Washington and Lee Law Review

Volume 81 | Issue 3 Article 8

Summer 2024

A Major Wrong on a Private Right of Action Under the Voting Rights Act

Macin Graber

Joshua A. Douglas
University of Kentucky, joshuadouglas@uky.edu

A Major Wrong on a Private Right of Action Under the Voting Rights Act

By Macin Graber* & Joshua A. Douglas†

Abstract

In Brnovich v. Democratic National Committee*, Justice Neil Gorsuch posited in a short concurrence that Section 2 of the Voting Rights Act ("VRA") does not confer a private right of action. That idea seemingly came out of nowhere, as Supreme Court precedent was clear and no one had suggested that the VRA did not allow private parties to bring suit. Justice Gorsuch's one-paragraph concurrence was both unsupported and wrong. Even the single case he cited did not support his proposition.*

An Arkansas district court and then the Eighth Circuit, however, followed Justice Gorsuch's lead, ruling that only the federal Department of Justice ("DOJ") may bring suits to challenge voting practices that violate Section 2 of the VRA. These holdings are yet another attempt to further undermine the vital protections of the VRA. The implications of giving the DOJ the sole responsibility for bringing all Section 2 cases is stark, as it will ultimately lead to underenforcement of the Act. The plaintiffs, likely fearful of a bad decision from the Supreme Court that would apply nationwide, chose not to appeal. Therefore, at

* J.D., Saint Louis University School of Law, 2024. To my co-author, I am eternally grateful for your confidence in me and the opportunity to partner with you on this important Essay. I also wish to extended my gratitude to Ben Bott, Megan Melvin, Dereck Basinger, and Professor Marcia McCormick for their constant personal and professional support.

† Acting Associate Dean for Research and Ashland, Inc.-Spears Distinguished Research Professor of Law, University of Kentucky J. David Rosenberg College of Law. Thanks to Chad Flanders, Tony Gaughan, and Mike Pitts for offering useful comments on an earlier draft of this paper.

least in the states within the Eighth Circuit, the VRA has lost some of its force given that private plaintiffs cannot bring suit.

History and precedent, however, show that Section 2 of the VRA implicitly confers a private right of action. Although the plaintiffs in the Eighth Circuit chose not to seek Supreme Court review, the issue is sure to recur. When it does reach the Supreme Court, the Justices should reject the Eighth Circuit's holding and rule that private plaintiffs may bring claims under Section 2. More broadly, this episode shows that Justices should pay close attention to the seemingly offhand comments that other Justices make and refute them explicitly.

Table of Contents

> *The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.*
>
> Chief Justice John Marshall, *Marbury v. Madison*[1]

INTRODUCTION

When Supreme Court Justices write, the legal community tends to listen—even if the statement from the Justice is largely unsupported and even if following the Justice's suggestion would upend decades of precedent.

1. 1 Cranch 137, 163 (1803).

That is the story of the most recent attack on the Voting Rights Act ("VRA"),[2] one of the most important civil rights laws in our nation's history. For decades, private plaintiffs have used Section 2 of the Act—which prohibits discrimination on the basis of race in all aspects of the voting process—to effectuate the right to a free and equal vote. Private individuals and groups have invoked the Act hundreds of times over the past sixty years to challenge redistricting maps and unfair voting practices.[3]

Then Justice Neil Gorsuch, joined by Justice Clarence Thomas, suggested in a short concurrence that perhaps the VRA does not allow private litigants to bring suit after all. Justice Gorsuch offered little support for this assertion and what he did cite actually refutes his claim. But an Arkansas district court and then the Eighth Circuit took the bait, declaring that private plaintiffs cannot bring suit under Section 2 despite the wealth of precedent and evidence of congressional intent that support a private right of action. That ruling puts the efficacy of the VRA in serious peril. The Supreme Court already gutted Section 5 of the VRA in its 2013 ruling in *Shelby County v. Holder*.[4] The decision to eliminate a private right of action represents another attack on the VRA.

The plaintiffs chose not to seek Supreme Court review, so for now organizations and others in the seven states within the Eighth Circuit cannot bring cases under Section 2 of the VRA.[5] The plaintiffs' lawyers contend that they can still challenge the

2. Voting Rights Act of 1965, 52 U.S.C. §§ 10101, 10301–14, 10501–08, 10701–02 (originally enacted as Pub. L. No. 89-110, 79 Stat. 437 (1965)).

3. *See* Ellen D. Katz, Brian Remlinger, Andrew Dziedzic, Brooke Simone & Jordan Schuler, *To Participate and Elect: Section 2 of the Voting Rights Act at 40*, UNIV. MICH. L. SCH. VOTING RTS. INITIATIVE (2022), https://perma.cc/T75P-U8MS (providing "a database and accompanying analysis of cases decided under Section 2 of the Voting Rights Act between June 29, 1982 to July 1, 2023").

4. 570 U.S. 529 (2013).

5. *See* Hansi Lo Wang, *After Controversial Court Rulings, a Voting Rights Act Lawsuit Takes an Unusual Turn*, NPR (July 4, 2024), https://perma.cc/3EV6-JJ4L. The states in the Eighth Circuit are Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

map in question under the Civil Rights Act,[6] but they also likely feared a restrictive ruling on the VRA from the Supreme Court that would apply nationwide.[7] The issue, however, is sure to recur, especially as other states are pressing the same argument.[8] When it eventually reaches the Supreme Court, the Justices should reject the Eighth Circuit's approach and instead find that Section 2 of the VRA allows a private right of action.

The story this Essay tells, however, is not just about one case and one statute, as important as they are for protecting the most fundamental right in our democracy, especially for racial minorities who have suffered underrepresentation and unfair attacks on their ability to participate. It is also a story of how a Supreme Court Justice can plant a seed in one case that might blossom into a deadly weed in another. No Justice pushed back against Justice Gorsuch when he laid the foundation for saying that Section 2 of the VRA might not confer a private right of action. That was a mistake. The Justices should pay scrupulous attention to the seemingly offhand comments that another Justice makes in a separate opinion and refute the invitation to change the law before the idea can gain traction in the lower courts.[9]

This Essay proceeds in three Parts. After this Introduction, Part I dissects Justice Gorsuch's concurrence in *Brnovich v.*

---

6. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.); *see also* Charquia Wright, *Circuit Circus: Defying SCOTUS and Disenfranchising Black Voters*, 83 OHIO ST. L.J. 601, 617–30 (2022).

7. *See* Rick Hasen, *Breaking: Plaintiffs, Likely Fearing the Supreme Court Will Make Things Worse, Decline to Seek Supreme Court Review of Eighth Circuit Case Holding There's No Right for Private Parties to Sue Under Section 2 of Voting Rights Act*, ELECTION L. BLOG (June 28, 2024), https://perma.cc/Y7AL-V8GF.

8. *See* Madeleine Greenberg, *Republican Attorneys General Attack Voting Rights in Latest Amicus Brief*, DEMOCRACY DOCKET (Dec. 11, 2023), https://perma.cc/8BHW-Y4F8 (highlighting an amicus brief in a case from Louisiana "on behalf of 13 attorneys general—from Alabama, Alaska, Georgia, Idaho, Indiana, Iowa, Kansas, Mississippi, Montana, Nebraska, South Carolina, Texas and West Virginia" arguing against a private right of action under Section 2 of the VRA).

9. Perhaps Justice Gorsuch's comment was an attempt to invoke the "one last chance" doctrine of constitutional avoidance that the Roberts Court sometimes employs to signal future changes in its jurisprudence. *See* Richard M. Re, *The Doctrine of One Last Chance*, 17 GREEN BAG 2D 173, 174–78, 181–83 (2014).

Democratic National Committee,[10] which spawned this trouble, explaining why his comment on the potential lack of a private right of action under Section 2 of the VRA failed on its own terms.[11] Part II recounts how an Arkansas district court and then the Eighth Circuit ran with this idea and rejected a private right of action under Section 2, saying that only the federal Department of Justice ("DOJ") can bring claims under the Act. Part III explains why the Eighth Circuit's decision is so concerning for the enforcement of the VRA given that the DOJ is unable to litigate every Section 2 case. The Essay concludes by suggesting that the other Justices should not have let a seemingly stray remark in a concurrence fester without response, especially given the harm to democracy that ensued.

Throughout its history, the VRA has been subject to numerous attacks.[12] The voting rights community is playing whac-a-mole, fighting against each new attempt to gut its effectiveness.[13] Justice Gorsuch's comment, which a district judge and then the Eighth Circuit embellished upon, was not the first attempt to harm the Act and likely will not be the last.

---

10. 594 U.S. 647 (2021).

11. *Id.* at 690 (Gorsuch, J. concurring).

12. *See, e.g.*, JESSE H. RHODES, BALLOT BLOCKED: THE POLITICAL EROSION OF THE VOTING RIGHTS ACT 59–60, 95–96, 186 (2017); Franita Tolson, *Election Law "Federalism" and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211, 2222–37 (2018) (recounting lower courts' rulings in VRA cases); Richard L. Hasen, *Race or Party? How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58, 60–62, 70–71 (2014); Atiba R. Ellis, *Economic Precarity, Race, and Voting Structures*, 104 KY. L.J. 607, 613–17 (2015) (exploring the risks of courts' deference to state interests and authority in voting rights cases).

13. *See e.g.*, Maggie Astor, *Seven Ways Alabama Has Made It Harder to Vote*, N.Y. TIMES (June 23, 2018), https://perma.cc/P2CB-NM9T (outlining the ways in which "Alabama has enacted a slew of restrictive voting laws and policies"); Adam Liptak, *Splitting 5-4, Supreme Court Grants Alabama's Request to Restore Voting Restrictions*, N.Y. TIMES (July 2, 2020), https://perma.cc/T398-DP49 ("[T]he Supreme Court . . . blocked a trial judge's order that would have made it easier for voters in three Alabama counties to use absentee ballots in this month's primary runoff election."); Christopher Ingraham, *The Smoking Gun Proving North Carolina Republicans Tried to Disenfranchise Black Voters*, WASH. POST (July 29, 2016), https://perma.cc/238A-ALTD ("The federal court in Richmond found that the primary purpose of North Carolina's [law] wasn't to stop voter fraud, but rather to disenfranchise minority voters.").

One lesson, then, is that those who support the VRA and its goals—including the other Justices—must refute any attempts to scuttle the Act from their inception.

I. JUSTICE GORSUCH CREATES A CONTROVERSY WHERE NONE EXISTED BEFORE

In 2021, the Supreme Court rejected a challenge to two Arizona laws in *Brnovich v. Democratic National Committee*.[14] Plaintiffs, the Democratic National Committee and other affiliated parties, argued that the two laws—one that required election officials not to count provisional ballots cast at the wrong precinct and the other that prohibited third parties from collecting and delivering ballots—violated Section 2 of the VRA.[15] The plaintiffs claimed the laws created a discriminatory effect that harmed minority voters.[16] The Court, in a 6–3 ruling, soundly rejected the argument, narrowing the scope of Section 2.[17] Justice Alito, writing for the majority, created five "guideposts" for construing a claim of vote denial under Section 2 that had little basis in the text of the Act.[18] Each guidepost makes it harder for plaintiffs to bring a successful claim of vote denial.

The decision, only eight years after the Court effectively gutted Section 5 of the VRA in *Shelby County*, was bad enough in cabining the reach of Section 2. But Justice Gorsuch made it worse. In a one-paragraph concurrence in *Brnovich*, which Justice Thomas joined, Justice Gorsuch wrote to "flag one thing"—that none of the parties had raised.[19] "Our cases have assumed—without deciding—that the Voting Rights Act of 1965 furnishes an implied cause of action under [Section] 2," he said,

14. *See Brnovich,* 594 U.S. at 690.

15. *Id.* at 661–62.

16. *Id.* at 662.

17. *See id.* at 690 ("Arizona's out-of-precinct policy and HB 2023 do not violate [Section] 2 of the VRA, and HB 2023 was not enacted with a racially discriminatory purpose.").

18. *Id.* at 669–72; *see also* Joshua A. Douglas, THE COURT V. THE VOTERS: THE TROUBLING STORY OF HOW THE SUPREME COURT HAS UNDERMINED VOTING RIGHTS 123–37 (2024) (arguing that "Justice Samuel Alito made up the law").

19. *Brnovich,* 594 U.S. at 690 (Gorsuch, J., concurring).

citing the Court's 1980 decision in *City of Mobile v. Bolden*.[20] He then claimed that lower federal "*courts*"—notice the plural—have treated the existence of a private right of action under Section 2 as an "open question."[21] It is not clear where Justice Gorsuch came up with the idea to raise it in this case.[22]

Justice Gorsuch cited only one case in his statement that lower "courts" had treated the issue as an "open question—a Fourth Circuit decision from 1981.[23] That Fourth Circuit case, however, did not analyze whether Section 2 offers a private right of action or suggest it was an "open question."[24] The case involved a claim for vote dilution based on the city of Columbia, South Carolina, using an at-large election system for its city council.[25] Most of the opinion dealt with the plaintiffs' arguments under the Fourteenth and Fifteenth Amendments.[26] On the VRA claim, the court noted that the Supreme Court had decided just a year before, in *City of Mobile v. Bolden*,[27] that proof of discriminatory impact alone is insufficient to support a vote dilution claim under Section 2—a holding that Congress

20. *Id.* (citing City of Mobile v. Bolden, 446 U.S. 55, 60 & n.8 (1980)).

21. *Id.*

22. The briefs in that 1980 case Justice Gorsuch cited included a short discussion of whether Section 2 includes a private right of action. The Plaintiffs' briefs contended that the private right of action under Section 2 might be broader than a claim under the Fifteenth Amendment, while the government's briefs questioned the existence of a private right of action under Section 2 altogether. *See* Supplemental Brief for Appellees, City of Mobile v. Bolden, 446 U.S. 55 (1980) (Nos. 77-1844, 78-357), 1979 WL 199654, at *7–10; Reply Brief for Appellants, *City of Mobile*, 446 U.S. 55 (No. 78-357), 1979 WL 213593, at *21–23. But it is not clear whether Justice Gorsuch reviewed those briefs in crafting his *Brnovich* concurrence or if there was another source for his idea.

23. *See id.* (citing Washington v. Finlay, 664 F.2d 913, 926 (4th Cir. 1981)). In 2023, Justice Thomas also raised the issue in dissent in *Allen v. Milligan*—another Section 2 case that a private plaintiff initiated and won—when he highlighted that the majority's opinion "does not address whether [Section] 2 contains a private right of action." 599 U.S. 1, 90 n.22 (2023) (Thomas, J., dissenting).

24. *See* Washington v. Finlay, 664 F.2d 913, 916–29 (4th Cir. 1981).

25. *Id.* at 917.

26. *Id.* at 918–27.

27. 446 U.S. 55 (1980).

explicitly overruled in its 1982 amendments to the VRA.[28] In the Fourth Circuit's short discussion, the court said, "assuming without deciding that the claims were not abandoned during trial and that there is a private right action under §§ 1971 and 1973 . . . we conclude that . . . plaintiffs may not succeed on either claim."[29] The Fourth Circuit did not need to decide the issue explicitly because it rejected the plaintiffs' claims on the merits,[30] and it hardly treated the issue as an "open question" like Justice Gorsuch suggested.[31]

In fact, the Fourth Circuit cited two cases to support its "assumption" that Section 2 confers a private right of action.[32] The first was the Supreme Court's decision in *City of Mobile*, which, as recounted above, narrowly construed the substantive standard under Section 2 to be coterminous with the Fifteenth Amendment after "[a]ssuming, for present purposes, that there exists a private right of action to enforce this statutory provision."[33] The second case the Fourth Circuit cited was a 1971 federal district court decision from Pennsylvania under the Civil Rights Act about police officers who were serving as Republican Party committeemen at the polls.[34] The court in that case noted that the plaintiffs "contend that, although 42 U.S.C. § 1971(c) authorizes the Attorney General to institute an action for the United States to enjoin violations of § 1971(b), nevertheless a private action for violations of § 1971(b) also lies."[35] The court went on to say that it "agree[d] with this contention" but that the statute did not apply to the facts of the case, which involved no allegations of racial discrimination.[36]

---

28. *Finlay*, 664 F.2d at 926 (citing *City of Mobile*, 446 U.S. at 60 & n.8); Voting Rights Act Amendments of 1982, sec. 2, § 3, Pub. L. No. 97-205, 96 Stat. 131, 134 (current version at 52 U.S.C. § 10301).

29. *Finlay*, 664 F.2d at 926.

30. *Id.* at 920.

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

32. *Finlay*, 664 F.2d at 927.

33. *City of Mobile v. Bolden*, 446 U.S. 55, 60 (1980).

34. Brooks v. Nacrelli, 331 F. Supp. 1350, 1351–52 (E.D. Pa. 1971), *aff'd*, 473 F.2d 955 (3d Cir. 1973).

35. *Id.*

36. *Id.*

To recap: Justice Gorsuch claimed in *Brnovich* that "courts" had declared it an open question whether the VRA allows private plaintiffs to bring suit under Section 2. His only support for that contention was a single Fourth Circuit case from 1981.[37] That Fourth Circuit case "assum[ed] without deciding" that Section 2 allows a private right of action, citing a 1980 Supreme Court decision about a private plaintiff bringing suit under Section 2 as well as a federal district court case from 1971 that agreed with the plaintiffs' assertion that a Civil Rights Act provision on voting allowed for a private right of action. [38] It is quite a leap to use a Fourth Circuit case from forty years prior, which itself cited cases that recognized the existence of a private right of action, to suggest that "courts" had questioned the practice. Justice Gorsuch's citation of this case was disingenuous, at best. And he failed to mention the intervening forty years of robust VRA litigation from private parties.[39]

But no Justices called him out in *Brnovich* for this sleight of hand. And then both a federal district court and the Eighth Circuit turned a seemingly insignificant comment into binding law for seven states.

II. THE EIGHTH CIRCUIT'S WEAK ANALYSIS

Only a few months after Justice Gorsuch "flag[ged]" an issue that no one had raised in *Brnovich*, an Arkansas federal court became the first court ever to hold that Section 2 of the

37. Notably, Justice Gorsuch did not even cite *Alexander v. Sandoval*, the 2001 case in which the Court narrowed the ability of federal courts to imply a private right of action. 532 U.S. 275, 286 (2001). Of course, the Court has ruled in favor of private plaintiffs in VRA cases several times even after that 2001 decision, including as recently as 2023. *See* Allen v. Milligan, 599 U.S. 1, 39 (2023).

38. Washington v. Finlay, 664 F.2d 913, 926 (4th Cir. 1981) (citing *City of Mobile*, 446 U.S. at 60).

39. *See, e.g.*, Ellen D. Katz, *Section 2 After Section 5: Voting Rights and the Race to the Bottom*, 59 WM. & MARY L. REV. 1961, 1963 (2018) (detailing how, "[i]n the years since *Shelby County*, plaintiffs have relied on section 2 of the VRA to challenge those retrogressive electoral practices that section 5 would have blocked"); *see also* Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 115–33 (2010) (exploring the evolution of the courts' role in overseeing elections).

VRA does not confer a private right of action.[40] The case was a relatively routine Section 2 dispute. The NAACP brought suit to challenge Arkansas's state legislative map for diluting the strength of Black voters because the map did not include enough majority-Black districts.[41] The plaintiffs presented data that the district maps resulted in discrimination toward Arkansas's Black population by "cracking" and "packing" them into districts, making it nearly impossible for Black voters to elect their preferred representatives in many places.[42] The map included only eleven majority-Black districts out of one hundred, even though 16 percent of the state's population identified as Black individuals.[43]

The initial briefing at the district court did not consider the question of whether the VRA would allow this private plaintiff, the NAACP, to bring suit under Section 2 of the Act. The NAACP, like other organizations, had routinely invoked Section 2 in previous redistricting cases.[44] Judge Lee P. Rudofsky issued an order directing the plaintiffs to explain why it had standing, and the state defendant's Response in Opposition to the Motion for Preliminary Injunction argued against standing, but neither document mentioned the issue of

---

40. *See* Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 586 F. Supp. 3d 893, 897 (E.D. Ark. 2022), *aff'd*, 86 F.4th 1204 (8th Cir. 2023).

41. *Id.*

42. *See* Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1207 (8th Cir. 2023). The court explained,

> The complaint alleged "vote dilution," which comes in two forms. The first is "packing," which involves drawing lines that concentrate a cohesive political group into a limited number of districts. An example is turning three possible majority-minority districts into just two by bunching the group's members into two supermajority districts. The other, "cracking," is basically the opposite. It takes a cohesive political group and "divide[s]" its members "among multiple districts," where other voters can numerically overwhelm them. Here, Arkansas has allegedly done a combination of both, making it harder for black voters to elect the representatives they prefer. *Id.* (citations omitted).

43. *See id.*

44. *Cf. id.* (C.J. Smith, dissenting) ("[S]cores if not hundreds of cases have proceeded under the assumption that Section 2 provides a private right of action." (quoting Coca v. City of Dodge City, 669 F. Supp. 3d 1131, 1140 (D. Kan. 2023))).

a private right of action.[45] But the day after the defendant filed its Response in Opposition to Motion for Preliminary Injunction, the court issued a docket order saying that it expected "the parties to be prepared to discuss at the hearing: (1) whether private right of action questions are considered jurisdictional in the Eighth Circuit; and (2) whether there is a private right of action that authorizes the claims brought and the relief sought by the Plaintiff-organizations in this case."[46] The parties then briefed the issue.[47] Thus, Judge Rudofsky, not the state defendant, introduced the question into the litigation, surely spurred by Justice Gorsuch's statement in *Brnovich*.

Turning to the "open question" that Justice Gorsuch had raised, Judge Rudofsky held that Section 2 of the VRA did not confer a private right of action—despite decades of precedent involving Section 2 cases from private parties.[48] Rejecting prior case law, legislative history, and common practice, Judge Rudofsky stated that "the text and structure [of the VRA] strongly suggest that exclusive enforcement authority resides in the Attorney General of the United States."[49] As legal reporter Ian Millhiser explained, Judge Rudofsky's analysis was wrong, particularly regarding Supreme Court precedent, and his

45. *See* Order at 2, Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 586 F. Supp. 3d 893 (E.D. Ark. 2022) (No. 4:21-cv-01239-LPR), ECF No. 44 ("[T]he fairest way to proceed is to give each Plaintiff an opportunity to alleviate the Court's concern by supplementing its vague standing allegations with a more detailed affidavit or declaration."); *see also* Response in Opposition to Motion for Preliminary Injunction at 6, *Ark. State Conf. NAACP*, 586 F. Supp. 3d 893 (No. 4:21-cv-01239-LPR) ("At the outset, the State notes that Plaintiffs have thus far failed to affirmatively establish they have standing to challenge Arkansas's legislative districts . . . .").

46. Docket Order, *Ark. State Conf. NAACP*, 586 F. Supp. 3d 893 (No. 4:21-cv-01239-LPR), ECF No. 55.

47. Reply Memorandum of Law in Support of Plaintffs' Motion for Preliminary Injunction, *Ark. State Conf. NAACP*, 586 F. Supp. 3d 893 (No. 4:21-cv-01239-LPR); Defendants' Surreply in Opposition to Plaintiffs' Motion for a Preliminary Injunction, *Ark. State Conf. NAACP*, 586 F. Supp. 3d 893 (No. 4:21-cv-01239-LPR).

48. *See Ark. State Conf. NAACP*, 586 F. Supp. 3d at 905–07.

49. *Id.* at 911.

decision would "neutralize one of the most important protections against racism in American elections."[50]

The plaintiff appealed the decision to the Eighth Circuit, which, on a 2–1 vote, affirmed Judge Rudofsky's opinion.[51] Judge David Stras wrote the opinion, in which he discounted the Supreme Court and Eighth Circuit precedent, as well as legislative history, to find that only the DOJ can bring a claim to enforce Section 2 of the VRA.[52]

Regarding precedent, the Eighth Circuit acknowledged that the Supreme Court has long recognized that private parties can bring Section 2 lawsuits.[53] In 1969, the Court decided in *Allen v. State Board of Elections*[54] that Section 5 of the VRA includes a private right of action.[55] The Eighth Circuit mentioned *Allen* in passing but failed to explain why the same logic does not apply to Section 2.[56] Then, in the 1996 case of *Morse v. Republican Party of Virginia*,[57] a majority of the Supreme Court explicitly stated that Section 2 includes a private right of action.[58] The Court found that private parties can sue to enforce Section 10 because "[i]t would be anomalous . . . to hold that both [Section] 2 and [Section] 5 are enforceable by private action but [Section] 10 is not."[59] Justice Stevens, writing the controlling opinion in *Morse*, said that "since 1965" Congress has "clearly

50. Ian Millhiser, *A Trump Judge's New Decision Would Undo More Than 50 Years of Voting Rights Law*, VOX (Feb. 18, 2022), https://perma.cc/E7WN-GFNF.

51. *Ark. State Conf. NAACP*, 86 F.4th 1204, 1218 (8th Cir. 2023).

52. *See id.*, 86 F.4th at 1208, 1217 (noting that while Eighth Circuit precedent stated that standing to sue under the VRA extended to aggrieved persons in addition to the Attorney General, "we should not read too much into a stray comment about a potentially different issue").

53. *See* Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1214–15 (8th Cir. 2023) ("The advocacy groups argue that courts have been adjudicating [Section] 2 claims brought by private plaintiffs for years, so they must be available. But assuming their existence, and even discussing them, is different from actually *deciding* that a private right of action exists.").

54. 393 U.S. 544 (1969).

55. *See id.* at 557 ("It is consistent with the broad purpose of the Act to allow the individual citizen standing to insure that his city or county government complies with the [Section] 5 approval requirements.").

56. *See Ark. State Conf. NAACP*, 86 F.4th at 1211.

57. 517 U.S. 186 (1996).

58. *Id.* at 232 (plurality opinion); *Id.* at 240 (Breyer, J., concurring).

59. *Id.* at 232.

intended" that a "private right of action under Section 2" exists.[60] Justice Breyer's concurrence acknowledged the same thing.[61] But Judge Stras of the Eighth Circuit discounted *Morse*, saying that the statements from the two different opinions were dicta because the case involved Section 10, not Section 2.[62] The court failed to acknowledge that several circuit courts—including the Eighth Circuit in a prior case—had recognized the power of Supreme Court dicta and the propriety of normally following it.[63] The Eighth Circuit also rejected the numerous Supreme Court cases that had vindicated private plaintiffs' rights under Section 2, saying those cases had merely assumed the existence of a private right of action without actually deciding the issue.[64] Further, Judge Stras never acknowledged that Chief Justice Roberts, in the *Shelby County* ruling that effectively gutted Section 5 of the Act, tried to temper that decision by highlighting the role of Section 2 litigation, proclaiming that "the Federal Government *and individuals*

60. *Morse*, 517 U.S. at 232 (plurality opinion).

61. *See id.* at 240 (Breyer, J., concurring) ("I believe Congress intended to establish a private right of action to enforce [Section] 10, no less than it did to enforce [Sections] 2 and 5.").

62. *See Ark. State Conf. NAACP*, 86 F.4th at 1215–16 (8th Cir. 2023) ("The question in *Morse* was about the private enforceability of [Section] 10, which has different requirements and language than [Section] 2." (citation omitted)).

63. *See In re* Pre-Filled Propane Tank Antitrust Litig., 860 F.3d 1059, 1064 (8th Cir. 2017) ("Appellate courts should afford deference and respect to Supreme Court dicta, particularly where, as here, it is consistent with longstanding Supreme Court precedent."); United States v. Serawop, 505 F.3d 1112, 1122 (10th Cir. 2007) ("[W]e are bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements." (internal quotation omitted)); Hollis v. Lynch, 827 F.3d 436, 448 (5th Cir. 2016) ("[W]e are generally bound by Supreme court dicta, especially when it is recent and detailed." (internal quotation omitted)); McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991) ("We think that federal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement." (citation omitted)).

64. Arkansas State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1214–15 (8th Cir. 2023).

have sued to enforce [Section] 2," and that "Section 2 is permanent [and] applies nationwide."[65]

The Eighth Circuit also rejected its own precedent from 1989 in which it had acknowledged that "aggrieved persons" can bring suit under Section 2, claiming that the statement was not necessary to the judgment because the plaintiff's case was "doomed" either way.[66] That is, Judge Stras discounted the court's explicit statement that Section 2 conferred a private right of action, saying that the court was merely "assuming" it given that the court rejected the plaintiff's lawsuit on other grounds.[67] He also suggested that this prior case was really about standing, not a private right of action.[68] The court further failed to acknowledge a Fifth Circuit decision from a month earlier that had rejected the argument that Section 2 does not include a private right of action.[69] The majority similarly neglected to mention an Eleventh Circuit case from 2020 which stated, "The VRA, as amended, clearly expresses an intent to allow private parties to sue the States."[70] These cases underscore the fact that, at least during the time period when Congress amended the Act, Congress often left the recognition of a private right of action to the courts instead of including it in the statutory text—another point that the Eighth Circuit majority simply ignored.[71]

---

65. Shelby County. v. Holder, 570 U.S. 529, 537 (2013) (emphasis added) (citing Johnson v. De Grandy, 512 U.S. 997 (1994)); *see* Katz, *supra* note 39, at 1972 (noting that "the Court's suggestion that [S]ection 2 alone provided adequate protection against racial discrimination in voting indicates that it anticipated [S]ection 2 would continue to operate as it had in the past").

66. *See Ark. State Conf. NAACP*, 86 F.4th at 1217 (refusing to follow Roberts v. Wamser, 883 F.2d 617, 624 (8th Cir. 1989)).

67. *Id.*

68. *Id.*

69. *See* Robinson v. Ardoin, 86 F.4th 574, 587–88 (5th Cir. 2023).

70. Ala. State Conf. of NAACP v. Alabama, 949 F.3d 647, 652 (11th Cir. 2020). Notably, the Eleventh Circuit decided this case a year before *Brnovich* and Justice Gorsuch's claim that courts had declared the issue an "open question." *Cf.* Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 690 (2021). Justice Gorsuch, of course, did not cite this Eleventh Circuit case.

71. *See* Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 91 F.4th 967, 971 (8th Cir. 2024) (Colloton, J., dissenting from denial of rehearing en banc):

The Eighth Circuit also rejected the clear legislative history. A committee report leading up to Congress's amendment of the VRA in 1982 said that Congress "intended that citizens have a private cause of action to enforce their rights under Section 2."[72] Another report said that "the Committee reiterates the existence of the private right of action under Section 2, as has been clearly intended by Congress since 1965."[73] The court refused to follow this legislative history because Congress had not explicitly included a private right of action in the text of the statute itself.[74] Instead of crediting the more likely reason—that no one really thought it was an issue because courts and litigants had always recognized that private plaintiffs could bring suit under Section 2—the court suggested (with no evidence) something more nefarious: that it could have been "a deliberate effort to amend a statute through committee reports."[75]

Moreover, the Eighth Circuit failed to acknowledge that Congress implicitly agreed with the courts' recognition of a private right of action under the VRA by never amending the law on this point, despite ample opportunities to do so.[76] Justice

---

> Congress, at least during the period of the enactment of the several Titles of the Civil Rights Act, tended to rely to a large extent on the courts to *decide* whether there should be a private right of action, rather than determining this question for itself. Cases [from the Supreme Court] and numerous cases from other federal courts gave Congress good reason to think that the federal judiciary would undertake this task. (quoting Cannon v. Univ. of Chi., 441 U.S. 667, 718 (1979) (Rehnquist, J., concurring)).

In 2001, the Supreme Court rejected the judicial recognition of an implied private right of action without evidence of statutory intent but still noted that "[t]he 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." Alexander v. Sandoval, 532 U.S. 275, 286 (2001). The Court did not mention or overturn the 1996 *Morse* case, which recognized a private right of action in the VRA, in that 2001 decision.

72. H.R. REP. NO. 97-227, at 32 (1981).

73. S. REP. NO. 97-417, at 30 (1982).

74. *See Ark. State Conf. NAACP*, 86 F.4th at 1214 ("[H]ere, the legislative history does not complete the statutory story. Rather, it tells a different story, one not reflected in the text of anything Congress passed.").

75. *Id.* (citation omitted).

76. *See id.* (claiming that, in the context of amending the VRA, "Congress's attention was on *how* states and political subdivisions could violate [Section] 2, not *who* could sue").

Barrett, when she was a law professor, once praised the Supreme Court's "strong presumption of irreversibility" in statutory cases under the "theory that Congress's failure to amend a statute in response to a judicial interpretation of it reflects approval of that interpretation."[77] Chief Justice Roberts similarly noted, when rejecting Alabama's argument to overturn precedent regarding the test the Court uses for Section 2 in redistricting cases, that Congress could alter the Supreme Court's approach to Section 2 if it wanted: "Congress is undoubtedly aware of our construing [Section] 2 to apply to districting challenges. It can change that if it likes. But until and unless it does, statutory stare decisis counsels our staying the course."[78] The federal courts have always allowed private litigants to bring Section 2 claims, and Congress has amended or reenacted the VRA several times on other issues—including to overturn Supreme Court case law—without altering private plaintiffs' ability to bring suit.[79]

Chief Judge Lavenski Smith of the Eighth Circuit wrote a vigorous dissent, which included a long string cite to the numerous cases in which courts have vindicated the rights of private plaintiffs in Section 2 cases.[80] As he put it, "[r]ights so foundational to self-government and citizenship should not depend solely on the discretion or availability of the government's agents for protection."[81]

77. Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1015, 1019 (2003) (internal quotation omitted); *see also* VALERIE C. BRANNON ET AL., CONG. RSCH. SERV., R46562, JUDGE AMY CONEY BARRETT: HER JURISPRUDENCE AND POTENTIAL IMPACT ON THE SUPREME COURT (2020), https://perma.cc/7C27-5LTA (PDF) ("Barrett posited that the most compelling explanation for statutory stare decisis is respect for the Constitution's division of power between the legislative and judicial branches . . . ." (internal quotation omitted)).

78. Allen v. Milligan, 599 U.S. 1, 39 (2023) (citation omitted).

79. *See* Katz, Remlinger, Dziedzic, Simone & Schuler, *supra* note 3; *see also* R. SAM GARRETT, CONG. RSCH. SERV., R47520, THE VOTING RIGHTS ACT: HISTORICAL DEVELOPMENT AND POLICY BACKGROUND 17–23 (Apr. 25, 2023), https://perma.cc/XH8M-KKZ6.

80. Ark. State Conf. NAACP v. Ark. Bd. Of Apportionment, 86 F.4th 1204, 1218–24 (8th Cir. 2023) (Smith, C.J., dissenting).

81. *Id.* at 1219 (Smith, C.J., dissenting).

The plaintiffs appealed the decision to the entire en banc Eighth Circuit, but to no avail.[82] A majority of judges refused to rehear the case.[83] Judge Stras, the author of the panel opinion, wrote a concurrence to the order, joined by Judge Ray Gruender—the other member of the panel majority—to reject the plaintiff's arguments and reaffirm the decision.[84] He did, however, suggest (without deciding) that "[i]t may well turn out that private plaintiffs can sue to enforce [Section] 2 of the Voting Rights Act under § 1983," making the decision to cut off direct private enforcement of the Act even more perplexing.[85] Perhaps this statement convinced the plaintiffs not to appeal further to the Supreme Court. Judges Smith, Colloton (a noted conservative jurist),[86] and Kelly would have granted the en banc petition for various reasons stated in their robust dissent, including the Supreme Court precedent that refuted the majority's decision, but their three votes were not enough.[87]

---

82. Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 91 F.4th 967, 967 (8th Cir. 2024) (en banc).

83. *Id*.

84. *Id*. at 967–69 (Stras, J., concurring).

85. *Id.* (Stras, J., concurring).

86. Judge Colloton, who was a George W. Bush appointee to the Eighth Circuit, was on Donald Trump's shortlist for a Supreme Court nomination. *See Steven Colloton,* NW. U. L. REV., https://perma.cc/M478-RTU7 (last visited June 11, 2024); *see also* Ryan Gittler, *Yale Grad Eyed for Supreme Court*, YALE DAILY NEWS (Jan. 20, 2017), https://perma.cc/2357-K2HY (discussing Colloton's background as a federal judge of the U.S. Court of Appeals for the Eighth Circuit and his clerkship for former Chief Justice William Rehnquist).

87. *See Ark. State Conf. NAACP*, 91 F.4th at 969–74 (Colloton, J., dissenting)

> The panel majority in this case rendered an ambitious and unprecedented ruling that an aggrieved voter does not have a private right of action under [Section] 2 of the Voting Rights Act of 1965 to enforce the right to vote. . . . The panel majority also seems oblivious to the risk of anachronistic error and to the disruption of settled expectations. . . . For this court to proceed on a hunch that a reconstituted Supreme Court would repudiate *Allen* and *Morse*, and thereby affirm a decision that refused to follow *Morse*, would be too clever by half. (citations omitted).

III. THE DANGEROUS IMPLICATIONS OF THE EIGHTH CIRCUIT'S DECISION

Unless reversed, the Arkansas district court and the Eighth Circuit's decisions will wreak havoc on the vital protections the VRA provides, as they cut off one of the main avenues for invoking the Act against unfair vote dilution and vote denial. The decisions are now the law in the states within the Eighth Circuit given that the plaintiffs chose not to appeal to the Supreme Court, likely fearing an adverse ruling that would apply nationwide.[88] Thus, VRA protection is unequal across the country, though advocates believe they can still seek relief under Section 2 of the VRA by bringing a claim under another civil rights statute, 42 U.S.C. § 1983.[89] Indeed, a North Dakota district court allowed a private plaintiff to use Section 2 of the VRA in a redistricting case by seeking relief under Section 1983.[90]

But plaintiffs should not have to jump through these legal hoops to effectuate their fundamental rights to fair and equal representation, making the Arkansas district court and Eighth Circuit rulings still harmful to the goals of the VRA. So far, those courts are alone in their analysis to reject a private right

88. *See* Wang, *supra* note 5.

89. *See* Crystal Hill, *Can the Voting Rights Act Survive if Individuals Can't Sue Under Section 2?*, DEMOCRACY DOCKET (July 11, 2024), https://perma.cc/G4WV-JWTU; *see also* Comment, *Election Law—Voting Rights Act—Eighth Circuit Holds Voting Rights Act Does Not Contain a Private Cause of Action to Enforce Section 2.*—Arkansas State Conference NAACP v. Arkansas Board Of Apportionment*, 86 F.4th 1204 (8th Cir. 2023)*, 137 HARV. L. REV. 2424 (2024) (noting that "private plaintiffs facing attacks on voting rights have another line of defense: a private cause of action under § 1983 to enforce [S]ection 2. The voting rights that [S]ection 2 guarantees to all citizens are privately enforceable under § 1983, which provides a complementary remedy to the VRA's remedies for state and local violations of voting rights").

90. Turtle Mountain Band of Chippewa Indians v. Jaeger, No. 3:22-CV-22, 2022 WL 2528256, at *4 (D.N.D. July 7, 2022) (explaining that "unlike the complaint in *Arkansas State Conf. NAACP*, the Plaintiffs here seek relief under § 1983 *and* Section 2 of the VRA. So, the Plaintiffs argue they have a private right of action to support their Section 2 claim because the complaint seeks to enforce Section 2 in conjunction with § 1983").

of action.[91] As a three-judge district court in Alabama recognized, "[h]olding that Section Two does not provide a private right of action would work a major upheaval in the law, and we are not prepared to step down that road today."[92] Similarly, a district court in Kansas explicitly refused to follow the Arkansas district court decision, instead finding that Section 2 provides a private right of action.[93] The court recognized that

> scores if not hundreds of cases have proceeded under the assumption that Section 2 provides a private right of action. All the while, Congress has consistently reenacted the Voting Rights Act without making substantive changes, impliedly affirming the previously unanimous interpretation of Section 2 as creating a private right of action.[94]

These courts saw what the Arkansas federal court and Eighth Circuit did not: a declaration that there is no private right of action under Section 2 of the VRA is contrary to precedent, legislative history, and the settled expectations of litigants and voting rights advocates. It would also severely undercut one of the most important statutes Congress has ever passed.

The VRA of 1965 transformed the nation.[95] Following the travesties of the Bloody Sunday march in Selma, Alabama, President Lyndon B. Johnson urged Congress to pass a voting rights bill that protected African Americans in both having an opportunity to cast a ballot and ensuring that those votes translated into elected officials representative of the

---

91. *See, e.g.*, City of Hammond v. Lake Cnty. Jud. Nominating Comm'n, No. 2:21CV160-PPS, 2024 WL 68279, at *4 (N.D. Ind. Jan. 4, 2024) (calling the Eighth Circuit's opinion "rather surprising" and refusing to follow it).

92. Singleton v. Merrill, 582 F. Supp. 3d 924, 1032 (N.D. Ala. 2022) (three-judge court), *aff'd sub nom*. Allen v. Milligan, 599 U.S. 1, 17 (2023).

93. *See* Coca v. City of Dodge City, 669 F. Supp. 3d 1131, 1140 (D. Kan. 2023) ("[U]ntil the Supreme Court or Tenth Circuit provide otherwise, the Court holds that Section 2 contains an implied private right of action.").

94. *Id.* at 1140.

95. *See generally* RHODES, *supra* note 12, at 24–57; BRIAN K. LANDSBERG, FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT (2007); ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 211–15 (2009) (discussing the VRA of 1965 and key provisions of the VRA's amendment in 1982).

population.[96] Congress enacted the VRA to "banish the blight of racial discrimination in voting, which has infected the electoral process" and to address "an insidious and pervasive evil."[97] This task was never intended to fall solely upon the shoulders of the DOJ.

Section 2 of the VRA initially stated, "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen . . . to vote on account of race or color."[98] Then in 1980, the Supreme Court weakened Section 2 by holding that it "no more than elaborates upon that of the Fifteenth Amendment . . . [and] was intended to have an effect no different from that of the Fifteenth Amendment itself."[99] Under this reading, a plaintiff could prove a violation only if they could demonstrate that the legislature had a discriminatory intent or purpose.[100] In cabining the reach of Section 2, the Court "[assumed], for present purposes, that there exists a private right of action to enforce this statutory provision" but said nothing more about the issue.[101] Congress then amended Section 2 in response to the Court's holding, changing the language to make clear that the provision also reaches laws that impose a discriminatory effect.[102] There was no need for Congress to address the private right of action question given that the Court had assumed it existed. But, as noted above, two committee reports also indicated that

96. *See Civil Rights Era*, JIM CROW MUSEUM, https://perma.cc/P3CD-CYCW (discussing the civil rights timeline from 1944–1972); *see also* President Lyndon B. Johnson, Speech to Congress on Voting Rights (Mar. 15, 1965) (transcript available in the Records of the United States Senate, National Archives), https://perma.cc/YUB8-ETEZ.

97. South Carolina v. Katzenbach, 383 U.S. 301, 308–09 (1966).

98. Voting Rights Act of 1965 § 2, Pub. L. No. 89-110, 79 Stat. 437, 437 (current version at 52 U.S.C. § 10301).

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

100. *Id.* at 60–63.

101. *Id.* at 60.

102. *See* Voting Rights Act Amendments of 1982, sec. 2, § 3, Pub. L. No. 97-205, 96 Stat. 131, 134 (current version at 52 U.S.C. § 10301) ("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 . . . to vote on account of race or color.").

legislators intended the statute to allow private plaintiffs to bring suit.[103] It would make little sense for Congress to amend the VRA to respond to the Court's narrow interpretation on the substantive standard but not clarify the question on a private right of action if anyone actually thought the issue was open. The whole point of Section 2 is to offer a strong layer of protection against state legislatures that disenfranchise minority voters or dilute the value of their votes once cast.[104]

The Supreme Court has long recognized that the VRA cannot reach its true potential without the ability of private parties to bring suit. In the first case to recognize a private right of action, albeit under Section 5, the Court in 1969 acknowledged that the Act "does not explicitly grant or deny private parties" the ability to sue but that Congress's goal was to provide voting rights for all citizens, particularly minority individuals.[105] Chief Justice Warren explained that the guarantees of the Act "might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement . . . ."[106] Further, "[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."[107] Chief Justice Warren also noted that a private party could always bring suit under the Fifteenth Amendment to effectuate the right to vote, "but it was the inadequacy of just these suits for securing the right to vote that prompted Congress to pass the VRA."[108]

Individual plaintiffs and interest groups have brought the majority of VRA lawsuits against state legislatures and local governments to vindicate the right to an equal election system for all.[109] In fact, almost all of the Supreme Court's most

---

103. H.R. REP. NO. 97-227, at 32 (1981); S. REP. NO. 97-417, at 30 (1982).

104. *See e.g.*, Allen v. Milligan, 599 U.S. 1, 41 (2023) ("[F]or the last four decades, this Court and the lower federal courts have repeatedly applied the effects test of [Section] 2 as interpreted in *Gingles* and, under certain circumstances, have authorized race-based redistricting as a remedy for state districting maps that violate [Section] 2.").

105. Allen v. State Bd. of Elections, 393 U.S. 544, 554–55 (1969).

106. *Id.* at 554–56.

107. *Id.*

108. *Id.* at 556 n.21.

109. *See* Katz, Remlinger, Dziedzic, Simone & Schuler, *supra* note 3.

important rulings on voting rights, including redistricting disputes, stem from lawsuits that individuals or interest groups have initiated.[110] As the dissent in the Eighth Circuit pointed out, there have been over 400 Section 2 cases filed in federal courts across the nation since 1982, with at least 182 successful claims.[111] The Attorney General has brought only fifteen cases on its own.[112] That is, private plaintiffs are the main drivers of Section 2 litigation. As recently as 2023, the Supreme Court upheld the use of Section 2 when the plaintiffs behind the case were private citizens: "[W]e have applied [Section] 2 to States' districting maps in an unbroken line of decisions stretching four decades."[113]

The Eighth Circuit's decision may significantly harm voting rights in the states within the circuit and potentially all across the United States if other courts follow suit. States are now pressing the argument in other circuits.[114] Cutting off private plaintiffs as litigants will result in fewer VRA claims, as the Attorney General simply does not have the funding, resources,

110. *See e.g.*, City of Mobile v. Bolden, 446 U.S. 55, 58 (1980) ("The appellees brought this suit in the Federal District Court for the Southern District of Alabama as a class action on behalf of all Negro citizens of Mobile."); *see also* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 186–87 (2008) ("[T]he Indiana Democratic Party and the Marion County Democratic Central Committee (Democrats) filed suit in the Federal District Court for the Southern District of Indiana . . . ."); Cooper v. Harris, 581 U.S. 285, 296 (2017) ("[R]egistered voters in the two districts . . . brought suit against North Carolina officials . . . ."); Rucho v. Common Cause, 588 U.S. 684, 689–90 (2019) ("Voters and other plaintiffs in North Carolina and Maryland challenged their States' congressional districting maps as unconstitutional partisan gerrymanders"); Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 662 (2021) ("In 2016, the Democratic National Committee and certain affiliates brought this suit . . . ."); *Milligan*, 599 U.S. at 16 ("Three groups of plaintiffs brought suit . . . [t]he first group was led by Dr. Marcus Caster, a resident of Washington County . . . [t]he second group, led by Montgomery County resident Evan Milligan . . . [and] [f]inally, the *Singleton* plaintiffs . . . amended their complaint . . . .").

111. *See* Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1219 n.8 (8th Cir. 2023) (Smith, C.J., dissenting) (citing Katz, Remlinger, Dziedzic, Simone & Schuler, *supra* note 3).

112. *Id.*

113. *Milligan*, 599 U.S. at 38 (citing Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 660 n.5 (2021)).

114. *See, e.g.*, Corrected Joint Response Brief of Defendants-Appellees at 1, 30–32, City of Hammond v. Lake Cty. Bd. of Elections, No. 24-1125, 2024 WL 2304101 (7th Cir. May 10, 2024); *see also* Greenberg, *supra* note 8.

and—in some presidential administrations—the incentive to defend the constant attacks on racial and language minorities.[115] The DOJ is also not equipped to spearhead all lawsuits to vindicate every citizen's right to vote. States and localities draw new districting maps every ten years—spawning legitimate vote dilution claims—and they enact all sorts of other election rules every year.[116] Although the Supreme Court in *Brnovich* made it much harder to bring successful claims of vote denial under Section 2, those claims are still viable, especially against egregious suppression efforts that have a discriminatory effect. Section 2's purpose is—and has always been—to protect the most fundamental right of all citizens to exercise the franchise.[117] The reality is that if only the DOJ can bring these suits, then there will be much less Section 2 litigation and states will feel even more emboldened to pass stringent election laws. The denial of a private right of action therefore fits within the Supreme Court's recent overall approach in voting rights cases to defer to state legislatures in their election rules.[118] It also

115. *See e.g.*, Charles J. Durante, *Diluting the Voting Rights Act*, 34 DEL. LAW. 22, 23 (2016) (noting how the 1979 DOJ filed sixty voter dilution cases while the 1980 DOJ filed only ten and how Assistant Attorney General John G. Roberts took the lead in opposing the VRA); *see also* Ari Berman, *Inside John Roberts' Decades-Long Crusade Against the Voting Rights Act*, POLITICO MAG. (Aug. 10, 2015), https://perma.cc/DZY7-CFGD ("The Reagan administration turned to Roberts to make the case against the House bill's version of Section 2. Roberts wrote upwards of 25 memos opposing an effects test for Section 2 . . . ."); *see generally* Michael J. Pitts, *Defining "Partisan" Law Enforcement*, 18 STAN. L. & POL'Y REV. 324, 329–30 (2007) (defining a "partisan law enforcement decision" in the context of the [VRA] as "when a federal official makes an illegitimate or largely illegitimate individual law enforcement decision intended to directly further the ability of the decision-maker's party to win elections").

116. *See, e.g.*, *Ark. State Conf. NAACP*, 86 F.4th at 1207; *see also National Summary*, ALL ABOUT REDISTRICTING, https://perma.cc/34DK-MB6X (last visited June 11, 2024).

117. *See* President Lyndon B. Johnson, *supra* note 96 ("Every citizen must have an equal right to vote. There is no reason which can excuse the denial of that right. There is no duty which weighs more heavily on us than the duty to ensure that right.").

118. *See* Joshua A. Douglas, *(Mis)trusting States to Run Elections*, 92 WASH. U. L. REV. 553, 553–602 (2015) ("First, the Court has accepted almost any assertion of a state interest to protect the integrity of the election . . . Second, the Court has discouraged facial challenges to state voting laws but has sustained facial challenges to congressional enactments . . . ."); *see also*

contributes to the overall demise of the VRA as a superstatute that guarantees robust civil rights.[119]

Due to the *Shelby County* decision, legislatures in previously covered jurisdictions under the VRA no longer have to obtain preclearance to implement election laws that may discriminate,[120] and if the Eighth Circuit decision stands, legislatures will no longer have to answer to individual citizens or pro-democracy groups when they enact discriminatory voting rules. With no one but the federal DOJ to vindicate the most precious right in America against discriminatory practices, minorities could suffer further harms on their ability to participate in elections and secure effective representation. The result is a skewed democracy.

CONCLUSION

The Eighth Circuit's decision to deny a private right of action under Section 2 of the VRA was bad enough, and hopefully the Supreme Court will reject the ruling once the issue eventually reaches the Court. But the implications of what happened in this case are broader than the vital ability of private individuals to effectuate the aims of the VRA. Justice Gorsuch began this firestorm with zero pushback from his colleagues. No Justice responded to his *Brnovich* concurrence to correct the record. "Courts" had not questioned whether Section 2 offers a private right of action. Even the one case he cited did not support the proposition. To the contrary, the Supreme Court and lower federal courts have heard hundreds of Section 2 cases that private parties have initiated, with numerous successful claims that ultimately vindicated voters' rights. But because Justice Gorsuch raised the issue, an Arkansas district court and then the Eighth Circuit felt emboldened to question the practice.

Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM. & MARY BILL RTS. J. 59–89 (2021) (discussing "why the federal courts' jurisprudence toward the right to vote in these recent cases is so concerning").

119. *See* Guy-Uriel E. Charles & Luis Fuentes-Rowher, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1420–24, 1429–30, 1435–38 (2015); RHODES, *supra* note 12; Astor, *supra* note 13.

120. Shelby County v. Holder, 570 U.S. 529, 557 (2013).

Perhaps nothing would have changed if the *Brnovich* dissent had publicly disputed Justice Gorsuch's ruminations from his concurrence. But maybe, if the Justices had thoroughly refuted Justice Gorsuch's draft, he would have tempered or withdrawn it before publication. We may never know. At a minimum, at least another Justice would have been on record to explain why Justice Gorsuch's approach was both wrong and dangerous. Ultimately, the story of this case should offer a cautionary tale to the Justices: they should not ignore side comments or suggestions from their colleagues, even if they come in a short, four-sentence concurring opinion. It is possible that an ambitious lower court judge will take the bait—with detrimental consequences for a fair and equal democracy.