10-2001

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Jack M. Beermann
Boston University School of Law

Clive B. Jacques

ARTICLES

SECTION 1983'S "AND LAWS" CLAUSE RUN AMOK: CIVIL RIGHTS ATTORNEY'S FEES IN CELLULAR FACILITIES SITING DISPUTES

CLIVE B. JACQUES* AND JACK M. BEERMANN**

INTRODUCTION

In the United States, wireless communication service providers

* J.D. 2000, Boston University School of Law

** Professor of Law, Boston University School of Law

The authors thank Scott Owens for research assistance and A.J. Bellia, Randy Barnett, Susan Bandes, Myriam Gilles, Sheldon Nahmod, Michael Harper, and Larry Yackle for helpful comments on earlier drafts.

("providers") serve over one hundred million subscribers with wireless telephone and other services, generating almost fifty billion dollars in revenues annually.[1] Wireless telephone service is called "cellular" because it operates via a network of antennae, each of which serves a geographic cell. As the user moves around, the cellular telephone is automatically linked to the nearest antenna.[2] In order to supply service, providers must build antennae. When cellular phones were introduced, the number of antennae was far from adequate to provide complete coverage. Although service has improved dramatically in recent years, partly due to advances in wireless technology—primarily the shift from analog to digital service—improvement is largely attributable to a major increase in the number of antennae, which allows for much better coverage.[3]

Although the number of antennae has increased dramatically, even in major metropolitan areas there are still "dead" areas in which conversations become distorted, crossed with other conversations, or even disconnected. Providers continue to increase their coverage by building more antennae. These towers are often unwelcome neighbors, especially in residential areas, and local governments have used their traditional zoning powers[4] to regulate the placement and appearance of cellular towers. Many zoning ordinances contain height, area and use restrictions that affect antennae of all kinds, including cellular towers. However, a major local concern has not been the appearance and location of cellular towers but instead the potential damage to human health from radiation emitted by cellular antennae.

Fearing that local zoning restrictions could inhibit the development of the personal wireless communication service industry in the United States, Congress included provisions in the 1996 Telecommunications Act ("TCA") that limit local zoning authorities' powers to regulate cellular towers. Section 704 of the TCA, codified at 47 U.S.C. § 332(c)(7) (Supp. IV 1998) [hereinafter "§ 332(c)(7)"], expressly preserves the power of local zoning

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[1] *See* Cellular Telecomms. & Internet Ass'n, *Semi-Annual Wireless Industry Survey Results: June 1985 to June 2000* (visited Aug. 21, 2001) <http://www.wow-com.com/pdf/wireless_survey_2000.pdf> (on file with the *Boston University Law Review* [hereinafter Cellular Telecomms. & Internet Ass'n, *Semi-Annual Wireless Industry Survey Results*]. The website's front page reports subscribers at more than 120,000,000. *See* Cellular Telecomms. & Internet Ass'n, *World of Wireless Communications* (visited Aug. 21, 2001) <http://www.wow-com.com> (on file with the *Boston University Law Review* [hereinafter Cellular Telecomms. & Internet Ass'n, *World of Wireless Communications*].

[2] *See* Fed. Communications Comm'n, *Wireless Facilities Siting Issues: Fact Sheet #1: New National Wireless Tower Siting Policies* (last modified April 23, 1996) <http://www.fcc.gov/wtb/siting/fact1.pdf> (explaining how a cellular system operates).

[3] Between 1996 and 2000, the number of cellular antenna sites almost quadrupled from approximately 25,000 in 1996 to more than 95,000 in 2000. *See* Cellular Telecomms. & Internet. Ass'n, *Semi-Annual Wireless Industry Survey Results*, *supra* note 1.

[4] New York City enacted the first comprehensive zoning program in 1916. *See generally* JESSE DUKEMINIER & JAMES KRIER, PROPERTY 992 (3d ed. 1993).

authorities over the siting of cellular phone towers.[5] However, this section goes on to limit that local authority in several ways. First, it prohibits "unreasonabl[e] discriminat[ion] among providers of functionally equivalent services" and forbids state and local authorities from imposing zoning restrictions that "prohibit or have the effect of prohibiting the provision of personal wireless services."[6] Second, it prohibits state and local governments from regulating cellular towers "on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission's [("FCC")] regulations concerning such emissions."[7] This provision effectively preempts local law that regulates the siting of cellular antennae based on health or other environmental effects of the emission of radio waves. The TCA also imposes procedural requirements on local governments, including timely decisions on applications to construct cellular antennae and a requirement that any denial of permission to construct an antenna "be in writing and supported by substantial evidence contained in a written record."[8]

The TCA also grants providers two options to enforce its requirements against state and local zoning authorities. First, providers aggrieved by any state or local action regarding cellular towers are granted an action in "any court of competent jurisdiction" to be heard on an "expedited basis."[9] The section does not specify the remedies available, but presumably a court would have the power to overturn a state or local government's denial of permission to site or modify a cellular tower. Second, in any case in which it is alleged that a permit to site or modify a cellular tower was denied because of environmental or health concerns, the aggrieved personal wireless service provider may petition the FCC for relief.[10] Again, although the statute does not mention remedies, presumably the FCC, if it found a denial improper,

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[5] *See* 47 U.S.C. § 332(c)(7)(A) (Supp. IV 1998).

[6] 47 U.S.C. § 332(c)(7)(B)(i). A zoning restriction could "have the effect of prohibiting the provision of personal wireless services" by disallowing placement of antennae adequate to cover an area as, for example, by completely prohibiting antennae in a municipality— where antennae in a neighboring municipality could not cover the entire area of the prohibiting municipality— or by restricting them to sites that are inadequate to provide coverage to all subscribers in the area.

[7] 47 U.S.C. § 332(c)(7)(B)(iv).

[8] 47 U.S.C. § 332(c)(7)(B)(iii).

[9] 47 U.S.C. § 332(c)(7)(B)(v).

[10] The relevant code, 47 U.S.C. § 332(c)(7)(B)(v), states:

> Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

Id.

would order the state or local government to grant the permit.

This provision is, to put it mildly, a model of poor statutory drafting. It raises more questions than it answers. Most obviously, it completely omits reference to remedies, leaving it a mystery as to what courts or the FCC must do if they conclude that the TCA has been violated. More fundamentally, its substantive provisions are so vague as to provide little in the way of guidance to courts that attempt to discern whether a violation has occurred. For example, what is "unreasonabl[e] discriminat[ion]" among providers of cellular services? Could a local zoning body allow some providers to construct antennae and then reject all further applications on the ground that more antennae would be unacceptable aesthetically, or would that amount to unreasonable discrimination in favor of incumbents? When would a refusal amount to an effective prohibition of the provision of personal communication services? Is local government obligated, by these provisions, to allow every provider sufficient access to cover completely every municipality, or is it enough that there exists some competition within the locality? Finally, if a zoning body rejects an application to build an antenna and cites only aesthetic or related concerns in its decision, could a court find that the rejection was based on environmental factors if local residents argued against approval based on such concerns? In short, § 332(c)(7) leaves numerous important issues for judicial resolution with little statutory guidance.

Personal wireless service providers whose applications for permission to construct antennae have been denied by local government zoning authorities have brought actions in state and federal court to force local governments to grant the permits. In some of these cases, not only have victorious providers convinced courts to order local governments to approve their applications, they have, despite the American rule that parties are usually responsible for their own attorney's fees, persuaded courts to award attorney's fees in their favor against local governments. They have done so by bringing their claims to enforce the TCA under section one of the Civil Rights Act of 1871, 42 U.S.C. § 1983, which, inter alia, grants a cause of action against persons, who, acting under color of state law, deny federal statutory rights.[11] By bringing what is known as an "and laws" claim under § 1983 to enforce the TCA, providers are able to take advantage of section 722 of the Civil Rights Attorney's Fees Act of 1976, codified at 42 U.S.C. § 1988(b), which grants attorney's fees to prevailing parties in cases brought under § 1983 and other civil rights statutes.[12]

In this article, we argue that enforcing the TCA against state and local zoning authorities raises serious legal concerns, especially if such enforcement is via a § 1983 "and laws" action. In particular, we argue that courts should not award attorney's fees under § 1988 to providers who prevail in claims alleging violation of TCA section 704. First, we argue that this is not an appropriate

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[11] *See* 42 U.S.C. § 1983 (Supp. IV 1998).

[12] *See* 42 U.S.C. § 1988(b) (1994 & Supp. IV 1998).

"and laws" claim because the TCA's cell siting provisions, in the main, do not create rights that are enforceable via § 1983 action. Further, in our view Congress did not intend that providers be free to use an "and laws" claim to enforce their rights under the TCA and receive an award of attorney's fees. Second, even if an "and laws" claim is available, we argue that courts should use their discretion not to award attorney's fees because (1) the civil rights-related purposes of the attorney's fees statute, as an exception to the American rule, are not met, and (2) the awarding of attorney's fees would threaten to undermine local government control of the important area of zoning. Third, we discuss the constitutionality of both the TCA's cell siting provisions and the "and laws" clause of § 1983. We first argue that some provisions of § 332(c)(7) may be unconstitutional because they impose specific duties on local government in violation of the anti-commandeering principle applied in recent Supreme Court Tenth Amendment jurisprudence. Next, we raise the possibility that the "and laws" clause of § 1983 is unconstitutional under recent understandings of congressional power to enforce the Fourteenth Amendment, at least when the clause is used to enforce laws passed under powers not related to civil rights, such as the commerce power under which the TCA was passed.

This article proceeds as follows. In Part I, we review the personal wireless communication service industry, focusing primarily on the provisions of the TCA relating to local zoning authority. In Part II, we explain and criticize the doctrinal basis under which providers have been awarded attorney's fees through the "and laws" clause of § 1983. In this Part we argue that the "and laws" clause should not apply to actions to enforce the TCA because providers should be confined to enforcement under the TCA itself, and that even if the "and laws" clause does apply, courts should use their discretion to deny attorney's fees awards in cases enforcing the TCA. In Part III, we examine the obligations the TCA places on state and local government officials and conclude that, at least in part, the TCA violates the Tenth Amendment anti-commandeering principles recognized recently by the Supreme Court. We also argue in this Part that the "and laws" clause may be unconstitutional by exceeding Congress's power to enforce the Fourteenth Amendment. Part IV summarizes our conclusions.

I. BACKGROUND

A. *Personal Wireless Services*

Personal wireless services, like most elements of the telecommunications industry and most uses of the broadcast spectrum, are subject to extensive federal regulation. The FCC allocates the broadcast spectrum among different uses and among competitors providing the same services. Cellular telephone technology maximizes use of the limited available spectrum by dividing service areas into small regions called "cells." Providers employ "frequency reuse," assigning the same frequencies to multiple non-adjacent cells in order

to prevent cells from interfering with each other. Wireless subscribers moving from one cell to another are imperceptibly transferred, or "handed-off," receiving uninterrupted service.[13] However, each cell has a finite capacity based upon its available bandwidth and the number of users within its range.

Wireless services are extremely popular with consumers in the United States. There are currently over one hundred million wireless subscribers in the United States.[14] This popularity drives increasingly rapid industry growth. As wireless service usage increases, so must the infrastructure that supports it. The most visible element of the wireless infrastructure is the network of antennae that compose a cellular system. To expand service into new geographic areas, a provider must erect new antennae , creating new cells. Further, to accommodate more users, providers must create more cells within the same geographic region. As more cells are created, more towers must go up. Since 1996, the number of cell sites—antenna locations—has almost quadrupled, approaching one hundred thousand; annual industry revenue has grown more than one hundred percent, approaching fifty billion dollars; and cumulative capital investment has more than tripled, exceeding seventy-five billion dollars.[15]

In many areas, state and local zoning laws regulate the types of structures that may be built in a particular area as well as the size and aesthetics of those structures that are built. In order to provide adequate coverage, cellular phone providers must locate antennas closer and closer to residential property.[16] Many of these locations are not zoned to allow transmission facilities, and wireless providers have often been unwelcome guests.[17] However, if providers

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[13] *See* Federal Communications Comm'n, *supra* note 2 ("As a subscriber travels across the service area the call is transferred (handed-off) from one cell to another without noticeable interruption.").

[14] *See* Cellular Telecomms. & Internet Ass'n, *World of Wireless Communication*, *supra* note 1.

[15] *See* Cellular Telecomms. & Internet Ass'n, *Semi-Annual Wireless Industry Survey Results*, *supra* note 1 (as of June 2000).

[16] *See* Dean J. Donatelli, Note, *Locating Cellular Telephone Facilities: How Should Communities Answer When Cellular Telephone Companies Call?*, 27 RUTGERS L.J. 447, 453-54 (1996) (explaining that the ideal configuration for antennae within cells and the growing number of cellular telephone users has led providers to select sites where zoning ordinances forbid such a use or where residents oppose the installation); *see also, e.g.*, Cellco Partnership v. Town Plan & Zoning Comm'n, 3 F. Supp. 2d 178, 181 (D. Conn. 1998) (explaining that provider Cellco applied to the Zoning Commission to rebuild a church steeple and place cellular antennae inside); Julie Tamaki, *Disguises Help Cut Static Over High-Tech Towers*, L.A. TIMES, July 12, 1998, at B1 (noting a current trend toward disguising cellular antennae as trees and church steeples to reduce "visual blight").

[17] *See Hearings on H.R. 1555 Before the Subcomm. on Telecomms. and Finance of the House Comm. on Commerce*, 104th Cong. (1995), *available in* 1995 WL 295409 (F.D.C.H.) (statement of Wayne Perry, Vice Chairman of McCaw Cellular Communications, Inc. and AT&T Wireless Services) (describing the increasing number of overlapping local regulations on cellular tower emissions and siting).

are not allowed to build their antennae, cells without transmission facilities can result, creating dead zones, or "holes," in a provider's service area. Consumers passing through such a hole cannot place calls, and calls placed elsewhere are suddenly disconnected when the consumer enters that dead zone.

B. *The 1996 Telecommunications Act*

Congress recognized that wireless services would be unpopular, or possibly economically unfeasible, unless they were uniform and reliable.[18] In order to secure that uniformity and reliability, § 332(c)(7) regulates local zoning authority over the placement of transmission facilities.[19] Specifically, although most local zoning authority is explicitly preserved in the TCA, the TCA restricts local zoning authorities in several ways. Local authorities may not impose regulations that "discriminate among providers of functionally equivalent services,"[20] or "prohibit or have the effect of prohibiting the provision of personal wireless services."[21] In addition, local authorities may not regulate "on the basis of the environmental effects of radio frequency emissions" as long as FCC requirements are met.[22]

The Act also imposes three procedural requirements on local decision-making concerning the placement of towers. The local authority must address personal wireless service facility permit applications within a reasonable period of time;[23] it may deny applications only in writing and with a statement of reasons; and any denial must be "supported by substantial evidence contained in a written record."[24]

The TCA also provides two avenues of relief for applicants whose applications regarding wireless communication service transmission facilities have been denied by zoning authorities. The TCA allows any person adversely affected by any final state or local zoning decision regarding transmission facilities to "commence an action in any court of competent jurisdiction."[25] The TCA requires courts to hear and decide such actions on an expedited basis.[26] Finally, the Act provides that a person adversely affected by a state or local action regarding the placement of wireless transmission facilities based

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[18] *See* Leonard J. Kennedy & Heather A. Purcell, *Section 332 of the Communications Act of 1934: A Federal Regulatory Framework That Is "Hog Tight, Horse High, and Bull Strong"*, 50 FED. COMM. L.J. 547, 548-50, 559-62 (1998) (explaining congressional recognition in enacting section 704 of the TCA that state and local regulation of wireless service providers was impeding the development of a national wireless service industry).

[19] *See generally* 47 U.S.C. § 332(c)(7) (Supp. IV 1998).

[20] 47 U.S.C. § 332(c)(7)(B)(i)(I).

[21] 47 U.S.C. § 332(c)(7)(B)(i)(II).

[22] 47 U.S.C. § 332(c)(7)(B)(iv).

[23] *See* 47 U.S.C. § 332(c)(7)(B)(ii).

[24] 47 U.S.C. § 332(c)(7)(B)(iii).

[25] 47 U.S.C. § 332(c)(7)(B)(v).

[26] *See id.* ("The court shall hear and decide such action on an expedited basis.").

on environmental effects may petition the FCC for relief.[27]

Although courts with jurisdiction are directed to hear and decide cases arising under the TCA on an expedited basis, the TCA is silent on remedies, with no mention of whether damages or injunctive relief are preferred or whether any party should recover attorney's fees or costs. Congress apparently either overlooked the remedies question, left it to the courts to fashion appropriate remedies, or thought it was obvious that the appropriate remedy for violating this provision of the TCA would be an order requiring the zoning authorities to issue the relevant permit. The TCA's "substantial evidence" requirement, which is a common standard used in judicial review of agency action, does not really help resolve the remedial issue because courts employ a wide range of remedies in judicial review of agency action, including reversing agency action, remanding a matter to the agency for further consideration, and, in some cases, ordering an agency to issue a permit or license wrongfully withheld.

II. SUITS TO ENFORCE THE TCA

Despite the TCA's lack of provisions concerning remedies, injunctive relief forcing state and local officials to abide by the TCA is presumably available. Injunctions could run the gamut from orders to issue written decisions, to decide on permits within a reasonable time, or to issue permits.[28] It is unclear whether courts would award damages resulting from violations of the TCA , although one can imagine situations in which damages would be appropriate, for example, if a provider lost profits because of an illegal denial of a permit, or if a locality imposed expensive conditions on a provider that later proved to

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[27] *See id.* ("Any person adversely affected by an act or failure to act by a state or local government or any instrumentality thereof that is inconsistent with clause (iv) [the environmental effects provision] may petition the Commission for relief.").

[28] Interestingly, in AT&T Wireless PCS, Inc. v. City of Atlanta, 50 F. Supp. 2d 1352, 1353 (N.D. Ga. 1999), *appeal dismissed per stipulation,* No. 00-15885, 2001 WL 1049229 (11th Cir. Sept. 13, 2001), the district court appears to have thought that the issuance of a permit follows automatically upon a finding of a procedural violation. An Eleventh Circuit panel initially reversed the district court's decision, but the panel's decision was vacated and then the appeal was dismissed after *en banc* rehearing was granted. *See* AT&T Wireless PCS, Inc. v. City of Atlanta, 210 F.3d 1322 (11th Cir. 2000) (vacating the district court's decision), *vacated for lack of jurisdiction,* 223 F.3d 1324 (11th Cir. 2000), *reinstated,* 250 F.3d 1307 (11th Cir. 2001), *vacated and reh'g en banc granted,* No. 00-15885, 2001 WL 901250 (11th Cir. Aug. 10, 2001), *and appeal dismissed per stipulation,* No. 00-15885, 2001 WL 1049229 (11th Cir. Sept. 13, 2001). It is not clear why the district court, *see* 50 F. Supp. 2d 1352 (N.D. Ga. 1999), did not consider whether it was appropriate to first allow the city to attempt to comply by issuing a written decision based on a written record. *Compare* City of Richmond v. Randall, 211 S.E.2d 56, 61 (Va. 1975) (hesitating to order issuance of a special use permit, because under Virginia law only a legislative body could issue permits, not courts on judicial review).

be illegal.[29] One way that providers have achieved certainty concerning remedies is to bring suit under section one of the Civil Rights Act of 1871, 42 U.S.C. § 1983, which clearly allows damages and injunctive relief and, when coupled with the Civil Rights Attorney's Fees Awards Act of 1976, attorney's fees to prevailing plaintiffs.[30] The following discussion explains how a violation of the Telecommunications Act of 1996 can be transformed into an action under § 1983.

A. *Section 1983 Actions to Enforce the TCA*

Section 1983 provides a federal cause of action for citizens whose federal rights, both constitutional and statutory, have been violated by a state actor under color of state law. The statute provides, in pertinent 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. . . .[31]

Section 1983 creates no rights. Rather, it provides a remedy for rights established elsewhere in federal law.[32] The section derives substantially from the first part of the Act of April 20, 1871, sometimes referred to as the Civil Rights Act of 1871 or the Ku Klux Klan Act.[33] The primary purpose of § 1983 is to provide a remedy in federal court in favor of private parties when state or local officials violate their federal rights. As the Supreme Court has stated, the purpose of § 1983 is to "interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'"[34]

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[29] *See* Bell v. Hood, 327 U.S. 678, 684 (1946) ("[F]ederal courts may use any available remedy to make good the wrong done."); *see also* Davis v. Passman, 442 U.S. 228, 248 (1979) ("By virtue of 42 U.S.C. § 1983, a damages remedy is . . . available to redress injuries . . . when they occur under color of state law.").

[30] *See* 42 U.S.C. § 1983 (Supp. IV 1998); 42 U.S.C. § 1988(b) (1994 & Supp. IV 1998).

[31] 42 U.S.C. § 1983 (Supp. IV 1998) (emphasis added).

[32] *See, e.g.*, Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617 (1979) ("[O]ne cannot go into court and claim a 'violation of § 1983'—for § 1983 by itself does not protect anyone against anything.").

[33] *See* 17 Stat. 13, § 1 (1871); Dist. of Columbia v. Carter, 409 U.S. 418, 423 (1973) (noting that § 1983 is rooted in the Ku Klux Klan Act of 1871, whose primary purpose was to enforce the Fourteenth Amendment).

[34] Mitchum v. Foster, 407 U.S. 225, 242 (1972) (quoting *Ex parte* Virginia, 100 U.S. 339, 346 (1880)).

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or

1. "And Laws"

When Congress codified the federal statutes in the Revised Statutes in 1874, the phrase "and laws" was added to § 1983, extending the remedy provided by § 1983 to violations of federal statutes by state and local officials acting under color of law.[35] Although there is reason to believe that Congress did not mean to extend § 1983's protections beyond the civil rights setting, the Supreme Court has held that the "and laws" clause should be taken literally to mean that violations of any federal statute under color of state law can presumptively give rise to a § 1983 action.[36] Providers of cellular service can thus make out a claim under the "and laws" clause of § 1983 by alleging that state and local officials, by denying a permit to construct or modify a facility, have deprived them of their rights under the TCA.

It is only a short step from finding that a § 1983 action is available to redress violations of the TCA to awarding attorney's fees to providers who have brought successful § 1983 challenges to state and local zoning decisions. The Civil Rights Attorney's Fees Awards Act of 1976 provides that district courts may, in their discretion, award attorney's fees to prevailing parties in, inter alia, § 1983 actions.[37] The Supreme Court has held that prevailing plaintiffs, provided they achieve a significant remedy such as an injunction or more than nominal damages, are nearly always entitled to attorney's fees[38] and that this entitlement extends to "and laws" claims.[39]

There are reasons, however, to question not only whether a § 1983 action ought to be available to enforce the TCA, but also, even if such an action is available, whether courts should award attorney's fees to prevailing providers in such cases. We address each of these issues in turn.

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otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Monroe v. Pape, 365 U.S. 167, 180 (1961).

[35] *See* Rev. Stat. § 1979 (1878) (adding the "and laws" clause); Maine v. Thiboutot, 448 U.S. 1, 4 (1980).

[36] *See id.* The argument that the "and laws" clause was meant to encompass only violations of civil rights laws is based on two factors. First, Congress stated that it did not intend to make substantive changes in the recodification process. Second, § 1983's jurisdictional counterpart was amended in the recodification process to provide jurisdiction for cases involving "an Act of Congress providing for equal rights." The Court in *Thiboutot* rejected both these arguments. *See Thiboutot*, 448 U.S. at 6-8; *infra* notes 313-317 and accompanying text.

[37] *See* 42 U.S.C. § 1988(b) (Supp. IV 1998).

[38] *See* Hensley v. Eckerhardt, 461 U.S. 424, 433 (1983) (citing Nadeau v. Helgemoe, 581 F.2d 275, 278 (1st Cir. 1978)). "[P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefits the parties sought in bringing suit." *Id.* (quoting *Nadeau* at 278-79).

[39] *See Thiboutot*, 448 U.S. at 5.

2. Exceptions to the Availability of the "And Laws" Action

Shortly after the Court decided that the "and laws" clause should be read literally to apply to all federal laws, not merely to federal civil rights or equal rights laws, the Court, in the *Pennhurst* case,[40] created two exceptions to this general rule. First, the Court noted that the § 1983 remedy would not be available if the federal statute upon which the plaintiff relies for the "and laws" claim does not create rights with sufficient clarity to be enforceable legally.[41] Second, the Court observed that a § 1983 "and laws" action would not be available when the federal statute in question provides an exclusive remedy.[42]

a. *No Enforceable Rights*

The *Pennhurst* case illustrates the "no enforceable rights" exception to the availability of § 1983 "and laws" claims.. *Pennhurst* was a class action alleging that Pennhurst State School violated federal rights conferred by, inter alia, the Developmental Disabilities Assistance and Bill of Rights Act ("Act").[43] The Court—in an opinion by Justice Rehnquist—eventually reversed and remanded the case because it found that Congress did not intend to create enforceable rights in the Act.[44] Rather, the Act merely "express[ed] a congressional preference for certain kinds of treatment."[45] The Act's "Bill of Rights"[46] provision, "simply a general statement of findings," was "too thin a reed" on which to support an argument that it creates "enforceable rights and obligations."[47]

The Court has set forth three criteria for determining whether a federal statute creates rights that are enforceable in a § 1983 "and laws" action. The criteria are: (1) that "Congress ha[s] intended the provision in question to benefit the plaintiff," (2) that the "right . . . is not so 'vague and amorphous' that its enforcement would strain judicial competence," and (3) that "the statute . . . unambiguously impose[s] a binding obligation on the States."[48] If these criteria are met, then the federal statute in question creates rights that may give rise to a § 1983 "and laws" claim.

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[40] Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) [hereinafter *Pennhurst*].

[41] *Id.* at 28.

[42] *See id.* at 28.

[43] 42 U.S.C. §§ 6000-6083 (1994) (Congress has repealed Chapter 75 of Title 42, containing §§ 6000-6083. The Developmental Disabilities Assistance and Bill of Rights Act of 2000 is codified at 42 U.S.C.S. §§ 15001-15115 (2001); *see Pennhurst*, 451 U.S. at 1.

[44] *See Pennhurst*, 451 U.S. at 18 (arguing that the Act's "language and structure demonstrate that it is a mere federal-state funding statute").

[45] *Id.*

[46] *See* 42 U.S.C. § 6009.

[47] *Pennhurst*, 451 U.S. at 18.

[48] Blessing v. Freestone, 520 U.S. 329, 340-41 (1997) (quoting Wright v. Roanoke Redevelopment & Housing Auth., 479 U.S. 418, 430-32 (1987)).

Illustrative of the application of these criteria is the Court's analysis, in *Wilder v. Virginia Hospital Ass'n*,[49] of whether the Medicaid Act creates enforceable rights. Medicaid is a joint program between the states and the federal government.[50] In order to receive federal funds, a state must maintain a medical assistance plan that provides reasonable and adequate compensation to health care providers.[51] The Virginia Hospital Association sued Virginia[52] under § 1983 for failing to comply with these federal requirements, specifically alleging that Virginia's compensation was neither reasonable nor adequate.[53] Virginia asserted that the Medicaid Act did not create rights, privileges, or immunities within the context of § 1983.

The Court held that the Medicaid Act's "reasonable and adequate" compensation requirement created a right enforceable by health care providers. The Court noted that this provision was clearly intended to benefit health care providers and to expressly bind the states.[54] Despite this provision's generality, the courts were held competent to enforce it.[55] What is most significant about the Court's decision is that it found an enforceable right in a relatively imprecise provision that appears more like an administrative standard than a liability standard.

b. *Comprehensive Remedial Scheme*

The Court addressed the second exception to the availability of the "and laws" action, the comprehensive remedial scheme, shortly after *Pennhurst*. In *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*,[56] the Court held that because the Federal Water Pollution Control Act[57] ("FWPCA") had its own "sufficiently comprehensive" remedial scheme, Congress must have intended to preclude § 1983 claims against state and local officials for violating the FWPCA.[58] The general rule under which the Court denied the § 1983 claim for FWPCA violations is that when Congress passes a statute that has its own comprehensive remedial scheme with carefully drawn substantive and procedural provisions, it must have intended for that comprehensive scheme to govern claims under that statute. A § 1983 claim, free of the

[49] 496 U.S. 498 (1990).

[50] *See id.* at 502.

[51] *See id.* at 502-03.

[52] L. Douglas Wilder, the named defendant, was then Governor of Virginia.

[53] *See Va. Hosp. Ass'n*, 496 U.S. at 503-04.

[54] At one time, receipt of federal Medicaid funds was expressly conditioned on state waiver of sovereign immunity. *See id.* at 516-17.

[55] The Court stated that although both the states and the Secretary of Health and Human Services enjoyed ample discretion to measure their rates, and judges might require "some knowledge of the hospital industry," to evaluate those measurements, "such an inquiry is well within the competence of the Judiciary." *Id.* at 520.

[56] 453 U.S. 1 (1981) [hereinafter *Sea Clammers*].

[57] 33 U.S.C. §§ 1251-1387 (1994 and Supp. IV 1998).

[58] *See Sea Clammers*, 453 U.S. at 21.

particulars of the comprehensive scheme, would upset the balance Congress struck in the particular statute.

A more detailed look at the *Sea Clammers* case illustrates the workings of the rule.. The National Sea Clammers Association sued several defendants for illegal sewerage discharge under the FWPCA, the Marine Protection, Research, and Sanctuaries Act of 1972 ("MPRSA"),[59] the federal common law of negligence, and a variety of other legal theories.[60] The defendants sought to have the suits dismissed because the plaintiffs had failed to comply with all the procedural requirements of the citizen-suit provisions of the FWPCA and MPRSA.[61] The plaintiffs persisted, based upon "saving clauses"[62] in both statutes, which, they argued, allowed an *implied* private right of action regardless of their compliance with the citizen-suit provisions.[63] The Court rejected this argument based on the structure and legislative history of the FWPCA and MPRSA.[64]

The Court *sua sponte*, and not the plaintiffs, raised the possibility of a § 1983 suit to enforce the provisions of the FWPCA and the MPRSA. Even in an age of judicial activism, it was somewhat surprising to see the Court advance and reject a cause of action not relied upon by any plaintiff in the case.[65] Nonetheless, the *Sea Clammers* Court raised a § 1983 "and laws" claim as "a possible alternative source of *express* congressional authorization of private suits under these Acts."[66] "[I]f controlling, [the § 1983] argument would obviate the need to consider whether Congress intended to authorize private suits to enforce these particularly federal statutes."[67] The Court concluded that the FWPCA's and the MPRSA's citizen-suit provisions were "sufficiently comprehensive" to demonstrate congressional intent to preclude §

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[59] *See* 33 U.S.C. §§ 1401-1445 (1994 and Supp. IV 1998).

[60] *See Sea Clammers*, 453 U.S. at 5.

[61] *See id.* at 10-11. Suits under these statutes must be preceded by sixty days' notice "(i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order. . . ." 33 U.S.C. § 1365(b)(1)(A) (1994).

[62]

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

Sea Clammers, 453 U.S. at 8 n.11 (quoting 33 U.S.C. § 1415(g)(5)).

[63] *See id.* at 9-10.

[64] *See id.* at 18.

[65] The plaintiffs did not raise a § 1983 "and laws" claim because *Thiboutot* was decided after the suit was initiated. *See id.* at 19; *see also* Maine v. Thiboutot, 448 U.S. 1 (1980) (extending the remedy provided by § 1983 to violations of federal statutes by state and local officials acting under color of law).

[66] *See Sea Clammers*, 453 U.S. at 19.

[67] *Id.*

1983 enforcement.[68] The Court found it "hard to believe that Congress intended to preserve the § 1983 right of action when it created so many specific statutory remedies, including the two citizen-suit provisions."[69]

This conclusion regarding congressional intent is somewhat hard to swallow, given that both statutes contained savings clauses, one of which, for example, provided that its provisions "shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek *any other relief*."[70] Thus, when the underlying federal statute—which provides the right that a § 1983 "and laws" claim would vindicate—contains its own comprehensive internal remedial mechanism, the § 1983 action is precluded, apparently even in the face of a savings clause indicating congressional intent to preserve alternate remedies.

c. *The Two Exceptions in Tandem*

The Supreme Court has continued to work out the contours of the two exceptions to the availability of the § 1983 "and laws" action. The "no enforceable rights" branch has generated less case law than the "comprehensive remedial scheme" branch, but both continue to be important limitations on the availability of the § 1983 "and laws" action. The Court's most recent "and laws" case involved both exceptions. *Blessing v. Freestone*[71] involved whether § 1983 was available to private individuals to compel state compliance with Title IV-D of the Social Security Act ("Title IV-D").[72] Title IV-D sets out the compliance requirements for states participating in the Aid to Families with Dependent Children program ("AFDC").[73] As part of the federal funding of state AFDC programs, states are required to achieve substantial compliance with federal standards regarding collection and distribution of child support payments, including helping custodial parents to locate absent parents and to establish paternity of children born out of wedlock.[74] Congress established the Office of Child Support Enforcement within the Department of Health and Human Services ("HHS") to administer the program, and if a state fails to achieve "substantial compliance" with federal guidelines, the Secretary of HHS can penalize the state by withholding up to five percent of federal AFDC funds.[75]

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[68] *Id.* at 20.

[69] *Id.*

[70] *Id.* at 8 n.11 (quoting 33 U.S.C. § 1415(g)(5)) (emphasis added).

[71] Blessing v. Freestone, 520 U.S. 329 (1997).

[72] 42 U.S.C. §§ 651-669b (1994 & Supp. 1998).

[73] *See id.*; *Blessing*, 520 U.S. at 333.

[74] *See* 42 U.S.C. §§ 609(a)(8), 651, 654 (1994 & Supp. 1998); *Blessing*, 520 U.S. at 335.

[75] *See* 42 U.S.C. § 609(a)(8) (Supp. IV 1998); *Blessing*, 520 U.S. at 335; *see also* 45 C.F.R. § 305.63 (2000) (superseding 45 C.F.R. § 305.20 and interpreting "substantial compliance" to be full compliance with administrative details, ninety percent compliance

In a case involving a suit brought by four Arizona mothers seeking relief over Arizona's failure to meet federal standards, the Court found that Title IV-D's "substantial compliance" requirement did not create an enforceable right because it "was not intended to benefit individual children and custodial parents. . . ."[76] Rather, the "substantial compliance" standard was designed to aid federal officials in determining whether to penalize non-complying states.[77] The Court did assume, however, that Title IV-D's more specific requirements might create other rights that could be enforced via § 1983.[78]

The Court also held that Title IV-D's administrative scheme, under which HHS could withhold funds should a state fail to meet federal standards, did not constitute a comprehensive remedial scheme that would indicate congressional intent to disallow a § 1983 "and laws" action.[79] The Court noted that it had held only twice that a statute's own remedial scheme was "sufficiently comprehensive to supplant § 1983"[80] and that in both cases, the federal statute at issue contained its own private remedy.[81] With regard to statutes that contain no private remedy but only an administrative enforcement scheme, the Court has always rejected the "comprehensive remedial scheme" defense on the ground that the lack of a private remedy indicates that Congress did not intend to foreclose the § 1983 remedy.[82]

Another factor that the Court has emphasized, when deciding that the § 1983 "and laws" remedy should not be available, is the level of procedural detail contained in the "and laws" statute.[83] The Court apparently presumes, consistent with common sense, that if Congress carefully constructs a remedial scheme in a federal statute, with finely tuned substantive and procedural

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with guidelines for opening and closing cases, and seventy-five percent compliance with all other guidelines).

[76] *Blessing*, 520 U.S. at 343.

[77] *See id.*

[78] *See id.* at 345 ("We do not foreclose the possibility that some provisions of Title IV-D give rise to individual rights. The lower court did not separate out the particular rights it believed arise from the statutory scheme, and we think the complaint is less than clear in this regard."). The Court concluded that a remand was necessary to determine "exactly what rights, considered in their most concrete, specific form, respondents are asserting. Only by manageably breaking down the complaint into specific allegations can the District Court proceed to determine whether any specific claim asserts an individual federal right." *Id.* at 346.

[79] *See id.* at 348 (stating that the Secretary's oversight powers are not broad enough to preclude § 1983 liability).

[80] *Id.* at 347.

[81] *See id.* at 347-48 (discussing *Sea Clammers*, 453 U.S. 1 (1981) and Smith v. Robinson, 468 U.S. 992, 992 (1984)).

[82] *See* Wright v. Roanoke Redevelopment & Housing Auth., 479 U.S. 418, 423 (1987); Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106 (1989) [hereinafter *Golden State*].

[83] *See Golden State*, 493 U.S. at 107 n.4; *Wright*, 479 U.S. at 423; *Sea Clammers*, 453 U.S. at 17.

requirements, then Congress would not have intended to allow plaintiffs to avoid those requirements by bringing their claims under § 1983. The more finely tuned the procedural structure, the stronger the presumption that the particular statutory scheme supplants the § 1983 claim.[84]

In fact, a finely tuned private remedial scheme can supplant not only "and laws" § 1983 claims but also constitutional ones as well, striking at the core of § 1983. There are two examples of this: (1) constitutional claims for release from state prison, which the Court has held are supplanted by the habeas corpus statute,[85] and (2) constitutional claims alleging equal protection violations by local schools regarding education for handicapped children, which the Court has held are supplanted by the Education for All Handicapped Children Act ("EAHCA").[86] These statutes share two important features: (1) they provide private remedies in a narrowly defined area of potential constitutional claims, and (2) they contain detailed procedures, including exhaustion requirements, that would not apply in cases brought under § 1983.[87]

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[84] This analysis is a bit conjectural because the Court has not looked at a statute with a private remedy that did not contain detailed procedural requirements. *See, e.g., Golden State*, 493 U.S. at 106. The TCA is such a statute because, although it has a private remedy, it has very little procedural detail.

[85] 28 U.S.C. § 2241 (1994) (providing that writs of habeas corpus are available, inter alia, to a person who is in custody in violation of the Constitution of the United States or its laws or treaties); 28 U.S.C. § 2254(c) (1994) ("An applicant shall not be deemed to have exhausted the remedies available in the Courts of the State. . . if he has the right under the law of the State to raise, by any available procedure, the question presented."); *see* Preiser v. Rodriguez, 411 U.S. 475 (1973).

[86] 20 U.S.C. §§ 1400-1491 (1994 & Supp. V 1999) (codifying the EAHCA. The EAHCA of 1975, *see* Pub. L. No. 94-142, 89 Stat. 773, became the Individuals with Disabilities Education Act ("IDEA") by amendment in 1991. *See* Pub. L. No. 102-119, 105 Stat 587. In 1997, the IDEA underwent further change. *See* Pub. L. No. 105-17, 111 Stat 37.); *see* Smith v. Robinson, 468 U.S. 992, 1009 (1984) ("Congress intended handicapped children with constitutional claims to a free appropriate public education to pursue those claims through the carefully tailored administrative and judicial mechanism set out in the [EAHCA]."). Some lower courts have held that Title VII is the exclusive remedy for employment discrimination by state and local employers, supplanting the § 1983 remedy for employment-related equal protection violations. 42 U.S.C. §§ 2000e to 2000e-17 (1994 & Supp. IV 1998); *see, e.g.*, Jackson v. City of Atlanta, 73 F.3d 60, 63 (5th Cir. 1996) ("[Section] 1983 is not available when 'the governing statute provides an exclusive remedy for violations of its terms.'" (citations omitted)); *but see*, Trigg v. Fort Wayne Community Sch., 766 F.2d 299, 302 (7th Cir. 1985) (concluding that Title VII and the Fourteenth Amendment bestowed individual rights, the former covered under its own remedial scheme, and the latter addressable under a § 1983 claim).

[87] These statutes are different in one respect that apparently is not important to the Court: The habeas statute, like § 1983, provides a remedy for constitutional violations but contains no substantive standards of its own. *See* 28 U.S.C. § 2241(c) (providing that writ of habeas corpus is available to a person in custody in violation of, inter alia, the Constitution of the United States). The IDEA , by contrast, not only provides a remedy but contains its own substantive standards that are not necessarily identical to the constraints that the equal

Although the analysis is similar to that applied to determine whether Congress intends to allow an "and laws" claim, it is important to note that these are not "and laws" claims. Rather, they are situations in which the Court believes that Congress intended to repeal § 1983's coverage of constitutional claims when it passed a detailed statute in a particular area of potential constitutional violations.

Despite the logical appeal of the Court's analysis, it may be that the Court gets Congress's intent exactly wrong when it allows the "and laws" action whenever the remedial scheme lacks a private remedy. When a federal statute contains an administrative enforcement mechanism but no private remedy, it may be more likely that Congress preferred to have no private remedy.[88] Conversely, when the statute contains its own private remedy, it may be less disruptive of Congress's scheme to add the § 1983 remedy to those provided in the "and laws" statute itself. However, absent a change of heart at the Court, the lack of a private remedy in an "and laws" statute is taken as evidence of congressional intent to preserve the § 1983 remedy.

3. Exceptions Applied to the TCA

a. *Does the TCA Create Enforceable Rights?*

Our next step is to apply this framework to the wireless telecommunications facilities siting provisions of the TCA. There is little doubt that the TCA creates at least some enforceable rights. The TCA states in no uncertain terms that state and local zoning authorities must follow its rather specific procedural elements. The requirement that decisions on permit applications be in writing and supported by substantial evidence on a written record, are very specific and appear to be intended to benefit applicants for permits to construct wireless service facilities.[89] They are identical to procedural requirements traditionally placed on agencies and enforced on judicial review.[90] The TCA repeatedly refers to "State or local" governments, thus explicitly placing obligations on

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protection clause might place on educational decisions regarding handicapped children. *See* 20 U.S.C. §§ 1400-1491 Title VII is akin to the education statute in that it contains substantive standards as well as procedural limitations. *See* 42 U.S.C. §§ 2000e to 2000e-17.

[88] This was Justice Powell's point in his influential dissent in Cannon v. University of Chicago, 441 U.S. 677 (1979), which ultimately convinced the Court not to infer private rights of action from federal statutes without strong evidence that Congress intended the right of action to exist. *See* Karahalios v. Nat'l Fed'n of Fed. Employees, 489 U.S. 527, 533 (1989) (holding that intent is the standard).

[89] *See* 47 U.S.C. § 332(c)(7)(B)(iii) (Supp. IV 1998).

[90] Because substantial evidence is a traditional standard of review that courts apply to agencies, insofar as this provision indicates that courts hearing claims arising under the cell siting provisions of the TCA should apply the "substantial evidence" standard of review, there is no indefiniteness problem with this aspect of the TCA's cell siting provisions.

states.[91] These procedural provisions are definite enough to create legal obligations.

The other procedural provisions, that zoning authorities act on applications within a "reasonable period of time"[92] and that actions to enforce the TCA be heard "on an expedited basis,"[93] may not be sufficiently clear to create rights enforceable in § 1983 "and laws" actions. What is a "reasonable period of time" for acting on an application to construct or modify a wireless transmission facility? Further, what does it mean for a court to hear an action on an "expedited basis"? Does it mean that it must be heard before all other cases, or only that it must jump the queue over some cases but not all?These two provisions— the requirement that zoning bodies act on applications within a "reasonable period of time" and the requirement that courts hear these actions on an expedited basis—are as indefinite as the "substantial compliance" standard that the Supreme Court found insufficiently clear to create enforceable rights.[94] One might perceive them as aspirational rather than enforceable.

Except for the prohibition against consideration of the effects of radio frequency emissions, which seems pretty clear, the remaining substantive provisions of the TCA raise even more doubt about whether they are definite enough to create enforceable rights. The prohibitions against "unreasonabl[e] discriminat[ion]"[95] and against action "having the effect of prohibiting the provision of personal wireless services"[96] leave a great deal of uncertainty. For example, may a town deny a permit to build a cell tower on the ground that there are too many such towers in the town already and that yet another would cause visual clutter? This is a very common consideration in zoning matters and would not be an equal protection violation under constitutional standards. However, at least one court has found that denying a permit for this reason violates the TCA, holding that such a zoning decision discriminated in favor of existing providers.[97]

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[91] *See* 47 U.S.C. § 332(c)(7).

[92] 47 U.S.C. § 332(c)(7)(B)(ii).

[93] 47 U.S.C. § 332(c)(7)(B)(v).

[94] *See* Blessing v. Freestone, 520 U.S. 329, 344- (1997) (holding that the substantial compliance standard "does not give rise to individual rights").

[95] 47 U.S.C. § 332(c)(7)(B)(i)(I).

[96] 47 U.S.C. § 332(c)(7)(B)(i)(II).

[97] *See* AT&T Wireless PCS, Inc. v. City Council , 979 F. Supp. 416, 416 (E.D. Va. 1997), *rev'd*, 155 F.3d 423 (4th Cir. 1998). Such a holding has enormously destructive potential for local zoning authority. It is difficult to believe that Congress intended to require every municipality to allow a cell site for every cellular provider who applies. A small town could end up with dozens of towers cluttering the landscape. Other courts have allowed local zoning authorities much more leeway, allowing denials, for example, based upon the "visual impact" of the tower or evidence of substantial opposition among residents. *See* Southwestern Bell Mobile Sys., Inc. v. Todd, 244 F.3d 51, 60-61 (1st Cir. 2001) (approving application of local zoning bylaw's "minimal visual impact" criterion to deny

The other substantive provision is even more confusing. What does it mean for a local government action to "have the effect of prohibiting the provision of personal wireless services"? If some providers already have facilities in a locality, is that locality safe from claims under this provision, or does any provider effectively shut out of a town have a claim under this provision? What if a town is small enough that facilities located in other municipalities can service its entire area? These provisions demand considerable elucidation before they transform into judicially enforceable standards.[98]

The explicit grant of a cause of action "in any court of competent jurisdiction" compels the conclusion that the TCA was intended to grant providers at least some enforceable rights. However, it may be that only the procedural requirements of written decisions and substantial evidence on a written record are sufficiently clear and binding to be enforced in § 1983 "and laws" actions. Although all courts addressing the matter have concluded that the TCA creates enforceable rights, there is good reason to question whether its substantive standards and its procedural requirement that applications be acted upon within a "reasonable period of time" create the kind of binding legal obligations that can be enforced with § 1983 "and laws" claims.

b. *Does the TCA's Remedial Scheme Preclude the Application of § 1983?*

The TCA's remedial scheme presents more difficult questions concerning the availability of § 1983 "and laws" actions. There are several reasons to believe that Congress may not have intended TCA enforcement through a § 1983 "and laws" action. First, the TCA itself creates a court action for violations of its terms, rendering the § 1983 action unnecessary, at least to achieve the primary goal of the TCA.[99] The fact that the TCA itself explicitly provides for a cause of action in "any court of competent jurisdiction," and in some cases via a petition before the FCC, means that the TCA provides ample internal means for enforcing its provisions.[100] Presumably, injunctive relief

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tower permit and explicitly stating that the TCA does not displace traditional zoning considerations such as aesthetics); AT&T Wireless PCS, Inc. v. City Council, 155 F.3d 423, 425 (4th Cir. 1998) (discussing the opposition among residents).

[98] The fact that courts have disagreed substantially over what these provisions means supports our argument that they are too indefinite to create binding legal obligations.

[99] PrimeCo Personal Communications Ltd. Partnership v. Lake County Fla., No. 97-208-CIV-10B, 1998 WL 565036 at *7 (M.D. Fla. July 20, 1998) (citing H.R. CONF. REP. NO. 104-458, at 206 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 124, which states that the purpose of the TCA is to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector development of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition").

[100] 47 U.S.C. § 332(c)(7)(B)(v) (Supp. IV, 1998) (permitting an action in "any court of competent jurisdiction" by any person adversely affected by any act or failure to act by a state or local government that is inconsistent with § 332(c)(7)(B) and a petition before the FCC by any person adversely affected by any act or failure to act by a state or local

under the TCA would be available, for example, if a locality were to discriminate among providers or deny a permit application without a written decision or record.[101]

Cases brought under both the TCA and § 1983 demonstrate that § 1983 is unnecessary and duplicative. Many courts cases vindicate the rights granted by § 332(c)(7) without relying upon any other remedial statute such as § 1983.[102] Because § 332(c)(7) explicitly creates its own private enforcement mechanism, the inference that Congress intended to allow § 1983 "and laws" enforcement is weak.[103]

In some respects, § 332(c)(7) is distinguishable from other statutes under which the court has not found congressional preclusion.[104] In *Blessing*, for instance, the Court found that Title IV-D of the Social Security Act did not provide a remedy so comprehensive as to preclude liability under § 1983.[105] The Court specifically relied upon the fact that Title IV-D lacked the private enforcement mechanism present in the statutes at issue in both *Smith v. Robinson* and *Sea Clammers*.[106] Both *Wright* and *Virginia Hospital Ass'n* involved statutes that relied on executive branch enforcement with little, if any, possibility for private enforcement, and even then it was only through state remedies.[107] In contrast, § 332(c)(7) relies entirely on private enforcement.

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government that is inconsistent with § 332(c)(7)(B)(iv), the environmental effects clause).

[101] Courts have held that injunctions are the appropriate remedy. *See, e.g.*, Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490, 495-97 (2d Cir. 1999) (granting an injunction ordering the Town of Oyster Bay to issue permits to Cellular Telephone Company for the construction of cell sites because of a violation of the environmental effects clause of the TCA, 47 U.S.C. § 332(c)(7)(B)(iv), and noting that the majority of district courts have determined that an injunction is an appropriate remedy).

[102] *See* PrimeCo Personal Communications. Ltd. Partnership, 1998 WL 565036, at *14-15 (granting declaratory and injunctive relief under the TCA and dismissing the § 1983 claim as moot); BellSouth Mobility, Inc. v. Gwinnett County Ga., 944 F. Supp. 923, (N.D. Ga. 1996) (issuing writ of mandamus solely on TCA grounds because BellSouth Mobility dropped the § 1983 claim before trial); *Cellular Tel. Co.*, 166 F.3d at 495-97 (granting an order to issue permits under the TCA).

[103] *See* Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 108-09 (1989) (discussing the availability of § 1983 to enforce the National Labor Relations Act).

[104] *See, e.g.*, Blessing v. Freestone, 520 U.S. 329, 348 (1997) (holding that the limited enforcement scheme of Title IV-D does not preclude enforcement through § 1983); Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 524 (1990) (finding that the Medicaid Act provides federal rights enforceable through § 1983); *Golden State*, 493 U.S. at 109 (determining that the National Labor Relations Act creates § 1983 rights against governmental interference with labor relations); Wright v. Roanoke Redevelopment & Housing Auth., 479 U.S. 418, 432 (1987) (finding that that the Brooke Amendment to the Housing Act creates rights enforceable through a § 1983 claim).

[105] *See Blessing*, 520 U.S. at 347-48; *see also* Smith v. Robinson, 468 U.S. 992 (1984); Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981).

[106] *See id.*

[107] *Compare Wright*, 479 U.S. at 428 (finding that the Brooke Amendment to the

Furthermore, § 332(c)(7)(B)(v) appears to contemplate not a limited state remedy but, rather, an expansive federal one that must be expedited in any court of competent jurisdiction.[108]

There are also, however, good arguments against interpreting the TCA to foreclose § 1983 relief. Although injunctions directly under the TCA may remedy any and all violations of that statute, the TCA is lacking in the details that have led the Court to hold, in other contexts, that private remedies in particular statutes foreclose § 1983 relief. Although the TCA creates rights and provides an action in "any court of competent jurisdiction," it provides no explicit guidance on what remedies and defenses are available in such actions. Furthermore, it contains no exhaustion requirement and it does not limit actions to any particular forum. The TCA lacks the procedural details that have led courts in other contexts to hold that a § 1983 "and laws" remedy would be incompatible with enforcement of the statute itself. In short, under the Court's "and laws" jurisprudence, the TCA may be insufficiently comprehensive to create the inference that Congress intended to foreclose the § 1983 remedy for violations of the TCA under color of law.

This analysis illustrates the importance of the Court's presumption that the "and laws" remedy is available unless Congress indicates that it intends to preclude it.[109] Section 1983 liability for violations of the TCA goes well beyond injunctive relief for wrongful permit denials. Because § 1983 is a tort-like remedy, it can include damages against individual officials and local governments, as well as attorney's fees against both individuals and government entities under the Civil Rights Attorney's Fees Award Act of 1976.[110] There is no indication in the TCA or its legislative history that Congress thought about any remedies beyond orders to comply with the TCA.

Another note on the "and laws" question is in order. Our two arguments against recognizing the "and laws" action may appear to be in tension with each other. If the TCA's substantive provisions do not create enforceable rights, how can we also argue that the TCA's own remedial scheme is sufficient on its own and indicates congressional intent to preclude the § 1983 "and laws" action? Can we really hold both of those beliefs at once?

We believe that any apparent inconsistency disappears on close examination of our argument. Congress clearly stated in § 332(c)(7) that its provisions are enforceable in court.[111] Insofar as any of these provisions is definite enough

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Housing Act creates individual rights sufficient to support a § 1983 claim), *with Va. Hosp. Ass'n*, 496 U.S. at 521 (finding that the Medicaid Act does not preempt § 1983 because the Medicaid Act lacks any provision for private judicial or administrative enforcement). *See also Blessing*, 520 U.S. at 346-48.

[108] *See* 47 U.S.C. § 332(c)(7)(B)(v) (Supp. IV 1998).

[109] *See, e.g., Blessing*, 520 U.S. at 346 (noting that the burden is on the one attempting to preempt § 1983 to show that the statute in question expressly preempts § 1983 or that the scheme of Congress in the statute in question is inconsistent with enforcement via § 1983).

[110] *See* 42 U.S.C. § 1988(b) (Supp. IV 1998).

[111] *See* 47 U.S.C. § 332(c)(7)(B)(v).

to create binding legal obligations, the TCA's own remedial scheme, coupled with the lack of any indication that Congress intended to allow victorious TCA plaintiffs to recover attorney's fees, renders the § 1983 "and laws" claim particularly inappropriate in this context. Even if some or all of the TCA's provisions turn out to be too indefinite to be legally binding and enforceable, Congress still tried to provide a remedy within the TCA itself. Congress's failure to provide a completely internal remedy does not change the fact that, as far as the existence of remedies is concerned, Congress precluded the § 1983 remedy under prevailing standards.

An additional reason for holding that TCA's procedures do not supplant § 1983 claims is the TCA's savings clause. In *AT&T Wireless PCS, Inc. v. City of Atlanta*,[112] in a now-vacated decision of an Eleventh Circuit panel, the court held in favor of allowing § 1983 "and laws" claims against local governments to redress violations of the TCA cell tower siting provisions,[113] largely because TCA section 601(c)(1) contains the following savings clause: "No implied effect. This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, state, or local law unless expressly so provided in such Act or amendments."[114] The panel found that the "plain meaning" of this language is that the TCA does not supersede § 1983's "and laws" provision because, presumably, that would allow the TCA to "modify, impair, or supersede Federal law,"[115] i.e. § 1983's "and laws" clause.[116] The panel noted that there was also a savings clause in *Sea Clammers*, where § 1983 was held inapplicable , but it distinguished that decision on the ground that the savings clause in *Sea Clammers* was narrower, saving "any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other

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[112] 210 F.3d 1322, 1323 (11th Cir. 2000) (noting that the issue of whether the TCA precludes an action under § 1983 is one of first impression among the courts of appeals), *vacated for lack of jurisdiction*, 223 F.3d 1324 (11th Cir. 2000), *reinstated*, 250 F.3d 1307 (11th Cir. 2001), *vacated and reh'g en banc granted*, No. 00-15885, 2001 WL 901250 (11th Cir. Aug. 10, 2001), *and appeal dismissed per stipulation*, No. 00-15885, 2001 WL 1049229 (11th Cir. Sept. 13, 2001).

[113] The panel noted that all district courts addressing the issue had held that the TCA creates enforceable federal rights, 210 F.3d . at 1325 & n.4 (citing cases) but that "there is a split among the district courts about whether the TCA provides a comprehensive remedial scheme supplanting § 1983." *See id.* at 1327 & n.7 (citing cases).

[114] AT&T Wireless PCS, Inc. v. City of Atlanta, 210 F.3d at 1328 (quoting Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(c)(1), 110 Stat. 143 (1996)). The panel noted that section 601 is contained in the historical and statutory notes appended to 47 U.S.C. § 152 (Supp. IV 1998) and that although it was not codified in § 152, it was enacted into law and is binding authority. *Id.* at 1328 & n.8.

[115] Telecommunications Act § 601(c)(1), 110 Stat. 143 (1996).

[116] *See* AT&T Wireless PCS, Inc. v. City of Atlanta, 210 F.3d at 1328 (refusing to "second guess" the plain meaning of the savings clause).

relief. . . ."[117] Given that the savings clause in *Sea Clammers* purported to save the right to seek "any other relief," the panel's distinction does not appear to be very persuasive.[118]

More importantly, there is reason to doubt that savings clauses like this should have any effect on § 1983 "and laws" claims. It is odd reasoning to say that when a court holds that an "and laws" claim is unavailable to enforce a particular statute because of that statute's own remedial scheme, this amounts to allowing that statute to "modify, impair, or supersede" § 1983. The existence of the "and laws" claim in the first place depends on the particular statute. Finding that Congress's intent behind the particular statute as a whole is not to contemplate enforcement beyond the enforcement mechanisms contained in the statute itself does not impair § 1983. If the particular statute did not exist, there would be no "and laws" claim, and no one would imagine that the failure of Congress to pass the particular statute had any effect on § 1983. Again, it is only the presumption that Congress intended the "and laws" remedy to be available that allows a court to reason that disallowing the "and laws" remedy amounts, in effect, to a partial repeal of § 1983.

c. *Cases Deciding Whether the TCA Allows § 1983 Action*

In addition to the Eleventh Circuit's decision holding that the TCA's savings clause means that the § 1983 "and laws" action is preserved, at least eleven additional federal cases, all in district courts, have squarely faced the issue of awarding § 1988 attorney's fees and costs in suits under § 1983 and § 332(c)(7).[119] None of these cases relies upon the savings clause. Although all

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[117] *Id.* at 1328 (quoting the Federal Water Pollution Control Act, 33 U.S.C. § 1365 (e)). Another statute at issue in *Sea Clammers*, the Marine Protection, Research, and Sanctuaries Act of 1972, had a very similar savings clause. *See* 33 U.S.C. § 1415(g)(5) (1994); Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 7 & n.10 (1981).

[118] The panel pointed out that the *Sea Clammers* Court "discounted the savings clause language because legislative history clearly revealed that Congress intended to preserve further enforcement of specific antipollution standards only." AT&T Wireless PCS, Inc. v. City of Atlanta, 210 F.3d at 1328. The Court's mode of construction in *Sea Clammers* effectively holds that when the plain meaning is against you, rely on the legislative history. The Eleventh Circuit's panel ignored the Supreme Court's relatively narrow reading of the savings clause in light of the panel's view that the overall remedial scheme of the statute in question in *Sea Clammers* was comprehensive enough to preclude § 1983 "and laws" claims. *See id.* at 1328.

[119] *See* Omnipoint Communications Enters. v. Charlestown Township., No. CIV. A. 98-CV-6563, 2000 WL 128703, at *5 (E.D. Pa. Jan. 21, 2000) (denying § 1983 "and laws" claims for damages and attorney's fees under § 1988); Omnipoint Communications. Enters. v. Zoning Hearing Bd., 72 F. Supp. 2d 512, 517 (E.D. Pa. 1999) (denying § 1983 "and laws" claims for damages and attorney's fees under § 1988); AT & T Wireless PCS, Inc. v. City of Atlanta, 50 F. Supp. 2d 1352, 1362 (N.D. Ga. 1999), (denying § 1983 "and laws" claims for damages and attorney's fees under § 1988), *appeal dismissed per stipulation,* No. 00-15885, 2001 WL 1049229 (11th Cir. Sept. 13, 2001) (For the complete procedural history of the

these cases agree that § 332(c)(7) creates a federal right which § 1983 might ordinarily redress, they disagree as to whether § 332(c)(7) creates a comprehensive enforcement mechanism, precluding litigation under § 1983.[120] None of them expressly addresses whether suits in this context present special circumstances that render attorney's fee awards unjust. However, two cases actually award attorney's fees and costs.[121]

Sprint Spectrum L.P. v. Town of Easton[122] forms the basis for the first line of cases that allows recovery of attorney's fees and costs under § 1988. Plaintiff Sprint Spectrum L.P. ("Sprint") sued the Town of Easton, Massachusetts, after the Easton Zoning Board denied Sprint's application for a building permit for a 150 foot tall communications tower.[123] The town denied the permit on the grounds that the tower was proposed for an "already congested area" and that town residents could already receive wireless services from other providers.[124] Massachusetts District Court Chief Judge Tauro held that the town's denial violated the TCA by restricting competition and by discriminating "between providers of equivalent services."[125]

Eleventh Circuit's action regarding this case, see *supra* note 28.); Omnipoint Communications, Inc. v. Penn Forest Township, 42 F. Supp. 2d 493, 509 (M.D. Pa. 1999) (denying § 1983 "and laws" claims for damages and attorney's fees under § 1988),; Cellco Partnership v. Hess, No. CIV. A. 98-3985, 1999 WL 178364, at *6 (E.D. Pa. March 30, 1999) (holding that the TCA does not preclude § 1983 "and laws" claims); Omnipoint Communications Enters. v. Zoning Hearing Bd., No. CIV. A. 98-3299, 1998 WL 764762, at *5 (E.D. Pa. Oct. 28, 1998) (holding that the TCA does not preclude § 1983 "and laws" claims); APT Minneapolis, Inc. v. City of Maplewood, No. CIV.97-2082(JRT/RLE), 1998 WL 634224, at *8 (D. Minn. Aug. 12, 1998) (allowing APT's § 1983 "and laws" claim for attorney's fees under § 1988); Nat'l Telecomm. Advisors, Inc. v. City of Chicopee, 16 F. Supp. 2d 117, 122 (D. Mass. 1998) (Ponsor, J.) (denying § 1983 claims for damages and attorney's fees under § 1988); Cellco Partnership v. Town Plan & Zoning Comm'n, 3 F. Supp. 2d 178, 186 (D. Conn. 1998) (Goettel, J.) (granting damages under § 1983 without analysis); Smart SMR of New York, Inc. v. Zoning Comm'n, 995 F. Supp. 52, 61 (D. Conn. 1998) (Goettel, J.) [hereinafter *Smart SMR I*] (holding that the TCA does not preclude § 1983 claims); Sprint Spectrum L.P. v. Town of Easton, 982 F. Supp. 47, 53 (D. Mass. 1997) (Tauro, C.J.) (holding that the TCA does not preclude § 1983 claims).

[120] *Compare National Telecomm. Advisors, Inc.*, 16 F. Supp. 2d at 122-23 (finding preclusion without discussing *Sprint Spectrum L.P.*), *with Cellco Partnership*, 3 F. Supp. 2d at 186 (finding no preclusion, relying on *Smart SMR I*); *Smart SMR I*, 995 F. Supp at 61 (finding no preclusion, relying on *Sprint Spectrum L.P.*), *and Sprint Spectrum L.P.*, 982 F. Supp. at 53 (finding no preclusion).

[121] *See* Smart SMR of New York, Inc. v. Zoning Comm'n, 9 F. Supp. 2d 143, 154 (D. Conn. 1998) (Goettel, J.) [hereinafter *Smart SMR II*] (awarding Smart SMR $9,411.93 in attorney's fees and costs); *APT Minneapolis, Inc.*, 1998 WL at *8 (granting APT's request for attorney's fees and costs under § 1988).

[122] 982 F. Supp. 47 (D. Mass. 1997).

[123] *Sprint Spectrum L.P.*, 982 F. Supp. at 49.

[124] *Id.* at 51.

[125] *Id.* (referring to § 332(c)(7)(B)(i)(I)).

After finding a violation of the TCA, Chief Judge Tauro turned to whether Sprint's case could be brought under § 1983, which would lay the basis for an award of attorney's fees and costs. After outlining the Supreme Court's "and laws" jurisprudence, the court held in just three brief and conclusory sentences, with little analysis, that the § 1983 action was available. The court stated: (1) that § 332(c)(7) neither implicitly nor explicitly precludes a § 1983 action,[126] (2) that § 332(c)(7) does not contain a comprehensive enforcement mechanism displacing § 1983,[127] (3) that the TCA creates substantive rights,[128] and (4) that "enforcement of Plaintiff's rights under the TCA through a § 1983 action does not 'strain judicial competence'. . . ."[129] The court thus granted summary judgment for Sprint and issued an injunction.[130] Chief Judge Tauro's § 1983 holding opened the door to § 1988 attorney fee awards, unless special circumstances would render such an award unjust.

The next case, *Smart SMR of New York, Inc. v. Zoning Commission*,[131] ("*Smart SMR I*") revolved around the plaintiff's attempt to place a cellular phone antenna on an existing 110 foot tall lattice tower currently serving as a windmill.[132] Nextel—the name under which the plaintiff was doing business—entered into a lease agreement with the tower's owners to modify the tower appropriately.[133] On April 18, 1997, Nextel applied to the Zoning Commission of the Town of Stratford ("Commission") for a special permit to begin construction.[134] The Commission held a hearing on May 20, 1997, and denied

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[126] *Id.* at 53 ("The TCA does not implicitly or explicitly foreclose § 1983 suits.").

[127] *Id.* ("More particularly, the TCA does not provide a comprehensive enforcement scheme intended to supplant a § 1983 remedy.").

[128] Although all courts agree that the TCA creates enforceable rights, the court's analysis of the issue in this case is less than satisfying. The only support the court relied upon for its holding that the TCA creates a right is the provision in the TCA that allows victims of violations of the TCA to seek relief in court. *Id.* ("In addition, the TCA creates substantive rights by providing that '[a]ny person adversely affected by any final action . . . by a . . . local government or any instrumentality thereof . . . may . . . commence action in any court of competent jurisdiction.'") This provision, creating a court action, is irrelevant as to whether any particular provision of the TCA is definite enough to create an enforceable right under the Supreme Court's "and laws" jurisprudence. Further, Chief Judge Tauro did not comment on whether the fact that the TCA itself so clearly provides for a judicial remedy has any bearing on whether the TCA's own remedial scheme displaces the "and laws" remedy. The opinion merely states, without analyzing the provisions of the TCA, that the TCA does not contain a comprehensive remedial scheme.

[129] *Id.* at 53 (citing Blessing v. Freestone, 520 U.S. 329, 341 (1997). "Given the foregoing, as well as the fact that enforcement of Plaintiff's rights under the TCA through a § 1983 action does not 'strain judicial competence,' a § 1983 remedy is available in this instance." *Id.* (footnote and citations omitted).

[130] *Id.*

[131] Smart SMR of N.Y., Inc. v. Zoning Comm'n, 995 F. Supp. 52 (D. Conn. 1998).

[132] *Smart SMR I*, 995 F. Supp. at 55.

[133] *See id.*

[134] *Id.*

the permit three weeks later, on June 12. Like the plaintiff in the *Sprint Spectrum L.P.* case, Nextel sought relief from the Commission's decision under both § 332(c)(7) and § 1983.[135] After granting summary judgment to Nextel on four of its five claims under § 332(c)(7),[136] the court addressed the § 1983 claim. The court reviewed the § 1983 "and laws" precedent and concluded: "Because we agree with the court's reasoning in [*Sprint Spectrum L.P.*[137]], we find that a section 1983 claim is available to Nextel."[138] Not surprisingly, the court granted summary judgment on Nextel's § 1983 claim,[139] vacated the zoning commission's permit denial, and ordered the Commission to grant Nextel's permit.[140]

After prevailing on summary judgment in *Smart SMR I*, Nextel moved for attorney's fees and costs under § 1988.[141] Although the court devoted most of its attention in *Smart SMR II* to determining the reasonableness and amount of fees and costs,[142] it also discussed Nextel's eligibility for fees.[143] The town asserted two bases for denying fees: (1) The award should be denied because of "special circumstances," namely, that granting fees would discourage zoning commissions from exercising their normal zoning authority in wireless facility siting issues, virtually compelling them to grant all permit requests; and (2) Awarding fees would penalize municipalities in a way that Congress did not intend.[144] The court rejected both arguments.

The court found no authority to support the town's "special circumstances" argument ("the chilling theory").[145] The court found that the chilling theory was based on the false premise that providers would prevail in all such actions.[146] The court concluded that awards of attorneys' fees could encourage compliance with the TCA: "Contrary to defendant's conclusions, we find that the threat of attorneys' fees could influence zoning authorities to ensure that their decisions comply with the Telecommunications Act's requirements."[147] As to the town's second argument against fees, the court could find no support

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[135] *See id.*

[136] *See id.* at 56-60 (granting summary judgment to plaintiff on two claims under § 332(c)(7)(B)(iii), one claim under 332(c)(7)(B)(i)(II), and one claim under 332(c)(7)(B)(iv) and granting summary judgment to defendant on one claim under 332(c)(7)(B)(iv)).

[137] Sprint Spectrum L.P. v. Town of Easton, 982 F. Supp. 47 (D. Mass. 1997).

[138] *Id.* at 61.

[139] *See id.*

[140] *See id.* at 62 (requiring that a permit be granted under such terms and conditions as might reasonably be prescribed).

[141] *See* Smart SMR of N.Y., Inc. v. Zoning Comm'n, 9 F. Supp. 2d 143, 147 (D. Conn. 1998) [hereinafter *Smart SMR II*].

[142] *See id.* at 147-53.

[143] *See id.* at 147-48.

[144] *Id.* at 148.

[145] *Id.*

[146] *Id.*

[147] *Id.*

in the TCA's legislative history, and it concluded that even without mentioning attorney's fees, the legislative history supported the contrary conclusion: "Rather, one of the Telecommunications Act's purposes is to provide a vehicle for wireless service providers to sue local zoning authorities based on any adverse decisions that fail to comply with the provisions of section 332(c)(7)."[148] The court awarded Nextel $9,411.93 of its $40,444.52 application for attorneys' fees.[149]

That same year, the same court decided *Cellco Partnership v. Town Plan & Zoning Commission*[150] ("*Cellco*"). In *Cellco*, plaintiff Cellco Partnership attempted to fill cellular coverage gaps in the Unionville section of Farmington, Connecticut, by using a church steeple. In the 1950s, the First Church of Christ of Farmington, Inc. ("Church") had removed its approximately one hundred foot tall steeple because of safety concerns.[151] Cellco entered into a lease with the Church that contemplated rebuilding the steeple as a camouflaged 135 foot tall antenna.[152] On June 20, 1997, Cellco submitted the necessary application to the Planning and Zoning Commission ("Zoning Commission").[153] The Zoning Commission held a public hearing in July and denied the application in September,[154] on the basis that "the height and scale of the proposed steeple would not be in character with the neighborhood."[155] Cellco promptly sought relief under both § 332(c)(7) and § 1983.[156] The court resolved the § 1983 claim in two short paragraphs, after finding against the Zoning Commission on the § 332(c)(7) claims.[157] The

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[148] *Id.*

[149] *See id.* at 147, 154. The court disallowed the majority of the fees Nextel requested on various grounds, including failure to establish the prevailing hourly rates for the attorneys and paralegals who worked on the case, failure to establish the necessity of many of the hours spent—the court found, e.g., that the lawyers spent excessive time preparing the complaint and that they even put in 1.5 hour for research on default judgments only three weeks after filing the complaint when there was no indication that the defendant would default—and failure to document adequately the hours worked—the court applied a thirty percent across-the-board reduction for the vagueness of the records submitted. There is no indication that the reduction was influenced by the TCA's effect on local governments or any other concerns related particularly to the TCA. *See id.* at 152-153.

[150] 3 F. Supp. 2d 178 (D. Conn. 1998).

[151] *See id.* at 181.

[152] *See id.*

[153] *See id.*

[154] *See id.*

[155] *Id.* at 182.

[156] *See id.*

[157] *Id.* at 182, 187. The court found that the Zoning Commission's stated reasons failed the substantial evidence test required by § 332(c)(7)(B)(iii). *See id.* at 182, 184. The court ruled against Cellco's other allegations that the Commission's decision (1) violated § 332(c)(7)(B)(i)(II) because it had the effect of prohibiting wireless services and (2) violated 332(c)(7)(B)(i)(I) because it unreasonably discriminated against this provider compared to other wireless providers. *See id.* at 184-87.

court stated, based on *Smart SMR I*,[158] that § 332(c)(7) does not preclude claims under § 1983 and it cited *Sprint Spectrum L.P.*[159] as an example.[160] Rather than remand the case to the Zoning Commission, the court vacated the permit denial and ordered the Zoning Commission to issue a permit to Cellco within twenty days.[161]

In all three of these cases, the courts found that § 332(c)(7) creates a federal right that is enforceable in § 1983 actions. Section 1988 attorney's fees awards are then treated as virtually automatic. In our view, this line of cases, starting with *Sprint Spectrum L.P.*, insufficiently examines the TCA under the Supreme Court's "and laws" jurisprudence and disregards the possibility that courts have discretion to deny or limit attorney's fees under § 1988.

One court has recognized these shortcomings and has carefully examined the difficult issues raised by § 1983 claims to enforce § 332(c)(7). In *National Telecommunication Advisors, Inc. v. City of Chicopee*,[162] the court looked carefully at whether successful plaintiffs should recover attorney's fees and costs pursuant to § 1988 in a § 1983 claim brought to enforce § 332(c)(7).[163] In February, 1996, National Telecommunication Advisors, Inc. ("NTA") applied to the Board of Aldermen for the City of Chicopee, Massachusetts ("Board") for a zoning variance to construct a cellular antenna on an industrial site.[164] The Board's zoning committee recommended that the application be denied.[165] Over a year later, on October 7, 1997, after several further meetings, the full Board denied the request–by a vote of six to four.[166] The Board memorialized the meeting in a handwritten note indicating that it wished to save the site for a "true industrial use."[167]

NTA promptly brought an action in the United States District Court for the District of Massachusetts under both § 332(c)(7)[168] and § 1983, seeking an injunction and a writ of mandamus compelling the issuance of a permit for the building site, compensatory and punitive damages, and attorney's fees and

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[158] Smart SMR of N.Y., Inc. v. Zoning Comm'n, 995 F. Supp. 52 (D. Conn. 1998).

[159] Sprint Spectrum L.P. v. Town of Easton, 982 F. Supp. 47 (D. Mass 1997).

[160] *See id.* at 186.

[161] *See id.* at 187 (determining that remand was not appropriate and would only cause further delay).

[162] 16 F. Supp. 2d 117 (D. Mass. 1998) [hereinafter *NTA*] (discussing the qualifications for an award of attorney's fees).

[163] *See id.* at 119-23.

[164] *See id.* at 117-18.

[165] *See id.* at 118.

[166] *See id.* at 118-19.

[167] *Id.* at 119.

[168] *See id.* at 118 (stating that NTA claimed that the Board's decision violated § 332(c)(7) because it was not supported by substantial evidence contained in a written record, *see* § 332(c)(7)(B)(iii), and it had the effect of prohibiting the provision of wireless services, *see* § 332(c)(7)(B)(i)(II).

costs.[169] The court scheduled the case for an expedited hearing[170] on October 27, 1997, but the parties settled the § 332(c)(7) claims before the hearing.[171] The only remaining issue was NTA's claim for attorney's fees and costs under § 1988, on which NTA then moved for summary judgment. This court analyzed the § 1983 claim in detail, noting that, under *Maine v. Thiboutot*,[172] § 1983 is an available remedy for federal statutory violations.[173] However, the court said plaintiffs must show, under *Blessing v. Freestone*:[174] (1) that the statute creates a substantial federal right and (2) that Congress did not create a comprehensive enforcement mechanism within the statute, which would indicate congressional intent to preclude § 1983 enforcement.[175]

The *NTA* court applied *Blessing*'s three-part version of the two-part test first set forth in *Golden State Transit Corp. v. City of Los Angeles*[176] and concluded that the TCA creates rights sufficiently definite to be enforceable in a § 1983 "and laws" action. Under this version of the test, the "and laws" plaintiffs must prove that the statute: (1) binds the government rather than simply expresses a congressional preference; (2) protects an interest which is not "too vague and amorphous" and thus "beyond the competence of the judiciary to enforce;" and (3) was intended to benefit the plaintiff.[177] On the first factor, the court held that the TCA's specific provisions, requiring local zoning commissions to make written findings supported by substantial evidence in a written record,[178] were so clearly intended to bind state and local governments that "[n]o interpretation of the statute could colorably suggest that this language merely expressed a 'Congressional [sic] preference.'"[179] The court found the second *Golden State* factor was satisfied because the statute itself provides for judicial review,[180] and its legislative history indicates that local

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[169] *See NTA*, 16 F. Supp. 2d at 118.

[170] *See* 47 U.S.C. § 332(c)(7)(B)(v) (Supp. 1998) ("The court shall hear and decide such action on an expedited basis.").

[171] *See NTA*, 16 F. Supp. 2d at 118.

[172] 448 U.S. 1 (1980).

[173] *See NTA*, 16 F. Supp. 2d at 119 (citing the holding in *Thiboutot*, 448 U.S. at 6, for the proposition that "in some circumstances, § 1983 is available to enforce violations of federal statutes and that § 1983 remedies are not limited to statutes enacted pursuant to the civil rights or equal protection provisions of the Constitution").

[174] 520 U.S. 329, 348 (1997).

[175] *See NTA*, 16 F. Supp. 2d at 119 (stating that a plaintiff must assert a federal right violation and show no congressional intent to create a comprehensive enforcement mechanism that precludes § 1983 remedies); *see also id.* (outlining the three factors courts should consider when deciding whether a statute provides for a federal right).

[176] 493 U.S. 103, 106 (1989) (setting forth the two-part test).

[177] *See NTA*, 16 F. Supp. 2d at 120 (citing *Golden State*, 493 U.S. at 106 for the three-part test that plaintiffs must meet to receive relief under § 1983).

[178] *See* 47 U.S.C. § 332(c)(7)(B)(iii) (Supp. IV 1998).

[179] *NTA*, 16 F. Supp. 2d at 120.

[180] *See* 47 U.S.C. § 332(c)(7)(B)(v).

zoning commission decisions should be measured by "the traditional [substantial evidence on a written record] standard used for judicial review of agency actions."[181] The third factor of the *Golden State* test was met because NTA was "precisely the sort of plaintiff the TCA was intended to benefit."[182] Because the TCA met all three factors of the *Golden State* test, the court concluded that the TCA did indeed create federal rights cognizable under § 1983.[183]

The court then turned to a careful examination of whether the TCA's enforcement provisions indicate that Congress did not intend to allow § 1983 "and laws" claims to enforce the TCA. The *NTA* court noted that Congress can preclude § 1983 enforcement either explicitly in the statute or implicitly, by creating a comprehensive enforcement mechanism within the statute which is incompatible with § 1983 enforcement.[184] To determine whether the TCA created a comprehensive enforcement mechanism that precluded § 1983 enforcement, the court contrasted two cases in which the Supreme Court had found preclusion, *Sea Clammers*[185] and *Smith v. Robinson*,[186] with *Blessing v. Freestone*,[187] in which it had not. Based upon this examination, as well as on other First Circuit precedent,[188] the *NTA* court made four specific findings. First, the court concluded that the absence of fee-shifting provisions in such a clear and detailed remedial provision indicates Congressional intent not to shift fees.[189] Second, the existence of a specific provision regarding judicial review is analogous to the statutory procedures at issue in *Sea Clammers* and in *Smith*, and it should be interpreted similarly to preclude an "and laws" action under § 1983.[190] Third, the TCA's judicial review provision is similar

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[181] H.R. CONF. REP. NO. 104-458, at 208 (1995), *reprinted in* 1996 U.S.C.C.A.N. 124, 223; *see NTA*, 16 F. Supp. 2d at 120.

[182] *See NTA*, 16 F. Supp. 2d at 120-21.

[183] *See id.* at 121.

[184] *See id.* (citing Blessing v. Freestone, 520 U.S. 329, 341 (1997)).

[185] Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 11 (1981) (holding that §1983 does not create a private right of action under the FWPCA or the MPRSA).

[186] 468 U.S. 992, 1012 (1984) (concluding that petitioners would not be entitled to attorney's fees even if they had made additional constitutional claims that could be brought under § 1983).

[187] 520 U.S. 329 (1997).

[188] *See* Mattoon v. City of Pittsfield, 980 F.2d 1, 5-6 (1st Cir. 1992) (holding that the remedies under the Safe Drinking Water Act preclude § 1983 claims); Garcia v. Cecos Int'l, Inc., 761 F.2d 76, 78 (1st Cir.1985) (holding that the remedies under the Resource Conservation and Recovery Act of 1976 preclude § 1983 claims).

[189] *See NTA*, 16 F. Supp. 2d at 122 ("Given this carefully drafted provision, and the absence of any indicia of contrary congressional intent, it is manifest that Congress provided precisely the remedies that it considered appropriate when drafting the TCA.").

[190] *See id.* (noting the strong resemblance that the case under consideration bears to *Smith* and *Sea Clammers*).

to two provisions (of another statute) that the Court of Appeals for the First Circuit had held to preclude § 1983 "and laws" actions.[191] Fourth, the court found that allowing an "and laws" action in this situation "trivializes [§ 1983] and is inconsistent with its intent" because, in this context, § 1983 added nothing to the plaintiff's cause of action but rather functioned only to allow a fee award.[192] The court seemed to say that the "and laws" action should not be allowed just to add fees, because it is apparent in such situations that Congress has provided a sufficient and complete remedy elsewhere. The court thus denied NTA's motion for attorney's fees and costs without examining whether § 1988 provided independent reasons for denying fees.

The *NTA* case on one side, and the *Smart SMR I*[193] and *Sprint Spectrum L.P.*[194] cases on the other, exemplify the division among the courts over allowing § 1983 "and laws" claims to enforce the TCA's provisions regarding zoning for cellular facilities. Building on this foundation, subsequent case law reveals that most courts have followed the reasoning in *NTA*.[195] However, substantial uncertainty remains concerning the ultimate resolution of these issues.[196]

B. *Attorney's Fees*

Because § 1988 allows the award of attorney's fees to virtually all prevailing § 1983 plaintiffs, one might question the wisdom of presuming generally that the "and laws" remedy is available and the wisdom of specific judicial holdings that the "and laws" remedy is available to victims of violations of the TCA's cellular siting provisions. Without specific evidence that Congress intended to allow attorney's fees to victorious communications providers in TCA enforcement actions, courts in the United States ordinarily would not make such awards. Even if Congress meant to allow for the entire range of judicial remedies by permitting victims of TCA violations to

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[191] *See id.* (comparing § 332(c)(7)(B)(v) with similar provisions held to preclude § 1983 enforcement in the Safe Drinking Water Act at issue in *Mattoon*, 980 F.2d at 78 and the Resource Conservation and Recovery Act at issue in *Garcia*, 761 F.2d at 5-6).

[192] *Id.* 122-23.

[193] Smart SMR of N.Y., Inc. v. Zoning Comm'n, 995 F. Supp. 52 (D. Conn. 1998).

[194] Sprint Spectrum L.P. v. Town of Easton, 982 F. Supp. 47 (D. Mass 1997).

[195] *See* Omnipoint Communications Enters. v. Charlestown Township, No. CIV.A.98-CV-6563, 2000 WL 128703, at *4 (citing numerous cases following the reasoning in *NTA*).

[196] Because the appeal in *AT&T Wireless PCS, Inc. v. City of Atlanta* was dismissed, it remains to be seen whether the Eleventh Circuit panel's reasoning will ultimately be accepted. *See supra* notes 112-118 and accompanying text (discussing AT&T Wireless PCS, Inc. v. City of Atlanta, 210 F.3d 1322 (11th Cir. 2000), *vacated for lack of jurisdiction*, 223 F.3d 1324 (11th Cir. 2000), *reinstated*, 250 F.3d 1307 (11th Cir. 2001), *vacated and reh'g en banc granted*, No. 00-15885, 2001 WL 901250 (11th Cir. Aug. 10, 2001), *and appeal dismissed per stipulation*, No. 00-15885, 2001 WL 1049229 (11th Cir. Sept. 13, 2001).

"commence an action in any court of competent jurisdiction,"[197] attorney's fees are not within the usual panoply of American judicial remedies, absent specific statutory authorization. [198]

Historically, American courts have followed the rule that each litigant bear its own fees and costs, the so-called "American rule."[199] In *Alyeska Pipeline Service Co. v. Wilderness Society*,[200] the Supreme Court held that federal courts could not award attorney's fees without congressional authorization.[201] The Court expressed disapproval of a wide range of attorney's fees awards, including awards in civil rights cases.[202] Congress responded by enacting § 1988, granting courts discretion to award fees and costs to the prevailing party—except for the United States—in any suit to enforce certain named statutes, including § 1983.[203] In subsequent cases, courts have held that virtually all § 1983 plaintiffs are entitled to attorney's fees, including plaintiffs bringing "and laws" claims.[204]

By enacting § 1988, Congress recognized both that many of the civil rights laws passed since 1866 rely entirely on private enforcement and that the enforcing citizen often cannot afford to hire a lawyer.[205] The Congress that passed the Civil Rights Attorney's Fees Award Act of 1976 expressed concern

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[197] 47 U.S.C. § 332(c)(7)(B)(v) (Supp. IV 1998).

[198] *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) (stating the American rule that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser"); S. REP. No. 94-1011, at 4, 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5911, 5913 (citing the relevant legislative history of § 1988 for the proposition that § 1988 "creates no startling new remedy" but rather simply meets the requirements for previously developed remedies).

[199] *See Alyeska Pipeline Serv. Co.*, 421 U.S. 240 at 247; Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 306 (1796) (disallowing counsel's fees as part of the damages awarded).

[200] 421 U.S. 240 (1975).

[201] *See id.* at 263-64 (noting that courts would have difficulty granting attorney's fees in connection with violations of important, as opposed to unimportant, statutes, without legislative guidance).

[202] *See id.* at 270, n.46 (citing lower court rulings that the Court believed erroneous).

[203] *See* 42 U.S.C. § 1988(b) (Supp. IV 1998). Section 1988(b) currently provides:

> **(b) Attorney's fees**
>
> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 13981 of this title,, [sic] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

42 U.S.C. § 1988(b) (first, second, and third brackets in original).

[204] *See* Maine v. Thiboutot, 448 U.S. 1 (1980) (following a plain language interpretation of § 1988 to find the prevailing plaintiffs eligible for attorney's fees).

[205] *See* S. REP. NO. 94-1011, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910.

over the inability of impecunious civil rights plaintiffs to hire attorneys and the consequences of that inability for civil rights enforcement.[206] The expressed concern was that, unless such citizens "recover what it costs them to vindicate these rights in court," "the Nation's fundamental laws" would not be upheld.[207] Fee awards form an "integral part of the remedy necessary to achieve compliance with our statutory policies.... Not to award [them] would be tantamount to repealing the Act itself by frustrating its basic purpose."[208] The strong presumption that plaintiffs who achieve significant relief in civil rights cases are entitled to attorney's fees under § 1988 is an accurate and appropriate reading of the statute and of Congress's intent.

Claims by telecommunications firms that zoning authorities are violating federal communications statutes are not within the universe of concerns that led Congress to pass § 1988. Unless one perceives a civil rights violation any time a state or local official violates a federal statute, perhaps the presumption in favor of attorney's fees should be rethought in "and laws" § 1983 cases. As Judge Carnes has stated, the justifications for § 1988 fees, giving civil rights victims effective access to the courts and giving members of the bar an economic incentive to act as "private attorneys general" by aiding civil rights enforcement, do not apply to non-civil rights "and laws" claims like the claim to enforce the TCA's cell siting provisions.[209] Given the exceptional nature of attorney's fees awards to victorious plaintiffs in courts in the United States, it would be appropriate to limit the application of the attorney's fees statute. Such a limitation might include only those cases about which Congress was concerned, or it might give "discretion," the word that appears in § 1988(b),[210] to courts to deny awards in particular cases or categories of cases, such as "and laws" claims generally or claims to enforce business rights such as the TCA cell siting provisions.

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[206] *See id.*

[207] *Id.*

[208] *Id.* (quoting Hall v. Cole, 412 U.S. 1, 13 (1973) (discussing the Labor-Management Reporting and Disclosure Act)); *see generally* Mark. D. Boveri, Note, *Surveying the Law of Fee Awards Under the Attorney's Fees Awards Act*, 59 NOTRE DAME L. REV. 1293, 1293-95 (1984) (recapping the legislative history which emphasized that precluding the award of fees to private citizens with insufficient funding for lawsuits would frustrate the goal of the civil rights laws); Michael J. McNamara, Note, *Judicial Discretion and the 1976 Civil Rights Attorney's Fees Awards Act: What Special Circumstances Render an Award Unjust?*, 51 FORDHAM L. REV. 320, 322-24 (1982) (providing background on the purpose of provisions that shift the burden of paying attorney's fees onto the losing party in the litigation).

[209] *See* AT&T Wireless PCS, Inc. v. City of Atlanta, 210 F.3d 1322, 1330 (Carnes, J. concurring specially) (noting that because AT & T Wireless is neither a civil rights victim nor without sufficient funds to pay for attorney's fees, it does not fall within scope of the fee-shifting provision of § 1988), *vacated for lack of jurisdiction*, 223 F.3d 1324 (11th Cir. 2000), *reinstated*, 250 F.3d 1307 (11th Cir. 2001), *vacated and reh'g en banc granted*, No. 00-15885, 2001 WL 901250 (11th Cir. Aug. 10, 2001), *and appeal dismissed per stipulation*, No. 00-15885, 2001 WL 1049229 (11th Cir. Sept. 13, 2001).

[210] 42 U.S.C. § 1988(b) (Supp. IV 1998).

The language of § 1988 and its legislative history may provide bases for allowing courts to consider whether fees in cell siting cases are appropriate even if an "and laws" claim is successful. The statute provides that "the court, in its *discretion*, may allow the prevailing party . . . a reasonable attorney's fee . . . ."[211] Section 1988's legislative history explains that district courts have discretion to deny fees if "special circumstances would render such an award unjust."[212] Courts and commentators have disagreed over what constitutes "special circumstances." Some commentators argue that courts simply have "discretion only to determine the amount of the fee award and not its availability."[213] In cases decided before the Supreme Court held that fee awards to victorious § 1983 plaintiffs are virtually automatic, some courts denied attorney's fees and costs to prevailing plaintiffs under a trio of standards known as: (1) the "bright-prospects" test; (2) the private attorney general theory; and (3) the totality-of-circumstances test.[214]

The "bright-prospects test" emerged from the Second Circuit's decision in *Zarcone v. Perry*.[215] The *Zarcone* court stated that § 1988 was intended to remove financial barriers to individuals asserting their civil rights.[216] In *Zarcone*, however, the court held that because the plaintiff had a strong case with significant damages and had no trouble hiring a qualified attorney on a contingent fee basis,[217] a § 1988 fee award served no purpose.[218] The "private attorney general" theory has its origin long before Congress passed § 1988, but it expresses the same underlying motives, and some courts have analyzed § 1988 claims using it.[219] Courts using this approach generally emphasize the importance of the underlying civil right and the extent to which the litigation

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[211] *Id.* (emphasis supplied).

[212] S. REP. No. 94 -1011, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912 (quoting Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968) (discussing the 1964 Civil Rights Act)).

[213] Boveri, *supra* note 208, at 1299.

[214] *See* McNamara, *supra* note 208, at 321-22 (outlining the broad circumstances in which courts have denied monetary damages, including attorney's fees).

[215] 581 F.2d 1039, 1044 (2d Cir. 1978) (articulating for the first time the factors that would later be labeled the "bright-prospects" test).

[216] *See id.* at 1042.

[217] *See id.* at 1044 (noting that "where a plaintiff sues for damages and the prospects of success are sufficiently bright to attract competent private counsel on a contingent fee basis," the need for attorney's fees award might be eliminated).

[218] *See id.* ("[T]he principal factor to be considered by the trial judge in exercising his discretion is whether a person in the plaintiff's position would have been deterred or inhibited from seeking to enforce civil rights without an assurance that his attorneys' fees would be paid if he were successful."); *cf.* Blanchard v. Bergeron, 489 U.S. 87, 90 (1989) (holding that contingent-fee agreements are not a cap on § 1988 awards).

[219] *See* McNamara, *supra* note 208, at 335 & n.119 (noting that even after the passage of § 1988, some courts "continue to view fees requests in terms of whether the plaintiff benefits any class and effectuates a strong congressional policy" and citing such cases).

benefits the general public—a lack of importance or benefit to the public could result in the denial of fees.[220] The last test, the totality of circumstances, is followed by many courts in differing ways, recognizing courts' broad discretion to deny fees in appropriate cases.[221] Courts employing this theory have denied fees because, for example, "[this] case . . . apparently meets all of the language set forth in 42 U.S.C. § 1988 but . . . none of its spirit."[222]

Although we do not advocate a return to these fees-limiting doctrines in § 1983 cases brought to enforce the Constitution or a civil rights statute, the reasoning behind them still rings true in "and laws" cases. When Congress passed § 1988, § 1983 had not yet been held to apply to statutory violations, and there is no indication that Congress expected fees to be available in non-civil rights cases. In addition, similar to the "bright-prospects" test, it is apparent that wireless communication service providers often have strong, valuable claims under the TCA and do not need the added incentive of attorney's fees to pursue them. Finally, the rights involved in "and laws" claims often do not offer the same social benefit as the constitutional rights involved in most § 1983 cases. Of course, holding § 1988 to be prima facie inapplicable to certain § 1983 claims plainly flies in the face of *Thiboutot*,[223] so we do advocate that the holding of *Thiboutot*, that fees are automatic in "and laws" cases, either be overruled or limited to cases involving civil rights or related concerns.

Thus, even if the "and laws" action is available to enforce the TCA's cell siting provisions, there are persuasive reasons why courts should seriously consider using their discretion to deny providers fees and costs in cases brought to challenge zoning decisions. First, providers, unlike many civil rights plaintiffs, have strong economic incentives[224] and the financial ability to

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[220] *See id.* at 335 (noting that if a plaintiff did not benefit any class that the fee award would be inappropriate).

[221] *See id.* at 338-43 (discussing the differences between the Fifth Circuit's and Fourth Circuit's approaches to the totality-of-circumstances test); *see also, e.g.*, Thorsted v. Munro, 75 F.3d 454, 456 (9th Cir. 1996) (affirming the district court's denial of attorney's fees based on the totality of the circumstances which it identified); Kerr v. Quinn, 692 F.2d 875, 877 (2d Cir. 1982) (reversing a lower courts denial of attorney's fees under § 1988 after noting that under the circumstances of the case, to hold otherwise would undermine the principal statutory purpose of § 1988).

[222] Green v. Carbaugh, 460 F. Supp. 1193, 1194 (E.D. Va. 1978). This is hardly a new maxim. "[W]e should remember the 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.'" Chapman v. Houston Welfare Rights Org., 448 U.S. 454, 469 (1975) (Powell, J., concurring) (quoting Muniz v. Hoffman, 422 U.S. 454, 469 (1975) (quoting Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892)).

[223] *See* Maine v. Thiboutot, 448 U.S. 1, 9 (1990) ("Since we hold that this statutory action is properly brought under § 1983, and since § 1988 makes no exception for statutory § 1983 actions, § 1988 plainly applies to this suit.").

[224] Although we do not have hard information about the value of individual cell sites, if you divide industry revenue ($50 billion) by existing sites—(95,000) the average site

vindicate their rights. Providers are not likely to forego their rights just because attorney's fees are not available, and they are obviously not likely to be too poor to afford attorneys. Further, at least some of the rights granted in the TCA are clearer than many of the constitutional interests advanced by civil rights plaintiffs, so litigating them is likely to be less risky than litigating many civil rights claims. In addition, the rights protected under the TCA do not enjoy the preferred status that led Congress to pass the § 1988's attorney's fees provision: § 332(c)(7) does not protect fundamental rights that would "become [a] mere hollow pronouncement" without § 1988's fee shifting provision.[225] Congress's fear that the cost of private enforcement of civil rights would be so great that enforcement would cease, has no application in this context.

Another set of reasons for caution regarding attorney's fees for violations of TCA § 332(c)(7) involves the nature of the claims and the identity of the defendants. Claims under the TCA cell siting provisions are likely to be claims challenging the decisions of duly authorized state and local governmental bodies.[226] Given both the "American rule's" tradition of not awarding attorney's fees to prevailing litigants and the lack of congressional attention to whether providers should receive attorney's fees for wrongful denials of cell siting permits, federal courts should hesitate before awarding attorney's fees. The potential for substantial awards of attorney's fees may illegitimately deter state and, especially, small local governmental units from exercising their rightful zoning authority. Actual awards may penalize cities and towns that, in good faith, attempted to limit cell towers in ways that ultimately are determined to violate the TCA.[227] Although in many cases

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generates approximately $526,000 annually. *See* Cellular Telecomms. & Internet Ass'n, *supra* note 1 and accompanying text. Undoubtedly some sites generate much more and others generate much less, and it is logical to assume that new sites are the least valuable, because presumably companies would have developed the most lucrative sites first.

[225] S. REP. NO. 94-1011, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913.

[226] State agencies and state officials in their official capacity are not "persons" subject to suit under § 1983, so any effort to sue them under the "and laws" clause of § 1983 would likely fail. However, state officials in their personal capacities, and local government bodies and officials, are persons subject to suit under § 1983 and presumably could be sued for damages and injunctive relief for violating § 332(c)(7). *See* 42 U.S.C. § 1983 (Supp. IV 1998).

[227] The cases establish that some courts have found violations when, from all outward appearances, zoning authorities have denied permits to construct cell towers for reasons consistent with traditional zoning concerns, such as aesthetics, preferred allocation of areas for various uses, and congestion. *See, e.g.*, Cellco Partnership v. Town Plan & Zoning Comm'n, 3 F. Supp. 2d 178, 182 (D. Conn. 1998) (finding a TCA violation where town denied permit to place antenna in 135 foot tall steeple on top of church, based on finding that the "height and scale of the proposed steeple would not be in character with the neighborhood"); Nat'l Telecomm. Advisors v. City of Chicopee, 16 F. Supp. 2d 117, 119 (D. Mass. 1998) (finding a TCA violation where town denied permit to build tower on an industrial site where town wanted to save the site for a "true industrial use"); Sprint Spectrum L.P. v. Town of Easton, 982 F. Supp. 47, 51 (D. Mass. 1997) (finding a TCA

individual officials would be indemnified, there is a potential chilling effect on state and local government officials if, in addition to injunctive relief for wrongful permit denials, they might be liable for attorney's fees and damages.[228] Although these costs are worth bearing in many civil rights contexts, they may not be so when the rights at stake are purely economic, as in the cell siting area. The promise of expedited judicial review of adverse decisions, coupled with the economic incentives providers have to pursue their claims, should be adequate to vindicate the interests protected by the TCA.

Unless any denial of a federal right under color of state law is thought of as a civil rights issue, providers suing under § 332(c)(7) and § 1983 have no more justification for fee awards than any other civil litigant under the "American rule." There are many situations in which private litigants find themselves in litigation with state and local government bodies over zoning and other regulatory matters, and it normally takes specific legislative action to create an entitlement or eligibility for awards of attorney's fees. There is no evidence that Congress anticipated that TCA cell siting violations would give rise to attorney's fees, and courts should deny them unless special circumstances make an award appropriate.

The majority of providers have apparently not invoked § 1983 or § 1988 when they have attempted to enforce their rights under § 332(c)(7). Although only one reported case has actually awarded attorney's fees and costs to a wireless communication service provider, *Smart SMR II*,[229] others appear to contemplate such awards.[230] The *Smart SMR II* court justified its award, in

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violation where town denied permit to construct tower in an "already congested area").

[228] The most likely targets of § 1983 damages suits to enforce the TCA and attorney's fees motions are municipalities, because they are more likely than individuals to have assets sufficient to satisfy judgments and do not share the states' sovereign immunity from damages awards. *See* U.S. CONST. amend. XI. Municipal governments are liable for § 1983 damages for final decisions denying permits such as those to build communications towers. *See generally* Monell v. Dep't of Social Servs., 436 U.S. 658 (1978) (recognizing that cities are "persons" amenable to suit within the meaning of § 1983 but only for those acts representing official policy). Individual members of town planning and zoning commissions and the like may enjoy absolute immunity from § 1983 damages if they are acting in a legislative capacity when deciding whether to grant a construction permit or zoning variance. *See* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) (holding that members of regional planning agency are absolutely immune from damages for actions taken in a legislative capacity).

[229] *See* Smart SMR of New York, Inc. v. Zoning Comm'n, 9 F. Supp. 2d 143, 154 (D. Conn. 1998) (awarding attorney's fees and costs to Smart SMR as part of the remedy for a § 332(c)(7) violation); *see also* APT Minneapolis, Inc. v. City of Maplewood, No. Civ.97-2082(JRT/RLE), 1998 WL 634224, at *8 (D. Minn. Aug. 12, 1998) (granting APT's request for attorney's fees and costs under § 1988 for a violation).

[230] *See, e.g.*, AT&T Wireless PCS, Inc. v. City of Atlanta, 210 F.3d 1322 (11th Cir. 2000), *vacated for lack of jurisdiction*, 223 F.3d 1324 (11th Cir. 2000), *reinstated*, 250 F.3d 1307 (11th Cir. 2001), *vacated and reh'g en banc granted*, No. 00-15885, 2001 WL 901250 (11th Cir. Aug. 10, 2001), *and appeal dismissed per stipulation*, No. 00-15885, 2001 WL

part, on the ground that "the threat of attorneys' fees could influence zoning authorities to ensure that their decisions comply with the Telecommunications Act's requirements."[231] But the purpose of § 1988 is "not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals . . . to seek judicial relief . . . ."[232] Courts should not simply conclude that § 1988 applies and therefore justifies the imposition of penalties on the losing party. The *Smart SMR II* court's concerns could be addressed by the inherent power of courts to award fees "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons'" [233] without creating an entitlement to fees in cases brought to enforce the TCA.

III. POTENTIAL CONSTITUTIONAL PROBLEMS WITH THE TCA AND § 1983 "AND LAWS" LITIGATION

In this section, we shift gears from considering the statutory issues surrounding the construction of § 332(c)(7) and the availability of attorney's fees under § 1988, and we direct our attention to the constitutional problems with the cell siting provisions of the TCA and the "and laws" clause of § 1983. In particular, the specific duties placed on state and local governments may violate recent Supreme Court decisions limiting federal power to require local governments to administer federal programs. Further, the "and laws" clause of § 1983 is subject to constitutional doubt insofar as it was passed pursuant to Congress's power to enforce the Fourteenth Amendment. "And laws" claims like those enforcing the TCA have no connection whatsoever to the Fourteenth Amendment or other constitutional rights, and thus they may run afoul of recent pronouncements on the nature of, and limits to, Congress's power to enforce the Fourteenth Amendment.

A. *Section 704 of the 1996 Telecommunications Act Is Unconstitutional*

There is no doubt under current constitutional standards that the Commerce Clause grants Congress the power to regulate the use of the airwaves and most telecommunications activity because most such activity affects interstate commerce. [234] Although we do not question the legitimacy of Congress's

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1049229 (11th Cir. Sept. 13, 2001).

[231] *Smart SMR II*, 9 F. Supp. 2d at 148; *see also APT Minneapolis, Inc.*, 1998 WL at *8 ("[A]n award of attorney's fees is not only clearly warranted, but necessary if there is any hope that the Maplewood City Council will comply with the TCA in the future.").

[232] Newman v. Piggie Park Enters., 390 U.S. at 402 (discussing the 1964 Civil Rights Act).

[233] *See* Alyeska Pipeline Servs. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975) (quoting F. D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116, 129 (1974)).

[234] U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian

interest in ensuring that local zoning laws do not interfere with the development of wireless communication services, we do question whether Congress's chosen regulatory method runs afoul of recent cases interpreting the Commerce Clause and the Tenth Amendment.[235]

Rather than empower a federal agency to administer federal wireless facilities siting standards, Congress has commanded state and local zoning authorities to apply federal standards and act according to federally prescribed procedures. In particular, in addition to those factors that state and local authorities consider under state and local law, Congress requires that zoning authorities neither "unreasonably discriminate among providers of functionally equivalent services"[236] nor act in a way that has "the effect of prohibiting the provision of personal wireless services."[237] Congress has also prescribed procedures that state and local zoning authorities must employ—decisions within a "reasonable period of time"[238] and written decisions based upon a written record[239]—and it has commanded state courts with jurisdiction over

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Tribes.");.*see* 47 U.S.C. § 151 (1994) (establishing the FCC to implement the 1934 Telecommunications Act).

[235] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). It is an odd feature of recent Tenth Amendment jurisprudence that the analysis begins with an acknowledgment that Congress is regulating within its Commerce Clause power. The language of the Tenth Amendment would seem not to apply to congressional action that is concededly within an enumerated power. Nonetheless, as we shall see, recent case law has created a category of congressional action that is within the Commerce Power but, nonetheless illogically, violates the Tenth Amendment's reservation of non-delegated powers to the states.

[236] 47 U.S.C. § 332(c)(7)(B)(i)(I) (Supp. IV 1998).

[237] 47 U.S.C. § 332(c)(7)(B)(i)(II). The prohibition against considering the environmental effects of radio emissions does not seem to present as serious a Tenth Amendment problem as the other substantive provisions of § 332(c)(7)(B). *See* 47 U.S.C. § 332(c)(7)(B)(v). This aspect of the TCA is similar to many instances of federal preemption of state law in that it represents a federal determination that something is safe or socially useful and prohibits state law to the contrary. Zoning authorities are not compelled to apply a federal health or environmental standard, rather they are merely prohibited from taking certain factors into account, much as state agencies that regulate power plant construction are prohibited from denying a permit to build a nuclear plant based on safety concerns. Thus, we think that this provision would survive Tenth Amendment scrutiny.

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> A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

47 U.S.C. § 332(c)(7)(B)(ii).

[239] 47 U.S.C. § 332(c)(7)(B)(iii) ("Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.").

TCA claims to hear and decide cases on an "expedited basis."[240] These requirements run afoul of recently recognized Tenth Amendment limitations on Congress's power to enlist state and local government agencies in the enforcement of federal law.[241]

The recent trend toward limiting federal power over states began with the Supreme Court's decision in *New York v. United States*,[242] in which the Court considered New York State's challenge to the Low-Level Radioactive Waste Policy Act.[243] One of the Act's provisions, the "take-title" provision, compelled states either to adopt certain regulations related to low-level radioactive waste or simply to take title to the waste, thus becoming responsible for any damage it caused as a result of inadequate storage.[244] The Court acknowledged that "[it]s jurisprudence in this area has traveled an unsteady path,"[245] but it avoided any attempt to clarify its prior holdings.[246]

The issue in *New York* was "the circumstances [if any] under which Congress may use the States as implements of regulation."[247] The Court found that, in implementing the Low-Level Radioactive Waste Policy Act, Congress had given the states "a choice between two unconstitutionally coercive

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> Any person adversely affected by any final action or failure to Act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis.

47 U.S.C. § 332(c)(7)(v).

241 The TCA's "substantial evidence" requirement may also create a commandeering problem. Although the statute explicitly provides that zoning authorities must base their decisions on "substantial evidence," it is implicit that, on judicial review, state courts would be required to apply the substantial evidence test. *See* 47 U.S.C. § 332(c)(7)(iii). This may amount to commandeering state courts because state law may provide for a different standard of judicial review. However, there are reasons to permit the federal government to commandeer state courts which do not apply to federal commandeering of other state and local governmental units. *See infra* notes 280-284 and accompanying text.

242 New York v. United States, 505 U.S. 144 (1992).

243 42 U.S.C. §§ 2021b-2021j (1994 & Supp. IV 1998).

244 *See* New York v. United States, 505 U.S. at 174-75 (describing the take-title provision).

245 *Id.* at 160 (citing Maryland v. Wirtz, 312 U.S. 183 (1968), Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), and Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)).

246 *Id.* at 160-61 (citing *Nat'l League of Cities*, 426 U.S. 833 (1976), Hodel v. Va. Surface Mining and Reclamation Ass'n, Inc., and *Garcia*). "This litigation presents no occasion to apply or revisit the holdings of any of these cases, as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties." *Id.* at 160.

247 *Id.* at 161.

regulatory techniques. . . ."[248] Congress could neither command the states to regulate according to its wishes nor could it simply vest title to the waste in the states. Perhaps the most direct statement of the principle is the following: "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."[249] Congress may regulate private individuals directly, and such regulations can preempt state law to the contrary, but Congress may not directly compel the states to regulate.

It is irrelevant to the analysis in *New York v. United States* that the Commerce Clause grants Congress the power to regulate in the area. As the Court stated:

> No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. *The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation.* Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.[250]

Legitimate questions can be raised concerning the wisdom of a doctrine that allows Congress to preempt state authority in an area completely but does not allow Congress to require states to cooperate in enforcing federal law. For example, it seems like a lesser intrusion on state authority to require local zoning authorities to administer local zoning law under federal standards than it would be for Congress to grant the FCC the power to order localities to allow providers to erect facilities wherever the FCC decides. Yet the former method would be constitutional while the latter would not.[251]

The Court's normative basis for its recent Tenth Amendment decisions may rationalize this apparent disparity. The Court's primary normative justification may be characterized as requiring transparency in political accountability.[252]

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[248] *Id.* at 176 ("[A]n instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and . . . a direct order to regulate, standing alone, would also be beyond the authority of Congress. . . .").

[249] *Id.* at 162.

[250] *Id.* at 178 (emphasis added).

[251] The Court has acknowledged, in both *New York* and *Printz*, that arguments like these may make the Court's commandeering doctrine appear formalistic. "The result may appear 'formalistic' in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity." Printz v. United States 521 U.S. 898, 933 (1997) (quoting New York v. United States, 505 U.S. at 187). In both cases, the Court responded that the Constitution is often concerned with questions of form, and that the form of our government is what preserves the separation of powers. *See Printz*, 521 U.S. at 933, *New York*, 505 U.S. at 187.

[252] Justice O'Connor first argued for this in her dissent in Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 787 (1982). *But see* Roderick M. Hills, Jr., *The*

The prohibition against requiring states to administer federal law prevents the federal government from avoiding responsibility for federal law by making it appear that state or local officials are responsible for regulatory action. If the federal government preempts an area and sets up its own bureaucracy, confusion is less likely to occur over which arm of government is responsible for regulatory action. The majority on the Court apparently views transparency in political accountability as important enough to fuel its recent Tenth Amendment jurisprudence.[253] Although we are not sure that the Court has provided an adequate normative basis for the doctrine, we are confident that the TCA raises serious questions under these principles.

The Court reaffirmed and extended the reasoning in *New York* five years later in *Printz v. United States*,[254] in which the Court held unconstitutional the Brady Handgun Violence Protection Act's[255] requirement that local law enforcement officials make reasonable efforts to conduct background checks on certain prospective handgun purchasers within five business days.[256] Justice Scalia summarized the Court's position as follows:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring

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Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't, 96 MICH. L. REV. 813, 822 (1998) (arguing that accountability concerns do not provide an adequate basis for the Court's recent Tenth Amendment decisions).

[253] The Court's Tenth Amendment jurisprudence also addresses a part of the problem of unfunded mandates under which the federal government imposes obligations on state government without paying the costs of compliance. Not every unfunded mandate violates the Tenth Amendment principles that prohibit requiring state and local government to administer federal law, but whenever the federal government requires state and local government to administer federal law without compensating them for doing so, such action amounts to an unfunded mandate. For example, Congress did not provide funds for zoning authorities to assemble written records or to produce their decisions in writing. This helps to explain why Tenth Amendment principles are not violated if Congress gives state a choice between administering federal law or declining to accept federal funds. This can even be questioned because the federal funding process is highly coercive. In substance, the federal government imposes taxes, or in periods of deficits borrows money, beyond what is needed to fund federal government programs, and then offers some federal money to state and local governments on the condition that they obey federal standards when using the federal money. The magnitude of federal taxation and federal borrowing makes it more difficult for state and local governments to raise money on their own, and state and local governments are effectively coerced into accepting federal money for their programs with federal strings attached.

[254] 521 U.S. 898 (1997).

[255] 18 U.S.C. § 922 (1994 & Supp. V 1999) (amending the Gun Control Act of 1968, 18 U.S.C. §§ 921-930).

[256] *See Printz*, 521 U.S. at 903.

> the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.[257]

More recently, the Court addressed the scope of the Tenth Amendment limitations on the Commerce power in *Reno v. Condon*,[258] which involved a challenge to a provision of the Driver's Privacy Protection Act, which prohibits states—and private individuals—from selling driver's license information, such as address and phone number data, without the driver's informed consent.[259] South Carolina challenged the law, basing its argument on *Printz*. A unanimous Court, in an opinion by Chief Justice Rehnquist, upheld the law primarily on the ground that Congress was regulating the states directly, not dictating how the states were to govern their own citizens.[260] The federal law prohibiting the sale of driver's license information did not require the states to enforce federal law, rather it held the state's own activities to federal standards.[261] The fact that state employees would need to take steps to comply with the Act's provisions was not enough to violate the principles laid down in *Printz*, because those employees were not spending time applying federal law to third parties.[262]

Section 332(c)(7) of the TCA is unconstitutional under this recent Commerce Clause and Tenth Amendment jurisprudence. Notwithstanding § 332(c)(7)'s title, "Preservation of local zoning authority," the statute in fact restricts local zoning authority and requires local zoning bodies to regulate third parties—wireless communication service providers—according to federal standards and procedures.[263] Section 332(c)(7) restricts not only the method in which local zoning authorities operate but also the substantive grounds they may consider when deciding whether to grant or deny a zoning permit for a cellular telephone tower.[264] Section 332(c)(7) does not directly regulate private citizens, nor does it regulate state or local government activities.

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[257] *Id.* at 935.

[258] 528 U.S. 141 (2000).

[259] *See* 18 U.S.C. §§ 2721-2725 (1994 & Supp. IV 1998).

[260] *See Condon*, 528 U.S. 141, 151 (2000) ("[The Act] does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.").

[261] *See id.* at 150-51 (comparing the Driver's Privacy Protection Act to a federal statute that prohibited states from issuing unregistered bonds, which the court upheld in *South Carolina v. Baker*, 485 U.S. 505 (1988)).

[262] *See id.*

[263] *See* 47 U.S.C. § 332(c)(7)(A) (Supp. IV 1998) ("Except as provided in this paragraph, nothing in this chapter shall limit or effect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities."); *see also* 47 U.S.C. § 332(c)(7)(B) (prescribing the federal standards that state and local governments must follow in making decisions on the placement, construction, and modifications of wireless service facilities).

[264] *See* discussion *supra* accompanying notes 95-98.

Rather, it regulates state and local government treatment of private citizens. Thus, § 332(c)(7) is not saved by *Condon*'s approval of laws that regulate the states' own activities.[265]

It is irrelevant to Tenth Amendment jurisprudence that Congress may have power under the Commerce Clause to take over the area of cell siting, for example by giving the FCC the power to decide cell siting issues and to promulgate orders allowing the building of wireless service facilities. Congress has not passed such legislation, and legislation seizing local control over zoning would be very controversial. It would be inappropriate for the federal courts to uphold § 332(c)(7) on the ground that more intrusive legislation would present an easier constitutional case, because there is little reason to believe that the more intrusive legislation would ever actually become law.

Recently, a panel of the Court of Appeals for the Fourth Circuit considered the constitutionality of § 332(c)(7).[266] However, that panel failed to produce an authoritative decision on the TCA's constitutionality. A two member majority ruled in favor of the county board of supervisors' decision to deny a permit to build a cellular tower.[267] One member of the majority, Judge Niemeyer, thought that the county's decision violated the TCA but found the TCA unconstitutional under the Tenth Amendment.[268] Judge Niemeyer analyzed the TCA's cell siting provisions under the Supreme Court's recent Tenth Amendment jurisprudence,[269] and he concluded that the requirement that permit denials be supported by substantial evidence "'commandeer[s]' the County's legislative process and is therefore unconstitutional under the Tenth Amendment."[270] The second member of the majority, Judge Widener, found the county's decision to be in compliance with the TCA and thus did not reach the TCA's constitutionality.[271] The dissenting member of the panel, Judge King, found against the county on both grounds, i.e., that the TCA was constitutional and had been violated.[272]

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[265] *Condon* is in the same line as *National League of Cities v. Usery*, 426 U.S. 833 (1976), under which the Court has allowed extensive regulation of states' own activities, such as state treatment of state employees. What the Court has not allowed, under *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997) is Commerce Clause-based federal control over state regulation of third parties.

[266] *See* Petersburg Cellular Partnership v. Bd. of Supervisors, 205 F.3d 688, 699-706 (4th Cir. 2000) (per curiam).

[267] *See id.* at 691.

[268] *See id.* at 705-06.

[269] *See id.* at 696-706.

[270] *See id.* at 705 (quoting New York v. United States, 505 U.S. at 175).

[271] Judge Widener concluded that the county's decision was supported by substantial evidence, so he did not reach the constitutional issue. *See id.* at 707.

[272] Judge King found that the county's decision was not supported by substantial evidence and that the Act was constitutional. Therefore, he alone among the panel would have ruled against the county and held that the permit should have been issued. *see id.* at

We need to be clear that not every provision of § 332(c)(7) is unconstitutional under anti-commandeering principles. The provision prohibiting state and local zoning authorities from considering the environmental effects of transmissions is a classic example of federal preemption of state law.[273] This prohibition, in our view, raises no commandeering issue because it does not affirmatively require state and local authorities to act; it merely states a specific federal prohibition that is binding on state and local officials.[274] However, in our view, the federal provisions that cellular tower permit denials may not unreasonably discriminate among providers of functionally equivalent services or have the effect of prohibiting the provision of service, violate anti-commandeering Tenth Amendment principles.[275] Although these may also appear to be classic examples of preemption, we do not think they should be considered as such, because, in effect, their application would transform state and local zoning authorities into federal administrators charged with developing and applying a body of federal zoning rules to cell siting permit applications. Unlike the environmental effects prohibition, these additional substantive provisions are so vague that they place local zoning authorities in substantial doubt about whether they have the power to deny a permit. This uncertainty and the possibly broad application of federal law have the potential to reshape completely state and local zoning practices. This is precisely the evil that the Court has attempted to eliminate with its anti-commandeering jurisprudence.

In addition, the normative basis underlying the anti-commandeering doctrine supports striking down even the prohibition against considering the environmental effects of transmissions. All of the substantive standards force state and local zoning bodies to apply federal standards in their regulation of third parties, obscuring the fact that permits may be granted against the wishes of the local authorities only because federal law so requires. One can easily imagine a disagreement among local officials and local constituents on whether federal law requires granting a particular permit. Under the Court's anti-commandeering principles, state and local agencies should not be required

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710-11. Judge King's opinion relied on Congress's ability conditionally to preempt local land use regulation:

> Congress need not directly preempt state law whenever it wishes to regulate private activity affecting interstate commerce. Instead, it may employ conditional preemption; that is, Congress may seek to induce states to regulate activities affecting interstate commerce by threatening to preempt contrary state regulation if the state itself fails to regulate in accordance with federal instruction.

See id. at 713.

[273] *See* 47 U.S.C. § 332(c)(7)(B)(iv) (Supp. IV 1998).

[274] *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981)(upholding the surface mining act as consistent with *National League of Cities*, as the statute "regulates only 'individual businesses necessarily subject to the dual sovereignty of the government of the Nation and the State in which they reside.'" Hodel, 452 U.S. at 293, quoting *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976)).

[275] *See* 47 U.S.C. § 332(c)(7)(B)(i)(I), (II).

to resolve such disputes and then apply their own interpretations of federal law in administering state and local law. If the federal government wants to grant cellular providers an entitlement to build facilities, it should administer the entitlement itself and not force state and local zoning authorities to do the dirty work. Achieving the Supreme Court's goal of transparency in political accountability would require the federal government to administer a permit system, and anti-commandeering principles should be understood broadly to prohibit the federal government from requiring state and local administrators to apply federal standards when they are regulating private parties.[276] We should also note that even if the substantive elements are constitutional, the requirements that petitions be heard within a reasonable period of time[277] and that denials be in writing based on substantial evidence on a written record,[278] present pure cases of commandeering and thus remain subject to anti-commandeering attack.

The provision granting a federal cause of action to attack permit denials[279] may be within Congress's powers, provided the permit denial is not challenged on the ground that the state failed to comply with one of the unconstitutional provisions of the TCA. Even if the provision allowing parties aggrieved by the denial of a permit to construct a wireless facility to "commence an action in any court of competent jurisdiction"[280] means that state courts must hear such actions, we do not believe that the provision violates the Supreme Court's anti-commandeering rules. It is well-established that state courts must hear federal claims that are similar to other claims within their jurisdiction,[281] and at least three related sets of reasons have been given for holding that this is permissible despite commandeering concerns.

The first set of reasons for allowing Congress to require state courts to hear federal claims rests on the historical role of the state courts in enforcing federal law. The Constitution does not create lower federal courts, and it appears that the expectation was that state courts would hear federal claims, subject to Congress's power to assign particular federal claims to lower federal courts that it might create.[282] It was not until 1875 that the lower federal courts were granted general federal question jurisdiction, and even then an amount in

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[276] Roderick Hills has argued that political accountability is always difficult to determine in federal-state cooperative regulation, regardless of whether "commandeering" is present. *See* Hills, *supra* note 252, at 826.

[277] *See* 47 U.S.C. § 332(c)(7)(B)(ii).

[278] *See* 47 U.S.C. § 332(c)(7)(B)(iii).

[279] *See* 47 U.S.C. § 332(c)(7)(B)(v).

[280] *Id.*

[281] *See* Testa v. Katt, 330 U.S. 386, 389 (1947) (holding that state courts have adequate and appropriate jurisdiction under established state law to adjudicate a claim brought under a federal statute and as such are not permitted to refuse to enforce such a claim).

[282] *See* U.S. CONST. art. III, § 1, cl. 1 ("The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time establish.")

controversy requirement meant that some federal claims were cognizable only in state courts.[283]

The second set of reasons depends on the Supremacy Clause of the Constitution.[284] The argument is that the Supremacy Clause was directed most strongly at state courts, with the understanding that state courts would ensure that federal law was enforced throughout the United States.

The third set of reasons holds that states are not truly obligated to recognize federal claims in their courts unless they choose to open their courts to claims that are similar to federal claims. Once the state courts are open to a particular type of claim, the supremacy of federal law requires that the state courts not discriminate against federal claims, but if the state courts are not open to that type of claim, the obligation to hear federal claims does not arise. The reference in the TCA to courts of "competent jurisdiction"[285] presumably would not require a state court, that was without jurisdiction, to hear the federal claims arising under the TCA. For example, if a state decided to stop hearing tort claims in its courts, then perhaps it would not be obligated to hear § 1983 claims in its courts because the Supreme Court has "repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability."[286]

One possible response to our entire attack on the constitutionality of § 332(c)(7) is that there is no commandeering because state and local governments could avoid all the duties imposed by the statute simply by getting out of the business of zoning. It is only because state and local governments have decided to impose zoning and other land use restrictions that federal law creates obligations. The federal government is not coercing state and local governments to act. Rather, state and local governments have decided to act, and the federal government is merely insisting that state and local governments conform to valid federal law. This is preemption, not commandeering. There is no coercion of state and local authorities; if they merely decide to do nothing, they will incur no obligation to enforce or administer federal law. They could simply allow property owners to build whatever facilities they want, and federal law would not enter the picture.

It may be that the Supreme Court would agree with the above analysis and hold that the TCA does not commandeer in the way that the federal statutes at issue in *New York*[287] and *Printz*[288] did. The Court stressed in *New York* that

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[283] *See* Act of March 3, 1875, 18 Stat. 470 (1875) (creating federal court and federal question jurisdiction subject to an amount in controversy requirement of $500).

[284] *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in pursuance thereof. . . shall be the supreme law of the land.").

[285] *See* 47 U.S.C. § 332(c)(7)(B)(v) (Supp. IV 1998).

[286] Heck v. Humphrey, 512 U.S. 477, 483 (1994) (noting that § 1983 "creates a species of tort liability in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution" and citing Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 305 (1986)).

[287] New York v. United States, 505 U.S. 144 (1992).

[288] Printz v. United States, 521 U.S. 898 (1997).

there was no way for the State of New York to avoid its obligations under the federal law challenged in that case.[289] However, we do not believe that the fact that states could stop regulating zoning means that there is no coercion present in § 332(c)(7). This argument, in fact, could have saved the Brady Act provisions struck down in *Printz*, because the Brady Act's obligations regarding background checks for gun purchasers were directed at the "chief law enforcement officer" of the area in which the purchase was being made.[290] State and local governments could have avoided their federal obligations by getting out of the business of law enforcement: without a chief law enforcement officer, no state or local employee would have been commandeered. Although this argument is correct in theory, in practice it is no more realistic to expect state and local governments to abandon zoning than it is to expect them to abandon law enforcement.

Further uncertainty regarding our conclusion that the TCA's cell siting provisions violate the Tenth Amendment arises from the fact that the Court upheld a somewhat similar federal statute in *Federal Energy Regulatory Commission v. Mississippi*[291] ("*FERC*"). That case involved the federal Public Utility Regulatory Policies Act of 1978 ("PURPA"),[292] which was enacted by Congress in response to the energy crisis of the 1970s and required state utility commissions to "consider" adopting federal standards for regulating utility rates. Federal law did not require that any of the standards actually be adopted by the state agencies, but it did prescribe procedures that the state agencies were required to follow when considering whether to adopt federal standards.[293] Further, PURPA granted the Secretary of Energy, and in some cases affected utility companies and consumers, the right to intervene in state proceedings regarding the federal standards, and any person participating in the state proceedings was granted the right to seek judicial review of the state agency's decision in state court.[294]

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[289] *See New York*, 505 U.S. at 177 (explaining that the provisions of the Low-Level Radioactive Waste Policy Act at issue require a state to follow the direction of Congress, regardless of the path the state chooses, and as such, exceeds the scope of congressional power).

[290] *See Printz*, 521 U.S. at 898.

[291] 456 U.S. 742 (1982). *See also* Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1991). We think that *Virginia Surface Mining & Reclamation Ass'n* is also no longer good law for basically the same reasons that we find *FERC* to be superseded by the analysis in *New York* and *Printz*. *See infra* notes 299-305 and accompanying text. We confine our discussion here to the *FERC* case.

[292] Pub. L. No. 95-617, 92 Stat. 3117 (1978).

[293] The procedures specified included notice and comment rulemaking by the state agency on whether to adopt the federal standards. The federal statute also required the state agency to provide a written statement of reasons if it decided not to adopt federal standards and states were required to report to the Secretary of Energy once per year for ten years on their consideration of the federal standards. 16 U.S.C. § 2626(a).

[294] 16 U.S.C. §§ 2621(b), 2621(c)(2), 2631(a), 2633(c)(1) (1994); 15 U.S.C. §§ 3203(a),

The State of Mississippi filed suit in federal court challenging PURPA as exceeding Congress's commerce power and as violating the Tenth Amendment's protections of state sovereignty. The Court upheld PURPA in its entirety. The Court easily dismissed the Commerce Clause challenge, holding that even intrastate power transmission has sufficient interstate effects to support federal regulation.[295] The Court found the Tenth Amendment challenge somewhat more difficult, but nonetheless upheld PURPA on two related grounds. First, the Court noted that Congress has the power, under the Commerce Clause, to preempt completely state regulation of electricity rates, and it viewed Congress's instructions that states consider—under federal procedures—whether applying federal standards would be a lesser intrusion on state prerogatives.[296] Second, the Court found that Congress had not commandeered state agencies to enforce PURPA because states could avoid federal regulation altogether by getting out of the business of regulating electricity.[297] Given this choice, the Court reasoned that requiring state utility commissions to consider adopting federal standards did not violate state sovereignty that was protected under the Tenth Amendment.

The Court's reasons for upholding PURPA apply with substantial force to the TCA's regulation of state and local zoning with regard to wireless communications facilities. First, the Commerce Clause justifications for federal regulation are quite strong, with cell towers possibly constituting the paradigm case of an interstate network subject to federal regulation.[298] Second, it seems pretty clear that Congress could completely preempt state regulation of zoning with regard to cellular towers. Third, state and local governments arguably are not commandeered because they could avoid federal regulation by simply abandoning regulation of zoning. Thus, if the Court simply were to apply its reasons for upholding PURPA to the TCA's cell siting provisions, it appears likely that the TCA would be upheld against a Tenth Amendment challenge.

In our view, *FERC v. Mississippi* is no longer good law,[299] and under

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3203(c), 3205 (1994).

[295] *See FERC*, 456 U.S. at 755-56 (stating that congressional findings relating to federal regulation of interstate power meet the necessary rational basis standard).

[296] *See id.* at 764-65 (noting that the Commerce Clause allows for total congressional preemption of private utility regulation. Under PURPA Congress chose not to preempt state regulation but chose instead to allow continued state regulation, provided that the states consider suggested federal standards).

[297] *See id.* at 766-67.

[298] Thanks to Randy Barnett for making this point.

[299] In *Printz*, the Court distinguished *FERC* on the ground that in *FERC* states were only required to "consider" federal standards, but in *Printz*, state officials were required to act under federal standards. *See* Printz v. United States, 521 U.S. 898, 926-28 (1997). We do not find this distinction persuasive since the state utility agencies in FERC were certainly required, by federal law, to take significant procedural actions in their regulation of electric rates and services.

current Tenth Amendment standards, the TCA's cell siting provisions would be held unconstitutional. The Court viewed *FERC* as a case of first impression, and it rejected Justice O'Connor's Tenth Amendment commandeering analysis, which she offered for the first time in her dissent in that case, and which a majority later accepted in *New York v. United States*.[300] None of the three reasons for upholding PURPA is, in our view, sufficient to uphold the TCA. First, in its more recent Tenth Amendment cases, the Court has stated that the strength of the federal interest is irrelevant to whether there is a possible Tenth Amendment violation.[301] Second, the fact that Congress could preempt state regulation of cell tower siting has also been held to be irrelevant to current Tenth Amendment jurisprudence.[302] Because the normative basis of current Tenth Amendment jurisprudence is the Court's focus on transparency of political accountability, the form of federal regulation is more important than the degree to which it displaces state regulatory authority. Complete preemption is normatively preferable to commandeering.

Third, the fact that the state could avoid commandeering by abandoning regulation of cell siting presents a possible limitation on the reach of the Court's current Tenth Amendment doctrine, but it is unclear whether this is so. The Court has not mentioned this factor in its last three Tenth Amendment decisions,[303] except to point out in *New York v. United States* that states had no way to avoid their obligations under federal law: They were required either to regulate under federal standards or to take title to nuclear waste.[304] It seems unrealistic to say that a state or local government has a choice under the TCA because it can avoid federal regulation by abandoning an area that the local political community found important enough to subject to regulation.[305]

Further, as we point out above in *Printz v. United States*, the Brady Act's background checking requirements could have been avoided if state and local governments decided to abandon law enforcement, obviously an exceedingly unlikely decision. Few if any local governments will give up zoning to avoid being commandeered into applying federal standards to cell tower siting disputes. Further, it seems inconsistent to hold that it is irrelevant that the federal government can preempt an area completely but then hold that the state or local government has the choice to abandon regulation, which in effect is the same as complete federal preemption.

In sum, it seems to us that the Court's Tenth Amendment jurisprudence is

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[300] 505 U.S. 144 (1992).

[301] *See Printz*, 521 U.S. at 931-32; *New York*, 505 U.S. at 177-78.

[302] *See New York*, 505 U.S. at 160, 166.

[303] *See generally* Reno v. Condon, 528 U.S. 141 (2000); Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

[304] *See New York*, 505 U.S. at 175-76.

[305] We view this choice as different in kind from the frequent choice state and local governments have regarding whether to accept federal conditions attached to the receipt of federal funding. There, the coercion, while present, is much less than the choice to give up regulating in an area entirely in order to avoid federal standards.

heading toward a strong prohibition against federal commandeering of state and local agencies to enforce federal law either against or in favor of private parties. The choice to abandon an area of regulation is not likely to be viewed as enough to eliminate the coercive element of commandeering. The doctrine may appear to place form over substance because the degree of federal regulation is irrelevant to whether the commandeering principle is violated, but the anti-commandeering principle appears not to take into account the degree of the burden, only its form.

We wish to emphasize that we are somewhat uncomfortable with the Court's Tenth Amendment jurisprudence. It seems somewhat out of proportion if relatively minor instances of commandeering are per se unconstitutional while extensive, expensive, and direct regulation of state functions is left intact, virtually subject only to the political process,[306] especially when the commandeering occurs in a field that Congress could, if it chose, entirely preempt. What the Court condemns as commandeering actually might be preferable to complete preemption, in that it creates a system of cooperative federalism within which those elements of federal concern are covered by federal law while state law governs most issues. In fact, we are still somewhat puzzled over the apparent inconsistency between the language of the Tenth Amendment and the Court's view that the Tenth Amendment applies even when Congress acts within its enumerated powers. Because the Tenth Amendment, on its face, reserves to the states or the people, only "[t]he powers not delegated to the United States by the Constitution," the most natural reading of the Tenth Amendment is that it applies only when Congress acts outside its enumerated powers.[307]

Even if we are correct that under current legal principles the TCA's cell siting provisions are unconstitutional, it is of course not certain that the Court would so hold. Results in Supreme Court cases are often surprising. Perhaps the Court's anti-commandeering jurisprudence will be refined so that the TCA's cell siting provisions would be upheld because states agencies are subject only to minor federal control, and then only if they continue to regulate in an area where a genuine choice over whether to regulate arguably exists. Further, the transparency of political accountability could be maintained some other way, for example if state and local officials could inform the public that they are under federal compulsion, or if state and local authorities felt free to deny permits and granted them only when courts enforcing the TCA ordered them to do so. Although this still puts the state or local authority through the expense and inconvenience of litigation, it would likely be apparent to constituents that permits were granted under compulsion and that state and local officials were not responsible. Attorney's fees under sections 1983 and 1988 would make this process significantly more expensive for the zoning

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[306] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985) (arguing that "the political process ensures that laws that unduly burden the state will not be promulgated").

[307] U.S. CONST. amend. X.

authorities and would increase the coercion they felt in deciding whether to deny a permit, thereby risking litigation. Thus, even if the TCA's cell siting provisions are constitutional, the values underlying the anti-commandeering doctrine counsel against awarding attorney's fees to telecommunications companies that successfully challenge permit denials.

B. *Constitutional Problems with the "and Laws" Clause*

In addition to the constitutional difficulties presented by the TCA's cell siting provisions, there are reasons to question the constitutionality of § 1983's "and laws" clause. Despite twenty years of case law construing and applying the clause,[308] there is no indication that its constitutionality has been challenged or considered. However, recent jurisprudence on the reach of Congress's power under § 5 of the Fourteenth Amendment[309] indicates that the "and laws" clause may lack a sufficient basis in Congress's constitutional powers.

The short statement of the argument that the "and laws" clause is unconstitutional, is that § 1983 was passed pursuant to Congress's power to enforce the Fourteenth Amendment, and most "and laws" claims have no connection whatsoever to the Fourteenth Amendment. However, the history of the "and laws" clause makes it difficult to be certain about the power under which it was passed. Section 1983 was passed in 1871 as part of a statute designed to enforce the Fourteenth Amendment.[310] Originally, the statute provided a cause of action against persons violating *constitutional* rights under color of state law.[311] Later, in the revision of 1874, the "and laws" clause was

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[308] Dating from Maine v. Thiboutot, 448 U.S. 1, 4 (1980) (stating that the "and laws" clause should not be limited to "some subset of laws").

[309] U.S. CONST. amend. XIV, § 5 ("Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

[310] *See* 17 Stat. 13, § 1 (1873); District of Columbia v. Carter, 409 U.S. 418, 423 (1973) (noting that § 1983 is rooted in the Ku Klux Klan Act of 1871, whose primary purpose was to enforce the Fourteenth Amendment).

[311] *See* Act of April 20, 1871, 17 Stat. 13, § 1 (providing a cause of action for the violation of rights "secured by the Constitution" without mentioning "laws").

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject. or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

added,[312] and ultimately the Supreme Court decided, despite strong evidence that no substantive changes were intended in the revision process,[313] that this clause created a cause of action whenever a state or local official violated a federal statute.[314] This opened an enormous amount of state activity to § 1983 litigation, because many federally funded programs are administered by state agencies under federal standards.[315] Under the "and laws" clause, a state's or local official's violation of federal standards in administering a joint state-federal program could lead to § 1983 damages, injunctive relief, and attorney's fees against the official or a municipal government.[316]

There is no question that § 1983 was passed originally under Congress's power to enforce the Fourteenth Amendment. The open issue is whether the revision process had any effect on this. There is no indication in statutes or legislative history that Congress invoked additional powers during the revision process. In fact, it appears that Congress viewed the Statutes at Large as the primary source of statutory authority. In authorizing the publication of the Revised Statutes in 1874, Congress stated that the Revised Statutes should contain "marginal notes referring to the statutes from which each section was compiled and repealed by said revision" and that "the printed volumes shall be legal evidence of the laws and treaties therein contained, in all the courts of the United States, and of the several States and Territories."[317] It appears that the revision was a codification of existing statutes so that the power under which the original statute passed would be the power against which the provision in the Revised Statutes would be measured in determining whether Congress acted within its constitutionally delegated powers. Thus, because the "and laws" clause was incorporated into the predecessor of § 1983 during the revision process, the safest assumption is that it was passed pursuant to Congress's power to enforce the Fourteenth Amendment.

Assuming that the "and laws" clause, like the remainder of § 1983, was passed pursuant to Congress's Fourteenth Amendment power, the question

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17 Stat. 13 § 1 (1873).

[312] *See* Rev. Stat. § 1979 (1878) (adding the "and laws" clause); *see also Thiboutot*, 448 U.S. at 4.

[313] *See* 2 CONG. REC. 827 (1874).

[314] *See* Maine v. Thiboutot, 448 U.S. 1, 5 (1980).

[315] *See id.* at 3 (offering Social Security as an example of a federally funded program administered by state agencies).

[316] The state itself, however, cannot be sued under § 1983. *See* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign state."); Monell v. Dep't of Social Servs., 436 U.S. 658, 663 (1978) (holding that liability runs primarily against individual officials and municipalities who can be sued under the municipal policy standards).. *See also* Jack M. Beermann, *Municipal Responsibility for Constitutional Torts*, 48 DEPAUL L. REV. 627,628 (1999) (describing the origins of municipal liability jurisprudence).

[317] Act of June 20, 1874, 18 Stat. 333 (1879).

becomes whether the clause is a legitimate exercise of that power. We argue that Congress's power to enforce the Fourteenth Amendment does not extend to creating causes of action that have no connection to violations of the Fourteenth Amendment. Many, if not most, potential "and laws" claims have no connection to the Fourteenth Amendment. If a Fourteenth Amendment violation were present, the claim could be brought under § 1983 without the "and laws" clause. Not every violation of federal law by a state official violates the Fourteenth Amendment. When the "and laws" clause of § 1983 provides the only basis for the federal claim, there is no Fourteenth Amendment violation.

Congress lacks power under the Fourteenth Amendment to create a cause of action against state and local officials who violate federal statutes passed pursuant to some other power, such as the Commerce Power. Recent Supreme Court decisions support our position that Congress lacks power under the Fourteenth Amendment to pass remedial statutes that do not address violations of the Fourteenth Amendment or at least interests protected by the Fourteenth Amendment. In these decisions, the Court has held that the power to enforce the Fourteenth Amendment may be invoked only when a substantial portion of the conduct targeted violates that amendment, and the remedy prescribed must be in proportion to the scope of the unconstitutional conduct addressed.[318] The "and laws" clause flunks these requirements with flying colors since it prescribes a broad-based remedy in cases where there is no constitutional violation nor even any relationship to the interests protected by the Fourteenth Amendment. Although it is arguable that religious liberty and freedom from discrimination based on age or handicap are protected by the Fourteenth Amendment, there is no connection between Fourteenth Amendment interests and the rights created by the TCA's cell siting provisions. Therefore, the Fourteenth Amendment does not grant Congress the power to pass § 1983's "and laws" clause.

This is actually an easier case for unconstitutionality than the cases involving Fourteenth Amendment legislation against discrimination or other conduct that might not actually violate the Fourteenth Amendment. These cases raise none of the difficult issues that arise when Congress attempts to legislate the substance of a constitutional right in situations that may be

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[318] *See, e.g.*, Bd. of Trustees of the Univ. of Alabama v. Garrett, 121 S. Ct. 955 (2001) (holding that the Eleventh Amendment bars Americans with Disabilities Act suits by state employees against states because Congress had not identified a pattern of discrimination violating the Fourteenth Amendment and Congress did not impose a remedy that was congruent and proportional to the targeted violation); Kimel v. Bd. of Regents, 528 U.S. 62 (2000) (holding the Eleventh Amendment bars Age Discrimination in Employment Act suits by state employees against states despite a clear congressional statement to abrogate such immunity, because such an abrogation exceeds Congress's power under § 5 of the Fourteenth Amendment); City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that Religious Freedom Restoration Act is beyond Congress's Fourteenth Amendment enforcement power).

analogous to constitutional violations but where no constitutional rights are actually violated. Rather, the "and laws" cases are cases in which Congress, acting pursuant to its Fourteenth Amendment enforcement power, granted a remedy for violations of other statutes that were passed pursuant to unrelated powers such as the Commerce Power or Spending Power. The closest precedent is the Supreme Court's recent decision holding that the power to enforce the Fourteenth Amendment did not grant Congress the power to make states liable to private parties for patent infringement.[319] There, as here, Congress was motivated by statutory violations "that do not necessarily violate the Constitution."[320] As the Court has explained, the power to enforce the Fourteenth Amendment is limited to remedying constitutional violations: "We thus held that for Congress to invoke § 5 [of the Fourteenth Amendment], it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct."[321]

The likely response to our argument is that it does not matter whether the "and laws" clause itself was passed pursuant to the Fourteenth Amendment. The power under which the statute being enforced in the "and laws" action was passed would normally support litigation against state and local officials to redress violations. To use the TCA as an example, the Commerce Power underlying the TCA as a whole provides ample support for damages, injunctions and attorney's fees against state and local officials—and municipalities—who violate its cell siting provisions. It should not matter that Congress, in passing § 1983, relied upon its power to enforce the Fourteenth Amendment, because courts normally look for any constitutional basis for statutes, even if Congress explicitly cited one that did not support the statute.[322]

We recognize the force of these arguments and realize that it is unlikely that the "and laws" clause will be struck down. However, although there are instances in which the Court has looked beyond the power identified by Congress as the basis of a statute, we have not found an explicit statement by the Court that this is proper. Further, in at least one case, the Court has stated that when Congress specifies a power, the omission of reference to another "precludes consideration" of it.[323] Despite these doubts, it may be that as long

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[319] Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) [hereinafter *Florida Prepaid*].

[320] *Id.* at 646.

[321] *Id.* at 639.

[322] *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 10 (1883) (rejecting the Commerce Clause as the basis for the Civil Rights Act of 1875, even though Congress relied only upon Fourteenth Amendment).

[323] The Court stated:

> There is no suggestion in the language of the statute itself, or in the House or Senate Reports of the bill which became the statute, that Congress had in mind the Just Compensation Clause of the Fifth Amendment. Since Congress was so explicit about invoking its authority under Article I and its authority to prevent a State from depriving

as the statute being enforced is supported by any of Congress's enumerated powers, so too is the application of the "and laws" clause to litigation under the statute. However, there are reasons to be cautious about adopting this line of reasoning, both particularly regarding § 1983 and generally.

With regard to § 1983, the civil rights context of that statute, and the repeated claims that the revision process was not meant to make substantive changes in the law, cast considerable doubt on the correctness of the Supreme Court's decision not to limit the reach of the "and laws" clause to equal rights laws.[324] Although the Members of Congress were told there was a change in the text of the § 1983, they were assured that "it may operate differently" only "in a very few cases."[325] There is no indication that anyone knew that the revision was creating an entirely new class of § 1983 actions that would impose attorney's fees on local governments and local government officials who violated federal statutory law. More fundamentally, when Congress has acted pursuant to other powers, such as the Commerce Power or the Spending Power, the "and laws" remedy is most likely to exist when Congress chose not to include a § 1983-like remedy in the statute itself,[326] indicating that Congress has not chosen to pass § 1983-like remedies under its other powers. Had anyone proposed a statute under the Commerce and Spending Powers, making state officials liable for damages, injunctions, and attorney's fees for all violations of federal statutes, it seems to us very unlikely that it would have passed either in 1871 or more recently.

More generally, Congress's identification of a power could serve as an interpretive principle, limiting the reach of the statute to instances within the particular power identified by Congress as the basis for the statute. When Congress explicitly relies upon a particular power when passing a statute, it may be that the same statute would not have passed had Congress been forced to rely upon a different power.[327] Members of Congress have their own views on the reach of each of Congress's enumerated powers.Suppose that some Members of Congress thought that the Fourteenth Amendment supports the

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a person of property without due process of law under the Fourteenth Amendment, we think this omission precludes consideration of the Just Compensation Clause as a basis for the Patent Remedy Act.

Florida Prepaid, 527 U.S. at 642 n.7.

[324] *See* Maine v. Thiboutot, 448 U.S. 1, 8 n.5 (1980).

[325] 2 CONG. REC. 828 (1874) (statement of Rep. Lawrence).

[326] If Congress had put a § 1983-like remedy into the statute itself, the "and laws" action might not be available because the particular statutory remedy would indicate congressional intent not to allow the additional § 1983 remedy. *See supra* notes 56-69 and accompanying text.

[327] When Congress names a particular power, it could mean that Congress wants the statute only if that power supports it. This is, however not the only plausible reason why Congress names a particular power in support of some statutes. Perhaps it is more plausible that Congress realizes that there are doubts about whether any power supports the statute, and Congress wants to express the view that the named power provides support.

"and laws" clause but that the Commerce Clause does not. Had the "and laws" clause been proposed as an exercise of the Commerce Power, those Members might have voted against it, under their independent duty to obey the Constitution. In short, there is always the chance that Congress would never have passed a statute had it known that the statute could only be supported by a power different from the one it explicitly relied upon.[328]

CONCLUSION

History, precedent and concepts of federalism demonstrate that providers should not be able to recover attorney's fees under § 1988(b) through a § 1983 action to enforce § 332(c)(7). Section 332(c)(7) is unconstitutional because it violates the Tenth Amendment federalism principles elaborated in recent Supreme Court decisions. Even if § 332(c)(7) is constitutional, most of its provisions are too indefinite to create enforceable rights, and its own remedial provisions should preclude recourse to § 1983. Further, claims by wireless communication service providers are not the type of claims that Congress had in mind when it created an entitlement to attorney's fees for successful § 1983 plaintiffs. Thus, even if courts allow such § 1983 claims to go forward, they should use their statutory discretion under § 1988(b) to deny fees and costs. Providers are able to protect their interests without seeking fees and costs against local governments and government officials who pursue legitimate zoning interests.

[328] When Congress passes a statute without naming a power, it is likely that Congress means to pass the statute under any available power.