VOTING RIGHTS AND PRIVATE RIGHTS OF ACTION: AN EMPIRICAL STUDY OF LITIGATION UNDER SECTION 2 OF THE VOTING RIGHTS ACT, 1982-2024

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ABSTRACT

The Voting Rights Act is perhaps the most effective civil rights law ever enacted, bringing millions of Americans who have historically been discriminated against into the democratic polity and facilitating the election of candidates of their choice. But for more than a decade, the rights guaranteed by this landmark statute have been undermined by the courts. Recently, the Eighth Circuit has eroded what remains of the Act by holding that private plaintiffs cannot sue to enforce the protections of Section 2 in federal court. This holding—which conflicts with several other circuits, as well as prior Supreme Court decisions regarding implied rights of action to enforce other parts of the Voting Rights Act—seems likely to be reviewed by the Court.

To assess the potential impact of a possible nationwide ban on private plaintiffs bringing Section 2 claims, this Article reports findings from a comprehensive empirical study of over 1500 challenges brought in federal court between 1982 and 2024. It finds that over 90% of Section 2 challenges were brought by private plaintiffs rather than the Attorney General. Moreover, private plaintiffs were highly successful in these challenges, winning nearly two-thirds of the time. The Article then explains why, if Section 2 lacks a private cause of action, the federal government is ill-equipped as both a practical and a political matter to fill this gap in enforcement.

INTRODUCTION 570
I. A CONCISE HISTORY OF THE VOTING RIGHTS ACT 573
A. Background 573
B. The Voting Rights Act of 1965 575
C. Mobile v. Bolden and the 1982 Amendments 578
D. Key Supreme Court Decisions 582
1. Thornburg v. Gingles 582
2. Shelby County v. Holder 583
3. Brnovich v. Democratic National Committee 584

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II. THE LAW GOVERNING PRIVATE RIGHTS OF ACTION 586
A. Express Private Rights of Action 586
B. Implied Private Rights of Action 587
C. Private Rights of Action and the Voting Rights Act 589
1. Allen v. State Board of Elections 589
2. 1975 Amendments 590
3. Morse v. Republican Party of Virginia 591
4. Eighth Circuit 593
III. EMPIRICAL STUDY OF SECTION 2 LITIGATION 597
A. Study Design and Data Collection 597
B. Limitations 603
C. Results 605
1. Total Challenges and Timing 605
2. Location 606
3. Types of Election Practices 611
4. Plaintiffs 614
5. Outcomes 616
D. Implications 617
CONCLUSION 621

INTRODUCTION

The Voting Rights Act[1] is often called the most effective civil rights law in history.[2] Enacted in 1965 in the wake of the Selma protests,[3] it enfranchised millions of Americans who had historically been denied the right to vote.[4] Equally significant, it led to the election of thousands of minority-supported candidates at the federal, state, and local level,

1. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 438-39 (1965).

2. *See, e.g.*, Allen v. Milligan, 599 U.S. 1, 10 (2023) (calling the Voting Rights Act "the most successful civil rights statue in the history of the Nation" (internal quotations and citation omitted)); Michael Kang, *The Post-Trump Rightward Lurch in Election Law*, 74 STAN. L. REV. ONLINE 55, 57-58 (2022) (explaining that the "Voting Rights Act of 1965" is "often characterized as the most successful congressional enactment of the twentieth century"); Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 FLA. ST. U. L. REV. 573, 573 (2016) ("The Voting Rights Act is often hailed as the most successful civil rights statute in American history.").

3. *See* DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965, at 69-85 (1978).

4. *Id.* at 19 tbl.1-3 & 189 tbl.6-1; BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY (1992); James E. Alt, *The Impact of the Voting Rights Act on Black and White Voter Registration in the South*, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT OF 1965-1990, at 351, 372 (Chandler Davidson & Bernard Grofman eds., 1994) (finding that "the Voting Rights Act transformed the basis of the southern electoral system, inasmuch as it was the vehicle for destroying the institutional barriers to black registration").

transforming the dynamics of political power in legislative bodies across the country and helping usher in a truly multiracial democracy.[5] For good reason, then, the Voting Rights Act has been labeled a "superstatute"[6] and an "extraordinary law."[7]

But more recently, the Act has been undermined by the courts. In *Shelby County v. Holder* (2013), the Supreme Court effectively gutted Section 5, which had required jurisdictions with a history of racial discrimination in voting to obtain federal authorization prior to implementing changes to their election systems.[8] Then, in *Brnovich v. Democratic National Committee* (2021), the Court weakened another pillar of the Act—Section 2—by making it more difficult to establish discrimination involving the process of casting and counting votes, such as early voting procedures and otherwise-valid votes cast in the wrong precinct.[9] In these decisions' wake, dozens of states imposed new barriers to voting, including photo ID and proof of citizenship requirements, shortened voting hours and days, and limits on mail-in voting,[10] helping increase the so-called "racial gap" in voter participation.[11]

A less visible, but critically important, issue regarding who can sue to enforce Section 2 presents the most recent threat to the Voting Rights Act. For decades, private plaintiffs—including civil rights organizations and individual voters—have filed Section 2 claims in federal court,[12] including all Section 2 cases decided by the Supreme Court

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5. *See generally* Andrea Bernini et al., *Race, Representation, and Local Governments in the U.S. South: The Effect of the Voting Rights Act*, 131 J. POL. ECON. 994 (2023); Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations*, *in* QUIET REVOLUTION IN THE SOUTH, *supra* note 4, at 335; John A. Garcia, *The Voting Rights Act and Hispanic Political Representation in the Southwest*, 16 PUBLIUS 49 (1986).

6. *See* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: Death of a Superstatute*, 100 IOWA L. REV. 1389, 1390-91 (2015) (defining a "superstatute" as "a category of landmark legislation that addresses a significant public policy problem that if left unresolved would call into question a fundamental constitutional commitment").

7. Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 692 (2021) (Kagan, J., dissenting).

8. Shelby Cnty., Ala. v. Holder, 570 U.S. 529, 547-557 (2013).

9. *See generally* 594 U.S. 647 (2021).

10. *See generally* Jasleen Singh & Sarah Carter, *States Have Added Nearly 100 Restrictive Voting Laws Since SCOTUS Gutted the Voting Rights Act 10 Years Ago*, BRENNAN CTR. FOR J., (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/4ZHM-S6X5]; Leadership Conference Education Fund, *Democracy Diverted: Polling Place Closures and the Right to Vote* 6-8 (Sept. 2019), https://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf [https://perma.cc/623T-YLJA]

11. *See generally* Kevin Morris & Michael Miller, *Did* Shelby County v. Holder *Increase the Racial Turnout Gap?* (last revised June 5, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4736882 [https://perma.cc/JEW8-ZSLW]; Stephen B. Billings et al., *Disparate Racial Impacts of Shelby County v. Holder on Voter Turnout*, 230 J. PUB. ECON. 105047 (2024).

12. Singleton v. Allen, 740 F. Supp. 3d 1138, 1166 n.10 (N.D. Ala. 2025) (three-judge court) ("P]rivate plaintiffs have brought over 400 Section Two cases resulting in

to date.[13] But in *Brnovich*, two Justices suggested that private plaintiffs may "lack a cause of action" for Section 2 claims.[14] A district court swiftly seized on this apparent invitation, *sua sponte* raising and then dismissing a suit brought by two civil rights organizations regarding Arkansas's legislative redistricting plan because "the Voting Rights Act does not provide . . . a private right of action."[15] The Eighth Circuit affirmed this holding,[16] thus creating a split with three other circuits and multiple three-judge district courts.[17] Compounding the issue, the Eighth Circuit recently held private plaintiffs also cannot maintain a private right of action for Section 2 claims via Section 1983,[18] the widely-invoked civil rights statute.[19] As a result, it seems likely that the Supreme Court will soon weigh in on this issue.[20]

To assess the potential impact of a nationwide decision holding that private plaintiffs cannot bring Section 2 claims, this Article presents findings from an original dataset of Section 2 challenges filed in federal court from 1982 through 2024. This dataset, which includes both cases that resulted in a published court decision and those that did not, represents the most comprehensive collection of Section 2

judicial decisions since 1982. . . .") (citing Ellen D. Katz et al., *To Participate and Elect: Section 2 of the Voting Rights Act 40*, Univ. Mich. L. Sch. Voting Rts. Initiative (2024), https://voting.law.umich.edu [https://perma.cc/9M3E-6MTL]).

13. *See infra* note 105 (listing cases).

14. *Brnovich*, 594 U.S. at 690 (Gorsuch, J., concurring). As Macin Graber and Josh Douglas have aptly noted, Justice Gorsuch and Thomas's concurrence "create[d] a controversy where none existed before." 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, 1132 (2024).

15. Ark. State Conf. NAACP v. Ark. Bd. of App., 586 F. Supp. 3d 895, 921 (E.D. Ark. 2022).

16. Ark. State Conf. NAACP v. Ark. Bd. of App., 86 F.4th 1204, 1207 (8th Cir. 2023), *reh'g en banc denied*, 91 F.4th 967 (8th Cir. 2024).

17. *See* Robinson v. Ardoin, 86 F.4th 574, 587-88 (5th Cir. 2023) ("Section 2 provides a private right of action"); Ala. State Conf. of NAACP v. Ala., 949 F.3d 647, 651-54 (11th Cir. 2020) (holding that Section 2 is "enforceable by private parties"), *vacated as moot*, 141 S. Ct. 2618 (2021); Mixon v. Ohio, 193 F.3d 389, 406 (6th Cir. 1999) ("An individual may bring a private cause of action under Section 2…"); *see, e.g.*, Singleton v. Allen, No. 2:21-CV-01291, 2025 WL 1342947 (N.D. Ala. May 8, 2025) (three-judge court); League of United Latin Am. Citizens v. Abbott, No.21-CV-00529, 2021 WL 5762035, at *1 (W.D. Tex. Dec. 3, 2021) (three-judge court); Ga. State Conf. of NAACP v. Ga., No. 1:21-CV-5338, 2022 WL 18780945, at *7 (N.D. Ga. Sept. 26, 2022) (three-judge court).

18. 42 U.S.C. § 1983.

19. Turtle Mountain Band of Chippewa Indians v. Howe, 137 F.4th 710, 721 (8th Cir. 2025), *stay granted*, 2025 WL 2078664 (July 24, 2025), *and petition for writ of certiorari filed*, 2025 WL 2557078 (Sept. 2, 2025) (No. 25-253). The U.S. Supreme Court granted the cert. petition in *Turtle Mountain Band of Chippewa Indians v. Howe* on May 18 and vacated and remanded the case back to the lower court for further consideration in light of *Louisiana v. Callais*, 146 S. Ct. 2644 (2026) (with Justice Jackson dissenting).

20. Emergency Application to Stay the Eighth Circuit's Mandate Pending Petition for Writ of Certiorari 19-23, Turtle Mountain Band of Chippewa Indians v. Howe, No. 25A52, 2025 WL 1957081 (July 15, 2025) (contending that "[t]here is a reasonable probability that four Justices will vote to grant review" on whether there is a private right of action to enforce Section 2).

litigation to date. It reveals that the overwhelming majority—more than 90%—of Section 2 challenges since 1982 were brought by private plaintiffs. In addition, it finds private plaintiffs were highly successful in Section 2 challenges, obtaining relief almost two-thirds of the time when a final outcome could be ascertained.

The remainder of this Article proceeds as follows. Part II summarizes the history of the Voting Rights Act, including the background leading up to its 1965 enactment, the adoption of the so-called "results test" in Section 2 in 1982 in response to the Supreme Court's decision in *City of Mobile v. Bolden*, and recent court decisions applying the Act. Part III then addresses the law governing private rights of action, first generally and then more specifically regarding other sections of the Voting Rights Act. It also recounts and critiques the recent Eighth Circuit decision holding there is no implied private right of action to enforce Section 2. Part IV discusses the methodology, limitations, findings, and implications from the data collected and presented in this Article. In particular, it contends that litigation brought by the Attorney General alone would not be adequate to effectively enforce Section 2. Part V concludes.

I. A CONCISE HISTORY OF THE VOTING RIGHTS ACT

A. Background

At the start of the 1960s, Black voter registration in much of the South remained shockingly low due to widespread use of discriminatory tactics like poll taxes, literacy tests, closure of voter registration offices, threats, and the reality of racially-motivated violence.[21] In all Southern states, less than a third of Blacks were registered, and even fewer in states like Alabama (13.7%) and Mississippi (5.2%).[22] Some individual counties were even more extreme; in Bullock County, Alabama, only 5 of 4,450 Black residents were registered to vote, while Lowndes and Wilcox Counties had no Black voters at all.[23]

21. *See* GARROW, *supra* note 3, at 8-10; ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 258-59 (2000); Burke Marshall, *Federal Protection of Negro Voting Rights*, 27 L. & CONTEMP. PROBS. 455 *passim* (1962).

22. GARROW, *supra* note 3, at 11 tbl.1-2; U.S. COMM'N ON C.R., VOTING: 1961 COMMISSION ON CIVIL RIGHTS REPORT 252-308 (1961) [hereinafter "1961 Civil Rights Report"].

23. U.S. COMM'N ON C.R., *supra* note 22, at 25-26.

Federal efforts to increase these figures were met with widespread resistance.[24] The Civil Rights Act of 1957,[25] which established the Civil Rights Division and authorized the Attorney General to bring suit in federal court to prevent local officials from interfering with the right to vote, had limited success in the face of delays by Eisenhower administration officials, the laborious and time-consuming process of case-by-case adjudication, and unsympathetic Southern federal judges.[26] Between 1956 and 1960, the total voting-age Black population registered in the South increased by only four percent.[27] The 1960 Civil Rights Act[28] and the Kennedy administration's more aggressive posture on civil rights, along with voter registration drives by civil rights organizations, spurred a modest additional increase.[29] But by 1964, a minority of Black voters in most Southern states—including all of those in the so-called "Deep South"—were registered to vote.[30]

The Selma campaign, and the federal government's response to it, dramatically changed things.[31] Selma, Alabama was emblematic of white supremacists' resistance to civil rights; even though a majority of Selma's population (about 15,000) was Black, only 156 Blacks had been able to register to vote by 1961.[32] Voter registration drives by local activists and national organizations and litigation by the Civil Rights Division increased this count only slightly in the next several years.[33] By late 1964 after President Lyndon Johnson won a landslide victory in the presidential race, and dozens of Democrats were elected to

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24. *See* Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 911 (2008) ("In the late 1950s and early 1960s, Congress passed several pieces of legislation designed to secure a fair registration process for African-Americans. Yet Southern resistance proved remarkably intense.").

25. Pub. L. No. 85-315, 71 Stat. 634.

26. GARROW, *supra* note 3, at 12-14; KEYSSAR, *supra* note 21, at 260; BRIAN K. LANDSBERG, FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT 27-147 (2007) (recounting in detail some of this litigation).

27. GARROW, *supra* note 3, at 11; Keyssar, *supra* note 21, at 260.

28. Pub. L. No. 86-449, 74 Stat. 86 (codified as amended in scattered sections of 18 U.S.C.).

29. GARROW, *supra* note 3, at 18-19; KEYSSAR, *supra* note 21, at 261-63; *see also* STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969, at 261-71 (1976) (describing in more detail the Kennedy administration's Justice Department work in voting rights and the role of civil rights organizations like NAACP, SNCC, CORE, and the National Urban League in voter registration drives in the early 1960s).

30. GARROW, *supra* note 3, at 19 tbl. 1-3. Specifically, a minority of voting-age Blacks were registered in Alabama (23%), Arkansas (49.3%), Georgia (44%), Louisiana (32%), Mississippi (6.7%), South Carolina (38.7%), and Virginia (45.7%) in 1964. *Id.*

31. *See* MICHAEL WALDMAN, THE FIGHT TO VOTE 141 (2016) ("Modern American democracy began in a hail of police batons and kicks on the Edmund Pettus Bridge in Selma.").

32. GARROW, *supra* note 3, at 31.

33. *Id.* at 31-34; *see* Margalit Fox, *Amelia Boynton Robinson, a Pivotal Figure at the Selma March, Dies at 104*, N.Y. TIMES (Aug. 26, 2015), https://www.nytimes.com/2015/08/27/us/amelia-boynton-robinson-a-pivotal-figure-at-the-selma-march-dies-at-104.html [https://perma.cc/L38J-ANHH].

Congress on his coattails[34]—Dr. Martin Luther King, Jr., and the leadership of the Southern Christian Leadership Conference (SCLC) had identified Selma as the target of its voting rights campaign for the following year.[35]

Weeks of mass meetings and demonstrations in Selma started in January 1965, along with beatings and other retaliation by local white officials.[36] The climax of the Selma campaign came on Sunday, March 7, when hundreds of peaceful marchers—led by future Congressman John Lewis—were violently assaulted by Alabama state troopers and sheriff's deputies on horseback on the Edmund Pettus Bridge.[37] Photographers and network television cameras captured these abhorrent scenes and broadcast them worldwide.[38]

Reaction to "Bloody Sunday" was immediate and widespread. Newspaper editorials decried the violence, and sympathy marches broke out in cities across the country.[39] In a joint address to Congress, President Johnson said that "we shall overcome" and called for Congress to enact voting rights legislation.[40] He instructed leadership at the Department of Justice "to write the goddamnedest toughest voting rights act that you can devise."[41] After several months of hearings, the Voting Rights Act passed Congress by overwhelming margins in both chambers,[42] and President Johnson signed it into law on August 6, 1965.[43]

B. The Voting Rights Act of 1965

The Voting Rights Act immediately banned literacy tests and similar devices in jurisdictions with a history of discrimination in voting,[44]

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34. *See generally* THEODORE H. WHITE, THE MAKING OF THE PRESIDENT 1964 (1965).

35. GARROW, *supra* note 3, at 35-39.

36. *Id.* at 45. This picture was reprinted on page 1 of the *New York Times* and page 2 of the *Washington Post*.

37. *Id.* at 73-77.

38. *Id.* at 78-81; WALDMAN, *supra* note 31, at 151.

39. GARROW, *supra* note 3, at 87-91.

40. Lyndon B. Johnson, *President Lyndon Johnson's Speech to Congress on Voting Rights* (Mar. 15, 1965), *available at* https://www.archives.gov/legislative/features/voting-rights-1965/johnson.html [https://perma.cc/Z292-SAX7].

41. HOWELL RAINES, MY SOUL IS RESTED 337 (1983).

42. The final vote on enactment was 333-85 in the House and 77-19 in the Senate. 111 CONG. REC. 11752 (May 26, 1965) (Roll Call Vote No. 96); *id.* at 16285-86 (July 9, 1965) (Roll Call Vote No. 179).

43. *See* Remarks of President Lyndon B. Johnson on the Voting Rights Act of 1965 (Aug. 6, 1965), *reprinted in* Weekly Compilation of Presidential Documents 52-53 (Monday, August 9, 1965).

44. *See* Voting Rights Act of 1965 § 4(a)-(c), Pub. L. No. 89-110, 79 Stat. 437, 438-39 (1965) (codified at 52 U.S.C. § 10303(a)-(c)). The prohibition on literacy tests for voter registration was extended nationwide by the 1970 renewal of the Voting Rights Act. *See* Voting Rights Act Amendments of 1970 § 6, Pub. L. No. 91-285, 84 Stat. 314, 315 (1970).

and it authorized federal officials to directly register minority voters.[45] (Poll taxes were separately eliminated in federal elections by the Twenty-Fourth Amendment in 1964 and held unconstitutional in state elections by the Supreme Court in 1966.[46]) It also authorized federal observers to monitor the voting and counting process,[47] and prohibited intimidation of voters under threat of criminal sanction.[48] The results were nothing short of remarkable. From 1965 to 1968, the percentage of Black voters registered to vote in the South increased to 62%,[49] and some individual states saw even more dramatic increases.[50]

But perhaps the most important provision in the original Voting Rights Act was Section 5, which barred certain jurisdictions, primarily in the South, with a history of racial discrimination in voting[51] from implementing any changes to their election laws and procedures until they proved to the Attorney General or a three-judge federal court sitting in Washington, DC that the change lacked both a discriminatory purpose and a discriminatory effect.[52] This novel requirement, commonly known as preclearance, operated to effectively block covered jurisdictions from adopting new methods of discrimination in voting after the previous ones had been prohibited.[53]

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45. Voting Rights Act of 1965 §§ 6-7, Pub. L. No. 89-110, 79 Stat. at 438-440.

46. U.S. CONST. amend. XXIV; *see generally* Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966).

47. Voting Rights Act of 1965 § 8 (codified at 52 U.S.C. § 10305).

48. Voting Rights Act of 1965 §§ 11(b), 12(a) (codified at 52 U.S.C. §§ 10307(b), 10308(a)).

49. GARROW, *supra* note 3, at 19 tbl. 1-3 and 189 tbl. 6-1.

50. For instance, in Mississippi, Black voter registration increased from less than 7% to almost 60% during the same period. *Id.*

51. As originally enacted, the coverage formula in Section 4(b) of the Act contained two requirements: a jurisdiction must (1) use a "test or device" for determining eligibility to register or vote, and (2) had a rate of voter registration or turnout below 50% in the 1964 presidential election. Voting Rights Act § 4(b) (codified at 52 U.S.C. § 10303(b)). This coverage formula effectively captured most areas that had a history of widespread racial discrimination in voting: the entire states of Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, as well as forty counties in North Carolina. Christopher B. Seaman, *An Uncertain Future for Section 5 of the Voting Rights Act: The Need for A Revised Bailout System*, 30 ST. LOUIS U. PUB. L. REV. 9, 17 (2010).

52. 52 U.S.C. § 10304 (1965); *see also* Mark A. Posner, *Time is Still on Its Side: Why Congressional Reauthorization of Section 5 of the Voting Rights Act Represents a Congruent and Proportional Response to Our Nation's History of Discrimination in Voting*, 10 LEGIS. & PUB. POL'Y 51, 56, 67 ("Section 5 is a central feature of the remedial scheme enacted byCongress to banish the blight of racial discrimination in voting. . . . Section 5, by its terms, prohibits the implementation of voting changes that have either a discriminatory purpose or a discriminatory effect." (internal quotations and citation omitted)).

53. *See* S.C. v. Katzenbach, 383 U.S. 301, 313 (1966) (upholding the preclearance requirement because "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting" and "[a]fter enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims"); *see also* Pitts, *supra* note 24, at 913 ("[T]he 1965 Act was written in such as way as to prevent recalcitrant state and

Although Section 5 was initially scheduled to expire after five years, Congress reenacted it in 1970, 1975, 1982, and 2006.[54] As part of the 1975 reenactment, Congress also expanded Section 5's coverage formula to cover the states of Alaska, Arizona, and Texas in their entirety,[55] as well as parts of several other states.[56] These changes brought Latinos, Native Americans, and Asian Americans within Section 5's scope.[57] From 1965 to 2000, the Justice Department employed Section 5 to block over a thousand discriminatory laws adopted by state and local governments,[58] and the preclearance requirement itself deterred more jurisdictions from following suit.[59]

In contrast, the other key pillar of the Voting Rights Act[60] Section 2—was initially relegated to a more limited role.[61] As originally

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local actors from engaging in the 'hydraulic' activity of switching to new methods of discrimination after old discriminatory methods had been prohibited.").

54. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400; Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131; Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 102 Stat. 577.

55. Civil Rights Division, U.S. Department of Justice, *Jurisdictions Previously Covered by Section 5* (last updated May 17, 2023), *available at* https://perma.cc/77FT-PPJW.

56. Specifically, it covered four counties in California; five counties in Florida; three counties, all in New York City, in New York; two counties in South Dakota; and two townships in Michigan. *Id*. Several other jurisdictions in Maine, New Mexico, and Oklahoma that were covered by the 1975 amendments were able to "bail out," or be removed from coverage. *See* John P. MacCoon, *The Enforcement of the Preclearance Requirement of Section 5 of the Voting Rights Act of 1965*, 29 CATH. U. L. REV. 107, 110 n.15 (1979).

57. GROFMAN et al., *supra* note 4, at 20. The 1975 amendments also prohibited discrimination in voting against members of "language-minority groups." Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, §§ 203, 301 (1975) (codified at 52 U.S.C. §§ 10301(f), 10310, 10503 (1965)). It defined "language minorities" and "language minority groups" as "persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage." 52 U.S.C. § 10503(e) (1975); *see also* David H. Hunter, *The 1975 Voting Rights Act and Language Minorities*, 25 CATH. U. L. REV. 250 (1976).

58. Peyton McCrary, Christopher Seaman & Richard Valelly, *The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. 275, 292-99 (2006); *see also Section 5 Objection Letters*, Civil Rights Division, U.S. Department of Justice, https://www.justice.gov/crt/section-5-objection-letters [https://perma.cc/3UVL-CTGJ] (last updated Aug. 7, 2015) (containing digital copies of Section 5 objection letters).

59. *See* Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, *in* VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 47, 65 (Ana Henderson ed., 2007) (finding that more information requests by the Justice Department, which sought more information from the covered jurisdiction to determine whether the change was discriminatory, "increased the DOJ's impact in Section 5 enforcement by 51% between 1982 and July 2005").

60. *See* Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 731 (1998) ("The two key provisions of the modern Voting Rights Act are section 2's 'results' test and section 5's 'retrogression' standard.").

61. *See* Amandeep S. Grewal, *Discriminatory Intent Claims Under Section 2 of the Voting Rights Act*, 2 FORDHAM L. VOTING RTS. & DEMOCRACY F. 1, 2 (2023) (noting that Section

enacted, it largely tracked the language of the Fifteenth Amendment, providing that "[n]o 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."[62] Unlike Section 5, Section 2 is permanent and applies nationwide.[63] But prior to 1982, it played little substantive role in voting rights litigation, being viewed as coterminous to the Fifteenth Amendment's prohibition on racial discrimination in voting.[64] That all changed, however, with the Supreme Court's 1980 decision in *City of Mobile v. Bolden* and Congress's response two years later.

C. Mobile v. Bolden and the 1982 Amendments

City of Mobile v. Bolden involved a vote dilution claim regarding the City Council of Mobile, Alabama.[65] Since 1911, the three members of City Council had been elected at-large (citywide) in one of three numbered posts (positions), and a candidate had to win an outright majority to be elected.[66] Despite comprising over 35% of the city's population, no Black resident had ever been elected to Council.[67]

Plaintiffs brought a class action on behalf of Black residents of Mobile, alleging this system was maintained to discriminate against Blacks and that, in light of racially polarized voting, it was effectively impossible for Black voters to elect a candidate of their choice in violation of Section 2 and the Fourteenth and Fifteenth Amendments. After a six-day bench trial, the district court issued extensive findings of fact, including that Blacks in Mobile "were subjected to massive official and private racial discrimination until the Voting Rights Act of 1965," that "[t]he pervasive effects of past discrimination still substantially

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2 was "once consigned to a modest role"); Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1352 (1983) (explaining that prior to *Bolden*, Section 2 was "a little-used provision that tracked the language of the Fifteenth Amendment").

62. 52 U.S.C. § 10301 (1965).

63. *Id.*; *see also Shelby Cnty.*, 570 U.S. at 537 ("Section 2 is permanent [and] applies nationwide. . . .").

64. *See* City of Mobile v. Bolden, 446 U.S. 55, 60-61 (1980) (plurality opinion) ("[I]t 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"); *id.* at 105 n.2 (Marshall, J., dissenting) ("I agree with the plurality . . . that the prohibition on denial or infringement of the right to vote . . . in § 2 of the Voting Rights Act . . . contains the same standard as the Fifteenth Amendment."); *see also* Note, *Race, Rights, and Remedies: Census Sampling and the Voting Rights Act*, 114 HARV. L. REV. 2502, 2521 (2001) ("Congress originally drafted [Section 2] to be coterminous with the Fifteenth Amendment's prohibition on racial discrimination in voting.").

65. 446 U.S. 55 (1980).

66. *Id.* at 59-60 (plurality opinion).

67. *Id.* at 97-98 (White, J., dissenting).

affec[t] political black participation," and that "local political processes are not equally open" to Blacks.[68] It also found that the Commissioners were not responsive to the needs of the Black community.[69]

Applying the standard for a vote dilution claim articulated by the Supreme Court in *White v. Regester*[70] and the Fifth Circuit in *Zimmer v. McKeithen*,[71] the district court held that these facts demonstrated that the political process in Mobile "was not open equally to the plaintiffs as a result of dilution of [Black] voting strength and consequently the members of the class had less opportunity to participate in the political process and elect candidates of their choice."[72] It rejected the city's argument that, under *Washington v. Davis*[73]—an employment discrimination case where the Court required proof of a "racially discriminatory purpose" to find a constitutional violation[74]—plaintiffs had to demonstrate that the at-large system of elections for City Council had been adopted with a discriminatory intent.[75] On appeal, the Fifth Circuit affirmed, holding that the district court's findings "amply support the inference that Mobile's at-large system unconstitutionally deprecates the value of the [B]lack vote."[76] Furthermore, if racially discriminatory intent was required, the Fifth Circuit concluded that the City's "at-large plan has been maintained with discriminatory intent."[77]

In 1980, however, a 4-justice plurality of the Supreme Court concluded that discriminatory purpose was required to establish a Fifteenth Amendment violation.[78] In addition, it held that plaintiffs' Section 2 claim "add[ed] nothing" because its language "no more than

68. Bolden v. City of Mobile, 423 F. Supp. 384, 387 (S.D. Ala. 1976).

69. *Id.* at 389-92.

70. 412 U.S. 755 (1973).

71. 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom.* E. Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976).

72. *Bolden*, 423 F. Supp. at 398. Notably, "[t]he chief significance of *White* and *Zimmer* was that neither rested its holding on a finding of discriminatory intent, instead concluding that the challenged at-large election schemes violated the Constitution due to their impact on minority voting strength." Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 704 (2006).

73. 426 U.S. 229 (1976).

74. *Id.* at 238-45; *see also id.* at 240 (noting "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose").

75. *Bolden*, 423 F. Supp. at 394-98.

76. Bolden v. City of Mobile, 571 F.2d 238, 245 (5th Cir. 1978).

77. *Id.* at 246.

78. *Bolden*, 446 U.S. at 62-65 (plurality opinion); *see also id.* at 62 ("[R]acially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation."). Justice Blackmun assumed without deciding that "proof of intent is a prerequisite to appellees' prevailing on their constitutional claim of vote dilution," *id.* at 80 (Blackmun, J., concurring in the result), while Justice Stevens agreed with the result that no constitutional violation had occurred but also reasoned that courts should not "focus on the subjective intent of the decisionmakers." *Id.* at 90 (Stevens, J., concurring).

elaborates upon that of the Fifteenth Amendment," and "it was intended to have an effect no different than that of the Fifteenth Amendment itself."[79] It also rejected the Fifth Circuit's holding that circumstantial evidence of discriminatory effect under *Zimmer* standard was sufficient by itself to establish a discriminatory purpose.[80] Ultimately, the discriminatory purpose requirement imposed by *Bolden* "made it significantly more difficult for minority voters to challenge election systems that effectively prevent them from electing candidates of their choice."[81]

Notably, the plurality opinion in *Bolden* also flagged the issue of whether private plaintiffs could bring a Section 2 claim. Citing to *Allen v. State Board of Elections*, which held that private plaintiffs could sue to enforce the preclearance requirement in Section 5,[82] it "[a]ssum[ed], for present purposes, that there exists a private right of action to enforce this statutory provision."[83] But it also cited in a footnote to two more recent cases that held an implied private right of action did not exist for other federal statutes.[84]

Bolden prompted "an avalanche of criticism, both in the media and within the civil rights community."[85] In response, legislation was introduced in Congress to amend Section 2, proposing that the phrase "to deny or abridge" the right to vote be replaced with "in a manner which results in a denial or abridgement."[86] This so-called "results test" made clear that Section 2 "reach[ed] discrimination" in voting "whether or not intent could be established."[87]

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79. *Id.* at 60-61.

80. *Id.* at 71-75; *see also id.* at 70 ("[D]isproportionate impact alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose.").

81. Tokaji, *supra* note 72, at 704. Interestingly, in a bench trial following remand, the district court in *Bolden* held that this requirement was met because "one of the principal motivating factors for the at-large election system for the Mobile City Commission was the purpose (intent) to discriminate against blacks, and to deny them access to the political process and political office." Bolden v. City of Mobile, 542 F. Supp. 1050, 1077 (S.D. Ala. 1982); *see also generally* Peyton McCrary, *History in the Courts: The Significance of* City of Mobile v. Bolden, *in* MINORITY VOTE DILUTION 47 (Chandler Davidson ed., 1984) (recounting historical evidence of discriminatory purpose by the plaintiffs' expert in the case).

82 393 U.S. 544, 554-57 (1969); *see also id.* at 555 (holding that private parties "may seek a declaratory judgment that a new state enactment is governed by § 5. Further, after proving that the State has failed to submit the covered enactment for § 5 approval, the private party has standing to obtain an injunction against further enforcement, pending the State's submission of the legislation pursuant to § 5.").

83. *Bolden*, 466 U.S. at 60.

84. *See id.* at n.8 (citing Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 24 (1979), which held there was no private right of action for damages or other relief for violations of the Investment Advisers Act of 1940, and Touche Ross & Co. v. Redington, 442 U.S. 560, 577 (1979), which held there was no implied private right of action for damages under 17(a) of the Securities Exchange Act of 1934).

85. Allen v. Milligan, 599 U.S. 1, 11 (2023) (quoting Boyd & Markman, *supra* note 61, at 1355).

86. *Id.* at 12 (quoting H.R. 3112, 97th Cong., 1st Sess., 2).

87. S. REP. NO. 97-417, at 19 (1982).

Ultimately, Congress split Section 2 into two subparts. Section 2(a) created the "results test," prohibiting any voting qualification, prerequisite to voting, or standard, practice, or procedure regarding voting "which results in a denial or abridgement" of the right to vote "on account of race or color" or membership in a language minority group.[88] Section 2(b) incorporated the equal openness standard articulated in *White*, providing that a jurisdiction violated the results test "if, based on the totality of circumstances," the political processes are "not equally open to participation" by minority voters.[89] To allay concerns that the results test required proportional representation,[90] Section 2(b) included a disclaimer that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."[91]

Apparently in response to the Court's discussion in *Bolden*, Congress also made clear in the legislative history that private plaintiffs could bring suit under Section 2. The Senate Committee Report stated that it "reiterates the existence of the private right of action under Section 2, as has been clearly intended by Congress since 1965."[92] Similarly, the House Committee Report declared that "[i]t is intended that citizens have a private cause of action to enforce their rights under Section 2."[93]

The amended Section 2, along with the rest of the 1982 amendments to the Voting Rights Act,[94] passed Congress by overwhelming margins.[95] It was signed into law by President Reagan on June 29, 1982, who proclaimed in the signing ceremony that "the right to vote is the crown jewel of American liberties" and that "[t]his act ensures

88. Voting Rights Act Amendments of 1982 § 3, Pub. L. No. 97-205, 96 Stat. 131, 134 (codified at 52 U.S.C. § 10301(a)).

89. *Id.* (codified at 52 U.S.C. § 10301(b)); *see also* S. REP. NO. 97-416, at 194-95 (1982) (additional views of Senator Robert Dole) (explaining that the revised Section 2 "codifies the legal standard articulated in *White v. Regester* . . . [T]he standard is whether the political processes are equally 'open' in that members of a protected class have the same opportunity as others to participate in the political process and to elect candidates of their choice.").

90. *See* Boyd & Markman, *supra* note 61, at 1396-1402.

91. Voting Rights Act Amendments of 1982 § 3 (codified at 52 U.S.C. § 10301(b)). This language became known as the Dole Compromise. Boyd & Markman, *supra* note 61, at 1414-20.

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

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

94. These changes included a renewal of the preclearance requirement for an additional 25 years and revisions to the bailout provisions in Section 4(a) to allow individual jurisdictions within covered states to request removal from coverage. *See* Boyd & Markman, *supra* note 61, at 1373-74, 1415.

95. *Id.* at 1379, 1424 (noting that the 1982 amendments passed the House 389-24 and passed the Senate 85-8).

equal access to the political process for all our citizens. . . .[It] proves our unbending commitment to voting rights."[96]

D. Key Supreme Court Decisions

1. Thornburg v. Gingles

The first Supreme Court decision applying the amended Section 2 was *Thornburg v. Gingles* (1986),[97] which significantly shaped the modern approach to vote dilution claims involving at-large elections. In *Gingles*, the Court established a three-part test to evaluate claims alleging that an electoral structure unlawfully dilutes minority voting strength.[98] Specifically, plaintiffs must demonstrate that: (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group is politically cohesive, meaning its members tend to vote similarly; and (3) the majority votes sufficiently as a bloc to usually defeat the minority-preferred candidate.[99] If these conditions are met, a court will then consider the "totality of the circumstances" to determine whether minority voters have less opportunity than others to elect representatives of their choice, resulting in impermissible dilution of minority voting strength.[100] To guide the "totality of the circumstances" inquiry, *Gingles* endorsed the Senate Report accompanying the 1982 amendments to Section 2, which articulated several relevant factors.[101] While none of these factors alone are dispositive, collectively they assist courts in determining whether a challenged electoral system impermissibly dilutes minority voting strength.

Gingles opened the door to hundreds of Section 2 claims against local jurisdictions that employed at-large elections and so-called "enhancing devices" such as numbered-place and majority-vote requirements that made it more difficult for minorities to elect a candidate of

96. *Remarks on Signing the Voting Rights Act Amendment of 1982,* RONALD REAGAN PRESIDENTIAL LIBR. AND MUSEUM, https://www.reaganlibrary.gov/archives/speech/remarks-signing-voting-rights-act-amendments-1982 [https://perma.cc/Y64V-HFRL].

97. 478 U.S. 30 (1986).

98. *Id.* at 49-51.

99. *Id.* at 50-51.

100. *Id.* at 30, 51.

101. The Senate factors include: (1) the history of official voting-related discrimination; (2) racially polarized voting; (3) practices or procedures that enhance opportunities for discrimination; (4) exclusion of minorities from candidate slating processes; (5) the continuing effects of discrimination in education, employment, and health, hindering minority political participation; (6) overt or subtle racial appeals in campaigns; (7) the success of minority candidates; (8) responsiveness of elected officials to minority concerns; and (9) the tenuousness of the justification for the challenged electoral practice. *Id.* at 36-37 (citing S. REP. NO. 97-417, at 28-29 (1982)).

their choice.[102] Many of these jurisdictions switched to single-member districting plans, either voluntarily or under court order,[103] resulting in the election of thousands of minority legislators across the country.[104] And in the following decades, the Supreme Court itself heard and decided numerous Section 2 vote dilution cases brought by private plaintiffs.[105]

2. Shelby County v. Holder

The tide began to turn, however, in 2013 when the Court effectively gutted Section 5, the other main pillar of the Voting Rights Act. During the 2006 reauthorization process, Congress collected "mountains of . . . evidence" of continued racial discrimination in voting since 1982[106] and renewed Section 5 for an additional 25 years.[107] Despite this, in *Shelby County v. Holder*, a 5–4 majority declared that "things have changed dramatically" in the South and held that the coverage formula in Section 4(b) of the Act was unconstitutional.[108] This decision effectively rendered Section 5 a null set: preclearance still existed, at

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102. *See infra* Part III.C.3; *see also* Ellen D. Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643 (2006).

103. *See infra* Part III.C.3.

104. *50 Years of the Voting Rights Act: The State of Race in Politics*, JOINT CTR. FOR POL. AND ECON. STUD. (2019), https://jointcenter.org/wp-content/uploads/2019/11/VRA-report-3.5.15-1130-amupdated.pdf [https://perma.cc/G8CY-A2AN].

105. *See, e.g.*, Allen v. Milligan, 599 U.S. 1 (2023); Brnovich v. Democratic Nat'l Comm., 594 U.S. 647 (2021); League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006); Holder v. Hall, 512 U.S. 874 (1994); Johnson v. De Grandy, 512 U.S. 997 (1994); Growe v. Emison, 507 U.S. 25 (1993); Voinovich v. Quilter, 507 U.S. 146 (1993); Thornburg v. Gingles, 478 U.S. 30 (1986).

106. *Brnovich*, 594 U.S. at 697 (Kagan, J., dissenting). Specifically, during the 2006 reauthorization process, Congress "held 21 hearings, heard from scores of witnesses, and received a number of investigative reports and other written documentation of continuing discrimination in covered jurisdictions. In all, the legislative record Congress compiled filled more than 15,000 pages." *Shelby Cnty.*, 570 U.S. at 565 (Ginsburg, J., dissenting) (citing H.R. REP. NO. 109-478; S. REP. NO. 109-295); *see also* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 179-207 (2007) (recounting the legislative process and record amassed by Congress during the 2006 renewal process).

107. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 § 4, Pub. L. No. 109-246, 102 Stat. 577 (2006).

108. 570 U.S. at 548-53. Notably, in its constitutionality analysis in Part III, the majority opinion in *Shelby County* never discussed that the formula articulated in Section 4(b) was only the start, not the end, of the coverage mechanism. Jurisdictions that could establish they lacked a history of recent discrimination in voting could seek removal from the preclearance requirement through the Act's bailout mechanism in Section 4(a), 52 U.S.C. § 10303(a), and nearly 200 jurisdictions (including the entire states of New Mexico and Arkansas) had successfully done so by the time of the Court's decision. *Shelby County*, 570 U.S. at 579-80 (Ginsburg, J., dissenting); *see also* Seaman, *supra* note 51, at 26-44 (discussing the bailout provision).

least in theory,[109] but no jurisdictions were subject to it.[110] Apparently seeking to soften the perceived blow, at the end of its opinion, the majority pointed to Section 2 as a remaining tool to combat discrimination in voting, noting that "[o]ur decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2."[111]

3. Brnovich v. Democratic National Committee

Just a few years later, however, the Court weakened Section 2 as well.[112] In *Brnovich v. Democratic National Committee*, it determined that vote denial claims regarding Arizona's procedures for mail-in voting and counting of wrong-precinct votes did not violate Section 2.[113] Specifically, the majority held that in cases involving the "application of a facially neutral rule specifying the time, place, or manner of voting," plaintiffs must establish that the challenged rules result in "voting that is not 'equally open'" to members of minority groups.[114] In doing so, the Court articulated several "guideposts" lower courts should consider that, in aggregate, make it more difficult for voting rights plaintiffs to establish a Section 2 violation.[115] These newly-announced

109. In a concurring opinion, Justice Thomas would have held Section 5 unconstitutional as well. *Shelby Cnty.*, 570 U.S. at 557-59. No other Justice joined his position.

110. A jurisdiction can be "bailed in" to the preclearance requirement under the so-called "pocket trigger" in Section 3 of the Act if a court finds that it has engaged in intentional discrimination, *see generally* Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992 (2010), but post-*Shelby County*, most such requests have been denied. Order, Milligan v. Allen, No. 2:21-CV-01530 (N.D. Ala. Aug. 7, 2025) (three-judge panel) (denying without prejudice plaintiffs' request to bail-in Alabama); N.C. State Conf. NAACP v. McCrory, 831 F.3d 204, 241 (4th Cir. 2016) (declining to subject North Carolina to ongoing preclearance requirements under Section 3); Perez v. Abbott, 390 F. Supp. 3d 804, 812-21 (W.D. Tex. 2019) (three-judge panel) (denying bail-in remedy under Section 3 for Texas, despite a finding of intentional race discrimination); *see generally* Edward K. Olds, Note, *More Than "Rarely Used": A Post-*Shelby *Judicial Standard for Section 3 Preclearance*, 117 COLUM. L. REV. 2185 (2017).

111. *Shelby Cnty.*, 570 U.S. at 557; *see also* Kang, *supra* note 2, at 57 ("On voting rights, the conservative position was that Section 5 of the Voting Rights Act should be thrown out, because Section 2 responsibly protected the voting rights of racial minorities.").

112. *See* Carolyn Shapiro, *The Limits of Procedure: Litigating Voting Rights in the Face of a Hostile Supreme Court*, 83 OHIO ST L.J. ONLINE 111, 116 (2022) (noting that the Supreme Court "largely eviscerated the other major provision of the [Voting Rights Act], Section 2, in *Brnovich v. DNC*").

113. 594 U.S. 647, 655 (2021).

114. *Id.* at 659-60.

115. *Id.* at 666-72. The (apparently nonexclusive) list of guideposts identified in *Brnovich* include: "the size of the burden imposed" on voters; the "size of any disparities . . . on members of different racial or ethnic groups;" "the degree to which a voting rule departs from . . . standard practice" in 1982; and other available options for voting. *Id.* It also included "legitimate state interest[s]" like "prevention of fraud" as a relevant guidepost, *id.* at 671-72, even though the trial court in *Brnovich* found there was no evidence of ballot collection fraud within Arizona. Democratic Nat'l Comm. v. Reagan, 329 F. Supp. 3d 824, 852-53 (D. Ariz. 2018).

"guideposts" lack any historical basis in either Section 2's text or its legislative history.[116]

In a biting dissent, Justice Kagan criticized the majority for "undermin[ing] Section 2" by "writ[ing] its own set of rules, limiting Section 2 from multiple directions" and weakening "a statute that stands as a monument to America's greatness."[117] In particular, the dissent took aim at the new "guideposts," which it called "a list of mostly made-up factors, at odds with Section 2 itself" that "all cut in one direction—toward limiting liability for race-based voting inequalities" and "stack[ing] the deck against minority citizens' voting rights."[118] Justice Kagan also noted some of the limitations of Section 2 to protect voting rights, pointing out that "litigation is an after-the-fact remedy, incapable of providing relief until an election—usually, more than one election—has come and gone."[119] But "after *Shelby County*, Section 2 is what voters have left."[120]

Most significant for this Article, *Brnovich* upended the widely-settled understanding that private plaintiffs could assert Section 2 claims.[121] In a one-paragraph concurrence, Justices Gorsuch, joined by Justice Thomas, "flag[ged] one thing" the Court "does not decide": whether "the Voting Rights Act of 1965 furnishes an implied cause of action under [Section] 2."[122] It asserted that "[l]ower courts have treated this as an open question,"[123] but failed to cite to any of the numerous cases where courts ratified the longstanding practice of private plaintiffs bringing Section 2 claims.[124] Instead, the concurrence cited only a

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116. Maureen A. Edobor, Brnovich*: Extratextual Textualism*, 26 U. PA. J. CON. L. 1495, 1537-51 (2024); *see also* Case Comment, *Voting Rights Act of 1965—Section Two—Disparate Impact Brnovich v. Democratic National Committee*, 135 HARV. L. REV. 481, 487 (2021) ("[T]he Brnovich Court's interpretation was contrary to [S]ection 2's text and purpose").

117. *Brnovich*, 594 U.S. at 691-92 (Kagan, J., dissenting).

118. *Id.* at 710-11.

119. *Id.* at 700.

120. *Id.* at 701.

121. *See* Shapiro, *supra* note 112, at 116 ("[P]rivate plaintiffs have been suing under Section 2 since well before [1982], no court has ever held that they cannot do so, and Congress, despite repeatedly amending and reenacting the statute, has never so much as suggested that such lawsuits are inappropriate.").

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

123. *Id.*

124. *See, e.g.*, Mixon v. Ohio, 193 F.3d 389, 406 (6th Cir. 1999); Ala. State Conf. of NAACP v. Ala., 949 F.3d 647, 651-54 (11th Cir. 2020); Tex. All. for Retired Ams. v. Hughs, 489 F. Supp. 3d 667, 689 n.4 (S.D. Tex. 2020) ("organizations, like private parties, have historically been able to enforce Section 2 of the VRA"), *rev'd in part, vacated in part on other grounds sub nom.* Tex. All. for Retired Ams. v. Scott, 28 F.4th 669 (5th Cir. 2022); Larry v. Ark., No. 4:18-CV-00116-KGB, 2018 WL 4858956, at *7 (E.D. Ark. Aug. 3, 2018) ("The Voting Rights Act creates a private cause of action permitting plaintiffs to file suit if they are an 'aggrieved person.'"); McGee v. City of Warrensville Heights, 16 F. Supp. 2d 837, 845 (N.D. Ohio 1998) ("Under section 2 of the Voting Rights Act, private parties can enforce their rights."); Casarez v. Val Verde Cnty., 957 F. Supp. 847, 852 (W.D. Tex. 1997) ("[The] Voting Rights Act['s] legislative history manifests congressional intent that private parties have a

single, pre-1982 Fourth Circuit case which "assum[ed] without deciding . . . that there is a private right of action" under the original Section 2.[125] Ultimately, "[b]ecause no party argue[d] that the plaintiffs lack[ed] a cause of action here," Justices Gorsuch and Thomas concluded that the "Court need not and does not address that issue today."[126]

II. THE LAW GOVERNING PRIVATE RIGHTS OF ACTION

This Part addresses the law governing private rights of action. It first briefly explains the existence of express private rights of action, then it turns to the more complex question of when courts will imply the existence of a private right of action when not specified by the statute's text and how that standard has changed over time. Finally, it provides an overview of previous Court decisions on implied rights of action for other parts of the Voting Rights Act.

A. Express Private Rights of Action

An express private right of action exists when Congress explicitly includes language within a statute authorizing private individuals to enforce statutory rights or obligations through litigation. Such express statutory provisions leave no ambiguity concerning legislative intent to permit enforcement by private plaintiffs, thus allowing individuals or groups directly harmed by statutory violations to seek judicial relief independently of government action.[127]

Several federal statutes relating to voting explicitly authorize private rights of action. For example, the National Voter Registration Act of 1993 ("NVRA") expressly grants private individuals standing to sue states for noncompliance with voter registration requirements.[128] Similarly, the Help America Vote Act of 2002 ("HAVA") permits private actions by individuals who believe their rights under its voter

right of action to enforce their rights under section 2."); Nixon v. Kent Cnty., Mich., 790 F. Supp. 738, 742 (W.D. Mich. 1992) ("The legislative history explicitly indicates congressional intent that private parties have a right of action to enforce their rights under section 2.").

125. Wash. v. Finlay, 664 F.2d 913, 926 (4th Cir. 1981). And even *Finlay* hardly supported the concurrence's claim; as Macin Graber and Josh Douglas have pointed out, one of the two cases it cited actually *recognized* a private right of action under the 1964 Civil Rights Act for a voter intimidation claim. Graber & Douglas, *supra* note 115, at 1133-35 (citing Brooks v. Nacrelli, 331 F. Supp. 1350, 1351-52 (E.D. Pa. 1971), *aff'd*, 473 F.2d 955 (3d Cir. 1973)).

126. *Brnovich*, 594 U.S. at 690 (Gorsuch, J., concurring). Justices Gorsuch and Thomas raised a similar point in a Section 2 case the following year. *See* Allen v. Milligan, 599 U.S. 1, 90 n.22 (2023) (Thomas, J., dissenting) ("The Court does not address whether § 2 contains a private right of action, an issue that was argued below but was not raised in this Court.")

127. Alexander v. Sandoval, 532 U.S. 275, 286-87 (2001).

128. 52 U.S.C. § 20510(b) (2024).

identification provisions have been violated.[129] Additionally, the materiality provision of the Civil Rights Act of 1964, which prohibits denying the right to vote based on immaterial errors or omissions on voter registration applications, also explicitly provides individuals with a private right of action.[130]

Section 2 lacks an express private right of action, so private plaintiffs must have either an implied right of action or rely on another federal statute, such as Section 1983, to challenge a discriminatory voting law, procedure, or policy.[131]

B. Implied Private Rights of Action

In the early 1960s, federal courts liberally inferred private rights of action under federal statutes. This approach is exemplified by decisions like *J.I. Case Co. v. Borak* (1964), where the Supreme Court recognized an implied private right of action under federal securities law, reasoning that private enforcement was necessary to effectuate congressional purpose and further the law's objectives.[132] In concluding that an implied private right of action existed, the Court highlighted the "broad remedial purposes" of the statute and the importance of providing effective remedies for violations of individuals' federal rights.[133] Following *Borak*, "a wave of decisions in the next decade" implied private rights of actions under various federal statutes,[134] including Section 5 of the Voting Rights Act in *Allen v. State Board of Elections* (1969).[135]

Beginning in the mid-1970s, however, the Supreme Court substantially narrowed its willingness to infer private rights of action. In *Cort v. Ash* (1975), the Court articulated a four-part test to determine when a private right of action could be implied from a federal statute, examining: (1) whether the plaintiff is "one of the class for whose especial benefit the statute was enacted"; (2) whether there is "any indication

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129. *Id.* § 21112(a).

130. *Id.* § 10101(a)(2)(B), (d) (2024); *see also* Schwier v. Cox, 340 F.3d 1284, 1296-97 (11th Cir. 2003).

131. *See* Morse v. Republican Party of Va., 517 U.S. 186, 232 (1996) (opinion of Stevens, J.) (explaining that "[Section 2], like [Section] 5, provides no right to sue on its face"); *see also* Derek A. Zeigler, Note, *As the Rainstorm Continues, Must We Throw Out the Raincoat Too? Private Enforcement of Section 2 of the Voting Rights Act,* 123 MICH. L. REV. 967, 969 (2025) ("Section 2, though only lacks an *explicit* private right of action; for decades, courts have adjudicated Section 2 cases brought by private plaintiffs, assuming it confers an *implied* right of action.").

132. J.I. Case Co. v. Borak, 377 U.S. 426, 432-33 (1964); *see also* Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1303 (1982).

133. *Borak*, 377 U.S. at 432-34.

134. Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 127 (2004).

135. 393 U.S. 544; *see also infra* Part II.C.1 (further discussing *Allen*).

of legislative intent, explicit or implicit, either to create such a remedy or to deny one"; (3) whether implication of a right of action is "consistent with the underlying purposes of the legislative scheme"; and (4) whether the cause of action is "traditionally relegated to state law," thus making implication of a private right of action under federal law inappropriate.[136] While *Cort v. Ash* left significant room for judicial interpretation,[137] subsequent decisions sharply limited this approach, underscoring legislative intent as paramount.[138]

This shift culminated in *Alexander v. Sandoval*, which significantly raised the bar for establishing implied private rights of action.[139] In *Sandoval*, the Court examined whether a regulation promulgated under Title VI of the Civil Rights Act of 1964, that prohibited actions with only a discriminatory effect (rather than discriminatory intent), supported an implied private cause of action.[140] Writing for a 5–4 majority, Justice Scalia emphasized that courts must anchor their analysis in congressional intent, as evidenced by statutory text and structure, rather than relying on perceived policy benefits or regulatory language alone.[141] *Sandoval* thus adopted a textualist approach to implied private rights of action by requiring that federal courts begin their analysis with the text and structure to discern congressional intent, explicitly rejecting broader judicial policy assessments.[142] Because Title VI itself explicitly prohibits only intentional discrimination and does not expressly authorize suits for disparate-impact violations, the majority concluded that no implied right of action existed under regulations promulgated pursuant to Title VI.[143]

Since *Sandoval*, "the Court has moved toward a much more restrictive view of implied rights of action."[144] For instance, in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.* the Court declined to find an implied private right of action under Section 10(b) of the

136. 422 U.S. 66, 78 (1975).

137. For instance, the Court several years later implied a private right of action for injunctive relief under Title IX of the Civil Rights Act. Cannon v. Univ. of Chi., 441 U.S. 677, 690-709 (1979).

138. *See, e.g.*, Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979) (refusing to imply a private right of action in a securities law case, stating that the courts' "task is limited solely to determining whether Congress intended to create the private right of action asserted"); Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11 (1979); Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981); *see also Cannon*, 441 U.S. at 731 (Powell, J., dissenting) ("Absent the most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action.").

139. 532 U.S. 275 (2001).

140. *Id.*

141. *Id.* at 286-87.

142. *Id.* at 287-89; *see also id.* at 286-87 ("Statutory intent . . . 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. . . . " (internal citations omitted)).

143. *Id.* at 293.

144. Tokaji, *supra* note 134, at 133.

Securities Exchange Act of 1934 for aiders and abettors, underscoring its continued reluctance to infer private rights of action, particularly in complex statutory schemes such as securities laws where judicial inference could disrupt legislative balances.[145] Similarly, in *Armstrong v. Exceptional Child Care Center, Inc.*, the Court held that the Medicaid Act did not create an implied private right of action for injunctive relief against a state to enforce the Act's reimbursement-rate standard.[146] Against this historical backdrop, the remainder of this Part turns to implied private rights of action under the Voting Rights Act.

C. Private Rights of Action and the Voting Rights Act

1. Allen v. State Board of Elections

The Supreme Court first addressed the question of implied rights of action to enforce the Voting Right Act in *Allen v. State Board of Elections*.[147] The main issue in *Allen* was whether changes to defendants' election systems—which involved ballot access requirements for candidates, the adoption of at-large election systems for local office, the appointment (instead of election) of local officials, and the process for valid write-in votes—counted as a "qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" that must be precleared prior to implementation.[148] Adopting a broad view of this statutory language, the Court answered yes.[149]

But *Allen* is also important because it held private plaintiffs had an implied right of action under Section 5 to sue covered jurisdictions that failed to obtain preclearance. Noting that the statutory text "does not explicitly grant or deny private parties authorization to seek a declaratory judgment that a State has failed to comply with the provisions of the Act," the Court explained that an implied private right of action was required because "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."[150] It pointed to limited resources and timeliness as reasons why litigation by the Justice Department, acting alone, might be inadequate for effective enforcement.[151] As a result, it concluded that "[i]t is consistent with the broad purpose of the Act to allow the individual citizen standing to

145. 552 U.S. 148, 164-65 (2008).

146. 575 U.S. 320, 327 (2015).

147. 393 U.S. 544 (1969).

148. *Id.* at 563.

149. *Id.* at 563-65.

150. *Id.* at 554-56.

151. *See id.* at 556-58 ("The 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.").

insure that [the citizen's] city or county government complies with" Section 5.[152]

2. 1975 Amendments

Congress added statutory language in 1975 that reaffirmed the existence of a private right of action for the Voting Rights Act. Section 3(c) was amended to provide that "an aggrieved person" may "institute[] a proceeding under any statute to enforce the voting guarantees of the [F]ourteenth or [F]ifteenth Amendment."[153] Similar language was added to Sections 3(a) and 3(b) regarding litigation seeking the appointment of federal examiners and banning the use of discriminatory tests or devices, respectively.[154] In addition, Section 14 was amended to authorize district courts to award attorney's fees "[to] the prevailing party, other than the United States," in any proceeding "to enforce the voting guarantees of the [F]ourteenth or [F]ifteenth Amendment."[155] As Ellen Katz has explained, "[t]here is no serious dispute" that this language "envision[s] private litigants instituting enforcement actions under the [Voting Rights Act]."[156]

The legislative history reinforces that the 1975 amendments "authorize[d] courts to grant . . . relief to private parties in suits brought to protect voting rights in covered and noncovered jurisdictions."[157] For example, the Senate Committee Report explained that Congress "has regularly established a dual enforcement mechanism" by "on the one hand, giv[ing] enforcement responsibility to a governmental agency, and on the other, . . . provid[ing] remedies to private persons acting as a class or on their own behalf. The Committee concludes that it is sound policy to authorize private remedies to assist the process of enforcing voting rights."[158] Similarly, it clarified that the attorneys' fee provision "is appropriate in voting rights cases because there, as in employment and public accommodations cases, and other civil rights cases, Congress depends heavily upon private citizens to enforce the

152. *Id.* at 557.

153. Voting Rights Act Amendments of 1975 § 401 (codified at 52 U.S.C. § 10302(c)). The legislative history explains that the term "'aggrieved person' is any person injured by an act of discrimination," including "an individual or an organization representing the interests of injured persons." S. REP. NO. 94-295, at 40 (1975).

154. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 401, 89 Stat. 400, 404 (1975) (codified at 52 U.S.C. § 10302(b)-(c)).

155. *Id.* § 402 (codified at 52 U.S.C. § 10310(e)).

156. Ellen D. Katz, *Curbing Private Enforcement of the Voting Rights Act: Thoughts on Recent Developments*, 123 MICH. L. REV. ONLINE 23, 24 (2024).

157. S. REP. NO. 94-295, at 40 (1975).

158. *Id.*; *see also* H.R. REP. NO. 94-196, at 43 (1975) ("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 parties.").

fundamental rights involved. Fee awards are a necessary means of enabling private citizens to vindicate these Federal rights."[159]

Moreover, in his signing statement for the 1975 reauthorization, President Gerald R. Ford declared that "this bill will permit private citizens, as well as the Attorney General, to initiate suits to protect the voting rights of citizens *in any State* where discrimination occurs."[160] The language "in any State" made clear the private right of action in the Voting Rights Act extended beyond Section 5, which was geographically limited in scope.[161]

3. Morse v. Republican Party of Virginia

The next Supreme Court decision on implied private rights of action to enforce the Voting Rights Act was *Morse v. Republican Party of Virginia*.[162] Plaintiffs alleged that the Virginia GOP's rule requiring voters participating in a state convention to select the party's nominee for the 1994 U.S. Senate election pay a registration fee was a prohibited poll tax under Section 10 of the Act. A three-judge District Court dismissed the voter-plaintiffs' claims because, in its view, Section 10 only authorized enforcement proceedings by the Attorney General and did not expressly mention private actions.[163]

On appeal, the Supreme Court reversed. Although the Court fractured into four separate opinions, none of which commanded a majority, five Justices held plaintiffs had a private right of action to enforce Section 10. Noting the evolving standard for implied private rights of action in the Court's jurisprudence since *Borak*, Justice Stevens's lead opinion explained courts "'must take into account'" the historical context "that Congress acted against a 'backdrop' of decisions in which implied causes of action were regularly found."[164] Applying this approach, Justices Stevens, joined by Justice Ginsburg concluded that "Congress [has] not only ratified *Allen*'s construction" that Section 5 contained an implied private right of action "but extended its logic to other provisions of the Act," including Section 2.[165] Justice Stevens pointed to both Congress's 1975 amendments to the Act and the Court's own history of "entertain[ing] cases brought by private

159. S. REP. NO. 94-295, at 40 (1975).

160. The President's Remarks Upon Signing H.R. 6219 Into Law in a Ceremony in the Rose Garden (Aug. 6, 1975) (emphasis added), *in* Weekly Compilation of Presidential Documents 203 (1975). Thanks to Rick Hasen for identifying this source.

161. *See supra* note 51 (describing the coverage formula for the preclearance requirement in Section 5).

162. Morse v. Republican Party of Va., 517 U.S. 186, 231-235 (1996).

163. Morse v. Oliver North for U.S. S. Comm., Inc., 853 F. Supp. 212, 217 (W.D. Va. 1994), *rev'd sub nom*. Morse v. Republican Party of Va., 517 U.S. 186 (1996).

164. *Morse*, 517 U.S. at 231 (quoting *Cannon*, 441 U.S. at 698-699 & nn.22-23).

165. *Id.* at 232.

litigants to enforce § 2" in reaching this conclusion.[166] The opinion explained that "[i]t would be anomalous, to say the least, to hold that both § 2 and § 5 are enforceable by private action but § 10 is not."[167]

In a separate opinion, Justices Breyer, O'Connor, and Souter "agree[d] with Justice Stevens that Congress must be taken to have intended to authorize a private right of action to enforce § 10 of the Act."[168] It reasoned there was no logical reason "to treat enforcement of § 10 differently from enforcement of §§ 2 and 5, particularly after 1975."[169] As a result, these justices concluded that "Congress intended to establish a private right of action to enforce § 10, no less than it did to enforce §§ 2 and 5."[170]

The remaining four justices contended in a dissent written by Justice Thomas that Section 10 lacked an implied private right of action. Justice Thomas attempted to distinguish *Allen* on the grounds that Section 10 lacked the rights-creating language of Section 5.[171] In addition, Justice Thomas asserted that the 1975 amendments to Section 3 did not support the existence of an implied private right of action under Section 10. Although admitting that Section 3 "explicitly recognizes that private individuals can sue under the [Act],"[172] Justice Thomas claimed Section 3 only applied to *parts* of the Voting Rights Act, not all of it. Specifically, he argued—contrary to legislative history in both the 1975 and 1982 amendments[173]—that Section 3 applied only to brought "cases brought pursuant to private right of action that this Court had recognized as of 1975, *i.e.*, suits under § 5, as well as any rights of action that we might recognize in the future."[174] Notably, this crabbed reading lacks any support in the text of Section 3 itself, and it also seemingly contradicts "Congress's firm intention to rid the country of racial discrimination in voting" by adopting "stringent new remedies" to "make the guarantees of the Fifteenth Amendment finally a reality for all citizens."[175] Similarly, Justice Thomas dismissed the amended Section 14(e) that authorized a "prevailing party, other

166. *Id.*; *see also id.* at 233 ("[W]hen Congress reenacted and extended the life of the Voting Rights Act in 1975, it recognized that private rights of action were equally available under Section 10.").

167. *Id.* at 232.

168. *Id.* at 240 (Breyer, J., concurring).

169. *Morse,* 517 U.S. at 240.

170. *Id.*

171. *Id.* at 286-88 (Thomas, J., dissenting).

172. *Id.* at 289.

173. *See supra* notes 93-94, 159-161 and accompanying text; *see also* Katz, *supra* note 156, at 33 ("For Justice Thomas, the statutory language sufficed to show that Congress did not intend to create the private right at issue. Legislative history and the 'backdrop' of implied rights of implied rights jurisprudence both suggested otherwise, but neither played any part in the dissent's analysis.").

174. *Morse*, 517 U.S. at 289.

175. *Allen*, 393 U.S. at 548, 556.

than the United States" to obtain attorneys' fees as a "general reference to private right of action" that failed to "address the availability of a private right to sue under § 10."[176]

4. Eighth Circuit

Almost three decades later, Justice Thomas's dissent gained new purchase in the Eighth Circuit's decision in *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*.[177] Plaintiffs representing black voters challenged the reapportionment plan for Arkansas's House of Representatives following the 2020 census, alleging that it unlawfully diluted Black voting strength in violation of Section 2 of the Voting Rights Act.[178] Citing Justices Gorsuch and Thomas's concurrence in *Brnovich*, the District Court *sua sponte* raised the issue of whether there is "a private right of action (including a private remedy)" under Section 2.[179] After briefing, it concluded there was not, holding that "[o]nly the Attorney General of the United States can bring a case" under Section 2, and thus dismissed plaintiffs' complaint for lack of subject-matter jurisdiction.[180]

On appeal, the Eighth Circuit affirmed. The majority opinion disclaimed any reliance on "congressional purpose" following *Sandoval* and instead evaluated the "text and structure" of the Act to ascertain whether Congress had "*both* created an individual right *and* given private plaintiffs the ability to enforce it."[181] On the first question, the majority concluded that "it is unclear whether § 2 creates an individual right."[182] But it asserted there was "[g]reater clarity" on the second question because "[a]nother provision, § 12, empowers the Attorney General to bring 'an action for preventive relief . . . for a temporary or permanent injunction, restraining order, or other order.' Any mention of private plaintiffs or private remedies, however, is missing."[183] Responding to plaintiffs' argument regarding the 1975 amendments, the majority echoed Justice Thomas's dissent in *Morse*, contending that "aggrieved person[s]" in Section 3 only created implied private rights

176. *Morse,* 517 U.S. at 289 (Thomas, J., dissenting).

177. 86 F.4th 1204 (8th Cir. 2023).

178. *Id.* at 1207.

179. Order, Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, No. 4:21-CV-1239 (E.D. Ark. Jan. 20, 2022), *available at* https://scholar.google.com/scholar_case?case=15280317631702035699 [https://perma.cc/ZS9P-S8P7].

180. Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 586 F. Supp. 3d 893, 905 (E.D. Ark. 2022).

181. *Ark. State Conf. NAACP*, 86 F.4th at 1209 (internal citations and quotations omitted).

182. *Id.*

183. *Id.* at 1210 (citation omitted).

of action for already-existing claims, such as to enforce Section 5, but not for Section 2 challenges.[184]

Dissenting, Chief Judge Smith argued that the majority should have followed decades of precedent assuming private enforcement of section 2, binding Supreme Court cases (*Allen* and *Morse*) reaching a similar conclusion for other parts of the Voting Rights Act, and "implied Congressional approval of Section 2's private right of action."[185] He also expressed concern that the majority's decision would hamper enforcement because the Attorney General had brought only a handful of Section 2 cases over the last few decades.[186]

The Eighth Circuit's reasoning in *Arkansas State Conference NAACP* is unconvincing on multiple grounds. First, it fails to recognize that Congress's adoption of an express cause of action was unnecessary in 1965 in light of then-existing precedent broadly implying private rights of action for federal statutes.[187] Instead, it retroactively applied the much more stringent *Sandoval* standard, which was decided 35 years later. The majority's refusal to consider the "contemporary legal context"[188] in which Congress originally acted led it to ignore abundant evidence that the "stringent new remedies" created by the Voting Rights Act, including Sections 2 and 5, were intended to be given "the broadest possible scope."[189] This is particularly true in light of the Department of Justice's mostly fruitless attempts to vindicate the right to vote through case-by-case litigation in the South during the late 1950 and early 1960s.[190] Congress was well aware of the inadequacies of this approach when it drafted the Act.[191] Consequently, "[i]t is consistent with the broad purpose of the Act to allow the individual citizen standing" to sue under Section 2 to vindicate her right to vote.[192]

Second, the Eighth Circuit's approach to statutory interpretation minimizes the significance of the Voting Rights Act's history and evolution since 1965. As Derek Ziegler has explained, "[t]his history

184. *Id.* at 1211-12.

185. *Id.* at 1218-24 (Smith, C.J., dissenting).

186. *See id.* at 1220 n.8 (noting that the United States brought fewer than ten percent of successful Section 2 cases).

187. *See* Katz, *supra* note 156, at 34; Derek A. Ziegler, Note, *As the Rainstorm Continues, Must We Throw out the Raincoat Too? Private Enforcement of Section 2 of the Voting Rights Act,* 123 MICH. L. REV. 968, 972 (2025) ("The [Voting Rights Act] has a unique history given that it was both enacted and routinely amended during an era in which the Supreme Court took a highly liberal approach to finding private rights of action.").

188. *Cannon*, 441 U.S. at 698-99. Notably, the *Sandoval* approach permits courts to consider "contemporary legal context . . . to the extent it clarifies [statutory] text." *Sandoval*, 532 U.S. at 288; *see also* Ziegler, *supra* note 187, at 972 (making the same point).

189. Allen, 393 U.S. at 548, 567.

190. *See supra* notes 26-30.

191. As *Allen* explained, "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." *Allen*, 393 U.S. at 556.

192. *Id.* at 557.

demonstrates that Congress and the Court concurred that Section 2 does indeed confer an implied private right of action."[193] The Voting Rights Act has been the subject of extensive interplay between Congress and the Supreme Court for more than a half-century. On multiple occasions, Congress has intervened in response to the Court's restrictive statutory interpretation of the Act. For example, following *Bolden*'s holding that proof of discriminatory purpose was required, Congress amended Section 2 to adopt the "results test," thus restoring the *White*/*Zimmer* totality of the circumstances approach.[194] Similarly, Congress amended Section 5 in 2006 to overturn the Court's decisions in *Bossier Parish II*,[195] which required proof of intent to retrogress (i.e., to make minorities worse off compared to the *status quo*, rather than just discriminatory intent), and *Georgia v. Ashcroft*,[196] which redefined retrogressive effect.[197]

In contrast, when confronted with decisions that construed the Act expansively by recognizing an implied private right of action, Congress did not just silently acquiesce,[198] but ratified them. Following *Allen*, Congress extended a private right of action to "aggrieve[d] person[s]" under Section 3.[199] Similarly, Congress amended Section 14 to allow prevailing parties other than the United States to recover attorneys' fees.[200] The legislative history for both the 1975 and 1982 amendments confirms that Congress intended to authorize private plaintiffs to sue.[201] And in *Morse*, five justices relied on this same text and history to conclude that Congress sought "to provide the same remedies to private parties as had formerly been available to the Attorney General alone."[202] In line with this (previously) well-settled understanding,

193. Ziegler, *supra* note 187, at 970.

194. *See supra* notes 87-91 and accompanying text.

195. Reno v. Bossier Par. Sch. Bd., 528 U.S. 320, 335 (2000). This has been called the "incompetent retrogressor," as a change with retrogressive effect would be prohibited under Section 5 following *Beer*. *Id.* at 331-32.

196. Ga. v. Ashcroft, 539 U.S. 461, 480-87 (2003).

197. Voting Rights Act of 1965, Pub. L. No. 109-246, sec. 1, § 5 (codified at 52 U.S.C. § 10304(b)-(d)); *see also* Persily, *supra* note 106, at 217 n. 165, 234-37 (further describing the *Bossier II* and *Ashcroft* "fixes" adopted by Congress).

198. *See generally* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988).

199. *See supra* notes 153-154 and accompanying text.

200. *See supra* note 155 and accompanying text.

201. *See supra* notes 92-93, 157-159, and accompanying text; *see also* Ziegler, *supra* note 187, at 1000 ("The 1975 House and Senate Reports accompanying the amendments show that inserting 'aggrieved person' was meant to empower private plaintiffs to sue under the VRA generally, which includes Section 2.").

202. *Morse*, 517 U.S. at 233 (opinion of Stevens, J.); *see also id.* at 240 (Breyer, J., concurring) ("I agree with Justice Stevens that Congress must be taken to have intended . . . to establish a private right of action to enforce § 10, no less than it did to enforce §§ 2 and 5.").

"private parties have sued States and state officials under § 2 . . . for decades."[203]

The Eighth Circuit's opinion engaged in contortions to avoid this straightforward conclusion. Citing the dissenters in *Morse*,[204] it argued the 1975 amendments authorizing "aggrieved person[s]" to sue "most reasonably refers to statutes that already allow for private lawsuits . . . not a new one created by § 3."[205] Thus, "some voting-rights protections" in the Act—like Section 5—"are enforceable by someone other than the Attorney General," but not Section 2.[206] But the statutory text does not support this *a-la-carte* approach to Section 3. Rather, the phrase "an aggrieved person" is immediately followed by "institute[] a proceeding under *any statute* to enforce the voting guarantees of the [F]ourteenth or [F]ifteenth amendment."[207] Placed in this context, "any statute" more plausibly means "every statute,"[208] rather than just some parts of the Act, as the Eighth Circuit contends.

Furthermore, the Eighth Circuit's application of the two-part *Sandoval* test is deeply flawed.[209] Despite Section 2's plain text, which expressly prohibits "denial or abridgement of the *right of any citizen … to vote*,"[210] it shockingly concluded that it was "unclear" whether Section 2 creates an individual right. To date, every other court to consider this issue has reached the contrary conclusion.[211] And for the second part, Section 3's "'aggrieved person' language provides strong evidence

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203. Ala. State Conf. of NAACP v. Ala., 949 F.3d 647, 652 (11th Cir. 2020).

204. The Eighth Circuit's opinion called the view of the five justices in *Morse* "mere dicta at most." *Ark. State Conf. NAACP*, 86 F.4th at 1211-12, 1215. But a dissent is even less significant than dicta, as it never commanded a majority.

205. *Id.* at 1211.

206. *Id.*

207. 52 U.S.C. § 10302(a) (2018) (emphasis added); *accord id.* §§ 10302(b)-(c) (same).

208. *See* Patel v. Garland, 596 U.S. 328, 338 (2022) ("As this Court has repeatedly explained, the word 'any' has an expansive meaning." (cleaned up); Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 219 (2008) ("[R]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" (cleaned up)); *see also* Eisenhauer v. Culinary Inst. of Am., 84 F.4th 507, 517 (2d Cir. 2023) ("'Any' means 'every'; its meaning is 'expansive' rather than restrictive.").

209. For a more detailed analysis on this point, see Ziegler, *supra* note 187, at 991-96; Recent Case, *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, 2428-30 (2024) [hereinafter Recent Case].

210. 52 U.S.C. § 10301(a) (emphasis added); *see also* Recent Case, 137 HARV. L. REV. 2424, 2430 (2024) ("The text of section 2 confers individual voting rights that are presumptively enforceable. . . .").

211. *See* Coca v. City of Dodge City, 669 F. Supp. 3d 1131, 1141-42 (D. Kan. 2023) ("Section 2 contain[s] clear rights-creating language. . . ."); Turtle Mountain Band of Chippewa Indians v. Jaeger, No. 3:22-CV-22, 2022 WL 2528256, at *5 (D.N.D. July 7, 2022) ("It is difficult to imagine more explicit or clear rights creating language."); *cf.* Shaw v. Hunt, 517 U.S. 899, 917 (1996) (citing Section 2 and stating that the "right to an undiluted vote (to cast a ballot equal among voters), belongs to . . . individual members").

that private plaintiffs—not just the [Department of Justice]" can obtain a private remedy.[212]

Despite all this, there are seemingly at least two Justices who agree with the Eighth Circuit,[213] and several others with a long record of hostility to the Voting Rights Act.[214] As a result, it appears likely the Court will soon consider whether there is an implied private right of action to enforce Section 2, and may conclude the answer is no.[215] The empirical study discussed in the next part of this Article will assess the potential impact of such an outcome by examining Section 2 litigation since 1982.

III. EMPIRICAL STUDY OF SECTION 2 LITIGATION

This Part discusses a novel empirical study regarding Section 2 challenges in federal court from 1982 through 2024. It first discusses the methodology used, including study design and data collection procedures. It then recounts several potential limitations of the methodology employed. Next, it details the key results from the empirical study, including the number of Section 2 challenges brought by private plaintiffs and DOJ, as well as the type of election law practice or procedure challenged, the type and location of the defendants involved, and each challenge's outcome when available. Finally, it addresses some implications that flow from these findings.

A. Study Design and Data Collection

The author created an original dataset from this study. A wide variety of sources were used to identify Section 2 claims filed in federal court, both those that resulted in a judicial decision and those that did not. These sources included the database of cases decided under Section 2 of the Voting Rights Act previously compiled by the University of Michigan Law School's Voting Rights Initiative[216] and targeted

212. Ziegler, *supra* note 187, at 995.

213. *See supra* notes 123-127 and accompanying text (Justices Gorsuch and Thomas).

214. *See* ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA 144-53 (2015) (recounting Chief Justice Roberts's work as a young lawyer opposing the 1982 amendments to the Voting Rights Act); Richard L. Hasen, *The Supreme Court's Latest Voting Rights Opinion is Even Worse Than It Seems*, SLATE, (July 8, 2021) https://slate.com/news-and-politics/2021/07/supreme-court-sam-alito-brnovich-angry.html [https://perma.cc/5XHU-XNKV] (noting that "Justice Alito . . . has long shown hostility to voting rights").

215. Substantive editing of this Article was completed as of mid-April 2026, while the petition for writ of *certiorari* in *Turtle Mountain Band of Chippewa Indians v. Howe* was still pending, *supra* note 19, and prior to the U.S. Supreme Court's decision in *Louisiana v. Callais*, No. 24-109 (argued Oct. 15, 2025).

216. Ellen D. Katz et al., UNIV. MICH. L. SCH. VOTING RIGHTS INITIATIVE, TO PARTICIPATE AND ELECT: SECTION 2 OF THE VOTING RIGHTS ACT SINCE 1982 (2025),

searches in the Federal Court Dockets database in Bloomberg Law.[217] To capture cases where the United States was a party, the search included lists of Section 2 litigation maintained on the Department of Justice's website[218] and provided to Congress during the 2006 reauthorization process.[219] In addition, reports by civil rights organizations and governmental bodies like the American Civil Liberties Union ("ACLU"),[220] the Lawyers Committee for Civil Rights Under Law,[221] and the U.S. Commission on Civil Rights[222] were reviewed to find Section 2 claims not previously captured and to collect further information on cases already located in other sources. The author also searched and reviewed numerous law review articles, books, and other

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https://voting.law.umich.edu [https://perma.cc/VQ57-5CPJ] (listing 472 Section 2 cases); *see also* Katz et al., *supra* note 102, at 654 (identifying 331 lawsuits encompassing 763 judicial decisions); Ellen D. Katz et al., *To Participate and Elect: Section 2 of the Voting Rights Act*, U. MICH. L. SCH. VOTING RTS. INITIATIVE (2022) https://repository.law.umich.edu/other/192/ [https://perma.cc/G54D-TSNC] (updating the previous study with Section 2 cases decided through the end of 2021). For conciseness and consistence with court opinions, *see Shelby Cnty.*, 570 U.S. at 577-78 (Ginsburg, J., dissenting), hereinafter the "Katz study" in the remainder of the Article.

217. The following search query was used in the Federal Court Dockets database on Bloomberg Law: ("section 2" w/20 "voting rights act") OR ("section 2" w/25 (("42 U.S.C." w/5 1973c!) OR ("52 U.S.C." w/5 1030!))). Each result from this query was then manually examined, including a review of the complaint if available, to ascertain if it involved a Section 2 claim. In addition, during the coding process, this was supplemented by additional searches in Bloomberg Law of specific federal court districts using Nature of Suit (NOS) Code 441, which covers actions filed under the Voting Rights Act, 52 U.S.C. § 10301, as well as the Civil Rights Act, 52 U.S.C. § 10101, and then manually examining each result as described above. *See* U.S. COURTS, CIVIL NATURE OF SUIT CODE DESCRIPTIONS (updated Apr. 2021), https://www.uscourts.gov/sites/default/files/js_044_code_descriptions.pdf [https://perma.cc/KUL9-KU8K]; *see also* Christina L. Boyd & David A. Hoffman, *The Use and Reliability of Federal Nature of Suit Codes*, 2017 MICH. ST. L. REV. 997, 997 (2017) (explaining that NOS codes can be unreliable).

218. CASES RAISING CLAIMS UNDER SECTION 2 OF THE VOTING RIGHTS ACT, C.R. DIV., U.S. DEP'T OF JUST. (last updated March 27, 2025), *available at* https://perma.cc/8T9K-ZTXF.

219. *Voting Rights Act: Section 5 of the Act - History, Scope and Purpose, Hearing Before the Subcomm. on the Const., H. Comm. on the Judiciary*, 109th Cong. 2835-39 (2005) (hereinafter "*History, Scope and Purpose*") (Appendix to the Statement of Bradley J. Schlozman, Acting Attorney General, Civil Rights Division, U.S. Department of Justice) (listing 97 cases Section 2 cases brought or joined by the Attorney General from 1982 through 2005).

220. *See* LAUGHLIN MCDONALD & DANIEL LEVITAS, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT, VOTING RIGHTS LITIGATION, 1982-2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION (2006). https://www.aclu.org/sites/default/files/pdfs/votingrightsreport20060307.pdf [https://perma.cc/25TK-3EE6].

221. LAWYERS COMMITTEE FOR CIVIL RIGHTS. UNDER LAW, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK, 1982-2005, APPENDIX TO THE STATEMENTS OF THE HON. BILL LANN LEE AND THE HON. JOE ROGERS, EVIDENCE OF CONTINUED NEED, HEARING BEFORE THE SUBCOMM. ON THE CONST., H. JUDICIARY COMM. (109th Cong., 2nd Sess., Mar. 8, 2006); LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, PRELIMINARY REPORT ON VOTING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES, 1994-2019 8-47, https://lawyerscommittee.org/wp-content/uploads/2019/11/LC_VOTER_DISCRIM_RPT_H.pdf [https://perma.cc/RHT7-6S7X].

222. AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS IN THE UNITED STATES 10, 250-256 U.S. COMM'N ON C.R. (2018), https://www.usccr.gov/files/pubs/2018/Minority_Voting_Access_2018.pdf [https://perma.cc/DZG6-TW2T].

secondary sources to help identify additional Section 2 cases.[223] Finally, to help capture cases that did not result in a court opinion, the author obtained and reviewed information regarding Section 2 claims from litigators and expert witnesses who were regularly involved in bringing these cases.[224] This wide-ranging, multimodal search resulted in identifying 1,519 Section 2 challenges[225] in federal court between 1982 and 2024,[226] resulting in the most comprehensive set of Section 2 litigation assembled to date.[227]

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223. *See* DANIEL MCCOOL, SUSAN M. OLSON, & JENNIFER L. ROBINSON, NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE, at 48-67, tbl. 3.1 (2007); *see e.g.*, Peyton McCrary, *The Struggle for Minority Representation in Florida, 1960-1990*, 86 FLA. HIST. Q. 93, 103 (2007). Particularly valuable are a series of state-specific reports prepared by voting rights litigators, scholars, and student researchers in connection with the 2006 reauthorization of the Voting Rights Act that were subsequently published in the *Southern California Review of Law and Social Justice*. *See e.g.*, Natalie Landreth & Moira Smith, *Voting Rights in Alaska: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 79 (2007); Joaquin G. Aliva, Eugene Lee & Terry M. Ao, *Voting Rights in California: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 131 (2007); Laughlin McDonald, Janine Pease & Richard Guest, *Voting Rights in South Dakota: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 195 (2007); James Blacksher et al., *Voting Rights in Alabama: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 249 (2008); James Thomas Tucker et al., *Voting Rights in Arizona: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 283 (2008); Robert A. Kengle, *Voting Rights in Georgia: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 367 (2008); Debo P. Adegbile, *Voting Rights in Louisiana: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 413 (2008); Robert McDuff, *The Voting Rights Act and Mississippi: 1965-2006*, 17 S. CAL. REV. L. & SOC. JUST. 475 (2008); Juan Cartagena, *Voting Rights in New York City: 1982-2006,* 17 S. CAL. REV. L. & SOC. JUST. 501 (2008); Anita S. Earls, Emily Wynes & LeeAnne Quatrucci, *Voting Rights in North Carolina: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 577 (2008); John C. Ruoff & Herbert E. Buhl, *Voting Rights in South Carolina: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 643 (2008); Nina Perales, Luis Figueroa & Criselda G. Rivas, *Voting Rights in Texas: 1982-2006,* 17 S. CAL. REV. L. & SOC. JUST. 713 (2008); Anita S. Earls et al., *Voting Rights in Virginia: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 761 (2008).

224. Declaration of Dr. Peyton McCrary at 10, Shelby County, Ala. v. Holder, No. 1:10-CV-00651 (D.D.C. Nov. 15, 2010), ECF No. 53, Ex. 1 (finding 99 Section 2 cases that resulted in settlements that were not captured in the Michigan Law database); Expert Witness Report of George Korbel at 17-19, Veasey v. Perry, No. 2:13-CV-00193 (S.D. Tex. June 27, 2014), ECF No. 365 (identifying numerous Section 2 cases in Texas); Rolando L. Rios, *Voting Rights Cases Litigated by Rolando L. Rios & Associates, PLLC,* https://perma.cc/K8D4-J94B (last updated Mar. 6, 2025) (listing over 200 cases under the Voting Rights Act brought by attorney Rolando Rios, primarily in Texas and New Mexico).

225. This Article uses "challenge" to designate a Section 2 claim regarding a particular governmental entity's plan, practice, or procedure regarding voting. In this study, the author found it was not uncommon for more than one group of plaintiffs to file separate lawsuits regarding the same election-related issue, particularly for statewide changes like redistricting plans. In these situations, rather than coding each case separately, the study combines them into a single entry (a challenge) in the dataset, and all related cases were captured as a string variable: [relatedcase]. Similarly, if a single lawsuit challenged more than one governmental entity's plan, practice or procedure related to voting—such as a claim that a county's legislative governing body (e.g., county commission or board of supervisors) and a county's school board both violated Section 2 through the use of at-large elections—then these were coded as separate challenges in the dataset.

226. Cases involving a Section 2 challenge filed prior to 1982 but that were still pending in federal court at the time of Congress's amendments to the Voting Rights Act are included in this dataset.

227. This dataset will be made publicly available upon publication on the author's website: https://christopherbseaman.com [https://perma.cc/TWG5-GZER].

Next, each Section 2 challenge was hand coded for a variety of information.[228] A standardized set of coding instructions was used for this process.[229] The coded variables fall into several categories.[230] First, basic case information was coded, including names of the plaintiff and defendant,[231] the date and year the case asserting the Section 2 challenge was filed,[232] the case's docket number,[233] the district court where it was filed,[234] and the relevant circuit court of appeal.[235] For cases where the election processes of more than one governmental entity were challenged, each governmental entity received a separate entry (row) in the dataset, and the number of entities in each case and their names were coded as well.[236] Also coded was whether the Section 2

228. The author personally hand coded all Section 2 challenges in the dataset, which took several hundred hours in aggregate. *See* Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 829 (2002) ("Unfortunately, data gathering is frequently labor-intensive and time-consuming. . . .").

229. *See* Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CAL. L. REV. 63, 109 (2008) (explaining that "good coding practice requires researchers to record their description of the working categories and their instructions for applying the categories"). The written coding instructions used in this study will be posted and preserved on the author's website: https://christopherbseaman.com [https://perma.cc/TWG5-GZER].

230. *See id.* at 107 ("Commonly used factors [in coding] might be sorted into four general groups: (1) the parties' identities and attributes, (2) the types of legal issues raised and in what circumstances, (3) the basic outcome of the case or issue, and (4) the bases for decision."). Variable names are listed in brackets in the following footnotes.

231. These were coded as two separate string (text) variables: [plaintiff] and [defendant]. If multiple plaintiffs or defendants were named, only the first named party was used for each variable.

232. This variable [date] was coded in the following format: MM/DD/YYYY. In situations where the day and/or month the case was filed could not be found (which occasionally occurred for older cases not captured on PACER), this information was replaced with 00. The variable [year] was coded as a continuous variable.

233. This variable [docket] was coded in the following format: N:NN-CV-NNNN (where N is a number). If the first number, which is often used to denote in which division a case was filed, was not available, it was replaced with a 0. If the district court docket number was unavailable, then the docket number in the circuit court of appeal was used. If neither the district court nor the circuit court docket numbers could be found, then this field was left blank.

234. This was initially coded as a string variable [court] using a three- or four-letter abbreviation consistent with PACER. For example, the Middle District of Alabama was abbreviated as "ALMD," while the Northern District of Alabama was abbreviated as "ALND." This variable was then encoded into a separate, categorical (numeric) variable [district] for purposes of data analysis.

235. This variable [circuit] was coded as a discrete numeric variable representing the respective circuit court of appeal. For example, the U.S. Court of Appeals for the Fifth Circuit was coded as 5. The U.S. Court of Appeals for the District of Columbia, which lacks a numeric designation, was coded as 12.

236. The former variable [numberdefs] was coded as a categorical variable based on the order of each governmental entity's appearance in the case's caption, while the latter variable [entity] is a string variable stating the name and state of the governmental entity defendant. If the change involved a redistricting plan to a legislative body, then the name of the legislative body was followed by the year the challenged plan was adopted in parentheses. For example: Arkansas House redistricting (2021).

challenge involved a local governmental body, such as a city council, county commission, or school board; or instead involved a statewide election practice or change, such as a redistricting plan for a state legislative body or statewide rule like a photo identification requirement.[237] In addition, any publicly-reported court decision in a challenge was captured,[238] along with information on the source where the Section 2 challenge was first identified[239] and a link to the docket sheet for the case if available.[240]

Second, the identity of the plaintiff(s) in each Section 2 challenge was coded more granularly. Specifically, the author coded for whether the Attorney General, representing the United States, brought the Section 2 challenge[241] or joined a previously-filed case brought by private plaintiff(s) as an intervenor.[242]

Next, the study coded for the type of election-related standard, practice, or procedure at issue in the Section 2 challenge.[243] This included:

- use of at-large elections or multimember districts, with or without "enhancing devices" such as numbered-place and majority vote requirements;[244]
- redistricting, reapportionment, or malapportionment of single-member district plans;
- annexations, de-annexations, and other municipal boundary changes;
- barriers to registration and voting, including photo identification and/or proof of citizenship requirements, voter registration and/or polling place locations, identity of polling place officials, and processes for absentee and mail-in ballot collection;

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237. This was coded as a binary variable: [local].

238. The reporter information for each court decision was coded as a (string) variable using *Bluebook* format in chronological order of appearance: [cite1], [cite2], [cite3], [cite4], [cite5], [cite6]. If a case had more than 6 reported court decisions, additional decisions would be cited in the following catchall string variable: [note].

239. This information was coded as a string variable: [source].

240. This information was coded as a string variable in the form of a hyperlink to the relevant docket page in Bloomberg Law: [link]. If the docket sheet was not available in Bloomberg law, but was available in PACER, then this was denominated simply by the word "PACER." If the docket sheet was not available in either Bloomberg Law or PACER, the entry "N/A" (for not available) was used.

241. This was coded as a binary variable: [doj_file].

242. This was coded as a binary variable: [doj_join]. Notably, this variable includes cases where both (1) the Attorney General intervened in a previously-filed lawsuit by private plaintiffs, and (2) the Attorney General filed a separate lawsuit, but the case was subsequently consolidated with litigation brought by private plaintiffs.

243. This was coded as a categorical variable: [type].

244. *See Zimmer*, 485 F.2d at 1305 (noting that devices such as "the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts" can enhance the tendency of at-large elections to dilute minority votes).

- felon disenfranchisement;
- election machines and related equipment (including ballot format);
- election contests regarding a particular election;
- issues related to elections during a natural disaster or public emergency, including the COVID-19 pandemic;
- voter referendum and constitutional amendments;
- appointment of officials; and
- other or unknown.

The final group of variables coded were the outcome of each Section 2 challenge[245] and the procedural posture of the final resolution.[246] Regarding the coding of outcomes, one challenge is deciding what counts as a "win" for plaintiffs.[247] Some are obvious, such as a final court decision on the merits.[248] But like most civil litigation,[249] the majority of Section 2 challenges captured in this dataset were settled or otherwise voluntarily resolved by the parties prior to a final court decision on the merits. As a result, the author sought to further examine these resolutions to determine if plaintiffs obtained meaningful relief as a result of their lawsuit.

Following this approach, the study classified all consent decrees—which is a binding court order enforcing the parties' agreement and granting the court continuing jurisdiction to enforce it[250]—as a win for

245. This was coded as a categorical variable: [win]. Accepted values for this variable were: plaintiff win; defendant win; voluntary dismissal; case still pending as of May 2025; and other/uncertain. In addition, further information on the case's resolution was captured in text format in a separate string variable: [outcome].

246. This was coded as a categorical variable: [outcome]. Accepted values for this variable were: voluntary dismissal prior to court decision; temporary restraining order or preliminary injunction (if no information available on final resolution); motion to dismiss; motion for summary judgment or judgment as a matter of law; resolution after bench trial; resolution after appeal; consent decree or other stipulated resolution between the parties; case still pending as of May 2025; and other/uncertain.

247. *See* Hall & Wright, *supra* note 229, at 108 ("Defining what counts as a win or loss across a range of cases is not a simple matter.").

248. For purposes of this study, the [outcome] variable captures the final court decision on liability—that is, whether the defendant jurisdiction was found to have violated Section 2 or not.

249. *See, e.g.*, Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111 (2009) (in a study of over 3000 civil cases filed in two federal district courts in 2001-2002, finding that the aggregate settlement rate was about 67%).

250. *See* Tobias Barrington Wolff, *Consent Decrees and Federal Jurisdiction*, 84 U. PITT. L. REV. 457, 460 (2022) ("When a district court enters a consent decree, it takes what would otherwise be a private settlement agreement between the parties and crafts an order that 'looks like and is entered as a judgment.' That formal step imbues the parties' agreement with the enforcement authority of the federal judiciary, an exercise of judicial power that mobilizes remedial tools that would not otherwise be available . . . and places limits on the ability of government defendants to alter or repudiate what would otherwise be purely contractual obligations.").

the plaintiff, as these decrees usually required the defendant jurisdiction(s) to implement changes to their electoral systems.[251] Similarly, this study classified stipulated or consent resolutions and settlements as a win for plaintiffs if there was publicly-available evidence that the resolution or settlement resulted in a change of the challenged election practice or procedure.[252] In contrast, if there was no publicly available information that a settlement provided relief, this was classified as a voluntary dismissal and not counted as a win for plaintiffs.[253] Finally, a text field was created to capture any additional relevant or notable information regarding a challenge.[254] Following completion of the coding process, the dataset was imported into Stata 19 for analysis.

B. Limitations

Like all empirical studies, the methodology used in this study has limitations that could affect the findings and implications discussed in the remainder of this Part. This section discusses several potential limitations and the author's efforts to address them.

First, this study involves a review of litigation, which is subject to the well-known phenomenon of selection bias. "[T]he disputes selected for litigation . . . will constitute neither a random nor a representative

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251. In particular, consent decrees were widely used in the *Dillard* litigation that challenged the use of at-large elections for over 190 local governmental entities in Alabama as dilutive of Black voting strength under Section 2. After a federal court granted a preliminary injunction, finding that plaintiffs were likely to succeed on their claim that governmental entities in nine Alabama counties had adopted or maintained at-large elections with a discriminatory intent, Dillard v. Crenshaw Cnty., 640 F. Supp. 1347, 1352 (M.D. Ala. 1986), nearly all the defendant jurisdictions entered into consent decrees that committed them to replacing at-large elections with single-member districts. *See* Dillard v. City of Foley, 926 F. Supp. 1053, 1067 (M.D. Ala. 1995); Dillard v. City of Elba, 863 F. Supp. 1550, 1552 (M.D. Ala. 1993); Dillard v. Crenshaw Cnty., 748 F. Supp. 819, 822 (M.D. Ala. 1990); *see also generally* Jerome Gray & James U. Blacksher, *The* Dillard *Cases and Grassroots Political Power*, 46 CUMB. L. REV. 311, 311-25, 335-46 (2016) (describing, by one of the attorneys for plaintiffs in the *Dillard* litigation, its development and resolution of most of the cases through consent decrees); Peyton McCrary, *Minority Representation in Alabama: The Pivotal Case of* Dillard v. Crenshaw County, *in* DIXIE REDUX: ESSAY IN HONOR OF SHELDON HACKNEY 268 (Raymond Arsenault & Orville Vernon Burton eds., 2013) (explaining, in an article written by the historian who served as expert witness for the *Dillard* plaintiffs, the evidence of discriminatory intent).

252. This evidence could be contained in a court order or other filing (for instance, an order noting that the defendant jurisdiction had agreed to adopt a single-member districting plan), or in publicly available documents identifying the relief provided. *See, e.g.*, McDonald & Levitas, *supra* note 220 (describing the outcome of numerous Section 2 cases brought by the ACLU that were settled or otherwise resolved prior to final judgment); Earls et al., *Voting Rights in North Carolina: 1982-2006*, *supra* note 223 (describing the outcome of Section 2 cases filed in North Carolina); Rios, *supra* note 224 (describing relief provided in numerous Section 2 cases brought by the author, a voting rights attorney, primarily in Texas).

253. As a result, this study may understate the success of plaintiffs in Section 2 challenges—for instance, in cases where the plaintiffs obtained meaningful relief through litigation, but there was no publicly-available evidence of this fact. *Cf.* Katz et al., *supra* note 102, at 655 (classifying all settlements as a "favorable determination for the plaintiff").

254. This was coded as a string variable: [note].

sample . . . of all disputes."[255] For instance, jurisdictions that voluntarily changed election practices without a Section 2 challenge would not be captured in this dataset.[256] Similarly, prior to *Shelby County*, a discriminatory change in a jurisdiction's voting system that was blocked under Section 5's preclearance requirement would not be included here. As a result, this study cannot assess the full impact of the Voting Rights Act in protecting voting rights.

Second, despite using a wide variety of sources, it is possible—and in fact likely—that this study failed to capture all Section 2 challenges during the relevant time frame (1982–2024). In particular, it was challenging to identify Section 2 cases filed in the 1980s and early 1990s that did not result in a judicial decision, as the PACER system,[257] which provides electronic access to federal court dockets (and more recently, full text of court filings) was not launched until 1990 and took some time to be fully implemented.[258] These omissions may result in an undercount of both total Section 2 challenges as well as those brought by private plaintiffs, as the federal government maintained a comprehensive list of Section 2 cases where it was a party.[259]

Third, hand coding of information can introduce bias or error. For example, if the coding instructions are imprecise or include room for subjectivity, this could introduce errors and negatively impact reproducibility.[260] However, this concern can be mitigated by creating, pilot testing, and implementing a written set of coding rules, as was done in this study.[261] In addition, the author—who previously conducted empirical legal research on various issues in civil litigation filed in federal

255. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984).

256. This could include, for example, jurisdictions that changed a voting rights practice in response to the outcome of a Section 2 challenge in another jurisdiction.

257. *About Us*, PACER, https://pacer.uscourts.gov/about-us [https://perma.cc/JZX8-22QB] (last visited Aug. 6, 2025).

258. Peter W. Martin, *Online Access to Court Records - From Documents to Data, Particulars to Patterns*, 53 VILL. L. REV. 855, 860 (2008); *see also* Declaration of Dr. Peyton McCrary, *supra* note 224, at 9 (noting that the "list of Section 2 settlements may be underinclusive" because "[s]ome docket sheets are available in the PACER database beginning in 1985, but not consistently until the early 1990s.").

259. *See supra* notes 218-219 and accompanying text.

260. *See* LEE EPSTEIN & ANDREW D. MARTIN, AN INTRODUCTION TO EMPIRICAL LEGAL RESEARCH 97-105 (2014) (explaining best practices in creating and applying coding instructions); ROBERT M. LAWLESS, JENNIFER K. ROBBENNOLT & THOMAS S. ULEN, EMPIRICAL METHODS IN LAW 148-53 (2d ed. 2016) (same).

261. *See* Epstein & Martin, *supra* note 260, at 106 ("[C]odebooks provide a guide to the database that the research is creating. The guide should be sufficiently rich so that it not only enables the researchers to code their data reliably but also allows others to replicate, reproduce, update, or build on the variables housed in the database (and any analyses generated from it)."); Lawless, Robbennolt & Ulen, *supra* note 260, at 152 (explaining the importance of a written set of coding instructions).

court,[262] as well as the implementation of Section 5 of the Voting Rights Act by the Department of Justice[263]—personally implemented the coding instructions.

C. Results

This section recounts the key findings from this empirical study. It is not a complete analysis of all data collected, but it provides information on the main issue of this article—private rights of action—as well as additional descriptive data that helps contextualize Section 2 litigation in federal court.

1. Total Challenges and Timing

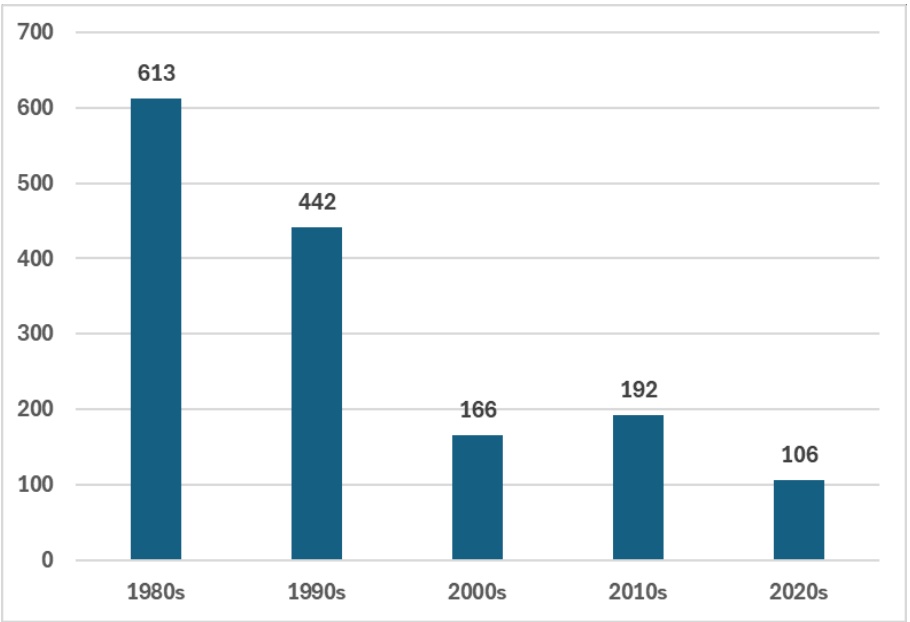
In total, 1,519 Section 2 challenges were identified during the studied time period (1982–2024). Of these, 613 challenges (40%) were filed or still being litigated during the 1980s, while 442 challenges (29%) were filed during the 1990s. Starting at the turn of the millennium, the total number of Section 2 challenges dropped significantly, with only 166 challenges (11%) filed during the 2000s, 192 challenges (13%) filed in the 2010s, and 106 challenges (7%) filed from January 1, 2020, through the end of the study period on December 31, 2024. This information is depicted visually in Figure 1 below. It is also consistent with earlier studies finding more Section 2 litigation in the first decade after the adoption of the "results test" than in the decades since.[264]

262. *See generally* David S. Levine & Christopher B. Seaman, *The DTSA at One: An Empirical Study of the First Year of Litigation Under the Defend Trade Secrets Act*, 53 WAKE FOREST L. REV. 105 (2018); Ryan T. Holte & Christopher B. Seaman, *Patent Injunctions on Appeal: An Empirical Study of the Federal Circuit's Application of eBay*, 92 WASH. L. REV. 145 (2017); Christopher B. Seaman, *Permanent Injunctions in Patent Litigation After* eBay*: An Empirical Study*, 101 IOWA L. REV. 1949 (2016); Christopher B. Seaman, *Willful Patent Infringement and Enhanced Damages After In re Seagate: An Empirical Study*, 97 IOWA L. REV. 417 (2012).

263. *See generally* McCrary, Seaman & Valelly, *supra* note 58.

264. Katz et al., *supra* note 102, at 656.

Figure 1: Section 2 Challenges by Decade



2. Location

Next, this article reports data on the location of Section 2 challenges. Table 1 contains a list of all states with at least 10 Section 2 challenges during the study period.

Table 1: Section 2 Challenges By State, 1982–2024
(Minimum 10 Challenges)

State	Number of Section 2 Challenges
Texas	297
Alabama	262
Georgia	138
Florida	85
North Carolina	80
Mississippi	79

State	Number of Section 2 Challenges
South Carolina	53
Arkansas	50
Louisiana	47
New York	44
California	42
Illinois	36
New Mexico	33
Virginia	31
Ohio	23
Maryland	20
Tennessee	17
Michigan	16
Massachusetts	15
South Dakota	15
Missouri	14
Arizona	13
Montana	13
Wisconsin	13
Indiana	11
All Others	*72*

Although Section 2 applies nationwide, the challenges are not distributed evenly. Notably, although 45 of 50 states had at least one case between 1965 and 2024,[265] the nine states with the most Section 2 challenges were all in the former Confederacy. These states (Alabama, Arkansas, Georgia, Florida, Louisiana, Mississippi, North Carolina, South Carolina, and Texas) represent over 70% of all Section 2 challenges (1091 of 1519), even though they contain slightly more than one-quarter (26%) of the total U.S. population.

Texas, with over 250 counties and more than 5,500 local governmental units[266]—including towns, cities, independent school boards, water and utility districts, hospital districts, and community college districts[267]—had the most Section 2 challenges (286). Most Section 2 challenges in Texas were filed during the 1990s regarding the use of at-large elections for local governments,[268] and the vast majority of these were successfully resolved in plaintiffs' favor prior to trial.[269] Similarly, in Alabama, which had the second-most number of Section 2 challenges, almost 90% (230 of 262) were brought against the use of at-large elections and enhancing devices for local governments,[270] mostly as part of the *Dillard* litigation.[271]

Not surprisingly, then, the majority of Section 2 challenges were filed in federal district courts located in the Fifth and Eleventh Circuits, which cover most of the South. Table 2 below provides data on the number of Section 2 challenges per circuit, both as raw numbers and in percentages.

Table 2: Section 2 Challenges by Circuit Court, 1982–2024

Circuit	Number of Challenges	Percentage of Challenges

265. The states without a Section 2 case were Alaska, Iowa, Maine, New Hampshire, Oregon, and Vermont. In addition to states, both the District of Columbia (2) and the District of Guam (1) had Section 2 cases.

266. *2022 Census of Governments, Organization Tables* tbl. 1-2, U.S. CENSUS BUREAU, https://www.census.gov/data/tables/2022/econ/gus/2022-governments.html [https://perma.cc/Q8YN-KYNS].

267. *2022 Census of Governments, Individual State Descriptions* 279-288 U.S. CENSUS BUREAU (2022), https://www.census.gov/content/dam/Census/library/publications/2024/econ/2022ISD.pdf [https://perma.cc/R24V-7N8J].

268. 63% of all Section 2 challenges in Texas were filed in the 1990s (187 of 297), and of these, over 80% (172 of 187) challenged the use of at-large elections and enhancing devices.

269. Plaintiffs prevailed in over 67% (116 of 182) of Section 2 challenges regarding at-large elections filed in Texas during the 1990s. Of these, nearly all (113 of 116) were resolved by consent decree or similar.

270. Of these 230 challenges, 222 (97%) were filed during the 1980s, and plaintiffs won nearly all of them (222 of 230, 97%), usually via a consent decree or similar (210 of 222 wins, 95%).

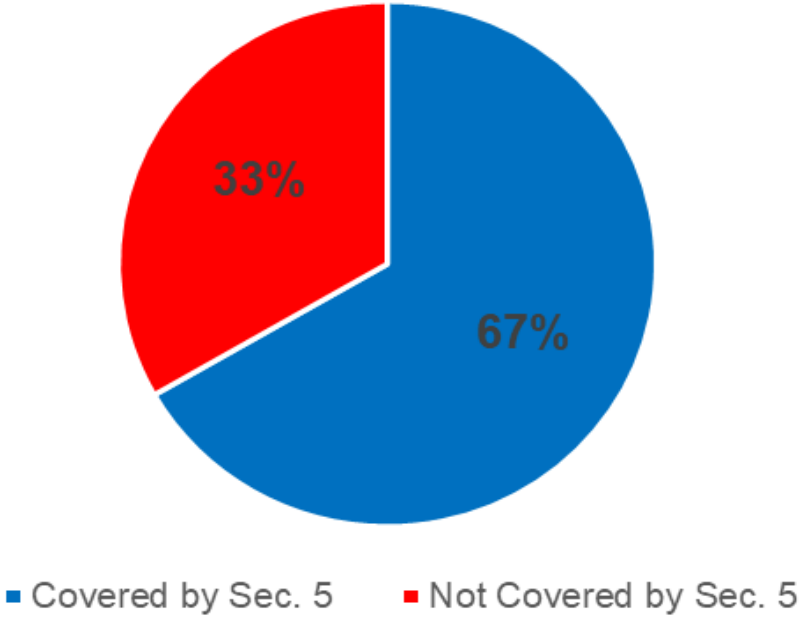
271. *See supra* note 260 (further describing the *Dillard* litigation).

First	17	1%
Second	48	3%
Third	21	1%
Fourth	184	12%
Fifth	423	28%
Sixth	59	4%
Seventh	60	4%
Eighth	93	6%
Ninth	80	5%
Tenth	47	3%
Eleventh	485	32%
D.C.	2	<1%

Another notable finding is the number of Section 2 challenges that were brought in jurisdictions formerly covered by Section 5's preclearance requirement.[272] Over 1000 Section 2 challenges in the dataset (1013 of 1519, 67%) were filed against election practices and procedures in formerly-covered jurisdictions. This is depicted visually in Figure 2 below.

272. *See supra* notes 51, 57 and accompanying text (explaining the coverage formula for Section 5's preclearance requirement).

Figure 2: Section 2 Challenges in Formerly-Covered Jurisdictions, 1982–2024



Comparing the decade before and after the *Shelby County* decision, more Section 2 challenges have been filed against formerly-covered jurisdictions since *Shelby County* (123 of 201, 61%) than in the ten-year period preceding the decision (87 of 164, 53%).[273]

Finally, the study coded for whether the challenged election practice was for a local governmental body, such as a city council, county legislature, or school board; or whether it involved a statewide election practice, such as a redistricting plan for a state legislative body. Most Section 2 claims—over 81% (1231 of 1519) involved local governments. This changed over time, however. As shown in Table 3 below, the vast majority of Section 2 claims in the 1980s and 1990s were brought against local governments. As time passed, however, challenges against statewide election practices, procedures, and plans increased, eventually making up a majority of all Section 2 challenges brought during the first half of the current decade (2020s).

273. This difference, however, is not large enough to be statistically significant at the $p < 0.05$ level ($p = 0.117$ for a two-sided chi-square test).

Table 3: Local vs. Statewide Section 2 Challenges, 1982–2024

	1980s	**1990s**	**2000s**	**2010s**	**2020s**
Local	580 (95%)	388 (88%)	108 (65%)	114 (59%)	41 (39%)
Statewide	33 (5%)	54 (12%)	56 (35%)	78 (41%)	65 (61%)

3. Types of Election Practices

Another category of information captured in the dataset is the type of election practice or procedure at issue in each Section 2 challenge. At-large elections (including enhancing devices) were by far the most common practice litigated, consisting of over 60% (918 of 1519) of all Section 2 challenges, followed by redistricting and reapportionment plans at slightly over 20% (310 of 1519) of challenges. The third most common type of challenge involved barriers to registration and voting (102 of 1519, 6.7%). All other practices coded for were 3% or less. Table 4 below provides complete data on this issue for the entire period of this study.

Table 4: Election Practices at Issue, 1982–2024

Type	**Total Number of Section 2 Challenges**	**Percentage of All Section 2 Challenges**
At-Large Elections (and Enhancing Devices)	918	60.4%
Redistricting	310	20.4%
Annexations	15	1.0%
Barriers to Voting	102	6.7%
Felon Disenfranchise-ment	10	0.6%
Election Equipment	7	0.5%
Election Contest	40	2.6%

Type	Total Number of Section 2 Challenges	Percentage of All Section 2 Challenges
Natural Disasters (incl. COVID-19)	19	1.3%
Referendum	12	0.8%
Appointments	15	1.0%
Other/Unknown	71	4.7%

Clear trends also emerged when studying the type of election practice or procedure challenged over time. The percentage of Section 2 challenges against at-large elections and enhancing devices decreased from almost 85% in the 1980s (520 of 613) to just 20% by the 2020s (21 of 106).[274] As local jurisdictions converted to single-member districts, the percentage of redistricting plans challenged in Section 2 litigation increased from 7% in the 1980s (43 of 613) to over 45% in the 2020s (48 of 106). Section 2 challenges to barriers to registration and voting also increased during the study period, from less than 3% in both the 1980s (13 of 613) and 1990s (12 of 442) to 20% in the 2010s (39 of 192). Another notable development is the rise of cases involving natural disasters or emergencies, which increased from zero during the 1980s and 1990s to over 15% of Section 2 challenges during the 2020s (16 of 106) due to the COVID-19 pandemic.[275] Complete data on the types of election practices challenged by decade are in Table 5 below.

274. *See also* Katz et al., *supra* note 102, at 658 (finding that most Section 2 lawsuits in the 1980s that resulted in a published court opinion involved at-large elections).

275. *See, e.g.*, Eugene D. Mazo, *Voting During a Pandemic*, 100 B.U. L. REV. ONLINE 283 (2020); Michael T. Morley, *Election Emergencies: Voting in Times of Pandemic*, 80 WASH. & LEE L. REV. 359 (2022).

Table 5: Election Practices at Issue, by Decade
(Percentage by Decade in Parentheses)

Type	1980s	1990s	2000s	2010s	2020s
At-Large Elections (and Enhancing Devices)	520 (85%)	293 (66%)	41 (25%)	43 (22%)	21 (20%)
Redistricting	43 (7%)	86 (19%)	57 (34%)	76 (40%)	48 (45%)
Annexations	4 (<1%)	5 (1%)	3 (2%)	3 (2%)	0 (0%)
Barriers to Voting	13 (2%)	12 (3%)	24 (14%)	39 (20%)	14 (13%)
Felon Disenfranchise-ment	1 (<1%)	3 (<1%)	4 (2%)	2 (1%)	0 (0%)
Election Equipment	1 (<1%)	0 (0%)	6 (4%)	0 (0%)	0 (0%)
Election Contest	8 (1%)	9 (2%)	13 (8%)	10 (5%)	0 (0%)
Natural Disasters (incl. COVID-19)	0 (0%)	0 (0%)	1 (<1%)	2 (1%)	16 (15%)
Referendum	3 (<1%)	2 (<1%)	0 (0%)	6 (3%)	1 (1%)
Appointments	3 (<1%)	5 (1%)	3 (2%)	3 (2%)	1 (1%)
Other/Unknown	17 (3%)	27 (6%)	14 (8%)	8 (4%)	5 (5%)
Total	**613 (100%)**	**442 (100%)**	**166 (100%)**	**192 (100%)**	**106 (100%)**

4. Plaintiffs

The next set of findings involves the plaintiffs in Section 2 litigation. As shown in Figure 3 below, over 90% of all Section 2 challenges were brought by private plaintiffs (1379 of 1519) during the study period. The Attorney General brought 7.5% of all Section 2 challenges (114 of 1519) and joined litigation filed by private plaintiffs in less than 2% of challenges (26 of 1519).[276]

Figure 3: Plaintiffs in Section 2 Challenges, 1982–2024

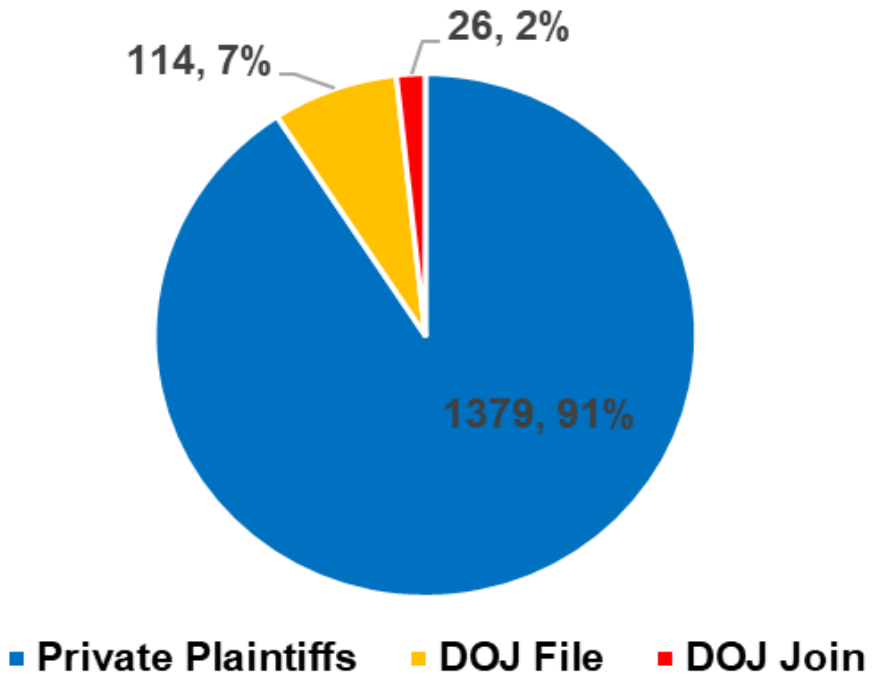
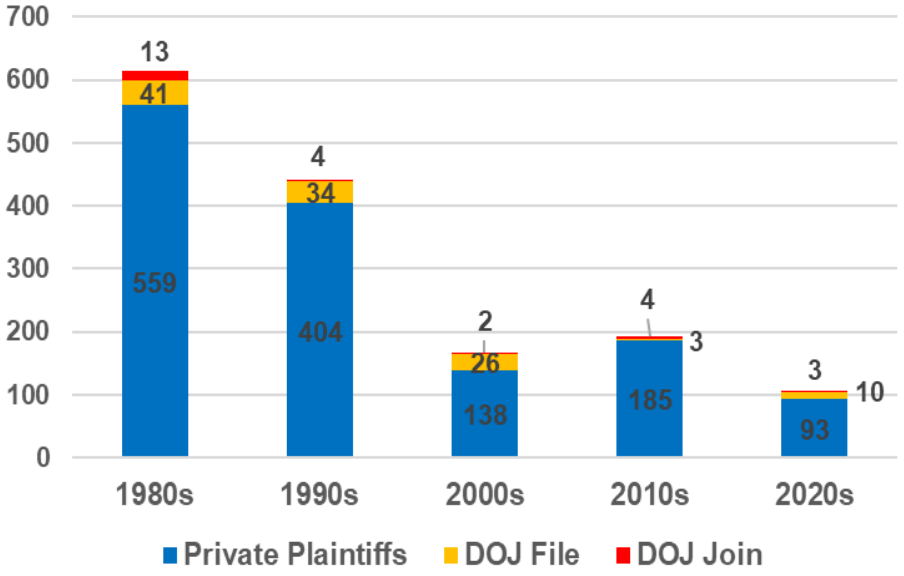


Figure 4 below depicts plaintiffs by decade. As can be seen, private plaintiffs brought the overwhelming majority of Section 2 challenges for each ten-year period, ranging from a low of 83% during the 2000s (138 of 166) and a high of 96% in the 2010s (185 of 192). Indeed, private plaintiffs have brought 278 Section 2 challenges since 2010 (93%), compared to only 20 by the Attorney General (7%).

276. This figure includes cases where the U.S. Department of Justice filed a Section 2 case regarding the same election practice or procedure at issue in litigation previously filed by private litigants and the two cases were consolidated for pre-trial proceedings and/or resolution on the merits.

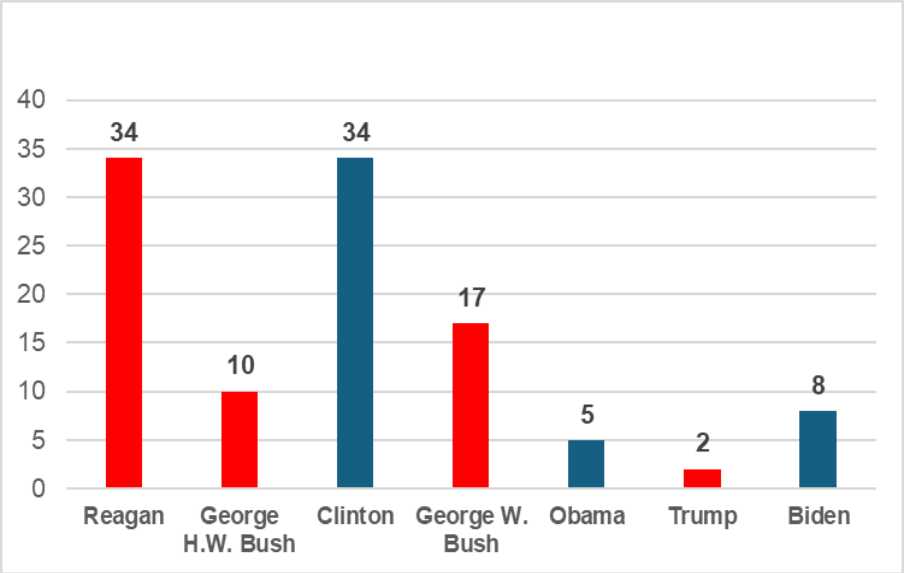
Figure 4: Plaintiffs in Section 2 Challenges, By Decade



The number of Section 2 challenges filed by presidential administration varied significantly, from 34 (Reagan and Clinton) to 2 (Trump), as depicted in Figure 5.[277]

277. The data in this chart exclude Section 2 challenges that were filed prior to 1982 but remained pending as of the time of the 1982 amendments. It also excludes cases where the Justice Department intervened for purposes of defending Section 2's constitutionality. For sake of completeness, it does include three Section 2 challenges filed in early 2025 by the Biden administration.

Figure 5: DOJ Section 2 Challenges Filed by Administration, 1982–2025



5. Outcomes

Another key finding is the success rate of plaintiffs in Section 2 challenges. In total, plaintiffs succeeded over two-thirds of the time (68%, 829 of 1224) where there was an ascertainable outcome.[278] Plaintiffs won more frequently in jurisdictions formerly covered by Section 5, prevailing over 75% of the time (613 of 807). In contrast, in Section 2 challenges in the rest of the country, plaintiffs won just over half of their claims (216 of 417, 52%).[279] This difference was statistically significant.[280]

Although plaintiffs were highly successful in the 1980s and 1990s, prevailing in 88% (473 of 535) and 71% (247 of 350) of their challenges, respectively, they were much less successful after 2000, winning only 32% (109 of 339) of the time. This is in line with findings from previous studies of Section 2 litigation.[281] Complete data on win rates per decade are presented in Table 6 below.

278. For this analysis, the author excluded all challenges where the plaintiffs filed a voluntary dismissal, where a final decision was still pending as of May 2025, or where there was an unknown outcome. This totaled 295 of 1519 Section 2 challenges in the dataset (19%).

279. This includes statewide election-related practices and procedures in states that were partially covered by the preclearance requirement.

280. $p < 0.001$.

281. *See* Katz et al., *supra* note 102, at 656 ("Courts identified violations of Section 2 more frequently between 1982 and 1992 than in the years since.").

Table 6: Win Rates in Section 2 Challenges, by Decade

Decade	**1980s**	**1990s**	**2000s**	**2010s**	**2020s**
Plaintiff win	437 (88%)	247 (71%)	48 (36%)	38 (27%)	23 (35%)
Defendant win	62 (12%)	103 (29%)	85 (64%)	103 (73%)	42 (65%)

Private parties also won less often than the United States as plaintiffs in Section 2 claims. In cases where the Attorney General was a plaintiff, the United States prevailed nearly 90% of the time (94 of 108); many of these were the result of consent decrees.[282] In contrast, private plaintiffs won almost two-thirds of Section 2 challenges that reached an ascertainable outcome (735 of 1116, 66%).

D. Implications

Several implications can be drawn from this data.

First, litigation by private plaintiffs is essential to effective enforcement of Section 2. As noted above, over 90% of Section 2 challenges, and nearly 90% of wins (735 of 829, 89%), were by private plaintiffs instead of the federal government. In particular, private plaintiffs have been instrumental in enforcing Section 2 at the local level, as the overwhelming majority of challenges in the dataset involved county, city, and other local governmental entities.

It is highly unlikely that the Justice Department, acting alone, could fill the gap if private plaintiffs are prohibited from bringing Section 2 claims. Section 2 litigation is resource intensive, requiring years of time[283] and often incurring over $1 million in attorney's fees and related costs if pursued to final judgment and appeal.[284] In addition,

282. Specifically, defendants entered into a consent decree or similar in 71% of Section 2 challenges where the Attorney General was a plaintiff (either filed a case or joined an existing lawsuit as an intervenor) that reached an ascertainable outcome (67 of 94).

283. *See, e.g.*, Montes v. City of Yakima, No. 2:12-CV-03108 (E.D. Wash. filed Aug. 22, 2012) (litigating over use of at-large elections for City of Yakima (WA) City Council took over three-and-a-half years from complaint through trial and appeal); Ga. State Conf. NAACP v. Fayette Cnty. Bd. of Comm'rs, No. 3:11-CV-00123 (N.D. Ga. filed Aug. 9, 2011) (litigating use of at-large elections for Fayette County (GA) Board of Commissioners took over 5 years from complaint until settlement in Sept. 2016); Bone Shirt v. Hazeltine, No. 3:01-CV-03032 (D.S.D. filed Dec. 26, 2001) (litigation over the 2001 redistricting of the South Dakota House of Representatives took over seven years, including multiple appeals to the Eighth Circuit); *see also History, Scope and Purpose*, *supra* note 219, at 101 (testimony of Anita S. Earls, Director of Advocacy, UNC Center for Civil Rights) (explaining that "[a] full section 2 case litigated just through end of trial is at least 2 years" and "2 to 5 years is a rough average").

284. *See, e.g.*, Order on Motions for Attorney's Fees, Veasey v. Abbott, No. 2:13-CV-193 (S.D. Tex. May 27, 2020), 2020 WL 9888360 (S.D. Tex. May 27, 2020) (awarding prevailing plaintiffs over $6.7 million in attorney's fees and costs); Memorandum Order at 3, N.C. State Conf. NAACP v. McCrory, 997 F. Supp. 2d 322 (M.D.N.C. Dec. 7, 2018) (No. 1:13-CV-00658)

vote dilution cases under Section 2 often involve extensive fact discovery and expert witness testimony regarding the *Gingles* factors and "totality of the circumstances" inquiry.[285] It is improbable that the Voting Section—which, according to a recent report, has been reduced from approximately thirty line attorneys to just three[286]—could successfully litigate more than a tiny fraction of the over 1300 cases that have been brought by private plaintiffs to date.[287] Over more than forty years, the Attorney General has only filed 114 Section 2 challenges—less than three per year.[288] Moreover, Section 2 litigation is incentivized, at least in part, by the availability of attorney's fees, expert witness fees, and costs for prevailing private plaintiffs—but which cannot be awarded to the United States.[289]

Second, the private voting rights bar is indispensable to effective enforcement of the Voting Rights Act. Section 2 litigation is highly complex, requiring deep expertise in the underlying legal issues, the ability and resources to marshal a wide range of factual evidence and expert witness testimony in support of the claim, and the skill to argue

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(awarding prevailing plaintiffs over $5.9 million in attorney's fees and litigation expenses); Order Re: Plaintiff's Motion for Costs and Attorneys' Fees, Montes v. City of Yakima, No. 2:12-CV-3108 (E.D. Wash. Jun. 19, 2015), 2015 WL 11120966 (awarding prevailing plaintiffs over $1.8 million in attorney's fees and costs).

285. *Restoring the Voting Rights Act: Combating Discriminatory Abuses, Hearing before the Subcomm. on the Constitution, Sen. Comm. on the Judiciary*, 107th Cong. 14-15 (2021) (testimony of Thomas Saenz, President and General Counsel, Mexican American Legal Defense and Education Fund) ("[L]itigation under Section 2 . . . is expensive and time-consuming. It is so because, under the law, Section 2 applies a totality of the circumstances test in court to allege violations of voting rights. . . . [T]hese cases involve multiple experts and lay-witnesses, thousands of pages of documents, before they reach resolution."); *see also* Mike Fault, *Big Costs, Heavy Hitters in ACLU Suit Against Yakima*, YAKIMA HERALD (Aug. 10, 2014), https://www.yakimaherald.com/big-costs-heavy-hitters-in-aclu-suit-against-yakima/article_3cbcce20-ee9d-11e4-bfba-f3e05bd949ca.html [https://perma.cc/5GRK-T5JH] (noting that in Section 2 litigation against the City of Yakima (WA), over 340,000 pages of documents were produced and more than 50 witnesses were deposed).

286. Matt Cohen, *DOJ Voting Section Has Just Three Lawyers Left, Watchdog Estimates,* DEMOCRACY DOCKET, https://www.democracydocket.com/news-alerts/doj-voting-section-has-just-three-lawyers-left-watchdog-estimates [https://perma.cc/9LMN-TJYX] (May 12, 2025).

287. *See* Delaney Cook, *When Courts Collide: How Statutory Interpretation Divides the Fifth and Eighth Circuits on Section 2 of the Voting Rights Act*, 93 U. CIN. L. REV. 799, 825 (2025) ("Realistically, the Attorney General does not have the time or ability to effectively oversee every Section 2 jurisdiction and properly bring every case on their own.").

288. If cases where the United States joined a suit brought by private plaintiffs as inventors are included, then it is slightly more than this figure. *See* christopherbseaman.com/datasets (making this data publicly available).

289. 52 U.S.C. § 10310(e); *see also* LULAC Council No. 4434 v. Clements, 923 F.2d 365, 367 (5th Cir. 1991) (explaining that "the Voting Rights Act's fee shifting provision for prevailing parties" is intended to "vindicat[e] civil rights" and encourage "'private attorneys general'" to "prosecut[e] a policy accorded the highest priority by Congress"); Donnell v. United States, 682 F.2d 240, 245 (D.C. Cir. 1982) ("The purpose of this provision . . . is the familiar one of encouraging private litigants to act as 'private attorneys general' in seeking to vindicate the civil rights laws.").

the case both at trial and on appeal.[290] Not surprisingly, then, there is only "a very small bar of people who do Section 2 litigation and who have the expertise to do it."[291] This includes both national civil rights organizations like the ACLU,[292] the NAACP Legal Defense and Education Fund ("LDF"),[293] and the Mexican-American Legal Defense and Education Fund ("MALDEF"),[294] as well as attorneys in private law firms who focus their practice primarily or exclusively on voting rights.[295] In light of the Voting Section's limited resources, litigation by the Attorney General often focuses on "the highest-impact Section 2 cases,"[296] leaving the private voting rights bar to bring the remaining claims, especially in local, more rural, and more disadvantaged areas.[297] This expertise and experience cannot easily be replaced, even if the federal government allocates more resources to voting rights enforcement.

Third, political considerations may result in the Voting Rights Act's underenforcement if the Attorney General is the sole entity who can bring Section 2 claims. Civil rights enforcement priorities shift each time a new administration comes to power, particularly following a change in partisan control of the Executive Branch.[298] Voting rights is

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290. *See, e.g.*, Johnson v. Hamrick, 196 F.3d 1216, 1223 (11th Cir. 1999) ("[T]he resolution of a voting dilution claim requires close analysis of unusually complex factual patterns." (internal quotations and citation omitted)); Rodriguez v. Harris Cnty., Tex., 964 F. Supp. 2d 686, 700 (S.D. Tex. 2013) (noting that vote dilution claims under Section 2 "present[] very complex political and legal issues whose resolution requires a comprehensive canvassing of the relevant facts"), *aff'd sub nom.* Gonzalez v. Harris Cnty., Tex., 601 F. App'x 255 (5th Cir. 2015).

291. *The Continuing Need for Section 5 Preclearance*, Hearing Before the Sen. Comm. on the Judiciary, 109th Cong. 15 (2006) (testimony of Pamela S. Karlan, Kenneth and Harle Montgomery Professor of Public Interest Law and Associate Dean for Research and Academics, Stanford University School of Law).

292. ACLU, *About the Voting Rights Project* (2013) https://www.aclu.org/documents/about-voting-rights-project [https://perma.cc/DVP8-Y6VE].

293. LDF, *Voting Rights 2025*, https://voting.naacpldf.org [https://perma.cc/XJQ2-H34Q] (last visited Aug. 9, 2025).

294. MALDEF, *Voting Rights*, https://www.maldef.org/court-cases/voting-rights [https://perma.cc/Q78V-J8R3] (last visited Aug. 9, 2025). Other civil rights organizations that commonly bring Section 2 litigation include Lawyers' Committee for Civil Rights Under Law, the Puerto Rican Legal Defense and Education Fund, Asian Americans Advancing Justice, and the Campaign Legal Center.

295. *See* Brief of Joaquin Avila et al. at 1, *Shelby Cnty.*, 570 U.S. 529 (No. 12-96), 2003 WL 332963, at *1 ("Amicus Curiae are long-serving members of the voting rights bar who each bring to bear decades of experience litigating hundreds of actions under Sections 2 and 5 of the Voting Rights Act . . .").

296. Perry Grossman, *The Case for State Attorney General Enforcement of the Voting Rights Act Against Local Governments*, 50 U. MICH. J.L. REF. 565, 595 (2017).

297. *Id.* at 597-98; *see also* Brief of Joaquin Avila et al., *supra* note 295, at 28-29 (noting the challenges of lack of experienced attorneys and sufficient financial resources to bring Section 2 claims "for minority voters in rural communities and for claims against local government").

298. Grossman, *supra* note 296, at 602; *see also* Michael Selmi, *Public vs. Private Enforcement of Civil Rights*, 45 UCLA L. REV. 1401, 1440-41 (1998).

no exception. For example, the George W. Bush administration focused more heavily on alleged voter fraud than minority voting rights, siding with states who adopted photo identification laws for voting[299] and launching a national investigation into voter fraud claims that ultimately came up mostly empty.[300] More recently, the current Trump administration dropped voting rights lawsuits brought by the Biden administration, including Section 2 challenges to congressional and state legislative districts in Texas and a Georgia county's use of at-large elections.[301] Also, an administration might not allege a Voting Rights Act violation if it would harm political allies, such as alleging that a statewide redistricting plan is discriminatory. In short, the Attorney General may decline to bring otherwise meritorious Section 2 claims for ideological or political reasons, resulting in underenforcement.

Fourth, the data for this study provides further empirical support for the claim that Congress was justified in extending Section 5's preclearance requirement and its geographically-targeted coverage formula in Section 4. Relying on Professor Katz's study of Section 2 litigation that resulted in a published court decision from 1982 through 2005, the district court in *Shelby County* held that the coverage formula was "sufficiently related to the problem that it targets."[302] Based in part on the Katz study's finding that more than 56% of successful Section 2 suits had been filed in covered jurisdictions, even though those jurisdictions contained less than 40% of the overall population, the district court found this "suggests that unconstitutional discrimination remains more prevalent in covered than in non-covered jurisdictions."[303] One limitation, however, is the Katz study did not

299. *See* Pamela S. Karlan, *Lessons Learned: Voting Rights and the Bush Administration*, 4 DUKE J. CON. L. & PUB. POL'Y 17, 20-23 (2009) (explaining that political appointees at the Justice Department overruled the recommendations of career staff to interpose an objection to new photo ID laws for voting in Arizona and Georgia).

300. *See* Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES 1, 1 (Apr. 12, 2007), https://www.nytimes.com/2007/04/12/washington/12fraud.html [https://perma.cc/GM6K-EQ5U] ("Five years after the Bush administration began a crackdown on voter fraud, the Justice Department has turned up virtually no evidence of any organized effort to skew federal elections, according to court records and interviews.").

301. Hansi Lo Wang, *Under Trump, The Justice Department is Stepping Away From Some Voting Rights Cases*, NPR 1, 2 (Mar. 31, 2025), https://www.npr.org/2025/03/24/nx-s1-5332145/voting-rights-act-1965-justice-department [https://perma.cc/JX89-VXLS]. The Trump administration also recently dismissed a lawsuit under the National Voter Registration Act ("NVRA") against Virginia regarding the cancellation of registrations of over 1600 voters just weeks before the 2024 general election, although claims by private plaintiffs in a parallel suit remain pending. Notice of Voluntary Dismissal, Va. Coal. for Immigrant Rts. v. Beals, No. 1:24-CV-1778 (E.D. Va. Jan. 28, 2025), ECF No. 139.

302. Shelby Cnty., Ala. v. Holder, 811 F. Supp. 2d 424, 506 (D.D.C. 2011) (citing Katz et al., *supra* note 102), *vacated,* 2013 WL 10509740 (D.D.C. 2013).

303. *Id.*

include cases that did not result in a published court opinion, which the district court noted could "seriously understate the findings."[304]

This study helps fill that gap, and it provides even stronger support for the coverage formula. It finds that over two-thirds of all Section 2 challenges were brought in formerly-covered jurisdictions,[305] and that plaintiffs won these challenges at a significantly higher rate in formerly-covered jurisdictions (75%) compared to those brought in the rest of the country (52%).[306] As a result, nearly three-quarters of all successful Section 2 challenges (613 of 829, 74%) were brought against formerly-covered jurisdictions.

Finally, this study provides some empirical support for the dissenters in *Shelby County*, who colorfully warned that "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[307] As witnesses before Congress warned, eliminating preclearance under Section 5 would put more pressure on expensive, time consuming Section 2 litigation to protect voting rights.[308] Since *Shelby County*, over 60% of Section 2 challenges (123 of 201) have been brought in jurisdictions formerly covered by Section 5's preclearance requirement, despite these jurisdictions being a minority of the national population.[309]

CONCLUSION

This study demonstrates that private enforcement is the backbone of Section 2 litigation under the Voting Rights Act. Over the past four decades, more than 90% of Section 2 challenges were brought by private plaintiffs, and nearly two-thirds of those cases resulted in meaningful relief. These suits have been particularly effective in jurisdictions with the worst histories of voting discrimination, where plaintiffs prevailed at substantially higher rates than elsewhere.

The historical record, legislative history, and decades of settled practice confirm that Congress intended private plaintiffs to play this essential role. From *Allen* to *Morse*, both the Supreme Court and Congress recognized that private enforcement was necessary to achieve the Act's "laudable goals" and to counter the inadequacies of

304. *Id.* at 482 (cleaned up) (quoting *The Continuing Need for Section 5 Pre–Clearance, Hearing before the S. Comm. on the Judiciary,* 109th Cong. 99, 143 (May 16, 2006)); *see also* Katz et al., *supra* note 102, at 734 ("To be sure, the resulting portrait is necessarily incomplete, reflecting the limits that inhere in relying on published Section 2 decisions as a source . . . .").

305. *See supra* Figure 2.

306. *See supra* Part IV.C.5.

307. *Shelby County*, 570 U.S. at 590 (Ginsburg, J., dissenting).

308. *See* Brief of Joaquin Avila et al., *supra* note 295, at 15-30 (summarizing the evidence presented to Congress on this issue).

309. *See supra* Fig. 1 & note 226 (describing and making available this data).

exclusive governmental enforcement. In contrast, the Eighth Circuit's hypertextualist decision disregards this history and the empirical reality of how Section 2 has functioned in practice.

If the Supreme Court eliminates the implied private right of action under Section 2, the consequences will be profound. Many discriminatory voting laws and practices—particularly at the local level—will go unchallenged. The result will be a dramatic weakening of one of the nation's most important civil rights laws. In sum, the evidence is clear: without private enforcement of Section 2, the Voting Rights Act's promise of equal political participation for all Americans will be gravely diminished.