NO MORE POWER TO IMPLY: *GONZAGA V. DOE* AND THE EVISCERATION OF § 253(C) OF THE TELECOMMUNICATIONS ACT♦

INTRODUCTION

The Telecommunications Act of 1996 ("the Act")[1] represented a massive overhaul of 62-year-old federal communications laws in an attempt to encourage large-scale development of American telecommunications infrastructure.[2] The Republican-controlled Congress believed that this goal would be best effectuated, not by federal mandates or a national government-imposed telecommunications scheme, but rather by curtailing national and local regulatory barriers to allow the telecommunications market itself to drive development.[3]

One particular provision in the Act, § 253, has generated a great deal of controversy since the day it was enacted. This provision is at the heart of the Act's declared anti-regulatory purpose – it prohibits state and local governments from passing any law that has the effect of barring any entity from providing telecommuni-

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.).

[2] 141 CONG. REC. S8206-02, at 1 (1995) (stating that the purpose of this bill is "to provide for a procompetitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . . ").

[3] *Id.*

cations service.[4] The provision, a product of Congressional compromise, does not specify whether it creates a cause of action enabling telecommunications companies to sue for damages incurred by government violations of the statute. The United States Circuit Courts that have confronted this question are split four to two in favor of reading the provision narrowly, precluding telecommunications companies from asserting a cause of action under § 253. The first two circuit courts to rule on the issue, the Sixth and the Eleventh Circuits, concluded that § 253 implies a cause of action on behalf of companies effectively barred from providing telecommunications service by local laws[5] while the subsequent four circuits to consider the question, the Second, Fifth, Ninth and Tenth Circuits, all ruled against such an implication.[6]

The two most recent circuit court decisions on the question, *Southwestern Bell Telephone v. City of Houston*[7] and *NextG Networks of NY v. City of New York*,[8] explain this chronological divide by pointing to the precedential impact of the Supreme Court's 2002 decision in *Gonzaga University v. Doe*.[9] In that case, the Supreme Court narrowly construed a provision of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (2006), to limit the ability of plaintiffs to sue government entities for statutory violations absent an express indication of Congressional intent to permit such liability.[10]

The Eleventh Amendment grants states sovereign immunity from suit in law or equity;[11] however, the Civil Rights Act (passed pursuant to new authority conferred by the Fourteenth Amendment)[12] limited this general grant of immunity. The Civil Rights Act contained a provision today codified as § 1983 that the Supreme Court has interpreted to permit plaintiffs to sue governments (and government officials acting in their sovereign capacity) for passing laws or engaging in activity that infringes upon a citizen's constitutional or statutory rights.[13] In this way, § 1983 functions like a procedural statute; that is, any individual right is presumptively enforceable against the state as long as Congress

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[4] 47 U.S.C. § 253(a) (2006).
[5] Bellsouth Telecomms. Inc. v. Town of Palm Beach, 252 F.3d 1169 (11th Cir. 2001); TCG Detroit v. City of Dearborn, 206 F.3d 618 (6th Cir. 2000).
[6] NextG Networks of N.Y., Inc. v. City of New York, 513 F.3d 49 (2d Cir. 2008); Southwestern Bell Tel., L.P. v. City of Houston, 529 F.3d 257 (5th Cir. 2008); Sprint Telephony PCS, L.P. v. County of San Diego, 490 F.3d 700 (9th Cir. 2007); Qwest Corp. v. City of Santa Fe, 380 F.3d 1258 (10th Cir. 2004).
[7] *Southwestern Bell*, 529 F.3d 257 at 261.
[8] *NextG Networks*, 513 F.3d at 53.
[9] 536 U.S. 273 (2002).
[10] *Id.*
[11] U.S. CONST. amend. XI.
[12] U.S. CONST. amend. XIV, § 1.
[13] *E.g.*, Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658 (1978).

has not indicated express intent to the contrary.[14] As such, the threshold question of § 1983 analysis with respect to statutory rights is whether a particular statute creates an enforceable right in the first place.

The question of when a particular statute creates a right giving rise to a cause of action is as old as the common law legal system and has traditionally been a source of division between jurisprudential liberals and conservatives. Whereas liberals seek to construe statutes broadly to allow remedies not directly addressed by the legislature, conservatives prefer to read statutes narrowly in an attempt to effectuate the intent of the only federal body with the power to make laws – Congress. The Supreme Court has vacillated between these two ideological camps as legal realities and the political makeup of the Court have changed. Despite the long history of implied cause of action jurisprudence, lower courts have interpreted the Supreme Court's precedent-shifting decision in *Gonzaga v. Doe* as effectively eviscerating their power to imply causes of action enforceable by § 1983.[15] The circuit split on the scope of § 253 of the Telecommunications Act is an example of how *Gonzaga* has redefined the landscape of statutory interpretation.

This Note will first introduce § 253 and demonstrate that drafting flaws and a complicated legislative history is responsible for the ambiguity as to whether Congress intended for the provision to create a private cause of action. Part II will briefly trace the development of implied cause of action and § 1983 jurisprudence and will argue that, while closely related, these issues are distinct and require separate analysis. Part III will argue that the Supreme Court's conflation of these two issues in *Gonzaga v. Doe* has constrained lower courts from implying causes of action absent express Congressional authorization and that this significant shift in the Supreme Court's implied cause of action jurisprudence has produced the Circuit split over whether § 253 creates a cause of action enforceable by § 1983. Finally, Part IV will argue that § 253 provides a striking example of the limitations inherent in the Court's exceedingly narrow approach to statutory interpretation. In the particular case of discriminatory rights-of-way regulations prohibited by § 253(c), this approach actually subverts the larger intent of Congress.

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[14] *E.g.*, Blessing v. Freestone, 520 U.S. 329 (1997).

[15] Rochelle Bobroff, *Section 1983 and Preemption: Alternative Means of Court Access for Safety Net Statutes*, LOY. J. PUB. INT. L., Part I (forthcoming 2009), *available at* http://www.ssrn.com/abstract=1273664.

I. LEGISLATIVE HISTORY

The Telecommunications Act of 1996 was passed "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[16] The Act was the result of an ambitious project undertaken by the Republican-controlled 104th Congress to limit the regulatory power of federal, state and local governments over the telecommunications industry in the belief that this was the best way to encourage nationwide telecommunications development. Section 253 is a central provision of the Act that expressly prohibits state and local governments from passing laws that have the effect of barring any entity from providing telecommunications services. This broad prohibition stirred significant controversy in both houses of Congress and, as a result, the final version of the provision was a product of lengthy debate and, ultimately, imperfect compromise. Section 253, as it was enacted, reads as follows:

> § 253. Removal of barriers to entry
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> (a) In general. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
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> (b) State regulatory authority. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
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> (c) State and local government authority. Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.
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> (d) Preemption. If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of

[16] H.R. REP. NO. 104-204, at 1 (1995).

> such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.[17]

At first blush, the provision seems relatively straightforward. Subsection (a) is the general prohibition limiting the ability of state or local governments to pass any laws that effectively bar telecommunication companies from providing service. Subsections (b) and (c) are exceptions to that general prohibition preserving local governments' authority to pass laws intended to protect the rights of its citizens and collect compensation for use of their local rights-of-way, respectively.[18]

While the basic contours of the prohibition are logically related to the overall purpose of the Act and, therefore, were largely uncontroversial, the enforcement section of the provision, subsection (d), was the focus of intense Congressional debate. The compromise ultimately forged has resulted in a considerable amount of litigation. Subsection (d) of the provision as it was enacted vests the Federal Communications Commission ("FCC") with primary jurisdiction to evaluate whether a local law has the effect of barring any entity from providing telecommunications service in that locality. This subsection gives the FCC the power to preempt any local law that implicates subsection (a), the general prohibition, or subsection (b), state regulatory authority, but it conspicuously omits subsection (c), the section pertaining to rights-of-way regulation.[19]

The original version of the bill in the House of Representatives not only granted the FCC preemption power over § 253 in its entirety, but it contained no provision reserving discretionary rights-of-way regulations to local governments. Instead, the bill included a "parity provision" requiring absolute equality in any franchise fees assessed against service providers for the use of local government-owned rights-of-way.[20] Representative Dan Schaefer (R-CO) argued that this provision would help erode the monopolistic policies that had benefited long-time service providers and discouraged new companies from entering the market.[21] Al-

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[17] 47 U.S.C. § 253 (2006).
[18] *Id.*
[19] *Id.* § 253(d) (2006).
[20] H.R. REP. NO. 104-204, at 6 (1995).
[21] 141 CONG. REC. H8460-01 (1995) (statement of Rep. Schaefer). Congressman Jack Fields (R-TX) supported this contention:

> The Schaefer amendment is necessary to overcome historically based discrimination against new providers. In many cities, the incumbent telephone company pays nothing, only because they hold a century-old charter, one which may even predate the incorporation of the city itself. In many cases, cities have made no effort to correct this unfairness. If local governments continue to discriminate in the imposition of franchise fees, they threaten to Balkanize the development of our national telecommunication infrastructure.

though Representative Schaefer's proposal squared with the larger goal of promoting telecommunications infrastructure development, many members of Congress were concerned that the parity requirement ignored the realities of rights-of-way regulation and inappropriately stripped local governments of the power to collect reasonable fees for the use of public property.[22]

Congressmen Bart Stupak (D-MI) and Joe Barton (R-TX) proposed an Amendment that struck Congressman Schaefer's parity provision and permitted local governments to regulate their own rights-of-way. On the floor of Congress, Representative Stupak underscored the importance of allowing local governments to manage their rights-of-way and to receive fair compensation for the use of public property:

> Local governments must be able to distinguish between different telecommunication providers. . . . The [current bill] states that local governments would have to charge the same fee to every company, regardless of how much or how little they use the right-of-way or rip up our streets. Because the contracts have been in place for many years, some as long as 100 years, if our amendment is not adopted . . . you will have companies in many areas securing free access to public property. Taxpayers paid for this property, taxpayers paid to maintain this property, and it simply is not fair to ask the taxpayers to continue to subsidize telecommunication companies. In our free market society, the companies should have to pay a fair and reasonable rate to use public property.[23]

After heated debate, the Amendment eventually passed over the objections of Representative Schaefer and other Congressmen concerned about the chilling effect they feared this provision would have on business development.

The House vote in favor of the Stupak-Barton Amendment made it was clear that local governments would retain the authority to regulate their rights-of-way on a nondiscriminatory basis and to impose fair franchise fees for their use. The House, however, did not resolve the question of who would have the power to evaluate whether rights-of-way regulations were discriminatory or capricious such that they violated the general prohibition articulated in § 253(a). The debate over the enforcement section actually took place two months earlier over a parallel bill in the Sen-

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Id.

[22] *See, e.g.*, 141 CONG. REC. H8460-01 (1995) (statement of Rep. Stupak). *See generally* Frank E. Ellrod III and Nicholas P. Miller, *Property Rights, Federalism and the Public Rights-of-Way*, 26 SEATTLE U. L. REV. 475 (2003) (discussing the corporeal property interest local communities have in public rights of way and why it is crucial that they be permitted to recover fair market value for their use).

[23] 141 CONG. REC. H8460-01 (1995) (statement of Rep. Stupak).

ate.[24]

The Senate Bill, S. 652, contained a provision labeled Section 254 that is identical to § 253 of the Telecommunications Act as it was ultimately enacted save one important difference. Subsection (d) of the provision vested power in the FCC to preempt any state or local law that had the effect of barring a telecommunications company from providing service.[25] Senators Diane Feinstein (D-CA) and Dirk Kempthorne (R-ID) were concerned about the prospect of granting the FCC broad powers to preempt local laws and proposed an amendment completely stripping the FCC of preemption power with respect to alleged violations of § 253.[26] This proposal met significant opposition from many Senators who believed that centralized oversight best achieved the overall purpose of the Act to promote telecommunications development in the interest of the nation as a whole.

Senator Slade Gorton (R-WA) forged a successful compromise. Senator Gorton proposed a sub-amendment to the Feinstein-Kempthorne Amendment that would preserve FCC preemption power over all local laws that effectively barred any entity from providing telecommunications service except for those pertaining to rights-of-way regulations.[27] Senator Gorton claimed that his proposed amendment did not alter the substantive prohibition against discriminatory rights-of-way regulations contained in § 253(c) but rather stripped the FCC of the authority to make the determination of whether a particular rights-of-way law violated § 253 and instead vested authority in local district courts. Senator Gorton stated:

> [The Amendment] does not impact the substance of the first three subsections of this section at all, but it does shift the forum in which a question about those three subsections is decided. Instead of being the Federal Communications Commission with an appeal to a Federal court here in the District of Columbia, those controversies will be decided by the various district courts of the United States from one part of this country across to every other single one.[28]

The Gorton Amendment passed producing the complex version of § 253 that exists today. The Amendment reconciled the divide between those Senators who believed FCC oversight was necessary to encourage telecommunications development on a

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[24] *See* 141 CONG. REC. S8206-02 (1995).
[25] S. 652, 104th Cong. (1995).
[26] 141 CONG. REC. S8206-02, at 2 (1995).
[27] *Id.* at 22.
[28] *Id.* at 24.

national scale and those Senators who believed that evaluation of local laws should be performed on the local level. The compromise preserved local adjudication of public rights-of-way disputes and granted the FCC preemption power over all other issues. Although this compromise was logical and effective in resolving the dispute, it created ambiguity as to how Congress intended § 253 to be enforced with respect to rights-of-way regulations.

Did the Gorton Amendment signal Congressional intent simply to shift the venue of the preemption analysis from the FCC to local district courts in the case of rights-of-way ordinances or did the Amendment indicate Congressional willingness to accept an alternative mechanism of enforcement with respect to the limited category of rights-of-way regulations? Traditionally, the question of legislative intent has been at the heart of the implied cause of action inquiry.[29] Circuit courts pre-*Gonzaga* focused on this prong in determining that § 253(c) implies a cause of action under which telecommunication companies can sue local governments[30] whereas circuit courts post-*Gonzaga* limited their inquiry to the plain language of the statute in concluding that § 253 does not imply a cause of action.[31]

II. IMPLIED CAUSE OF ACTION AND § 1983 JURISPRUDENCE

In order to understand the magnitude of the Supreme Court's decision in *Gonzaga* and to appreciate its impact on courts' subsequent analysis of whether § 253(c) implies a cause of action, one must first trace the development of implied cause of action jurisprudence with particular attention to its interplay with § 1983. As an initial matter, it is important to understand the significance of the cause of action itself. English common law relied on a rigid system of form pleading whereby, in order to request relief from the court, a plaintiff was required to fit his claim under a specific and pre-established form of proceeding.[32] This greatly circumscribed the ability of plaintiffs to seek redress for injuries not previously recognized by the court but underscored the one-to-one relationship between rights and remedies that was at the heart of

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[29] *See* Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, 19-20 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 570 (1979).

[30] Bellsouth Telecomms., Inc. v. Town of Palm Beach, 252 F.3d 1169 (11th Cir. 2001); TCG Detroit v. City of Dearborn, 206 F.3d 618 (6th Cir. 2000).

[31] NextG Networks of N.Y., Inc. v. City of New York, 513 F.3d 49 (2d Cir. 2008); Southwestern Bell Tel., L.P. v. City of Houston, 529 F.3d 257 (5th Cir. 2008); Sprint Telephony PCS, L.P. v. County of San Diego, 490 F.3d 700 (9th Cir. 2007); Qwest Corp. v. City of Santa Fe, 380 F.3d 1258 (10th Cir. 2004).

[32] Bobroff, *supra* note 15. S*ee also* Anthony J. Belia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777 (2004).

the English common law system.[33] The American legal system adopted this approach with the new Constitution and maintained rigid form pleading standards up until the mid-20th century.[34]

Forms of pleading were abolished in 1938 with the adoption of the Federal Rules of Civil Procedure.[35] Although the new rules purportedly substituted the concept of a "claim" for the antiquated notion of a "cause of action," courts continue to speak in terms of requiring a cause of action for plaintiffs to demonstrate entitlement to relief.[36] The difference, however, is that rather than being forced to fit an individualized injury under the heading of a pre-approved category, today's plaintiffs merely need to demonstrate an entitlement to enforce a particular legal duty.[37] While the Federal Rules of Civil Procedure relaxed the formal requirements for demonstrating a cause of action, they retained the one-to-one relationship between rights and remedies that had long been the hallmark of the Anglo-American legal system.[38]

The correlation between rights and remedies is a well-established principle as old as the concept of judicial review.[39] The existence of a right necessarily includes the ability to seek redress when that right is abrogated. The difficulty therefore is determining what rights exist and who has standing to enforce them. In the case of statutes that include clear rights-creating language, this analysis is uncomplicated. Congress has the authority to create rights in limited classes of individuals or groups.[40] The more difficult question is to what extent are courts permitted to imply causes of action from legislation that does not contain explicit rights-creating language?

In *Cort v. Ash*, the Court unanimously established a four-part test for determining when a federal statute implies a cause of action.[41] The test asks whether: 1) the plaintiff is in the class for whose [particular] benefit the statute was enacted; 2) there is any indication of legislative intent, explicit or implicit, either to deny or to create a private right to enforce; 3) a private right to enforce would be consistent with the underlying purpose of the statute; and 4) the cause of action is traditionally in the purview of state

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[33] Bobroff, *supra* note 15, at 6.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at 7.
[38] *Id.*
[39] Michael A. Mazzuchi, Note, *Section 1983 and Implied Rights of Acton: Rights, Remedies, and Realism*, 90 Mich. L. Rev. 1062, 1069 (1992); *see also* Marbury v. Madison, 5 U.S. 137, 163 (1803).
[40] U.S. CONST. Art. I, § 8, cl. 18.
[41] Cort v. Ash, 422 U.S. 66 (1975).

law such that a federal right to enforce would be inappropriate.[42] Beginning with two subsequent cases in 1979, the Supreme Court has indicated that particular emphasis should be placed on the legislative intent prong of the *Cort* test.[43] In so doing, the Court indicated its preference for express causes of action; yet, by definition, any statute subjected to implied cause of action *Cort* analysis contains no explicit rights-creating language. So, the following question remains. Absent express rights-creating language, when and how can the Court impute Congress' intent to create a cause of action?

Since the 1970s, the Supreme Court has addressed this question largely in the context of its § 1983 jurisprudence.[44] Section 1983 was originally contained within the Civil Rights Act of 1871 and has subsequently been interpreted to allow plaintiffs to sue governments and government officials for violations of constitutional or statutory rights.[45] Section 1983 does not create rights in and of itself; rather, it provides a procedural mechanism for the enforcement of rights (express or implied).[46] The Supreme Court's conception of causes of action has changed a great deal since the 19th century. As a result, it is not surprising that § 1983 has experienced an equally tumultuous interpretive history.[47]

Section 1983 analysis has emerged as a focal point in the struggle between jurisprudential "liberals" and "conservatives" on the Supreme Court over the last thirty-five years.[48] Rather than reflecting a coherent approach that has logically evolved over time, the Supreme Court's § 1983 jurisprudence is better characterized as a struggle between two distinct ideological camps.[49] The "liberal" camp reads § 1983 as providing wide latitude for plaintiffs to assert claims in federal court even when the underlying statute lacks express rights-creating language. This approach views implied cause of action analysis as separate and distinct from § 1983

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[42] *Id.* at 78.
[43] Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, 19-20 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 570 (1979).
[44] Bobroff, *supra* note 15, at 9.
[45] Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658 (1978).
[46] 42 U.S.C. § 1983 (2006) ("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 . . . .").
[47] *See* Michael G. Collins, *Economic Rights, Implied Constitutional Actions, and the Scope of Section 1983*, 77 Geo. L. J. 1493 (1989) for a full treatment of § 1983's earlier history.
[48] The terms "liberal" and "conservative" are applied loosely in this context and are meant only to characterize the ideological divide between those judges who read § 1983 and rights-creating statutes expansively and their counterparts who read such statutes narrowly.
[49] Bobroff, *supra* note 15, at 9.

analysis and establishes a presumption that favors the private enforcement of rights.[50] The "liberal" view prevailed in § 1983 cases from the 1970s until the 1990s when the "conservatives" achieved a majority on the Court.[51] This new "conservative" Court transformed the previous dissents into majority opinions without expressly overruling the earlier cases.[52] The "conservative" line of cases effectively reversed the presumption of the applicability of § 1983 and merged implied cause of action and § 1983 analysis.[53]

The Court did not attempt to reconcile the clear contradiction between the two lines of cases until its seminal 2002 decision in *Gonzaga v. Doe*.[54] In *Gonzaga*, the Court addressed its history of § 1983 and implied cause of action jurisprudence and attempted to solidify the "conservative" approach that demanded narrowly construing statutes – oxymoronically requiring an *express* statement from Congress in order to *imply* a cause of action.[55] Although the majority claimed to preserve lower courts' ability to imply causes of action that would be presumptively enforceable by § 1983, *Gonzaga* actually represented a significant departure from earlier implied cause of action jurisprudence.

The *Gonzaga* Court conceded that § 1983 merely provides a remedy for state violations of individual statutory or constitutional rights and that the first step in determining whether a particular statute is enforceable via § 1983 is a determination that the statute at issue creates an individual right in the first place.[56] The Court went even further acknowledging that, with respect to ambiguous statutes, the first part of the § 1983 inquiry (whether the statute at issue creates enforceable rights) is the same as the implied cause of action inquiry.[57] Nevertheless, rather than preserving the implied cause of action analysis embodied in *Cort* and its progeny, the Court significantly circumscribed the ability of lower courts to imply a cause of action in the absence of express rights-creating language.[58]

The majority accomplished this sleight-of-hand by stressing the near identity of implied cause of action and § 1983 analysis focusing on legislative intent as the crux of both analyses:

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[50] Mazzuchi, *supra* note 39, at 1098.
[51] Bobroff, *supra* note 15, at 9-10.
[52] *Id.* at 10.
[53] Mazzuchi, *supra* note 39, at 1099-1100.
[54] Gonzaga Univ. v. Doe, 536 U.S. 273 (2002).
[55] *Id.* at 283-84.
[56] *Id.* at 284.
[57] *Id.* at 285 ("A court's role in discerning whether personal rights exist in the § 1983 context should therefore not differ from its role in discerning whether personal rights exist in the implied right of action context.").
[58] *Id.* at 286.

> [T]he [implied cause of action and § 1983] inquiries overlap in one meaningful respect – in either case it must first be determined whether Congress *intended to create a federal right.* For a statute to create such private rights, its text must be phrased in terms of persons benefited. . . . Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983.[59]

Rather than clarifying the Court's position and distinguishing between implied cause of action and § 1983 jurisprudence as it claimed to do, *Gonzaga* seemingly discarded implied cause of action analysis altogether.[60] The majority paid mere lip service to the distinction between implied causes of action and enforcement of rights under § 1983 effectively stripping courts of their power to interpret ambiguous statutes to imply causes of action.[61]

After *Gonzaga*, § 1983 analysis has proceeded rather mechanically – devoid of the interpretive latitude the Supreme Court had recognized since 1961. Instead of a probing, albeit constrained, inquiry into whether a neutral reading of a particular statute impliedly creates new rights in a select class of persons, post-*Gonzaga* § 1983 analysis simply requires looking at the plain text of a statute.[62] If, and seemingly only if, Congress expressly included rights-creating language in a particular statute, then such rights are presumptively enforceable under § 1983.[63] In the name of federalism, the Supreme Court greatly circumscribed the federal judiciary's interpretive power.

Justice Breyer, in a concurring opinion joined by Justice Souter, criticized the majority's exceedingly narrow approach to statutory interpretation and suggested that implied cause of action/§ 1983 analysis should be a case-specific inquiry.[64] In many ways, this case-by-case approach was precisely the limited, multifactored analysis promulgated in *Cort v. Ash* and its progeny. Instead of adhering to the bulk of implied cause of action precedent that permitted courts some latitude to imply causes of action in limited circumstances, *Gonzaga* established a nearly insurmountable presumption against reading a statute to mean anything more than what its literal words indicate.

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[59] *Id.* at 283-84 (citations omitted).
[60] *Id.* at 283 ("[W]e further reject the notion that our implied right of action cases are separate and distinct from our § 1983 cases. To the contrary, our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983.").
[61] *Id.*
[62] *Id.*
[63] *Id.* ("We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983.").
[64] *Id.* at 291.

Justice Stevens, with whom Justice Ginsburg joined in dissent, was more scathing in his criticism of the majority's opinion. Stevens not only vociferously disagreed with the Court's conclusion but also took the majority to task for conflating implied cause of action and § 1983 jurisprudence in an effort to reverse the traditional presumption of the enforceability of rights.[65] Instead of reconciling earlier case law, Stevens argued, the majority tacitly overruled established § 1983 precedent. He stated: "Rather than proceeding with a straightforward analysis under [previously well-established principles of § 1983 jurisprudence], the Court has undermined [the force of this precedent] by needlessly borrowing from cases involving implied rights of action . . . ."[66]

Despite its claims to the contrary, the majority squeezed the implied cause of action into virtual non-existence by requiring Congress not only to explicitly indicate its intent to create a cause of action but also to prescribe the precise remedies that would be available.[67] The traditional approach required merely a finding of a right (either express or implied) and did not require a concomitant Congressional grant of a remedy. Section 1983 provides a remedy for government violations of statutory rights; therefore, requiring specific Congressional authorization to make a remedy available with respect to each individual rights-creating statute is redundant.[68] Although the majority claimed to maintain the distinction between rights and remedies, preserving the independent force of implied cause of action analysis,[69] the *Gonzaga* Court effectively eviscerated implied cause of action jurisprudence requiring Congress to state its intention to create new rights in unambiguous terms.[70]

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[65] *See* Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 509 n.9 (1990), for the general proposition that § 1983 analysis is distinguishable from implied cause of action analysis insofar as any right recognized by the Court is presumptively enforceable by § 1983.

[66] *Gonzaga*, 536 U.S. at 300-01 (Stevens, J., dissenting).

[67] *Id.* at 302.

> [T]he Court has collapsed the ostensible two parts of the implied right of action test ("is there a right" and "is it enforceable") into one. As a result, and despite its statement to the contrary . . . the Court seems to place the unwarranted "burden of showing an intent to create a private remedy," . . . on § 1983 plaintiffs. Moreover, by circularly defining a right actionable under § 1983 as, in essence, "a right which Congress intended to make enforceable," the Court has eroded – if not eviscerated – the long-established principle of presumptive enforceability of rights under § 1983. (citations omitted).

Id.

[68] *See Wilder* 496 U.S. at 509 n.9; Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 19 (1981).

[69] *Gonzaga*, 536 U.S. at 283.

[70] *Id.* at 290.

III. *GONZAGA*'S IMPACT ON CIRCUIT COURTS' INTERPRETATION OF § 253

The Court radically shifted the goalposts of § 1983 analysis in *Gonzaga* and lower courts, bound by this precedent, have dutifully fallen in line. The circuit court split over how to interpret § 253 of the Telecommunications Act, specifically § 253(c), is a clear example of the tremendous impact *Gonzaga* has had on federal courts' willingness to use their interpretive power to imply causes of action absent an unambiguous statement of Congressional intent to confer an enforceable right.[71]

The first two circuit courts to confront the question of whether § 253(c) creates a cause of action enforceable against local governments applied pre-*Gonzaga* implied cause of action analysis. Focusing on legislative history and the overall structure of the statute rather than simply the plain language of the provision at issue, these courts concluded that § 253(c) creates a cause of action permitting telecommunications companies to sue local governments for discriminatory rights-of-way regulations.[72] The legislative history of § 253(c) and its conspicuous omission from the enforcement provision, § 253(d), convinced both courts that Congress intended disputes involving rights-of-way regulations to be resolved in federal court rather than by the FCC; moreover, the courts reasoned, this omission implied a preference for creating a cause of action rather than merely shifting preemption jurisdiction to another venue.[73]

It is important to note that both courts considered § 253(c) a savings clause that carved out an exception to the general prohibition against regulations that have the effect of barring telecommunications companies from providing service.[74] Nevertheless, both courts went beyond a plain reading of the provision (which by virtue of being a savings clause had no "rights-creating language") in an effort to effectuate the intent of Congress. The

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[71] *See* Bobroff, *supra* note 15, at 39-46.

[72] Bellsouth Telecomms., Inc. v. Town of Palm Beach, 252 F.3d 1169, 1191 (11th Cir. 2001); TCG Detroit v. City of Dearborn, 206 F.3d 618, 624 (6th Cir. 2000).

[73] *TCG Detroit*, 206 F.3d at 623 ("The district court whose judgment we re-view here quotes to telling effect the Senate debate on § 253(d), as that subsection is intended to relate to the safe harbor of subsection (c). During the debate, Senator Gorton explained: 'There is no preemption . . . for subsection (c) which is entitled, 'Local Government Authority,' and which is the subsection which preserves to local governments control over their public rights of way.' It accepts the proposition . . . that these local powers should be retained locally, *that any challenge to them take place in the Federal district court in that locality and that the Federal Communications Commission not be able to preempt such actions.*"); *Bellsouth*, 252 F.3d at 1191 ("[The Gorton Amendment] retains not only the right of local communities to deal with their rights of way, but their right to meet any challenge on home ground in their local district courts.").

[74] *Bellsouth*, 252 F.3d at 1189; *TCG Detroit*, 206 F.3d at 623-24.

courts concluded that the Gorton Amendment specifically mandated that rights-of-way disputes had to be resolved by local district courts rather than by the FCC.[75] Although the plain language of § 253 was ambiguous on this point, the Congressional Record is clear.[76] These courts followed the dictates of the *Cort* test and concluded that, notwithstanding the plain language of the statute, Congress intended to create a cause of action in the narrow case of allegedly discriminatory rights-of-way regulations.[77]

The four circuit courts to consider the same question in the years after *Gonzaga* reached a different conclusion ruling that since § 253(c) lacked any express rights-creating language, it did not create a cause of action enforceable by § 1983.[78] All four of these courts took notice of the earlier decisions in the Sixth and Eleventh Circuits and differentiated those cases on the basis of the doctrinal change marked by the Supreme Court's *Gonzaga* decision.[79] The *Gonzaga* Court and subsequent lower courts have preferred to characterize the *Gonzaga* decision as a "clarification" of pre-existing doctrine rather than a major shift in the interpretative latitude courts are afforded to imply causes of action.[80] Nevertheless, even the most cursory examination of the history of the Supreme Court's § 1983 jurisprudence and the extent to which lower courts have struggled to implement this new strict textualist approach to statutory interpretation evinces the true revolutionary nature of the *Gonzaga* decision.[81]

Section 253(c) clearly fails the stringent *Gonzaga* test. It contains no unambiguous rights-creating language and is a savings clause phrased in terms of rights reserved by local governments rather than rights conferred on telecommunications companies.[82] The *Gonzaga* decision requires lower courts to constrain their inquiry to the four corners of the statute itself. As opposed to the *Cort* test that permitted courts to look beyond the plain language

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[75] *Bellsouth*, 252 F.3d at 1191; *TCG Detroit*, 206 F.3d at 624.
[76] 141 CONG. REC. S8206-02, at 23 (1995).
[77] *Bellsouth*, 252 F.3d at 1191; *TCG Detroit*, 206 F.3d at 624.
[78] NextG Networks of N.Y., Inc. v. City of New York, 513 F.3d 49, 53 (2d Cir. 2008); Southwestern Bell Tel., L.P. v. City of Houston, 529 F.3d 257, 262 (5th Cir. 2008); Sprint Telephony PCS, L.P. v. County of San Diego 490 F.3d 700, 717 (9th Cir. 2007); Qwest Corp. v. City of Santa Fe, 380 F.3d 1258, 1266 (10th Cir. 2004).
[79] *NextG Networks*, 513 F.3d at 53; *Southwestern Bell*, 529 F.3d at 262; *Sprint Telephony* 490 F.3d at 717; *Qwest*, 380 F.3d at 1266.
[80] *Southwestern Bell*, 529 F.3d at 261.
[81] *See* Brian J. Dunne, Comment, *Enforcement of the Medicaid Act Under 42 U.S.C. § 1983 after Gonzaga University v. Doe: The "Dispassionate Lens" Examined*, 74 U. CHI. L. REV 991 (2007) (arguing that rather than focusing on precedent, the Court in *Gonzaga* transformed the long line of textualist dissents from its earlier § 1983 cases into the majority opinion under the pretext of federalism and, moreover, that this major shift has challenged many lower courts to fall in line despite their own contradictory precedents).
[82] *See* 47 U.S.C. § 253(c) (2006).

of a given provision to its legislative history, the *Gonzaga* test bars such a probing inquiry.[83] In the case of an ambiguously drafted provision, like § 253(c), courts are confronted with a dilemma. The express omission of § 253(c) from FCC purview and the unambiguous statements of Senator Gorton and those who supported him make it clear that Congress intended rights-of-way disputes between telecommunications companies and local governments to be adjudicated in local district courts; yet, precisely how is left unspecified.[84]

Simple application of the textualist *Gonzaga* test has produced post-*Gonzaga* circuit court rulings that § 253(c) does not create a cause of action. Nevertheless, these courts acknowledged the legislative history indicating Congressional intent to differentiate between rights-of-way disputes covered under § 253(c) and all other barriers to entry prohibited by § 253(a).[85] Accordingly, they held that although § 253(c) did not create a cause of action under which a telecommunications company plaintiff could seek § 1983 damages, federal courts could take jurisdiction under the Supremacy Clause[86] to deem a discriminatory local rights-of-way regulation preempted by § 253.[87] Section 253(d) does not designate federal preemption as a remedy for discriminatory rights-of-way regulations any more than it expressly creates a private cause of action for telecommunications companies to sue; yet, this did not stop the post-*Gonzaga* circuit courts from asserting federal preemption as the intended remedy proposed by § 253. Preemption is an inadequate substitute for a cause of action. Granting telecommunications companies a cause of action to sue local governments for discriminatory rights-of-way regulations is cognizable under "liberal" pre-*Gonzaga* implied cause of action jurisprudence and, practically, this would better effectuate Congress' intent to promote development and individual entrepreneurship by deregulating the national telecommunications industry.

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[83] Gonzaga Univ. v. Doe, 536 U.S. 273, 283-85 (2002).
[84] 47 U.S.C. § 253(c) (2006); 141 CONG. REC. S8206-02 (1995).
[85] NextG Networks of N.Y., Inc. v. City of New York, 513 F.3d 49, 54 (2d Cir. 2008); Southwestern. Bell Tel., L.P. v. City of Houston, 529 F.3d 257, 262 (5th Cir. 2008); Sprint Telephony PCS, L.P. v. County of San Diego 490 F.3d 700, 709 (9th Cir. 2007); Qwest Corp. v. City of Santa Fe, 380 F.3d 1258, 1266 (10th Cir. 2004).
[86] U.S. CONST. art. VI, cl. 2; *see* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n. 14 (1983) (citing *Ex parte Young*, 209 U.S. 123, 160-62 (1908) for the proposition that "it is beyond dispute that federal courts have jurisdiction to enjoin state officials from interfering with federal rights.").
[87] NextG Networks of N.Y., Inc. v. City of New York, 513 F.3d 49, 54 (2d Cir. 2008); Southwestern. Bell Tel., L.P. v. City of Houston, 529 F.3d 257, 262 (5th Cir. 2008); Sprint Telephony PCS, L.P. v. County of San Diego 490 F.3d 700, 709 (9th Cir. 2007); Qwest Corp. v. City of Santa Fe, 380 F.3d 1258, 1266 (10th Cir. 2004).

IV. CONFLICTING CONSERVATIVES: THE § 253(C) ENFORCEMENT PARADOX

In *Gonzaga v. Doe*, the Supreme Court established a strict-textualist paradigm of statutory interpretation.[88] The post-*Gonzaga* circuit courts asked to rule on whether § 253(c) creates a private cause of action point directly to the "clarification" embodied in *Gonzaga* to explain their disagreement with the pre-*Gonzaga* circuit courts decisions on the same issue.[89] Nevertheless, rather than merely dismissing the telecommunications companies' claims outright rendering § 253(c) unenforceable in federal court, the post-*Gonzaga* circuit courts concluded that federal preemption was the appropriate (and intended) remedy for discriminatory local rights-of-way regulations.[90] This compromise, while consistent with post-*Gonzaga* case law, runs contrary to the wishes of Congress in enacting the statute and undermines the efficacy of its enforcement.

There are a number of doctrinal and practical problems with the post-*Gonzaga* circuit courts' preemption compromise. Doctrinally, while federal preemption may be either express or implied, the underlying test of any preemption analysis is whether Congress intended the statute at issue to preempt state or local laws.[91] In the case of § 253, Congress expressly included subsection (d) to vest the FCC with exclusive authority to preempt local laws in violation of § 253(a) and § 253(b);[92] moreover, the omission of § 253(c) from the preemption provision indicates Congress' express intent *not* to allow preemption for violations of § 253(c). By granting federal courts preemption power over § 253 in its entirety, the post-*Gonzaga* circuit courts not only undermined Congress' jurisdictional preference but also effectively dismantled the compromise that was intended to keep local rights-of-way regulations beyond the reach of federal preemption.[93]

In concluding that injunctive relief by way of federal preemption was Congress' intended remedy for local government violations of § 253, the post-*Gonzaga* circuit courts simply ignore the jurisdictional and substantive limitations imposed by Congress. Even a plain reading of the statute makes it clear that Congress intended to vest preemption power exclusively with the FCC and to

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[88] *Gonzaga*, 536 U.S. at 283.
[89] *NextG Networks*, 513 F.3d at 53; *Southwestern Bell*, 529 F.3d at 260; *Qwest*, 380 F.3d at 1266.
[90] *NextG Networks*, 513 F.3d at 53; *Southwestern Bell*, 529 F.3d at 260; *Qwest*, 380 F.3d at 1266.
[91] Louisiana Public Service Com'n v. F.C.C., 476 U.S. 355, 368 (1986).
[92] *See* 47 U.S.C. § 253(d) (2006).
[93] For the FCC's own analysis of the scope of its authority under the Telecommunications Act of 1996, see In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15, 499 (1996).

exempt local right-of-way regulations from its purview; nevertheless, the Second, Fifth, Ninth and Tenth Circuits are willing to undermine Congressional intent for the sake of reconciling § 253, a pre-*Gonzaga* law, with the new post-*Gonzaga* rules of statutory interpretation. None of these post-*Gonzaga* decisions address the reality that their position runs contrary to Congress' intent in enacting the statute at issue. The courts ignore the question of whether federal preemption was Congress' intended remedy for § 253(c) violations. Further, the decisions evade the problem of the omission of § 253(c) from § 253(d) by determining that either discriminatory rights-of-way provisions are really encompassed under the general protection of § 253(a) (and are therefore covered by the preemption section),[94] that the regulation at issue does not really deal with rights-of-way (and therefore is not saved from preemption by the omission of § 253(c)),[95] or that the regulation at issue is not discriminatory such that § 253(c) has not been violated.[96]

Admittedly, the post-*Gonzaga* legal landscape grants courts greater latitude in implying federal preemption than in implying a federal cause of action; nevertheless, it is important to note that it is precisely the precedent-shifting impact of *Gonzaga* that is responsible for the post-*Gonzaga* circuit courts' determination that federal preemption, as opposed to a cause of action, was Congress' preferred remedy for § 253(c) violations. While the plain language of the statute *does not* support the conclusion that Congress intended § 253(c) to create a private cause of action, the statute *does* clearly indicate that Congress intended to exempt rights-of-way regulations from FCC preemption.[97] By granting federal court preemption of local rights-of-way regulations, the post-*Gonzaga* circuit courts do more to undermine Congressional intent than to effectuate it.

This legal quagmire is actually a product of subtle ideological irony. The Telecommunications Act of 1996 marked a great success for the conservative camp in Congress. The Republican-controlled legislature passed the Act for the purpose of promoting competition and removing regulatory barriers on the theory that pro-business, free market principles would best enable the fast and efficient development of telecommunications infrastructure nationwide.[98] Another victory for American political conservatives was the Supreme Court's abandonment of the doctrine of implied

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[94] *NextG Networks*, 513 F.3d at 52-54; *Sprint Telephony*, 490 F.3d at 716-18.
[95] *Qwest*, 380 F.3d at 1272.
[96] *Southwestern Bell*, 529 F.3d at 263.
[97] 47 U.S.C. § 253(d) (2006).
[98] 141 CONG. REC. S8206-02, at 1 (1995).

causes of action in its 2002 *Gonzaga v. Doe* decision.[99] The first post-*Gonzaga* § 253 case evinced the contradiction between these two positions.[100] The conservative view of statutory interpretation requires that in order to confer individual rights, Congress must speak in a clear, unambiguous voice phrased in terms of persons benefited.[101] At the same time, the conservative view of how best to encourage business development in the field of telecommunications calls for dismantling regulatory barriers and empowering individual companies to vindicate their own rights under the law.[102] In this narrow instance, the emergence of conservative strict constructionism as the prevailing ideology of statutory interpretation has effectively eviscerated the most conservative, pro-business provision of the Telecommunications Act of 1996.

The circuit courts on both sides of the § 253 split were forced to decide how § 253(c) should be enforced absent an express statement from Congress. The pre-*Gonzaga* courts were able to consider implying either preemption or a cause of action as a possible remedy but post-*Gonzaga* courts were effectively prohibited from considering the latter possibility. The Sixth Circuit, in *TCG Detroit*, looked to the statute's legislative history to conclude that Congress expressly intended to exempt § 253(c) from FCC preemption.[103] The following questions then remained. If § 253(c) was exempt from FCC preemption, how did Congress intend for that provision to be enforced? What mechanism was available to ensure that local governments did not enact discriminatory rights-of-way regulations?

The *TCG Detroit* court read the omission of § 253(c) from the enforcement section as a tacit statement by Congress that it intended telecommunications companies themselves to raise a claim to vindicate their rights under the statute:

> The subsection of § 253 authorizing Commission action, § 253(d), pointedly omits reference to violations of § 253(c). Thus, we believe it is incorrect to say that reading a private right of action into § 253(c) "runs counter to the statutory scheme of § 253 itself." A violation of § 253(c) might well *not* involve violating § 253(a); unfair or unreasonable fees need not rise to the level of erecting a barrier to entry, while only the latter violation authorizes the Commission to act pursuant to § 253(d).

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[99] Bobroff, *supra* note 15, at 6.
[100] *Qwest*, 380 F.3d at 1258.
[101] Gonzaga Univ. v. Doe, 536 U.S. 273, 280 (2002).
[102] 141 CONG. REC. S8206-02, at 1 (1995). *See also* In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15, 499 (1996).
[103] TCG Detroit v. City of Dearborn, 206 F.3d 618, 623 (6th Cir. 2000).

> Accordingly, we hold that the Michigan district court correctly decided in *TCG* that § 253(c) of the Act authorizes a private right of action in federal court for telecommunications providers aggrieved by a municipality's allegedly discriminatory or allegedly unfair and unreasonable rates.[104]

In *NextG Networks*, the Second Circuit explained that the pre-*Gonzaga* decisions concluding that the omission of § 253(c) from § 253(d) implied Congressional intent to create a cause of action were a product of those courts' failure "to consider possible jurisdiction under the Supremacy Clause."[105] Although the *NextG Networks* court was right to point out that the pre-*Gonzaga* courts' decisions to imply a cause of action stems principally from their characterization of § 253(c) as an independent basis for municipal liability, it mistakenly accuses the Sixth and Eleventh Circuits of failing to consider federal preemption as a potential answer to the question of how Congress intended § 253(c) to be enforced.[106] In the pre-*Gonzaga* era, when implied causes of actions were still permitted, the Sixth and Eleventh Circuits simply concluded that allowing telecommunications companies to sue under § 253(c) would best effectuate the larger intent of Congress to deregulate the telecommunications industry and promote national development. The post-*Gonzaga* courts, unable to consider implying a cause of action, were forced to either take jurisdiction under the Supremacy Clause or render § 253(c) unenforceable.

CONCLUSION

The Supreme Court's landmark decision in *Gonzaga v. Doe* has completely stripped lower courts of their ability to imply causes of action in the face of statutory ambiguity. While this strict textualist view of statutory interpretation is a cornerstone of conservative judicial thinking, its application to § 253 of the Telecommunications Act of 1996 subverts other important conservative values – the correlation between rights and remedies and deregulated free market economics.[107] In the wake of *Gonzaga*, telecommunications companies can seek preemption of discriminatory rights-of-way regulations and extortionist franchise fees only long after the damage to their business has been done; moreover, these companies cannot seek any pecuniary redress. The *Gonzaga* Court, by reversing thirty years of "liberal" precedent

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[104] *Id.* at 624 (citation omitted).
[105] NextG Networks of N.Y., Inc. v. City of New York, 513 F.3d 49, 53 n.4 (2d Cir. 2008).
[106] *Id.*
[107] Mazzuchi, *supra* note 39.

permitting implied causes of action, unwittingly undercut the "conservative," pro-business telecommunications legislation embodied in § 253.

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[*] J.D. Candidate, Benjamin N. Cardozo School of Law, 2010; B.A., Columbia University, 2006. I would like to thank my entire family for their love and support. In particular, I would like to dedicate this article to my grandmother, Miriam Krakinowski, whose perseverance throughout a lifetime of adversity inspires me in everything that I do.