CURBING PRIVATE ENFORCEMENT OF THE VOTING RIGHTS ACT: THOUGHTS ON RECENT DEVELOPMENTS

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For decades, private plaintiffs have brought claims to enforce key provisions of the Voting Rights Act (VRA). Recent decisions have tossed out these claims on the ground that enforcement authority lies solely with the Attorney General of the United States. These decisions are deeply flawed. The VRA's text and structure, history, precedent, and longstanding practice all support private enforcement of the VRA—including private enforcement of Sections 2 and 11(b). This Essay explains why.

INTRODUCTION

The Voting Rights Act (VRA) has been hollowed out by more than three decades of federal court decisions that have steadily narrowed the statute's substantive reach. A handful of recent lower court decisions now threaten to cabin the VRA yet further. Unlike prior rulings, these new decisions leave the substance of the statute intact and instead dramatically restrict who is able to enforce its provisions. More precisely, these decisions hold that private parties may not bring claims under either the VRA's Section 2, which bars electoral practices that have racially discriminatory results, or Section 11(b), which prohibits conduct that threatens or intimidates voters.[1]

Three years ago, Justice Gorsuch all but invited these rulings. Joined by Justice Thomas, he wrote a concurring opinion in *Brnovich v. DNC* to "flag one thing," namely, the contention that the Court had long "assumed" that private parties could enforce Section 2 of the VRA but never actually decided the question.[2] The suggestion, of course, is that, under proper analysis, no such private right of action exists. The rationale for this idea, developed years earlier in dissent by Justice Thomas, extends beyond Section 2 to encompass private enforcement of VRA provisions like

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1. Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204 (8th Cir. 2023), *reh'g denied*, 91 F.4th 967 (8th Cir. 2024); Andrews v. D'Souza, 2023 WL 6456517 (N.D. Ga. 2023).

2. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., concurring).

Section 11(b) as well.[3] Both Justices Thomas and Gorsuch, and the recent lower court decisions that follow their lead, posit that the VRA's text and structure are best understood to preclude what thousands of private plaintiffs have been doing without dispute for nearly sixty years—namely, bringing suit to enforce Sections 2 and 11(b). It is a position that the Supreme Court is all but certain to review, and likely adopt, albeit less imminently that previously anticipated.[4] It is also deeply flawed.

This Essay explains why recent challenges to private enforcement of the VRA should fail. Part I examines the statutory text and structure on which the argument against private enforcement rests. It argues that the VRA, read most reasonably, shows that Congress intended to allow private enforcement of Sections 2 and 11(b). Part II explores how history, precedent, and longstanding practice all bolster what the statutory text authorizes. Part III presses the claim that the private enforcement Congress anticipated encompasses claims brought against both public and private actors. A brief conclusion follows.

I. TEXT AND STRUCTURE

Let's begin with what is not in dispute. First, there is widespread consensus that the VRA envisions enforcement proceedings initiated by private parties. Most notably, Section 3, as amended in 1975, authorizes courts to appoint federal election observers and take other corrective and preventative actions "[w]henever the Attorney General *or an aggrieved person* institutes a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment."[5] Section 14, similarly, authorizes the award of reasonable attorney's fees to "the prevailing party, other than the United States" in any proceeding "to enforce the voting guarantees of the fourteenth or fifteenth amendment."[6] There is no serious dispute that Section 3's reference to "an aggrieved person" and Section 14's reference to "a prevailing party, other than the United States" envision private litigants instituting enforcement actions under the VRA.

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3. *See* Morse v. Republican Party of Va., 517 U.S. 186, 286–91 (1996) (Thomas, J., dissenting).

4. *See* Hansi Lo Wang, *After Controversial Court Rulings, a Voting Rights Act Lawsuit Takes an Unusual Turn*, NPR (July 4, 2024), https://www.npr.org/2024/07/04/nx-s1-5025758/voting-rights-act-arkansas-supreme-court-section-1983?mc_cid=b64bf8249f&mc_eid=090502ec4c [https://perma.cc/WW54-VPA4] (reporting that plaintiffs opted not to seek Supreme Court review).

5. 52 U.S.C. § 10302(a) (emphasis added); *see also* 52 U.S.C. §§ 10302(b)–(c) (discussing proceedings instituted by the "Attorney General or an aggrieved person").

6. 52 U.S.C. § 10310(e).

Second, while there is disagreement over precisely which VRA claims private plaintiffs may pursue, everyone agrees on one: Section 5 of the VRA long required designated jurisdictions with a history of racial discrimination to obtain federal approval before changing electoral practices, or more precisely, it did so until the Supreme Court rendered it functionally inoperative in 2013.[7] Private enforcement of Section 5 was formally recognized in 1969, when the Supreme Court held that a private right to enforce the provision could be implied from the VRA's overarching purpose "to make the guarantees of the Fifteenth Amendment finally a reality for all citizens."[8] Six years later, Congress added the words "an aggrieved person" to Section 3,[9] and no one then—or ever since—has raised a serious doubt that the proceedings Section 3 describes encompass ones brought by private plaintiffs to enforce Section 5.

Third, there is substantial, albeit less comprehensive, agreement that Sections 2 and 11(b) contain what the Supreme Court describes as "rights-creating language."[10] Under now-controlling precedent, such language is a necessary prerequisite to private enforcement of statutes like the VRA that do not expressly authorize a private right of action.[11] There is significant consensus at present that language in Sections 2 and 11(b)—protecting the "right of any citizen . . . to vote" free from racial discrimination, on the one hand,[12] and shielding "any person" who votes or attempts to vote from threats and intimidation,[13] on the other—describes classes of beneficiaries with the sort of precision previously found to be sufficient to constitute rights-creating language. The point is not wholly uncontested,[14] but even the lower courts that have most recently rejected private enforcement of Sections 2 and 11(b) acknowledged either that these provisions contain sufficient rights-creating language or the strength of the claim that they do.[15]

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7. *See* Shelby County v. Holder, 570 U.S. 529 (2013).

8. Allen v. State Bd. of Elections, 393 U.S. 544, 556–57 (1969).

9. Voting Rights Act Amendments, Pub. L. No. 94-73, sec. 401, § 3, 89 Stat. 400, 404 (1975).

10. Alexander v. Sandoval, 532 U.S. 275, 289 (2001) (holding that Title VI of the Civil Rights Act lacks requisite "rights-creating language").

11. *Id.* at 288–89.

12. 52 U.S.C. § 10301(a).

13. 52 U.S.C. § 10307(b).

14. *See, e.g.*, Schilling v. Washburne, 592 F. Supp. 3d 492, 497–98 (W.D. Va. 2022).

15. Andrews v. D'Souza, 696 F. Supp. 3d 1332, 1351 (N.D. Ga. 2023) (finding "that Section 11(b) contains rights-creating language"); Colo. Mont. Wyo. State Area Conf. of the NAACP v. U.S. Election Integrity Plan, 653 F. Supp. 3d 861, 868 (D. Colo. 2023) (same); Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1209–10 (8th Cir. 2023) (finding both rights-creating language in Section 2 and language to the contrary and deeming the issue "unclear").

What is vigorously disputed at present is whether there is sufficient evidence that Congress meant to allow private enforcement of Sections 2 and 11(b). The recent decisions blocking private enforcement of these provisions deemed the evidence showing this second prerequisite to an implied private right of action to be insufficient. In concluding that Congress did not intend to allow private plaintiffs to initiate actions under these provisions, these decisions relied on two textual claims. The first is that Section 3, while referencing private enforcement, does not define the specific claims private plaintiffs may press, and instead instructs us to look elsewhere to identify them. As a federal appellate court stated last year, "the text of § 3 . . . most reasonably refers to . . . [a]n already existing proceeding . . . not a new one created by § 3."[16] The second textual claim is that affirmative language in Section 12(d) of the VRA—empowering the Attorney General to enforce specified provisions of the VRA, including Sections 2 and 11(b)—signals that Congress did not intend to allow concurrent private enforcement of these provisions.[17] That same appellate court noted, "If the text and structure of § 2 and § 12 show anything, it is that 'Congress intended to place enforcement in the hands of the [Attorney General], rather than private parties.' "[18]

This argument mirrors one Justice Thomas advanced almost thirty years ago. Dissenting in *Morse v. Republican Party of Virginia*, Justice Thomas objected to the Court's recognition of a private right of action under the VRA's Section 10. He argued that this provision is best read to provide exclusive authority to the Attorney General to challenge efforts to enforce poll taxes. In his view, "[t]he inescapable inference from this express grant of litigating authority to the Attorney General is that no other person may bring an action under § 10."[19] Critically, Justice Thomas saw nothing in Section 3 to suggest otherwise. His dissent acknowledged that this provision—as amended in 1975 to reference proceedings instituted by "an aggrieved person"—"explicitly" recognized private enforcement of the statute.[20] Justice Thomas nevertheless maintained that Section 3 failed to "identify any of the provisions under which private plaintiffs may sue."[21] He wrote that "[t]he most logical deduction" was that "Congress meant to address those cases brought pursuant to the 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."[22]

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

17. *See* 52 U.S.C. § 10308(d).

18. *Ark. State Conf. NAACP*, 86 F.4th at 1211 (quoting Freeman v. Fahey, 374 F.3d 663, 665 (8th Cir. 2004)) (alteration in original).

19. Morse v. Republican Party of Va., 517 U.S. 186, 286 (Thomas, J., dissenting).

20. *Id.* at 289 (internal quotation marks omitted).

21. *Id.*

22. *Id.*

Read that last sentence again. It is a curious one, and one well worth unpacking, given that it provides the roadmap for recent restrictions imposed on private enforcement of the VRA.[23] On the one hand, Justice Thomas was certainly correct that, when Congress added the words "aggrieved person" to Section 3 in 1975, it anticipated that the proceedings such a person might institute would include "suits under § 5."[24] By that time, it was firmly established that private plaintiffs could pursue such claims, and there is no evidence whatsoever that Congress meant to disrupt that practice.[25] Far less certain, however, is Justice Thomas's suggestion that Congress meant to exclude all other claims, save those the Supreme Court might "recognize in the future."[26] That is a distinctly odd take. History, precedent, and practice all suggest just the opposite, as Part II of this Essay will show. Most critically, however, it is the text of Section 3 that makes Justice Thomas's assessment of congressional meaning so improbable.

Simply put, what Justice Thomas said Congress meant is not what Congress said. The text of Section 3 does not limit the proceedings "an aggrieved person" may institute to those that enforce Section 5 and the private rights of action the Supreme Court might someday recognize. Instead, it identifies these proceedings as encompassing those instituted "under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment."[27] While this language, as Justice Thomas's dissent noted, does not identify the individual VRA provisions under which plaintiffs might sue, it hardly leaves the question wholly unspecified. Section 3 describes a particular category of claims—namely, those brought under statutory provisions that enforce Fourteenth and Fifteenth Amendment "voting guarantees" that it plainly envisions private plaintiffs would "institute[]."[28] It contains no suggestion that these claims would be limited to Section 5 enforcement actions and whatever claims the Justices sooner or later identify.

In fact, Section 3, read in its entirety, indicates that Congress anticipated private enforcement well beyond the categories specified in Justice Thomas's *Morse* dissent. As amended in 1975, Section 3 includes not one, but three separate references to proceedings instituted "by . . . an aggrieved

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23. *See, e.g.*, *Ark. State Conf. NAACP*, 86 F.4th at 1211 (relying on Justice Thomas's reading of Section 3 to disallow private enforcement of Section 2).

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

25. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 556–57 (1969) (formally recognizing private enforcement of Section 5).

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

27. 52 U.S.C. §§ 10302(a)–(c) (similarly discussing proceedings instituted by the "Attorney General or an aggrieved person").

28. *Id.*

person."[29] Each reference empowers courts adjudicating these proceedings to take a different action, from appointing federal observers where appropriate (Section 3(a)); to suspending tests and devices that abridge the right to vote (Section 3(b)); to retaining jurisdiction to prevent implementation of a new "standard, practice, or procedure" absent a determination showing the change to be nondiscriminatory (Section 3(c)).[30] Had Congress truly meant to limit private enforcement to proceedings under Section 5, the changes it made to Section 3 in 1975 would have been largely meaningless. Jurisdictions subject to Section 5 were places where, by definition, tests and devices that abridge the right to vote had already been suspended,[31] and places where electoral changes had been barred absent a showing of nondiscriminatory purpose and effect.[32] In other words, the second and third subparts of Section 3 had no application in places already subject to Section 5.[33] As such, there would be no reason for Congress to amend these provisions to reference private enforcement if it meant to limit the claims private plaintiffs could initiate in the manner described in Justice Thomas's *Morse* dissent.

Section 3 is more plausibly read to envision private enforcement that extends beyond Section 5 proceedings to encompass what the statutory text actually says. That is, Section 3 suggests private plaintiffs will institute claims under those statutory provisions that "enforce the voting guarantees of the fourteenth or fifteenth amendment." On this reading, Section 3 invites an inquiry into which statutory provisions fall into this category.

It is this inquiry Justice Thomas's interpretation of Section 3 would foreclose. His reading replaces the actual text of Section 3 with an imagined congressional instruction directing Supreme Court Justices to identify "any [private] rights of action" they "might . . . in the future" deem worthy of recognition. On this view, the propriety of private enforcement of a given VRA provision does not rest on whether the provision is one that, as Section 3 suggests, "enforce[s] the voting guarantees of the fourteenth or fifteenth amendment." Instead, it hinges on a very different question, namely, whether the Supreme Court thinks the provision at issue independently suggests Congress intended to allow private enforcement. Capturing this stance, Justice Thomas's dissent in *Morse* deemed private enforcement of Section 10 improper without ever inquiring whether that

29. *Id.*

30. *Id.*

31. 52 U.S.C. § 10303(a)(1).

32. *See* 52 U.S.C. § 10304(a).

33. As to Section 3(a): Federal observers were, at the time, routinely deployed in jurisdictions subject to Section 5 and, thus, Congress had reason to make clear that they were available in cases brought by private plaintiffs. *See* U.S. DOJ C.R. DIV., *About Federal Observers and Election Monitoring*, https://www.justice.gov/crt/about-federal-observers-and-election-monitoring#observers [https://perma.cc/ALL7-NPYW].

provision's treatment of poll taxes enforces voting guarantees grounded in the Fourteenth and Fifteenth Amendments.[34] Similarly, the most prominent recent decision to reject private enforcement of Section 2 did so without considering whether Section 2 is a provision enforcing the voting guarantees of these constitutional amendments.[35]

In so doing, that appellate decision emphasized that Section 3 does not itself explicitly create a private right of action to enforce any specified provisions of the VRA.[36] This is both correct and irrelevant. The question at issue in the present dispute—whether there is sufficient evidence that Congress intended to allow private enforcement of Sections 2 and 11(b)—is at issue only because the VRA, including Section 3, does not expressly authorize private enforcement. The absence of language setting forth an express private right of action in Section 3 is the beginning rather than the end of the inquiry. That absence is certainly not cause to disregard what the provision actually says. To suggest otherwise is to misunderstand the inquiry at hand.

It is this misunderstanding that led the lower court to an absurd result. The argument for blocking private enforcement of Section 2 would block private enforcement of the statute in its entirety. In contrast to Justice Thomas's *Morse* dissent, which rejected private enforcement of Section 10 based in part on the idiosyncratic language Congress used in that provision,[37] the more recent restrictions imposed on Section 2 rest entirely on Section 12(d), which authorizes the Attorney General to institute a civil action to enforce not only Section 2 but Sections 3, 4, 5, 10, and 11.[38] If Section 12(d) is best read to block private enforcement of Section 2, it presumably should be read to block private enforcement of these other provisions as well. It is a reading that renders express references to private enforcement—in Sections 3 and 14—nullities.

This not a good reading of the VRA. A far better one refuses to excise the VRA's repeated textual references to private enforcement and instead understands these references as strong evidence that Congress meant to allow private plaintiffs to press a host of statutory claims.

II: PRECEDENT, HISTORY AND PRACTICE

Textual support for private enforcement of Sections 2 and 11(b) is bolstered by precedent construing the VRA, the statute's legislative history, and longstanding practice. Each source supports the idea that Congress

34. *Morse*, 517 U.S. at 286 (Thomas, J., dissenting).

35. Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1211 (8th Cir. 2023).

36. *Id.*

37. *Morse*, 517 U.S. at 286 (Thomas, J., dissenting).

38. 52 U.S.C. § 10308(d).

meant to allow private plaintiffs to press a range of VRA claims, including those arising under Sections 2 and 11(b).

Private enforcement of the VRA dates from the statute's enactment.[39] By 1969, the Supreme Court upheld the practice, finding that private plaintiffs could enforce Section 5 despite the absence of express statutory language authorizing them to do so. Writing for the Court in *Allen v. Virginia Board of Elections*, Chief Justice Earl Warren stated that the VRA's "laudable goal could be severely hampered" if enforcement of the statute was limited to actions initiated by the Attorney General.[40] The Chief Justice noted that because the AG alone would be unable to identify the full range of electoral enactments than ran afoul of Section 5, private enforcement comported with the "broad purpose" of the VRA "to make the guarantees of the Fifteenth Amendment finally a reality for all citizens."[41]

The connection *Allen* drew between private enforcement and the VRA's broader goals validated the Section 5 claims at issue in that case. More broadly, it suggested that private enforcement of other VRA provisions was also permissible. Because *Allen*'s rationale rested more on the VRA's overarching purpose than on anything particular to Section 5, the decision offered support for the idea that private plaintiffs could press claims under any VRA provision that similarly helped vindicate "the guarantees of the Fifteenth Amendment."

Considerable evidence indicates Congress agreed. The year following *Allen*, Congress reauthorized and extended the VRA, but made no effort to limit *Allen*'s assessment of private enforcement.[42] An accompanying report issued by the House Committee on the Judiciary cited *Allen* with approval, noting that the Court "perceiv[ed] the need for private policing" to secure the goals of the VRA.[43] Five years later, Congress again reauthorized the VRA, this time adding language to Sections 3 and 14, that, as explained in Part I, plainly envisioned broad private enforcement of the statute. As noted, these changes included the insertion of the words "or an aggrieved person" to three subsections of Section 3, and the authorization of attorney's fees awards to "the prevailing party, other than the United States" in Section 14.[44]

The Senate Judiciary Committee report that accompanied the 1975 Amendments stated plainly that the language added to Section 3 was intended "to afford to private parties the same remedies which Section 3 now affords only to the Attorney General."[45] Making clear that private parties

39. *See, e.g.*, Whitley v. Johnson, 260 F. Supp. 630 (S.D. Miss. 1966).

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

41. *Id.* at 556–57.

42. *See* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285.

43. H.R. REP. NO. 91-397, at 8 (1970).

44. 52 U.S.C. §§ 10302, 10310(e); *see also* Part I.

45. S. REP. NO. 94-295, at 39–40 (1975).

would not be limited to claims under Section 5, which, by definition, arose only in covered jurisdictions, the report stated the amendments were meant to "authorize courts to grant similar relief to private parties in suits brought to protect voting rights in covered and noncovered jurisdictions."[46] Finally, as the Court did in *Allen*, the Senate report linked private enforcement to securing the VRA's broader goals, noting that Congress relies on this "dual enforcement mechanism" and "depends heavily upon private citizens to enforce the fundamental rights involved."[47] The report thus emphasized the committee's conclusion "that it is sound policy to authorize private remedies to assist the process of enforcing voting rights."[48]

In 1980, the Supreme Court first suggested some uncertainty regarding private enforcement of parts of the VRA. In *Mobile v. Bolden*, the Court held that violations of Section 2 hinged on proof of racially discriminatory intent, while noting that it was "[a]ssuming . . . that there exists a private right of action to enforce [Section 2]."[49] Congress responded quickly. The 1982 VRA amendments clarified that Section 2 barred electoral practices that resulted in racial discrimination, regardless of the motivation that spurred their enactment.[50] Meanwhile, reports from the House and Senate Judiciary Committees that accompanied the amendments confirmed *Mobile*'s assumption about the propriety of private enforcement of Section 2. The House report stated unequivocally that "[i]t is intended that citizens have a private cause of action to enforce their rights under Section 2."[51] The Senate report, which became the go-to interpretive tool for construing the 1982 amendments to Section 2, stated that "the Committee reiterates the existence of the private right of action under Section 2, as has been clearly intended by Congress since 1965."[52]

This history shaped the Court's 1996 ruling recognizing private enforcement of Section 10 of the VRA. Justice Stevens's lead opinion in *Morse v. Republican Party of Virginia* noted that while the Court had become more reluctant to imply private rights of action, the Justices also recognized that their evaluation of congressional action predating this reluctance "must take into account its contemporary legal context," and

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46. *Id.* at 40.

47. *Id.*

48. *Id.*; *see also* H.R. REP. NO. 94-196, at 33–34 (1975).

49. Mobile v. Bolden, 446 U.S. 55, 60 n.8 (1980).

50. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205.

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

52. S. REP. NO. 97-417, at 30 (1982). *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 43 n.7 (1986) (calling Senate Report the "authoritative source for legislative intent" behind Section 2); *see also* Brnovich, 141 S. Ct. at 2332–2333 (discussing the "oft-cited" 1982 Senate Report).

specifically, the fact that "Congress acted against a 'backdrop' of decisions in which implied causes of action were regularly found."[53]

Applying this principle, Justice Stevens, joined by Justice Ginsburg, viewed private enforcement of both Section 2 and Section 5 to be firmly established in light of the holding in *Allen*, the congressional action that "extended its logic" and the longstanding practice of private enforcement of Section 2.[54] Justice Stevens went on to conclude 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, when all lack the same express authorizing language."[55] Writing separately, Justice Breyer stated unequivocally that he "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."[56] Like Justice Stevens, Justice Breyer thought that *Allen*'s rationale "applies with similar force not only to § 2 but also to § 10."[57] Joined by Justices O'Connor and Souter, Justice Breyer wrote that he "believe[d] Congress intended to establish a private right of action to enforce § 10, no less than it did to enforce §§ 2 and 5."[58]

Justice Thomas disagreed. In a dissent joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, he argued that the text of the VRA showed that Congress did not intend to authorize private enforcement of Section 10. He wrote that Section 10 lacked the rights-creating language manifest in Section 5, and, further, that the private enforcement referenced in Section 3 was limited to claims under Section 5—and whatever other provisions the Court might subsequently deem appropriate.[59]

Part I of this Essay showed that the text and structure of Section 3 do not support the limits this dissent identified. Needless to say, Justice Thomas was convinced otherwise, and, indeed, so much so that he saw no need to delve into either the history of the VRA, or the "contemporary legal context" in which Congress crafted it.[60] In fact, Justice Thomas wrote that he was "unpersuaded by the maxim that Congress is presumed to legislate against the backdrop of our 'implied cause of action' jurisprudence."[61]

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53. Morse v. Republican Party of Virginia, 517 U.S. 186, 230–31 (1996) (opinion of Stevens, J.) (quoting Cannon v. University of Chicago, 441 U.S. 677, 698–99 (1979)).

54. *Id.* at 232.

55. *Morse*, 517 U.S. at 232 (1996) (opinion of Stevens, J.). *See also* Singleton v. Merrill, 582 F.Supp.3d 924, 1031 (N.D. Ala. 2022), *aff'd sub nom.* Allen v. Milligan, 599 U.S. 1 (2023)(Morse's "understanding that Section Two provides a private right of action was necessary to reach the judgment that Section Ten provides a private right of action").

56. *Morse*, 517 U.S. at 240 (Breyer, J., concurring).

57. *Id.*

58. *Morse*, 517 U.S. at 240 (Breyer, J., concurring).

59. *Id.* at 289 (Thomas, J., dissenting).

60. *Id.* at 288 (Thomas, J., dissenting) (quoting Cannon, 441 U.S. at 699).

61. *Id.*

In his view, that presumption had limited application. He wrote "[t]hough we may . . . look to [it] for guidance in evaluating the history of a statute's enactment, 'what must ultimately be determined is whether Congress intended to create the private remedy asserted.' "[62] Justice Thomas insisted that this determination "begin[s] with the language of the statute itself."[63] His dissent made clear that it ends there as well. 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 jurisprudence both suggested otherwise, but neither played any part in the dissent's analysis.

Nearly three decades later, this lack of interest in the history of the VRA and the legal context that shaped it has morphed into mistrust and disdain. Among the recent decisions curbing private enforcement of the VRA, the lead appellate decision on point dismissed the legislative reports and guiding presumptions that shaped the VRA as specious, and possibly intentionally so.[64] That court insisted that these materials tell us "nothing" about the statute's text and structure, and suggested that they might instead be nothing more than a mix of post-hoc explanations, the views of "unrepresentative committee members—or, worse yet, unelected staffers and lobbyists."[65] Most critical to that court, these materials "fail[] to answer an obvious question. If the 1965 Congress 'clearly intended' to create a private right of action, then why not say so in the statute? If not then, why not later, when Congress amended § 2?"[66]

This is not a serious critique. The materials comprising the VRA's legislative history on private enforcement speak overwhelmingly in the present tense about active commitments, and they cannot fairly be dismissed as offering mere post hoc explanations.[67] Nor is there any reason to think these commitments represent a minority view; indeed, there is no evidence of any competing claims raised during the crafting or amending of the VRA that endorsed or even suggested limiting private enforcement. Most fundamentally, however, the fact that the VRA does not explicitly provide for private enforcement, as noted in Part I, is simply not relevant. Indeed, contrary to the lower court's suggestion, the entire jurisprudence on implied rights of action is premised on the recognition that Congress may intend

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62. *Id.* (Thomas, J., dissenting) (quoting Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15–16 (1979)).

63. *Id.*

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

65. *Id.* (quoting Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005)).

66. *Ark. State Conf. NAACP*, 86 F.4th at 1214.

67. *See supra* notes 43, 45, 51, 52 and accompanying text.

to allow for a private enforcement and still "not say so in the statute."[68] To require express authorization would abolish this entire area of law.

There is, moreover, a better, more straightforward explanation for why Congress did not provide an express private right in the VRA. It did not think one was a necessary. And why would it? In 1969, the Supreme Court's decision in *Allen* made clear that private enforcement did not hinge on express statutory authorization and that such enforcement would, instead, be generously inferred so long as it promised to advance the VRA's "broad purpose."[69] It was against this legal "backdrop" that Congress repeatedly amended the statute, applying *Allen*'s reasoning to Section 5 and, more broadly, to claims arising under other provisions that similarly help vindicate constitutional voting guarantees.[70] This backdrop and its legal implications informed the commitment to broad private enforcement expressed in legislative materials supporting the 1970, 1975 and 1982 amendments to the VRA.

Longstanding practice confirms what the text, history, and precedent establish, namely, congressional intent to allow broad private enforcement of the VRA. Since the statute's enactment, thousands of private plaintiffs have instituted proceedings under Sections 2, 5, 10, and 11(b). Private enforcement efforts vastly outnumber public ones. For example, private plaintiffs have been party to 96.4% of Section 2 claims that produced published opinions since 1982, and the sole litigants in 86.7% of these decisions.[71] The Supreme Court's supposition in *Shelby County v. Holder* that Section 2 litigation provided an adequate substitute for Section 5, while highly contestable on its face, becomes wholly implausible if private enforcement of Section 2 litigation is disallowed.[72]

Since its enactment, Congress has repeatedly amended the VRA without ever voicing a qualm about private enforcement of the statute. It never acted to limit this longstanding practice. Instead, Congress made statutory changes that affirmed and broadened private enforcement and included with these amendments legislative reports that explicitly endorsed that practice. During this same period, federal courts, including the Supreme Court, routinely reviewed VRA claims without questioning the propriety of private enforcement. This practice should continue.

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68. *Ark. State Conf. NAACP*, 86 F.4th at 1214.

69. *Allen*, 393 U.S. at 556–57.

70. *See supra* notes 42–44 and accompanying text.

71. See *Section 2 Cases Database*, MICHIGAN LAW VOTING RIGHTS INITIATIVE (Aug 8, 2024 6:20pm) https://voting.law.umich.edu/database/ [https://perma.cc/SCQ3-SP72]. Forty-five cases (totaling 13.3%) involved *both* public and private parties.

72. Transcript of Oral Argument, Shelby County v. Holder, 570 U.S. 529 (2013) (No. 12-96) https://www.supremecourt.gov/oral_arguments/argument_transcripts/2012/12-96_7648.pdf [https://perma.cc/YEL9-FR59].

III: STATE ACTION

Section 11(b) of the VRA prohibits acts that "intimidate, threaten, or coerce . . . any person for voting or attempting to vote."[73] Unlike Sections 2 and 5, this provision applies not only to public officials but instead to any person "whether acting under color of law or otherwise."[74] For decades, voters have relied on 11(b) to challenge various types of menacing conduct at the polls and beyond. The provision offers distinct advantages given that it does not require proof of either a conspiracy or a purpose to intimidate and allows for awards of attorney fees when plaintiffs prevail.[75]

Voters would be barred from bringing 11(b) claims if the rationale underlying the recent decisions blocking private enforcement of Section 2 were to be applied more widely; indeed, at least one federal district court has blocked an 11(b) claim on this ground.[76] There is, moreover, a separate argument, applicable only to 11(b), that presents a distinct and weighty challenge to private enforcement of this provision. This argument emerges from an intricate web of doctrine, but, distilled most succinctly, posits that state action is a necessary prerequisite to private enforcement of the VRA. On this view, private plaintiffs may not bring claims under 11(b) to challenge the conduct of private actors.

This understanding of private enforcement may best explain why a federal district court in Georgia recently dismissed an 11(b) claim brought by an individual voter against the producers of the movie *2000 Mules*. Security footage used in that movie showed Georgia resident Mark Andrews depositing five absentee ballots in a Gwinnett County ballot drop box on October 6, 2020.[77] Voice-over narration from Dinesh D'Souza labeled Andrews a "mule" and accused him of participating in a "coordinated ring of paid ballot trafficking" that "dumped" "fraudulent votes . . . en masse into mail-in drop boxes."[78] This accusation was repeated in materials publicizing the film that often included images of Andrews's face and the license plate of his car. All the while, Andrews had done nothing wrong. The Gwinnett County resident acted in full compliance with Georgia law when he delivered his ballot along with the ballots completed by his wife and his three adult children.[79]

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73. 52 U.S.C. § 10307.

74. *Id.*

75. 52 U.S.C. § 10307(b), 10310(e). *See also* Carly E. Zipper, *Let Us Not Be Intimidated: Past and Present Applications of Section11(b) of the Voting Rights Act*, 97 WASH. L. REV. 301, 320 (2022).

76. *See* Schilling v. Washburne, 592 F. Supp. 3d 492, 498–99 (W.D. Va. 2022) (reading statute's express grant of litigating authority to the AG to preclude concurrent private enforcement of Section 11(b)).

77. Andrews v. D'Souza, 696 F. Supp. 3d 1332, 1340–41 (N.D. Ga. 2023).

78. *Id.* at 1341.

79. *Id.* at 1342.

In the lawsuit that followed, the trial court tossed out Andrews's claim that the producers of *2000 Mules* engaged in voter intimidation in violation of Section 11(b). Without disputing the charge, the court held that 11(b) was not among the VRA provisions for which private enforcement was permitted. The court noted that private plaintiffs could sue under VRA provisions that "enforce the voting guarantees of the fourteenth or fifteenth amendment," but concluded that 11(b) was not such a provision.[80] It explained that there was insufficient evidence that 11(b) was "designed" to enforce the voting guarantees at issue, and, further, an insufficient "identifiable link" between the rights 11(b) creates and the VRA's language supporting private enforcement.[81]

On a first pass, this analysis seems plausible. After all, violations of the Fourteenth and Fifteenth Amendments require state action. The producers of *2000 Mules* thus did not themselves violate any of the voting guarantees of these Amendments by targeting Andrews as they did. Private conduct, however objectionable, cannot violate these provisions. A Fifteenth Amendment violation, moreover, requires not only state action but also evidence of race-based discrimination. There happens to be good reason to think that the *2000 Mules* defendants targeted Andrews, who is Black, because of his race,[82] but a Section 11(b) violation does not require any showing of a racially discriminatory motive.[83]

None of this, however, makes private enforcement of 11(b) improper. Various VRA provisions that bar constitutional conduct have long been understood to be enforcing the Fourteenth and Fifteenth Amendments' voting guarantees. For instance, the statute's ban on literacy tests[84] and its prohibition on practices with racially disparate "results"[85] enforce these constitutional voting guarantees even though the conduct they regulate is itself constitutional. The Supreme Court has repeatedly upheld Congress's

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80. *Id.* at 1341.

81. *Id.*

82. *See, e.g.*, Doug Bock Clark, *Close to 100,000 Voter Registrations Were Challenged in Georgia—Almost All by Just Six Right-Wing Activists*, PROPUBLICA (July 13, 2023, 7:00 AM), https://www.propublica.org/article/right-wing-activists-georgia-voter-challenges [https://perma.cc/J92W-83XC]; Kristine Phillips, *'Damaging to Our democracy': Trump Election Lawsuits Targeted Areas with Large Black, Latino Populations*, USA TODAY (Dec. 1, 2020, 4:27 PM), https://www.usatoday.com/story/news/politics/2020/12/01/trump-voter-fraud-claims-target-counties-more-black-latino-votes/6391908002/ [https://perma.cc/7X92-PV7L]; Juana Summers, *Trump Push to Invalidate Votes in Heavily Black Cities Alarms Civil Rights Groups*, NPR (Nov. 24, 2020, 6:26 AM), https://www.npr.org/2020/11/24/938187233/trump-push-to-invalidate-votes-in-heavily-black-cities-alarms-civil-rights-group [https://perma.cc/WN8G-CMQ7]; Zipper, *supra* note 75, at 325 (observing that Black voters are disproportionately the targets of voter intimidation efforts).

83. *See* 52 U.S.C. § 10307(b).

84. *See* 52 U.S.C. § 10501.

85. *See* 52 U.S.C. § 10301.

power to enforce these Amendments in this manner.[86] Hence, 11(b) can both prohibit constitutional conduct and enforce the Fourteenth and Fifteenth Amendments' voting guarantees.

There is, moreover, substantial evidence showing that Congress crafted—or, as the court in *Andrews v. D'Souza* put it, "designed"—Section 11(b) to enforce the voting guarantees set forth in the Fourteenth and Fifteenth Amendments. On July 6, 1965, Congressman Emanuel Celler stated explicitly that Section 11(b) was designed to enforce these Amendments. The chair of the House Judiciary Committee and a chief sponsor of the bill that became the VRA, Celler told the House of Representatives that 11(b), as proposed, was "primarily . . . an exercise of the power of Congress to enact 'appropriate legislation' to enforce the 15th amendment's ban on racial discrimination in voting."[87] Representative Celler noted further "that section 11(b) can also be sustained on 14th amendment grounds," as an exercise of Congress's "duty to . . . insure the equal protection of the laws."[88]

Representative Celler readily acknowledged that Section 11(b) prohibited conduct that did not itself violate the Fourteenth and Fifteenth Amendments. Celler, however, stated that Congress's power to enforce these Amendments extended beyond "the[ir] precise scope" and included the power to prohibit otherwise constitutional conduct when doing so was a "reasonable measure to fully and effectively implement the amendment[s]."[89] Celler viewed Section 11(b) to be just such a measure. "And so here," according to Celler, 11(b)'s prohibition on privately initiated voter intimidation advanced the goals of both the Fourteenth and Fifteenth Amendments by helping to "eradicate the effects of official racial discrimination in voting" and to provide remedies where states were "unwilling to punish or prevent" such acts.[90] Celler presented 11(b) as a core component of the package of remedies set forth in the VRA to vindicate the voting guarantees provided by these Amendments.[91]

Celler's comments are evidence that Congress crafted Section 11(b) to enforce the voting guarantees set forth in the Fourteenth and Fifteenth Amendments. His claim, moreover, that 11(b) fell amply within Congress's powers to enforce these Amendments accurately described constitutional

86. *See, e.g.*, Allen v. Milligan, 143 S. Ct. 1487, 1516–17 (2023); Oregon v. Mitchell, 400 U.S. 112, 131–34 (1970); South Carolina v. Katzenbach, 383 U.S. 301, 334 (1966).

87. 111 CONG. REC. 15651 (1965).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

doctrine at the time. Indeed, the Supreme Court would uphold core provisions of the VRA based on an even more capacious understanding of those powers.[92]

Today, by contrast, Celler's analysis of congressional power is more contestable. The Court has come to embrace a narrower conception of those powers, one that affords Congress less discretion to craft remedies and that demands a tighter fit between statutory prohibitions and constitutional protections than was previously required.[93] Of particular relevance to Section 11(b), *United States v. Morrison* struck down a provision of the Violence Against Women Act (VAWA) that authorized a civil remedy against private individuals who committed acts of gender-motivated violence.[94] In so doing, the Court did not dispute congressional findings documenting pervasive unconstitutional bias within state criminal justice systems against victims of such violence.[95] The Court nevertheless held that Congress's power to remedy these documented violations of the Fourteenth Amendment did not include the power to enact the challenged VAWA provision, given that it targeted wholly private action.[96]

Morrison may be read to hold that Congress may never reach private conduct when enforcing the Fourteenth or Fifteenth Amendments. If so, Section 11(b) would fall outside Congress's power to enforce these Amendments. This, arguably, would mean that private plaintiffs would be unable to institute proceedings under the provision. After all, Section 3 of the VRA contemplates private enforcement only of those provisions that enforce the voting guarantees of the Fourteenth and Fifteenth Amendments.[97] *Andrews v. D'Souza*'s ruling that 11(b) is not such a provision may rest on this idea.

There is, however, a narrower reading of *Morrison*, one that would allow Congress to reach some private action when enforcing the Fourteenth or Fifteenth Amendments. This reading focuses on the fact that the Court in in *Morrison* thought VAWA's remedy, which enabled those injured by gender-motivated violence to sue their assailants,[98] did nothing to reduce, much less cure, the pervasive constitutional violations that Congress had documented within state criminal justice systems. Chief Justice

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92. *See* Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding Section 4(e) to displace state English literacy test); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding the VRA's Section 5 preclearance process).

93. *See* Shelby County v. Holder, 570 U.S. 529 (2013) (striking down the VRA's Section 4(b) coverage formula); City of Boerne v. Flores, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act).

94. United States v. Morrison, 529 U.S. 598, 601–02 (2000).

95. *Id.* at 619–20.

96. *Id.* at 626–27.

97. *See supra* note 27 and accompanying text.

98. *Morrison*, 529 U.S. at 605.

Rehnquist noted that VAWA's remedy "visit[ed] no consequence whatever on any Virginia public official involved in investigating or prosecuting" the gender-motivated assault.[99] In this sense, VAWA's civil action left biased state action against victims of gender-motivated violence unchecked. The private claim it authorized against assailants was not structured to incentivize needed criminal justice reform.[100]

Section 11(b), like VAWA's civil remedy, both addresses private conduct and "visits no consequence" on any public official who might have engaged in unconstitutional conduct. Section 11(b) nevertheless stands in a different relation to public action and the constitutional right at issue than did VAWA's remedy. Private voter harassment, of course, is not itself unconstitutional. Injuries of constitutional dimension nevertheless emerge because such harassment may itself burden the right to vote.

Public officials are constitutionally obligated to craft and enforce voting procedures that allow voters to cast ballots free from harassment and intimidation. Their efforts, to be sure, fall short when they are "unwilling" to prevent such harassment, a circumstance Representative Celler identified back in 1965 as a constitutional injury that Section 11(b) would address. But even absent public unwillingness of this sort, a cognizable constitutional burden may result from the private acts of voter harassment. That is, routine and predictable failures of election administration, even in a system overseen by public actors operating in good faith, can and will contribute to burdens on the right to vote that are of constitutional dimension.

By penalizing and hence discouraging private acts of voter intimidation, 11(b) makes it less likely that either routine failures or intentional lapses of public election administration will give rise to constitutional injuries. As important, the provision makes it more likely that voters will be able to elect public officials committed to stopping harassment and securing equal access for all voters. In other words, Section 11(b)'s ban on private voter intimidation helps to protect the right to vote. It is in this sense that 11(b) may be understood to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments and be distinguished from VAWA's civil remedy.

Admittedly, the present Supreme Court is unlikely to agree. A majority of the Justices seem more inclined to view 11(b) just like VAWA's civil remedy and thus outside Congress's power to enforce the Fourteenth

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99. *See id.* at 626.

100. *See* Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2054 & n.352 (2003); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 506 (2000); *cf.* Evan Caminker, *Private Remedies for Public Wrongs Under Section 5*, 33 LOY. L.A. L. REV. 1351, 1362–64 (2000).

Amendment. A decision so holding would not render 11(b) unconstitutional given that the Constitution's Elections Clause, standing alone, vests Congress with power sufficient to enact the provision, at least with regard to federal elections.[101] Such a ruling, however, would present a serious challenge to private enforcement of 11(b), given that the statute envisions such enforcement only of claims that themselves enforce the voting guarantees of the Fourteenth and Fifteenth Amendments.

More specifically, private enforcement of 11(b) would end if such enforcement hinges on recognition of Congress's present ability to enact the provision pursuant to its power to enforce the Fourteenth or Fifteenth Amendments. Absent that ability, the argument goes, Section 11(b) cannot be considered a provision that enforces these Amendments, and hence not a provision that private plaintiffs may invoke. On this view, the VRA's reference to claims that enforce these constitutional guarantees (for which private enforcement is envisioned) describes a fluid category of claims the contents of which were intended to ebb and flow as the Court's conception of Congress's enforcement power evolved.

The VRA's text undeniably allows for this interpretation, but it does not inexorably mandate it. There is a competing—and, arguably, more compelling—view, one that focuses on the rules that govern implied private rights of action rather than on the scope of Congress's constitutional powers. This argument emphasizes that, under governing precedent, the propriety of private enforcement of a statute that does not expressly authorize it depends on whether Congress meant to provide for such enforcement.[102] On this view, it does not matter whether Congress could, at present, enact 11(b) in the first instance using its power to enforce the Fourteenth and Fifteenth Amendments. Instead, the relevant question is whether 11(b) was among the provisions Congress understood to enforce "the voting guarantees" of these Amendments at the time it crafted this language. (Recall here that Representative Celler stated unequivocally that it was.)[103]

This argument for private enforcement of 11(b) builds on the interpretative rule used to imply private rights of action more generally. Justices Stevens relied on this rule back in *Morse v. Republican Party of Virginia* to uphold private enforcement of Section 10, noting that evaluation of any

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101. *See* U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

102. *E.g.*, Alexander v. Sandoval, 532 U.S. 275, 288–89 (2001).

103. 111 CONG. REC. 15651 (1965).

congressional action "must take into account its contemporary legal context" and "a 'backdrop' of decisions" against which Congress acted.[104] Here, the argument for private enforcement of 11(b) takes into account the contemporary legal backdrop regarding both implied causes of action and congressional power to enforce the Fourteenth and Fifteenth Amendments. This backdrop, in turn, shows that Congress understood 11(b) to be a provision that enforced the voting guarantees in these Amendments, and thus meant to allow private enforcement of 11(b).

This position rests on the commonsense idea that Congress meant for the statutory terms it crafted to mean what they meant at the time. On this view, private enforcement of Section 11(b) is proper. This is the better approach to private enforcement of 11(b).

CONCLUSION

Chief Justice Earl Warren thought private enforcement of the VRA was essential to the achievement of the statute's "laudable goal" of making constitutional voting guarantees "finally a reality for all citizens."[105] Private litigants have shaped enforcement of the VRA from the start, supplementing public enforcement efforts with private resources, information, and perspectives. Private litigants have been—and remain—well situated to identify conduct that runs afoul of the statute, and are appropriately incentivized to seek relief, particularly when offending conduct occurs, as it so often does, in close proximity to an election. Consistent with the statutory text, legislative history, and precedent, voters have been bringing claims under the VRA for more than half a century. This practice should continue.

104. Morse v. Republican Party of Virginia, 517 U.S. 186, 230–231 (1996) (plurality opinion of Stevens, J.) (quoting Cannon v. Univ. of Chi., 441 U.S. 677, 698–99 (1979)).

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