# DON'T FORGET THE AGGRIEVED: A TEXTUAL ANALYSIS OF THE VOTING RIGHTS ACT TO PRESERVE SECTION 2 PRIVATE CAUSE OF ACTION AFTER *ARKANSAS NAACP*

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ABSTRACT

This Note conducts a comprehensive textual analysis of the Voting Rights Act using established principles of statutory interpretation. It argues that the Act expressly provides a private right of action under Section 2 and demonstrates why this interpretation is both textually superior and doctrinally stronger than the available alternatives: implying a private cause of action, relying exclusively on the Department of Justice for enforcement, bringing claims directly under the Reconstruction Amendments, or suing through Section 1983.

The Voting Rights Act is being dismantled, and Section 2 is gradually being hollowed out. Section 2 has long relied on private plaintiffs to bring lawsuits challenging racially discriminatory voting laws and government actions. However, following a suggestion by Justice Gorsuch in *Brnovich v. Democratic National Committee*, state and local government defendants have increasingly argued that Section 2 does not provide a private cause of action at all. At least one federal appellate court—the Eighth Circuit in *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*—has accepted this argument, holding that private plaintiffs lack the right to sue under Section 2.

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## INTRODUCTION

On August 6, 1965, President Lyndon B. Johnson signed the Voting Rights Act of 1965 (VRA) into law, declaring it "a triumph for freedom as huge as any victory that has ever been won on any battlefield."[1]

This statement rings true. The Voting Rights Act stands as one of the most pivotal civil rights laws in American history, yielding immediate and profound results.[2] Despite its transformative impact, the VRA's provisions have faced sustained challenges. Notably, in *Shelby County v. Holder*, the Supreme Court held the Section 4(b) "coverage formula" of the VRA to be unconstitutional.[3] While the Court declined to strike down the Section 5 preclearance regime,[4] the absence of the coverage formula renders Section 5 effectively unenforceable. In the decade since *Shelby County*, at least 29 states have enacted 94 restrictive voting laws,[5] with approximately one-third of them passed in the 11 states that were previously subject to preclearance in 2013.[6]

More recently, conservative groups and judges have turned their attention to another target: Section 2 of the VRA. Section 2 prohibits the "denial or abridgement of the right of any citizen of the United States to vote on account of race or color" (or being a member of a language minority group).[7] Since its enactment, Section 2 has

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1. President Lyndon B. Johnson, Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act (Aug. 6, 1965), LBJ PRESIDENTIAL LIBR., https://www.lbjlibrary.org/object/text/remarks-capitol-rotunda-signing-voting-rights-act-08-06-1965 [https://perma.cc/BZF9-ZQ7H]; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended in scattered sections of 52 U.S.C.).

2. *See infra* Part I.A.

3. Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013).

4. By contrast, Justice Thomas would have found Section 5 of the VRA to be unconstitutional as well because "[t]oday, our Nation has changed," and thus Congress "cannot justify the considerable burdens created by §5." *Shelby Cnty.*, 570 U.S. at 557–58 (Thomas, J., concurring).

5. "Restrictive voting laws" include instating higher standards for voter registration, curtailing early voting opportunities, closing polling places, and limiting voter assistance. Jasleen Singh & Sara Carter, *States Have Added Nearly 100 Restrictive Laws Since SCOTUS Gutted the Voting Rights Act 10 Years Ago*, BRENNAN CTR. FOR JUST. (June 23, 2023), https://www.brennancenter.org/our-work/analysis-opinion/states-have-added-nearly-100-restrictive-laws-scotus-gutted-voting-rights [https://perma.cc/FJ9N-JGMY].

6. *Id.*

7. Voting Rights Act of 1965 § 2, 52 U.S.C. § 10301.

empowered both the federal government and private parties to challenge discriminatory election practices and procedures. However, recent efforts seek to undermine Section 2.

Justice Gorsuch laid the kindling for these challenges in 2021 through his brief, one-paragraph Concurring Opinion in *Brnovich v. Democratic National Committee*.[8] There, with no real explanation or reasoning, Justice Gorsuch questioned whether the "Voting Rights Act of 1965 furnishes an implied cause of action under § 2," an assumption which stood for nearly six decades.[9] In doing so, Justice Gorsuch prompted states and localities to adopt this novel legal theory in their defense against Section 2 challenges.[10]

Following this lead, in *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*,[11] the Eighth Circuit affirmed the decision of the Eastern District of Arkansas, holding that Section 2 of the VRA did not provide private plaintiffs with a cause of action,[12] despite the strong merits of their unlawful vote dilution claim.[13] This case marked the first and, thus far, the only instance where a court has held that there is no private cause of action under Section 2 of the VRA.[14] As the plaintiffs declined to petition for certiorari, the Supreme Court will not resolve this "open question" for the time being.[15] Consequently, an emerging circuit split exists between the Eighth Circuit and every other circuit that has thus far recognized an implied private cause of action under Section 2.

Should courts determine that no private cause of action exists under Section 2, the U.S. Department of Justice (DOJ) would

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8. Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 690 (2021) (Gorsuch, J., concurring).

9. *Id.*

10. Only Justice Thomas joined in the concurrence. *Id.*

11. Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204 (8th Cir. 2023).

12. *Id.* at 1206–07.

13. *See* Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 586 F. Supp. 3d 893, 896–97 (E.D. Ark. 2022) ("From what the Court has seen thus far, there is a strong merits case that at least some of the challenged districts in the Board Plan are unlawful under § 2 of the Voting Rights Act.").

14. *Brnovich*, 594 U.S. at 690 ("Our cases have assumed—without deciding—that the Voting Rights Act of 1965 furnishes an implied cause of action under §2."); *see also Ark. State Conf. NAACP*, 86 F.4th at 1219 (Smith, C.J., dissenting) ("Resolution of whether § 2 affords private plaintiffs the ability to challenge state action is best left to the Supreme Court in the first instance.").

15. *Brnovich*, 594 U.S. at 690 ("Lower courts have treated this as an open question.").

effectively become the sole entity able to challenge states' racially discriminatory election practices.[16] However, historically, the DOJ has been slow to challenge election laws and practices under Section 2. Between 1982 and 2024, there have been 466 Section 2 cases, and only 18 of them were initiated by the DOJ.[17] Even under U.S. Attorney General Merrick Garland, who assured that the DOJ "remains committed to relentlessly protecting voting rights with the enforcement powers,"[18] less than three percent of all voting rights cases brought between 2021 and 2023 were initiated by the DOJ.[19] Although the DOJ may become more active if private enforcement is eliminated, doing so would subject voting rights challenges to heightened resource constraints and partisan incentives,[20] leaving grave civil liberties violations either unchallenged or vulnerable to exploitation by opportunistic political actors.

Scholars and activists have extensively debated the potential for implying a private right of action under Section 2 of the VRA. However, no prior analysis has posited that the VRA contains an *explicit* private right of action for Section 2. This Note contends that a comprehensive textual analysis of the VRA, employing established principles of statutory interpretation, reveals such an explicit right. Part I begins by underscoring the critical importance of Section 2. It then provides an overview of implied private cause of action

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16. Although it is possible for state attorneys general to bring challenges under the Voting Rights Act or through state laws or constitution, it is far less likely that they would challenge their own states' laws and practices. State officials, state attorneys general, state legislatures, and congressional representatives also often share the same political motives because they share the same constituency and electorate. *But see* Perry Grossman, *The Case for State Attorney General Enforcement of the Voting Rights Act Against Local Governments*, 50 U. MICH. J.L. REFORM 565, 569–70 (2017) (arguing that state attorney general can provide effective enforcement of the Voting Rights Act against local governments and political subdivisions).

17. Ellen D. Katz et al., *Section 2 Cases Database*, UNIV. MICH. L. SCH. VOTING RTS. INITIATIVE (2022), https://voting.law.umich.edu/database/ [https://perma.cc/T5V8-KDWN].

18. Press Release, U.S. Dep't. of Just., Statement of Attorney General Merrick B. Garland on the 57th Anniversary of the Voting Rights Act (Aug. 5, 2022).

19. Rachel Selzer, *The DOJ Pledged to Relentlessly Protect Voting Rights. Is it Living Up to Its Promise?*, DEMOCRACY DKT. (May 4, 2023), https://www.democracydocket.com/analysis/the-doj-pledged-to-relentlessly-protect-voting-rights-is-it-living-up-to-its-promise/ [https://perma.cc/4ADF-WCPN].

20. *See infra* Part III.D.

jurisprudence and the Supreme Court's application of this doctrine to the VRA. Subsequently, Part II examines the emerging circuit split precipitated by the Eighth 'Circuit's decision in *Arkansas NAACP*,[21] contrasting it with the holdings of other circuits on this issue. Finally, Part III demonstrates how Section 3 of the VRA, alongside other textual evidence, establishes an explicit private cause of action to enforce Section 2. It also addresses the limitations of alternative voting rights enforcement mechanisms.

## I. SECTION 2 AND THE PRIVATE CAUSE OF ACTION JURISPRUDENCE

### A. The Significance of Section 2

Soon after the ratification of the Fifteenth Amendment in 1869, the first Black members of Congress took office, with Hiram Rhodes Revels elected to the U.S. Senate from Mississippi and Joseph H. Rainey to the U.S. House of Representatives from South Carolina.[22] Between 1870 and 1901, hundreds of Black officeholders were elected, including 173 in Alabama, 135 in Georgia, 210 in Louisiana, 226 in Mississippi, 187 in North Carolina, and 316 in South Carolina.[23]

Despite its initial success in rapidly increasing Black voter participation, by the turn of the twentieth century, the Fifteenth Amendment proved ineffective in ensuring the equal participation of Black Americans in elections.[24] Through the use of disenfranchisement tactics such as literacy tests, poll taxes, and grandfather clauses, alongside intimidation and harassment by groups like the Ku Klux Klan,[25] numerous former Confederate states

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21. Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204 (8th Cir. 2023).

22. IDA A. BRUDNICK & JENNIFER E. MANNING, CONG. RSCH. SERV. RL30378, AFRICAN AMERICAN MEMBERS OF THE U.S. CONGRESS: 1870-2020, at 4 (2020).

23. ERIC FONER, FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION xiv (La. State Univ. Press, 2nd ed. 1996).

24. KEVIN J. COLEMAN, CONG. RSCH. SERV. R43626, THE VOTING RIGHTS ACT OF 1965, at 1 (2015).

25. "Founded in 1866, the Ku Klux Klan (KKK) soon unleashed "'a reign of terror' against Republican leaders black and white," including through assassinations of political leaders such as Congressman James M. Hinds and "three members of the South Carolina legislature." ERIC FONER,

successfully disenfranchised a significant portion of the Black population.[26] By 1910, Black voter registration in most southern states plummeted to single digits.[27] From 1901 to 1929, no Black member was elected to the House, and from 1881 to 1967, no Black member was elected or appointed to the Senate.[28]

To address these and other discriminatory behaviors prevalent in the Southern states,[29] Congress enacted the Civil Rights Acts of 1957, 1960, and 1964.[30] Among other things, the 1957 Act established the Civil Rights Division within the United States Department of Justice and authorized the Attorney General to bring lawsuits against state efforts to deny minority voters' access to the ballot.[31] However, with just fifteen people in the Division in 1960, the work was slow and ineffective.[32]

The Voting Rights Act of 1965 was adopted against this backdrop of systemic disenfranchisement and ineffective enforcement

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RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 342 (1988).

26. *See* JERROLD G. RUSK, A STATISTICAL HISTORY OF THE AMERICAN ELECTORATE 17–18, 33–35 (2001).

27. 1.3% in Alabama in 1902, 4.3% in Georgia in 1910, 1.1% in Louisiana in 1904, 7.1% in Mississippi in 1904, 4.6% in North Carolina in 1904, between 3.8% and 13.8% in South Carolina between 1896 and 1904, and 15.2% in Virginia in 1904. J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910, at 61 (1974).

28. BRUNDNICK & MANNING, *supra* note 22, at 4.

29. Many northern states also had restrictions on voting rights through literacy requirements and criminal exclusion. For example, the first state to employ a literacy requirement was Connecticut, which it used to keep Irish immigrants from voting under the pretext of it applying to every citizen equally and it being necessary to maintain an educated use of the ballot. Steve Thornton, *Literacy Tests and the Right to Vote*, CONNECTICUTHISTORY.ORG (Sep. 15, 2022), https://connecticuthistory.org/literacy-tests-and-the-right-to-vote/ [https://perma.cc/ZE2Q-PY2F]. All but two states (Maine and Vermont) disenfranchise people incarcerated for felonies. CHRISTOPHER UGGEN ET AL., LOCKED OUT 2022: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION 3 (2022). However, twenty-six states and the District of Columbia expanded the right to vote for people with felony convictions. NICOLE D. PORTER & MORGAN MCLEOD, EXPANDING THE VOTE: STATE FELONY DISENFRANCHISEMENT REFORM, 1997-2023, at 5–6 (2023).

30. COLEMAN, *supra* note 24, at 1.

31. Civil Rights Acts of 1957, 52 U.S.C § 10101 (1957).

32. John Doar, *The Work of the Civil Rights Division in Enforcing Voting Rights Under the Civil Rights Acts of 1957 and 1960*, 25 FLA. ST. U. L. REV. 1, 2 (1997).

of the Civil Rights Acts, marking the most significant and immediate expansion of voting rights in United States history. Among other things, through the Section 2 cause of action and the Section 5 "preclearance" requirement,[33] the VRA worked to both dismantle existing discriminatory laws and prevent new ones. This achieved immediate success. By the end of 1965, a quarter of a million new Black voters had been registered.[34] Within four years, this number surged to nearly one million registered, encompassing over 50 percent of the Black voting-age population in every Southern state.[35] Moreover, following the 1966 elections, the number of Black elected officials more than doubled, rising from 72 to 159.[36] In the five years following the Act's passage, Black voter registration in six Southern states surpassed the total registration for the entire century since the Fifteenth Amendment's ratification.[37]

Nevertheless, the U.S. Supreme Court encountered challenges in establishing the requisite proof for racial vote dilution cases.[38] Adhering to the standard established in *Washington v. Davis,*[39] the Court held in *City of Mobile v. Bolden* that plaintiffs alleging vote dilution under Section 2 must demonstrate discriminatory intent or purpose, rather than solely relying on disproportionate impact.[40] Specifically regarding Section 2, the Court

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33. Voting Rights Act of 1965 § 2, 52 U.S.C. § 10301; Voting Rights Act of 1965 § 5, 52 U.S.C. § 10304.

34. *Voting Rights Act (1965)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/voting-rights-act, [https://perma.cc/9K95-MLHF].

35. COLEMAN, *supra* note 24, at 12.

36. *Id.*

37. CHANDLER DAVIDSON, THE VOTING RIGHTS ACT: A BRIEF HISTORY, IN CONTROVERSIES IN MINORITY VOTING 7, 21 (Bernard Grofman & Chandler Davidson eds., 1992).

38. Racial vote dilution refers to a method used in redistricting to dilute the collective voting power of racial groups. This can occur by concentrating those voters into a few districts to reduce their influence elsewhere and/or dividing them across many districts to prevent them from forming a large enough voting bloc to influence elections. *See generally* CONGRESS: CONSTITUTION ANNOTATED, *Amdt14.S1.8.6.6 Racial Vote Dilution and Racial Gerrymandering*, https://constitution.congress.gov/browse/essay/amdt14-S1-8-6-6/ALDE_00013453 [https://perma.cc/NWY5-B6WW] (suggesting that the creation of majority-minority districts can avoid minority vote dilution).

39. Washington v. Davis, 426 U.S. 229, 238 (1976) (requiring proof of discriminatory intent for equal protection claims challenging facially neutral government conduct with a racially disparate impact).

40. City of Mobile v. Bolden, 446 U.S. 55, 134 (1980). Prior to both *Washington v. Davis* and *City of Mobile*, the Court had implied an intent requirement in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), by holding

reasoned that "the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself."[41] Because "racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation,"[42] the same was true for Section 2.[43]

In direct response to this ruling, Congress amended the VRA in 1982 to allow plaintiffs to establish Section 2 violations by demonstrating discriminatory effects.[44] The amended statute now prohibits any "qualification," "prerequisite," "practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[45] The 1982 amendment transformed Section 2 into a "vital weapon for combatting innovative and facially race-neutral methods of voting discrimination."[46] When coupled with Section 5 preclearance, these two provisions worked in tandem to both root out historically entrenched discrimination and block emerging forms of discrimination.

In the aftermath of *Shelby County*, with Section 5 preclearance rendered effectively redundant,[47] Section 2 has become the primary safeguard against discriminatory voting laws and practices. However, Section 2 challenges have predominantly depended on private parties initiating litigation.[48] Consequently,

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disproportionate representation of minorities alone is insufficient to establish a violation of equal protection rights.

41. *City of Mobile*, 446 U.S. at 60–61.

42. *Id.* at 62.

43. *Id.* at 61 ("In view of the section's language and its sparse but clear legislative history, it is evident that this statutory provision adds nothing to the appellees' Fifteenth Amendment claim").

44. Voting Rights Act of 1965 § 2, 52 U.S.C. § 10301 (amended 1982). This amended language is referred to as the "results test." *See, e.g.*, Chisom v. Roemer, 501 U.S. 380, 384 ("[t]he question presented by these cases is whether this 'results test' protects the right to vote in state judicial elections").

45. Voting Rights Act of 1965 § 2, 52 U.S.C. § 10301 (amended 1982).

46. Grossman, *supra* note 16, at 577.

47. Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013) (holding that § 4(b)'s coverage formula is unconstitutional, without which there are no jurisdictions subject to § 5 preclearance). I do not discuss *Shelby County* further because, although it is undoubtedly relevant to voting rights in general, it is irrelevant to the discussion of a private cause of action under Section 2.

48. *E.g.*, Brnovich v. Democratic Nat'l Comm., 594 U.S. 647 (2021); Allen v. Milligan, 599 U.S. 1 (2022).

preserving the ability of private litigants to bring challenges under Section 2 is of paramount importance.[49]

## B. Implied Private Cause of Action Generally

Federal statutes that make specific actions unlawful are often accompanied by an explicit grant of a private cause of action against the offender.[50] Some statutes, however, while specifying penalties for violations, remain silent regarding a private plaintiff's ability to seek redress.[51] When a statute lacks an explicit provision for a private cause of action, courts must determine whether such a right can be implied.[52] This analysis inevitably engages the enduring debate between textualism and purposivism, and the U.S. Supreme Court's approach to implied private rights of action has closely mirrored its shifting adherence to these interpretive methodologies.[53]

The Warren Court liberally granted implied rights of action to effectuate perceived congressional purposes.[54] For example, in *J.I. Case Co. v. Borak*, a case arising under the Securities Exchange Act of 1934, despite the statute's lack of an express private right of action, the Court discerned an implied right within the legislative intent.[55] Citing legislative history,[56] the unanimous Court concluded that "broad remedial purposes are evidenced in the language of the section. . . . While this language makes no specific reference to a private right of action, among its chief purposes is 'the protection of investors,' which certainly *implies* the availability of judicial relief

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49. *See infra* Part III.D (discussing the insufficiency of the alternatives to private enforcement of Section 2).

50. *E.g.*, National Voter Registration Act of 1993, 52 U.S.C. § 20510(b) ("A person who is aggrieved by a violation of this chapter may . . . bring a civil action").

51. *E.g.*, Securities Exchange Act of 1934 § 14, 15 U.S.C. § 78n (governing disclosure during proxy contests without providing for a private right of action).

52. *See infra* notes 55–58 and accompanying text (describing how the Supreme Court implied a private right of action in Securities Exchange Act of 1934 § 14).

53. Stephen E. Ronfeldt, *Rights of Action For Minorities and the Poor Through Presumptions of Legislative Intent*, 34 HASTINGS L.J. 969, 970 (1983).

54. *See infra* Section I.C.1 (discussing Allen v. State Bd. of Elections, 393 U.S. 544 (1969))

55. J.I. Case Co. v. Borak, 377 U.S. 426, 431–32 (1964).

56. Although the legislative reports cited by the court do substantiate the intended purpose of the statute, they do not explicitly substantiate the congressional intent to provide a remedy to private plaintiffs. *Id.*; *see generally* H.R. REP. NO. 73-1383 (1934); *see also* S. REP. NO. 73-792 (1934).

where necessary to achieve that result."[57] Moreover, the Court asserted, "it is the *duty* of the courts to be alert to provide such remedies as are necessary *to make effective the congressional purpose*."[58] This opinion signaled a broad exercise of judicial lawmaking with respect to implied private rights of action.

### 1. Burger Court and *Cort*

The Burger Court subsequently reversed that trend in gradual steps. Initially, in *Cort v. Ash*,[59] the Court established a four-factor test to determine whether a private remedy could be implied from a statute that did not expressly provide one: (1) Was the statute enacted for the benefit of the plaintiff (or their class)? (2) Is there any indication of legislative intent to create a private remedy? (3) Is a private remedy consistent with the underlying purposes of the legislative scheme? And (4) Is the cause of action one traditionally relegated to states?[60]

In 1979, the Court applied these factors in *Cannon v. University of Chicago*, holding that § 901(a) of Title IX of the Education Amendments of 1972 ("Title IX") contained an implied private cause of action.[61] In relevant part, Title IX provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[62]

In analyzing the *Cort* factors, the Court first concluded that the statute "expressly identifies the class Congress intended to benefit," and therefore "[u]nquestionably . . . favors the implication of a private cause of action."[63] Second, regarding legislative history, the Court deemed it sufficient to note that if "it is clear that federal law has granted a class of persons certain rights, it is not necessary to

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57. *Borak*, 377 U.S. at 431–32 (emphasis added).
58. *Id.* at 433 (emphasis added).
59. Cort v. Ash, 422 U.S. 66 (1975).
60. *Id.* at 78.
61. Cannon v. Univ. of Chi., 441 U.S. 677, 688–89 (1979).
62. Education Amendments of 1972, 20 U.S.C. § 1681.
63. *Cannon*, 441 U.S. at 690–94 (noting that if Congress drafted Title IX had written it "simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices" then "[t]here would be far less reason to infer a private remedy in favor of individual persons").

show an intention to create a private cause of action, although an explicit purpose to deny such cause of action would be controlling."[64] Nonetheless, the Court found additional evidence of congressional intent to provide a private cause of action.[65] Third, the Court held that a private remedy would effectively support the dual statutory purposes of avoiding the use of federal resources to support discriminatory practices and providing individual citizens with effective protection against those practices.[66] Lastly, the Court held that the prohibition of invidious discrimination does not raise federalism concerns.[67] Thus, the Court held that Title IX includes an implied cause of action for private victims of discrimination.

In subsequent years, the Court consistently applied the *Cort* factors to deny implying private causes of action.[68] Still, recognizing that the *Cort* analysis "too readily permits [lower] courts to override the decision of Congress not to create a private action,"[69] the Burger Court further retracted the standard. While acknowledging that they were departing from—but not overruling—*Borak*,[70] in a series of 1979

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64. *Id.* at 694 (quoting *Cort*, 422 U.S. at 82). Still, the Court looks to legislative history, noting that Title IX was modeled after Title VI, which Congress understood to include an implied private cause of action per lower court decisions. *Id.* at 694–95.

65. *Id.* at 699–702.

66. *Id.* at 704. Here, the Court notes that in this third factor, "when that remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute." *Id.* at 703.

67. *Id.* at 708–09.

68. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 294 (1978) (holding that, per *Cort*, the Trade Secrets Act does not afford a private right of action to enjoin disclosure in violation of the statute); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 61 (1978) (holding that, using the *Cort* factors, "the structure of the statutory scheme and the legislative history of Title I suggest that Congress' failure to provide remedies other than habeas corpus was a deliberate one."); Piper v. Chris-Craft Indus., 430 U.S. 1, 37–40 (1977) (holding that the lower court's conclusion that an implied cause of action for damages by judicial interpretation is not necessary to effectuate Congress' statutory objectives is confirmed by the four factors identified in *Cort*).

69. *Cannon*, 441 U.S. at 740–41 (White, J., dissenting). Although the majority here found an implied private right of action, in Justice Rehnquist's concurrence, he warned that in the future, the Court "should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch." *Id.* at 718. Just a month later, in *Touche Ross & Co.*, Justice Rehnquist showed this reluctance. 442 U.S. 560, 578 (1979).

70. The Court in *Touche Ross* acknowledged that they departed from the broad standard applied in *Borak*: "To the extent our analysis in today's decision differs from that of the Court in *Borak*, it suffices to say that in a series of cases

cases, the Court sharply limited reliance on the purposive analysis to imply private cause of action. In *Touche Ross & Co. v. Redington*,[71] the Court explained that "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person."[72] Further, in clarifying (or altering) the *Cort* test, the Court in *Touche Ross* explained:

> [T]he Court did not decide that each of these factors is entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action. Indeed, the first three factors discussed in *Cort*—the language and focus of the statute, its legislative history, and its purpose . . . are ones traditionally relied upon in determining legislative intent.[73]

Thus, congressional intent—discerned through both text *and* legislative history—emerged as the central, if not sole, test for implied private cause of action.[74] Thus, in practice, the test became a simple, two-factor analysis of the (1) statutory language and (2) legislative history.[75]

### 2. Rehnquist Court and *Sandoval*

Even after *Touche Ross*, the Court continued its trend of moving toward a more restrictive view of implied rights of action,[76] leaving the status of the *Cort* and *Touche Ross* test uncertain. In *Arkansas NAACP*, the Eighth Circuit relied heavily on *Alexander v. Sandoval*.[77]

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since *Borak* we have adhered to a stricter standard for the implication of private cause of action, and we follow that stricter standard today." *Touche Ross & Co.*, 442 U.S. at 578.

71. Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).

72. *Id.* at 568 (citing *Cannon*, 441 U.S. at 688).

73. *Id.* at 575–76.

74. Caroline Bermeo Newcombe, *Implied Private Rights of Action: Definition, and Factors to Determine Whether a Private Action Will Be Implied from a Federal Statute*, 49 LOY. U. CHI. L.J. 117, 125 (2017).

75. *See, e.g.*, Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 15–16 (1979) ("[W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear.").

76. Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 133 (2010).

77. Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1209–12 (8th Cir. 2023).

*Sandoval* is perhaps the most striking contemporary example of the Court's restrictive approach to implied right of action.[78] *Sandoval* involved a challenge under Sections 601 and 602 of Title VI of the Civil Rights Act of 1964.[79] Section 601, among other things, prohibits *intentional* discrimination "on the ground of race, color, or national origin," in "any program or activity" that receives federal funding.[80] Meanwhile, Section 602 empowered federal agencies to "effectuate" the goals of Section 601 through "rules, regulations, and orders."[81] When Alabama decided to administer state driver's license exams only in English, applicants challenged this policy under a disparate impact regulation that the DOJ had promulgated consistent with Section 602.[82]

Justice Scalia's majority opinion in *Sandoval* first rejected that a DOJ-created cause of action is enforceable, stating: "private rights of action to enforce federal law must be created by *Congress*."[83] Thus, the private right of action had to come from the texts of Sections 601 and 602 themselves. The majority further articulated:

> The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create *not just a private right but also a private remedy*. . . . Statutory intent on this latter point is determinative. . . . Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.[84]

This explanation all but overrules the *Borak* view that a right of action should generally be inferred when plaintiff is of the class that the statute was designed to benefit.[85] Instead, it requires an indication *within the text itself* that Congress intended to confer *both*

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78. Alexander v. Sandoval, 532 U.S. 275, 276 (2001).

79. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 601–02, 78 Stat. 241, 252–53 (1964) (codified as amended at 42 U.S.C. §§ 2000d, 2000d-1).

80. *Id.* § 601 (codified as amended at 42 U.S.C. § 2000d).

81. *Id.* at § 602 (codified as amended at 42 U.S.C. § 2000d-1).

82. 28 C.F.R. § 42.104(b)(2)(1999).

83. *Sandoval*, 532 U.S. at 286 (emphasis added) (citing *Touche Ross*, 442 U.S. at 578).

84. *Id.* at 286–87 (emphasis added) (citations omitted).

85. *See, e.g.*, Tokaji, *supra* note 77 ("The [*Sandoval*] opinion thus represents the clearest break from the *Borak* view that a right of action should generally be inferred when plaintiff is of the class the statute was designed to benefit.").

*a private right and a private remedy*. While similar to *Cannon*, *Sandoval* goes further, requiring that the evidence for congressional intent come from the language of the statute itself, thereby undermining the Court's previous acceptance of legislative purpose and legal context.[86]

Justice Scalia examined the statute's text for "rights-creating" language analogous to that found in *Cannon*.[87] In doing so, Justice Scalia pointed to a footnote in *Cannon*, which stated that:

> right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action. With the exception of one case, . . . this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case.[88]

Of course, as discussed above, the statutory text in *Cannon* did not explicitly confer a private right, but rather identified a class of private individuals the statute intended to benefit, and that class was the subject of the statutory text.

In analyzing the statutory language, the *Sandoval* Court recognized that it is "immediately clear" the rights-creating language

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86. *Id.*

87. *Sandoval*, 532 U.S. at 288–89.

88. Cannon v. Univ. of Chi., 441 U.S. 677, 690 n.13 (1979). The footnote then goes on to list the following examples of cases that implied private causes of action, quoting the relevant statutory rights-creating language: Sullivan v. Little Hunting Park, 396 U.S. 229, 235 n.3 (1969) (42 U.S.C. § 1982: "All citizens of the United States shall have the same right . . . as is enjoyed by white citizens thereof . . ."); Allen v. State Bd. of Elections, 393 U.S. 544, 545 (1969) (42 U.S.C. § 1973c (later editorially reclassified as 52 U.S.C. § 10304): "no person shall be denied the right to vote . . ."); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 414 n.13, 436 (1968) (same as in *Sullivan*, 396 U.S. at 238); Tunstall v. Locomotive Firemen & Enginemen, 323 U.S. 210, 213 (1944) (Railway Labor Act § 2, 42 U.S.C. § 152: "Employees shall have the right to organize and bargain collectively through representatives . . ."); Steele v. Louisville & Nash. R.R. Co., 323 U.S. 192, 199 (1944) (same); Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 545 (1937) (Railway Labor Act § 2: "the carrier shall treat with the *representative* so certified" (emphasis added)); Tex. & New Orleans R.R Co. v. Bhd. of Ry. & S.S. Clerks, 281 U.S. 548, 567–70 (1930) (Railway Labor Act § 2: "Representatives . . . shall be designated by the respective *parties* . . . without interference, influence, or coercion exercised by either party . . ." (emphasis added)); Tex. & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 40 (1916) (Safety Appliance Act of 1910, 27 Stat. 532: "any employee of any such common carrier").

"is completely absent from § 602."[89] Meanwhile, the Court "[took] as given" that "private individuals may sue to enforce § 601," because its decree that "no person . . . shall . . . be subjected to discrimination" created a right and placed the individuals protected as the subject, rather than the person regulated.[90] Yet, because § 601 only allowed claims for *intentional* discrimination, plaintiffs had to rely on § 602.[91] The Court then turned to an analysis of the rest of § 602's text, which empowers agencies to enforce their regulation by terminating funding.[92] Thus, the Court found that § 602 specifically contemplated a remedy to be administered by agencies, and alluding to the principle of *expressio unius*, concluded that "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."[93]

### C. Private Cause of Action Under the Voting Rights Act

In relevant part, the text of Section 2 of the Voting Rights Act states:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . .[94]

The plain text of Section 2 of the Voting Rights Act does not explicitly grant private plaintiffs a right of action. The 1982 amendment added subsection (b), which lays out the "results" test codified by Congress after *City of Mobile*,[95] but this too lacks an explicit grant of a private right of action.[96]

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89. *Sandoval*, 532 U.S. at 288.

90. *Id.* at 278–79. The Court explains: "[s]tatutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons." *Id.* at 289 (quoting California v. Sierra Club, 451 U.S. 287, 294 (1981)).

91. 42 U.S.C. § 2000d; *Sandoval*, 532 U.S. at 280 ("§ 601 prohibits only intentional discrimination").

92. 42 U.S.C. § 2000d-1; *Sandoval*, 532 U.S. at 289.

93. *Sandoval*, 532 U.S. at 290.

94. Voting Rights Act of 1965 § 2, 52 U.S.C. § 10301 (amended 1982).

95. City of Mobile v. Bolden, 446 U.S. 55, 134 (1980); *see supra* note 40 and accompanying text.

96. *Id.*; *see supra* notes 44–45 and accompanying text.

Still, when the first Section 2 challenge reached the Supreme Court in *Thornburg v. Gingles*, without questioning the private plaintiffs' right to sue, the Court unanimously struck down a discriminatory redistricting plan.[97] Since then, Section 2 became a "vital weapon for combatting innovative and facially race-neutral methods of voting discrimination,"[98] and those challenges have largely relied on private parties to bring such suits.

### 1. Supreme Court Precedent—*Allen* and *Morse*

While the Supreme Court has not explicitly ruled on whether Section 2 includes an implied private cause of action, it has consistently affirmed the existence of implied private rights of action to enforce various provisions within the Act that also lack a private right of action. In doing so, the Court has indirectly addressed the question of whether Section 2 also contains such an implied right.

Just four years after the enactment of the VRA, in 1969, the Court in *Allen v. State Board of Elections* heard a case involving the private enforcement of Section 5 of the Act.[99] Now rendered forceless, the Section 5 "preclearance" provision required jurisdictions covered by Section 4(b) to obtain an approval from the Attorney General or the District Court for the District of Columbia before enacting changes in election practices or procedures.[100] This was to ensure that any new enactments in those jurisdictions do "not have the purpose and will not have the effect of denying or abridging the right to vote

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97. Thornburg v. Gingles, 478 U.S. 30, 30 (1986).

98. Grossman, *supra* note 16, at 577. Despite its continued importance, recent Supreme Court decisions have weakened Section 2. Notably, in 2024, the Court held in *Alexander v. S.C. State Conf. NAACP* that, where race and partisanship are closely intertwined in redistricting cases, states are entitled to a presumption of legislative good faith, and plaintiffs bear the burden of showing either that race predominated in the legislature's decision making or that the state could have achieved its partisan objectives through alternative means less dependent on race. 602 U.S. 1, 10 (2024). In practice, this standard makes it substantially more difficult for plaintiffs to challenge racially gerrymandered districts where partisan motives are also present. More recently, in *Louisiana v. Callais*, the Court held that a state's attempt to comply with the VRA by creating a majority-minority district constituted an impermissible racial gerrymander. 146 S. Ct. 1131, 1152–55 (2026). Taken together, these decisions create a framework in which racially discriminatory districting schemes are increasingly difficult to challenge, while state efforts to comply with them may be subjected to heightened judicial scrutiny.

99. Allen v. State Bd. of Elections, 393 U.S. 544 (1969).

100. 52 U.S.C. § 10304(a).

on account of race or color."[101] As the Court in *Allen* recognized, if the Attorney General does not object to a new enactment and if the covered state obtains a declaratory judgment in the District Court, "there is no further remedy provided [to private parties] by § 5."[102] Despite this lack of an explicit private cause of action, as a threshold matter, the Court in *Allen* considered "whether private litigants may invoke the jurisdiction of the district courts."[103]

The Court examined Section 5's language, which stated "no person shall be denied the right to vote for failure to comply with [Section 5]."[104] Interpreting "this language in light of the major purpose of the Act," the Court held that private parties "may seek a declaratory judgment that a new state enactment is governed by § 5."[105] Recognizing that the VRA was enacted for the purpose of "mak[ing] the guarantees of the Fifteenth Amendment finally a reality for all citizens," the Court reasoned that "[t]he achievement of the Act's laudable goal could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General."[106] In reasoning this way, the Court recognized that "[t]he Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government."[107] Thus, the Court explained that "[t]he guarantee of § 5 that no person shall be denied the right to vote . . . might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition."[108]

Thus, although the Supreme Court in *Allen* did not discuss Section 2, the same analysis and reasoning could apply in the exact same way to Section 2. Subsequently, the House Report accompanying the 1975 Amendment to the VRA recognized:

> Title III authorizes the Attorney General to bring suit against any state or political subdivision which fails or refuses to comply with its prohibitions. Of course, *private persons* who are injured by the failure or refusal of a state or political subdivision to comply

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101. *Allen*, 393 U.S. at 544.
102. *Id.* at 549–50.
103. *Id.* at 554.
104. 52 U.S.C. § 10304(a).
105. *Allen*, 393 U.S. at 554–55.
106. *Id.* at 556.
107. *Id.* at 556–57.
108. *Id.* at 557.

> *would also have the right to bring suit*. Allen v. State Board of Elections, 393 U.S. 544 (1969); see J. I. Case Co. v. Borak, 377 U.S. 426 (1964). . . .[109]

Having recognized the Supreme Court's holding in *Allen* and endorsed its decision to grant private citizens the right to sue under Section 5, Congress in 1975 went further by amending Section 3 to include a right of action "to enforce the right to vote" for not only the Attorney General, but for "an aggrieved person."[110] As Part III of this Note will argue, Congress's understanding of *Allen* and its decision to amend Section 3 signals an intent to confer an explicit private right of action to enforce Section 2.[111]

Later, in 1996, well after the 1982 amendment that added the results test in Section 2, the Supreme Court decided *Morse v. Republican Party of Virginia*.[112] In *Morse*, the fractured Court decided, among other things, that Section 10 of the VRA[113] contained an implied private cause of action.[114] Section 10 prohibits the use of "a poll tax as a precondition to voting," and specifically "authorize[s] and direct[s]" the Attorney General to institute actions to enforce the prohibition,[115] and "does not expressly mention private actions."[116] Despite the fractured Court failing to produce a majority opinion, five Justices of the Court nonetheless agreed that Section 10 does indeed include an implied private cause of action.[117] In arriving at that conclusion, the Court first applied the same logic as in *Allen*, noting that "achievement of the Act's laudable goal could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General."[118] Recognizing that "the same is surely true of § 10," the Court reasoned that Section 10 must include an implied private cause of action. [119]

In a significant move, the same five Justices explicitly endorsed the existence of a Section 2 private cause of action.[120] While

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109. H.R. REP. NO. 94-196, at 32 (1975) (emphasis added).
110. 52 U.S.C. § 10302.
111. *Infra* Part III.
112. Morse v. Republican Party of Va., 517 U.S. 186 (1996).
113. 52 U.S.C. § 10306.
114. *Morse,* 517 U.S. 186, 230–35.
115. 52 U.S.C. § 10306.
116. *Morse*, 517 U.S. at 230.
117. *Id.* at 230–31.
118. *Id.* at 232 (quoting *Allen*, 393 U.S. at 556).
119. *Id.*
120. The Opinion for the Court was written by Justice Stevens and was joined only by Justice Ginsburg. However, Justice Breyer's concurrence—joined

acknowledging that Congress did not explicitly codify *Allen*'s recognition of a Section 5 private cause of action, Justice Stevens's plurality referred to legislative history. Both House and Senate Reports, he noted, acknowledged that "the existence of the private right of action under Section 2 . . . has been clearly intended by Congress since 1965."[121] Justice Stevens then reasoned that "it would be anomalous, to say the least, to hold that *both § 2 and § 5 are enforceable by private action* but § 10 is not, when all lack the same express authorizing language."[122] In Justice Breyer's concurrence, he agrees: "I do not know why Congress would have wanted to treat enforcement of § 10 differently from enforcement of §§ 2 and 5," and thus, Justice Breyer reasoned: "Congress intended to establish a private right of action to enforce § 10, no less than it did to enforce §§ 2 and 5."[123] Therefore, although arguably dicta,[124] a 5-4 majority of the Court in *Morse* not only recognized the existence of a private cause of action under Section 10 of the VRA, but also under Section 2.

Meanwhile, Justice Thomas's dissent in *Morse* employed textualism to highlight a crucial distinction between Sections 5 and 10—a distinction potentially applicable to Section 2 in a future case.[125] While tacitly endorsing the holding in *Allen*, Justice Thomas argued that Section 10 "forecloses" private enforcement.[126] In differentiating *Allen*, Justice Thomas argued that *Allen* involved an analysis of the text of Section 5 which proclaims that "no person shall be denied the right to vote for failure to comply with [a new state

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by Justices O'Connor and Justice Souter—endorsed Stevens's analysis regarding a private right of action under Section 10 and explicitly approved of his reasoning analogizing between Sections 2, 5, and 10 as all including implied private rights of action. *See id.* at 240.

121. *Id.; See* S. REP. NO. 97-417, at 30 (1982); *see also* H. R. REP. NO. 97-227 (1981).

122. *Morse*, 517 U.S. at 232 (emphasis added).

123. *Id.* at 240.

124. In *Arkansas NAACP*, the District Court treated this as "only dicta," Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 586 F. Supp. 3d 893, 914 (E.D. Ark. 2022), and the Eighth Circuit agreed, holding it is "mere dicta at most." Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1215 (8th Cir. 2023). However, Plaintiff-Appellants pushed back in their brief that "the understanding [in *Morse*] that Section Two provides a private right of action was necessary to reach the judgment that Section Ten provides a private right of action," and therefore is part of *Morse*'s holding. Brief of Plaintiffs-Appellants at 21–22, *Ark. State Conf. NAACP*, 86 F.4th 1204 (8th Cir. 2023) (No. 22-1395).

125. Note that Justice Thomas joined Justice Gorsuch's concurrence in *Brnovich*. 594 U.S. 647, 690 (2021) (Gorsuch, J., concurring).

126. *Morse*, 517 U.S. at 253, 286–89 (Thomas, J., dissenting).

enactment covered by, but not approved under, Section 5]."[127] In contrast, "§ 10 creates no statutory privilege in any particular class of persons to be free of poll taxes."[128] Instead, he argued, "[t]he only possible 'guarantee' created by § 10 is that the Attorney General will challenge the enforcement of poll taxes on behalf of those voters who reside in poll tax jurisdictions."[129]

Thus, mirroring the textually-focused analytical approach later employed in *Sandoval*, [130] Justice Thomas notes that "Section 10 creates no ban on the imposition of poll taxes, whereas § 5, *Allen* said, guaranteed that no person would be subject to unapproved voting changes."[131] As such, Justice Thomas implicitly pushed back against reliance on legislative history and statutory purpose (that is not derived from the text itself) in analyzing an implied private right of action question.

## II. THE EMERGING CIRCUIT SPLIT

### A. Questioning Section 2 Private Cause of Action—*Brnovich* and *Arkansas NAACP*

*Brnovich v. Democratic National Committee* involved Section 2 challenges to two Arizona voting rules.[132] The first rule required out-of-precinct ballots to be discarded entirely, even for statewide offices.[133] The second, a "ballot collection ban," criminalized third-party ballot collection except by family or caregivers.[134] In a 6-3 decision, the Supreme Court reversed the en banc Ninth Circuit decision, upholding the Arizona laws and establishing stricter standards for Section 2 claims,[135] thereby making it harder to challenge potentially discriminatory voting laws.

While *Brnovich* significantly limits the scope of Section 2, neither party in the case raised the question of whether the provision

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127. *Id.* at 286–87 (citing *Allen*, 393 U.S. at 555).
128. *Id.* at 287.
129. *Id.*
130. *See supra* Part I.B.2.l.
131. *Morse*, 517 U.S. at 287–88.
132. Brnovich v. Democratic Nat'l Comm., 594 U.S. 647 (2021).
133. *Id.* at 661–62.
134. *Id.* at 662.
135. *Id.* at 655.

allows for a private cause of action.[136] The majority opinion by Justice Alito did not discuss private plaintiffs' cause of action either. Despite this, Justice Gorsuch, in a brief concurring opinion joined only by Justice Thomas, explicitly highlighted the issue:

> I join the Court's opinion in full, but *flag one thing* it does not decide. Our cases have assumed—without deciding—that the Voting Rights Act of 1965 furnishes an implied cause of action under §2. . . . Lower courts have treated this as an open question. . . . Because no party argues that the plaintiffs lack a cause of action here, and because the existence (or not) of a cause of action does not go to a court's subject-matter jurisdiction, . . . this Court need not and does not address that issue today.[137]

Thus, although Justice Gorsuch did not explicitly deny the existence of a private right of action under Section 2, his strategic decision to highlight this "open question"[138] effectively invites defendants in future Section 2 cases to raise it as a potential defense.

Just months later, in *Arkansas State Conference NAACP v. Arkansas Board of Apportionment* ("*Arkansas NAACP*"), the state raised this very argument—and prevailed. In *Arkansas NAACP*, despite the district court's assessment that the plaintiffs had a "strong merits case,"[139] the Eight Circuit concluded that the "text and structure [of the VRA] reveal" Congress did not give private plaintiffs the ability to sue under Section 2.[140]

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136. *Id.* at 690 (Gorsuch, J., concurring) ("no party argues that the plaintiffs lack a cause of action here").

137. *Id.* at 690 (Gorsuch, J., concurring) (emphasis added) (citations omitted).

138. It's not clear that lower courts have treated this as an "open question," as Justice Gorsuch claims. The only case that the Justice cites—Washington v. Finley, 664 F. 2d 913 (4th Cir. 1981)—did not analyze private cause of action at all, much less suggest it was an open question. In that case, the Fourth Circuit rejected the plaintiffs' vote dilution claims on the merits and the only reference it made to a private cause of action is to say that even "[a]ssuming without deciding . . . that there is a private cause of action under" the Act, the plaintiffs' case does not succeed. *Id.* at 926.

139. Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 586 F. Supp. 3d 893, 896–97 (E.D. Ark. 2022). In the district court case, they did not reach the merits because of lack of subject-matter jurisdiction. *Id.* at 905.

140. Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1206–07 (8th Cir. 2023).

The case began as a "relatively routine Section 2 dispute."[141] Plaintiffs Arkansas State Conference NAACP and the Arkansas Public Policy Panel alleged that Arkansas's 2021 reapportionment plan for the state's House of Representatives unlawfully "dilute[d] Black voting strength in violation of Section 2 of the [VRA]."[142]

Initially, the district court did not address whether Section 2 provided a private cause of action, nor did the state raise the issue as a defense.[143] However, a week before a scheduled preliminary injunction hearing, *sua sponte*, Judge Lee P. Rudofsky ordered the parties to prepare to discuss "whether there is a private right of action that authorizes the claims brought and the relief sought by the Plaintiff-organizations in this case."[144] Shortly thereafter, the court dismissed the case, concluding that, based on text and structure, Section 2 claims "may be brought only by the Attorney General of the United States."[145]

In the subsequent appeal to the Eighth Circuit, the parties—and their respective *amici*—took markedly different approaches to the question of whether Section 2 provides a private right of action. Plaintiff-Appellants relied heavily on the history and precedent surrounding Section 2. Throughout their brief, they stressed the fact that "federal courts . . . have heard and decided hundreds of Section 2 cases and provided relief to private plaintiffs for Section 2 violations for decades."[146] They framed the district court's ruling as "unprecedented," arguing that no court had previously denied the existence of a private right of action under Section 2.[147] In addition to referencing "hundreds of" Supreme Court and Eighth Circuit cases assuming Section 2 private right of action,[148] Appellants argued that

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141. Macin Graber & Joshua A. Douglas, *A Major Wrong on a Private Right of Action Under the Voting Rights Act*, 81 WASH. & LEE L. REV. 1127, 1136 (2024).

142. Complaint at 9, Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, No. 4:21-cv-1239 (E.D. Ark. Dec. 29, 2021).

143. *See generally* Defendants' Response in Opposition to Motion for Preliminary Injunction, Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, No. 4:21-cv-1239 (E.D. Ark. Jan. 19, 2022).

144. Order at 1–2, Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, No. 55 4:21-cv-1239 (E.D. Ark. Jan. 20, 2022).

145. *Ark. State Conf. NAACP*, 586 F. Supp. 3d at 897.

146. Brief of Plaintiffs-Appellants at 15–16, Ark. State Conf. NAACP v. Ark. Bd. Of Apportionment, No. 22-1395 (8th Cir. Apr. 18, 2022).

147. *Id.*

148. *E.g.*, Roberts v. Wamser, 883 F.2d 617, 621 (8th Cir. 1989) (recognizing that the Voting Rights Act was amended "to reflect the standing of

"*Morse* is dispositive."[149] Appellants argued that the *Morse* Court's acknowledgment of Section 2 private right of action was not "only dicta,"[150] but rather, "the understanding [in *Morse*] that Section Two provides a private right of action was *necessary* to reach the judgment that Section Ten provides a private right of action," and thus "part of *Morse*'s holding and controls."[151] Additionally, Appellants contended that because courts have long assumed a private right of action under Section 2, Congress "unequivocal[ly]" understands and accepts the Section to include such a right.[152]

The Eighth Circuit rejected these arguments. In analyzing the *Sandoval* factors, the Eighth Circuit began by punting the first factor, stating it is "unclear" whether Section 2 confers a private right because the statute focuses on both the person benefited and person regulated.[153] Moving on to the second factor, the Eighth Circuit was more assertive, concluding that "[e]veryone agrees that § 2 itself contains no private enforcement mechanism. All it does is specify what is unlawful."[154] The court reasoned that the remedial framework is contained in Section 12,[155] which empowers "the Attorney General [to] institute . . . an action for preventive relief,"[156] and relied on *Sandoval*'s application of *expressio unius* to hold that the inclusion of this remedy implies the exclusion of others.[157] Based on this reasoning, the Eighth Circuit affirmed the decision to deny private litigants a cause of action under Section 2.[158]

## B. The Circuit Split—5th, 6th, and 11th Circuits' Decisions

Prior to *Arkansas NAACP*, every court that considered the question of an implied private cause of action under Section 2

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'aggrieved persons' to enforce their right to vote," but holding that a losing candidate is not an "aggrieved voter").

149. Brief of Plaintiffs-Appellants, supra note 146, at 20–25.

150. *Id.; see supra* text accompanying notes 121–125.

151. Brief of Plaintiffs-Appellants at 21–22, *Ark. State Conf. NAACP*, No. 22-1395 (8th Cir. Apr. 18, 2022) (emphasis added).

152. *Id.* at 44–50.

153. *Ark. State Conf. NAACP*, 86 F.4th at 1210.

154. *Id.*

155. *Id.*

156. 52 U.S.C. § 10308(c).

157. *Ark. State Conf. NAACP*, 86 F.4th at 1210–11. *See also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW; THE INTERPRETATION OF LEGAL TEXTS 107 (2012) (defining *expressio unius* as the negative-implication canon: "the expression of one thing implies the exclusion of others").

158. *Ark. State Conf. NAACP*, 86 F.4th at 1210–11.

determined that one exists. Specifically, the Fifth, Sixth, and Eleventh Circuits had explicitly held that Section 2 contained an implied private right of action.

First, in 1999, the Sixth Circuit considered the question in *Mixon v. Ohio*.[159] In that case, rather than providing any analysis, the court simply stated that "[a]n individual may bring a private cause of action under Section 2 of the Voting Rights Act."[160] In a footnote, however, the court distinguished Section 2 from 42 U.S.C. § 1971 of the Civil Rights Act of 1957,[161] stating that unlike Section 2, "only the Attorney General can bring a cause of action under this section."[162] As evidence, the footnote cited 42 U.S.C. § 1971(c), which states: "[w]henever any person has engaged . . . in any act or practice which could deprive any other person of any right or privilege . . . [to vote], the Attorney General may institute for the United States . . . a civil action . . . for preventive relief."[163] Without any further analysis, the *Mixon* court distinguished Section 2, which it described as "the more substantive provision[] of the Voting Rights Act."[164] Notwithstanding this lack of in-depth reasoning, the Sixth Circuit in *Mixon* became the first federal appellate court to decide that Section 2 provides a private right of action.

More than twenty years later, the Eleventh Circuit became the next appellate court to address whether Section 2 confers a private right of action. In *Alabama State Conference of the NAACP v. Alabama*,[165] the state argued that they are immune from plaintiffs' Section 2 challenge under the Eleventh Amendment's doctrine of state sovereign immunity.[166] The Eleventh Circuit rejected this argument, holding that Section 2 involves an "abrogation of the state's immunity" because the VRA "clearly expresses an intent to allow private parties to sue the States."[167] In its reasoning, the Eleventh Circuit relied on the text of Section 3, which was amended

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159. Mixon v. Ohio, 193 F.3d 389, 406–08 (6th Cir. 1999).

160. *Id.* at 406.

161. Civil Rights Act of 1957, Pub. L. 85-315, § 131, 71 Stat. 634 (codified as amended at 52 U.S.C. § 10101).

162. *Mixon*, 193 F.3d at 406 n.12.

163. Civil Rights Act of 1957 § 131(c) (codified as amended at 52 U.S.C. § 10101(c)).

164. *Mixon*, 193 F.3d at 406 n.12.

165. Ala. State Conf. NAACP v. Alabama, 949 F.3d 647, 654 (11th Cir. 2020).

166. *Id.* at 653–54.

167. *Id.* at 652.

in 1975 to allow not only the Attorney General, but also "an aggrieved person" to institute a proceeding "to enforce the voting guarantees of the fourteenth and fifteenth amendment[s]" against "any State or a political subdivision."[168] Thus, the court held, "[t]he language of § 2 and § 3, read together, imposes direct liability on States for discrimination in voting."[169] However, because the case centered on state sovereign immunity rather than implied private right of action, the Eleventh Circuit did not engage in a *Sandoval* analysis. Instead, the case arguably turned on the reference to "proceedings against 'any State or political subdivision,'" rather than on those proceedings being brought by "any aggrieved person."[170] Nonetheless, this decision made the Eleventh Circuit the second appellate court to opine on and affirm the existence of a private cause of action under Section 2.

In 2023, just ten days before the Eighth Circuit decision in *Arkansas NAACP*, the Fifth Circuit issued its ruling in *Robinson v. Ardoin*.[171] In that case, the district court had granted private plaintiffs' motion for a preliminary injunction against Louisiana's congressional map, finding that they were highly likely to succeed on the merits of their Section 2 claim and would suffer irreparable harm if the 2022 election proceeded under the challenged map.[172] During the proceedings, then-Louisiana Attorney General Jeff Landry intervened, arguing that the plaintiffs were unlikely to succeed on the merits because, among other reasons, "there is no private right of action under Section 2."[173] In making this argument, he cited the Eastern District of Arkansas's decision in *Arkansas NAACP*.[174] The district court in *Robinson* had rejected this argument, explaining that they are bound by the Supreme Court's analysis in *Morse*,[175] and that, despite Justice Gorsuch's concurrence in *Brnovich* raising questions about the issue, "*Morse* has not been overruled, and this Court will apply Supreme Court precedent."[176] Meanwhile, on appeal, the Fifth Circuit affirmed, relying primarily on its own circuit precedent.[177] The court pointed to its decision in *OCA-Greater Houston v. Texas*, in

168. 52 U.S.C. § 10302.
169. *Ala. State Conf. NAACP*, 949 F.3d at 652.
170. *Id.* (quoting 52 U.S.C. § 10302).
171. Robinson v. Ardoin, 86 F.4th 574 (5th Cir. 2023).
172. Robinson v. Ardoin, 605 F. Supp. 3d 759, 820–51 (M.D. La. 2022).
173. *Id.* at 774.
174. *Id.* (citing *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 586 F. Supp. 3d 893 (E.D. Ark. 2022)).
175. *Id.* at 819.
176. *Id.*
177. *Robinson*, 86 F.4th at 588 (5th Cir. 2023).

which the Fifth Circuit had held the VRA (though not Section 2 specifically) validly abrogated state sovereign immunity.[178] Though its reasoning was brief, the decision made the Fifth Circuit the third, and thus far most recent, appellate court to explicitly recognize a private right of action under Section 2.

Since the cases above, multiple federal district courts have addressed the question of implied private causes of action under Section 2 and other provisions of the VRA. Except for the Eighth Circuit,[179] these courts have consistently found an implied private right of action within the VRA.[180] This divergence of opinion is likely to persist in future cases and will ultimately require clarification from either Congress through an amendment,[181] or the Supreme Court.

## III. ANALYSIS OF THE WHOLE VOTING RIGHTS ACT —THE EXPLICIT PRIVATE CAUSE OF ACTION

The preceding discussion has highlighted the continuing importance of a private cause of action under Section 2 for safeguarding voting rights. Nevertheless, the Eighth Circuit's holding in *Arkansas NAACP* and Justice Gorsuch's concurring opinion in *Brnovich* suggest that inferring an *implied* private cause of action within Section 2 may prove challenging based on today's implied private cause of action jurisprudence. Still, hope is not lost. As this Part will demonstrate, analyzing the text and structure of the entire VRA in light of the Act's complex contemporary legal context provides a compelling basis for arguing that this *express* grant, specifically contained within Section 3, should extend to the guarantees afforded by Section 2.

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178. OCA-Greater Houston v. Texas, 867 F.3d 604, 614 (5th Cir. 2017).

179. *See, e.g.*, Wattleton v. Turner, 2024 U.S. Dist. LEXIS 132226 (D. Minn., July 26, 2024) (dismissing case under Section 2 for lack of subject-matter jurisdiction and failure to state a claim).

180. *See, e.g.*, Aquino v. Hazleton Area Sch. Dist., 2024 U.S. Dist. LEXIS 195048, at *15 (M.D. Pa. Oct. 28, 2024) (holding Section 2 contains an implied private right of action); League of Women Voters of Ohio v. Larose, 2024 U.S. Dist. LEXIS 128303, at *21 (N.D. Ohio, July 22, 2024) (holding Section 208 of the VRA contains an implied private right of action).

181. *See, e.g.*, John R. Lewis Voting Rights Act of 2021, H.R. 4, 117th Cong. (2021); John R. Lewis Voting Rights Advancement Act of 2021, S. 4, 117th Cong. (2021).

### A. The Contemporary Legal Context

Historically, the analysis of implied private causes of action placed significant emphasis on legislative intent, necessitating a review of legislative history. As previously discussed, the reliance on legislative intent in such inquiries has been reduced in recent decades.[182] Nevertheless, even with the current Court's decreased emphasis on legislative history, examining it remains instructive in understanding the purpose and context surrounding Congress's enactment of Section 2 of the VRA.

As previously stated, the VRA was enacted against a backdrop of multiple ineffective civil rights legislation and an understaffed, underfunded DOJ Civil Rights Division.[183] The purpose of the VRA was to "make the guarantees of the Fifteenth Amendment finally a reality for all citizens."[184] Initially, however, Section 2 was not intended to confer any supplemental rights. As the Supreme Court recognized in *City of Mobile*, "Section 2 was an uncontroversial provision" that was "intended to have an effect no different from that of the Fifteenth Amendment."[185] During the Senate hearings regarding the VRA, Senator Dirksen and Attorney General Katzenbach agreed that Section 2 "is a restatement, in effect, of the Fifteenth Amendment," and similarly, was intended as "the all-inclusive section" in the VRA."[186] Thus, it was initially understood as simply reiterating the Fifteenth Amendment, and nothing more.[187] It was not until the 1982 amendment to the VRA, which added the results test, that Section 2 began having independent force.[188] By adding the results test, Congress sought to address "the unsettling effect of the decision of the U.S. Supreme Court in *City of Mobile v. Bolden*"[189] by establishing that "proof of purpose or intent is not a

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182. *See infra* Section II.B.

183. *See supra* Part I.A; *see also infra* Part III.D.1–2.

184. Allen v. State Bd. of Elections, 393 U.S. 544, 556 (1969).

185. City of Mobile v. Bolden, 446 U.S. 55, 60–61 (1980).

186. *Voting Rights: Hearings on S. 1564 Before the Senate Comm. on the Judiciary*, 89th Cong. 171 (1965).

187. *City of Mobile*, 446 U.S. at 60–61 ("it is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself").

188. *E.g.*, Thornburg v. Gingles, 478 U.S. 30, 35–36 (1986) ("Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test'").

189. H. R. REP. NO. 97-227, at 2.

prerequisite to establishing voting discrimination violations in Section 2 cases."[190]

Notably, *City of Mobile* itself was a case brought by private litigants under Section 2, the Fourteenth and the Fifteenth Amendment.[191] Thus, the Court in *City of Mobile* assumed, without deciding, that there exists a private right of action, and Congress recognized the case.[192] Yet, in response, Congress did not bar such private suits in subsequent amendments. Instead, both chambers' reports accompanying the 1982 amendment explicitly stated their understanding that Section 2 includes a private right of action. The House Report stated: "It is intended that citizens have a private cause of action to enforce their rights under Section 2."[193] Furthermore, the "oft-cited"[194] Senate Report stated, "the Committee reiterates the existence of the private right of action under Section 2, as has been clearly intended by Congress since 1965. *See Allen v. Board of Elections*, 393 U.S. 544 (1969)."[195] This legislative history leaves little doubt that Congress intended (on a bicameral basis) to confer a private right of action under Section 2.

### B. Section 3—Explicit Private Cause of Action

If both chambers of Congress agreed that there should be a private cause of action under Section 2, why didn't they amend Section 2 to reflect that? The answer is simple—because it already existed. To find this, one must look beyond Section 2 and examine other provisions of the VRA. Conveniently, immediately following it is Section 3, which provides relief for a "proceeding under *any* statute to enforce the voting guarantees of the fourteenth or fifteenth amendment" instituted by "the Attorney General *or an aggrieved person.*"[196] This reference to "proceedings . . . instituted by" "an aggrieved person" is an *explicit* textual indication of Congress's intent to provide private plaintiffs with a cause of action under Section 2.

However, as originally enacted, Section 3 did not include the phrase "or an aggrieved person." Congress added this phrase in the

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190. *Id.*
191. *City of Mobile*, 446 U.S. at 60.
192. *Id.*
193. H. R. REP. NO. 97-227, at 32 (1981).
194. Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 658 (2021).
195. S. REP. NO. 97-417, at 30 (1982); *see also supra* Part I.C.1 (discussing *Allen*).
196. 52 U.S.C. § 10302(a) (emphasis added).

1975 amendment.[197] This being before *City of Mobile*, Congress likely believed it sufficient to allow "aggrieved" private plaintiffs to enforce the Fifteenth Amendment's voting guarantee against states, mirroring the Attorney General's power under the previous version of the VRA.[198] Thus, in the intervening period between the 1975 amendment and *City of Mobile*, it is reasonable to interpret Section 3 to allow an "aggrieved person" to bring a "proceeding . . . to enforce the voting guarantees of the . . . Fifteenth Amendment." This reading is supported by the title of Section 3, which evinces its aim: "Proceeding to enforce the right to vote."[199]

This interpretation is further supported by the legislative history. The House Report accompanying the 1975 amendment defines "aggrieved person" as "any person injured by an act of discrimination," without reference to the actor's intent.[200] The same report "concludes that it is sound policy to authorize private remedies to assist the process of enforcing voting rights."[201] In summarizing Section 3, the House Report says, "[t]he amendment to Section 3 would allow a court, in a suit brought by a private party, to grant the Act's special remedies. The sole consequence of this amendment is to broaden the scope of equitable relief which may be requested and granted when such litigation has been filed by private plaintiffs."[202]

This interpretation suggests that, absent the Supreme Court's decision in *City of Mobile*, Congress would have considered the explicit grant of a private right of action within Section 3 to be sufficient to enable private plaintiffs to enforce the guarantees of the Fifteenth Amendment. After all, the Court has repeatedly acknowledged that in enacting the VRA, Congress acted pursuant to its "power to enforce the provisions of the Fifteenth Amendment."[203] It is only because of *City of Mobile* that Section 2 and the Fifteenth Amendment gained divergent meanings, contrary to congressional intent. Even after *City of Mobile*, Congress understood the explicit grant of a private cause of action to enforce the Fifteenth Amendment to apply equally to Section 2.

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197. Pub. L. 94-73, sec. 401, § 3, 89 Stat. 400, 404 (1975).

198. H.R. REP. No. 94-196, at 33–34; *see also* S. REP. NO. 94-295, at 39–40 (1975) (explaining that Section 3 was amended "to afford to private parties the same remedies which Section 3 now affords only to the Attorney General").

199. 52 U.S.C. § 10302.

200. H.R. REP. NO. 94-196, at 34.

201. *Id.*

202. *Id.* at 43.

203. City of Boerne v. Flores, 521 U.S. 507, 518 (1997).

Furthermore, reassured by contemporary private cause of action jurisprudence, as exemplified by *Allen* and *Borak*, Congress reasonably deemed Section 3 to be sufficient. As the Court recognized in *Morse*, "[t]he Voting Rights Act itself was passed one year after this Court's decision in *J. I. Case Co. v. Borak*, which applied a highly liberal standard for finding private remedies,"[204] and thus Congress had no reason to meticulously and repeatedly include a private cause of action for each Section of the VRA, when Section 3 already grants it for the "guarantees of the Fifteenth Amendment."[205] Indeed, were it not for *City of Mobile*,[206] Section 2 likely would not have been amended, and would not have gained its current level of prominence, as challenges would have instead been pursued under the Fifteenth Amendment. Congress reasonably believed that interpreting Section 3 as originally intended—to confer a private cause of action—and supporting it with bicameral legislative history, would suffice.

### C. Additional Textual Evidence—Sections 12 and 14

Further support for the existence of an explicit private cause of action within Section 2 can be found in other sections of the Act. In particular, Sections 12(f) and 14(e) demonstrate Congress's understanding that private litigants can and should initiate legal action. Without a private right of action to enforce Section 2, these provisions would be rendered ineffective and meaningless. Therefore, applying the canon of statutory interpretation to avoid surplusage, [207] Sections 2 and 3 should properly be read in conjunction to indicate not merely an implied, but an explicit private right of action.

Section 12 of the VRA outlines the procedures for civil and criminal prosecutions initiated by the Attorney General under various sections, including Section 2.[208] Some have applied the principle of *expressio unius* to argue that the presence of these procedures for the Attorney General, but not for private litigants, suggests Congress did not intend to grant private individuals the

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204. Morse v. Republican Party of Va., 517 U.S. 186, 231 (1996) (internal citations omitted).

205. 52 U.S.C. § 10302.

206. City of Mobile v. Bolden, 446 U.S. 55 (1980); *see supra* notes 184–191 and accompanying text.

207. SCALIA & GARNER, *supra* note 157, at 174 ("If possible, every word and every provision is to be given effect. . . . None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.").

208. 52 U.S.C. § 10308.

right to sue under the Act.[209] However, this reading of the Section is flawed. The Attorney General initiates both civil and criminal suits. Thus, Section 12 includes provisions for criminal penalties, such as imprisonment, and orders concerning ballot processing, which are clearly inapplicable to private challenges.[210]

Moreover, Section 12(f) explicitly states that "[t]he district courts of the United States shall have jurisdiction of proceedings instituted . . . [by] a person asserting rights under the provisions" of this Act,[211] regardless of whether there has been an exhaustion of administrative remedies. Here, the phrase "person[s] asserting their rights" clearly refers to private litigants, or "aggrieved persons,"[212] whose voting rights have been infringed, not the Attorney General. Thus, Section 12 assumes that, in addition to the Attorney General, who alone may pursue criminal actions, private litigants may bring civil suits under the VRA.

Section 14(e) further provides compelling evidence for the existence of a private right of action to enforce Section 2. Section 14, as a whole, delineates rules governing enforcement proceedings under the VRA.[213] Subsection (e) specifically states: "In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, reasonable expert fees, and other reasonable litigation expenses as part of the costs."[214] This provision explicitly contemplates litigation initiated by parties other than "the United States," or the Attorney General, to "enforce the voting guarantees of the fourteenth and fifteenth amendments."[215] Again, given that the VRA itself was enacted "to enforce the fifteenth amendment,"[216] and that Section 2 is intended as a restatement of that amendment,[217]

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209. *E.g.*, Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1210 (8th Cir. 2023) (discussing Spectra Commc'ns Grp., LLC v. City of Cameron, 806 F.3d 1113, 1119 (8th Cir. 2015) finding that "when a statute is 'phrased as a restriction on state and local governments,' it is unlikely to be privately enforceable").

210. *Id.*

211. 52 U.S.C. § 10308(f).

212. 52 U.S.C. § 10302.

213. 52 U.S.C. § 10310.

214. 52 U.S.C. § 10310(e).

215. *Id.*

216. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

217. *Id.*; *see* City of Mobile v. Bolden, 446 U.S. 55, 60–61 (1980) ("it is apparent that the language of § 2 no more than elaborates upon that of the

Section 14(e) aims to enhance enforcement by facilitating private citizen lawsuits. Consequently, if Section 2 were not privately enforceable, Section 14(e) would be rendered superfluous, a result that courts generally seek to avoid.[218]

It is noteworthy that Section 14(e) was not included in the VRA as originally enacted in 1965. It was added by the 1975 amendment, the same amendment that introduced the "aggrieved person" language in Section 3.[219] This concurrent addition of these amendments signals a clear congressional intent to *encourage* private enforcement of the VRA.

Again, this is supported by the legislative history. The amendments were recommended by the U.S. Commission on Civil Rights. In their report, they informed Congress that "[m]uch of the burden of voting rights litigation has fallen on private parties."[220] During Senate hearings regarding the VRA's 1975 reauthorization, Commission Chairman Arthur Flemming testified: "[t]o facilitate the use of Section 3—and *private voting rights litigation generally*—we recommend that the Voting Rights Act be amended to provide for attorney's fees in voting rights litigation."[221] Thereafter, the House Report accompanying the amendment explained: "The awarding of such fees is important in the area of voting rights because of the significant role which private citizens must play in their enforcement."[222] Similarly, the Senate Report endorsed the concept of "'private attorneys general,' or private enforcers of civil rights laws,"[223] which had gained popularity in the 1970s. This report emphasized: "Such 'private attorneys general' should not be deterred from bringing meritorious actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's

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Fifteenth Amendment, and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself").

218. SCALIA & GARNER, *supra* note 157, at 174.

219. *See supra* Part III.B.

220. U.S. COMM'N ON C.R., THE VOTING RIGHTS ACT: TEN YEARS AFTER: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 353 (1975).

221. *Extension of the Voting Rights Act of 1965, Hearing Before the S. Comm. on Const. Rts. of the S. Judiciary Comm.*, 94th Cong. 98 (1975) (emphasis added).

222. H.R. Rep. No. 94-196, at 34.

223. S. REP. NO. 94-295, at 42 (1975); *see generally* William B. Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129 (2004) (dispelling the myth of a singular private attorney general concept and typologizing the range of distinct private attorneys general).

counsel fees should they lose."[224] Thus, by amending Section 14 to include a fee-shifting provision, Congress intended not only to permit but to *encourage* private actions under the VRA, specifically to "enforce the fifteenth amendment,"[225] which is the central objective of Section 2.

### D. Insufficiency of the Alternatives to Section 2 Private Cause of Action

As previously discussed, the current implied private cause of action jurisprudence presents a significant uphill battle. Thus, scholars have presented various alternatives, including giving up on private enforcement entirely and relying on the DOJ, relying on the Reconstruction Amendments, or enforcing Section 2 through Section 1983.[226] However, a thorough analysis of these alternatives will reveal their profound inadequacies. These limitations underscore why the recognition of an *explicit* private cause of action to enforce Section 2 represents the most effective and comprehensive interpretation of the statute.

#### 1. Department of Justice Enforcement—Civil Rights Division's Lack of Resources

If courts hold that no private cause of action exists under Section 2, the only party effectively able to bring challenges under the Section is the DOJ. However, as the Supreme Court previously stated, "[t]he Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government."[227] This remains true. Historically, the DOJ has been slow to bring such cases, and most Section 2 challenges have been brought by private parties. Of the

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224. S. REP. NO. 94-295, at 40–41 (1975).

225. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

226. *See, e.g.*, Perry Grossman, *The Case For State Attorney General Enforcement of the Voting Rights Act Against Local Governments*, 50 U. MICH. J.L. REFORM 565, 569 (2017) (advocating for state attorneys general to bring VRA cases); Paul Feingold, *Section 1983 and Voting Rights: A Case Study on the Materiality Provision and the Future of Private Enforcement*, 93 FORDHAM L. REV. 149, 153 (2024) (arguing that the materiality provision of the Civil Rights Act can be used through Section 1983 to challenge voting rights cases); Stephanie N. Kang, *Restoring the Fifteenth Amendment: The Constitutional Right to an Undiluted Vote*, 62 UCLA L. REV. 1392, 1396–97 (2015) (advocating for a restoration of the Fifteenth Amendment in future vote dilution claims).

227. Allen v. State Bd. of Elections, 393 U.S. 544, 556 (1969).

more than 460 Section 2 challenges brought between June 1982 and August 2024, only 18 of them were brought by the DOJ—the rest by various private parties including the American Civil Liberties Union (ACLU), National Association for the Advancement of Colored People (NAACP), and League of United Latin American Citizens (LULAC).[228] Thus, as the Court has recognized, "[t]he achievement of the [Voting Rights Act's] laudable goal could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General."[229]

The Voting Section of the DOJ's Civil Rights Division handles the enforcement of federal voting laws, including the VRA, the Uniformed and Overseas Citizens Absentee Voting Act, the National Voter Registration Act, the Help America Vote Act, and the Civil Rights Acts.[230] Yet, the Civil Rights Division lacks the resources to monitor and enforce these laws. For example, in Fiscal Year (FY) 2024, the DOJ had a total discretionary budget of $37.3 billion.[231] Of this amount, the Civil Rights Division's budget totaled just $190 million,[232] roughly 0.5% of the DOJ's total budget. In terms of change over time, while the total DOJ budget increased by about $10 billion over the ten-year period since FY 2014, when it was $27.3 billion,[233] the Civil Rights Division's budget increased only by $38 million.[234] Given that plaintiffs in Section 2 challenges have historically incurred costs ranging from $500,000 to $5 million over a period of

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228. Ellen D. Katz et al., *Section 2 Cases Database*, UNIV. MICH. L. SCH. VOTING RTS. INITIATIVE (2022), https://voting.law.umich.edu/database/ (on file with the *Columbia Human Rights Law Review*).

229. *Allen*, 393 U.S. at 556.

230. *Voting Section*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/voting-section [https://perma.cc/37ES-92RT] (last visited Nov. 12, 2024).

231. U.S. DEP'T OF JUST., FY 2025 BUDGET SUMMARY 1 (2024), https://www.justice.gov/jmd/media/1342656/dl?inline [https://perma.cc/3R5L-BT85].

232. U.S. DEP'T OF JUST., GENERAL LEGAL ACTIVITIES: CIVIL RIGHTS DIVISION (CRT) (2026), https://www.justice.gov/jmd/media/1433151/dl?inline [https://perma.cc/ED7E-R5Y4].

233. *Compare* U.S. DEP'T OF JUST., FY 2017 BUDGET SUMMARY 1 (2016), https://www.justice.gov/d9/pages/attachments/2016/02/08/4_doj_2017_budget_summary.pdf [https://perma.cc/HH2A-DWVM] *with* U.S. DEP'T OF JUST., *supra* note 232.

234. *Compare* U.S. DEP'T OF JUST., GENERAL LEGAL ACTIVITIES: CIVIL RIGHTS DIVISION (CRT) (2016), https://www.justice.gov/sites/default/files/jmd/legacy/2014/06/25/crt.pdf [https://perma.cc/4JEL-WMVM] *with* U.S. DEP'T OF JUST., *supra* note 233. Though, note, this is a relatively proportional percentage increase over the 10 years.

two to five years on average,[235] it is evident that these challenges would place a strain on an already underfunded DOJ.

As of 2024, the Division consists of 466 attorneys operating across 94 federal judicial districts throughout the U.S.[236] Despite its tremendous growth since its creation through the 1957 Civil Rights Act, the Division still lacks the personnel to effectively monitor and enforce the VRA.[237] John Doar, a member of the Civil Rights Division in 1960 who would later become the Division's chief, wrote, "[i]n 1960 the Division was small—very small. It consisted of about fifteen lawyers who (as if the Division did not have enough to do) had been assigned criminal and civil jurisdiction over election fraud and federal custody matters."[238] At the time, the division was "seen primarily as a symbolic measure with little enforcement," and as "[w]ell-intentioned as the bill surely was, it had few teeth and little impact: the Justice Department was sluggish in initiating suits, southern federal judges were sometimes unreceptive, and the entire strategy of relying on litigation inescapably meant that progress would be slow."[239]

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235. LEGAL DEF. FUND, THE COST (IN TIME, MONEY, AND BURDEN) OF SECTION 2 OF THE VOTING RIGHTS ACT LITIGATION 3–6 (2021), https://www.naacpldf.org/wp-content/uploads/Section-2-costs-2.19.21.pdf [https://perma.cc/CY9Q-9QG3]. These figures are based on legal fees awarded to successful plaintiffs. Thus, it is theoretically different, and likely higher than costs that the DOJ would incur in their Section 2 challenges. Additionally, this study suggests that Section 2 challenges cost far more than Section 5 challenges.

236. U.S. DEP'T OF JUST., GENERAL LEGAL ACTIVITIES: CIVIL RIGHTS DIVISION (CRT) (2026), https://www.justice.gov/jmd/media/1433151/dl?inline [https://perma.cc/ED7E-R5Y4]; Sam Levine, *Justice department civil rights division loses 70% of lawyers under Trump*, THE GUARDIAN, https://www.theguardian.com/us-news/2025/may/01/civil-rights-division-doj-trump [https://perma.cc/KD72-7LDY] (noting that the Trump administration has cut this number by almost 70%).

237. *See, e.g.*, Fredreka Schouten, *Appeals Court Strikes Down Key Tool Used to Enforce Voting Rights Act*, CNN (Nov. 20, 2023), https://www.cnn.com/2023/11/20/politics/appeals-court-voting-rights-act-ruling/index.html [https://perma.cc/6CEG-YQZY] ("The US Justice Department's voting section – which enforces federal voting laws – simply does have not enough lawyers 'to be everywhere in the nation at once,' said David Becker, executive director of the Center for Election Innovation & Research").

238. John Doar, *The Work of the Civil Rights Division in Enforcing Voting Rights Under the Civil Rights Acts of 1957 and 1960*, 25 FLA. ST. U. L. REV. 1, 2 (1997).

239. Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. REV. L. & SOC. CHANGE 173, 189 n.98 (2015) (quoting Gilda R. Daniels, *A Vote Delayed is a Vote Denied: A Preemptive Approach to Eliminating Election Administration Legislation that Disenfranchises*

### 2. Department of Justice Enforcement—Partisan Motives

Of course, all of this is relevant only if the DOJ *wants* to enforce the laws—it may not want to, depending on who is in charge and who the enforcement benefits. The Judiciary Act of 1789 created the position of Attorney General, but the Act lacked guidance about the mechanisms for appointment and removal.[240] Although the initial versions of the Bill gave the responsibility of appointing the Attorney General to the Supreme Court, Congress later scrapped it, hoping to make the position accountable to the President.[241] Thus, the Attorney General has inherent partisan fidelity to the President.[242] The partisan incentives to either restrict or expand voting rights to racial minorities are clear. For example, validated voter analyses by Pew Research Center estimates that between 91-93% of Black, non-Hispanic validated voters voted for candidates from the Democratic

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*Unwanted Voters*, 47 U. LOUISVILLE L. REV. 57, 58 (2008); ALEXANDER KEYSSAR, THE RIGHT TO VOTE 18 (2d ed. 2009)).

240. Judiciary Act, Ch. 20, § 35, 1 Stat. 73, 92–93 (1789) (current version codified at 28 U.S.C. §§ 503, 511, 512, 516 (2017)).

241. Tonna Onyendu, *Department of Justice's Role in Electoral Politics: Maintaining Neutrality in the Enforcement of Voting Rights*, 31 GEO. J. LEGAL ETHICS 799, 800–01 (2018) (noting that earlier drafts of the Judiciary Act of 1789 vested appointment power in the Supreme Court, but Congress removed that provision to render the Attorney General politically accountable to the President); NANCY V. BAKER, CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE 48 (1992) (noting that draft versions of the Judiciary Act of 1789 provided for judicial appointment of the Attorney General, but Congress rejected that approach in favor of presidential appointment with Senate confirmation, reflecting a deliberate choice to prioritize political accountability over judicial independence); Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN L. REV. 1931, 1956 (2008) (explaining that the Judiciary Act of 1789 provided few structural safeguards for Attorney General independence—leaving appointment to the President with Senate confirmation, lacking formal ethical constraints, and thereby reinforcing political accountability and presidential loyalty over institutional neutrality); Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 38 DUKE L.J. 561, 578 (1989) (demonstrating that Congress rejected a judiciary-based appointment scheme for the Attorney General and instead adopted a structure consistent with presidential appointment, signaling a deliberate preference for political accountability over institutional independence).

242. Onyendu, *supra* note 241, at 801.

Party in each election between 2016 and 2022, including in mid-term elections.[243]

As such, it is particularly telling that the majority of restrictive voting laws (including photo ID requirements, early voting cutbacks, and registration restrictions) enacted post-*Shelby County* were in states under both a Republican-controlled legislature and a Republican Governor.[244] The Republican party argues that these restrictive voting laws are necessary to reduce the chances of voter fraud or the perception of it.[245] However, there is minimal evidence suggesting that voter fraud is a widespread issue that threatens the integrity of U.S. elections.[246] At the same time, the Democratic Party has been advocating for rapidly expanding voting rights and making it easier for people to vote.[247] However, this approach does not adequately address or alleviate valid concerns about potential inaccuracies or errors in election management as they work to increase voter access and participation.[248]

Thus, regardless of their underlying motivations, both parties have strong partisan interests in either expanding or limiting voting

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243. Hannah Hartig et al., *Voting Patterns in the 2022 Elections*, PEW RSCH. CTR. (July 12, 2023), https://www.pewresearch.org/politics/2023/07/12/voting-patterns-in-the-2022-elections/ [https://perma.cc/L86M-7M2V]; Ruth Igielnik, Scott Keeter & Hannah Hartig, *Behind Biden's 2020 Victory: An Examination of the 2020 Electorate, Based on Validated Voters*, PEW RSCH. CTR. (June 30, 2021), https://www.pewresearch.org/politics/2021/06/30/behind-bidens-2020-victory/ [https://perma.cc/QU7K-WAXF].

244. *New Voting Restrictions in America,* BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/research-reports/new-voting-restrictions-america [https://perma.cc/J33C-JLB5] (last updated Nov. 19, 2019).

245. *See, e.g.*, Amy Gardner & Yvonne Wingett Sanchez, *Republicans Push for Stricter Election Laws, Despite Scant Proof of Fraud*, WASH. POST (Apr. 2, 2023), https://www.washingtonpost.com/nation/2023/04/02/republicans-restrictive-voting-laws [https://perma.cc/KCW6-5BJD] (reporting that GOP lawmakers continue to advance restrictive voting measures aimed at tightening election security and addressing concerns about election integrity); *see also* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 191 (2008) (recognizing the deterring voter fraud is a valid state interest).

246. Gardner & Sanchez, *supra* note 245.

247. *See, e.g.*, DEMOCRATIC NAT'L COMM., 2024 DEMOCRATIC PARTY PLATFORM 47–48 (2024), https://democrats.org/wp-content/uploads/2024/08/FINAL-MASTER-PLATFORM.pdf [https://perma.cc/7HHJ-J4Q8] (stating that Congress must restore the protections of the Voting Rights Act and take additional steps to ensure access to the ballot box).

248. Onyendu, *supra* note 241, at 799.

access.[249] As the Supreme Court acknowledged in *Alexander v. South Carolina State Conference of the NAACP*, "when race and partisan preferences are highly correlated,"[250] it poses difficulties for both courts and plaintiffs—yet, for state legislatures aiming to get away with racial discrimination, it provides them a tremendous opportunity to do just that. Per the Court's holding in *Alexander*, given the high correlation between race and party preferences, almost any racially gerrymandered district can be passed off as mere partisan gerrymandering, rendering the case nonjusticiable.[251]

These partisan incentives inevitably influence the DOJ. The DOJ is required to propose a strategic plan that identifies the Attorney General's priorities. Since 1997, each strategic plan has listed protecting voting rights through enforcing the VRA as a priority.[252] However, in his first strategic plan, Attorney General Jeff

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249. *See generally* William D. Hicks et al., *A Principle or a Strategy? Voter Identification Laws and Partisan Competition in the American States*, 68 POL. RES. Q. 18 (2015) (stating that anything that is within the rules is exploited by partisans to gain electoral advantage, including expanding or contracting the rate of political participation).

250. Alexander v. S.C. State Conf. of the NAACP, 602 U.S. 1, 6 (2024).

251. *Id.*

252. U.S. DEP'T OF JUST., STRATEGIC PLAN 1997-2002 (1997), https://www.justice.gov/archive/mps/plan.htm [https://perma.cc/H62Z-8ABY] ("We will increase compliance with civil rights laws in the areas of . . . voting"); U.S. DEP'T OF JUST., STRATEGIC PLAN 2000-2005 (2000), https://www.justice.gov/archive/mps/strategic2000_2005/tocpdf.htm [https://perma.cc/8UFJ-VBQF] ("The Department enforces several civil justice statutes designed to protect civil rights, including the Voting Rights Act of 1965 and the National Voter Registration Act."); U.S. DEP'T OF JUST., STRATEGIC PLAN 2001-2006: GOAL IV, at 47 (2001), https://www.justice.gov/archive/mps/strategic2001-2006/tocpdf.htm [https://perma.cc/8DG5-K736] ("Departmental attorneys litigate cases stemming from myriad statutes. For example, the Department enforces the Voting Rights Act of 1965" and other statutes that safeguarding the right to vote of all individuals who are eligible, and that prohibit voting practices and procedures that discriminate on the basis of race, color, or membership in a language minority group."); U.S. DEP'T OF JUST., STRATEGIC PLAN 2003-2008: GOAL II, [at 49 (2003), [https://perma.cc/9G92-8H9M]; U.S. DEP'T OF JUST., STRATEGIC PLAN 2007-2012: STRATEGIC GOAL II, at 56 (2007) [https://perma.cc/PZ8R-AZPC] ("DOJ will address voting rights violations, ensure access to the polls for all who qualify"); U.S. DEP'T OF JUST., STRATEGIC PLAN 2014-2018, at 36 (2014), https://www.justice.gov/d9/jmd/legacy/2014/02/28/doj-fy-2014-2018-strategic-plan.pdf [https://perma.cc/B9ZT-4RQR] ("The Department will continue to place a high priority on the protection of voting rights through efforts to detect and investigate voting practices that violate the federal laws it enforces, through affirmative litigation to enjoin such practices, and through monitoring of elections all throughout the country each year.").

Sessions removed this language from the 2018–2022 plan.[253] In contrast, Attorney General Merrick Garland not only reinstated it in the 2022–2026 strategic plan but elevated it to its own objective category.[254] This difference is more than symbolic lip-service, as the DOJ's actions reflect these shifts in priorities. In their first budget request, the Civil Rights Division under the first Trump Administration did not request increased funding and proposed to cut personnel by 121 positions, from 714 in FY 2017 to 593 in FY 2018.[255] Four years later, in the Biden Administration's first budget request, the Civil Rights Division requested an additional $25 million in funding and proposed to increase their personnel from 639 positions in 2021 to 724 in 2022.[256]

### 3. Reconstruction Amendments Challenge

The Fifteenth Amendment to the Constitution states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[257] As discussed previously, it is not surprising that the Fifteenth Amendment is similar to Section 2's bar on the "denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[258] As can be seen from the Voting Rights Act's full name, "An Act to Enforce the Fifteenth Amendment to the Constitution of the United States, and for Other Purposes,"[259] the purpose of the Act was to "eradicate once and for all the chronic system of racial discrimination which has for so long excluded so many citizens from the electorate because of the color of their skins, contrary to the explicit command of the 15th

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253. U.S. DEP'T OF JUST., STRATEGIC PLAN 2018-2022 (2018), https://www.justice.gov/archives/jmd/page/file/1071066/dl?inline [https://perma.cc/7NAY-HU5Q].

254. U.S. DEP'T OF JUST., STRATEGIC PLAN 2022-2026 (2022), https://www.justice.gov/doj/doj-strategic-plan/strategic-goal-3 [https://perma.cc/CQ3G-NMJB] ("Objective 3.1: Protect the Right to Vote").

255. U.S. DEP'T OF JUST., GENERAL LEGAL ACTIVITIES: CIVIL RIGHTS DIVISION (CRT) (2018) https://www.justice.gov/jmd/page/file/968381/dl?inline [https://perma.cc/YGF5-U492].

256. U.S. DEP'T OF JUST., GENERAL LEGAL ACTIVITIES: CIVIL RIGHTS DIVISION (CRT) (2023), https://www.justice.gov/d9/pages/attachments/2021/05/27/crt.pdf [https://perma.cc/MWD5-4RH9].

257. U.S. CONST. amend. XV, § 1.

258. 52 U.S.C. § 10301.

259. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

Amendment."[260] Thus, as the Supreme Court recognized, Section 2 "was intended to have an effect no different from that of the Fifteenth Amendment itself."[261] Instead, the Section was intended only to restate, and thereby reiterate and buttress the guarantees of the Fifteenth Amendment through the VRA.

Yet, the Supreme Court's holding in *City of Mobile v. Bolden* severely undercut the Fifteenth Amendment by requiring that plaintiffs bringing Fourteenth or Fifteenth Amendment challenges show discriminatory intent or purpose, rather than just disproportionate impact.[262] Because of it, the almost identical language in Section 2—which was rarely used on its own because it added nothing to a Fifteenth Amendment claim—[263] also became insufficient.

By adding the results test in the 1982 amendment to Section 2 and shifting the focus to results rather than intent, plaintiffs are better positioned to challenge measures and districts that disenfranchise minorities even in the absence of explicit evidence of intent. This approach acknowledges the modern reality that overtly discriminatory statements or documents by public officials are rare. Moreover, in a legal framework that starts "with a presumption that the legislature acted in good faith,"[264] it remains uncertain whether any amount of circumstantial evidence can suffice to demonstrate intent. Because of this onerous intent requirement, the Reconstruction Amendments are rendered insufficient for addressing restrictive voting measures that often lack clear evidence of discriminatory purpose.

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260. S. REP. NO. 89-162 Part 3, at 2 (Joint Views of 12 Members of the Judiciary Committee Relating to the Voting Rights Act of 1965).

261. City of Mobile v. Bolden, 446 U.S. 55, 60–61 (1980).

262. *Id.* at 40. *See also* Washington v. Davis, 426 U.S. 229 (1976) (requiring proof of discriminatory intent for an Equal Protection Clause challenge to an employer's skills test that is facially neutral regarding race). Prior to both *Washington* and *City of Mobile*, the Court had implied an intent requirement in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), by holding disproportionate representation of minorities alone is insufficient to establish a violation of equal protection rights.

263. *See, e.g.*, *City of Mobile*, 446 U.S. at 61 ("it is evident that this statutory provision adds nothing to the appellees' Fifteenth Amendment claim.").

264. Alexander v. S.C. Conf. of the NAACP, 602 U.S. 1, 6 (2024).

4. Section 1983 Challenge

After *Arkansas NAACP*, many scholars are looking to Section 1983 as the potential fallback if private enforcement of VRA falls.[265] 42 U.S. Code § 1983 ("Section 1983") provides:

> 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 . . .[266]

In other words, although Section 1983 does not itself prescribe any rights, a private plaintiff can sue a state under Section 1983 for infringements of their rights protected elsewhere by a federal statute or Constitution.[267]

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265. *See, e.g.*, Paul Feingold, *Section 1983 and Voting Rights: A Case Study on the Materiality Provision and the Future of Private Enforcement*, 93 FORDHAM L. REV. 149 (2024) (arguing that §1983 provides a viable pathway for private enforcement of voting rights where implied rights of action are unavailable); Hansi Lo Wang, *After controversial court rulings, a Voting Rights Act lawsuit takes an unusual turn*, NPR (July 4, 2024), https://www.npr.org/2024/07/04/nx-s1-5025758/voting-rights-act-arkansas-supreme-court-section-1983 [https://perma.cc/3367-HZA4] (noting that recent rulings restricting private § 2 enforcement have prompted litigants to consider §1983 as an alternative vehicle); Crystal Hill, *Can The Voting Rights Act Survive if Individuals Can't Sue Under Section 2?*, DEMOCRACY DKT. (July 11, 2024), https://www.democracydocket.com/analysis/can-the-voting-rights-act-survive-if-individuals-cant-sue-under-section-2/ [https://perma.cc/HEB9-754V] (noting that if private plaintiffs cannot sue under §2, enforcement of the Voting Rights Act would be significantly weakened, leaving § 1983 as a critical alternative); Will Craft & Sam Levine, *Obscure legal theory could weaken voters' protections from racist laws*, THE GUARDIAN (Mar. 15, 2024), https://www.theguardian.com/us-news/2024/mar/15/arkansas-voting-rights-act-racial-bias [https://perma.cc/72KQ-Y8ZE] (noting that limiting private §2 enforcement threatens to undermine a primary mechanism for policing racial discrimination in voting, with §1983 emerging as a possible alternative).

266. 42 U.S.C. § 1983 (civil action for deprivation of rights).

267. *See, e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273, 285 (2002) (citing Chapman v. Houston Welfare Rts. Org., 441 U.S. 600, 617 (1979) (("One cannot go into court and claim a 'violation of § 1983'—for § 1983 by itself does not protect anyone against anything."); *see also* Health & Hosp. Corp. v. Talevski, 599 U.S. 166 (2023) (holding that "laws" "means what it says," and thus any federal statute, not just the Constitution, can be enforced against states under §1983).

The benefit of using a Section 1983 challenge is that, unlike in a *Sandoval* analysis, there is no requirement to show textual evidence of an intent to provide a private remedy. It suffices to show a private right. This is because Section 1983 itself "supplies a remedy for the vindication of rights secured by federal statutes."[268] Yet, again, the Court recently set the bar high for when an otherwise secured right can be enforced under Section 1983.

The *Gonzaga* framework provides the method for determining whether a statutory provision unambiguously confers individual rights enforceable under Section 1983. [269] Courts must use traditional tools of statutory interpretation to assess whether Congress intended to create specific federal rights for an identifiable class of beneficiaries, rather than simply protecting a general zone of interest. A provision satisfies this if it uses "rights-creating" language that focuses unmistakably on the benefited class.[270] Conversely, statutory provisions with aggregate, programmatic purposes, lacking individual-centric language, or primarily aimed at federal fund distribution do not create enforceable rights. [271] If a provision meets this standard, it secures rights presumptively enforceable under Section 1983, aligning with the statute's text and purpose. [272] Here, the analysis is no different from the private right analysis in *Sandoval*.[273] Then, the burden shifts to the state to rebut this presumption by showing that Congress specifically foreclosed a remedy under the Section by demonstrating that Congress shut the door to private enforcement either (1) expressly, through specific evidence from the statute, or (2) impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under 1983.[274]

In *Talevski*, the Court found unambiguous "rights-creating" language that is "phrased in terms of persons benefited"[275] in the Federal Nursing Home Reform Act (FNHRA),[276] which specified

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268. *Gonzaga*, 536 U.S. at 284.

269. *Id.* at 283.

270. *Id.* at 283–84; *see supra* note 88 (discussing what constitutes "rights-creating" language, per *Cannon*).

271. *Gonzaga*, 536 U.S. at 285–86; *Talevski*, 599 U.S. at 167.

272. *Gonzaga*, 536 U.S. at 284; *Talevski*, 599 U.S. at 168.

273. *Gonzaga*, 536 U.S. at 285–86; Alexander v. Sandoval, 532 U.S. 275, 286 (2001).

274. *Gonzaga,* 536 U.S. at 297.

275. *Talevski*, 599 U.S. at 183–84.

276. 42 U.S.C. § 1396r.

certain rights afforded to each nursing home resident, such as "[t]he *right* to be free from . . . any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat the resident's medical symptoms."[277] Meanwhile, in *Gonzaga*, the Court held that the Family Rights and Privacy Act of 1974 (FERPA)[278] did not use rights-creating language and thus was not enforceable under Section 1983.[279] The relevant section of FERPA states: "[n]o funds shall be made available . . . to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . . ) of students without the written consent of their parents. . . ."[280] In FERPA's case, the Court held that the provision lacked both a "rights-creating" language and an "individually focused terminology," making it fail the enforceability test of Section 1983.[281]

It is noteworthy that in *Arkansas NAACP*, the Eighth Circuit decided to punt on this question of a private right by saying it is "unclear."[282] Should the court be asked to take a position on this question through a Section 1983 challenge, however, it would be easy to hold that Section 2 does not confer an individual right.

Section 2 protects "the *right* of any citizen . . . to vote."[283] This seemingly straightforward conferral of a right is complicated by the Supreme Court's requirement that such provisions be phrased in terms of the persons benefited. [284] Because of this, a reviewing court could easily argue that Section 2 fails this requirement because, rather than defining a right, privilege, or immunity,[285] it creates a prohibition. Specifically, it limits when suffrage can be denied or abridged, focusing on the actions of the state rather than the class of individuals intended to be protected.[286] This structure is analogous to the language of FERPA discussed in *Gonzaga*, where the Court

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277. 42 U.S.C. § 1396r(c)(1)(A)(ii) (emphasis added).

278. 20 U.S.C. § 1232g.

279. *Gonzaga*, 536 U.S. at 287.

280. Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g(b)(1) (1974).

281. *Gonzaga*, 536 U.S. at 287.

282. Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1209–10 (8th Cir. 2023).

283. 42 U.S.C. § 1973 (emphasis added).

284. Health & Hosp. Corp. v. Talevski, 599 U.S. 166, 183–84 (2023) (explaining that "the provision . . . is 'phrased in terms of the persons benefited' . . . and has an 'unmistakable focus on the benefited class").

285. 42 U.S.C. § 1983.

286. 42 U.S.C. § 1973.

emphasized that statutes must clearly define the benefited class to create enforceable rights.[287]

This distinction is further illustrated by cases like *Cannon* and *Sandoval*.[288] In *Cannon*, the Court differentiated between statutes drafted "with an unmistakable focus on the benefited class," and those drafted "simply as a ban on discriminatory conduct . . . or as a prohibition."[289] Similarly, in *Sandoval*, the Court explained that "[s]tatutes that focus on the regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons."[290] Consequently, a court could easily deny Section 2 enforcement through Section 1983.

Given the importance of preserving a private cause of action under Section 2, both private plaintiffs and courts should adopt interpretations that minimize the risk of generating adverse precedent that could ultimately dismantle the provision. Accordingly, Section 3 of the Voting Rights Act should be read as explicitly creating a private right to enforce Section 2. This approach offers a more robust and comprehensive interpretation, making it less susceptible to attacks based on the wording of Section 2.

## CONCLUSION

The Voting Rights Act stands as a monumental achievement in the struggle for civil rights, a "triumph for freedom as huge as any victory that has ever been won on any battlefield."[291] However, due to the slow dismantling of its various provisions, Section 2 is now one of the few remaining provisions central to this triumph. Its continued vitality is paramount to ensuring fair and equal ballot box for all Americans.

However, the Supreme Court's increasingly restrictive stance on implied private causes of action presents a significant challenge. Relying solely on implied rights to enforce Section 2 is a precarious strategy, potentially leaving vulnerable communities without recourse against discriminatory voting practices. To address this, this Note proposes a novel approach: leveraging the text and structure of the VRA to identify not merely an implied, but an *explicit* private

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287. *Gonzaga*, 536 U.S. at 284.
288. *See supra* Part I.B.1–2.
289. Cannon v. Univ. of Chi., 441 U.S. 677, 690–93 (1979).
290. Alexander v. Sandoval, 532 U.S. 275, 289 (2001).
291. Johnson, *supra* note 1.

right of action. This argument is buttressed through examination of the VRA's legislative history and the contemporary legal context, demonstrating that Congress intended to empower private citizens to enforce its provisions. While various scholars and activists have advocated for alternative theories, this Note contends that establishing an explicit private cause of action for Section 2 remains the most robust, effective, and comprehensive means of safeguarding voting rights in the face of evolving challenges.