 844.
17. 29 U.S.C. § 722 (1976 & Supp. V 1981).
18. 542 F. Supp. at 844-46.
19. *Id.* at 845.
20. *Id.* at 845-46.

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implicitly preclude any other form of action."[21]

Turning to the first exception, the court found that Title I clearly did create enforceable rights under section 1983. The court reached this conclusion after reviewing the specific rights for handicapped individuals and the accompanying obligations upon the states under Title I.[22]

Next, the court addressed the more difficult question of "whether the remedies now provided handicapped individuals in Title I should be deemed to be exclusive" and thus preclude Ryans from asserting his claims under section 1983.[23] The court held "that the statutory scheme created by Congress in Title I does not, by its nature, preclude a § 1983 remedy."[24] Thus, the court found that Ryans could proceed under section 1983 with his suit alleging violations of Title I of the Rehabilitation Act of 1973.

II. Analysis

The court in *Ryans* was the first to face the difficult question of determining whether section 1983 was available to enforce Title I of the Rehabilitation Act. This Note will analyze the court's application of the second exception to section 1983's availability under federal statutes: "whether Congress had foreclosed private enforcement of that statute in the enactment itself."[25]

The two tests which courts have relied on to determine whether this exception applies to preclude a section 1983 remedy—(1) whether the enforcement scheme is comprehensive enough to preclude a section 1983 remedy and (2) whether a section 1983 remedy and the statutory remedial scheme are inconsistent—are unclear and do not produce consistent results when applied to statutes such as Title I of the Rehabilitation Act. The *Ryans* court purported to use a congressional intent approach to determine whether the section 1983 remedy was foreclosed. In fact, however, the court focused heavily on the two tests other courts have relied on but gave little weight to other evidence of congressional intent such as legislative history. The intent stan-

21. *Id.* at 846.
22. *Id.* at 847.
23. *Id.*
24. *Id.* at 849 (footnote omitted).
25. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 19 (1981).

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dard found in the language of the *Ryans* court's opinion, rather than the more limited intent inquiry actually applied in *Ryans,* would be a more appropriate standard to determine if section 1983 should be precluded under this exception. The proposed standard is similar to current implied-right analysis and would be applied in a similar manner. Applying this proposed approach to Title I would result in a finding that the legislative history of Title I indicates an intent by Congress to preclude section 1983.

A. *The Existence of a Comprehensive Enforcement Scheme or of Inconsistent Remedies*

1. *Comprehensive enforcement schemes*

The approach applied by most courts since *Pennhurst* and *Sea Clammers* consists of two tests. The first of these tests is whether the enforcement scheme in the underlying statute is sufficiently "comprehensive" to be exclusive and thus precludes the section 1983 remedy.[26] The Supreme Court developed this test in *Sea Clammers,* concluding that the "comprehensive enforcement scheme" contained in the underlying statutes was meant to be exclusive and thus precluded an action under section 1983.[27] This conclusion might indicate that the touchstone of section 1983's application to any federal statute is whether the statute in question provides a sufficiently "comprehensive enforcement scheme."[28] Since the Supreme Court in *Sea Clammers* did not say what procedures or remedies constitute a "comprehensive enforcement scheme," the meaning of that test is unclear and its application produces inconsistent results. This is illustrated by contrasting the application of the test by the *Ryans* court with other applications.

In *Ryans* the court concluded that "the statutory scheme created by Congress in Title I does not, by its nature, preclude a § 1983 remedy."[29] In reaching this conclusion the court relied heavily upon its comparison of the administrative remedies con-

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26. *Id.* at 20.

27. *Id.* at 21.

28. *See, e.g.,* Uniformed Firefighters Ass'n, Local 94 v. City of New York, 676 F.2d 20, 22-23 (2d Cir. 1982); Noe v. Ambach, 542 F. Supp. 70, 72-73 (S.D.N.Y. 1982); McCroan v. Bailey, 543 F. Supp. 1201, 1208-10 (S.D. Ga. 1982); Operating Eng'rs Local Union No. 3 v. Bohn, 541 F. Supp. 486, 491 (D. Utah 1982). *See also* Manley, *The Next Thirty Years of Civil Rights Litigation,* 13 URB. LAW. 541, 557-58 (1981).

29. 542 F. Supp. 841, 849 (D.N.J. 1982) (footnote omitted).

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tained in Title I and the "highly comprehensive" remedies in the statutes underlying the decision in *Sea Clammers*.[30] The *Ryans* court observed that in *Sea Clammers* there was an elaborate enforcement scheme which included a citizen-suit provision allowing judicial review and possible injunctive relief but not damages; the court noted that Title I allowed only administrative procedures and provided for no judicial review.[31] While the administrative remedies available to an individual under Title I are perhaps not as "comprehensive" as the judicial remedy available in the statutes underlying the *Sea Clammers* decision,[32] Title I's administrative remedies are fairly detailed[33] and are more comprehensive than at least one other statute which has been found to preclude a section 1983 remedy.

In *Pennhurst State School & Hospital v. Halderman* the Supreme Court suggested that the remedies contained in the Developmental Disabilities Assistance and Bill of Rights Act (DD Act) might be sufficiently comprehensive to preclude a section 1983 action.[34] Subsequently, in *Garrity v. Gallen*,[35] the New Hampshire District Court found that section 1983 could not be invoked because "review of the enforcement mechanisms incorporated into the DD Act reveals that the remedies therein provided are exclusive."[36] The primary method of enforcement under the DD Act is the Secretary's mandate to ensure compliance.[37] In contrast to the individual administrative procedures and hearings available to aggrieved persons under Title I of the Rehabilitation Act, the DD Act provides only for the Secretary

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30. *Id.* at 848.

31. *Id.*

32. For a discussion of the enforcement schemes under the statutes involved in the *Sea Clammers* decision, see Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13-17 (1981).

33. The statute provides that the State Director shall establish procedures for the review of determinations by a counselor at the request of a handicapped individual. 29 U.S.C. § 722(d)(1) (1976 & Supp. V 1981). The Director is required to make a final decision in writing. *Id.* If the handicapped individual is not satisfied with the final decision of the Director he or she may request the Secretary to review the decision; the Secretary is required to review the decision and make recommendations to the Director as to the appropriate disposition of the matter. 29 U.S.C. § 722(d)(2) (1976 & Supp. V 1981). In addition, there is a provision which directs that funding be cut off if the state fails to comply with the statute. 29 U.S.C. § 721(c) (1976 & Supp. V 1981).

34. 451 U.S. 1, 28 (1981). It should be noted that this part of the opinion was dictum. Justice Blackmun labeled it "advisory." *Id.* at 32 (Blackmun, J., concurring).

35. 522 F. Supp. 171 (D.N.H. 1981).

36. *Id.* at 205.

37. 42 U.S.C. §§ 6000, 6065 (1976 & Supp. III 1979).

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to cut off funds if a state fails to comply with the Act. Title I's enforcement scheme would seem, therefore, to be more comprehensive than that of the DD Act, yet the DD Act has been held to preclude section 1983 actions and Title I to allow them. Furthermore, if the DD Act precludes section 1983 actions, virtually every statute, unless it is completely silent with regard to remedies, will preclude section 1983 actions as well. But in light of the relatively recent Supreme Court holding in *Thiboutot* that section 1983 applies to all federal statutes, this result is unlikely.[38]

Confusion over the meaning of "comprehensive enforcement scheme" aside, emphasizing solely the existence, or lack, of a sufficiently comprehensive remedial scheme in determining whether or not section 1983 is precluded presents certain conceptual and logical difficulties. For example, suppose Congress, in considering the water pollution and marine protection statutes underlying the *Sea Clammers* decision,[39] had determined and made clear in the legislative history that only administrative remedies should be available to enforce the statutes because citizen suits would be too costly and would hamper the enforcement of the programs. If Congress then passed the statutes, a later court decision, like the one in *Ryans*, might find that Congress did not preclude a section 1983 remedy, which includes damages[40] and attorney's fees.[41] The result becomes anomalous: Congress can foreclose a section 1983 remedy, without expressly saying so in the statute itself, only if it enacts a "comprehensive enforcement scheme," which *Ryans* seems to suggest should include a judicial remedy. Since Congress, as a practical matter, rarely makes intended remedies very explicit, the "comprehensive enforcement scheme" test would not seem to allow Congress to establish limited remedial procedures if it chose to do so.[42]

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38. One commentator, however, has concluded that § 1983 is available only when the statute provides no enforcement scheme. Mahoney, *The Prima Facie Section 1983 Case*, 14 URB. LAW. 131, 146 (1982).

39. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. V 1981); Marine Protection, Research, and Sanctuaries Act of 1972, 16 U.S.C. §§ 1431-1433; 33 U.S.C. §§ 1401-1445 (1976 & Supp. V 1981).

40. Carely v. Piphus, 435 U.S. 247 (1978).

41. 42 U.S.C. § 1988 (1976). *See generally* Note, *Promoting the Vindication of Civil Rights Through the Attorneys Fees Awards Act*, 80 COLUM. L. REV. 346 (1980).

42. The failure of Congress to indicate explicitly what remedies will be available under a particular statute has been a recurring problem which in recent years "has arisen with increased frequency." Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13 n.21 (1981).

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2. Inconsistency of remedies

The second test that courts have relied on is whether the statutory remedial scheme would be "inconsistent" with the broad remedies available under section 1983. This test had its origin in *Great American Federal Savings & Loan Association v. Novotny*.[43] In *Novotny* the Supreme Court held that Title VII's limited remedies were inconsistent with, and would be impaired by, a remedy under section 1985(c).[44] Since the Supreme Court's decisions in *Pennhurst* and *Sea Clammers*, several courts have relied on the analysis of the *Novotny* line of cases to determine whether the section 1983 remedy is precluded because it would be "inconsistent" with the remedy in the underlying statute.[45]

The court in *Ryans* relied on this consideration in support of the proposition that Title I's remedial scheme was not exclusive. The court found that since exhaustion of the administrative remedies under Title I was required before a section 1983 action could be maintained, "the availability of a § 1983 remedy will not interfere with the administrative remedies now provided in the statute."[46]

However, the facts in *Ryans* illustrate how allowing a section 1983 remedy under Title I is, as a practical matter, inconsistent with the Act. Gerald Ryans was granted an informal administrative review on October 1, 1981; he apparently declined the "fair hearing" he was entitled to, and he also did not appeal to the Federal Commission, as was his right.[47] By November 4, 1981, Ryans had filed suit and the court concluded he had "exhausted" his administrative remedies in a little over a month.[48] Given the broad section 1983 damage remedy and the availability of attorney's fees, potential plaintiffs and their attorneys have incentive to bypass the administrative remedy, as Ryans did in this case.

Another recent court decision indicates confusion concerning what would make a statutory remedy "inconsistent" with a section 1983 remedy. The Seventh Circuit in *Anderson v.*

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43. 442 U.S. 366 (1979).

44. *Id.* at 375-78.

45. *See, e.g.*, Ruth Anne M. v. Alvin Indep. School Dist., 532 F. Supp. 460, 474-75 (S.D. Tex. 1982); Tatro v. Texas, 516 F. Supp. 968, 982-83 (N.D. Tex. 1981).

46. 542 F. Supp. 841, 848 (D.N.J. 1982).

47. *Id.* at 851.

48. *Id.* at 844, 852.

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Thompson found the remedies under the Education for All Handicapped Children Act (EAHCA) to be inconsistent with section 1983: "Because we hold that the EAHCA does not contain a traditional damage remedy, section 615 cannot be given 'unimpaired effectiveness' if a section 1983 action is available for EAHCA violations."[49] Viewed in this light, Title I, which does not even provide for judicial review, should certainly be found inconsistent with the section 1983 damage remedy. Arguably, however, the logic used by the Seventh Circuit in *Anderson* would always find section 1983 "inconsistent" unless the statute in question contained the same remedies as section 1983, in which case section 1983 would not be needed. This uncertainty over the meaning of "inconsistent" remedies and the existence of some inconsistency between the section 1983 remedy and Title I's remedial scheme demonstrates that this test produces neither a clear nor a totally satisfactory result when applied to statutes such as Title I.

B. The Approach in Ryans

The approach in *Ryans* deals with legislative intent. As discussed previously, the court addressed the comprehensiveness of Title I's remedial scheme and whether it would be "inconsistent" with the section 1983 remedy. But language from the court's opinion suggests that these issues were raised as part of a general inquiry into whether Congress had intended to preclude section 1983: "The difficulty arises when, as here, Congress has not spoken clearly and efforts must be made to discern its underlying intent from the legislative history and surrounding circumstances."[50] The district court judge in *Ryans* concluded that "[v]iewing Title I as a whole, I find no Congressional intent to foreclose the assertion of a § 1983 action by a handicapped individual denied benefits under the program."[51] Despite this language from the opinion, the court's treatment of evidence of congressional intent from the legislative history of Title I demonstrates that the test applied by the court was not nearly as broad an intent inquiry as the quoted language would indicate.

The court purported to give consideration to indications of congressional intent other than the comprehensiveness of the

49. 658 F.2d 1205, 1216 (7th Cir. 1981).
50. 542 F. Supp. at 848.
51. *Id.* at 849.

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enforcement scheme in determining whether section 1983 should be precluded. During the court's analysis of whether Ryans could assert his Title I claim by way of an implied right of action, the court reviewed some of Title I's legislative history and concluded that Congress did not intend "to include a judicial remedy."[52] When determining whether section 1983 was precluded, however, the court found "no intention on the part of Congress to foreclose a § 1983 remedy for the enforcement of Title I."[53] The court explained its conclusion as follows:

> While the legislative history referred to in the previous section indicates that Congress chose not to include a civil action remedy in Title I itself, it does not suggest that Congress intended to make administrative remedies exclusive. The conference committee might equally well have chosen not to include a judicial remedy in 29 U.S.C. § 722 because it assumed that a § 1983 action was already available and would suffice.[54]

The court's reasoning seems to be flawed in at least two respects. First, it is unlikely that Congress would go to the trouble of developing administrative remedies for aggrieved individuals and also specifically decide not to include judicial review when it intended that the broad section 1983 remedy be available. Second, and more important, had Congress been aware of the case law regarding the availability of section 1983 to federal statutes, it would have known that the courts were split on whether section 1983 could be used to enforce federal statutes generally.[55] Therefore, Congress could not have known that a court would find the section 1983 remedy available, and thus it is extremely unlikely that Congress would have relied on section 1983's availability.

In addition, while the *Ryans* court would apparently accept such implicit evidence of congressional intent as the comprehensiveness of the enforcement scheme, the court would always re-

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52. *Id.* at 845.

53. *Id.* at 848.

54. *Id.*

55. *See, e.g.*, Blue v. Craig, 505 F.2d 830, 835-38 (4th Cir. 1974) (§ 1983 applicable to all federal statutory claims); McCall v. Shapiro, 416 F.2d 246, 249-50 (2d Cir. 1969) (§ 1983 only available for statutory rights providing for equal or civil rights); Wynn v. Indiana State Dept. of Pub. Welfare, 316 F. Supp. 324, 330-33 (N.D. Ind. 1970) (§ 1983 not available to enforce purely statutory federal rights). The Supreme Court had twice reserved the question of § 1983's availability to enforce purely statutory rights. Southeastern Community College v. Davis, 442 U.S. 397, 404-05 n.5 (1979); Hagans v. Lavine, 415 U.S. 528, 534 n.5 (1974).

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quire explicit legislative history indicating that section 1983 was not to be available (for example, clear language in a report on the section 1983 remedy) in order to find that the legislative history demonstrated congressional intent to preclude section 1983. Without explicit language to the contrary, it could always be argued, as in *Ryans*,[56] that if the statute was silent with regard to section 1983, then Congress assumed it to be available. The holding in *Sea Clammers*, however, that the remedial schemes in the underlying statutes were comprehensive enough to show evidence of congressional intent to preclude section 1983, would seem to demonstrate that explicit statements of congressional intent are not required in order to find that section 1983 is precluded. Indeed, a major reason for Justice Stevens' dissent in *Sea Clammers* on the availability of section 1983 was that he felt, contrary to the majority's approach, that section 1983 should be presumed to be available "unless Congress has *expressly* withdrawn that remedy."[57]

In sum, while language in the *Ryans* opinion would suggest that the court was applying a section 1983 preclusion test which focused on congressional intent, it is clear from the court's treatment of the legislative history that the test applied focused on congressional intent as evidenced by the comprehensiveness of the enforcement scheme and the consistency of the statutory remedies with the section 1983 remedy. From the standard evidenced by the decision in *Ryans*, it would seem that if Congress had adopted the judicial review provision it considered, but rejected,[57.1] section 1983 would have been precluded because the court would have found the enforcement scheme to be comprehensive enough.[58] Instead, in the face of evidence that Congress specifically chose not to include a judicial remedy under Title I, the court found the broad section 1983 remedy to be available.

56. 542 F. Supp. at 848.

57. 453 U.S. 1, 26 (1981) (Stevens, J., concurring in part and dissenting in part) (emphasis added).

57.1 *See infra* text accompanying notes 80-85.

58. *See, e.g.*, Turillo v. Tyson, 535 F. Supp. 577, 581 (D.R.I. 1982) (detailed remedial scheme under EAHCA, including a judicial remedy, found to indicate congressional intent to preclude § 1983 actions; the other remedy available under EAHCA is the withholding of funds by the Commissioner if a state fails to comply).

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C. *A Proposed Approach for Section 1983 Preclusion Analysis*

1. *Congressional intent to preclude section 1983*

It has been shown that the approach actually applied in *Ryans* relies heavily upon whether the enforcement scheme is "comprehensive" enough and whether remedies are "inconsistent" to determine if section 1983 should be precluded. This approach, however, is not compelled by a closer reading of the Supreme Court's decision in *Sea Clammers*. The Court there held that "[w]hen the remedial devices provided in a particular act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983."[59] This language suggests that a "sufficiently comprehensive" remedial scheme may be only one of the ways an intent on the part of Congress to preclude the section 1983 remedy can be shown. It is submitted that the appropriate application of this exception to section 1983's federal statutory coverage is the standard found in the language of the *Ryans* court's opinion which turns on the question of congressional intent, rather than the approach actually applied in *Ryans*.

This intent approach was suggested earlier by Justice White, who was a member of the majority in both *Thiboutot* and *Sea Clammers*. He stated in his concurring opinion in *Chapman v. Houston Welfare Rights Organization* that section 1983 applies to rights secured by federal statutes "unless there is clear indication in a particular statute that its remedial provisions are exclusive or that for various other reasons a § 1983 action is inconsistent with congressional intention."[60] Since the decision in *Sea Clammers* the federal court for the Southern District of Texas has concluded that a general intent inquiry is now the proper approach for determining whether section 1983 should be precluded: "The ultimate consideration in determining whether the deprivation of a right created by legislative enactment can be the basis of action under 42 U.S.C. § 1983 is congressional intent."[61]

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59. 453 U.S. 1, 20 (1981). Justice Stevens wrote: "[W]e must not lose sight of the fact that our evaluation of a statute's express remedies is merely a tool used to discern congressional intent; it is not an end in itself." *Id.* at 28 (Stevens, J., concurring in part and dissenting in part).

60. 441 U.S. 600, 672 (1979) (White, J., concurring).

61. Ruth Anne M. v. Alvin Indep. School Dist., 532 F. Supp. 460, 476 (S.D. Tex.

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In addition, the Supreme Court's overall treatment of the availability of section 1983 since its decision in *Maine v. Thiboutot* gives support to an intent approach. In *Thiboutot,* the Supreme Court relied on the "plain language" of section 1983 to conclude "that the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law."[62] The subsequent *Pennhurst* and *Sea Clammers* decisions indicate that there are greater limits on the scope of section 1983 as applied to federal statutory law than section 1983's "plain language" would indicate. In fact, *Pennhurst* and *Sea Clammers* have weakened *Thiboutot's* legal and historical underpinnings. It would take an incredible stretch of the imagination to assume that Congress, in enacting the Civil Rights Act of 1871, intended it to apply to all federal statutes not containing a "comprehensive enforcement scheme." There is surely nothing in section 1983's language or legislative history to suggest such a result.[63] Section 1983, therefore, seems to have become a judicially created remedy much like the implied right of action, and it would seem logical that the analysis of whether a section 1983 remedy exists should be similar to the analysis used to determine whether an implied right of action exists. The key test now under implied-right analysis is congressional intent.[64]

While a congressional intent standard will not solve all the problems involved in determining whether section 1983 is precluded,[65] it will produce more logical and consistent results than mere inquiries into the comprehensiveness and consistency of remedies, particularly when other evidence of congressional intent is available. Considering all evidence of congressional intent

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1982). *See also* Turillo v. Tyson, 535 F. Supp. 577, 581 (D.R.I. 1982) (EAHCA's comprehensive remedies imply congressional intent to withdraw the § 1983 remedy); Davis v. Maine Cent. School Dist., 542 F. Supp. 1257, 1261-62 (N.D.N.Y. 1982).

62. 442 U.S. 1, 4 (1980). In his dissent, Justice Powell asserted that the "and laws" language "was—and remains—nothing more than a shorthand reference to equal rights legislation enacted by Congress." *Id.* at 12 (Powell, J., dissenting). One commentator has suggested that on the historical evidence, Justice Powell "has by far the better argument." Howard, *The States and the Supreme Court,* 31 CATH. U.L. REV. 375, 415 (1982) (footnote omitted).

63. *See* Note, *supra* note 2, at 1137-56.

64. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13 (1981).

65. For example, if there were no clear legislative history that Congress did not intend a judicial remedy under Title I, the result of applying an intent test would be no different than the *Ryans* court's approach which this Note has argued produces an inconsistent and unclear result.

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would remove the arbitrary preference for the necessity of finding a "comprehensive enforcement scheme" or "inconsistent" remedies in order to find that Congress intended to preclude section 1983 under a particular federal statute such as Title I.

2. Comparison of implied right analysis and section 1983 preclusion analysis

After *Sea Clammers,* some commentators suggested that the analysis used to determine whether a cause of action could be implied may have merged with the analysis used to determine whether section 1983 is available.[66] Indeed, in *Sea Clammers* the Supreme Court used the same analysis to determine both questions: "We therefore conclude that the existence of these express remedies demonstrates not only that Congress intended to foreclose implied private actions but also that it intended to supplant any remedy that otherwise would be available under § 1983."[67]

While for some time the implied right analysis followed the four-factor test enunciated in *Cort v. Ash,*[68] the ultimate inquiry now is congressional intent.[69] In *Sea Clammers,* when discussing whether an implied right of action could be found under the statutes in question there, the Court outlined the approach to this intent inquiry: "We look first, of course, to the statutory language, particularly to the provisions made therein for enforcement and relief. Then we review the legislative history and other traditional aids of statutory interpretation to determine

66. Brown, *Pennhurst as a Source of Defenses for State and Local Governments,* 31 CATH. U.L. REV. 449, 456 (1982); *Municipal Liability under 42 U.S.C. 1983, Hearings before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary,* 97th Cong., 1st Sess. 406 (statement of Prof. Leon Friedman) [hereinafter cited as *Municipal Liability Hearings*].

67. 453 U.S. 1, 21 (1981).

68. 442 U.S. 66 (1975). The Court described the four factors:

> 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 (citations omitted) (emphasis in original).

69. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13 (1981).

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congressional intent."[70] The same approach would be appropriate to determine whether Congress intended to preclude section 1983.

One important difference between implied right analysis and this proposed section 1983 preclusion analysis, however, should be noted. This difference was stressed in the *Ryans* decision,[71] asserted strongly by Justice Stevens' opinion in *Sea Clammers*,[72] and supported in the language of the majority opinion in *Sea Clammers:* The section 1983 remedy, unlike an implied right of action, is presumed to exist until it can be shown that Congress intended to preclude it.[73] Accordingly, the proposed standard for section 1983 preclusion analysis can be expressed in terms of the second *Cort v. Ash* factor—which is now the controlling factor in implied right analysis—with one small, but important, change: "[I]s there any indication of legislative intent, explicit or implicit, . . . to deny [a section 1983 remedy]? . . ."[74]

3. *Applying the proposed standard to Title I*

In applying the proposed standard to Title I, it is important to consider the various indicators available to determine whether Congress intended to preclude the section 1983 remedy. As noted previously, the remedial scheme under Title I is detailed, but it is questionable whether it is "comprehensive" enough to be found exclusive.[75] It is also debatable whether Title I's remedial scheme and a section 1983 remedy are "inconsistent."[76]

Borrowing from implied right analysis, however, one may find evidence from the legislative history which makes it clear that Congress considered and rejected a judicial remedy, such as section 1983, under Title I. When Congress amended the Rehabilitation Act in 1978, it provided that the remedies contained in Title VI of the Civil Rights Act of 1964 would be available under

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70. *Id.*

71. 542 F. Supp. at 848.

72. 453 U.S. at 27 n.11 (Stevens, J., concurring in part and dissenting in part).

73. *Id.* at 20-21 n.31. The Court found that Congress intended to "foreclose" the § 1983 remedy which implies that § 1983 is presumed to be available. *Id.* at 21.

74. 422 U.S. 66, 78 (1975).

75. *See supra* notes 26-42 and accompanying text.

76. *See supra* notes 43-48 and accompanying text.

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section 504 of the Rehabilitation Act,[77] but it amended Title I differently to provide for administrative review of individual cases by the Commissioner.[78] From this the court in *Jones v. Illinois Department of Rehabilitation Services* concluded: "These amendments indicate an intention not to extend a private right of action to such cases under title I."[79]

In addition, the amendment process of Title I itself caused the court in *Ryans* to conclude that Congress did not intend a judicial remedy to enforce the statute.[80] Originally, the Act had contained no procedures for an aggrieved handicapped individual to obtain review.[81] The Senate version of the 1978 amendments would have provided an aggrieved individual an administrative hearing, an appeal to an arbitration panel, and ultimately judicial review limited to injunctive relief.[82] The House language, however, contained no procedures for review of individual complaints.[83] The Conference Committee apparently considered the procedures and agreed that administrative procedures were appropriate but that judicial review under Title I was not.[84] Congress then passed the review procedures which the Conference Committee had agreed to.[85]

These indications of congressional intent not to allow a judicial remedy under Title I, as well as the detailed administrative remedy, would be sufficient under the proposed approach to show that Congress intended to preclude a section 1983 remedy under Title I.[86]

D. *Policy Considerations of Proposed Approach*

Judges and commentators who favor an expansive judicial role in the vindication of federally created statutory rights have

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77. 29 U.S.C. § 794(a) (1976 & Supp. V 1981).

78. 29 U.S.C. § 722 (1976 & Supp. V 1981).

79. 504 F. Supp. 1244, 1251 (N.D. Ill. 1981).

80. 542 F. Supp. at 845.

81. Pub. L. No. 93-112, § 103, 87 Stat. 355 (1973).

82. H. R. Rep. No. 1780, 95th Cong., 2d Sess. 65 *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 7375, 7379.

83. *Id.*

84. *Id.* at 7379-80.

85. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 102, 92 Stat. 2955, 2959-60 (codified as amended at 29 U.S.C. § 722(d) (1976 & Supp. V 1981)).

86. Since this is evidence of congressional intent not to allow a judicial remedy under Title I, concluding that § 1983 is foreclosed is consistent with a presumption that § 1983 is available under federal statutes. *See supra* notes 70-73 and accompanying text.

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expressed disappointment over the Supreme Court's restriction of the availability of the implied right of action in recent years.[87] The Court's decision in *Thiboutot,* holding that section 1983 was broadly available to remedy violations of federal statutory law, was viewed with favor.[88] Some suggested that section 1983 could now be used to skirt the obstacles presented by restrictive implied right analysis.[89]

Those who favor such a broad judicial role in remedying violations of federal statutory law were disappointed in the restrictions placed on the availability of section 1983 in the *Pennhurst* and *Sea Clammers* decisions.[90] An approach to section 1983 preclusion analysis which was arguably more restrictive, such as the approach suggested in this Note, would hardly be looked upon with favor. Indeed, from a social policy perspective, a strong argument can be made in the instant case that Ryans, being blind and relying on the services provided under Title I, should be allowed a judicial forum in which to assert his claims.

On the other hand, the decision in *Thiboutot* was accompanied by loud criticisms that it would result in tremendous burdens upon state and local governments. In his dissent in *Thiboutot,* Justice Powell observed "that state and local government, officers, and employees now may face liability whenever a person believes he has been injured by the administration of *any* federal-state cooperative program, whether or not that program is related to equal or civil rights."[91] State and local government organizations have called on Congress to overrule or modify *Thiboutot.*[92]

It is extremely difficult to weigh the competing policy considerations in determining the proper role for section 1983 suits

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87. *See, e.g.,* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 22-26 (1981) (Stevens, J., concurring in part and dissenting in part); Comment, *Implied Causes of Action: A New Analytical Framework,* 14 J. MAR. L. REV. 141, 170-72 (1981).

88. *See, e.g., Municipal Liability Hearings, supra* note 65, at 45-46 (statement of Steven H. Steinglass).

89. *See, e.g.,* Comment, *Statutorily Based Federal Rights: A New Role for Section 1983,* 14 J. MAR. L. REV. 547, 553 (1981).

90. As Professor Friedman stated in testimony on behalf of the ACLU, "the Supreme Court having given with one hand, of course, finds a way of taking back with the other . . . ." *Municipal Liability Hearings, supra* note 65, at 405.

91. 448 U.S. 1, 22 (1980) (Powell, J., dissenting) (footnote omitted).

92. *Municipal Liability Hearings, supra* note 65, at 370-72 (National Conference of State Legislatures), 390-91 (National Association of Counties), 523 (National Association of Attorneys General).

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alleging violations of federal statutes. Much depends on one's perception of the role of the judiciary.[93] Rather than try to harmonize these conflicting views, this Note demonstrates that the proposed intent standard for determining the role of section 1983 under particular federal statutes is most consistent with logic and legal precedent. Congress, as the majority noted in *Thiboutot,* is best suited to clarify its intention concerning the scope of section 1983.[94]

III. Conclusion

The decision in *Ryans* is important because it is the first case to decide the question of whether section 1983 is available to remedy violations of Title I of the Rehabilitation Act of 1973. *Ryans* is also important because the standards the court used to determine whether section 1983 was precluded will be influential in future section 1983 claims under Title I and under other federal statutes with similar remedial schemes. The congressional intent approach articulated—but not applied—by the court in *Ryans* is the appropriate test to determine whether section 1983 should be precluded. Applying this approach results in the conclusion that the section 1983 remedy is not available to address violations of Title I of the Rehabilitation Act. Ultimately, the best solution would be for Congress to clarify the intended scope of section 1983, which it originally enacted in 1871, and also to provide a clear indication of the remedies it deems appropriate under particular federal statutes. But since this is unlikely in the near future, and until the Supreme Court provides further guidance, courts should focus on the various indicators of congressional intent—including the existence of a "comprehensive enforcement scheme," "inconsistency" of a section 1983 remedy and the statutory remedial scheme, and legislative history, as in *Ryans*—to determine whether Congress intended to foreclose a section 1983 remedy under a particular federal statute.

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93. Howard, *supra* note 62, at 392-93, 424.
94. 448 U.S. 1, 8 (1980).

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