

2018

Promoting Private Enforcement of the Voting Rights Act and the Materiality Provision: Contrasting Northeast Ohio Coalition for the Homeless v. Husted and Schmier v. Cox

Megan Hurd

Follow this and additional works at: <https://scholarship.law.uc.edu/uclr>

Recommended Citation

Megan Hurd, *Promoting Private Enforcement of the Voting Rights Act and the Materiality Provision: Contrasting Northeast Ohio Coalition for the Homeless v. Husted and Schmier v. Cox*, 86 U. Cin. L. Rev. 1379 (2018)
Available at: <https://scholarship.law.uc.edu/uclr/vol86/iss4/8>

This Article is brought to you for free and open access by University of Cincinnati College of Law Scholarship and Publications. It has been accepted for inclusion in University of Cincinnati Law Review by an authorized editor of University of Cincinnati College of Law Scholarship and Publications. For more information, please contact ken.hirsh@uc.edu.

PROMOTING PRIVATE ENFORCEMENT OF THE VOTING
RIGHTS ACT AND THE MATERIALITY PROVISION:
CONTRASTING *NORTHEAST OHIO COALITION FOR THE
HOMELESS V. HUSTED* AND *SCHWIER V. COX*

*Megan Hurd**

I. INTRODUCTION

The United States has a long, dark history surrounding the use of voting laws to disenfranchise minority voters. The Voting Rights Act (“VRA”) was enacted to protect the civil rights of individuals within the jurisdiction of the United States.¹ Among the many protections provided by the VRA is the guarantee that an individual will not be denied the right to vote based on an error on a voter registration form that is immaterial to determining whether that individual is qualified to vote.² This guarantee is referred to as the “Materiality Provision” of the VRA.³ The VRA exists to protect the rights of individuals, but courts are divided as to whether those individuals can enforce those rights themselves, or whether they must rely on the Attorney General to enforce those rights on their behalf.

The Sixth and Eleventh Circuits divide over how to interpret the enforcement mechanism for the VRA. These courts have taken diverging approaches, embodied in *Northeast Ohio Coalition for the Homeless v. Husted*, a Sixth Circuit case, and *Schwier v. Cox*, an Eleventh Circuit case.⁴ This Comment reviews the split of authority by analyzing these cases. Part II of this Comment begins with an overview of the doctrine surrounding the judicial implication of private rights of action in federal courts, followed by an explanation of the VRA and the Sixth and Eleventh Circuit cases. Part III analyzes the differing views of the private right of action under the VRA.⁵ Finally, Part IV explains why individuals should be granted a private right of action under the VRA.

* Associate Member, 2016-2017 *University of Cincinnati Law Review*.

1. Civil Rights Act of 1957, Pub. L. 85-315, 71 Stat. 634 (1957).

2. 52 U.S.C.S. § 10101(a)(2)(B) (LexisNexis, Lexis Advance through PL 115-60, approved 9/15/17).

3. *E.g.*, Reply Brief for Petitioners, *Ne. Ohio Coal. for the Homeless v. Husted*, 137 S. Ct. 2265 (2017) (cert. denied); Brief of the Brennan Center for Justice as *Amicus Curiae* in Support of Petitioners, *Ne. Ohio Coal. for the Homeless v. Husted*, 137 S. Ct. 2265 (2017) (cert. denied) [hereinafter Brief for the Brennan Center of Justice].

4. 837 F.3d 612 (6th Cir. 2016); 340 F.3d 1284 (11th Cir. 2003).

5. 52 U.S.C.S. § 10101 (LexisNexis, Lexis Advance through PL 115-60, approved 9/15/17).

II. BACKGROUND

The Sixth and Eleventh Circuits divide over the procedural enforcement mechanism for similar claims under the “Materiality Provision” of the VRA. Part A of this section provides an overview of the individual private right of action as an enforcement mechanism for federal statutes. Part B provides a brief explanation of the VRA. Finally, Part C delves into the main cases that exemplify the split of authority: *Northeast Ohio Coalition for the Homeless v. Husted* and *Schwier v. Cox*.⁶

A. Private Rights of Action

When Congress creates legislation, it has the option to include an enforcement mechanism within the statute. Some statutes explicitly state that private parties may sue to seek redress for harm suffered when their rights are violated.⁷ In other federal statutes, Congress creates rights without stating “whether or how private litigants may bring federal lawsuits to vindicate those rights.”⁸ If a federal statute does not expressly authorize suit by private persons, the courts will have to determine whether to recognize the lawsuit—a remedy not expressly authorized by the statute.⁹

A private right of action is “a non-governmental litigant’s ability to bring suit to enforce a federal statute.”¹⁰ Put differently, a private right of action is “the right of a private party to seek judicial relief from injuries caused by another’s violation of a legal requirement.”¹¹ From early on in American history, the Supreme Court recognized that “where there is a legal right, there is also a legal remedy.”¹² The Supreme Court later expressly held that a plaintiff could sue under a federal statute that did not expressly create a private right of action.¹³

The question then becomes when may an individual sue to enforce a federal statute that does not expressly provide for a private right of action. There are two ways in which a court allows a private right of

6. 837 F.3d 612 (6th Cir. 2016); 340 F.3d 1284 (11th Cir. 2003).

7. Richard H. Fallon, Jr., et al., *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 723 (7th ed. 2015).

8. *Id.*

9. *Id.*

10. Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 *Ind. L. Rev.* 113, 113 n. 1 (2010). A private right of action is also sometimes referred to as a “private cause of action.” *Id.*

11. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 730 n. 1 (1979) (Powell, J., dissenting).

12. Tokaji, *supra* note 10, at 126 (citing *Marbury v. Madison*, 5 U.S. 137, 163 (1803)).

13. *Id.* (citing *Tex. & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 41 (1916)).

action when it is not explicitly permitted by the statute: (1) by implying a private right of action into the statute, or (2) by incorporating the private right of action by reference using 42 U.S.C. § 1983.¹⁴ Section 1983 confers a right of action on individuals “whose rights under federal laws have been violated by a person acting . . . under color of state law.”¹⁵ The Supreme Court has greatly limited each of these methods for a court to find a private right of action, beginning in 1975.¹⁶

Each of the two ways in which a court may infer a private right of action begins with the same inquiry: “whether Congress intended to create a federal right.”¹⁷ Under the modern, restrictive view of implied rights of action, courts focus narrowly on whether the statutory language shows congressional intent to create both an individual right and a private remedy.¹⁸

When deciding whether an individual may bring a right of action under § 1983, courts look to whether Congress intended to confer an individual *right* in the legislation, not necessarily a remedy.¹⁹ If a statute includes a private remedy, the Supreme Court has held that there is a presumption that enforcement via a § 1983 claim is precluded.²⁰ The modern test used to determine if there are rights enforceable by individuals under § 1983 is the *Gonzaga/Blessing* test.²¹ The first step of this analysis is to ask whether the statute contains “explicit right-or duty-creating language.”²² The second step is to determine whether “the statute clearly provides rights which are specific and not amorphous.”²³ Finally, the language of the statute must be mandatory, rather than precatory.²⁴

Prior to the limitations imposed by the Supreme Court on private rights of action, the Court implied a private right of action under the VRA.²⁵ In *Allen v. State Bd. of Elections*, the Supreme Court held that §

14. *Id.* at 126, 133; 42 U.S.C. § 1983 (LexisNexis, Lexis Advance through PL 115-68, approved 10/06/17).

15. *Id.* at 133.

16. *Id.* at 129, 133.

17. *Schwier*, 340 F.3d at 1290.

18. Tokaji, *supra* note 10, at 133.

19. *Id.*

20. *Id.* at 135.

21. *Schwier*, 340 F. 3d at 1296; *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (rejecting a § 1983 claim because no personal rights were created under the Family Educational Rights and Privacy Act of 1974); *Blessing v. Freestone*, 520 U.S. 329 (1997) (rejecting a § 1983 claim because the Social Security Act did not give rise to individualized rights).

22. *Schwier*, 340 F. 3d at 1296.

23. *Id.*

24. *Id.* at 1297.

25. *See* Tokaji, *supra* note 10, at 129, 133; *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969).

5 of the VRA²⁶ is enforceable through a private right of action, even though the VRA “does not explicitly grant or deny private parties authorization to seek a declaratory judgment.”²⁷ The Court relied on precedent, holding that a federal statute passed to protect a class of citizens implies a right of action, even though it did not specifically authorize members of the class to sue.²⁸ The Court focused on the guarantee of the statute that no person shall be denied the right to vote for failure to comply with unapproved enactments under § 5, holding that this would be an “empty promise” without the option for private citizens to seek judicial enforcement.²⁹

The Supreme Court began its turn away from the implication of private rights of action in *Cannon v. University of Chicago* in 1979.³⁰ The majority in *Cannon* implied a private right of action, but Justice Powell’s dissent laid the foundation for the Court rejecting implied private remedies in future cases.³¹

In *Cannon*, the plaintiff alleged that her admission to medical school was denied on the basis of sex, in violation of Title IX of the Education Amendments of 1972.³² The Court implied a private right of action, in part based on the rights created by the statute, legislative history, the similarity between the language of the statute and that of the statute in *Allen*, the purpose of the statute, and whether the subject matter was better handled by the States.³³ Justice Powell challenged this holding in his dissent, arguing that judicial implication of private rights of action should end.³⁴ Justice Powell argued that implied rights of action violate the doctrine of separation of powers because the decision to provide a private civil remedy is a legislative function.³⁵ He also addressed Supreme Court precedent, in which he described *Allen* in a benign way.³⁶ Overall, Justice Powell advanced the position that, “[a]bsent the most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action.”³⁷ Since *Cannon* was

26. Section 5 of the VRA requires covered states to receive declaratory judgment that changes to the states’ election laws do not have the purpose or effect of denying the right to vote on the basis of race or color. 393 U.S. at 548-49.

27. *Id.* at 554.

28. *Id.* at 557.

29. *Id.*

30. 441 U.S. 677 (1979).

31. Fallon, *supra* note 7, at 739. As stated by Fallon, et al., “Justice Powell lost the battle in *Cannon*, but he won the war.” *Id.*

32. 441 U.S. at 680.

33. *Id.* at 689-90, 694, 703, 708.

34. *Id.* at 730 (Powell, J., dissenting).

35. *Id.* at 730-731 (Powell, J., dissenting).

36. *Id.* at 737 (Powell, J., dissenting).

37. *Cannon*, 441 U.S. at 731 (Powell, J., dissenting).

decided in 1979, the Court has gravitated much closer to Justice Powell's position requiring clear evidence of congressional intent to imply a private remedy.³⁸

The Supreme Court again implied a private right of action under the VRA in 1996 in *Morse v. Republican Party*.³⁹ The Court addressed the substantive issue of whether § 5 of the VRA required preclearance of the political party's decision, and the procedural issue of whether the parties were permitted to sue under a private right of action to enforce § 10 of the VRA.⁴⁰ The Court cited to *Cannon* for the principle that it must consider the legal context in which the legislation was enacted.⁴¹ As in *Cannon*, the Court here found that "Congress acted against a 'backdrop' of decisions in which implied causes of action were regularly found."⁴² The Court stated that it would be "anomalous" to hold that § 10 is not enforceable by private action, while the Court has previously held other sections to be enforceable, despite the lack of express authorizing language in all of the sections.⁴³ The Court relied on precedent and legislative history to support its conclusion that § 10 of the VRA is enforceable by private citizens.⁴⁴

Alexander v. Sandoval is an oft-cited, modern example of the Supreme Court's trend of reticence toward implying a private right of action.⁴⁵ In *Sandoval*, the Court addressed the issue of whether private citizens may sue to enforce regulations promulgated under Title VI of the Civil Rights Act of 1964.⁴⁶ The Court held that there was no rights-creating language in the statute, under which the regulation was promulgated.⁴⁷ The majority remained resolute in refusing to imply a private right of action without clear congressional intent.⁴⁸ The *Sandoval* Court rejected the Court's prior reliance on the legal context of the enactment of the statute, holding instead that legal context matters only to the extent that it clarifies the text of the statute.⁴⁹ The Supreme

38. Tokaji, *supra* note 10, at 131-2.

39. 517 U.S. 186 (1996).

40. *Id.* at 190. § 10 of the VRA prohibits poll taxes as a precondition to voting. *Id.*

41. *Id.* at 230-31.

42. *Id.* at 231 (citing *Cannon*, 441 U.S. at 698-99).

43. *Morse*, 517 U.S. at 232.

44. *Id.* at 230-34.

45. 532 U.S. 275 (2001). The Plaintiffs argued that Alabama's English-only policy for administering state driver's licenses violated a Department of Justice regulation because it subjected non-English speakers to discrimination based on their national origin. *Id.* at 279.

46. *Id.* at 278.

47. *Id.* at 288.

48. *Id.* at 287. As stated in the majority opinion by Justice Scalia, "[h]aving sworn off the habit of venturing beyond Congress's intent, we will not accept respondent's invitation to have one last drink" *Id.*

49. *Id.* at 287-88. The Court states that only three prior cases that have implied private rights of

Court implied a private right of action as late as 1996 in *Morse*, yet neither the majority nor dissent mentioned *Morse*, a recent holding at the time.⁵⁰ *Sandoval* exemplifies the Supreme Court's trend toward a much more restrictive view of implied rights of action.⁵¹

B. The Voting Rights Act⁵²

Congress enacted the VRA “to provide means of further securing and protecting the civil rights of persons within the jurisdiction of the United States.”⁵³ The VRA protects the civil rights of Americans by ensuring that the right to vote is not affected because of their race, color, or previous condition of servitude.⁵⁴ The VRA was originally codified as part of the Civil Rights Act of 1964, which was codified under 42 U.S.C. § 1971, but is not codified under 52 U.S.C. § 10101.⁵⁵ In part, the VRA prohibits anyone from acting under the color of law to

deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.⁵⁶

Section § 10101(c) of the VRA was added to the statute by the Civil Rights Act of 1957 and provides that when any person has or is going to engage in conduct that would “deprive any other person of any right of privilege secured by subsection (a) or (b), the Attorney General may institute . . .” a civil action for injunctive relief.⁵⁷ Courts disagree as to whether this provision providing for enforcement by the Attorney General precludes a private right of action for individual voters.

action have found legal context to be relevant, but the cases it cites ignores *Morse*, a case more recent than the others cited. *Id.*; *Morse v. Republican Party*, 517 U.S. 186 (1996).

50. Fallon, *supra* note 7, at 735.

51. Tokaji, *supra* note 10, at 133.

52. 52 U.S.C.S. § 10101 (LexisNexis, Lexis Advance through PL 115-60, approved 9/15/17).

53. Civil Rights Act of 1957, Pub. L. 85-315, 71 Stat. 634 (1957).

54. 52 U.S.C.S. § 10101(a)(1) (LexisNexis, Lexis Advance through PL 115-60, approved 9/15/17)

55. 42 U.S.C.S. § 1971 (LexisNexis, Lexis Advance through PL 115-61, approved 9/27/17). The statute will be referred to in this Comment by the name used by the cited court, which largely depends upon the time during which the case was decided.

56. 52 U.S.C.S. § 10101(a)(2)(B) (LexisNexis, Lexis Advance through PL 115-60, approved 9/15/17)

57. 52 U.S.C.S. § 10101(c) (LexisNexis, Lexis Advance through PL 115-60, approved 9/15/17); *Schwier*, 340 F.3d at 1294.

C. *The Circuit Split*

Two modern cases from federal courts of appeals exemplify the split among the federal circuits as to whether an individual has a private right of action under the VRA of 1965: *Northeast Ohio Coalition for the Homeless v. Husted* and *Schwier v. Cox*.⁵⁸ While both courts agree that the VRA provides for enforcement by the Attorney General, they disagree about the right of individuals to sue to enforce their rights.⁵⁹ The Supreme Court has declined to resolve the split among circuits.⁶⁰ This section discusses each of the main cases in turn.

1. *Schwier v. Cox*⁶¹

The plaintiffs, Deborah Schwier, Theodore Schwier, and Michael Craig, sued the Georgia Secretary of the State, Cathy Cox, seeking injunctive relief under 42 U.S.C. § 1983.⁶² The Plaintiffs claimed that Georgia's voter registration procedure violated § 7 of the Privacy Act of 1974 and § 1971 of the VRA by requiring voters to supply their social security numbers to register.⁶³ Relevant to this Comment, the Plaintiffs argued that Georgia's requirement that voters supply their social security numbers violates § 1971(a)(2)(B) of the VRA because the social security numbers are not "material" in determining whether an individual is eligible to vote.⁶⁴

In order to bring their case under the VRA, the Plaintiffs contended that when Congress gave the authority to enforce the VRA to the Attorney General, Congress merely added a means of enforcing the statute but did not take away the previously existing remedy of a private right of action via 42 U.S.C. § 1983.⁶⁵ In response, the Defendant argued that the VRA may only be enforced by the Attorney General, the method provided by the statute.⁶⁶ In the alternative, the Defendants argued that even if the statute may be enforced by a private right of action, the Plaintiffs' claim is moot because Georgia has since modified its voter registration form.⁶⁷

58. 837 F.3d 612 (6th Cir. 2016); 340 F.3d 1284 (11th Cir. 2003).

59. *Ne. Coalition*, 837 F.3d at 630; *Schwier*, 340 F.3d at 1296.

60. *Ne. Ohio Coal. for the Homeless v. Husted*, 137 S. Ct. 2265 (2017).

61. 340 F.3d 1284 (11th Cir. 2003).

62. *Schwier*, 340 F.3d at 1285.

63. *Id.* at 1285-6.

64. *Id.* at 1286-87.

65. *Id.* at 1287.

66. *Id.*

67. *Schwier*, 340 F.3d at 1287.

a. The District Court Decision

The United States District Court for the Northern District of Georgia found that the Plaintiffs could not bring a private right of action for violations of the Privacy Act or the VRA under 42 U.S.C. § 1983.⁶⁸ The district court found that Congress added § 1971(c) to the statute with the intention of foreclosing the possibility of a private right of action.⁶⁹ The District Court relied on the Sixth Circuit's holding in *McKay v. Thompson* that § 1971 of the VRA is enforceable only by the Attorney General.⁷⁰

The district court granted a preliminary injunction, allowing the Plaintiffs to vote in the election without providing their social security numbers.⁷¹ The district court granted summary judgment in favor of the Defendant for both the Privacy Act and VRA claims.⁷² The Plaintiffs appealed the district court's decision.⁷³

b. The Eleventh Circuit Decision

On appeal, the United States Court of Appeals for the Eleventh Circuit reviewed the District Court's grant of summary judgment de novo.⁷⁴ The Eleventh Circuit began its analysis of the private right of action issue by looking at the language of the VRA and the legislative history.⁷⁵ The court found that § 1971(a)(2)(B) was "intended to address the practice of requiring unnecessary information for voter registration with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters."⁷⁶ Additionally, the court reviewed House Report 291 and found that the statute's purpose was "to provide means of *further* securing and protecting the civil rights of persons within the jurisdiction of the United States."⁷⁷ The Eleventh Circuit noted that nothing in the House Judiciary Committee Report indicated that the Committee intended for the provision granting the Attorney General

68. *Id.* at 1286.

69. *Id.* at 1294.

70. *Id.*

71. *Id.* at 1286

72. *Schwieb*, 340 F.3d at 1286.

73. *Id.*

74. *Id.* at 1287. De novo review means that an appellate court may freely review a trial court's findings on matters of law, but not on findings of fact. 5 Am Jur 2d Appellate Review § 646. Deference is owed to the trial court for findings of fact, but not for findings concerning an issue of law. *Id.*

75. *Schwieb*, 340 F.3d at 1294.

76. *Id.*

77. *Schwieb*, 340 F.3d at 1295 (emphasis in original).

enforcement authority foreclosed the continued enforcement by individuals under § 1983.⁷⁸ The court found that the language of the Report and the purpose of the statute do not support the conclusion that Congress merely intended to substitute one form of enforcement for another.⁷⁹ Rather, Congress likely wanted to expand the protection provided by the statute.⁸⁰

In addition to the legislative history, the Eleventh Circuit analyzed the timing of the enactment of the statute.⁸¹ The provision giving the Attorney General the authority to enforce § 1971 was not added to the statute until 1957 with the passage of the Civil Rights Act of 1957.⁸² The Eleventh Circuit concluded that this timing meant that before 1957, individuals could sue to enforce § 1971 under 42 U.S.C. § 1983.⁸³

Next, the Eleventh Circuit reviewed the case law cited by the district court. After analyzing the case law relied upon by the district court, the Eleventh Circuit reviewed Supreme Court cases that held that other sections of the VRA, 42 U.S.C. §§ 1973(c) and 1973(h), could be enforced by an individual through a private right of action, even though those sections of the statute also provide for enforcement by the Attorney General.⁸⁴ First, in *Allen v. State Board of Elections*, the Supreme Court held that “the possibility of enforcement by the Attorney General did not preclude enforcement by private citizens,” which the Eleventh Circuit court recognized was contrary to the Sixth Circuit’s holding.⁸⁵ Second, in *Morse v. Republican Party of Virginia*, the Supreme Court held that a private right of action to enforce the VRA’s prohibition on the poll tax was not foreclosed by the provision that gave the Attorney General the authority to sue for violations.⁸⁶ In both of these Supreme Court cases, the Court held that private citizens could sue to enforce other provisions of the VRA. In the process of reviewing Supreme Court precedent, the court also explicitly rejected the Sixth Circuit’s position on the issue.

Based on the foregoing reasons, the Eleventh Circuit concluded that neither the provision for enforcement by the Attorney General nor the failure of Congress to expressly include a private right of action require the conclusion that Congress intended for no private right of action to

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Schwier*, 340 F.3d at 1295.

83. *Id.*

84. *Id.* at 1294.

85. *Id.* at 1295.

86. *Id.* at 1296.

exist.⁸⁷ From this conclusion that a private right of action is not precluded, the Eleventh Circuit then moved to the issue of whether the VRA “creates rights enforceable by individuals under § 1983.”⁸⁸

To determine whether a statute creates rights enforceable by individuals under 42 U.S.C. § 1983, the Eleventh Circuit applied the *Gonzaga/Blessing* analysis.⁸⁹ Courts use this analysis to determine whether Congress created an individual right in a statute that is enforceable by the individual.⁹⁰ The Eleventh Circuit applied this framework to the Materiality Provision of the VRA.⁹¹

The court found that the language of § 1971(a)(2)(B) was clearly analogous to the right-creating language cited by the Supreme Court in the *Gonzaga* case.⁹² Next, the court held that the rights protected are specific and not amorphous because the statute protects an individual’s right to vote generally, but also specifically protects the right of a potential voter to not be disqualified for failure to provide immaterial information on a voter registration form.⁹³ Last, the court held that the language of the statute was mandatory because it included the phrase “no person . . . shall . . . deny the right of any individual to vote”⁹⁴ Since § 1971 satisfied the *Gonzaga/Blessing* analysis, the Eleventh Circuit held that the VRA may be enforced by a private right of action under § 1983.⁹⁵ Even under the Supreme Court’s most stringent test, the Eleventh Circuit held that the VRA is privately enforceable.⁹⁶

Based on the foregoing reasons, the Eleventh Circuit reversed the district court’s ruling, ultimately finding that § 1971 of the VRA permits enforcement by a private right of action under § 1983.⁹⁷

2. *Northeast Ohio Coalition for the Homeless v. Husted*⁹⁸

The Plaintiffs in this case were the Northeast Ohio Coalition for the Homeless, Service Employees International Union, Columbus Coalition for the Homeless, and the Ohio Democratic Party.⁹⁹ The Plaintiffs sued

87. *Schwier*, 340 F.3d at 1296.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Schwier*, 340 F.3d at 1296. *See* note 17.

93. *Schwier*, 340 F.3d at 1296-97.

94. *Id.* at 1297.

95. *Id.*

96. Tokaji, *supra* note 10, at 141.

97. *Schwier*, 340 F.3d at 1297.

98. 837 F.3d 612 (6th Cir. 2016).

99. *Id.* at 620-21.

the Defendants—the State of Ohio and the Secretary of State, Jon Husted—to enjoin the enforcement of two voter-identification and provisional-ballot laws, Senate Bill 205 (“SB 205”) and Senate Bill 216 (“SB 216”).¹⁰⁰ This litigation proceeded for many years, with multiple motions heard at both the district and circuit court levels.¹⁰¹

The first of the challenged laws, SB 205, changed the requirements for absentee ballots by requiring the birthdate and address fields on absentee ballots to be accurately completed, reducing the amount of time for corrections to be submitted, and prohibiting election officials from assisting voters, unless the voter is unable to complete their ballot because of blindness, disability, or illiteracy.¹⁰² The other law challenged by Plaintiffs, SB 216, made similar changes to the requirements for provisional ballots by requiring the birthdate and address fields to be accurately completed and by reducing the number of days a voter has to cure a provisional ballot.¹⁰³

The parties entered a consent decree¹⁰⁴ in 2010, which required the Secretary of State to inform election boards to count provisional ballots of voters whose affirmation forms had an accurate name, verified signature, and the last four digits of the voter’s social security number.¹⁰⁵ The consent decree also listed grounds for which a provisional ballot could not be rejected, including failure to provide a birthdate or address tied to a building.¹⁰⁶ The consent decree was extended through the end of 2016.¹⁰⁷

Following the extension of the consent decree, the Southern District Court of Ohio permitted Plaintiffs to file a supplemental compliant to

100. *Id.*

101. *NE Coalition*, 837 F.3d 612 (6th Cir. 2016).

102. *Id.* at 619-20. In Ohio, any eligible voter may apply for an absentee ballot, which requires a name, signature, registration address, date of birth, and a form of identification. *Id.* at 619. When voting with an absentee ballot, voters must also complete an identification envelope, which requires the voter’s name, signature, voting residence, and birthdate. *Id.* The name and signature on the envelope must be proper for the ballot to be counted, but SB 205 adds the birthdate and address fields to this requirement. *Id.* The time allowed for corrections to the absentee ballots was reduced from ten days to seven days after Election Day. *Id.*

103. *Ne. Coalition*, 837 F.3d at 620. Ohio voters may use an in-person provisional ballot if he or she does not appear on the precinct’s list of eligible voters when he or she goes to vote during the early-voting period or on Election Day. *Id.* at 618. The affirmation form completed by provisional ballot voters also doubles as a voter registration form for the following year if the voter was found to not be registered during the current voting year. *Id.* at 620. The time allowed for a voter to cure a provisional ballot was reduced from ten to seven days after Election Day. *Id.*

104. A consent decree is an agreement entered into by the consent of the parties involved; the agreement is not a judicial decision, but the court retains jurisdiction over the agreement. *Consent decree*, BLACK’S LAW DICTIONARY (10th ed. 2014).

105. *Ne. Coalition*, 837 F.3d at 620-21.

106. *Id.* at 621.

107. *Id.*

challenge the voter-identification requirements more generally.¹⁰⁸ The Plaintiffs asserted ten counts against the State and the Secretary.¹⁰⁹ The relevant claim for this Comment is the immaterial error claim under the Materiality Provision of the VRA.

The Plaintiffs argued that the Ohio laws violated the Materiality Provision of the VRA because it denied citizens the right to vote based on errors or omissions on absentee or provisional ballots that were not material to determining the citizens' eligibility to vote.¹¹⁰ The Plaintiffs relied on the Eleventh's Circuit's analysis and holding from *Schwieb* to support their argument that a private right of action is permitted to enforce the Materiality Provision.¹¹¹ The Plaintiffs argued that § 1983 expressly authorizes the private lawsuit because the deprivation of rights was perpetrated by government officials.¹¹² Alternatively, the Plaintiffs argued that the language of the statute itself and the legislative history support an implied private right of action.¹¹³ To support this argument, the Plaintiffs cited the Attorney General, who testified before Congress that the amendments to the VRA "are not taking away the right of the individual to start his own action . . . private people will retain the right they have now to sue in their own name."¹¹⁴ Ultimately, the Plaintiffs sought a permanent injunction against the above-stated election laws.¹¹⁵

108. *Ne. Coalition*, 837 F.3d at 621. A court may permit a party to serve a supplemental pleading for any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. Fed. R. Civ. P. 15(d). The Sixth Circuit permitted a supplemental complaint because "SB 216 'ero[ded]' the consent decree's protections and because both SB 205 and SB 216 related to the original complaint, which challenged Ohio's voter-identification requirements more generally." *NE Coalition*, 837 F.3d at 621. The Sixth Circuit held that the trial court did not abuse its discretion in granting the plaintiffs' motion for a supplemental complaint. *Id.* at 625.

109. *Id.* at 621. The ten claims are as follows: (1) a viewpoint discrimination claim under the First and Fourteenth Amendments; (2) a claim under the Due Process Clause of the Fourteenth Amendment for a fundamentally unfair voting system; (3) a claim under the Due Process Clause of the Fourteenth Amendment for violation of procedural due process; (4) a claim under the Equal Protection Clause of the Fourteenth Amendment of undue burden; (5) a claim under the Equal Protection Clause of the Fourteenth Amendment for lack of uniform standards; (6) a claim under the Equal Protection Clause of the Fourteenth Amendment for arbitrary and disparate treatment; (7) a claim of intentional discrimination under the Fourteenth and Fifteenth Amendments; (8) a claim of vote denial under the Voting Rights Act; (9) a claim of immaterial error under the Voting Rights Act; and (10) a literacy test claim under the Voting Rights Act. *Id.*

110. Petition for Writ of Certiorari, p. 23-24, *Ne. Ohio Coal. for the Homeless v. Husted*, 137 S. Ct. 2265 (2017) [hereinafter Petition for Writ of Certiorari].

111. *Id.* 34-37.

112. *Id.* at 42.

113. *Id.* at 42-43. The Plaintiffs argued that the doctrine against implied repeal supports this conclusion. *Id.* at 43.

114. *Id.* at 21.

115. *NE Coalition*, 837 F.3d at 621.

a. The District Court Decision

The United States District Court for the Southern District of Ohio heard a bench trial in March 2016 on the supplemental complaint.¹¹⁶ The district court entered judgment for the Plaintiffs on the undue burden and vote denial claims, and for Defendants on all other counts, including the immaterial error claim.¹¹⁷ The Defendants appealed the undue burden and vote denial claims, and the Plaintiffs cross-appealed the uniform standards, literacy test, due process, intentional discrimination, and immaterial error claims.¹¹⁸

b. The Sixth Circuit Decision

On appeal, the United States Court of Appeals for the Sixth Circuit reviewed the district court's legal conclusions de novo and factual findings for clear error.¹¹⁹ In evaluating the claim under the Materiality Provision of the VRA, the Sixth Circuit cited *McKay v. Thompson*¹²⁰ to hold that there is not a private right of action under this provision of the VRA.¹²¹

In *McKay*, a pro se litigant filed a lawsuit against two Tennessee state election officials to enjoin Tennessee from requiring its citizens to disclose their social security numbers as a condition for voter registration.¹²² The plaintiff brought this claim under the Privacy Act of 1974, the National Voter Registration Act, and the Civil Rights Act of 1964.¹²³ The plaintiff also raised constitutional claims under 42 U.S.C. § 1983, such as a claim that the enforcement of the Tennessee law infringed upon his free exercise of religion and that his right to vote was unconstitutionally burdened.¹²⁴ The Eastern District of Tennessee rejected these claims, and the Sixth Circuit affirmed summary judgment for the defendants upon de novo review.¹²⁵ Relevant here, the plaintiff argued that his social security number was immaterial to determining his qualification to vote, and therefore his omission could not be used to

116. *Id.*

117. *Id.* at 622.

118. *Id.*

119. *Id.* at 625.

120. 226 F.3d 752 (6th Cir. 2000).

121. *Ne. Coalition*, 837 F.3d at 630.

122. 226 F.3d at 754.

123. *Id.* at 755-56; Pub. L. No. 93-579 § 7; 42 U.S.C. § 1973gg-3(c)(2)(B); 42 U.S.C. § 1971(a)(2)(B) (this section is now codified as the Voting Rights Act under 52 U.S.C. § 10101(a)(2)(B)).

124. *McKay*, 226 F.3d at 756-57.

125. *Id.* at 754.

refuse his voter registration form under the Materiality Provision.¹²⁶ The Sixth Circuit cited the language of the statute and *Willing v. Lake Orion Community Sch. Bd. of Trustees*¹²⁷ from the Eastern District of Michigan to hold that the provision for the Attorney General to enforce the Civil Rights Act under § 1971(c) precludes private citizens from doing so under a private right of action.¹²⁸

In *Willing*, a pro se litigant sued multiple defendants, including her local school board of trustees, the Oakland County board of canvassers, and the Oakland County Prosecutor's office.¹²⁹ The plaintiff asserted violations of the United States Constitution and numerous federal and state statutes, stemming from technical violations of Michigan election law in two school elections and two recounts of the elections.¹³⁰ These claims included an alleged violation of § 1971(b) of the VRA, which prohibits intimidation, threats, and coercion in elections for the President, Vice President, presidential elector, Delegates, or Commissioners from the Territories.¹³¹ The court concluded, based on the language of the statutes and *Good v. Roy*,¹³² a district court decision from Kansas, that the VRA does not permit a private right of action.¹³³ The court stated that the VRA is enforceable by the Attorney General, not by private citizens, under § 1971(c).¹³⁴ Importantly, the court held that even if it implied a private right of action, the claim would fail because the Plaintiff's claim did not fit the language of the statute.¹³⁵

In *Good*, the Plaintiff sought injunctive and declaratory relief under the VRA for protection against misleading statements by a candidate for public office.¹³⁶ The court found that this protection is not present within the VRA.¹³⁷ The court stated that "the unambiguous language of Section 1971 will not permit us to imply a private right of action" because subsection (c) provides for enforcement by the Attorney General, with no mention of enforcement by private persons, and because the purpose of the VRA is to protect against racial

126. *Id.* at 756.

127. 924 F. Supp. 815 (E.D. Mich. 1996).

128. *McKay*, 226 F.3d at 756.

129. 924 F. Supp. at 817.

130. *Id.*

131. *Id.* at 820.

132. 459 F. Supp. 403 (D.Kan. 1978).

133. *Willing*, 934 F. Supp. at 820.

134. *Id.*

135. *Id.* The statute enumerates the types of elections to which it applies, but school board elections are not included in the list. *Id.* Therefore, the court concludes that the claim would be dismissed regardless of whether the court implied a private right of action. *Id.*

136. 459 F. Supp. at 404-05.

137. *Id.* at 405.

discrimination, of which there is no allegation in this case.¹³⁸ Finally, the court held that a private right of action is not available under § 1983 because there is no allegation of state action.¹³⁹

In *NE Coalition*, the Sixth Circuit followed the precedent set by *McKay* because “[a] panel of this court may not overturn binding precedent because a published prior panel decision remains controlling authority,” unless the Supreme Court issues an inconsistent decision or the Sixth Circuit sitting en banc overrules the prior decision.¹⁴⁰ The Sixth Circuit followed the precedent set by *McKay* regarding the private right of action under the VRA without further analysis.¹⁴¹ Because Congress included a provision for enforcement by the Attorney General, the statute precluded private rights of action.¹⁴² The Sixth Circuit followed binding precedent and affirmed the district court’s decision in favor of the Defendants for the immaterial error claim.¹⁴³

c. The Supreme Court Decision

The Sixth Circuit’s decision in *NE Coalition* left the issue of whether there is a private right of action under the VRA ripe for intervention from the Supreme Court. However, the Supreme Court declined to resolve the split between the circuit courts in 2017 when it denied the Plaintiffs’ petition for writ of certiorari.¹⁴⁴

IV. PROMOTING PRIVATE ENFORCEMENT AND WHY IT IS DESIRABLE IN THE CONTEXT OF THE VOTING RIGHTS ACT

The Eleventh Circuit’s holding that there is a private right of action under the VRA more thoroughly and accurately analyzes the relevant issues under the modern tests than does the Sixth Circuit’s conclusion, and results in a more satisfactory outcome. This section will discuss the circuit courts’ analyses, briefly review the Supreme Court precedent discussed earlier in this Comment, and explain the public policy reasons supporting the Eleventh Circuit’s outcome.

138. *Id.* at 405-06.

139. *Id.* at 406.

140. *Ne. Coalition*, 837 F.3d at 630.

141. *Id.*

142. *Id.*

143. *Id.* at 638.

144. *Ne. Ohio Coal. for the Homeless v. Husted*, 137 S. Ct. 2265 (2017).

A. Circuit Court Analyses

The Eleventh Circuit and the Sixth Circuit both faced the same issue in *Schwier* and *NE Coalition*: whether the Materiality Provision of the VRA is enforceable via a private right of action. Even though the courts considered the same issue, the analyses of the courts differed greatly.

In *Schwier*, the Eleventh Circuit provided an extensive analysis of the issue of private enforcement under the Materiality Provision. First, the Eleventh Circuit analyzed the statutory language, legislative history, timing of enactment, and Supreme Court precedent to determine that neither the provision for enforcement by the Attorney General, nor the failure of Congress to explicitly include a provision for a private right of action, mean that Congress did not intend for private enforcement to be possible.¹⁴⁵ The court concluded that a private right of action was not precluded based on the foregoing reasons.¹⁴⁶ Second, the court performed a § 1983 analysis, using the *Gonzaga/Blessing* test.¹⁴⁷ The court found that the Materiality Provision contained right-creating language, specific rights, and mandatory language, meaning that a private right of action could be implied under § 1983.¹⁴⁸ With this thorough, multi-step analysis, the Eleventh Circuit logically supported its conclusion.

In stark contrast, the Sixth Circuit rejected a private right of action under the VRA with a “brief, conclusory, and unsatisfying” analysis.¹⁴⁹ As stated by the Plaintiffs in the case, “[t]he Sixth Circuit’s analysis of the issue is so cursory that it is easier to quote than to summarize.”¹⁵⁰ In *NE Coalition*, the Sixth Circuit cited precedent from the Circuit, which states that the enforcement of the VRA by the Attorney General precludes enforcement through a private right of action.¹⁵¹ The Sixth Circuit briefly cited to *McKay* and stated that it may not decide a case inconsistently with the Circuit’s precedent unless the Supreme Court issued an inconsistent decision.¹⁵²

However, upon further examination of this line of precedent, there is not a strong analysis in any of the cases to support such an indiscriminate reliance by the Sixth Circuit. The analysis in *McKay* is even shorter than the cursory analysis provided in *NE Coalition*, relying upon *Willing v. Lake Orion Community Sch. Bd. of Trustees* as the basis

145. See *supra* notes 75-88 and accompanying text.

146. See *supra* note 87-88 and accompanying text.

147. See *supra* note 89-91 and accompanying text.

148. See *supra* note 92-93 and accompanying text.

149. Tokaji, *supra* note 10, at 140.

150. Petition for Writ of Certiorari, p. 33.

151. See *supra* note 141-42 and accompanying text.

152. See *supra* note 142 and accompanying text.

for the conclusion that “[s]ection 1971 is enforceable by the Attorney General, not private citizens.”¹⁵³ The Sixth Circuit in *McKay* briefly discussed the issue of a private right of action under the VRA, citing a lower court in *Willing* as the authority for the analysis.¹⁵⁴

The *Willing* court provides another brief analysis of the issue. The *McKay* court cited *Willing* for the holding that the VRA is enforceable by the Attorney General, not private citizens. The *Willing* court indeed stated this, but did not offer any analysis to support the statement. Rather, it cited to another district court case, *Good* from the District of Kansas.¹⁵⁵

The *Good* court concluded that the language of the statute providing for enforcement by the Attorney General precluded the court from implying a private right of action.¹⁵⁶ The court reasoned that the statutory language was unambiguous but provided no further reasoning or legal support.¹⁵⁷

There are a few problems with this string of cases in the precedent relied upon by the Sixth Circuit. First, the *Willing* court appears to be quick to dismiss the issue of the private right of action because the plaintiff failed to properly raise a claim under the statute.¹⁵⁸ This begs the question of whether the court would have provided a more thorough analysis of the plaintiff’s ability to sue had the claim been viable under the statute. The court appears to brush off the issue because the ultimate result of the case does not change, regardless of their conclusion on the issue of whether to imply a private right of action. The irrelevance of this decision in the case raises the question of whether this should be trusted by a higher court as precedent, without further analysis. For the Sixth Circuit to rely on *McKay*, it should have provided further analysis to support the precedent case’s reasoning.

Second, lower court decisions are not binding on higher courts, but the Sixth Circuit does not provide an explanation for why it chose to follow the lower court decision.¹⁵⁹ The Eastern District of Michigan in *Willing* followed the case law from the District of Kansas in *Good*, which is also not binding authority over the court.¹⁶⁰ The Sixth Circuit

153. *McKay* 226 F.3d at 756.

154. *See supra* note 128 and accompanying text.

155. *See supra* note 133 and accompanying text.

156. *See supra* note 138 and accompanying text.

157. *Id.*

158. *See supra* note 135 and accompanying text.

159. Lower court decisions can serve as persuasive authority for higher courts, but lower court decisions are not binding on higher courts. 18-134 Moore’s Federal Practice – Civil § 134.02(1)(c) (2017).

160. While federal district court decisions can serve as persuasive authority for other federal district courts, the decisions of district courts are not binding authority for other district courts. 18-134

then cited the Eastern District of Michigan in *McKay*, which is not binding on the Sixth Circuit, without additional analysis. Finally, the Sixth Circuit in *NE Coalition* cited *McKay*, stating that court could not rule contrary to its precedent, absent an intervention by the Supreme Court. The Sixth Circuit failed to explain why it relied upon these lower court cases to establish the precedent of the Circuit in *McKay*, and refused to reassess this decision in *NE Coalition*. The Sixth Circuit has not provided a satisfactory reason for its decision to preclude rights of action for individuals to enforce their rights under the VRA in either case that has addressed the issue.

The contrast between the Sixth and Eleventh Circuit analyses cannot be easily reconciled. The reasoning behind the Eleventh Circuit analysis is easier to follow, much more thorough, and more convincing than that of the Sixth Circuit.

B. Supreme Court Precedent

The Supreme Court has implied private rights of action under the VRA in prior cases, such as *Allen* and *Morse*.¹⁶¹ The Court implied a private right of action in *Morse*, even after the general contraction of implied rights of action in the post-*Cannon* case law, suggesting that a majority of the Court has considered private enforcement of the VRA to be especially important.¹⁶² The *Morse* Court acknowledged that other sections of the VRA have been held to be privately enforceable despite the lack of express language in the statute, so it would be inconsistent to hold that other sections are not privately enforceable.¹⁶³ Based on the precedent cited above, and the judicial context in which it was decided, the Court has not precluded private enforcement of the VRA, and appears to support the implication of the right to sue for private citizens in this context.

C. Public Policy Rationale

In addition to the superior legal analysis performed by the Eleventh Circuit and the support found in Supreme Court precedent, there are public policy reasons that support implying a private right of action under the VRA.

First, enforcement by the Attorney General is not an adequate

Moore's Federal Practice – Civil § 134.02(1)(d) (2017).

161. *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); *Morse v. Republican Party*, 517 U.S. 186 (1996).

162. *See supra* notes 38, 44 and accompanying text.

163. *Morse*, 517 U.S. at 232.

substitute for private enforcement. With the limited resources of the Department of Justice, many meritorious voting rights violations will likely go unchallenged.¹⁶⁴ The Department of Justice has limited time, staff, and funding, making it unreasonable to think that enforcement by the Attorney General will be sufficient, given how lengthy and resource-intensive many voting rights cases can be.¹⁶⁵

Furthermore, the federal government does not have an administrative agency able to issue guidance on the meaning of federal election law.¹⁶⁶ Without such an agency, federal courts are the only way in which citizens can receive authoritative guidance on the rights protected under the VRA.¹⁶⁷ With federal courts as the only means of guidance and enforcement for election statutes, enforcement by the Department of Justice is insufficient to handle all violations. Private enforcement of the VRA would provide a broader opportunity for the country's elections to proceed in accordance with the requisite laws.

Additionally, the partisan political climate of the executive branch will likely influence whether the Attorney General chooses to pursue these lawsuits. The Attorney General's priorities are subject to change, both during a single administration, and between the tenures of different Attorney Generals.¹⁶⁸ With the limited resources of the Department of Justice discussed above, the Attorney General must make choices about how to allocate those resources. Depending on the political climate, the priorities of the leadership will affect the allocation of the Department's resources, meaning other duties of the Department of Justice could be prioritized over the enforcement of the VRA. If this occurs, individuals should have another means to remedy the violation of their voting rights.

Further, except for the rare instances in which the federal government decides to get involved in enforcing the statute, most interpretation and enforcement is performed by state and local officials.¹⁶⁹ The partisan affiliation of these officials creates an inherent conflict of interest, jeopardizing fair and consistent enforcement of election statutes. Private enforcement of the VRA would allow for more consistent interpretation and enforcement of the law.

Between the limited resources of the Department of Justice, and the partisan fluctuations in the priorities of the Attorney General, enforcement solely by the Attorney General is insufficient. While these resources and priorities fluctuate, individual citizens' need for robust

164. Brief for the Brennan Center for Justice, *supra* note 3, at 29.

165. *Id.* at 29-30.

166. Tokaji, *supra* note 10, at 119.

167. *Id.*

168. Brief for the Brennan Center for Justice, *supra* note 3, at 31.

169. Tokaji, *supra* note 10, at 114.

protection of their voting rights remains constant.¹⁷⁰ As stated by the *Allen* Court, the VRA'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."¹⁷¹ To further the goal of the VRA, individuals should be permitted to sue to ensure that their rights are not violated.

Next, the VRA serves a public interest by protecting the civil rights of all United States citizens. Enforcement of the VRA by the Attorney General can further this collective interest, but private enforcement provides a great supplement to furthering this common good. One may argue that private plaintiffs, often including interest groups, are not the best option to enforce this collective interest because they will have their own agendas and may not serve that interest.¹⁷² However, the rights protected under the VRA further the systemic interest of protecting civil rights, regardless of who enforces them. The goal of the VRA is to promote fairness and equality in the United States' electoral system. This goal strengthens American democracy, regardless of whether the rights are enforced to benefit one individual or a large group of people. Therefore, supplemental enforcement by private citizens will help further the legislature's goal, not diminish it.

In addition to prior support from the Supreme Court stated above, the Attorney General and the United States government have expressed support for private enforcement of the VRA. In *Allen*, the Attorney General urged the Court to find a right of action for private citizens.¹⁷³ Additionally, the United States government encouraged a private right of action as *amicus curiae*¹⁷⁴ in *Morse*.¹⁷⁵ Endorsement from these influential political actors demonstrates the widespread support for a private right of action. The Attorney General's endorsement is significant because the Attorney General is the other actor with authority to enforce the statute.

Importantly, the circuit split and variations among lower courts on the issue of whether an individual is permitted to sue to enforce his or her rights under the VRA could produce a chilling effect on these types of cases. As discussed in an *amicus curiae* brief for *NE Coalition*, "uncertainty concerning private enforcement is likely to deter individuals and groups from pursuing voting rights cases at all,"

170. Brief for the Brennan Center for Justice, *supra* note 3, at 31.

171. 393 U.S. at 556.

172. Michael R. Dimino, Sr. et al., *Understanding Election Law and Voting Rights* 238 (2017).

173. *Allen*, 393 U.S. at 557, n. 23.

174. An *amicus curiae* is "[a] party that is not involved in litigation but gives expert testimony when the court asks. They can support public interest not being addressed in the trial." *Amicus curiae*, Black's Law Dictionary (10th ed. 2014).

175. *Morse*, 517 U.S. 231-32.

especially in cases in which a relatively small number of citizens are affected.¹⁷⁶ The denial of a private right of action in some courts could have a “corrosive and discouraging impact” on individual initiative to protect their rights under the VRA.¹⁷⁷ The potential chilling effect of the uncertainty created by the variations in case law is contrary to the goal of the VRA legislation: to protect against racial discrimination by preventing abuse of state voting procedures.¹⁷⁸

Finally, a private right of action under the VRA could have a deterrent effect on states. If states are more likely to be challenged on violations of the Materiality Provision, they may be more reluctant to push the boundaries when enacting statutes and regulations. Private enforcement of the VRA allows individuals to enforce their own rights, furthering the collective interest of fairness and equality in elections, while also deterring future violations of the statute.

Based on the disadvantages of enforcement of the VRA solely by the Attorney General, the support from significant political actors, the potential chilling effect of the current state of relevant case law, and the potential deterrent effect of private enforcement, courts should permit private enforcement of the VRA by individual citizens. Private enforcement will further the public policies underlying the VRA by allowing more violations to be challenged and by incentivizing state officials to follow the statutory obligations more closely by opening the door to private litigants.

V. CONCLUSION

The split of authority among United States courts regarding private enforcement of the VRA should be resolved in favor of the Eleventh Circuit’s conclusion. A private right of action should be permitted to enforce the Materiality Provision of the VRA. The legal analysis used by the Eleventh Circuit is more thorough than the Sixth Circuit’s analysis, and results in more satisfying outcome. The Eleventh Circuit used a methodical, multi-step analysis that examined the legislative history, Supreme Court precedent, and applied the Supreme Court’s test for allowing a private right of action under 42 U.S.C. § 1983.¹⁷⁹ Additionally, public policy considerations support permitting a private right of action for individuals whose rights have been violated under the VRA. In conclusion, a private right of action should be implied under the Materiality Provision of the VRA.

176. Brief of the Brennan Center for Justice, *supra* note 3, at 14.

177. *Id.* at 20-21.

178. *Id.* at 21.

179. *See supra* notes 75-95 and accompanying text.