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Federal Statutory Review Under Section 1983 and the APA

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FEDERAL STATUTORY REVIEW UNDER SECTION 1983 AND THE APA

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INTRODUCTION

Following hard on the heels of two unanimous decisions sustaining the authority of state courts to enforce federal law,[1] two more unanimous rulings at the end of the 1989 Supreme Court Term strongly emphasized their duty to do so. *McKesson Corporation v. Division of Alcoholic Beverages & Tobacco*,[2] held that the states must provide meaningful postpayment remedies for parties forced to pay state taxes that had been extracted contrary to the commerce clause,[3] and *Howlett v. Rose*[4] affirmed the existence of a nearly inescapable duty in the state courts to entertain section 1983 actions.[5] Additionally, three days after *Howlett*, the Court held in *Wilder v. Virginia Hospital Association*,[6] that the Boren Amendment to the Medicaid Act, which requires states to reimburse health care providers in accordance with rates that are " 'reasonable and adequate to meet the cost . . . incurred,' " is enforceable by providers in section 1983 actions.[7] Finally, in *Dennis v. Higgins*,[8] the Court granted certiorari to decide whether dormant commerce clause claims can be maintained under section 1983.

Against this background of unfolding opportunities for plaintiffs to vindicate their federal rights, *Golden State Transit Corporation v. City of Los Angeles*,[9] decided early in the Term, may escape much independent notice even among federal court specialists despite its likely significance.

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1. See Yellow Freight Sys., Inc. v. Donnelly, 110 S. Ct. 1566 (1990) (Title VII of Civil Rights Act of 1964); Tafflin v. Levitt, 110 S. Ct. 792 (1990) (civil RICO action).

2. 110 S. Ct. 2238 (1990).

3. See also James B. Beame Distilling Co. v. Georgia, 259 Ga. 363, 382 S.E.2d 95 (1989), cert. granted, 110 S. Ct. 2616 (1990), in which the Supreme Court granted certiorari, presumably to clarify the nature of the duty. In theory, perhaps, the duty imposed by *McKesson* might be discharged by a state administrative agency. But the practical bite of the Court's ruling is, as it was in *McKesson* itself, on the state judicial system.

4. 110 S. Ct. 2430 (1990).

5. 42 U.S.C. § 1983 (1988) provides in relevant part: "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."

6. 110 S. Ct. 2510 (1990).

7. Id. at 2516, 2518–19.

8. 234 Neb. 427, 451 N.W.2d 676 (1989), cert. granted, 110 S. Ct. 2559 (1990).

9. 110 S. Ct. 444 (1989). The Court's only other § 1983 decision during the Term came in Ngiraingas v. Sanchez, 110 S. Ct. 1737 (1990). There, the Court held that

This is, in part, because of its rather drab character. Three years earlier, the Court had construed the National Labor Relations Act ("NLRA") to preempt a municipality's effort to condition renewal of a taxi cab franchise on the franchisee's settlement of a pending labor dispute.[10] On remand, the lower federal courts obediently required franchise reinstatement, but they refused to award compensatory damages, holding that section 1983 was inapplicable to this preemption claim.[11] The Supreme Court reversed the section 1983 holding.[12] While disclaiming as "obviously . . . incorrect" any assertion that all federal preemption claims could be asserted under section 1983, a 6-3 majority found that the "federal right" created by the NLRA itself could be so enforced.[13]

Three decades before *Golden State*, *Monroe v. Pape*[14] had established section 1983 as a vehicle for affirmative enforcement of federal constitutional rights. Nearly twenty years later, *Maine v. Thiboutot*[15] did the same for federal statutory rights, when the Court held that section 1983 is not restricted to enforcing federal statutes providing for equal rights. *Golden State* magnifies *Thiboutot*'s importance; despite its disclaimer, *Golden State* confirms a general framework for section 1983 that authorizes its sweeping use not only in the preemption context but also in any case in which the plaintiff can establish the existence of a "federal right."[16] This is a matter of considerable importance given the Court's increasing resistance to implying rights of action from federal statutes.[17]

Golden State's important implications for the scope of section 1983 alone warrant a careful analysis, and this is the focus of Part I. Part II uses the division within the *Golden State* Court as a background against which to examine the uncertainty and confusion in the taxonomy and categories of analysis that sometimes surround judicial enforcement of duties imposed by federal substantive law. It discusses the need to es-

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neither the Territory of Guam nor a territorial official is a "person" within the meaning of § 1983.

10. See Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 615–19 (1986) (relying largely upon 28 U.S.C. § 158(d)).

11. See 660 F. Supp. 571, 576–78 (C.D. Cal. 1987), aff'd, 857 F.2d 631 (9th Cir. 1988), rev'd, 110 S. Ct. 444 (1989).

12. See 110 S. Ct. at 452.

13. Id. at 449–52.

14. 365 U.S. 167 (1961).

15. 448 U.S. 1 (1980).

16. *Wilder* extended the logic of *Golden State* beyond the preemption context. In *Wilder*, the entire Court functioned within the *Golden State* framework. The *Wilder* dissent was confined almost entirely to the narrow issue of whether the Boren Amendment conferred any substantive rights on health care providers. See Wilder v. Virginia Hosp. Ass'n, 110 S. Ct. 2510, 2527 (1990) (Rehnquist, C.J., dissenting). The dissent suggests by implication, however, that the dissenting justices may not be willing to apply *Golden State* expansively.

17. See infra notes 91, 96 and accompanying text.

tablish both a primary and remedial right in order to secure relief. Finally, in Part III *Golden State* is compared with judicial review under section 702 of the Administrative Procedure Act ("APA").[18] Section 1983 is customarily thought of as a "constitutional tort" statute.[19] But that vision is incomplete. Often section 1983 operates simply as a way of determining whether state officials have complied with federal statutory norms—and here the analogue is section 702, in which the issue is whether federal (rather than state) officials have transgressed federal statutory norms. *Lujan v. National Wildlife Federation*,[20] decided on the final day of the 1989 Term, shows that, despite considerable differences in the operative legal vocabulary, a framework parallel to that established by *Golden State* for review of action by state officials under section 1983 has emerged for APA review under section 702. In each context the Court must determine whether public officials have violated federal statutory duties of which the plaintiffs are "intended" rather than "incidental" beneficiaries.

I. THE *GOLDEN STATE* DECISION

Although the Court in *Golden State* decided that a federal preemption claim was enforceable under section 1983, the dissent was troubled that a federal immunity could constitute a "right" within the meaning of section 1983. But the weaknesses inherent in the dissent's analysis raise important issues that are fundamental to any inquiry into the availability of rights of action under section 1983. *Golden State* is usefully approached, therefore, by first examining the dissenting opinion of Justice Kennedy and then turning to the opinion for the Court authored by Justice Stevens.

A. *Justice Kennedy's Dissenting Opinion*

For Justice Kennedy, a claim of immunity from state action based solely upon a federal statute's preemptive effect does not create a "right" within the meaning of section 1983 because section 1983 does not include immunities resulting "solely" from the division of power in the federal system. His analysis is problematic, however, because he assumes that the district court in *Golden State* had the authority to grant injunctive relief, but not damages. Yet unless a right of action arose under section 1983 or was implied from the NLRA, it is not clear that the district court had "arising under" jurisdiction,[21] and thus any au-

18. 5 U.S.C. § 702 (1988).

19. See Monroe v. Pape, 365 U.S. 167, 187 (1961) (best known example of this notion); accord Symposium: Section 1983: The Constitution and the Courts, 77 Geo. L.J. 1441 (1989), particularly the articles by Professors Abernathy and Nahmod. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) is *Monroe*'s natural tort analogue at the federal level.

20. 110 S. Ct. 3177 (1990).

21. See 28 U.S.C. § 1331 (1988).

thority to enjoin the federally preempted conduct.

Drawing upon the celebrated analytical framework constructed by Professor Hohfeld in his series of articles beginning with *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*,[22] Justice Kennedy characterized the preemption claim as a simple claim of a federal "immunity":

> The city's lack of power gives rise to a correlative legal interest in [plaintiff] that we did not discuss in [our previous decision]. The majority has chosen to call the interest a right. I would prefer to follow the familiar Hohfeldian terminology and say that Golden State has an immunity from the city's interference with the NLRA. This terminology best reflects Congress' intent to create [a] free zone of bargaining. . . .[23]

Justice Kennedy recognized that, in terms, section 1983 embraces " 'the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.' "[24] But, for him, the "immunity" conferred by the NLRA was not one "secured" within the meaning of section 1983 because this statute does not protect "those interests merely resulting from the allocation of power between the State and Federal Governments."[25]

Justice Kennedy's appeal to the Hohfeldian distinction between rights and immunities cannot carry him very far. The Hohfeldian categories (as we shall see) lack resolving power;[26] they are entirely formal and descriptive.[27] Accordingly, they cannot inform the crucial substantive decision whether a federal immunity claim can be asserted affirmatively. Because that determination turns solely on the wishes of Congress,[28] Justice Kennedy was quickly forced to undertake a detailed examination of section 1983's legislative history and the Court's cases construing the statute.[29] The necessity for examination of the meaning of the relevant statute, not Hohfeld, is clarified by analogy to other fed-

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22. Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16 (1913); Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 26 Yale L.J. 710 (1917). Professor Hohfeld published these articles together in 1919 in a work entitled Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays. See also Corbin, Legal Analysis and Terminology, 29 Yale L.J. 163 (1919) (setting forth definitional system based on Hohfeld).

23. Golden State Transit Corp. v. City of Los Angeles, 110 S. Ct. 444, 453 (1989) (Kennedy, J., dissenting) (citations omitted).

24. Id.

25. Id. at 453–54.

26. See infra notes 110–118 and accompanying text.

27. Moreover, Hohfeld's analysis centered on the common law, and it is not evident how much this analytical system illuminates public law fields such as constitutional and administrative law. There is a considerable literature denying that public law is adequately understood through the framework of the common law categories. See P. Bator, P. Mishkin, D. Meltzer & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 79–82 (3d ed. 1988) [hereinafter, Hart and Wechsler].

28. See infra notes 51–53, 75 and accompanying text.

29. See 110 S. Ct. at 454–55.

eral statutes that are concerned with federal immunities. For example, the statute that governs the Court's appellate jurisdiction over state courts authorizes review when "any title, right, privilege or immunity is specially set up or claimed" under federal law.[30] Surely, Justice Kennedy would not believe that a Hohfeldian "immunity" claim would not qualify for the purposes of section 1257.

Justice Kennedy's rejection of the section 1983 claim left him with deep difficulties. What was the source of the district court's authority to enjoin the federally preempted conduct? Did the district court have "arising under" subject matter jurisdiction; and even if so, did the court have the authority to award an injunction? Justice Kennedy moved so quickly that he did not separate these issues.

Early in his opinion, Justice Kennedy stated that an "injured party does not need § 1983 to vest in him a right to assert [in the federal district court] that an attempted [state] exercise of jurisdiction or control violates the proper distribution of powers within the federal system."[31] He cited without elaboration such great decisions as *Gibbons v. Ogden*,[32] *Willson v. Blackbird Creek Marsh Co.*,[33] and *Cooley v. Board of Wardens*.[34] But none of these decisions involved the nature of the district court's "arising under" jurisdiction; each was rendered on appellate review of a state court judgment rejecting a federal defense and thus fell squarely within section 25 of the Judiciary Act of 1789,[35] the predecessor of present 28 U.S.C. § 1257. Only at the close of his opinion did Justice Kennedy seek to ground his claim that the district court could award equitable or declaratory relief:

> Our omission of any discussion of § 1983 [when *Golden State* was first before the court] perhaps stemmed from a recognition that plaintiffs may vindicate *Machinists* pre-emption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes. See 28 U.S.C. § 1331 (1982 ed.); 28 U.S.C.A. § 2201 (Supp. 1989); 28 U.S.C. § 2202 (1982 ed.); *New York Tel. Co. v. New York Labor Dept.*, 440 U.S. 519, 525, 99 S.Ct. 1328, 1332, 59 L.Ed. 2d 553 (1979) (plaintiff sought declaratory and injunctive relief on a *Machinists* pre-emption claim). These statutes do not limit jurisdiction to those who can show the deprivation of a right, privilege, or immunity secured by federal law within the meaning of § 1983.[36]

This analysis fails. To begin with, it does not explain why the dis-

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30. 28 U.S.C. § 1257 (1988).

31. 110 S. Ct. at 453. If § 1983 is available, the district courts automatically have "arising under" jurisdiction pursuant to 28 U.S.C. § 1331.

32. 22 U.S. (9 Wheat.) 1 (1824).

33. 27 U.S. (2 Pet.) 245 (1829).

34. 53 U.S. (12 How.) 299 (1851).

35. 1 Stat. 73.

36. 110 S. Ct. at 455.

trict court could have awarded declaratory and injunctive relief but not damages under the cited statutes. But the difficulties run deeper. Section 1331 is simply the general "arising under" jurisdictional statute; the statute merely confers jurisdiction when a plaintiff has a right of action—it does not itself create a right of action.[37] Justice Kennedy's references to the Declaratory Judgment Act,[38] are even more inapposite. That act is remedial only; it is not designed to confer any "jurisdiction," let alone to dispense with the need to establish a right of action.[39] Finally, *New York Telephone*, the only decision cited by Justice Kennedy, simply observes that (like *Golden State*) the case arose as a suit to enjoin conduct preempted by the NLRA, without commenting on the source of the federal court's jurisdiction.[40]

Perhaps because he thought the district court's jurisdiction to award equitable and declaratory relief to any preemption plaintiff so clear, Justice Kennedy made no mention of several recent decisions that seemingly did so hold. For example, in *Shaw v. Delta Air Lines*,[41] the Court said that a "plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve."[42] But if *Shaw* and similar decisions are read to establish the district courts' authority to award relief to nondamages-seeking, federal preemption plaintiffs, they provide no explanation for their result.

The difficulty with both *Shaw* and Justice Kennedy's dissent in *Golden State*, is the source of subject matter jurisdiction. *Shaw* did posit a distinction between plaintiffs claiming preemption, for whom jurisdic-

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37. See, e.g., United States v. Testan, 424 U.S. 392, 400 (1976) ("[a]s stated above, the Tucker Act is merely jurisdictional, and grant of a right of action must be made with specificity"); Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 249 (1951) ("The Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions.").

38. 28 U.S.C. §§ 2201, 2202 (1988).

39. See Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671–72 (1950); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937). This statement may need some qualification at the edges, see Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 19 n.19 (1987); Note, Developments in the Law: Declaratory Judgment—1941–1949, 62 Harv. L. Rev. 787, 802–03 (1949); infra notes 51–55 and accompanying text.

40. See New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519, 525 (1979).

41. 463 U.S. 85 (1983).

42. Id. at 96 n.14; cf. Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988) (upholding jurisdiction in declaratory judgment action based on preemption claim); Lawrence County v. Lead-Deadwood School Dist. No. 40-1, 469 U.S. 256, 259 n.6 (1985) (noting that federal court *could* exercise jurisdiction over declaratory judgment action based on preemption claim). If this dubious authority is sound, then an injunction is also proper. See 28 U.S.C. § 2202 (1988).

tion was available, and plaintiffs seeking a declaration of nonpreemption.[43] Congress could, of course, draw precisely such a jurisdictional line, and such a line possesses intuitive appeal. But whether that line reflects existing "arising under" doctrine is another matter. Under the "well-pleaded complaint" rule,[44] the existence of a federal immunity to a state law claim does not confer "arising under" jurisdiction.[45] The result should not be different simply because the immunity holder is the plaintiff. Under *Public Service Commission v. Wycoff Co.*,[46] federal court jurisdiction is not available if the plaintiff simply alleges a claim of a right to be let alone because federal statutory or constitutional law so requires.[47] There, the Court said:

> If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law.[48]

The tension between *Wycoff* and *Shaw* is obvious,[49] and has already been noted in the courts of appeals.[50] *Shaw* seems wrong, if read to permit any federal immunity holder automatic access to federal courts

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43. See 463 U.S. at 96 n.14.

44. See the line of decisions elucidating the well-pleaded complaint rule: Louisville & N.R.R. v. Mottley, 211 U.S. 149, 152, 154 (1908); 13B C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3566 (1989); infra note 45. The doctrine is not, however, of constitutional dimension. See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 494–97 (1983).

45. An illustrative case is Oklahoma Tax Comm'n v. Graham, 109 S. Ct. 1519 (1989), in which Native American tribes asserted a federal immunity to efforts by the state to collect taxes. The Court concluded that any such "immunity may provide a federal defense to Oklahoma's claims.... But it has long been settled that the existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law." Id. at 1521.

46. 344 U.S. 237 (1952).

47. See id. at 248–49.

48. Id. at 248.

49. Justice Brennan's opinion in Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 16 n.14, 19 n.19 (1983), attempts to read *Wycoff* more narrowly than the language quoted in the text justifies. Yet he also appears to endorse the *Shaw* doctrine. See id. at 20 n.20 ("a person subject to a scheme of federal regulation may sue in federal court to enjoin application to him of conflicting state regulations").

50. In Playboy Enters. v. Public Serv. Comm'n, 906 F.2d 25, 29–30 (1st Cir. 1990), cert. denied, 111 S. Ct. 388 (1990), and First Nat'l Bank v. Taylor, 907 F.2d 775, 776 n.3 (8th Cir. 1990), both of the courts noted the apparent conflict between *Wycoff* and *Shaw* and followed *Shaw*. The court's approach in *Playboy Enterprises* is particularly puzzling

for declaratory and injunctive relief. Unless Congress otherwise directs, as it has in various removal statutes,[51] generally the plaintiff must assert a right to sue in order to establish "arising under" jurisdiction.[52] That is, a plaintiff asserting a substantive federal immunity—or even a federal primary right—must also assert a remedial right of action.[53] This rule has been relaxed to the extent that the Court seems willing to permit declaratory judgment suits without insisting upon a right of action when the defendant could have maintained a coercive suit under federal law.[54] But, of course, even if the Declaratory Judgment Act permits party realignment and alteration in the timing of an otherwise proper federal court suit, that exception is not broad enough to explain jurisdiction in cases such as *Shaw* in which plaintiffs seek access to federal courts based solely on their own federal immunities.[55]

The plaintiff in *Golden State* surely satisfied the standard established under *Bell v. Hood*[56] and its progeny that a *colorable* claim of a federal right of action suffices to establish "arising under" jurisdiction.[57] But even if subject matter jurisdiction would exist for the plaintiff to seek an

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because it went on to find that § 1983 was applicable. See 906 F.2d at 31. If so, there is no doubt that arising under jurisdiction exists.

51. See, e.g., 28 U.S.C. § 1442(a)(1) (1988) (removal by federal officers); Tennessee v. Davis, 100 U.S. 257, 262–71 (1880) (sustaining constitutionality of removal statute and allowing removal by federal official asserting federal defense).

52. See, e.g., Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 249 (1951); Currie, Misunderstanding Standing, 1981 Sup. Ct. Rev. 41, 42 ("No one can sue . . . unless authorized by law to do so . . . ."); Hart & Wechsler, supra note 27, at 995. But see *Franchise Tax Bd.*, 463 U.S. at 20 n.20, 26–27 & nn. 30–31; Hart & Wechsler, supra note 27, at 1038–40, 1053–56.

53. The right of action can come from the Constitution, of course. See Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 68–70 & n.13 (1978). In principle, the right of action could also come from state law. See Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199 (1921); Hart & Wechsler, supra note 27, at 995 (Proposition B). In *Golden State*, perhaps a right of action drawn from state law would have sufficed for purposes of arising under jurisdiction (although the taxi company did not make that argument). This seems doubtful, however, after Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 813–17 (1986), which indicates judicial hostility to recognizing arising under jurisdiction on a state right of action when Congress has refused to provide a federal right of action.

54. See supra note 39 and accompanying text. Indeed *Wycoff* itself can he read to endorse jurisdiction in such a situation. See supra notes 46–48 and accompanying text.

55. The *Shaw* Court cited Ex Parte Young, 209 U.S. 123 (1908), for the proposition that "federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights." 463 U.S. at 96 n.14. But *Ex Parte Young* does not dispense with the requirement that the plaintiff assert a federal remedial right, and the Court has long been understood to have assumed such a right from the fourteenth amendment. See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 400–02 n.3 (1971) (Harlan, J., concurring); Hart & Wechsler, supra note 27, at 1181. Perhaps the Court in *Shaw* implicitly assumed the existence of an implied right of action under ERISA for preemption plaintiffs. Yet surely Justice Kennedy did not assume that the *Golden State* plaintiffs had an implied right of action under the NLRA.

56. 327 U.S. 678 (1946).

57. See Hart & Wechsler, supra note 27, at 1024–25 (collecting cases).

injunction, Kennedy's assertion that a remedy other than relief under section 1983 would be available seems unjustified. To obtain injunctive relief, the plaintiff must do more than establish a colorable claim: a right of action must actually be established before injunctive relief is appropriate.[58] For example, *California v. Sierra Club*[59] was a suit by an environmental organization and several of its members to enjoin construction of a state water project as a violation of a federal statutory prohibition on unauthorized waterway obstructions. Presumably, the complaint satisfied the requirements of *Bell v. Hood*. After extended analysis, though, the Court concluded that the relevant federal statute did not confer a private right of action on the plaintiffs.[60] The Court then declined an invitation to address the merits of the controversy notwithstanding this defect: "we cannot consider the merits of a claim which Congress has not authorized [plaintiffs] to raise."[61] Unless Justice Kennedy assumed that the *Golden State* plaintiffs possessed an implied right of action under the NLRA, his denial of a right of action under section 1983 would have left the plaintiffs without a remedy in the federal courts, despite his assertions to the contrary.

B. *Justice Stevens's Opinion: The Search for a Federal "Right"*

The Court's opinion in *Golden State*, written by Justice Stevens, deserves careful attention from three perspectives: first, its emphasis on the importance of an underlying federal right; second, its rejection of any attempt to formulate a general exclusion from section 1983 of interests that are the "sole result" of preemption; and finally, the extended reach of section 1983 confirmed, if not established, by the decision.

Analytically, the Court's opinion contains much that is satisfying. The entire opinion is cast in terms of a judicial hunt for a "federal right," which is consistent with section 1983's focus on the "deprivation of any rights" secured by federal law, and the statute's provision of

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58. Declaratory judgments and injunctions are simply remedies. The Declaratory Judgment Act has obscured this fact because one of its principal uses is to obtain negative declarations—in that respect it enlarges upon the office of the injunction. See, e.g., Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549, 573 n.41 (1947) (declaratory judgments not subject to remedial limitations governing injunctions, such as proof of irreparable injury).

59. 451 U.S. 287 (1981).

60. Id. at 292–98.

61. Id. at 298; see also Wheeldin v. Wheeler, 373 U.S. 647, 649 (1963) ("arising under" jurisdiction but no federal right of action); Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 249, 255 (1951) (same). Hart & Wechsler, supra note 27, at 1025 n.3, is correct in insisting that "notwithstanding *Bell*, there is often a complete functional congruence between the question whether the plaintiff states a valid claim of federal right and the question whether, for jurisdictional purposes, the case 'arises under' federal law."

a "remedy [that] encompasses violations of . . . [such] rights."[62] The Court recognizes that while section 1983 "must be broadly construed," the preemption plaintiff nonetheless "must assert the violation of a federal right."[63] Apparently, section 1983's additional references to "privileges or immunities" secured by federal law refer to claims that in some important way also possess the structure of "rights." This concern with the contours of a federal right is quite understandable and has its roots, in part, in article III's "case or controversy" requirement. Courts do not confer discretionary benefits; a case requires that the plaintiff assert a claim of right.[64] This means, as the Court correctly recognized, that a plaintiff seeking access to a federal court must assert more than that the federal statute expresses a congressional "preference";[65] the plaintiff must assert an interest sufficiently specific to be capable of judicial enforcement.[66]

If violation of a federal "right" can be established, section 1983 is available, the Court said, unless Congress has " 'specifically foreclosed a remedy [thereunder].' "[67] The Court then undertook an inquiry for the requisite right.[68] In a single sentence the Court denied that the supremacy clause itself could constitute a general source of rights enforceable through section 1983.[69] That clause simply states a rule of priority: valid federal law prevails over conflicting state law. By itself the clause provides no algorithm for determining when concededly

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62. Golden State Transit Corp. v. City of Los Angeles, 110 S. Ct. 444, 448 (1989).

63. Id. The need for a "right" has been expressed in earlier section 1983 decisions. See, e.g., Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 423–24 (1987). But in no prior decision does the concept dominate the opinion as it does in *Golden State*.

64. See Tutun v. United States, 270 U.S. 568, 578 (1926) ("In passing upon the application the court exercises judicial judgment. It does not confer or withhold a favor.").

65. This point was first emphasized in Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 19 (1981); see also Wilder v. Virginia Hosp. Ass'n, 110 S. Ct. 2510, 2517 (1990) (statute "creates an enforceable right unless it reflects *merely* a 'congressional preference' ") (emphasis added).

66. See *Wright*, 479 U.S. at 431–32; Former Special Project Employees Ass'n v. City of Norfolk, 909 F.2d 89, 93–94 (4th Cir. 1990).

67. 110 S. Ct. at 448 (quoting Smith v. Robinson, 468 U.S. 992, 1005, n.9 (1984)).

68. The Court's analysis here follows automatically from its preemption holding in the earlier case, Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986). In that case, the Court had implicitly held that the taxi company had a remedial right sufficient for jurisdictional purposes. That remedial right must have been based on § 1983, since it probably could not have been implied directly from the NLRA. See infra note 91 and accompanying text. The only other possible source for jurisdiction presumed by the first *Golden State* decision is the *Shaw* case, which was probably incorrectly decided as to the availability of subject matter jurisdiction without the existence of any remedial right of action. See supra notes 41–55 and accompanying text. It seems doubtful, however, that *Shaw* provided the basis for the plaintiff's right to sue because in the initial *Golden State* decision the Court did not foreclose the award of damages on remand. See 475 U.S. at 620.

69. See 110 S. Ct. at 449.

valid federal law can be asserted only as a defense, or when it can be employed also as a sword.

The heart of the Court's opinion is contained in the sentences that immediately follow its rejection of the claim under the supremacy clause. The Court first noted that

> [g]iven the variety of situations in which preemption claims may be asserted, in state court and in federal court, it would obviously be incorrect to assume that a federal right of action pursuant to § 1983 exists every time a federal rule of law preempts state regulatory authority. Conversely, the fact that a federal statute has preempted certain state action does not preclude the possibility that the same federal statute may create a federal right for which § 1983 provides a remedy.[70]

This reasoning led to the following formulation:

> In all cases, the availability of the § 1983 remedy turns on whether the statute, by its terms or as interpreted, creates obligations "sufficiently specific and definite" to be within "the competence of the judiciary to enforce," *Wright*, 479 U.S., at 432, . . . *is intended to benefit the putative plaintiff*, and is not [specifically] foreclosed . . . .[71]

Turning to the task of applying these principles, the Court found that the "nub of the controversy" turned on whether the NLRA created "rights" in labor and management that are "protected . . . against governmental interference,"[72] and it answered that question affirmatively.[73]

The Court is surely correct that federal statutory preemption of state action "does not preclude the possibility that the same statute may create a federal right for which § 1983 provides a remedy." But care must be taken to see the precise work that the concept of "right" does here. Congress could confine assertion of a federal immunity claim to a defense in a state law enforcement proceeding; indeed, federal preemption claims often work precisely that way. But *Osborn v. Bank of the United States*[74] long ago established that Congress also can invest the

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70. Id.

71. Id. (emphasis added).

72. Id.

73. See id. at 449–52. While for our purposes we can assume that the Court has correctly analyzed the NLRA, the opinion does seem to involve some shift in reasoning. In the previous *Golden State* opinion, the Court held that § 8(d) of the NLRA, as amended, 29 U.S.C. § 158(d), preempted the city policy. See Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 616–19 (1986). But on this occasion, the Court seemed to locate the right enforceable by § 1983 not in § 8(d) but in the NLRA's general structure. See 110 S. Ct. at 450–52.

74. 22 U.S. (9 Wheat.) 738 (1824). In *Osborn*, the Court held that the United States Bank can sue to enjoin state officials from collecting a state tax to which the Bank is immune. While the *Osborn* Court paid insufficient attention to the issue, it seems to have assumed that the existence of a specific jurisdictional statute supported the bank's right to press affirmatively its federal preemption claim. See id. at 817–18.

federal immunity shield with the character of a sword—unconstrained by legal abstractions such as "rights" and "immunities." Congress need only make clear its will.[75]

As section 1983 itself shows, terms such as "rights" are the familiar staples of the legal structure and are frequently employed by Congress. Without contrary Congressional direction, courts should be expected to interpret legislation within the familiar framework. But more specifically, when a section 1983 action is filed in a federal court, that court's recognition of a federal "right" will be important in two ways: in *Golden State*, for example, the existence of a federal "right" under the NLRA meant jurisdictionally that "arising under" jurisdiction was incontestable;[76] substantively, it allowed for the award of damages and attorneys fees.[77]

C. *Scope of the* Golden State *Decision*

1. *Of Personal Rights and Federalism.* — In *Golden State*, the Court stated that "it would obviously be incorrect" to conclude that section 1983 is available "every time a federal rule of law preempts state regulatory authority." This conclusion followed, the Court said, because of "the variety of situations in which preemption claims may be asserted, in state and in federal court . . . ."[78] Seemingly, this perception would instruct the Court that in each case judicial consideration must be focused upon context-specific factors such as the extent to which affirmative challenges would disrupt state programs and the need for affirmative enforcement. Instead, however, the Court immediately fashioned a general approach that is unconnected to any of the restrictive implications of its reasoning: unless specifically displaced, section 1983 is available to any plaintiff with a federal right to enforce federally established legal duties. Put differently, despite its disclaimer, the Court does *not* treat preemption claims differently from any other claims raised by a section 1983 plaintiff.

At the center of the differences between the dissent and the Court is Justice Kennedy's effort to distinguish the treatment of preemptive claims from other section 1983 claims. For him, section 1983 requires

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75. See Franchise Tax Bd. v. Construction Lahorers Vacation Trust, 463 U.S. 1, 18 n.17 (1983); text accompanying supra notes 51–52; infra note 125 and accompanying text.

76. See American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916) ("[a] suit arises under the law that creates the cause of action"); Hart & Wechsler, supra note 27, at 995 (Proposition A).

77. Note that if the Court's presumption in the earlier *Golden State* case that the plaintiff properly asserted a remedial right of action was based on *Shaw* rather than § 1983, see supra note 68, then the Court's § 1983 holding in the second case is only meaningful because it adds damages and the possibility of recovering attorneys' fees pursuant to 42 U.S.C. § 1988 (1988).

78. 110 S. Ct. at 449; see also text accompanying supra note 70 (where the passage under discussion is quoted in full).

that the plaintiff assert some identifiable "plus" apart from the simple existence of the preemptive federal law—federal property entitlements would qualify, such as the right to a particular rent calculation or to social security benefits.[79] Justice Kennedy also believed that section 1983 embraced cases like *Monroe v. Pape*,[80] because the official conduct challenged in these cases "constitutes only an element in the primary wrong that the injured party seeks to vindicate."[81] But section 1983 would not include federal statutory interests that are "the sole result of the [federal] statute's preemptive effect."[82] These interests reflect only the appropriate distribution of power between the nation and the states; they do not establish the kind of "personal interest" secured by section 1983.

To my mind, Justice Kennedy's attempt to isolate interests that are "the sole result" of preemption is unconvincing. He cited no convincing historical support for his analysis,[83] and without such a basis no other principled difference between *Monroe* and *Golden State* appears.[84] In each case, the plaintiff seeks damages complaining that state officials have interfered with a federally secured right to be let alone. Justice Kennedy seems to have unconsciously assumed that the interests protected by the common law of torts (at issue in *Monroe*) implicate section 1983 but not those protected by the common law of contracts (at issue in *Golden State*). Why that should be so is never made clear in his opinion. More fundamentally, in seeking to identify interests that are "the sole result" of federal preemption, Justice Kennedy fails to recognize that every claim against state officials based upon federal regulatory or entitlement law is, in the end, "the sole result" of federal preemption. If the otherwise applicable state rule (a rule of no recovery) is displaced, it is only because it has been displaced by valid federal law.[85]

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79. See 110 S. Ct. at 454.

80. 365 U.S. 167 (1961).

81. 110 S. Ct. at 455.

82. Id. at 454. Of course, the Court partially agrees. It requires the existence of a "right."

83. See id. The sparse historical analysis Justice Kennedy cited refers only to § 1983's reach with respect to constitutional claims. See id. (quoting Remarks of Rep. Shellabarger, Cong. Globe, 42d Cong., 1st Sess. 317 (1871)). Moreover, he acknowledged that "[o]ur cases in recent years have expanded the scope of § 1983 beyond that contemplated by the sponsor of the statute. . . ." Id.

84. Justice Kennedy's endorsement of the use of § 1983 in the rent calculation and social security benefit cases is discussed supra text accompanying note 79 and infra text accompanying note 159.

85. Thus, in *Howlett v. Rose*, an opinion Justice Kennedy joined, § 1983 was held to preempt a state rule that accorded a sovereign immunity defense to a local school board. See 110 S. Ct. 2430, 2442–45 (1990). The state rule will be displaced whether the immediate source of preemption is a federal statute, a federal administrative rule, or the federal Constitution itself. I put to one side those areas, if any, in which state law ceased to operate at all because of the Constitution. See generally Hill, The Law-Making Power of the Federal Courts: Constitutional Preemption, 67 Colum. L. Rev. 1024, 1030–68 (1967) (discussing areas in which the Constitution itself forecloses state action).

Stripped of historical support, Justice Kennedy needs some theory to support his distinctions. That theory will be hard to come by; indeed no coherent theory seems plausible. Consider in this context the question to be argued in *Dennis v. Higgins*:[86] whether section 1983 is available to vindicate a dormant commerce clause claim. Presumably, for Justice Kennedy the "immunity" conferred by the clause is not "secured" by section 1983; the commerce clause is concerned with the appropriate distribution of power between the nation and the state and thus does not involve the kinds of personal rights embraced by section 1983. But the "and thus" is a *non sequitur*; the purported dichotomy between distribution of power and personal rights issues is illusory.[87] For the Framers and well into the nineteenth century the power-allocating provisions of the national constitution (federalism and separation of powers) were thought to be important structures for maximizing individual liberty.[88]

If section 1983 does not embrace commerce clause claims, another round of analysis will be called for: for what rights secured by the Constitution does section 1983 make available a remedy? The Court then also must consider the full implications of its decision in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*[89] on the duty of the states to provide adequate remedies for state violations of federal constitutional commands.[90]

2. *Scope of Section 1983.* — In *Golden State*, the Court does not suggest that the NLRA itself satisfied the four criteria established by *Cort v. Ash*[91] for judicial recoguition of implied rights of action. If it had, "arising under" jurisdiction (and the award of an injunction and compensatory damages) could have been predicated on that basis alone,

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86. 234 Neb. 427, 451 N.W.2d 676, cert. granted, 110 S. Ct. 2559 (1990).

87. Interestingly, however, an analogous distinction has surfaced in academic writing on the measure of damages in § 1983 actions for constitutional violations. See Nahmod, Constitutional Damages and Corrective Justice: A Different View, 76 Va. L. Rev. 997, 1000, 1011–17 (1990) (criticizing efforts to exclude damages when the constitutional violation causes only "systemic" injury).

88. See, e.g., United States v. Munoz-Flores, 110 S. Ct. 1964, 1970–71 (1990) (separation of power); Federalist No. 84 (A. Hamilton); see also Monaghan, Book Review, 94 Harv. L. Rev. 296, 308–11 (1980) (discussing relationship between constitutional structure and individual liberty). Moreover, Justice Kennedy's argument seems to be, at bottom, in tension with Wilder v. Virginia Hosp. Ass'n, 110 S. Ct. 2510, 2518–19 (1990), which held that health care providers could challenge state reimbursement rates for Medicaid under § 1983. It is difficult to see a suit challenging a state rate structure resonating in conventional "personal right" terms.

89. 110 S. Ct. 2238 (1990).

90. See id. at 2247, 2258; Amar, Of Sovereiguty and Federalism, 96 Yale L.J. 1425, 1519 (1987) (stressing duty of states to provide remedies for violation of federal commands).

91. 422 U.S. 66, 78 (1975). The four factors have been reduced to the question of legislative intent, and the Court has shown ever hardening resistance to the implication of such rights. See, e.g., Karahalios v. National Fed'n of Fed. Employees, Local 1263, 109 S. Ct. 1282, 1286–87 (1989).

without need for any reference to section 1983.[92] In *Wilder v. Virginia Hospital Association*,[93] both the Court and the dissent render explicit what *Golden State* assumed: section 1983's availability turns only on whether federal statutory law creates a "primary" right, even though the federal law does not otherwise establish a "remedial" right (i.e., a right of action). In a footnote in *Wilder*, the Court noted that the availability of section 1983 presents "a different inquiry" from that involved in implied right of action analysis.[94] Chief Justice Rehnquist, dissenting, agreed on this point. He observed that the Court's section 1983 jurisprudence in effect reduced *Cort v. Ash*'s four factors to its first: did the "statute[] contain a right 'in favor of' the particular plaintiff."[95] This observation serves to highlight *Golden State*'s importance because judicial resistance is hardening against implication of rights of action.[96]

Golden State thus "completes the process of divorcing section 1983 from its historical [and rights] roots and directs the focus of future cases away from the availability of a section 1983 cause of action and toward the scope of the right asserted under a particular constitutional or statutory provision."[97] Section 1983 is, of course, unavailable if Congress has "specifically" foreclosed the remedy.[98] But both *Golden State* and *Wilder* shore up the intimations in prior case law that this limitation is exceedingly narrow.[99] Implied preemption of a section 1983 remedy on the basis of the assertedly comprehensive nature of the remedial scheme created by the federal legislation is not favored; indeed,

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92. Unless itself foreclosed by the statute creating the right, § 1983 would simply provide a parallel basis for relief. But the availability of § 1983 is important because counsel fees are available to successful § 1983 litigants under 42 U.S.C. § 1988 (1988). Moreover, § 1983 authorizes punitive damages. See Smith v. Wade, 461 U.S. 30, 34–38 (1983).

93. 110 S. Ct. 2510 (1990).

94. Id. at 2517 n.9.

95. Id. at 2526. This is not quite accurate because Chief Justice Rehnquist reformulates the first *Cort* factor by omitting "*especial*." *Cort* asks, "is the plaintiff 'one of the class for whom *especial* benefit the statute was enacted.' " 422 U.S. at 78 (quoting Texas & Pacific R. Co. v. Rigsby, 241 U.S. 33, 39 (1916)); accord supra note 91 and accompanying text.

96. See Hart & Wechsler, supra note 27, at 948–49; supra note 91. Of course, the remaining three *Cort* factors retain importance with respect to suits against persons not subject to § 1983.

97. The Supreme Court, 1989 Term, Leading Cases, 104 Harv. L. Rev. 129, 340 (1990). The commentator suggests that by depriving § 1983 of its "special" quality, all § 1983 actions may become more vulnerable to judge made door-closing doctrines such as abstention. See id. at 347–48.

98. See supra text accompanying note 71.

99. Compare Wright v. City of Roanoke Redev. & Hous. Auth., 479 U.S. 418, 423–29 (1987) (holding that complex enforcement scheme of Brooke Amendment to Housing Act did not foreclose a parallel § 1983 remedy) with Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13–18 (1981) (intent to foreclose § 1983 found in comprehensive remedial scheme provided by Congress, which itself provided for private actions).

Wilder pointedly observed that "only on two occasions" had the Court held that the section 1983 remedy was foreclosed on these grounds.[100]

Golden State closes any Hohfeldian gap between primary federal statutory rights and section 1983 rights of action. The latter follows simply from the existence of the former. Apart from article III's requirements of injury in fact, causation, and redressability,[101] the only limiting principle on the apparent sweep of section 1983 in enforcing federal legal obligations is the Court's statement in *Golden State* that section 1983 "may not be available" when the plaintiffs are benefited "only as an incident of the federal scheme of regulation."[102] "May not" is more than that; as *Wilder* demonstrates, whether a plaintiff is categorized as an intended or an incidental beneficiary determines whether or not that plaintiff has a primary federal right.[103]

> We must therefore determine whether the Boren Amendment creates a "federal right" that is enforceable under § 1983. Such an inquiry turns on whether "the provision in question was intend[ed] to benefit the putative plaintiff." . . . If so, the provision creates an enforceable right unless it reflects merely a "congressional preference" for a certain kind of conduct rather than a binding obligation on the governmental unit, . . . or unless the interest the plaintiff asserts is "too vague and amorphous" such that it is " 'beyond the competence of the judiciary to enforce.' "[104]

The term "right" contained in section 1983, therefore, expresses the crucial conclusions with respect to whom are owed the legal duties created by federal statutes.

II. Of Primary and Remedial Law

Golden State's search for an underlying "federal right" draws not only on section 1983's explicit language but on currents deeply embedded in our legal and political culture. Apostolic authority instructs us

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100. See *Wilder*, 110 S. Ct. at 2523 (referring to *National Sea Clammers Ass'n*, and Smith v. Robinson, 468 U.S. 992 (1984)).

101. See, e.g., Lewis v. Continental Bank Corp., 110 S. Ct. 1249, 1253–54 (1990); Warth v. Seldin, 422 U.S. 490, 505 (1975).

102. Golden State Transit Corp. v. City of Los Angeles, 110 S. Ct. 444, 450 (1990).

103. To the extent that the distinction between intended and incidental beneficiaries depends upon a determination of congressional intent, it may impose quite a significant limit on the availability of § 1983 after *Golden State*. See, for example, the reasoning of the *Wilder* dissent, infra note 104.

104. *Wilder*, 110 S. Ct. at 2517 (citations omitted). In *Wilder*, the Court divided 5–4 on whether the Boren Amendment to the Medicaid Act created legal rights in health care providers. Apparently acknowledging that the amendment created legal obligations, the dissent denied that it conferred "any substantive rights on Medicaid services providers." Id. at 2527 (Rehnquist, C.J., dissenting). They were simply incidental beneficiaries of any legal obligations established by the amendment, which were matters between the state and national government alone. The dissent also argued that if any private rights were created, they were of a procedural, not substantive, nature. See id.

that "the province of the court is, solely, to decide on the rights of individuals."[105] More important here, the judicial fixation on a search for and articulation of the relevant "federal right" is an analytic approach that not only has powerful cultural appeal but also is quite useful for the concrete needs at hand.[106] Nonetheless, uncertain use of familiar legal terms can cause unnecessary confusion. For example, "cause of action" is a term thought to possess such intractable difficulties tbat it was banished from the Federal Rules of Civil Procedure.[107] Of course, the effort failed; the term persists in the working vocabulary of lawyers and judges with the tenacity of original sin.[108] More to the point here, the term "right" is susceptible to particular uncertainty because it is "incorrigibly multifarious in actual usage."[109] For example, to state that *A* has no right against *B* may carry either of two different meanings: *A* lacks a primary right against *B*, or *A* has such a primary right but no remedial right. Thus, an important distinction exists between primary and remedial law.

A. *Primary Law*

Primary law concerns the "authoritative directive arrangements"—or more simply, the legal rules—that govern persons independently of litigation.[110] In this domain, concepts such as "rights," "duties," "immunities," and "powers" simply describe the various "characteristic positions" held by persons in relationship to one another.[111] "Duty" plays a pivotal role: active in character, this term describes the position of a person who is legally required to act, not to act, or to act only in a certain way.[112] Surprisingly, perhaps, at first blush "primary right" seems to be a theoretically uninteresting concept: wholly passive, it simply mirrors the primary duty. "[A] 'right,' if spoken of with Hohfeldian accuracy, is a position which a person has because someone else has a duty in the performance of which the right-holder is . . . *inter-*

105. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

106. For example, in Howlett v. Rose, 110 S. Ct. 2430 (1990), the Court described § 1983 as a federal remedy, a federal right, a federal right of action, and a federal cause of action—but the differing taxonomy did not at all impede the Court's measured consideration of the fundamental institutional issue before it.

107. See United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724 (1966).

108. For examples of the persistence of the confusion caused by the term, see Note, Claim Preclusion in Modern Latent Disease Cases: A Proposal for Allowing Second Suits, 103 Harv. L. Rev. 1989, 1991–95 (1990).

109. Hart & Sacks, 1 The Legal Process: Basic Problems In the Making and Application of Law 151 (tent. ed. 1958). At the remedial level, the concept of duty also plays a role. Ordinarily, however, in the civil area it simply restates the primary right. Of course, that need not be the case, as the numerous decisions awarding treble and punitive damage show. See, e.g., Smith v. Wade, 461 U.S. 30, 34–38 (1983) (punitive damages may be awarded in a "proper case" in a § 1983 action).

110. Hart & Sacks, supra note 109, at 142.

111. Id. at 141–42.

112. Id. at 145.

ested."[113] This perception contains much that illuminates.[114] *Golden State* itself makes apparent the passive, reflective character of a primary right. For all its emphasis on the need to establish the existence of a "right," the Court's description of what that meant was repeatedly cast in terms descriptive of the kind of obligations imposed on the putative duty holder:

> In deciding whether a federal right has been violated, we have considered whether the provision in question creates obligations binding on the governmental unit or rather "does no more than express a congressional preference for certain kinds of treatment." The interest the plaintiff asserts must not be "too vague and amorphous" to he "beyond the competence of the judiciary to enforce." We have also asked whether the provision in question was "inten[ded] to henefit" the putative plaintiff.[115]

The Court's reasoning correctly assumes the need to establish hoth (a) the existence of a legal obligation, and (b), the "persons" to whom the obligation is owed: the "what" and the "to whom." The latter can be one person, several, or the entire population. From this perspective, the judicial concern with primary right draws attention to the "to whom" issue—the persons who *in a legally cognizable sense* are "interested" in the duty holder's discharge of his obligations. The effort (exemplified in both *Golden State* and *Wilder*) is to capture a distinction between those who are "incidental" beneficiaries of federal programs imposing duties and those who are intentionally protected. To be sure, this inquiry can be, and has been, extracted from the concept of duty—*A* owes a duty to *B* but not to *C*—but the Court's inquiry into the federal "right" is a way of highlighting the important fact that duties imposed by federal law are not necessarily owed to the public at large.

The word *federal* is properly underscored, at least initially. One could argue that the American political tradition supports, even though it may not require, a theory of judicial recognition of federal primary rights more restrictive than that applied at the state law level.[116] This position might be defended as a residual aspect of our constitutional tradition of a national government of (theoretically) limited powers, or, perhaps more persuasively, as expressive of an appropriate federal ju-

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113. Id. at 150 (emphasis added).

114. Hart and Sacks argue that there is comparatively little need for the concept of primary right in private law, see id. at 153, but that "the concept of private right has an important and highly distinctive role in the analysis of relations between private persons and [public] officials." Id. at 153 n.7. That demonstration is never made, however.

115. Golden State Transit Corp. v. City of Los Angeles, 110 S. Ct. 444, 448 (1989) (citations omitted).

116. The actual content of this restrictive theory remains unclear. But see Thompson v. Thompson, 108 S. Ct. 513, 523 (1988) (Scalia, J., concurring) (advocating "a flat rule that private rights of action will not be implied in statutes hereafter enacted").

dicial role grounded in separation of powers concerns. Any such contention is, however, misplaced. Claims of excessive judicial lawmaking made in the context of criticizing the propriety of implying rights of action[117] seem unpersuasive: perhaps judicial establishment of new primary duties invades the legislative prerogative, but fashioning remedial rights hardly seems to rise to that level. In any event, whatever the merits of implying a right of action, this dispute has no relevance to deciding whether the legislature has created a primary right.

When both the duty and a general right of action (section 1983) have been established by Congress, no persuasive claim of excessive lawmaking exists because the Court discharges an ancient task in determining whether *A* is an intended, rather than an incidental, beneficiary.[118] In the area of primary rights, there seems to be no reason to impose unusual restrictions on the courts that interpret the will of Congress.

B. *Remedial Law*

Section 1983 is, of course, an express right of action, and *Golden State* and *Wilder* close the gap between primary right and remedial right, making the existence of the former determinative of the existence of the latter.[119] This development is important because the existence of a primary right entails no necessary conclusion that the right holder can sue.[120] To sue, a plaintiff must establish the existence of a remedial right, a right of action in the traditional language:[121]

> A right of action is a species of power—of remedial power. It is a capacity to invoke the judgment of a tribunal of authoritative application upon a disputed question about the application of preexisting arrangements and to secure, if the claim proves to be well-founded, an appropriate official remedy.[122]

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117. See Cannon v. University of Chicago, 441 U.S. 677, 730 (1979) (Powell, J., dissenting).

118. In the *Golden State* situation, the existence *vel non* of the primary right determines whether a remedial right exists. See infra text accompanying note 119 But the remedial right, § 1983, was created by Congress, so the excessive lawmaking argument is inapplicable.

119. See supra notes 101–104 and accompanying text.

120. Indeed, the violation of the duty may have no consequences even in an enforcement proceeding against the right holder. See, e.g., United States v. Montalvo-Murillo, 110 S. Ct. 2072, 2077 (1990).

121. The right of action might be expressly conferred, or it might be implied if the four criteria set forth in Cort v. Ash, 422 U.S. 66 (1975), are met. See supra notes 91–96 and accompanying text.

122. Hart & Sacks, supra note 109, at 154. Earlier, Hart and Sacks described a power as a situation in which the law offers a person "positive assistance" by imposing duties on others to respect the power-holder's decisions. "A power may be defined as a capacity, either singly or in concert with one or more others, to effect by a deliberative act a settlement of a question of group living which will be accepted and enforced by the official representatives of the group." Id. at 148–49.

But the beneficiary of a primary right may not possess a right of action: there may be no express action and one may not be implied; alternatively, any right of action may inhere only in a public official.[123]

Distinguishing among rights, rights of action, and remedies helps illuminate some issues, particularly issues arising in the context of "Our Federalism." For example, in a diversity case how shall we understand the respective relationship between state and federal law? Clearly, both the underlying duty and the right of action are drawn from state law. But what of the remedy? It is possible, but rather awkward, to conceive of the federal court as awarding a "state law remedy." For me, the federal court simply supplies a federal remedy to enforce a state-created right of action. This formulation better captures our understanding that state law cannot authorize the award of remedies beyond those authorized by Congress,[124] but Congress may enlarge remedies beyond what state law authorizes.[125] Similarly, section 1983 simply provides a minimum remedy, available in federal and state courts, to enforce many federally-created rights.[126]

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123. It is possible to argue that a primary right has little value if the right holder has no right of action and hence no power to enforce the right. In reality, however, the existence of the primary right generally presupposes some remedy against the duty holder for breach of duty, even though the right holder may not have a remedial "sword" himself. For example, before *Bivens*, fourth amendment rights were enforceable, not only as a "shield"—a defense to a criminal prosecution—but also under state law.

I should add here that judicial references to the existence of the "cause of action" created by section 1983 are operationally equivalent to the assertion that section 1983 is available because the plaintiff has claimed both the existence of a legal duty and a primary right in the plaintiff's favor. To that extent at least, the term's persistence is ordinarily quite harmless. See, e.g., Wilder v. Virginia Hosp. Ass'n, 110 S. Ct. 2510, 2516 (1990).

124. See Pusey & Jones Co. v. Hanssen, 261 U.S. 491, 497–99 (1923). As *Pusey & Jones* itself illustrates, this will often entail a difficult determination of whether the state law created a new substantive right or simply an additional remedy. Compare *Pusey & Jones*, 261 U.S. at 498 (state statute conferred remedy so enforcement in federal court denied) with Guardian Sav. & Trust Co. v. Road Improvement Dist. No. 7, 267 U.S. 1, 6–7 (1925) (state law created new right).

125. See Skelly Oil Co. v. Phillips Petroleum Co. 339 U.S. 667, 674 (1950) (fact that "the declaratory remedy which may be given in the federal courts may not be available in the state courts is immaterial"). In my view, Congress could constitutionally reinstate the equitable remedial rights doctrine established by Guffey v. Smith, 237 U.S. 101 (1915). The logic of McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 421 (1819), which was cited in Hanna v. Plumer, 380 U.S. 460, 472 (1965), seems to me to be controlling. The power of Congress to establish courts subsumes the power to enact rules that are rationally classifiable as procedural or remedial. See Wayman v. Southard, 23 U.S. (10 Wheat) 1 (1825), which, unless abandoned, completely settles the point; accord Ely, The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693, 700–06 (1974). Thus, to the extent that Allstate Ins. Co. v. Charneski, 286 F.2d 238 (7th Cir. 1960), indicates that Congress lacks the power in a diversity case to give "juster justice," it is wrong.

126. In Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 238 (1969), the Court casually characterized the state court as awarding "a federal remedy" when enforcing the implied right of action created by 42 U.S.C. § 1982. This description is unsound. In

III. SECTION 1983 AND THE APA[127]

Golden State should be compared with developments that have now taken hold in the area of standing under section 702 of the Administrative Procedure Act ("APA") to obtain judicial review of the compliance of federal officials with federal statutory commands.[128] There is, however, a natural resistance to undertaking such a comparison. Our reflex is to think of section 1983 as involving trial oriented litigation in which plaintiffs seek damages caused by "constitutional torts" like assault, battery, and defamation, with issues of sovereign and official immunity sharply arising. On the other hand, APA review appears to involve the quite different task of judicial review of the compliance of federal officials with federal norms. In fact, however, as both *Golden State* and *Wilder* illustrate, much section 1983 litigation after *Maine v. Thiboutot*[129] is at bottom no more than judicial review of the compliance of state (rather than federal) officials with federal statutory norms. And in both cases the Court distinguishes between "intended" beneficiaries, who may sue, and "incidental" beneficiaries, who may not.

A. *A Comparison Between Section 1983 and APA Section 702*

To the extent that section 1983 functions like section 702, a methodological comparison is warranted. The most important barrier to that undertaking is the differences in the operative vocabulary. Section 702 replaces familiar section 1983 (Hohfeldian) terminology such as right, duty, and right of action with a provision stating that any "person suffering legal wrong . . . or adversely affected or aggrieved by agency

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enforcing federal rights the state courts are not simply transformed into federal courts. Like state court jurisdiction and state court rules of procedure, the remedy awarded has its ground in state law: "federal law sets certain minimum [remedial] requirements that States must meet but may exceed in providing appropriate relief." American Trucking Ass'ns, Inc. v. Smith, 110 S. Ct. 2323, 2331 (1990). Although state courts may be obliged to entertain jurisdiction and to provide a remedy materially parallel to the federal remedy, see Howlett v. Rose, 110 S. Ct. 2430, 2439 (1990), federal preemption of state jurisdictional, procedural, and remedial rules to the extent that they obstruct enforcement of federal law does not *pro tanto* transform the character of the state courts. See id. at 2440 n.17. Precisely this same understanding underlies the Court's decision in McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 110 S. Ct. 2238 (1990), which did not involve § 1983, but did stress the independent duty of state courts to provide remedies adequate to enforce federal constitutional commands: "The State is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined." Id. at 2258.

127. Part III of this Article benefitted from conversations with my colleagues Richard Pierce and especially Peter Strauss.

128. The term "standing" itself seems to have become common in legal usage only in this century. See J. Vining, Legal Identity: The Coming of Age of Public Law 55 (1978). APA "standing" litigation developed historically before Monroe v. Pape, 365 U.S. 167 (1961), made section 1983 important. But, like § 1983, most standing concerns involve the attempted use of federal substantive law as a sword.

129. 448 U.S. 1 (1980). See supra note 15 and accompanying text.

action within the meaning of a relevant statute, is entitled to judicial review thereof."[130] But the language differences mask important structural similarities between section 1983 and section 702. In Hohfeldian terms, like section 1983, section 702 provides a general "right of action." Like section 1983, it, too, is available even though there is no other express or implied right of action.[131] Also like section 1983, it embodies the important distinction between primary and remedial law. And, as *Lujan v. National Wildlife Federation*[132] shows, section 702, like section 1983, ultimately requires distinguishing between intended and incidental beneficiaries.

Lujan originated as a challenge by an environmental group to federal agency decisions permitting increased mining on public lands. After noting that no claim of an implied right of action had been made, the Court said that plaintiff's standing depended upon a demonstration that it was "adversely affected or aggrieved by agency action. . . .":[133]

> the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the "zone of interests" sought to be protected by the statutory provision whose violation forms the legal basis for his complaint. See *Clarke v. Securities Industry Assn.*, 479 U.S. 388, 396–397. . . . Thus, for example, the failure of an agency to comply with a statutory provision requiring "on the record" hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be "adversely affected within the meaning" of the statute.[134]

This inquiry is substantially parallel to that required by *Golden State*: the section 1983 plaintiff must establish the existence of a duty of which she is an intended beneficiary.[135] *Clarke*, cited by the Court in *Lujan*, had noted that the APA standing test is more liberal than the standard for implying a private right of action in cases in which the APA is inapplicable; the latter requires the plaintiff to show membership in a "class for whose *especial* benefit the statute was enacted."[136] Although "especial" is not a requirement under section 702 of the APA (or of section

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130. 5 U.S.C. § 702 (1988). Here I refer to the line of standing decisions generated by Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970) and Barlow v. Collins, 397 U.S. 159 (1970).

131. See Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 400–01 n.16 (1987).

132. 110 S. Ct. 3177 (1990).

133. Id. at 3186.

134. Id.

135. National Fed'n of Fed. Employees v. United States, 905 F.2d 400, 405–06 (D.C. Cir. 1990), is unusual in that it ignores this dimension in discussing review under the APA.

136. *Clarke*, 479 U.S. at 400–01 n.16 (quoting Cort v. Ash, 422 U.S. 66, 78 (1975)). The Court stated that more was required of the "would-be plaintiffs in *Cort* than a show-

1983),[137] section 702 only confers standing to intended and not incidental beneficiaries. *Lujan* also imposed a causation requirement for APA standing comparable to the same inquiry in section 1983 actions. The Court found that although the litigants asserted the sorts of aesthetic and recreational use interests that the relevant federal statutes were designed to protect, and thus the plaintiffs were "intended beneficiaries," the record failed to show that those interests were affected by the specific agency action challenged.[138] Proof that the defendant's conduct caused injury to the plaintiff is, of course, also a long-recognized standing requirement in section 1983 actions.[139]

The convergence of the two lines of decisions appears from another aspect of *Lujan*. The APA's "finality" requirement and settled rules governing ripeness bar premature challenges to governmental conduct.[140] More specifically, as the Court said in *Lujan*, ordinarily plaintiffs cannot bring wholesale challenges to agency misconduct or mismanagement; in most cases those who seek "*wholesale* improvement of [a governmental] program" must resort to "the offices of the Department or the halls of Congress, where programmatic improvements are normally made."[141] Here, too, APA review parallels developments in section 1983 litigation. The Court has some—but by no means complete—reluctance to permit plaintiffs to invoke section 1983 to bring systemic challenges to state governmental agencies on the ground that

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ing that their interests were arguably within the zone protected or regulated by" the statute in a claim under the APA. Id.

137. See supra notes 91–96 and accompanying text.

138. See 110 S. Ct. at 3187–89. The affidavits showed only that two of plaintiff's members used "unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred." Id. at 3179.

139. See, e.g., Warth v. Seldin, 422 U.S. 490, 502–08 (1975). It is also a requirement in standing cases not implicating section 1983. See Allen v. Wright, 468 U.S. 737 (1984), and its progeny.

140. See 5 U.S.C. § 704 (1988) ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."); see also Currie, Federal Courts Cases and Materials 57–69 (4th ed. 1990) (dealing with finality, ripeness, and exhaustion); Ukiah Valley Medical Center v. FTC, 911 F.2d 261, 264 n.1 (9th Cir. 1990) (distinguishing between ripeness, a judge-made prudential doctrine, and finality, a jurisdictional requirement). The ripeness and standing requirements are not entirely independent. See Currie, supra, at 44.

141. 110 S. Ct. at 3190. The Court added:

> Absent [statutory authority], however, a regulation is not ordinarily considered the type of agency action "ripe" for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him. (The major exception, of course, is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. Such agency action is "ripe" for review at once, whether or not explicit statutory review apart from the APA is provided. . . .)

Id. The Court's initial reference to "regulation" seems out of place because the whole point of the suit was that there was no regulation, but the general point is clear.

the agency is being mismanaged contrary to federal law.[142]

Other symmetries exist. For example, the Court's requirement that a plaintiff's section 1983 claim assert more than a congressional preference and not be too open-ended for judicial enforcement resonates with APA cases refusing judicial review when "agency action is committed to agency discretion by law."[143] Furthermore, the case law shows a presumption of reviewability under the APA, but Congress can specifically foreclose review of federal agency action just as it may foreclose a section 1983 remedy.[144]

Of course, some differences remain, at least so far:[145] section 702 does not itself authorize suits for damages without the consent of Congress, or for punitive damages.[146] This distinction is not crucial when the real relief sought is declaratory or injunctive, and, in addition, the case turns on the meaning of the underlying federal statutes.[147] But the distinction can matter. To be sure, doctrines of sovereign and official immunity make damages of any kind hard to obtain from public officials under section 1983 when the gist of the complaint is no more than that state officials have transgressed federal statutory com-

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142. Compare O'Shea v. Littleton, 414 U.S. 488, 500–01 (1974) (refusing to grant injunctive relief under § 1983) with Missouri v. Jenkins, 109 S. Ct. 2463 (1989) (decrees entered to bring about school desegregation). See generally Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976) (arguing that the traditional role of adjudication—resolving disputes among private parties—has increasingly given way to the determination of issues of public law); Note, The Dual Role of the Structural Injunction, 99 Yale L.J. 1983 (1990) (discussing the use of the "structural injunction" in such areas as school desegregation, reform of state mental health systems, and reform of state penal institutions).

143. 5 U.S.C. § 701(a)(2) (1988). See Webster v. Doe, 108 S. Ct. 2047, 2053 (1988); United States Information Agency v. KRC, 905 F.2d 389, 395 (D.C. Cir. 1990); Levin, Understanding Unreviewability in Administrative Law, 74 Minn. L. Rev. 689, 693–733 (1990).

144. See, e.g., Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 399 (1987); Block v. Community Nutrition Inst., 467 U.S. 340, 351 (1984).

145. The scope of the differences, at least as to who may sue, depends upon the extent to which the "zone of interest" requirement is equivalent to the "primary federal right" requirement. The "zone of interest" requirement has been applied to standing cases outside the APA context. See, e.g., Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982); see also City of Los Angeles v. National Highway Traffic Safety Admin., 912 F.2d 478, 483 (D.C. Cir. 1990) ("If a petitioner can establish that it has suffered an injury within that zone of interests, it will necessarily have satisfied the constitutional injury requirement as well."). Thus, if the "zone of interest" and "federal primary right" inquiries are interchangeable, it appears that the issues of standing, "arising under" jurisdiction, remedial right, and "federal primary right" are all on their way to becoming one and the same inquiry. See Fletcher, The Structure of Standing, 98 Yale L.J. 221, 234–39 (1988) (standing not a separate inquiry but rather a determination on merits of plaintiff's claim).

146. Section 702 waives sovereign immunity except for money damages.

147. Not only does § 702 not authorize review, the monetary claim cannot be pursued under the Federal Torts Claims Act. See 28 U.S.C. § 2680(a) (1988).

mands.[148] But public bodies below the state and its subdivisions hold no immunity from damage claims, and they may be held liable for the consequences of their seemingly official policies.[149]

Other differences also exist, most significantly with respect to the scope of review. The *Chevron* doctrine, which requires judicial deference to reasonable agency constructions of ambiguous statutes,[150] is not directly applicable to section 1983 actions. But in section 1983 actions based on violations of federal statutory law, I believe that courts should review actions by state officials who adhere to the construction given to federal statutes by the responsible federal administrative officials with the same deference under *Chevron* that would be applied in section 702 proceedings to review the federal official conduct. Nor is there any reason to believe that section 1983 actions against state officials for the violation of federal statutes would require a disregard of any administration record or of the APA's substantial evidence test, if otherwise appropriate.[151]

B. *Intended and Incidental Beneficiaries*

Whatever the differences between section 1983 and section 702, *Golden State* and *Wilder* bring section 1983 criteria closer to APA standing rules when the issue is who may sue. Under both statutes not everyone can sue; something more than "injury in fact" must be established, however that term is defined. The availability of section 1983 turns on the distinction between direct and incidental beneficiaries.[152] While at first blush the APA's "adversely affected" langnage may suggest a more

148. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), requires the plaintiff to show that the defendant's conduct violated "clearly established statutory rights." For recent discussion, see Rudovsky, The Qualified Immunity Doctrine In the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights, 138 U. Pa. L. Rev. 23 (1989).

149. For lucid discussions of the line of cases beginning with Monell v. Department of Social Servs., 436 U.S. 658 (1978) and Owen v. City of Independence, 445 U.S. 622 (1980), see Oren, Immunity and Accountability In Civil Rights Litigation: Who Should Pay?, 50 U. Pitt. L. Rev. 935, 962–69 (1989); Schuck, Municipal Liability Under Section 1983: Some Lessons From Tort Law and Organization Theory, 77 Geo. L.J. 1753 (1989).

150. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865–66 (1984).

151. See 5 U.S.C. § 706(2)(E) (1988).

152. See supra notes 102–104 and accompanying text. In *Golden State* the Court observed that when Congress has "just 'occupied the field' with legislation that is passed solely with the interest of the general public in mind . . . [and] benefits particular parties only as an incident of the federal scheme of regulation, a private damages remedy under § 1983 may not be available." Golden State Transit Corp. v. City of Los Angeles, 110 S. Ct. 444, 450 (1989). The "may not" should be a "cannot." The distinction between direct and incidental beneficiaries appears in other contexts such as antitrust, see, e.g., Kansas & Missouri v. Utilicorp United, Inc., 110 S. Ct. 2807 (1990), and the third party beneficiary doctrine in contract law, see generally E. Farnsworth, Contracts § 10.3 (2d ed. 1990) (collecting cases and statutes).

pragmatic and generous attitude toward permitting access by plaintiffs than that suggested by section 1983's "a federal right" language, that difference is, at best, likely to be marginal.[153] The section 702 litigant must still show that she is adversely affected "within the meaning of a relevant statute," a requirement that, after *Lujan*, seems identical to the Court's insistence in *Golden State* that the section 1983 plaintiff must establish that she is more than simply an "incidental" beneficiary of a federal statute.[154] That symmetrical approaches are taken in the two contexts is entirely justified because (so far as is relevant here) both are concerned with the same issue: determining who is a proper plaintiff when public officials (federal or state) have transgressed norms imposed by federal law.

The distinction between intended beneficiaries and bystanders has the appearance of a conventional legal question: what did Congress intend? No doubt there is much truth to such a characterization of the problem, but there is more to the matter than that. Judicial attitudes, often formed by deep but imperfectly conscious intuitions, will play a role, at least at the margins, in making this distinction. We can, accordingly, expect to see similar divisions in both section 1983 and APA section 702 cases over just who, legally, is only a "bystander."[155] My own bias is toward ready access to the courts. I have never been persuaded that deep separation of powers concerns exist every time courts entertain suits by those hurt by administrative agencies to determine whether the injury-causing agency conduct was wrongful.

My bias aside, precedents developed under section 702 and section 1983 will, I suspect, prove to be interchangeable. Thus, persons who are subject to state regulation (as in *Golden State* and *Wilder*) contrary to federal law will readily be found to be right holders.[156] It seems unlikely, though, that the ultimate "beneficiaries" of federal regulatory

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153. Indeed, in *Golden State* the Court used expansive language in referring to statutes "intended to benefit the putative plaintiff." 110 S. Ct. at 449.

154. See also Block v. Community Nutrition Inst., 467 U.S. 340, 352–53 (1984) (discussed in Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 399 (1987)) (milk handlers can obtain judicial review of pricing orders by Secretary of Agriculture, but milk consumers have no such right of action).

155. These disputes will, at the least, bear a family resemblance to the kinds of disputes that have previously surfaced over what constitutes injury in fact. What should count as 'injury' often involves important normative conclusions. See Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1365–71 (1973) (tracing evolution of concept of injury). See generally Hart & Wechsler, supra note 27, at 123–28 (reviewing key standing cases involving questions of adequacy and diffuseness of injury). *Lujan* itself is illustrative, in its assumption that injury to aesthetic and recreational use interests can constitute injury in fact. See Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3187–89 (1990); see also Atlantic Richfield Co. v. USA Petroleum Co., 110 S. Ct. 1884, 1889 (1990) (competitive injury not enough to constitute antitrust injury; injury must stem from illegal anticompetitive activity).

156. These plaintiffs can sue under the APA. See *Clarke*, 479 U.S. at 399; National Fed'n of Fed. Employees v. United States, 905 F.2d 400, 402 n.2 (D.C. Cir. 1990).

and entitlement programs will be able to invoke section 1983 to compel state officials to comply with the federal obligations imposed on them; they are likely to be treated as "incidental beneficiaries." In *Wilder*, for example, it is doubtful that the patients dealing with the health care providers would be treated as appropriate plaintiffs to assert that the state rates transgressed federal law. This seems to be the teaching of the APA cases, which frequently deny standing to the ultimate beneficiaries of federal statutes, typically on the grounds of "causation" and "non-redressability."[157] Only beneficiaries asserting something that looks like a "property" right will be able to seek review.[158] Thus, in *Golden State* Justice Kennedy had no doubt that persons asserting a "property" claim—for example, to social security benefits or a particular rent calculation—could properly invoke section 1983.[159] Curiously, however, he dissented in *Wilder*, even though the plaintiffs were asserting what could be seen as a federal property entitlement comparable to a particular rent calculation. Perhaps this was based on an unexpressed intuition that judicial review could not work in the health care area with any effectiveness,[160] or on a view that corporate public contracts were troublesome in this regard.[161]

A commentator recently has insisted that the Court's refusal to confer standing upon beneficiaries of programs reflects a return to an older private rights or Hohfeldian model of administrative law in which

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157. See Allen v. Wright, 468 U.S. 737, 756 (1984) ("Recognition of standing in such circumstances would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.' ") (quoting United States v. SCRAP, 412 U.S. 669, 687 (1973); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 37–42 (1976). See generally Sunstein, Standing and the Privatization of Public Law, 88 Colum. L. Rev. 1432, 1480 (1988) (collecting cases and accusing Court of "hostility to suits brought by beneficiaries of regulatory programs to ensure fidelity to statute").

158. The Supreme Court may address the issue soon given the split in the circuits over whether the Model Cities Act creates rights in employees enforceable through § 1983. Compare Former Special Project Employees Ass'n v. City of Norfolk, 909 F.2d 89, 94 (4th Cir. 1990) (holding that Model Cities Act does not create such rights) with Members of the Bridgeport Hous. Auth. Police Force v. City of Bridgeport, 646 F.2d 55, 62 (2d Cir.) (Model Cities Act *does* create such rights), cert. denied, 454 U.S. 897 (1981).

159. See supra notes 83–85 and accompanying text.

160. Whether the Court's *Wilder* decision will actually prove important is an interesting question. There is serious doubt that courts have the institutional capacity to determine what rates are "reasonable and adequate to meet the costs incurred," although the Court believed that it could make such determinations. 110 S. Ct. at 2522–23. But in comparable fields the Court has effectively withdrawn from serious scrutiny. See Pierce, Public Utility Regnlatory Takings: Should The Judiciary Attempt to Police The Political Institutions?, 77 Geo. L.J. 2031, 2053–70 (1989). For a recent illustration in the utility rate-setting context, see Duquesne Light Co. v. Barasch, 109 S. Ct. 609, 618–19 (1989).

161. See San Bernardino Physicians' Servs. Medical Group, Inc. v. County of San Beruardino, 825 F.2d 1404 (9th Cir. 1987), criticized in Note, *San Bernardino Physicians' Services Medical Group, Inc. v. County of San Bernardino*: Constitutionally Protected Public Contract Property Interests Under 42 U.S.C. Section 1983, 74 Minn. L. Rev. 879 (1990).

the only proper litigant is a person asserting interests protected by the common law.[162] But this characterization seems overdrawn. Judicial review is now available to whole categories of litigants who would have been barred by at least the early version of the private rights model. Moreover, APA section 702 and section 1983 review are open to plaintiffs asserting not only the traditional common law property interests but also, as Justice Kennedy acknowledges, the "New Property" interests created by the welfare state.[163] In addition, *Lujan* is inconsistent with this characterization; there the Court seemed quite willing to assume that aesthetic and recreational use interests were protected by the relevant federal statutes.[164]

CONCLUSION

When the issue is whether a public official violated a federal statutory norm, the structure of the inquiry under section 1983 and section 702 of the APA is largely identical. Both analyses reflect the distinction between primary and remedial law that runs back to well before Hohfeld. In both cases, the Court must focus on inquiries of primary law: what were the duties, and who are the intended beneficiaries of the federal statutes from which the rights are derived. If these determinations are decided favorably to the plaintiff, section 1983 and APA section 702 review follow generally as a matter of course, as *Golden State*, *Wilder*, and *Lujan* demonstrate. And that, I submit, is how things should be.

ADDENDUM

Just as this Article went to print, the Supreme Court decided *Dennis v. Higgins*. Relying in part on *Golden State*, a 7-2 majority held that section 1983 was available to vindicate negative commerce clause claims.[165] Justice Kennedy, joined by the Chief Justice, dissented, again insisting on a dichotomy between "rights-securing and power-allocating" provisions.[166] He argued that the Court's decision "compounds the error of *Golden State*."[167]

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162. See Sunstein, supra note 157, at 1434–35. This model accords standing to litigants urging that the government is interfering with liberty or property interests that the common law of property and tort would secure against private interference. For example, because the common law conferred no immunity from competition, competitors were denied standing. See, e.g., Alabama Power Co. v. Ickes, 302 U.S. 464, 479–80 (1938).

163. See generally Reich, The New Property, 73 Yale L.J. 733 (1964).

164. 110 S. Ct. at 3187.

165. 1991 U.S. LEXIS 1142, *4, 1991 WL 18099, *2 (Feb. 20, 1991).

166. 1991 U.S. LEXIS at *29, 1991 WL at *10.

167. 1991 U.S. LEXIS at *21, 1991 WL at *7.