

# PUBLIC RIGHTS AND PRIVATE RIGHTS OF ACTION: THE ENFORCEMENT OF FEDERAL ELECTION LAWS

DANIEL P. TOKAJI\*

## INTRODUCTION

In what circumstances should there be a private right of action to sue for violations of federal election statutes?<sup>1</sup> Lying at the intersection of federal courts and election law, this question has arisen in several recent cases,<sup>2</sup> as private litigants have increasingly called upon federal courts to resolve election disputes.<sup>3</sup> The question was before the U.S. Supreme Court in *Brunner v. Ohio Republican Party*.<sup>4</sup> The plaintiffs in *Brunner* alleged that a state chief election official had failed to follow the requirements of the Help America Vote Act of 2002 (HAVA) pertaining to statewide voter registration lists. In a one-paragraph, unanimous per curiam opinion, the Court held that a political party could *not* bring suit to enforce this requirement.<sup>5</sup>

The brevity of the *Brunner* decision masks the significance and complexity of the larger question. To be sure, under existing doctrine, the issue before the Court in *Brunner* was not a difficult one. In a series of opinions over the last four decades—only one of which involved elections<sup>6</sup>—the Court has sharply curtailed the private enforcement of federal statutory mandates. It has increasingly refused to imply private rights of action under federal statutes, absent a clear congressional intent to create both a right and a remedy.<sup>7</sup> More recently, the Court has declined to recognize a cause of action against state and local officials under 42 U.S.C. § 1983, unless the federal statute “unambiguously” confers an individual right.<sup>8</sup> This is a high bar, one that was not satisfied in *Brunner*, given that the statute in question imposed duties on state

---

\* Professor of Law, The Ohio State University, Moritz College of Law. The author thanks Meredith Bell-Platts, David Gilmartin, Rick Hasen, and Mike Pitts for their helpful comments on an earlier draft and Alexander Darr for his outstanding research assistance.

1. The terms “private right of action” and “private cause of action” both refer to a non-governmental litigant’s ability to bring suit to enforce a federal statute. This Article uses the former term.

2. For a discussion of these cases, see *infra* Part III.

3. See Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 89-90 (2009) (documenting increase in election litigation between 1996 and 2008 and the decreasing percentage of that litigation in state courts).

4. 129 S. Ct. 5, 6 (2008) (per curiam).

5. *Id.*

6. See *Cort v. Ash*, 422 U.S. 66 (1975), *abrogated by Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), and *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). For a discussion of *Cort* and its progeny, see *infra* Part II.A.

7. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).

8. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002).

officials without conferring a right on any identifiable individual.<sup>9</sup> Under established doctrine, then, *Brunner* was a straightforward case.

The problem is that existing private-right-of-action doctrine fails to account for the vital role that federal courts play in overseeing elections in the United States, especially through pre-election litigation. This failure is not surprising given that the doctrine on private rights of action was fashioned in other contexts. This Article argues that existing doctrine, particularly the requirement that there be an unambiguously conferred individual right, is inappropriate for alleged violations of federal election statutes.

The availability of a private right of action is especially critical in cases arising under election statutes such as HAVA—and the “unambiguously conferred right” test especially ill-fitting—for both conceptual and practical reasons. On a conceptual level, election cases typically involve non-individuated, collective interests.<sup>10</sup> Federal election statutes are not solely aimed at protecting the individual right to vote. Although this is one of the interests they may promote, federal election statutes also aim to serve systemic interests in a fair election process. These interests are not always reducible to individual harms and thus cannot adequately be served by a myopic focus on whether the statute unambiguously confers an individual right, as existing doctrine demands. It follows that the Court’s insistence on an unambiguously conferred individual right makes little sense in election cases. To apply such a test in the electoral context is like trying to pound a square peg into a round hole.

Existing doctrine is also problematic from a practical perspective, given the absence of any institution besides the federal courts with the ability to ensure consistency in the interpretation of federal law. The ultimate consequence is to leave the interpretation of federal election law in the hands of state officials, except in those rare instances when the federal government decides to get involved. This is troubling given the partisan affiliation of most state and many local election officials, which creates an inherent conflict of interest and makes federal judicial oversight especially important.<sup>11</sup> In the absence of a private right of action, the U.S. Attorney General functions as the gatekeeper to federal court. This exacerbates the conflict-of-interest problem, in light of the concerns of partisanship that have sometimes surrounded the Justice Department.<sup>12</sup>

For these reasons, this Article argues that the Court should revisit existing

---

9. The statute at issue was 42 U.S.C. § 15483 (2006), which is part of HAVA.

10. See Saul Zipkin, *Democratic Standing*, 26 J.L. & POL. (forthcoming 2011) (manuscript at 1) (arguing for broad standing in election law cases because they “often involve[] claims of harm to the electorate as a whole or to the democratic process itself”).

11. I discuss the conflict of interest faced by election officials at greater length in Daniel P. Tokaji, *Lowenstein Contra Lowenstein: Conflicts of Interest in Election Administration*, 9 ELECTION L.J. (forthcoming 2010) [hereinafter Tokaji, *Lowenstein Contra Lowenstein*].

12. See Daniel P. Tokaji, *If It’s Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. 785, 798-819 (2006) [hereinafter Tokaji, *If It’s Broke, Fix It*]. It raises the spectre of federal election statutes being enforced more aggressively—and perhaps only being enforced—where they benefit the party in control of the federal executive branch.

doctrine on private rights of action under § 1983 to facilitate more robust private enforcement of federal election statutes. Part I of this Article traces the evolving judicial role in overseeing elections during the past decade. It then puts the increased judicialization of U.S. election administration in comparative context by examining the electoral role played by politically independent institutions in other democratic countries. Part II discusses the Supreme Court doctrine on private rights of action, including both implied rights of action and claims under § 1983. In both these lines of precedent, the Court has made it increasingly difficult for private litigants to sue under federal statutes and regulations generally. As set forth in Part III, this general chariness has been extended—by the lower courts and by the Supreme Court in *Brunner*—to cases alleging violations of HAVA and other federal election statutes. Part IV argues that the Court's stringent approach to private rights of action is ill-suited to election disputes, given that they involved quintessentially public rights for which a judicial forum is essential.

## I. FEDERAL COURTS AS ELECTION OVERSEERS

Almost a decade has passed since the 2000 presidential election. During this period, we have seen both unprecedented legislative attention to the administration of elections and a marked increase in election-related litigation.<sup>13</sup> Although this story is quite familiar to students of U.S. election administration, it is necessary to review both the precipitating causes of and the justifications for the judiciary's more active involvement in overseeing election, in order to contextualize the doctrinal questions surrounding private rights of action. Such an examination reveals that federal courts serve a function in the American election system comparable to that played by politically independent electoral institutions in other countries.

### A. *Election Litigation in the United States*

The 2000s began, of course, with the dispute over the outcome of Florida's presidential election and the Supreme Court's decision in *Bush v. Gore*.<sup>14</sup> Shortly thereafter, lawsuits were brought in a number of states claiming that the punch-card voting systems used in Florida and other states violated federal law, including both the U.S. Constitution and the Voting Rights Act.<sup>15</sup> Specifically, plaintiffs claimed that these systems systematically disadvantaged voters who used them, having a particularly negative impact on minority voters. Two of these cases resulted in federal circuit court decisions holding that the use of

---

13. See Hasen, *supra* note 3, at 89 (finding that the number of election-related disputes went from an average of ninety-four per year before 2000 to an average of 237 per year in the period between 2000 and 2008, peaking at 361 in 2004).

14. 531 U.S. 98 (2000).

15. For a description of this litigation, see Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 *FORDHAM L. REV.* 1711, 1729-30, 1742-44, 1748-54 (2005) [hereinafter Tokaji, *The Paperless Chase*].

punch-cards violated the Equal Protection Clause, but both these decisions were subsequently vacated by en banc courts.<sup>16</sup> Enactment of HAVA, which set new voting standards and provided funds for the replacement of antiquated equipment, led to the virtual extinction of punch-card machines, while causing new disputes to emerge and find their way to federal court. Prominent among them were disputes over the security and reliability of touchscreen electronic voting systems, with some activists going to court to argue that these machines unconstitutionally denied their votes.<sup>17</sup> Challenges to electronic voting technology have not fared well in court, but that is not to say that they have been without impact. In fact, they have spurred legislative reforms—including the implementation of a voter-verified paper audit trail in many states—as well as greater administrative attention to the risks associated with new technology.<sup>18</sup>

Voting technology is not the only area in which courts have played a prominent role in the past decade. The enactment of HAVA in 2002 led to a new round of litigation that continued through the 2008 election season.<sup>19</sup> HAVA represented the federal government's most intensive intervention in the administration of elections in U.S. history. In addition to spurring the replacement of outdated voting equipment, HAVA imposed minimum standards for voter registration, provisional voting, and voter identification, applicable across the country. It also created an administrative agency, the Election Assistance Commission (EAC), to oversee the implementation of these requirements.

The degree of federal involvement in the conduct of elections should not be exaggerated. The requirements of HAVA are modest,<sup>20</sup> federal funding for elections is limited, and the EAC enjoys little power. While most other democracies have strong central election authorities,<sup>21</sup> Congress's decision not to create such an entity at the federal level was deliberate. As then-Representative Bob Ney, the primary Republican sponsor in the House, stated

---

16. *Stewart v. Blackwell*, 444 F.3d 843, 869-70 (6th Cir. 2006), *superseded by* 473 F.3d 692 (6th Cir. 2007) (en banc); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 882 (9th Cir. 2003), *rev'd* (en banc), 344 F.3d 914 (9th Cir. 2003). The author was an attorney for plaintiffs in both cases.

17. Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065, 1077-78 (2007) [hereinafter Tokaji, *Leave It to the Lower Courts*] (discussing these cases); *see also* Tokaji, *The Paperless Chase*, *supra* note 15, at 1800-01, 1801 n.607.

18. Tokaji, *Leave It to the Lower Courts*, *supra* note 17, at 1078; *see also* Tokaji, *The Paperless Chase*, *supra* note 15, at 1774-80, 1791-94 (discussing security and transparency concerns associated with electronic voting systems and potential solutions).

19. *See* Daniel P. Tokaji, *Voter Registration and Institutional Reform: Lessons from a Historic Election*, 3 HARV. L. & POL'Y REV. ONLINE 1-2 (Jan. 22, 2009) [hereinafter Tokaji, *Voter Registration and Institutional Reform*], [http://www.hlpronline.com/wordpress/wp-content/uploads/2009/11/Tokaji\\_HLPR\\_012209.pdf](http://www.hlpronline.com/wordpress/wp-content/uploads/2009/11/Tokaji_HLPR_012209.pdf).

20. These requirements are discussed *infra* Part III.C.

21. *See infra* Part I.B.

during the legislative debate over HAVA, the EAC's title was "not an accident."<sup>22</sup> Its purpose was to provide *assistance* to the states, not to "dictate to States how to run their elections" or otherwise "impose its will on the States."<sup>23</sup> Thus, election administration remains mostly a matter of state law and local practice, as has been the case throughout U.S. history. Authority is largely devolved to the fifty chief election officials in the states and to thousands of local election officials at the state and local level.<sup>24</sup>

Despite the hyper-decentralization of American elections, and at least partly because of it, federal judicial oversight of elections has become a prominent feature of the post-2000 world. As Professor Rick Hasen has documented, the rise in election litigation during the 2000s was accompanied by a decrease in the proportion of cases filed in state as opposed to federal court.<sup>25</sup> Over eighty percent of election cases in the early 2000s were filed in state court, compared to only fifty-four percent in 2008.<sup>26</sup> Interestingly, the federal courts have opened their doors to election litigation,<sup>27</sup> even though the U.S. Supreme Court has adopted a hands-off posture in the election administration cases that have come before it since 2000<sup>28</sup>—and has treated *Bush v. Gore* as though it does not exist.<sup>29</sup>

In the 2004 election cycle, the State of Ohio provided especially fertile ground for federal litigation. The subjects of litigation included voting technology, provisional ballots, voter registration, voter identification, challenges to voter eligibility, and polling place operations.<sup>30</sup> The new requirements of HAVA, and uncertainty over the meaning of some of them, were partly responsible for this litigation. For example, voting rights activists in a number of states sued to require that provisional ballots be counted even if cast in the wrong precinct.<sup>31</sup> New requirements of HAVA also precipitated litigation in the 2008 election cycle. Most notable were disputes over HAVA's requirement of statewide registration databases to replace the local registration lists that

---

22. 148 CONG. REC. H7838 (daily ed. Oct. 10, 2002) (statement of Rep. Ney).

23. *Id.*

24. See Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL'Y REV. 125, 130-31 (2009) [hereinafter Tokaji, *The Future of Election Reform*].

25. Hasen, *supra* note 3, at 90.

26. *Id.* at 91.

27. Tokaji, *Leave It to the Lower Courts*, *supra* note 17, at 1072.

28. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008) (rejecting challenge to Indiana voter identification law without citing *Bush v. Gore*); *Purcell v. Gonzales*, 549 U.S. 1, 5-6 (2006) (reversing injunction against Arizona voter identification law, again without citing *Bush v. Gore*).

29. See Chad Flanders, *Please Don't Cite This Case! The Precedential Value of Bush v. Gore*, 116 YALE L.J. POCKET PART 141, 143-44 (2006); Adam Cohen, *Has Bush v. Gore Become the Case That Must Not Be Named?*, N.Y. TIMES, Aug. 15, 2006, at A18.

30. Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1214-18 (2005) [hereinafter Tokaji, *Early Returns*].

31. See *id.* at 1228-30.

dominated in most states.<sup>32</sup> In Wisconsin and Ohio, conservatives went to court seeking to require that new voters' registration information be "matched" against information in statewide registration databases<sup>33</sup>—and, as discussed more fully below, a case brought by the Ohio Republican Party on this ground made it up to the U.S. Supreme Court. For present purposes, the key point is that HAVA's new requirements are at least partly responsible for some of the litigation surrounding election administration in the post-2000 era.

It bears emphasis that, despite legal commentators' preoccupation with constitutional questions, some of the most important electoral disputes in this period have involved questions of federal statutory law—most conspicuously, the meaning of HAVA. This is partly attributable to the unavailability of any administrative agency with the power to clarify its meaning. The EAC lacks the power to promulgate binding regulations, except for in the narrow area of mail registration.<sup>34</sup> And in that narrow area, the EAC's bipartisan structure—with two Republicans, two Democrats, and a majority required to take action—has predictably led to stalemate on the most significant issue that it has faced.<sup>35</sup> Absent any other entity able to issue authoritative interpretations of HAVA, the courts have stepped in to fill the void, at least in part. They have issued decisions on whether states must count provisional ballots cast out of precinct,<sup>36</sup> whether states should issue provisional ballots to those who requested (but did not cast) an absentee ballot,<sup>37</sup> and, before the Court's ruling in *Brunner*, on the extent of states' obligations to match voter registration information against other databases.<sup>38</sup> While HAVA is the most important federal statute governing the administration of elections, it is not the only one whose meaning has become the subject of litigation. The past decade has also seen litigation over the National Voter Registration Act (NVRA),<sup>39</sup> a provision of the Civil Rights Act of 1964 concerning voter registration (42 U.S.C. § 1971), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), and, of course, the Voting Rights Act

---

32. Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 471 (2008) [hereinafter Tokaji, *Voter Registration and Election Reform*].

33. *Brunner v. Ohio Republican Party*, 129 S. Ct. 5, 6 (2008); Order at 4, *Van Hollen v. Gov't Accountability Bd.*, No. 08-cv-004085 (Wis. Ct. App. Oct. 23, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/vanhollenv.gab.php>. I have discussed the legal issue in these cases in some detail in Tokaji, *Voter Registration and Institutional Reform*, *supra* note 19, at 8-11.

34. 42 U.S.C. § 15329 (2006).

35. See Tokaji, *The Future of Election Reform*, *supra* note 24, at 135. That issue concerned the State of Arizona's requirement of proof of citizenship for voter registration. *Id.*

36. *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 578 (6th Cir. 2004) ("There is no reason to think that HAVA . . . should be interpreted as imposing upon the states a federal requirement that out-of-precinct ballots be counted. . .").

37. *White v. Blackwell*, 418 F. Supp. 2d 988, 991 (N.D. Ohio 2006).

38. *Ohio Republican Party v. Brunner*, 544 F.3d 711 (6th Cir.) (en banc), *vacated*, 129 S. Ct. 5 (2008).

39. 42 U.S.C. §§ 1973gg-1973gg-10 (2006).

(VRA).

The active role of federal courts in overseeing election administration is understandable and, I contend, desirable.<sup>40</sup> With no administrative agency able to issue authoritative guidance on the meaning of federal law, courts are the only option. Otherwise, the interpretation of HAVA's requirements would be left to chief election officials in the states and to local election officials. This is problematic not only because it compromises the uniform implementation of federal law across the country, but also because of the partisanship that pervades state and local election administration. Election officials are typically elected or selected as representatives of their party, raising troubling questions about their impartiality. The majority of state chief election officials, usually the secretary of state, are elected as candidates of their party.<sup>41</sup> Even where state chief election officials are appointed rather than elected, the appointing authority is typically a partisan elected official. This arrangement is also problematic, raising doubts about whether the political appointee can be trusted to implement the law evenhandedly. A similar problem exists in many, though not all, localities. Most jurisdictions still elect their local election officials, and party-affiliated officials run elections in almost half of U.S. jurisdictions.<sup>42</sup>

Thus, despite the significant changes that have occurred in U.S. elections since 2000, the allocation of institutional authority remains largely unchanged. While HAVA was the federal government's most significant intervention in election administration in U.S. history, most day-to-day responsibility for running elections still lies at the state and local levels. American election administration thus remains very decentralized. Nor has there been much change in the partisanship of U.S. election administration. For all the criticism leveled at Florida's Secretary of State Katherine Harris in 2000 and Ohio's Secretary of State Ken Blackwell in 2004, party-affiliated state chief election officials are still the norm. This does not necessarily mean that election officials will discharge their duties in a biased manner; nor is it easy to discern when they are doing so. It does, however, create an inherent conflict of interest between election officials' duty to implement election laws impartially and the temptation to serve the political interests of their parties or themselves. The major institutional change that *has* occurred is the increased engagement of the federal judiciary, which serves as a vital check upon the otherwise decentralized and partisan administration of U.S. elections.<sup>43</sup>

---

40. Tokaji, *The Future of Election Reform*, *supra* note 24, at 149-53.

41. Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 974 (2005).

42. David C. Kimball et al., *Helping America Vote? Election Administration, Partisanship, and Provisional Voting in the 2004 Election*, 5 ELECTION L.J. 447, 453 (2006); *see also* David C. Kimball & Martha Kropf, *The Street-Level Bureaucrats of Elections: Selection Methods for Local Election Officials*, 23 REV. POL'Y RES. 1257, 1261-62 (2006) (showing methods of selection in 4566 local electoral jurisdictions).

43. I elaborate on this argument elsewhere. *See* Tokaji, *The Future of Election Reform*, *supra* note 24, at 149-53; Tokaji, *Lowenstein Contra Lowenstein*, *supra* note 11.

### B. A Comparative Perspective

In both its decentralization and its partisanship, American democracy is distinctive.<sup>44</sup> These peculiar characteristics of our election systems make the federal courts important institutional players when it comes to the administration of elections.<sup>45</sup> To see why, it is helpful to compare U.S. electoral institutions to those in other countries, as well as international norms of election management. Two countries—India and France—provide particularly helpful points of comparison in understanding the vital role of the federal judiciary in overseeing U.S. elections.

The spread of democracy around the world is perhaps the most important global trend of recent decades. With this spread has come increasing attention to the characteristics that are necessary for a trustworthy and stable democratic system. Independence from partisan politics is increasingly viewed as a necessary component of such a system. As the influential European Commission for Democracy Through Law (also known as the “Venice Commission”) has put it: “Only transparency, impartiality and *independence from politically motivated manipulation* will ensure proper administration of the election process, from the pre-election period to the end of the processing of results.”<sup>46</sup>

Democratic countries vary dramatically in the degree to which they satisfy this ideal. Globally, election management bodies can be divided into three broad categories.<sup>47</sup> The first and most common is an independent electoral commission, the structure that is now employed in most democratic countries.<sup>48</sup> The advantage of this model is that it tends to promote impartiality by insulating those running the election from political pressures. This is consistent with a growing

---

44. Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 82 (2004); Daniel P. Tokaji, *The Birth and Rebirth of Election Administration*, 6 ELECTION L.J. 118, 121 (2007) (reviewing ROY G. SALTMAN, *THE HISTORY AND POLITICS OF VOTING TECHNOLOGY: IN QUEST OF INTEGRITY AND PUBLIC CONFIDENCE* (2006)).

45. See Pildes, *supra* note 44, at 83 (“Courts . . . are the primary American institution capable under current circumstances of addressing the central structural problem of self-entrenchment.”).

46. European Commission for Democracy Through Law [“Venice Commission”], *Code of Good Practice in Electoral Matters*, at 26, CDL-AD (2002) 23 (Oct. 30, 2002) (emphasis added), available at [http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)023-e.pdf](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023-e.pdf).

47. I discuss these in somewhat greater detail in Tokaji, *The Future of Election Reform*, *supra* note 24, at 137-41.

48. RAFAEL LÓPEZ-PINTOR, UN DEV. PROGRAMME, *ELECTORAL MANAGEMENT BODIES AS INSTITUTIONS OF GOVERNANCE* 120 (2000), available at <http://www.undp.org/governance/docs/Elections-Pub-EMBbook.pdf>; see also LOUIS MASSICOTTE ET AL., *ESTABLISHING THE RULES OF THE GAME: ELECTION LAWS IN DEMOCRACIES* 83-96 (2004); Oliver Ihl, *Electoral Administration*, in *ENCYCLOPEDIA OF EUROPEAN ELECTIONS* 87, 87-89 (Yves Deloye & Michael Bruter eds., 2007). All three of these sources describe the institutions that are responsible for managing elections in democratic countries. The discussion in the text mostly follows López-Pintor’s taxonomy.

recognition that such impartiality is essential to a fair democratic process.<sup>49</sup> Among the countries employing this model are Australia,<sup>50</sup> Canada,<sup>51</sup> and India.<sup>52</sup> The second category of election management is to entrust a government ministry with authority to oversee elections.<sup>53</sup> From the standpoint of ensuring independence from partisan politics, this structure might seem problematic, but it is the norm in many western European countries with a strong democratic tradition, including Belgium, Denmark, and Sweden.<sup>54</sup> The success of this model is probably attributable to the existence of a core of professional civil servants who are sufficiently insulated from political pressures.<sup>55</sup> The third model is for authority to be divided among different entities. Authority may be divided vertically, as in the U.S. system in which federal, state, and local actors have authority over elections. This dispersal of authority makes it difficult for any one group to “steal” an election, but, as I have already suggested, it also makes it difficult to ensure equal treatment across jurisdictions. Another way of dividing power is to do so horizontally, among different components of the national government. The leading example is the French system, in which a ministry runs presidential elections under the supervision of judicial actors.<sup>56</sup> Dividing authority in this way may also provide some assurance of impartiality, insofar as a relatively independent entity is looking over the shoulder of the government officials who are actually running the election.

The first model, an independent electoral commission, is properly viewed as the gold standard when it comes to election management.<sup>57</sup> Yet the United States and virtually all the individual states lack politically insulated bodies of this nature to run their elections.<sup>58</sup> The United States also lacks a core of professional

---

49. INT’L INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE, INTERNATIONAL ELECTIONS STANDARDS: GUIDELINES FOR REVIEWING THE LEGAL FRAMEWORK OF ELECTIONS 37 (2002), available at <http://www.idea.int/publications/ies/index.cfm> (recognizing an “autonomous and impartial” electoral management body as an international election standard).

50. MASSICOTTE ET AL., *supra* note 48, at 90-91; LÓPEZ-PINTOR, *supra* note 48, at 27-28, 31.

51. Frank Emmert et al., *Trouble Counting Votes? Comparing Voting Mechanisms in the United States and Selected Other Countries*, 41 CREIGHTON L. REV. 3, 25 (2008).

52. David Gilmartin, *One Day’s Sultan: T.N. Seshan and Indian Democracy*, 2 CONTRIBUTIONS TO INDIAN SOCIOLOGY 247 (2009) (describing how India’s electoral commission functions); LÓPEZ-PINTOR, *supra* note 48, at 27-28.

53. LÓPEZ-PINTOR, *supra* note 48, at 24.

54. *Id.* at 27, 59.

55. See Tokaji, *The Future of Election Reform*, *supra* note 24, at 140; see also Venice Commission, *supra* note 46, at 26 (“In states where the administrative authorities have a long-standing tradition of independence from the political authorities, the civil service applies electoral law without being subjected to political pressures. It is therefore both normal and acceptable for elections to be organised by administrative authorities, and supervised by the Ministry of the Interior.”).

56. LÓPEZ-PINTOR, *supra* note 48, at 22, 60-61. This model is discussed further below.

57. See Venice Commission, *supra* note 46, at 26.

58. The only real exception is the State of Wisconsin, which has a Government

and politically independent civil servants that is needed in order to entrust election administration to a government ministry. This type of system is the norm, however, in most U.S. states.

To understand both of these shortcomings of election administration in the United States, it is helpful to contrast our system with that of the world's largest democracy: India. With an election administration apparatus that is both centralized and insulated from partisan politics, India is the polar opposite of the United States. To American observers, the degree of independence that India's Election Commission ("the Commission") enjoys—as well as the scope of authority it enjoys in executing its responsibilities—is almost unimaginable.<sup>59</sup> The Commission was established by India's 1950 Constitution, which gave it authority over the management of parliamentary and state legislative elections.<sup>60</sup> Over the ensuing six decades, the Commission has established broad control over the management of elections, with the assistance of India's Supreme Court, which has held that the Commission enjoys a broad "power to make all necessary provisions for conducting free and fair elections."<sup>61</sup> During the 1990s, under the leadership of Chief Election Commissioner T.N. Seshan, the Commission successfully increased its authority during "electoral time," while successfully fending off attempts to compromise its independence.<sup>62</sup>

The degree of control that the Commission enjoys during electoral time is enormous. During the period before and during an election, the Commission has almost plenary authority to commandeer government workers from other government agencies, to put them in service of running elections.<sup>63</sup> The Commission's ability to draw on a professional cadre of civil servants—in contrast to the largely volunteer force that U.S. jurisdictions must mobilize on its election days—provides it with a noteworthy advantage. The Commission has

---

Accountability Board that is responsible for overseeing elections. See STEVEN F. HUEFNER, DANIEL P. TOKAJI & EDWARD B. FOLEY, FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES 115-17 (2007); <http://moritzlaw.osu.edu/electionlaw/projects/registration-to-recounts/index.php>.

59. See Christopher S. Elmendorf, *Election Commissions and Electoral Reform: An Overview*, 5 ELECTION L.J. 425, 429 (2006) (identifying India's Election Commission as leading example of an entity empowered to make and enforce election rules).

60. Under the Constitution of India, the Commission is responsible for the "superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every States and of elections to the offices of President and Vice-President." INDIA CONST. Dec. 1, 2007, art. 324, § 1; see also VASSIA GUEORGUEVA & RITA S. SIMON, VOTING AND ELECTIONS THE WORLD OVER 143-48 (2009) (describing structure and functions of India's Election Commission).

61. Elmendorf, *supra* note 59, at 429 (quoting *Union of India v. Ass'n for Democratic Reforms*, 2 L.R.I. 305 (2002)).

62. Gilmartin, *supra* note 52, at 253. For an illuminating discussion of restrictions on political expression during electoral time, see Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1423-29 (2007).

63. Gilmartin, *supra* note 52, at 254-55.

also promulgated a Model Code of Conduct that is in force during electoral time.<sup>64</sup> Accordingly, it enjoys the authority to punish violations through the threat of cancelling or nullifying elections.<sup>65</sup> As a practical matter, then, the Commission enjoys extremely broad authority during electoral time, and it has often made and implemented rulings that are unpopular with the ruling party.<sup>66</sup> It also enjoys a high degree of credibility with the public compared to other institutions, even including India's judiciary.<sup>67</sup> The independence and status of the Commission has allowed India's judiciary, including its Supreme Court, to play a back-seat role in overseeing elections. Indian courts have adopted a highly deferential posture toward rulings of the Commission made during electoral time.<sup>68</sup>

The Indian Election Commission's broad powers during electoral time, along with the widespread perception that it stands "above politics,"<sup>69</sup> gives it a status that election management bodies in the United States simply do not enjoy. It may eventually be possible to develop comparably independent electoral institutions in the United States. Indeed, the State of Wisconsin has recently attempted to do so, through the creation of a Government Accountability Board staffed with former judges, who must be confirmed by a supermajority of the state legislature—a structure that is designed to ensure impartiality in the Board's operations.<sup>70</sup> For the time being, however, election administration is likely to remain in the hands of party-affiliated actors in most U.S. states and many localities. Therefore, in the here and now, there must be some means by which to induce those officials to act impartially. As the U.S. institution that is most insulated from partisan politics, the federal judiciary is best suited to perform this function.<sup>71</sup>

To understand the functional role that federal courts can and should play in the United States, it is helpful to compare the French electoral system. France has a more centralized system than the United States.<sup>72</sup> The Ministry of Internal

---

64. *Id.*

65. *Id.* at 256.

66. *Id.* at 257.

67. Peter Ronald deSouza, *The Election Commission and Electoral Reforms in India*, in DEMOCRACY, DIVERSITY, STABILITY: 50 YEARS OF INDIAN INDEPENDENCE 51, 52-53 (1998).

68. Anurag Tripathi, *Election Commission of India: A Study* 19 (manuscript Mar. 19, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1575309](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1575309) ("The Supreme Court of India has held that where the enacted laws are silent or make insufficient provision to deal with a given situation in the conduct of elections, the Election Commission has the residuary powers under the Constitution to act in an appropriate manner.").

69. Gilmartin, *supra* note 52, at 281.

70. HUEFNER, TOKAJI & FOLEY, *supra* note 58, at 115; Tokaji, *The Future of Election Reform*, *supra* note 24, at 144.

71. See Pildes, *supra* note 44, at 83.

72. Noëlle Lenoir, *Constitutional Council Review of Presidential Elections in France and a French Judicial Perspective on Bush v. Gore*, in THE LONGEST NIGHT: POLEMICS AND PERSPECTIVES ON ELECTION 2000, at 295, 305-06 (Arthur J. Jacobsen & Michael Rosenfeld eds.,

Affairs oversees elections throughout the country, but (as in the United States) authority is dispersed among local entities.<sup>73</sup> The most significant feature of France's election system—one that is both similar to and different from the United States—is the role that courts play in overseeing elections.<sup>74</sup> The 1958 Constitution created the French Constitutional Council and entrusted it with responsibility for resolving disputes in presidential and parliamentary elections,<sup>75</sup> while administrative courts (with the Conseil d'Etat at the top of the ladder) have responsibility for regional and local elections.<sup>76</sup> These bodies, while usually characterized as courts, serve both a judicial and an administrative function when it comes to elections, including responsibility for the counting of votes and announcement of results.<sup>77</sup> For presidential elections, the Constitutional Council “monitors the whole chain of electoral operations from the beginning of the preparation of the instruments organizing the election to the declaration of the final results and the name of the elected president.”<sup>78</sup> In terms of the number of decisions it issues, the Constitutional Council is predominantly an electoral court, with three-quarters of its decisions involving elections, with the number of decisions increasing sharply in the 1990s.<sup>79</sup> It has been described as an “engine by which the ‘judicialization of politics’ has grown in France.”<sup>80</sup> Its functions include advising the government on actions concerning elections, considering the legality of administrative actions, providing information for voters, supervising the conduct of elections and reporting incidents, and announcing the results.<sup>81</sup> The Constitutional Council thus plays an active role before, during, and after elections, functioning as a sort of “election monitor.”<sup>82</sup>

The jurisdiction of the French Constitutional Council extends well beyond

---

2002).

73. GUEORGUEVA & SIMON, *supra* note 60, at 45.

74. LÓPEZ-PINTOR, *supra* note 48, at 60-61.

75. 1958 CONST. art. 58 (Fr.) (“(1) The Constitutional Council shall ensure the regularity of the election of the President of the Republic. (2) It shall examine complaints and shall proclaim the results of the vote.”); *see also* Lenoir, *supra* note 72, at 297; LOPEZ-PINTOR, *supra* note 48, at 61.

76. LÓPEZ-PINTOR, *supra* note 48, at 60-61; Kieran Williams, *Judging Disputed Elections in Europe*, 8 ELECTION L.J. 277, 278 (2009).

77. LÓPEZ-PINTOR, *supra* note 48, at 61; Lenoir, *supra* note 72, at 299. *But see* Williams, *supra* note 76, at 278 (noting that the Constitutional Council “sits outside the judiciary and is composed as much of onetime politicians . . . and civil servants as of career judges”).

78. Lenoir, *supra* note 72, at 299.

79. Sylvain Brouard, *The Constitutional Council: The Rising Regulator of French Politics*, in *THE FRENCH FIFTH REPUBLIC AT FIFTY: BEYOND STEREOTYPES* 99, 106-07 (Sylvain Brouard et al. eds., 2009).

80. *Id.* at 116 (citation omitted).

81. Jean-Louis Debre, President, Constitutional Council, Statement on the Role of the French Constitution Council in National Polls (July 16, 2007), *available at* [http://www.conseil-constitutionnel/root/bank\\_mm/pdf/Conseil/20070716Debre.pdf](http://www.conseil-constitutionnel/root/bank_mm/pdf/Conseil/20070716Debre.pdf).

82. Lenoir, *supra* note 72, at 304.

that of federal courts in the United States. The Council considers matters that would be deemed nonjusticiable political questions in the U.S. federal courts. At the same time, a fruitful comparison can be made in the broad range of topics the Constitutional Council addresses. It considers questions that arise before, during, and after elections, providing a check on the ministry that runs the election. In effect, this allows the Constitutional Council to look over the shoulder of the government officials running elections.

Comparison of the U.S. system with that of India and France thus helps illuminate the role that the judiciary—and specifically the federal courts—plays in the administration of elections. The increased role of courts, especially the federal courts, in overseeing the conduct of elections can be seen as a response to the decentralization and partisanship of U.S. elections. For the most part, election administration in the United States remains a matter of state law and local practice. The United States lacks an independent electoral commission like India's and does not have courts that are specifically entrusted with a broad-ranging review of the conduct of elections, as in France. With the enactment of HAVA's new nationwide requirements in 2002, and without a federal agency capable of promoting consistency in the interpretation of the law, federal courts were left to fill this void.<sup>83</sup> Given the absence of other U.S. institutions that are sufficiently insulated from partisan politics, the federal courts are best suited to perform this role. Unfortunately, as I shall explain in Parts II and III, federal courts are hampered by the restrictive legal doctrine on when private litigants can bring suit to enforce federal statutory law.

## II. PRIVATE RIGHTS OF ACTION

As explained in Part I, federal courts play an important role with respect to the conduct of U.S. elections. For the most part, the United States lacks election management bodies that are independent of partisan politics as in India, or a formal system of dividing electoral authority as in France. While it would be naive to believe that judges are apolitical, federal courts enjoy greater insulation from politics than the other players in our election system. Accordingly, it is valuable for those courts to look over the shoulder of party-affiliated election officials. One way of doing so is through constitutional adjudication, though this is an awkward tool at best. Constitutionalizing election rules may strain judicial competence. It may also induce even greater resentment by the losing side, given the practical impossibility of overruling a constitutional ruling as opposed to a statutory one. Greater constitutionalization of election administration is also an enterprise that the U.S. Supreme Court has been reluctant to engage in—as suggested by its reluctance even to cite *Bush v. Gore*<sup>84</sup> in the decade after which that momentous case was decided.<sup>85</sup>

An alternative means for federal courts to oversee the administration of

---

83. 42 U.S.C. §§ 15301-15545 (2006 & Supp. 2008).

84. 531 U.S. 98 (2000).

85. Flanders, *supra* note 29, at 144; Cohen, *supra* note 29.

elections is through their interpretation of the federal statutes governing this area, most notably HAVA. The federal courts have decided some important cases under federal election administration statutes in recent years.<sup>86</sup> Yet their ability to act in this area is impeded by two obstacles. One is the absence of an express private right of action under HAVA and some other election statutes. The other is the restrictive doctrine that the Supreme Court has crafted over the past four decades, on when a private right of action may be implied—either directly or under § 1983.

### A. Implied Rights of Action

Common law courts generally permitted private persons claiming a violation of state statutes to seek redress, so long as they were among the class the statute purported to protect.<sup>87</sup> The implication of a right of action is rooted in the Blackstonian principle, famously asserted in *Marbury v. Madison*,<sup>88</sup> that “where there is a legal right, there is also a legal remedy.”<sup>89</sup> In *Texas & Pacific Railway Co. v. Rigsby*, decided in 1916, the Supreme Court explicitly recognized that a plaintiff could bring suit under a federal statute that did not expressly create a private right of action.<sup>90</sup> According to *Rigsby*, “disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default is implied.”<sup>91</sup> Despite this pronouncement, it was not very common for the Supreme Court to imply private rights of action for the next half century or so.<sup>92</sup>

---

86. See generally Tokaji, *Early Returns*, *supra* note 30; Tokaji, *Voter Registration and Election Reform*, *supra* note 33; Tokaji, *Voter Registration and Institutional Reform*, *supra* note 19.

87. Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 411-12 (1982).

88. 5 U.S. (1 Cranch) 137 (1803).

89. *Id.* at 163 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES 23); see also Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. REV. 681, 696 (2009) (describing roots of implied right of action doctrine in *Marbury* and BLACKSTONE).

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

91. *Id.* at 39.

92. Lisa E. Key, *Private Enforcement of Federal Funding Conditions Under § 1983: The Supreme Court's Failure to Adhere to the Doctrine of Separation of Powers*, 29 U.C. DAVIS L. REV. 283, 294 (1996); see also *Cannon v. Univ. of Chi.*, 441 U.S. 677, 733 (1979) (Powell, J., dissenting) (asserting that, for almost fifty years after *Rigsby*, the only other statute under which the Court had recognized an implied right of action was the Railway Labor Act of 1926). This appears to be a disputed point. Professor Sunstein asserts that federal courts used their common law powers recognized in *Swift v. Tyson* to permit rights of action for violations of federal law, even after *Erie Railroad v. Tompkins*. Sunstein, *supra* note 87, at 411-12. But Professor Sunstein does not cite any Supreme Court decisions actually doing so between *Rigsby* and *Borak*. See Richard

Implying a right of action for violations of federal laws allowed non-governmental entities to serve as private attorneys general, a “progressive” legal reform supported by liberals and conservatives alike.<sup>93</sup> The case that did most to encourage the implication of private rights of action was the Supreme Court’s 1964 decision in *J.I. Case Co. v. Borak*.<sup>94</sup> Plaintiff Borak was a shareholder of defendant corporation alleged to have made a deceptive proxy solicitation in violation of § 14(a) of the Security and Exchange Act of 1934.<sup>95</sup> The Court acknowledged that the language of the statute “makes no specific reference to a private right action,” but adverted to the underlying purposes of the statutes, most notably “the protection of investors,” which certainly implies the availability of judicial relief where necessary to achieve that result.<sup>96</sup> The Court also took notice of the fact that the harm asserted “results not from the deceit practiced on him alone but rather from the deceit practiced on the stockholders *as a group*.”<sup>97</sup> The collective nature of the harm made a private right of action especially vital in the Court’s view.<sup>98</sup> As Richard Stewart and Cass Sunstein have explained, the reason for creating a right of action was to protect “a diffuse collective good,” rather than simply to provide redress to individual victims.<sup>99</sup> Even though the Securities and Exchange Commission had the concurrent power to enforce § 14(a), leaving enforcement to this agency alone was inadequate given its limited ability to thoroughly examine all the proxy statements it received and assess the harms that might be done by misrepresentations. The federal courts, therefore, had not just the power but the duty to provide remedies necessary to effectuate Congress’s purpose—including both prospective relief and damages—despite the fact that the statute did not explicitly authorize shareholders like Borak to sue.<sup>100</sup> Put simply, the Court believed a private right of action was necessary to make the statute work.<sup>101</sup>

*Borak* triggered a wave of decisions in the next decade implying private rights of action under various federal statutes.<sup>102</sup> During this golden era for

---

B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1300-06 (1982) (reviewing history of private rights of action in various contexts).

93. Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 442 (2007).

94. 377 U.S. 426 (1964).

95. *Id.* at 427.

96. *Id.* at 432 (quoting Security and Exchange Act of 1934, 15 U.S.C. § 78n(a) (2006)).

97. *Id.* (emphasis added).

98. *Id.* at 432-33.

99. Stewart & Sunstein, *supra* note 92, at 1303.

100. *Borak*, 377 U.S. at 433.

101. Berzon, *supra* note 89, at 697.

102. Key, *supra* note 92, at 294-95; see also PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 164 (6th ed. 2008) (“In the decade following [*Borak*], the lower courts routinely recognized private rights of action to enforce federal regulatory provisions.”); Bradford C. Mank, *Suing Under § 1983: The Future After Gonzaga University v.*

implied rights of action, the principal focus was on whether the statute protected a special class of people that included the plaintiff.<sup>103</sup> If they were, then a private right of action was generally implied. Among the laws under which the Supreme Court recognized private rights of action were statutes regulating the financial sector<sup>104</sup> and protecting civil and political rights.<sup>105</sup>

An example is *Allen v. State Board of Elections*,<sup>106</sup> in which the Court implied a right of action for voters claiming that their states had implemented new electoral rules without complying with § 5 of the then-new Voting Rights Act of 1965.<sup>107</sup> Under § 5, covered jurisdictions—at the time, states and political subdivisions in the South—are required to obtain preclearance of electoral changes before those changes may go into effect. At issue in *Allen* was whether the states' electoral changes counted as “qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” which had to be precleared.<sup>108</sup> *Allen* is mostly known for its capacious interpretation of § 5, holding that it is not limited to practices limiting who may vote but also includes at-large election schemes and other rules that might limit the effectiveness of minority votes<sup>109</sup>—in other words, that § 5 applies to vote dilution as well as vote denial.<sup>110</sup> But *Allen* is also important for its holding that private citizens had a right to sue states that had failed to obtain § 5 preclearance. The VRA did not explicitly grant minority voters the right to sue in these circumstances, and the Court might have held that only the U.S. Department of Justice could sue to stop a state from implementing an un-precleared electoral change.<sup>111</sup> The *Allen* Court,

---

Doe, 39 HOUS. L. REV. 1417, 1423 n.31 (2003) (noting that the Supreme Court and lower courts found implied rights of action under several statutes between 1964 and 1975).

103. Key, *supra* note 92, at 295 (citing Stephen E. Ronfeldt, *Implying Rights of Action for Minorities and the Poor Through Presumptions of Legislative Intent*, 34 HASTINGS L.J. 969, 977 (1983)).

104. See *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375 (1970).

105. See *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979); *Allen v. Bd. of Elections*, 393 U.S. 544 (1969).

106. 393 U.S. 544 (1969).

107. *Id.* at 548.

108. *Id.* at 563 (quoting 42 U.S.C. § 1973c (2006)).

109. *Id.* at 565-66.

110. For a discussion of this distinction and *Allen*'s significance in extending § 5 to vote dilution, see Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691-92, 703 (2006) [hereinafter Tokaji, *The New Vote Denial*].

111. The Court would later distinguish *Allen* in *Morris v. Gressette*, 432 U.S. 491 (1977), which held that the Justice Department's right to grant administrative preclearance under § 5 is *not* subject to judicial review. *Id.* at 506-07. In that case, voters sought to challenge the Justice Department's decision not to object to a South Carolina reapportionment plan. *Id.* at 493. The majority relied on the legislative history of the VRA, which it characterized as showing Congress's intent to provide speedy method of complying with § 5. *Id.* at 503. Because judicial review of decisions granting preclearance would delay resolution of § 5 disputes, the Court concluded that

however, concluded that the VRA's goals "could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General."<sup>112</sup> As in *Borak*, the Court alluded to the limited enforcement resources at the government's disposal and Congress's intent to protect a class of citizens.<sup>113</sup> The collective nature of the harm—including the representational injury to minorities whose voting strength was diluted—were thus an important part of the justification for implying a right of action.<sup>114</sup>

The decline of implied rights of action began just over a decade after *Borak*, with the unanimous decision in *Cort v. Ash*.<sup>115</sup> *Cort* was both an election case (like *Allen*) and a shareholder derivative case (like *Borak*). Plaintiff Ash was a shareholder seeking to sue Bethlehem Steel and its directors for violations of criminal provisions of the Federal Election Campaign Act (FECA) Amendments of 1974.<sup>116</sup> Specifically, Ash alleged that the corporation and its directors had violated a federal law<sup>117</sup> prohibiting corporations from making contributions or expenditures in connection with a federal election, seeking both injunctive relief and damages.<sup>118</sup> Justice Brennan's opinion for the Court first concluded that the administrative procedure set forth in the FECA amendments, under which complaints were to be filed before the newly created Federal Election Commission (FEC), was the sole means by which to secure injunctive relief for violations of § 610 in future elections.<sup>119</sup> Turning to the shareholders' damages claim, the Court articulated a four-factor test for ascertaining whether a cause of action should be implied: (1) whether plaintiff is "one of the class for whose especial benefit the statute was enacted"; (2) whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one"; (3) whether implication of a right of action is "consistent with the underlying purposes of the legislative scheme"; and (4) whether the claim is one "traditionally relegated to state law, in an area basically the concern of the States," thus making implication of a private right of action under federal law inappropriate.<sup>120</sup> While the Court noted the absence of any indication that Congress intended civil enforcement of § 610, its analysis rested primarily on the fact that protection of shareholders was, at best, a subsidiary purpose of the

---

Congress could not have intended these decisions to be reviewable. *Id.* at 506-07.

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

113. *Id.* at 557.

114. In a later decision, *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), a majority of the Court relied on *Allen* to find an implied right of action to enforce § 10 of the VRA, which prohibits poll taxes. *Id.* at 230-35; *id.* at 240 (Breyer, J., concurring).

115. 422 U.S. 66 (1975), *abrogated by* *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) and *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979).

116. *Id.* at 66.

117. 18 U.S.C. § 610 (2009).

118. *Cort*, 422 U.S. at 71-72.

119. *Id.* at 75-76.

120. *Id.* at 78.

statute.<sup>121</sup> According to the Court, Congress's main motivation was to reduce the influence of money on federal elections.<sup>122</sup> The absence of a "clearly articulated federal right in the plaintiff" led the Court to decide against implying a right of action.<sup>123</sup>

Although *Cort* denied a private right of action, its reasoning is consonant with *Borak*. In both cases, the central question was whether the plaintiff was part of the class that the statute was designed to protect. In addition, *Cort* left room for courts to consider the policy implications of implying a private right of action, including whether it would help or hurt the underlying regulatory scheme.<sup>124</sup>

At the same time, the *Cort* test suggests an underlying tension between two different conceptions of whether a private right of action should lie.<sup>125</sup> On one view, the one borrowed from *Borak*, the question is whether the statute was designed to benefit an identifiable class of persons that includes the plaintiff.<sup>126</sup> On the other view, the question is whether Congress intended to confer a right of action on private plaintiffs.<sup>127</sup>

The tension between these perspectives, latent in *Cort*, came to a head four years later in *Cannon v. University of Chicago*.<sup>128</sup> The plaintiff in *Cannon* alleged that she had been denied admission to federally funded educational institutions on the basis of her sex, in violation of Title IX of the Civil Rights Act.<sup>129</sup> The majority opinion, authored by Justice Stevens, applied the *Cort* factors to find an implied right of action for injunctive relief.<sup>130</sup> Although affirmative evidence of a congressional intent to confer a right of action was lacking, the Court rested heavily on the fact that the statute was designed to benefit a class, of which the plaintiff was a member.<sup>131</sup> It also relied on the "contemporary legal context" of the statute.<sup>132</sup> The statute was enacted during the period after *Borak* and before *Cort*, during which private rights of action were routinely implied, and it was appropriate to presume congressional familiarity with these precedents.<sup>133</sup> Justice Powell's dissent, by contrast, insisted that

---

121. *Id.* at 80-81.

122. *Id.* at 81-82.

123. *Id.*

124. Sunstein, *supra* note 87, at 412.

125. See Michael A. Mazzuchi, Note, *Section 1983 and Implied Rights of Action: Rights, Remedies, and Realism*, 90 MICH. L. REV. 1062, 1078 (1992).

126. Bruce A. Boyer, Note, *Howard v. Pierce: Implied Causes of Action and the Ongoing Vitality of Cort v. Ash*, 80 NW. U. L. REV. 722, 732 (1985).

127. *Id.* This view is evident in Justice Powell's opinion for the Court in *Morris v. Gressette*, discussed *supra* note 111.

128. 441 U.S. 677 (1979).

129. *Id.* at 677.

130. *Id.* at 689-709.

131. *Id.* at 693-94.

132. *Id.* at 699.

133. *Id.* at 731-32 (Powell, J., dissenting).

clearer evidence of Congress's intent to confer a private right of action was required. Taking issue with *Cort*'s four-factor test, Justice Powell insisted that "[a]bsent the most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action."<sup>134</sup> The only factor that should matter, in Justice Powell's view, was congressional intent to create a right of action. To consider other factors, he argued, was an "open invitation to federal courts to legislate causes of action not authorized by Congress," running afoul of the principle of separation of powers.<sup>135</sup>

Although Justice Powell's position did not carry the day in *Cannon*, the Court has increasingly gravitated toward his intent-based test in the years since that case was decided.<sup>136</sup> Just a month after *Cannon*, the Court in *Touche Ross & Co. v. Redington*<sup>137</sup> refused to imply a private right of action in a securities case, stating that "our task is limited solely to determining whether Congress intended to create the private right of action asserted."<sup>138</sup> The Court similarly relied on the absence of congressional intent to create a right of action in subsequent cases seeking damages for statutes prohibiting fraudulent investment practices<sup>139</sup> and a right to contribution from other participants in an unlawful conspiracy.<sup>140</sup> A majority of the Court backed off a bit from its insistence on evidence of congressional intent in *Thompson v. Thompson*.<sup>141</sup> While denying a private right of action to seek an injunction against a Louisiana custody decree under the Parental Kidnapping and Prevention Act of 1980, the Court emphasized that affirmative evidence of congressional intent was not necessarily required.<sup>142</sup> Some other decisions in the post-*Cannon* period have recognized a private right of action, particularly for statutes passed during the period in which they were routinely implied.<sup>143</sup> Still, the Court has moved much closer to Justice

---

134. *Id.* at 731.

135. *Id.*

136. Mazzuchi, *supra* note 125, at 1076, 1078.

137. 442 U.S. 560 (1979).

138. *Id.* at 568.

139. *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979).

140. *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981).

141. 484 U.S. 174 (1988).

142. *Id.* at 179 (clarifying that "[o]ur focus on congressional intent does not mean that we require evidence that Members of Congress, in enacting the statute, actually had in mind the creation of a private cause of action").

143. *See Morse v. Republican Party of Va.*, 517 U.S. 186, 233-34 (1996) (relying on the contemporary legal context of the VRA to imply a right of action to enforce prohibition on poll taxes); *Musick, Peeler & Garrett v. Emp'rs Ins. of Wausau*, 508 U.S. 286, 292-93 (1993) (implying a right of action under Rule 10b-5, promulgated under § 10(b) of the Securities and Exchange Act of 1934); *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 70-71 (1992) (implying a right of action for damages under Title IX of the Civil Rights Act); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 (1983) (implying a right of action under Rule 10b-5, promulgated under § 10(b) of the Securities and Exchange Act of 1934); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 387-88 (1982) (implying a right of action under the Commodity Futures Trading

Powell's position requiring clear evidence of Congress's intent to create a private right of action.

The most striking contemporary example of the Court's restrictive approach is *Alexander v. Sandoval*.<sup>144</sup> The plaintiff in *Alexander* sought to challenge the Alabama Department of Public Safety's English-only policy, arguing that it violated disparate-impact regulations promulgated by the Department of Justice under Title VI of the Civil Rights Act.<sup>145</sup> While *Cannon* implied a right of action for private individuals to sue *directly* under Title VI, the statute itself only covers intentional discrimination.<sup>146</sup> To make a disparate-impact claim, then, it was necessary to imply a right of action in plaintiff's favor under Title VI regulations. Justice Scalia's opinion for the Court rejected such a private right of action, reasoning that "private rights of action to enforce federal law must be created by Congress,"<sup>147</sup> and that Congress had created no such right.

In ascertaining whether a right of action was created, the *Alexander* majority—consistent with Justice Scalia's textualist approach—looked to the language of the statute: "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."<sup>148</sup> In this respect, the majority opinion did not simply embrace Justice Powell's view from his dissent in *Cannon* that there must be "compelling evidence"<sup>149</sup> of congressional intent to create a right of action, but goes further. It suggested that this evidence must come from the statute itself. The *Alexander* opinion thus represents the clearest break from the *Borak* view that a right of action should generally be inferred when plaintiff is of the class the statute was designed to benefit. Justice Scalia's opinion for the Court makes this point explicitly by labeling the plaintiff's contrary argument as an attempt to "revert . . . to the understanding of private causes of action that held sway 40 years ago."<sup>150</sup> In characteristically colorful fashion, Justice Scalia declined the invitation: "Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink."<sup>151</sup> Looking to the statutory text, the majority found neither "rights-creating" language nor the "intent to create a private remedy."<sup>152</sup> The Court also rejected the argument that language in the regulations is relevant to the question. The sole issue, instead, was whether the statute evinces congressional intent to create a private right and

---

Commission Act).

144. 532 U.S. 275 (2001).

145. *Id.* at 279.

146. *Id.* at 280-81; *Guardians Ass'n v. Civil Serv. Comm'n of New York City*, 463 U.S. 582 (1983); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

147. *Alexander*, 532 U.S. at 286.

148. *Id.* (citing *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979)).

149. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 730 (1979) (Powell, J., dissenting).

150. *Alexander*, 532 U.S. at 287.

151. *Id.*

152. *Id.* at 288-89.

remedy.<sup>153</sup>

As *Alexander* exemplifies, the Court has moved toward a much more restrictive view of implied rights of action. In the decade or so following *Borak*, the Court was quite generous in implying rights of action, especially where a plaintiff alleged a collective harm and was among the class experiencing that harm. Prime examples were the minority voters in *Allen* who claimed that injury to their collective interest in fair representation by virtue of vote dilutive election practices.<sup>154</sup> Since 1975, the focus has increasingly narrowed to whether the statutory text shows a congressional intent to create both an individual right and a private remedy.

### B. Rights of Action Under § 1983

For plaintiffs seeking to sue state or local officials for violations of federal statute, there is an alternative route for asserting a private right of action. Section 1983 confers a right of action on litigants whose rights under federal laws have been violated by a person acting “under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory”<sup>155</sup>—that is, under color of state law. As with implied rights of action, the Supreme Court has made it increasingly difficult for private litigants to bring suit under § 1983 for federal statutory violations. Although the two tests are not identical, plaintiffs now must show that Congress intended to confer an individual right (though not necessarily a remedy) in order to sue under § 1983. In addition, the Court will sometimes infer that Congress intended to preclude a § 1983 right of action, where the statute contains an alternative remedial scheme.

The seminal case for private plaintiffs suing under § 1983 for statutory violations is *Maine v. Thiboutot*.<sup>156</sup> Plaintiffs in *Thiboutot* alleged that the State of Maine and its officials had violated a provision of the Social Security Act by denying them welfare benefits to which they were entitled.<sup>157</sup> Because the relevant provision of the Social Security Act contained no private right of action, plaintiffs sought to make their claim under § 1983, citing the statute’s language allowing claims for violations of the “Constitution *and laws*.”<sup>158</sup> The Court rejected the state’s argument that § 1983 only provided a right of action for

---

153. For a similar view, see *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008) (“[I]t is settled that there is an implied cause of action only if the underlying statute can be interpreted to disclose the intent to create one. . .”).

154. *Allen v. State Bd. of Elections*, 393 U.S. 544, 549 (1969).

155. 42 U.S.C. § 1983 (2006).

156. 448 U.S. 1 (1980); see also Key, *supra* note 92, at 320 (noting that *Maine v. Thiboutot* was the first case to confront the meaning of § 1983’s “and laws” language).

157. *Thiboutot*, 448 U.S. at 2-3.

158. 42 U.S.C. § 1983 (emphasis added). Section 1983 was originally part of the Civil Rights Act of 1871. The phrase “and laws” was added in 1874 without any legislative history to explain the reason for the change. Mank, *supra* note 102, at 1427. For a discussion of the origins of § 1983, see Sunstein, *supra* note 87, at 398-409.

violation of statutes protecting equal rights.<sup>159</sup> Justice Brennan's opinion for the majority instead relied on the plain meaning of the term "and laws," as used in § 1983, concluding that it "means what it says" and was not limited to civil rights statutes.<sup>160</sup> As in *Cannon*, decided the previous term, Justice Powell dissented.<sup>161</sup> Relying on the legislative history of § 1983, he concluded that it provided a right of action only for federal statutes protecting equality of rights.<sup>162</sup> He also raised practical concerns about the majority's ruling, including the danger of litigation that would "harass state and local officials" and overly burden the courts.<sup>163</sup>

Although the Court has never adopted Justice Powell's position that § 1983 is limited to statutes protecting equal rights, it has imposed two major limitations on the availability of a § 1983 right of action to redress violations of federal statutes.<sup>164</sup> The first is that a § 1983 right of action is not available where it is precluded—expressly or implicitly—by the statutory scheme that the private plaintiff seeks to enforce. This limitation stems from *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, in which the Court rejected a § 1983 claim brought by commercial fishermen seeking to enforce federal laws restricting water pollution.<sup>165</sup> It held that the "comprehensive enforcement mechanisms" in these statutes demonstrated Congress's intent to preclude a § 1983 right of action.<sup>166</sup> Specifically, the environmental statutes in question allowed for citizen suits, administrative remedies, and federal agency enforcement. The Court concluded that these "unusually elaborate enforcement provisions" demonstrated congressional intent to supplant a § 1983 remedy.<sup>167</sup> On the other hand, in *Wright v. City of Roanoke Redevelopment and Housing Authority*,<sup>168</sup> the Court rejected the argument that relief under a federal housing law was impliedly precluded by an administrative enforcement scheme.<sup>169</sup> Although the U.S. Department of Housing and Urban Development had some authority to enforce the statute, the remedies expressly provided were not "sufficiently comprehensive and effective to raise a clear inference that Congress intended to foreclose a § 1983 cause of action."<sup>170</sup>

---

159. *Thiboutot*, 448 U.S. at 5.

160. *Id.* at 4.

161. *Id.* at 11 (Powell, J., dissenting).

162. *Id.* at 16.

163. *Id.* at 23.

164. See ERWIN CHERMERINSKY, FEDERAL JURISDICTION 562-70 (5th ed. 2007).

165. *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 17-18 (1981).

166. *Id.* at 20.

167. *Id.* at 13, 21; see also *Smith v. Robinson*, 468 U.S. 992, 1003-04 (1984) (finding implied preclusion of a § 1983 claim under the Education of the Handicapped Act).

168. 479 U.S. 418 (1987).

169. *Id.* at 424.

170. *Id.* at 425; see also *Blessing v. Freestone*, 520 U.S. 329, 348 (1997) (rejecting an argument that an administrative scheme foreclosed § 1983 relief where there was no private judicial or administrative remedy).

*Wright* says that congressional intent to preclude must be clear—the reverse of the presumption that now exists for *implied* rights of action—for a § 1983 claim to be foreclosed by an alternative enforcement scheme.<sup>171</sup> More recently, however, the Court has held that preclusion will be presumed where the statute includes its own private remedy. In *City of Rancho Palos Verdes v. Abrams*,<sup>172</sup> an amateur radio operator sought to sue the municipality in which he lived under § 1983, claiming that it had violated various provisions of the Telecommunications Act of 1996.<sup>173</sup> Justice Scalia’s opinion for the Court rejected plaintiff’s § 1983 claim, reasoning that a statute’s “provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983.”<sup>174</sup> This suggests that a statute’s inclusion of private remedy will ordinarily be presumed to foreclose a § 1983 claim. Because the Telecommunications Act provided remedies to private parties, and because plaintiff failed to counter the presumption against a § 1983 claim, the Court concluded that this claim was impliedly precluded.<sup>175</sup> By contrast, an administrative procedure providing only for the withdrawal of federal funding—and not for a private remedy—is insufficient to preclude a § 1983 claim.<sup>176</sup>

The other major limitation on using § 1983 to enforce a federal statute is the requirement that the statute confer rights. This requirement is drawn from the language of § 1983 itself, which states that plaintiffs deprived of “rights, privileges, or immunities” secured by federal law may obtain redress.<sup>177</sup> Over time, this requirement too has become more stringent, with the current Court requiring an unambiguous conferral of an individual right to make a § 1983 claim under a federal statute. The Court first carved out this limitation in *Pennhurst State School and Hospital v. Halderman*,<sup>178</sup> decided just one year after *Thiboudot*. Justice Rehnquist’s opinion for the Court concluded that the statute in question, the Developmentally Disabled Assistance and Bill of Rights Act of 1975, declared policy but did not create substantive rights.<sup>179</sup> In *Golden State Transit Corp. v. City of Los Angeles*, the Court held that a private plaintiff may sue under § 1983 if a three-part test is satisfied: (1) the federal statute creates a binding obligation; (2) the interest is sufficiently specific as to be judicially

---

171. *Wright*, 479 U.S. at 425.

172. 544 U.S. 113 (2005).

173. *Id.* at 116-18.

174. *Id.* at 121.

175. *Id.* at 122.

176. *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 795-96 (2009).

177. 42 U.S.C. § 1983 (2006).

178. 451 U.S. 1 (1981).

179. *Id.* at 22. The *Pennhurst* Court relied in part on the fact that the federal statute in question was enacted pursuant to Congress’s spending power, and that the remedy for failure to comply with such statutes is usually termination of funds. *Id.* at 28.

enforceable; and (3) the statute is designed to benefit the plaintiff.<sup>180</sup> Subsequent cases, however, have tightened this test by clarifying that the federal statute must do more than impose a duty on state or local officials.<sup>181</sup> There must instead be an intent to confer a specific right on individuals.<sup>182</sup>

The Court's most emphatic insistence that federal law must confer an individual right appears in *Gonzaga University v. Doe*.<sup>183</sup> The plaintiff was a former student at Gonzaga University who alleged that the school had released information in violation of the Family Educational Rights and Privacy Act (FERPA).<sup>184</sup> In rejecting his claim, the Court reviewed its prior cases holding that laws imposing a specific, binding obligation on states were sufficient to allow § 1983 relief.<sup>185</sup> While acknowledging that some language in these cases suggested a more generous standard, the *Gonzaga* majority expressly "reject[ed] the notion that . . . anything short of an unambiguously conferred right" suffices to support a § 1983 right of action.<sup>186</sup> The Court also clarified that only an "individual right" will suffice.<sup>187</sup> Once plaintiff establishes that the statute unambiguously confers an individual right, the burden shifts to the state or local defendant to show that Congress intended to foreclose a § 1983 remedy.<sup>188</sup> In this respect, the inquiry differs from that which now applies to implied rights of action, under which plaintiff has the burden of demonstrating congressional intent to create both a private right *and* a private remedy.<sup>189</sup> But the first part of the inquiry—whether Congress intended to create an individual right—is now the same for both implied and § 1983 rights of action.<sup>190</sup> Because FERPA's

180. *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 106 (1989); *see also Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 510-11 (1990) (finding a § 1983 right of action where a statute created a "binding obligation"); *Mazzuchi*, *supra* note 125, at 1095-96 (understanding *Wilder* to mean that § 1983 creates a presumption of private enforceability where a right exists under the *Cort* test).

181. *See Key*, *supra* note 92, at 346-52 (describing and criticizing the Court's approach to rights of action under § 1983 for federal statutory violations).

182. *See, e.g., Blessing v. Freestone*, 520 U.S. 329, 344-45 (1997) (rejecting a § 1983 claim for violation of provisions of Title IV-D of the Social Security Act requiring states to provide child support services on the ground that they did not "give rise to individualized rights"); *Suter v. Artist M.*, 503 U.S. 347, 363 (1992) (rejecting § 1983 claim for alleged violation of Adoption Assistance and Child Welfare Act of 1980, which imposed a "generalized duty on the State," but did not "unambiguously confer an enforceable right upon the Act's beneficiaries").

183. 536 U.S. 273 (2002).

184. *Id.* at 277.

185. *Id.* at 279-82.

186. *Id.* at 283.

187. *Id.* at 284.

188. *Id.* at 284, 284 n.4.

189. *Id.* at 284.

190. *Id.* at 285 ("A court's role in discerning whether personal rights exist in the § 1983 context should therefore not differ from its role in discerning whether personal rights exist in the implied rights of action context. . . . Both inquiries simply require a determination as to whether

nondisclosure provisions lacked clear and unambiguous “rights-creating” language, the Court found there to be no § 1983 right of action to enforce them.<sup>191</sup>

*Gonzaga* thus imposed the most restrictive test to date on plaintiffs seeking relief under § 1983 for violations of a federal statute. There may be some basis for limiting its impact in the future, given that the majority spends much of its opinion emphasizing that FERPA and other statutes considered in earlier § 1983 cases were enacted pursuant to Congress’s Spending Clause authority.<sup>192</sup> Where Congress acts pursuant to this power, the “typical remedy” for a violation is termination of federal funds.<sup>193</sup> If *Gonzaga*’s demanding test were limited to statutes enacted under Congress’s spending power, then its rationale resembles the preclusion reasoning articulated in cases like *Sea Clammers*<sup>194</sup> and *Abrams*.<sup>195</sup> On this theory, the restrictive test for finding a § 1983 right of action is predicated on the availability of an alternative remedy—namely, cutting off federal funds—that is presumed to preclude a private claim.

The problem with this argument is that *Gonzaga*’s language requiring an “unambiguously conferred right” is not expressly limited to Spending Clause cases. This suggests that the Court intended that the same restrictive test for a § 1983 right of action apply, regardless of the subject matter of the dispute and the source of constitutional authority for the statute in question.<sup>196</sup> So interpreted, *Gonzaga* represents a major impediment to private plaintiffs seeking redress for federal statutory violations committed by state or local actors—including actions under federal election statutes. Like all the previous § 1983 right-of-action cases decided by the Supreme Court, *Gonzaga* did not involve an election dispute. Its language is nevertheless broad enough to encompass such disputes.

### III. PRIVATE ENFORCEMENT OF FEDERAL ELECTION STATUTES

The Court’s restrictive doctrine on private rights of action has mostly developed outside the context of elections. In fact, prior to *Brunner v. Ohio*

---

or not Congress intended to confer individual rights upon a class of beneficiaries.”); *see also* Mank, *supra* note 102, at 1448 (“Chief Justice Rehnquist significantly changed the test [in *Gonzaga*] . . . by emphasizing that the same issue of congressional intent controls as in implied right of action cases.”).

191. *Gonzaga*, 536 U.S. at 287. In dissent, Justice Stevens protested the majority’s partial conflation of the tests for implied and § 1983 rights of action, on the ground that § 1983 claims do not implicate the same separation-of-powers concerns. *Id.* at 300 (Stevens, J., dissenting).

192. *Id.* at 278-81.

193. *Id.* at 280 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981)).

194. *See supra* notes 165-67.

195. *See supra* notes 172-75.

196. *See Key, supra* note 92, at 324 (describing the result of the Court’s jurisprudence as “eliminat[ion] of the practical utility of § 1983 statutory causes of action, while ostensibly still recognizing their existence”).

*Republican Party*,<sup>197</sup> none of the Court's decisions on § 1983 rights-of-action involved election law disputes. This is partly because some of the most important federal election statutes—including § 2 of the Voting Rights Act<sup>198</sup> and the National Voter Registration Act<sup>199</sup>—are privately enforceable. In fact, the prominence of these statutes is at least partly attributable to the availability of a private right of action to enforce them.

It is unclear whether other election statutes are privately enforceable, and there have been several recent cases in which lower courts have applied the Court's right-of-action jurisprudence to claims that federal election statutes had been violated. This section canvasses lower court cases brought to remedy alleged violations of three statutes: (1) the voter qualification and registration requirements codified in 42 U.S.C. § 1971; (2) UOCAVA; and (3) HAVA. I then turn to the *Brunner* litigation, explaining why the underlying question was more complex than the Court's brief opinion might lead one to believe. This part of the Article is mainly focused on the application of existing private-right-of-action doctrine, leaving a critique of that doctrine for Part IV.

#### A. Section 1971

The federal election statute that has led to the most opinions over private rights of action is 42 U.S.C. § 1971. This is somewhat ironic, given the relative obscurity of this provision, but not entirely surprising. As described below, most courts to have addressed the issue have concluded that this statute is not privately enforceable. The statute's obscurity is partly attributable to the courts' general refusal to imply a private right of action.

The voter qualification and registration requirements codified in § 1971 have their origins in a voting rights statute enacted in 1870, one year before § 1983. Through § 1971, Congress exercised its power to enforce the newly enacted Fifteenth Amendment by prohibiting state and local entities from denying the vote based on race, color, or previous condition of servitude.<sup>200</sup> Section 1971 was amended as part of the Civil Rights Act of 1957 to prohibit the intimidation and coercion of voters and to allow for enforcement by the U.S. Attorney

---

197. 129 S. Ct. 5 (2008) (per curiam).

198. 42 U.S.C. § 1973 (2006). Interestingly, § 2 does not expressly confer a right of action, though the Supreme Court has routinely allowed private enforcement of this provision. See, e.g., *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Chisom v. Roemer*, 501 U.S. 380 (1991). Commentators have likewise stated that § 2 provides a private right of action, with little or no explanation of why. See Nathaniel Persily, *Options and Strategies for Renewal of Section 5 of the Voting Rights Act*, 49 HOW. L.J. 717, 732 (2006). In one of the few cases to address the question expressly, which was decided shortly after the VRA's enactment, a federal district court concluded that § 2 was enforceable through § 1983. *Gray v. Main*, 291 F. Supp. 998, 999-1000 (M.D. Ala. 1966).

199. 42 U.S.C. §§ 1973gg-1973gg-10.

200. *Id.* § 1983.

General.<sup>201</sup> Congress amended § 1971 again as part of the Civil Rights Act of 1960, enhancing the federal courts' remedial powers in cases where a "pattern or practice" of violations was found to exist.<sup>202</sup>

The most significant amendment, for purposes of private enforceability, was the addition of requirements pertaining to voter qualifications and registration as part of the Civil Rights Act of 1964.<sup>203</sup> These amendments, now codified at 42 U.S.C. § 1971(a)(2), include two key components. First, with respect to voter qualifications, the statute prohibited the application of a "standard, practice, or procedure" to some voters that was different from that applied to other voters in the same jurisdiction.<sup>204</sup> Second, the statute prohibited the denial of the right to vote based on an "error or omission on any record or paper relating to any application, registration, or other act requisite to voting," unless the error or omission was "material in determining whether such individual is qualified . . . to vote."<sup>205</sup> By their terms, these requirements are not limited to race discrimination, and some courts have held that they apply to discrimination on other grounds, including sex or student status.<sup>206</sup>

The 1957, 1960, and 1964 civil rights acts are generally viewed as having been ineffective in protecting voting rights, because they depended mainly on litigation for enforcement. Southern federal district judges were often unwilling to intercede, and even when they did, new disenfranchising practices were often adopted right after the old ones had been stopped.<sup>207</sup> The 1964 amendments to § 1971 might well have assumed greater importance, however, had Congress not enacted the VRA the next year.<sup>208</sup> The VRA effectively overwhelmed the system of disenfranchisement that had kept Southern blacks from voting since the end

---

201. *Id.* § 1971(g).

202. *Id.* § 1971(e).

203. Pub. L. 88-352, § 101, 78 Stat. 241 (1964).

204. 42 U.S.C. § 1971(a)(2)(A).

205. *Id.* § 1971(a)(2)(B). The 1964 amendment also added a prohibition on literacy tests, unless administered wholly in writing with the questions. *Id.* § 1971(a)(2)(C). This change was effectively supplanted by the temporary ban on literacy tests in covered jurisdictions (made permanent in 1975) in § 4 of the Voting Rights Act of 1965. *Id.* § 1973(b). BERNARD GROFMAN ET AL., *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 21 (1992); Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, in *MINORITY VOTE DILUTION* 145, 149 (Chandler Davidson ed., 1984).

206. See *Ball v. Brown*, 450 F. Supp. 4, 7-8 (N.D. Ohio. 1977) (concluding that § 1971 reaches sex discrimination); *Frazier v. Callicutt*, 383 F. Supp. 15, 19-20 (N.D. Miss. 1974) (concluding that § 1971(a)(2)(A) reaches discrimination against students). *But see* *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 839-40 (S.D. Ind. 2006) (questioning plaintiffs' argument that § 1971(a)(2) reaches non-racial discrimination, but then assuming that it does and finding no violation), *aff'd on other grounds sub nom.* *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008).

207. Tokaji, *The New Vote Denial*, *supra* note 110, at 702.

208. Pub. L. No. 89-110, 79 Stat 457 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

of Reconstruction.<sup>209</sup> Because the VRA was so effective in enfranchising Southern blacks,<sup>210</sup> § 1971's requirements—and with it the question of whether the statute is privately enforceable—receded in significance.<sup>211</sup>

There have, however, been several cases in which private plaintiffs have sought to enforce the qualification and registration requirements of § 1971.<sup>212</sup> The Supreme Court has never confronted the issue directly, although it did assume private enforceability in *United States v. Mississippi*, stating that “private persons might file suits under § 1971 against individual registrars who discriminated in applying otherwise valid laws.”<sup>213</sup> Because that case was brought by the U.S. government rather than private plaintiffs, it is dictum that has been given scant weight by subsequent courts.

There is a split of authority in the lower courts on the question of § 1971's private enforceability, with most rejecting the argument that there is a private right of action. But in all of the cases rejecting a private right of action, the analysis is brief, conclusory, and unsatisfying.<sup>214</sup> Based on § 1971's express provision for enforcement by the Attorney General,<sup>215</sup> these courts concluded that private enforcement is precluded. Without exception, the decisions fail to apply the tests established by the Supreme Court, either for an implied right of action or for a § 1983 right of action.

The most thorough analysis of the issue appears in the one appellate decision

209. Tokaji, *The New Vote Denial*, *supra* note 110, at 702.

210. *Id.*; see also GROFMAN ET AL., *supra* note 205, at 23 tbl.1 (showing increase in black registration in covered states from 29.3% to 52.1% between 1965 and 1967).

211. The VRA included an amendment to § 1971, extending it from federal elections to all elections. Pub. L. No. 89-110, § 15, 79 Stat. 37, 445 (codified as amended at 42 U.S.C. § 1971 (2006)).

212. One of those cases was the challenge to Indiana's photo identification law, which ultimately led to the Supreme Court's decision upholding its constitutionality. *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008). The district court in that case rejected plaintiffs' § 1971 claim on the merits without deciding whether there was a private right of action to enforce the statute. *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 842 n.112 (S.D. Ind. 2006), *aff'd on other grounds sub nom. Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008), and neither the Seventh Circuit nor the Supreme Court addressed § 1971. *Crawford*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008).

213. 380 U.S. 128, 137 (1965).

214. See, e.g., *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000); *Gilmore v. Amityville Union Free Sch. Dist.*, 305 F. Supp. 2d 271, 279 (E.D.N.Y. 2004); *Spivey v. Ohio*, 999 F. Supp. 987, 996 (N.D. Ohio 1998), *aff'd sub nom. Mixon v. Ohio*, 193 F.3d 389, 406 n.12 (6th Cir. 1999); *McKay v. Altobello*, No. 96-3458, 1996 WL 635987, at \*2 (E.D. La. Oct. 31, 1996); *Cartagena v. Crew*, No. CV-96-3399, 1996 WL 524394, at \*3 n.8 (E.D.N.Y. Sept. 5, 1996); *Willing v. Lake Orion Cmty. Sch. Bd. of Trs.*, 924 F. Supp. 2d 815, 820 (E.D. Mich. 1996); *Good v. Roy*, 459 F. Supp. 403, 405 (D. Kan. 1978); see also *Broyles v. Texas*, 618 F. Supp. 2d 661, 697 n.11 (S.D. Tex. 2009) (citing cases that have found no private right of action to enforce § 197, but disposing of case on other grounds), *aff'd*, No. 09-20290, 2010 WL 2465093 (5th Cir. June 11, 2010).

215. 42 U.S.C. § 1971(c) (2006).

expressly holding that there is a private right of action to enforce § 1971. In *Schwier v. Cox*,<sup>216</sup> the Eleventh Circuit considered a challenge to Georgia's law requiring that voters furnish their Social Security numbers.<sup>217</sup> The court canvassed the history of § 1971, noting that the provisions for Attorney General enforcement were not added until 1957, thus suggesting that—at least from the enactment of § 1983 in 1871 until 1957—§ 1971 was enforceable by private plaintiffs.<sup>218</sup> The court also relied in part on Supreme Court precedent holding that portions of the VRA are privately enforceable, despite the fact that they may also be enforced by the Attorney General.<sup>219</sup> In other words, the express provision for enforcement by the federal government does not necessarily preclude private enforcement. The Eleventh Circuit then turned to the test for whether there is a private right of action under § 1983, finding that § 1971 includes precisely the sort of clear, rights-creating language that the *Gonzaga* Court demanded.<sup>220</sup> Accordingly, the *Schwier* court found the requirements of § 1971 to be privately enforceable.<sup>221</sup>

Despite the fact that most other courts have disagreed, the Eleventh Circuit's conclusion that § 1971 is privately enforceable is correct, even under the stringent test that the *Gonzaga* Court set forth for private rights of action under § 1983. The lower courts that have reached the opposite conclusion have simply failed to apply the Court's test.

There is an additional factor, not mentioned in *Schwier* or formally part of the doctrine, that provides further support for the conclusion that § 1971 should be privately enforceable: the lack of any administrative agency able to provide guidance on the statute's meaning.<sup>222</sup> Although § 1971 has been around for quite

---

216. 340 F.3d 1284 (11th Cir. 2003). There are also some district court decisions finding a private right of action to enforce § 1971. See, e.g., *Ball v. Brown*, 450 F. Supp. 4, 7-8 (N.D. Ohio 1977); *Brooks v. Nacrelli*, 331 F. Supp. 1350, 1351-52 (E.D. Pa. 1971). There are also other cases in which the courts have reached the merits of private plaintiffs' § 1971 claims without expressly addressing the issue of whether there is a private right of action. See, e.g., *Ballas v. Symm*, 494 F.2d 1167, 1171-72 (5th Cir. 1974); *Frazier v. Callicutt*, 383 F. Supp. 15, 19-20 (N.D. Miss. 1974); *Brier v. Luger*, 351 F. Supp. 313, 316 (M.D. Pa. 1972); *Brown v. Post*, 279 F. Supp. 60, 63-64 (W.D. La. 1968).

217. *Schwier*, 340 F.3d at 1293-94.

218. *Id.* at 1295-97.

219. *Id.* at 1294-96.

220. *Id.* at 1296 (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002)).

221. *Id.* at 1297.

222. It might be argued that the Civil Rights Act of 1964, which added the qualification and registration provisions codified at § 1971(a)(2), conferred this authority on the U.S. Commission on Civil Rights (USCCR). 42 U.S.C. § 1971(a)(2) (2006). Specifically, § 507 of the 1964 Act gave the USCCR broad power to make such rules and regulations as are necessary to carry out the purposes of the Act. Pub. L. No. 88-352, § 507, 78 Stat. 241, 252 (1964). The United States Commission on Civil Rights Act of 1983, which made the USCCR an independent agency, included the same language—although the reference to “this Act” is best understood as referring only to the 1983 Act (rather than to § 1971(a)(2) or other provisions added by the Civil Rights Act of 1964).

a while, there is relatively little precedent on precisely what practices are barred by its provisions, particularly the qualification and registration provisions of § 1971 (a)(2). Without any agency empowered to issue regulations that would clarify the scope of § 1971, the courts are the only entity in a position to provide authoritative guidance. But without a private right of action, the only way of getting disputes into court would be for the Attorney General to bring suit. Even putting aside the dangers of giving exclusive enforcement authority to the Department of Justice (a concern to which I will return in Part IV),<sup>223</sup> the lack of a private right of action would limit—and no doubt has limited—the ability of courts to clarify the meaning of § 1971. Although this is not something that the Supreme Court has recognized to be relevant in assessing whether there is an implied or § 1983 right of action, the ability of courts to clarify the law would be a significant benefit of private enforceability. For without a private right of action, the only cases that can be heard in a federal court are the ones that the U.S. government brings. If the Department of Justice declines to bring litigation under § 1971 (or, for that matter, any other federal election statute), then its meaning will remain indeterminate for both the voters it protects and the election officials who are required to follow it.

### B. UOCAVA

Another election statute that lacks an express private right of action is the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).<sup>224</sup> This statute has generated even less litigation than § 1971, and so far, no decisions have expressly held whether there is an implied or § 1983 right of action to enforce the statute.<sup>225</sup>

UOCAVA has its origins in the Federal Voting Assistance Act of 1955,<sup>226</sup> which was designed to allow members of the armed services and their families to vote absentee when stationed overseas,<sup>227</sup> and the Overseas Citizens Voting Rights Act of 1975,<sup>228</sup> which extended absentee voting to other citizens residing

---

42 U.S.C. § 1975b(d). In any event, the USCCR functions as an investigatory rather than regulatory agency. See Peter P. Swire, Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 YALE L.J. 1766, 1782 (1985) (characterizing USCCR as a “purely investigatory agency”). Throughout its history, the USCCR has apparently understood its rulemaking authority as limited to its internal operations, and not to include the interpretation of substantive provisions of civil rights law such as § 1971.

223. See *infra* Part IV.

224. 42 U.S.C. §§ 1973ff-1973ff-6 (2006).

225. For a summary of litigation involving UOCAVA, see Deborah Buckman, *Validity, Construction, and Application of Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)*, 42 U.S.C.A. §§ 1973ff *et seq.*, 1 A.L.R. FED. 2d 251 (2005).

226. 42 U.S.C. §§ 1973cc-1973cc-3, *repealed by* UOCAVA, Pub. L. No. 99-410, § 203, 100 Stat. 924.

227. *Id.*

228. 42 U.S.C. §§ 1973dd-1973dd-5, *repealed by* UOCAVA, Pub. L. No. 99-410, § 203, 100

outside the United States.<sup>229</sup> In 1986, Congress repealed these statutes and enacted UOCAVA in their place, out of a recognition that overseas voters still faced serious obstacles to voting absentee and having their votes counted.<sup>230</sup> Broadly speaking, UOCAVA requires states to allow uniformed and overseas voters to use absentee voter procedures.<sup>231</sup> UOCAVA also prescribes a process by which voters who request but do not receive their absentee ballots in time may cast a federal write-in ballot,<sup>232</sup> and it includes a number of “recommended” steps that states can take to facilitate voting by uniformed and overseas voters.<sup>233</sup> This leaves many of the details to be worked out by individual states.<sup>234</sup> The U.S. Attorney General has the power to enforce UOCAVA through actions for declaratory or injunctive relief, but the act is silent on private enforceability.<sup>235</sup> The Department of Justice’s website reports there were thirty-five lawsuits to enforce UOCAVA between 1986 and 2009.<sup>236</sup>

In 2009, Congress strengthened UOCAVA through the Military and Overseas Voter Empowerment (MOVE) Act.<sup>237</sup> Finding that military and overseas voters still faced a “complicated and convoluted system,”<sup>238</sup> the MOVE Act imposed more specific requirements on the states. Among these requirements are: (1) to allow the electronic transmission of registration materials, ballot requests, and blank ballots, (2) to give covered voters forty-five days to complete and return their absentee ballots, (3) to create a system for determining whether voters’ ballots have been received, (4) to ensure the privacy of military and overseas voters, and (5) to prohibit states from rejecting registration or ballot requests for lack of notarization or other formalities.<sup>239</sup> It also gives a presidential designee (now the Secretary of Defense) various responsibilities, such as the establishment of procedures for delivery of ballots and an outreach program for voters covered by the Act.<sup>240</sup>

---

Stat. 924.

229. *Id.*

230. H.R. REP. NO. 99-765, at 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2009, 2014.

231. 42 U.S.C. § 1973ff-1 (2006).

232. *Id.* § 1973ff-2.

233. *Id.* § 1974ff-3.

234. *See* *Bush v. Hillsborough Cnty. Canvassing Bd.*, 123 F. Supp. 2d 1305, 1314 (N.D. Fla. 2000).

235. 42 U.S.C. § 1973ff-4.

236. *Voting Section Litigation*, U.S. DEP’T OF JUSTICE, [http://www.justice.gov/crt/voting/litigation/caselist.php#uocava\\_cases](http://www.justice.gov/crt/voting/litigation/caselist.php#uocava_cases) (last visited Sept. 29, 2010).

237. Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, § 574-89, 123 Stat. 2190 (codified at 42 U.S.C. §§ 1973ff to 1973ff-2 (2006)).

238. 155 CONG. REC. S10682 (daily ed. Oct. 22, 2009) (statement of Sen. Charles Schumer).

239. 42 U.S.C. § 1973ff-1(a).

240. *Id.* § 1973ff-2A. The Secretary of Defense has delegated its responsibilities under UOCAVA, as amended by MOVE, to the Federal Voting Assistance Program. FEDERAL VOTING ASSISTANCE PROGRAM, <http://www.fvap.gov/> (last updated Sept. 24, 2010); *The Uniformed and Overseas Citizens Absentee Voting Act*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/>

There are very few reported decisions involving UOCAVA,<sup>241</sup> although that may change with the imposition of new responsibilities on the states through the MOVE Act. Of those decisions, none expressly addressed whether UOCAVA is privately enforceable. One of the most prominent UOCAVA cases was brought by George W. Bush, Dick Cheney, and the Florida Republican Party during the dispute over the outcome of Florida's 2000 presidential contest. In *Bush v. Hillsborough County Canvassing Board*,<sup>242</sup> the plaintiffs challenged various Florida counties' refusal to accept ballots from overseas and military voters that were unpostmarked, had illegible postmarks, or were postmarked after election day.<sup>243</sup> Without addressing whether the private plaintiffs were entitled to enforce UOCAVA, the court found that some of the counties' practices violated the MOVE Act and granted declaratory relief.<sup>244</sup> The failure to discuss the private right of action issue is surprising, given that candidates Bush and Cheney were plaintiffs in the case.<sup>245</sup> While individual voters who are denied relief might well meet the standard for implied or § 1983 rights of action,<sup>246</sup> it is difficult to imagine how a candidate could do so. Perhaps the inclusion of the Florida Republican Party—which undoubtedly included members whose rights under UOCAVA were allegedly violated—made it unnecessary, in the view of the court and the litigants, to consider whether candidates Bush and Cheney had a right of action.<sup>247</sup>

The question whether there is a private right of action to enforce UOCAVA did arise in *United States v. Cunningham*, a case challenging Virginia officials' alleged failure to comply with the statute, brought the day before the 2008

---

gov/crt/voting/misc/activ\_uoc.php (last visited Sept. 29, 2010).

241. For a description of those few cases, see Buckman, *supra* note 225. A few of those cases involve challenges to UOCAVA's constitutionality—all of them unsuccessful. See, e.g., *Romeu v. Cohen*, 265 F.3d 118 (2d Cir. 2001); *Igartua de la Rosa v. United States*, 107 F. Supp. 2d 140 (D.P.R. 2000); *Howard v. State Admin. Bd. of Election Laws*, 976 F. Supp. 350 (D. Md. 1996), *aff'd*, 122 F.3d 1061 (4th Cir. 1997). Others involve cases in which compliance with UOCAVA was asserted as a defense to a claim under another law. See, e.g., *Casarez v. Val Verde Cnty.*, 957 F. Supp. 847 (W.D. Tex. 1997); *N.J. Democratic Party, Inc. v. Samson*, 814 A.2d 1028 (N.J. 2002).

242. 123 F. Supp. 2d 1305 (N.D. Fla. 2000).

243. *Id.* at 1306.

244. *Id.* at 1317.

245. *Id.* at 1306.

246. My research has located only one other decision, an unreported one, in which voters were allowed to assert claims under UOCAVA. See *Reitz v. Rendell*, No. 104-CV-2360, 2004 WL 2451454 (M.D. Pa. Oct. 29, 2004). As in *Hillsborough County*, there was no discussion of the private right of action issue. *Id.*

247. There is also a question of whether plaintiffs in this case had standing. For a discussion of a similar question in the *Bush v. Gore* litigation, see Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1097-1102 (2001) (arguing that Bush lacked standing). *But see* Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2491-92 (2003) (suggesting a rationale for the assumption that Bush had standing to raise the claims of voters).

presidential election.<sup>248</sup> As originally filed, the only plaintiff was the campaign committee for the Republican presidential ticket.<sup>249</sup> For the same reason that Bush and Cheney lacked a right of action in 2000, it is highly questionable that the McCain-Palin campaign had a private right of action to enforce UOCAVA—even assuming that a right of action would lie on behalf of voters whose rights were denied by Virginia’s failure to comply with the statute. In their motion to dismiss, defendants argued that UOCAVA did not create privately enforceable rights and that the express provision for Attorney General enforcement should be understood to preclude private enforcement.<sup>250</sup> Before that motion was adjudicated, the United States government intervened in the case on the side of plaintiff. The district court subsequently granted the United States’ motion to intervene and dismissed the McCain-Palin campaign as a plaintiff without expressly stating its reasons.<sup>251</sup>

A close look at UOCAVA reveals that the question of the statute’s private enforceability is a murky one. Contrary to the argument made by the state defendants in *Cunningham*, the fact that the statute expressly provides for Attorney General enforcement does not necessarily foreclose a private right of action. Although lower federal courts have accepted a similar argument in denying a right of action under § 1971, that is flatly inconsistent with the Supreme Court’s tests for rights of action. Nor do the implementation responsibilities given to the Secretary of Defense under UOCAVA, as amended by MOVE, amount to a comprehensive enforcement scheme sufficient to preclude private enforcement. That said, the current doctrine probably would not permit implication of a right of action directly under UOCAVA, as there appears to be no evidence that Congress—either in 1986 or when it amended the statute in 2009—intended any of its requirements to be privately enforceable.

There is a much stronger argument that certain provisions of UOCAVA are privately enforceable under § 1983, although the matter is hardly free from doubt. Recall that, under the line of cases culminating with *Gonzaga*, private plaintiffs must show that Congress intended to create an individual right (though not necessarily a private remedy) in order to sue under § 1983 for violation of a federal statute. Several provisions of UOCAVA are best understood as

---

248. *United States v. Cunningham*, No. 3:08CV709, 2009 WL 335028, at \*1 (E.D. Va. Oct. 15, 2009). The case was originally filed as *McCain-Palin 2008, Inc. v. Cunningham*, but changed to *United States v. Cunningham*, after the United States intervened as a plaintiff. See *infra* notes 249-51.

249. Complaint, *McCain-Palin 2008, Inc. v. Cunningham*, No. 3:08CV709 (E.D. Va. Nov. 3, 2008), available at <http://moritzlawosu.edu/electionlaw/litigation/documents/McCain-Complaint-11-3-08.pdf>.

250. Memorandum in Support of Motion to Dismiss, *McCain-Palin 2008, Inc. v. Cunningham*, No. 3:08CV709 (E.D. Va. Nov. 6, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/McCain-Memo1-11-6-08.pdf>.

251. Order at 1-2, *McCain-Palin, 2008, Inc. v. Cunningham*, No. 3:08cv709 (E.D. Va. Nov. 17, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/McCain-order-11-17-08.pdf>.

conferring an individual right against state officials. Among them are the requirements that states:

- “permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot” in federal elections,<sup>252</sup>
- “accept and process . . . any otherwise valid voter registration application and absentee ballot application from an absent uniformed services voter or overseas voter” if received not less than thirty days before a federal election,<sup>253</sup>
- “permit absent uniformed services voters and overseas voters to use Federal write-in absentee ballots” in federal elections,
- “transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter . . . not later than 45 days before the election,” so long as the request is received before then,<sup>254</sup> and
- establish procedures that “shall ensure that the privacy of the identity and other personal data” of uniformed and overseas voters is protected.<sup>255</sup>

The conclusion that these and similarly worded provisions of UOCAVA are privately enforceable is strengthened by language in the statute confirming that Congress thought it was conferring rights on uniformed and overseas voters: “The exercise of any *right* under this subchapter shall not affect, for purposes of any Federal, State, or local tax, the residence or domicile of a person exercising such *right*.”<sup>256</sup> This makes it quite clear and unambiguous that at least some provisions of UOCAVA confer rights. Under *Gonzaga*, the existence of rights-creating language creates a presumption of § 1983 enforceability and, given the absence of a “comprehensive enforcement scheme that is incompatible with individual enforcement,”<sup>257</sup> it is unlikely that the state can rebut that presumption. On the other hand, other provisions of UOCAVA appear to lack the sort of rights-creating language that *Gonzaga* demands. For example, UOCAVA’s requirements that states “establish procedures” for transmitting absentee ballots<sup>258</sup> and report data on ballots transmitted<sup>259</sup> do not appear to confer a right upon any individual—much less do so “unambiguous[ly]” as *Gonzaga*’s test demands—even though these requirements are undoubtedly designed to benefit uniformed and overseas voters.

---

252. 42 U.S.C. § 1973ff-1(a)(1) (2006).

253. *Id.* § 1973ff-1(a)(2).

254. *Id.* § 1973ff-1(a)(8).

255. *Id.* § 1973ff-1(e)(6)(B).

256. *Id.* § 1973ff-5 (emphasis added).

257. *Blessing v. Freestone*, 520 U.S. 329, 341 (1997).

258. 42 U.S.C. § 1973ff-1(a)(7).

259. *Id.* § 1973ff-1(a)(11).

### C. HAVA

The most prominent area of election law in which the private-right-of-action question has arisen is the enforcement of HAVA. Passed in the wake of the 2000 election meltdown, HAVA imposes modest but important requirements on states.<sup>260</sup> As a general matter, HAVA's requirements attempt to promote the sometimes competing goals of access and integrity or, as one of the bill's co-sponsors put it, making it both "easier to vote" and "harder to cheat."<sup>261</sup> These requirements can be broken down into four categories:

1. *Voting Technology*—HAVA did not require the replacement of the punch-card voting technology that proved so troublesome in 2000. In fact, it specifically declined to require jurisdictions to replace their existing equipment.<sup>262</sup> HAVA does, however, impose some basic requirements that all voting equipment must meet. Among the requirements are that voting systems allow voters to correct errors before casting their ballots, that equipment produce an auditable record, that they be accessible to people with disabilities, and that they provide alternate language accessibility.<sup>263</sup>

2. *Statewide Registration Lists*—Before HAVA's enactment, registration lists were kept at the local level (typically the county or municipal level) in most states.<sup>264</sup> HAVA changed this by requiring every state that requires voter registration to have "a single, uniform, official, centralized, interactive computerized statewide voter registration list."<sup>265</sup> This list, sometimes referred to as a "statewide registration database," must contain the name and registration information of every legally registered voter in the state. HAVA contains some specific requirements for the maintenance of these lists, including requirements that "duplicate names are eliminated" and that "only voters who are not registered or who are not eligible to vote are removed."<sup>266</sup> It also requires that state chief election officials enter into agreements with state motor vehicle authorities to "match" voter registration information against motor vehicle records, to the extent required to verify the accuracy of information on voter registration applications.<sup>267</sup>

3. *Voter Identification*—Among the most controversial topics to have emerged in the years since 2000 is whether and how voters should be required to prove their identity in order to have their votes counted. HAVA imposed a limited identification requirement, applicable only to certain voters—specifically,

---

260. *Id.* §§ 15301-15545 (2006 & Supp. 2008).

261. David Nather, *Election Overhaul May Have to Wait in Line Behind Other 'Crisis' Issues*, CQ WKLY., July 27, 2002, at 2034 (quoting Rep. Steny Hoyer).

262. 42 U.S.C. § 15481(c)(1).

263. *Id.* §§ 15481(a)(1)-(4).

264. Tokaji, *Voter Registration and Election Reform*, *supra* note 32, at 471.

265. 42 U.S.C. § 15483(a)(1)(A).

266. *Id.* §§ 15483(a)(2)(B)(ii)-(iii).

267. *Id.* § 15483(a)(5)(B)(i).

to first-time voters who register by mail.<sup>268</sup> Those voters are required to produce identifying information, though it need not be in the form of photo identification such as a driver's license. Other acceptable forms of identification include utility bills, bank statements, government checks, paychecks, or government documents with the voter's name and address.<sup>269</sup>

4. *Provisional Voting*—Finally, HAVA requires that voters be permitted to cast a provisional ballot if their names do not appear on the registration list or if they lack required identification.<sup>270</sup> To cast a provisional ballot, the voter must affirm that he or she is “a registered voter in the” jurisdiction and “eligible to vote in that election.”<sup>271</sup> The voter's ballot must then be counted, if he or she is determined eligible under state law.<sup>272</sup> HAVA also prescribes, in general terms, the process that election officials are supposed to follow in notifying voters that they may cast a provisional ballot, permitting them to cast such ballot, transmitting provisional ballots for verification, determining whether to count the ballot, and creating a procedure for notifying voters whether their ballot has been counted.<sup>273</sup>

HAVA is silent on whether any of its requirements are privately enforceable. If we take seriously *Alexander's* statement that an implied right of action requires evidence of a congressional intent to create one in the statute itself,<sup>274</sup> it is hard to see how this standard could be met. A more difficult question is whether HAVA, or at least some of its requirements, may be enforced under § 1983. HAVA expressly allows the U.S. Attorney General to bring suit for declaratory or injunctive relief,<sup>275</sup> though this is not dispositive of whether there is a § 1983 right of action.<sup>276</sup> HAVA also requires an administrative complaint procedure for those who believe that there has been a violation of the statute.<sup>277</sup> This, however, falls well short of the comprehensive remedial scheme that might be deemed to demonstrate a congressional intent to foreclose a private judicial remedy.<sup>278</sup> Under the HAVA-required administrative complaint process, states are required to have a process for receiving complaints but have unreviewable discretion to dismiss complaints if they find no violation, without any provision for judicial review.<sup>279</sup> Even in cases where they find a violation, it is up to states to determine the “appropriate remedy,” again without any provision for judicial

268. *Id.* § 15483(b)(1).

269. *Id.* § 15483(b)(2)(A)(i)(II).

270. *Id.* § 15482(b)(2)(A)(i)(b)(2)(B).

271. *Id.* § 15483(a)(2).

272. *Id.* § 15483(a)(4).

273. *Id.* §§ 15483(a)(1)-(4).

274. *See supra* notes 144-48.

275. 42 U.S.C. § 15511.

276. *See supra* Parts II.A. & II.B.

277. 42 U.S.C. § 15512.

278. *See, e.g.,* *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005); *Middlesex Cnty. Sewerage Auth. v. Nat'l Seal Clammers Ass'n*, 453 U.S. 1, 13 (1981).

279. 42 U.S.C. § 15512(a)(2)(G).

review.<sup>280</sup> This is a far cry from the sort of “comprehensive enforcement mechanism[]”<sup>281</sup> that the Court has required to foreclose a right of action under § 1983.<sup>282</sup>

The legislative history of HAVA is also of little help in determining whether its requirements may be privately enforced. There is only one statement from the floor debate expressly addressing the subject.<sup>283</sup> In commenting on the Conference Report on the bill, Senator Chris Dodd, one of HAVA’s co-sponsors, stated that he “would have preferred that we extend the private right of action afforded private parties under [the National Voter Registration Act],” but that the House (at that time controlled by Republicans) “simply would not entertain such an enforcement provisions [sic].”<sup>284</sup> Assuming that this statement is true, it explains why there is no express private right of action in HAVA, but it tells us nothing about whether any provisions of the statute creates rights enforceable under § 1983.

Given that both the statutory text and the legislative history are silent on the private enforceability of HAVA’s obligations under § 1983, it is no surprise that the issue has found its way into court. The question has arisen with respect to three specific requirements of HAVA: (1) that provisional ballots be provided to certain voters; (2) that accessible technology be made available for people with disabilities; and (3) that information in state voter registration databases be matched against other records. What is interesting about these three parts of the statute is that they can be placed at different points along the spectrum in terms of their creating individual rights as required by existing doctrine. The first requirement clearly does create an enforceable right, the second arguably does so, while the third clearly does not do so.

The provision of HAVA that most clearly confers an individual right, thus satisfying *Gonzaga*’s demanding test, is the requirement that certain voters be provided with provisional ballots. In *Sandusky County Democratic Party v. Blackwell*,<sup>285</sup> the Sixth Circuit correctly held that this requirement contains the sort of rights-creating language necessary for private enforceability under § 1983.<sup>286</sup> In that case, a local party organization claimed that Ohio’s secretary of

---

280. *Id.* § 15512(a)(2)(F).

281. *See Nat’l Sea Clammers Ass’n*, 453 U.S. at 20.

282. *See Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 425 (1987) (refusing to find congressional intent to foreclose §1983 remedy, where statute lacked a comprehensive and effective private remedy).

283. I base this statement on a Boolean search for “(‘help america vote’ or ‘election reform’) and (‘private right’ or ‘private cause’)” in LexisNexis’s “Congressional Record - 107th Congress” database. The statements by Senator Chris Dodd discussed in the text are the only ones on the topic of private rights of action to enforce HAVA’s requirements.

284. 148 CONG. REC. S10508 (daily ed. Oct. 16, 2002) (statement of Sen. Dodd).

285. 387 F.3d 565 (6th Cir. 2004).

286. *Id.* at 572-73. Two district courts have reached the same conclusion on HAVA’s provisional voting requirement. Citing the same language as the Sixth Circuit, the court in *Florida Democratic Party v. Hood* concluded: “The relevant section of HAVA clearly evinces a

state was in violation of HAVA by refusing to issue provisional ballots to or count the ballots of voters appearing at the wrong precinct. After reciting the doctrine articulated in the line of cases extending through *Gonzaga*, the Sixth Circuit turned to the language of HAVA's provisional voting requirement, finding that its "rights-creating language . . . is unambiguous."<sup>287</sup> The court emphasized that HAVA's language refers to an "individual" being permitted to cast a provisional ballot, if he or she complies with certain specific criteria.<sup>288</sup> The statutory text also specifically refers to the "right of an individual to cast a provisional ballot."<sup>289</sup> This language is similar to that contained in Titles VI<sup>290</sup> and IX<sup>291</sup> of the Civil Rights Act, and quite unlike that at issue in *Gonzaga*, which referred not to individuals but instead to programmatic requirements.<sup>292</sup> As the Sixth Circuit's opinion suggests, this is a relatively easy case, even under the stringent test that now exists for private enforcement under § 1983.<sup>293</sup> Congress explicitly conferred an individual right to a provisional ballot on certain voters, and there is no comprehensive remedial scheme that would overcome the presumption that a private right of action lies.

A more difficult question is whether HAVA's disability access mandate is privately enforceable under § 1983. HAVA requires that voting systems be "accessible to individuals with disabilities," specifically mandating that states provide access for visually impaired voters so that they will have the "same opportunity for access and participation (including privacy and independence) as for other voters."<sup>294</sup> Although the statute does not use the word "right," there is no doubt at all about what individuals this requirement is designed to benefit, and the statute even refers to those specific individuals.<sup>295</sup> Is this enough to satisfy *Gonzaga's* requirement that there be an unambiguously conferred individual right in order to sue under § 1983? There is little precedent on this question, though two district courts have answered the question in the negative.<sup>296</sup>

---

congressional intention to create a federal right." 342 F. Supp. 2d 1073, 1078 (N.D. Fla. 2004). The district court in *Bay County Democratic Party v. Land* likewise held that this section contains the "type of unmistakable rights-focused language that the Supreme Court has" required for a § 1983 claim. 347 F. Supp. 2d 404, 426 (E.D. Mich. 2004).

287. *Sandusky Cnty. Democratic Party*, 387 F.3d at 572.

288. *Id.* at 574.

289. *Id.* at 573 (quoting 42 U.S.C. § 15482(b)(2)(E) (2006)) (emphasis omitted).

290. 42 U.S.C. § 2000d (using the language "[n]o person" to confer individual rights).

291. 20 U.S.C. § 1681 (using the language "[n]o person" to confer individual rights).

292. *See supra* notes 183-89.

293. In saying this is an easy case, I am referring only to the conclusion that there is a private right of action. On the merits, the Sixth Circuit concluded that voters were entitled to cast a provisional ballot if they affirmed that they were eligible and registered to vote, but that these provisional ballots need not be counted if voters appeared in the wrong precinct. *Sandusky Cnty. Democratic Party*, 387 F.3d at 574-79.

294. 42 U.S.C. § 15481(a)(3)(A).

295. *See id.*

296. *See Taylor v. Onorato*, 428 F. Supp. 2d 384, 386 (W.D. Pa. 2006); *Paralyzed Veterans*

One of those decisions, *Taylor v. Onorato*,<sup>297</sup> applied the wrong legal test. In denying plaintiffs relief, the court stated: “Nowhere in [HAVA] . . . does Congress indicate an intention that . . . [its voting equipment requirements] may be enforced by private individuals.”<sup>298</sup> But as I have explained, that is not the appropriate test for rights of action under § 1983, for which plaintiffs are *not* required to demonstrate that Congress intended to create a private *remedy* but rather to show that it created an individual right.

The other disability access decision, *Paralyzed Veterans of America v. McPherson*,<sup>299</sup> is more careful in its analysis, though it reaches the same conclusion.<sup>300</sup> After considering and rejecting the argument that *Gonzaga* only applies to statutes enacted under the Spending Clause, the *Paralyzed Veterans* court considered whether HAVA’s disability access requirement unambiguously conferred an individual right.<sup>301</sup> The court acknowledged the question to be a close and difficult one and found that Congress had not “expressly or impliedly” shut the door on § 1983 enforcement.<sup>302</sup> It also found that, given HAVA’s relatively clear mandate on disability access, private enforcement of this requirement would not “strain judicial competence.”<sup>303</sup> The court nevertheless held that this requirement was not enforceable under § 1983 due to the absence of unambiguous rights-creating language.<sup>304</sup> As applied by the court in *Paralyzed Veterans*, then, *Gonzaga* is a highly formalistic test. If the statute uses the term “right,” then it is presumptively enforceable under § 1983; if not, it is presumptively unenforceable—even if, as with HAVA’s disability access requirements, it is very clear whom the statute is designed to benefit. This is a defensible, though debatable, understanding of *Gonzaga*’s test. The alternative understanding is that a statutory requirement is presumptively enforceable under § 1983 so long as it is clear that Congress intended to protect a particular class of individuals. Measured by this less formalistic, more functional standard, HAVA’s disability access requirement would be privately enforceable.

The third provision of HAVA on which the question of private enforceability has arisen concerns the “matching” of information in statewide registration databases against motor vehicle records. It was this provision that was at issue in the Supreme Court’s brief per curiam opinion in *Brunner v. Ohio Republican Party*.<sup>305</sup> In that case, the Ohio Republican Party claimed that Ohio’s Democratic secretary of state was not matching voter registration information for new

---

of *Am. v. McPherson*, No. C06-4670, 2006 WL 3462780, at \*10 (N.D. Cal. Nov. 28, 2006).

297. *Taylor*, 428 F. Supp. 2d 384.

298. *Id.* at 386.

299. *Paralyzed Veterans*, 2006 WL 3462780.

300. *Id.* at \*10.

301. *Id.* at \*8.

302. *Id.* at \*9.

303. *Id.* at \*10.

304. *Id.*

305. 129 S. Ct. 5, 6 (2008) (per curiam).

registrants, as the statute requires.<sup>306</sup> The relevant provision of HAVA reads as follows:

The chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.<sup>307</sup>

It is difficult to see how this language confers an individual right upon anyone, much less how it does so “unambiguously” as *Gonzaga* requires. That is true whether one embraces a formalistic or functional understanding of *Gonzaga*. Not only does the statutory language avoid the term “right,” but the statute does not benefit any specific class of individuals. It simply requires election officials to enter into matching agreements with their states’ motor vehicle authorities, to the extent required to verify accuracy. Even putting aside the fact that the statute mandates only an *agreement*—and not, at least explicitly, the actual matching of voters—the statute is aimed at ensuring that voter registration information is accurate. There is no express indication of whom this provision is designed to benefit. In fact, the provision is aimed *not* at protecting any specific individuals, but rather at protecting the integrity of the system, by preventing voters from registering with false or inaccurate information. This requirement might well protect the public at large, by preventing voting by people who are not eligible (because they are disenfranchised felons or noncitizens, for example) and by preventing double-voting. But it does not unambiguously confer a right upon anyone, as *Gonzaga* demands.

Nevertheless, and quite remarkably, the lower courts found that the Ohio Republican Party had a right to sue under § 1983 to enforce HAVA’s matching requirement.<sup>308</sup> The district court found there to be a private right of action and issued a temporary restraining order against the Ohio secretary of state.<sup>309</sup> Its cursory analysis failed even to consider whether this provision unambiguously conferred an individual right. Instead, the court relied on *Sandusky County Democratic Party*’s conclusion that the provisional voting requirement was privately enforceable, noting that there was no indication that Congress intended to close the door to private litigation.<sup>310</sup> This misses the predicate question of whether the matching provision unambiguously confers an individual right.

A three-judge panel subsequently vacated the district court’s order on the

---

306. *Id.*

307. 42 U.S.C. § 15483(a)(5)(B)(i) (2006).

308. *Ohio Republican Party v. Brunner*, 582 F. Supp. 2d 957, 962 (S.D. Ohio), *aff’d*, 544 F.3d 711 (6th Cir.) (en banc), *vacated*, 129 S. Ct. 5 (2008) (per curiam).

309. *Ohio Republican Party*, 582 F. Supp. 2d at 966.

310. *Id.* at 962 (citing *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 572 (6th Cir. 2004)).

merits,<sup>311</sup> but the en banc Sixth Circuit reversed and reinstated the district court's decision.<sup>312</sup> Judge Sutton's opinion for a majority of the en banc court recites the existing test, acknowledging that *Gonzaga* requires an "unambiguously conferred" right.<sup>313</sup> There is nothing in the above-quoted language that comes close to conferring a right on any individual, much less does so "unambiguously"—and the en banc majority did not really argue to the contrary. Instead, the en banc court upheld the district court's order on the ground that, in this case, there is no individual to whom rights-creating language could conceivably apply.<sup>314</sup> As the court put it, this provision is one that "effectively benefits everyone but no one in particular."<sup>315</sup> Accordingly, Judge Sutton's majority opinion understood the *Gonzaga* test not to apply to this sort of case. Whatever the advantages of this mode of analysis, it is not consistent with *Gonzaga*, which is quite explicit in requiring that the relevant statute unambiguously confer a federal right.<sup>316</sup> Judge Moore convincingly made this point in her dissent from the en banc decision, noting that there is "absolutely no rights-creating language" in HAVA's matching statute.<sup>317</sup> As she rightly concluded, this was an easy case under *Gonzaga*'s demanding standard—one that the district court had clearly gotten wrong.

Although the en banc majority characterized the question before it as a "close" one,<sup>318</sup> it really was nothing of the sort. The conclusion that there is a private right of action to enforce the matching requirement is not defensible under *Gonzaga*. In this respect, the issue before the Supreme Court in *Brunner* was quite straightforward. The Court reversed the Sixth Circuit in a one-paragraph order, addressing the private-right-of-action issue in a single sentence: "Respondents, however, are not sufficiently likely to prevail on the question whether Congress has authorized the District Court to enforce Section 303 [of HAVA] in an action brought by a private litigant to justify the issuance of a TRO."<sup>319</sup> Given the absence of an unambiguously conferred right in HAVA's matching provision, this conclusion is undeniably correct under existing law.

The problem is that existing doctrine is wrong, at least when it comes to disputes implicating the electoral process. That doctrine misses the fact that electoral disputes implicate a different sort of interest than classic individual-rights cases. As Judge Sutton's en banc opinion recognized, they involve quintessentially *public* rights.<sup>320</sup> Existing private-right-of-action doctrine fails to

---

311. *Ohio Republican Party*, 544 F.3d at 715.

312. *Id.* at 720-21.

313. *Id.* at 720 (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002)).

314. *Id.*

315. *Id.*

316. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002).

317. *Ohio Republican Party*, 544 F.3d at 727 (Moore, J., dissenting).

318. *Id.* at 719.

319. *Brunner v. Ohio Republican Party*, 129 S. Ct. 5, 6 (2008) (per curiam) (citing *Gonzaga Univ.*, 536 U.S. at 283); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

320. *Ohio Republican Party*, 544 F.3d at 720.

recognize such non-individuated or collective rights. But as I shall now argue, it should.

#### IV. PUBLIC RIGHTS IN FEDERAL ELECTION LAW

To this point, I have focused on the explanation and application of existing doctrine on private rights of action. As explained in Part II, *Gonzaga* forbids private enforcement of federal statutes through § 1983 absent an unambiguously conferred individual right. As explained in Part III, the Sixth Circuit failed to apply this doctrine in *Ohio Republican Party v. Brunner*. In this Part, I turn from application of existing doctrine to a critique of that doctrine, arguing that existing private-right-of-action doctrine fails to account for the vital role that federal courts play in overseeing U.S. election administration.

There is both a conceptual and practical dimension to the institutional role of federal courts when it comes to elections and, accordingly, to the problems with applying the existing test for private rights of action to cases arising in this area. Conceptually, election cases typically involve non-individuated harms. *Brunner* is a perfect example. The harms that would arise from a failure to comply with HAVA's matching procedures were not ones that would flow to any identifiable individual. They were instead injuries that could only be understood though their aggregate effect on voters and, more broadly, on the electoral system as a whole. This is what Judge Sutton's opinion for the en banc majority was getting at, in referring to HAVA's matching requirement as one that "effectively benefits everyone but no one in particular."<sup>321</sup> That requirement is designed to prevent the systematic skewing of elections, which might occur if ineligible people were to register and vote. While some commentators—myself included—believe those risks are greatly exaggerated, Judge Sutton was correct to recognize that the interests protected by HAVA's matching requirement cannot readily be conceptualized in individualistic terms.<sup>322</sup> This requirement is instead aimed at diffused harms that arise from the aggregate nature of the right to vote, the fact that each person's vote becomes meaningful only when joined with those of like-minded others.<sup>323</sup>

In this sense, the interest at stake in *Brunner* is typical of election cases, which tend to involve systemic rather than merely atomistic injuries.<sup>324</sup> The real problem is not (or at least not just) the harm to individual voters, but rather the risk that an electoral law or practice will disproportionately harm certain groups of voters, thereby threatening to skew electoral outcomes and, more broadly, the distribution of political power. It is in this sense that the interests protected by

---

321. *Id.*

322. *See supra* note 311 and accompanying text.

323. *See* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001).

324. Saul Zipkin makes a similar point in a forthcoming article, arguing that the "structural" harms typically at stake in election cases call for a modified standing inquiry. Zipkin, *supra* note 10 (manuscript at 5).

statutes like HAVA are best conceived as *public* rights. They belong to groups of citizens and to the larger public rather than to specific, identifiable individuals.<sup>325</sup> The idea that there must be an individual right, as *Gonzaga* demands, therefore misses the main interest that is typically at stake in election disputes.<sup>326</sup> The en banc majority in *Ohio Republican Party v. Brunner*<sup>327</sup> was right to recognize that the statute was aimed at protecting such rights. Its error was in thinking that existing doctrine allows for them to be considered.

*Brunner* provides a particularly salient example of a federal statute protecting a public right, given that the harm of which the Ohio Republican Party complained could not readily be understood in individual terms.<sup>328</sup> But it is not an isolated case. Other federal statutory requirements also protect group or collective interests, even though they may protect individual interests as well. Examples include each of the federal statutes discussed in Part III. As I have explained, § 1971's qualification and registration requirements can be understood as protecting the individual right to equal treatment.<sup>329</sup> Accordingly, there is a strong argument that these requirements are privately enforceable, even under the *Gonzaga* test. But these requirements do more than protect the individual right to vote; they also prevent systematic exclusion of certain groups of voters, including racial minorities, students, and women.<sup>330</sup> So too, UOCAVA does not merely protect the individual right to vote for uniformed and overseas voters, but prevents the systemic harm that would arise if these groups of voters were disproportionately excluded. Even provisions that are not clearly targeted to any specific individuals—such as UOCAVA's data collection provision—serve the collective interest of promoting a more fair and inclusive electoral process.

HAVA's various requirements likewise promote a fair electoral process, one that does not systematically skew elections for or against certain groups of voters. An example is HAVA's mandate that states ensure that "only voters who are not registered or who are not eligible to vote are removed."<sup>331</sup> In addition to protecting individuals from being wrongfully purged, this requirement prevents the systemic unfairness that may result from the disproportionate removal of certain groups of voters—like racial minorities or college students—from the

---

325. In arguing for private enforcement of public rights, I disagree with Professor Sunstein, who has argued that statutes protecting collective interests should generally *not* be privately enforceable. Sunstein, *supra* note 87, at 435-36. Although not focused on election statutes, Professor Sunstein argued that "[c]ollective benefits are more often, and sometimes more appropriately, protected through public enforcement mechanisms than through private remedies." *Id.* at 435. This argument may have some currency with respect to statutes protecting other collective interests, but it has very little in the election-law context, for the reasons set forth in the text below.

326. *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

327. 544 F.3d 711 (6th Cir.) (en banc), *vacated*, 129 S. Ct. 5 (2008).

328. *Id.* at 720.

329. 42 U.S.C. § 1971 (2006).

330. *See supra* note 216 and accompanying text.

331. 42 U.S.C. § 15483(a)(2)(B)(ii).

rolls.

The idea that election laws protect collective as well as individual interests is, of course, a familiar one. It recalls the long-running debate among election law scholars over whether judicial review should focus on the protection of individual rights or the promotion of a fair democratic structure.<sup>332</sup> Structuralists have tended to focus on the collective interest in a fair democratic process, which I have called public rights, while proponents of the rights-based perspective have tended to focus on individual interests. Even if one takes a rights-based view of judicial review, however, that does not preclude the recognition of public rights as a basis for private enforcement of federal election statutes.<sup>333</sup> Whatever one's perspective on the appropriate role of courts in *constitutional* cases, it must be acknowledged that, when Congress enacts laws regulating the democratic process, those statutes sometimes protect collective interests as well as individual ones. The doctrine on private rights of actions should, accordingly, allow litigants to sue under § 1983 where a statute protects such public rights, and not just when it protects the individual right to vote. One need not be a structuralist to support the broad enforceability of election statutes, whether they protect individual or collective interests.

I have thus far explained why applying the *Gonzaga* test for private rights of action to election law cases is problematic on a conceptual level—namely, because this test fails to recognize that election statutes often confer public rights rather than just private or individual rights. But there is also a practical dimension to the problem, which concerns the unfortunate consequences that arise from applying the stringent test for private enforcement to election disputes. The *Gonzaga* test does not simply require that the federal statute protect an individual right; it also requires that the right be unambiguously conferred.<sup>334</sup> At least some courts have interpreted this requirement quite formalistically, as demanding that the statute use the word “right” (or some close approximation), as in the cases denying private enforcement of HAVA's disability access requirements.

The practical problem with applying such a demanding test to election statutes relates to the vital role that federal courts now play in overseeing

---

332. Sam Issacharoff and Rick Pildes are the leading proponents of the structural perspective, arguing that democratic politics be thought of as a sort of marketplace, with courts intervening to promote robust political competition. See Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998). On the other side of the debate, Rick Hasen argues that courts should focus on promoting equality rights, rather than focusing on structural concerns, in determining when to intervene in democratic politics. RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 138-56 (2003).

333. The conception of equality that Professor Hasen advances includes a “collective action” principle, prohibiting unreasonable barriers to groups organizing politically. HASEN, *supra* note 332, at 88. This may be capacious enough to accommodate the non-individuated interests protected by statutes like HAVA.

334. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 282 (2002).

American election administration, as described in Part I. Without a strong central election authority (as in India<sup>335</sup>) or a formal role for the judiciary in running elections (as in France<sup>336</sup>), the administration of U.S. elections is largely in the hands of party-affiliated election officials at the state and local level. Since 2000, federal courts have quite properly played a more active role in policing election administration, sometimes through constitutional adjudication and at other times through the enforcement of federal statutes. Without a private right of action, interpretation and implementation of federal election laws is left to the discretion of state and local election officials, many of whom have a conflict of interest because they are affiliated with political parties or elected to office. The only federal entity with the power to enforce those laws would be the U.S. Department of Justice (DOJ), which has a checkered history when it comes to the evenhanded enforcement of election statutes.<sup>337</sup> Leaving DOJ as the sole gatekeeper to the federal courts also tends to impede efforts to obtain authoritative clarification of ambiguous statutes such as HAVA, given the absence of a federal agency empowered to promulgate binding regulations. It also raises the possibility that federal election laws will be enforced only, or at least predominantly, in those instances where doing so will benefit the President's party. Allowing a private right of action thus provides a check on potential partisanship by DOJ, as well as state and local election officials.

It is certainly true that in some areas of law, allowing a private right of action might impede consistent implementation of federal law.<sup>338</sup> That is especially true where Congress has created an administrative agency with interpretive or enforcement authority. For better or for worse, that is not a problem with respect to the federal election statutes discussed in Part III, particularly HAVA, given the absence of an administrative agency with the power to issue binding interpretations of law. In fact, Congress specifically denied the EAC regulatory authority (outside of one narrow area) when it enacted HAVA.<sup>339</sup> Accordingly, private enforcement through § 1983 poses no real danger of muddying the law or impeding administrative enforcement.

Unfortunately, the *Brunner* Court did not consider either the conceptual or practical problems with applying existing private-right-of-action doctrine to election disputes. This is not surprising, given the brevity of the opinion and the compressed timetable on which the case was decided. In fact, the difficulty of thinking through all the ramifications of a decision is one of the main reasons for the Supreme Court being extraordinarily cautious in deciding whether to grant certiorari of pre-election cases.<sup>340</sup> In the appropriate case, the Court should revisit the issue and carve out an exception to the demanding test it has generally

---

335. INDIA CONST. Dec. 1, 2007, art. 329(b).

336. 1958 CONST. art. 58 (Fr.).

337. See Tokaji, *If It's Broke, Fix It*, *supra* note 12, at 798-815.

338. Stewart & Sunstein, *supra* note 92, at 1290-94 (giving examples of such areas of law).

339. 42 U.S.C. § 15329 (2006). That area is mail voting under the NVRA. See *id.* §§ 1973gg-1973gg-10.

340. See Tokaji, *Leave It to the Lower Courts*, *supra* note 17, at 1067, 1094.

prescribed for private enforcement under § 1983. Where federal election statutes are at issue, it should allow enforcement of public (and not just individual) rights and eliminate the requirement that the statute unambiguously confer a right, as *Gonzaga* demands.<sup>341</sup>

I close by considering two possible objections to my suggestion of a more generous test for private enforcement of federal election statutes. The first objection is that it would violate separation of powers. This is a familiar objection, extending at least as far back as Justice Powell's dissenting opinion in *Cannon*.<sup>342</sup> It is for Congress to determine whether and how federal statutes are to be enforced, the argument goes. Accordingly, it would violate separation of powers to allow a private right of action in cases where Congress has not done so.

This argument would have some force in cases where congressional intent to preclude enforcement through § 1983 is clear. In such cases, I would acknowledge that the statute cannot be enforced. But the set of cases with which this Article has been concerned are ones in which congressional intent is not clear—and it is therefore up to the courts to determine whether a private right of action lies. All three of the federal election statutes discussed above fall into this category.<sup>343</sup> Where congressional intent is not clear, courts can and should adopt presumptions to guide the determination whether the statutory requirement is privately enforceable. The Court has done just that, in adopting a general presumption against implication of private rights of action, and in generally refusing to allow § 1983 absent an unambiguously conferred individual right.<sup>344</sup> My argument is not that federal courts should disregard legislative intent, but rather that they should adopt a different presumption in election cases where the intent of Congress is not clear.<sup>345</sup> Should Congress disagree, it is always free to

---

341. *Gonzaga v. Doe*, 536 U.S. 273, 282-83 (2002).

342. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 733 (1979) (Powell, J., dissenting) (asserting that for almost fifty years after *Rigsby*, the only other statute under which the Court had recognized an implied right of action was under the Railway Labor Act of 1926).

343. That includes HAVA, and Senator Dodd's statement that Republicans would not support inclusion of a right of action in the statute (*supra* note 284 and accompanying text) does not alter that conclusion. All this means is that Congress could not agree on whether to include an express right of action, thus throwing the question of its enforceability under § 1983 to the courts.

344. *See supra* Part II.B.

345. One might argue that my proposed revision changes the default rule, of which Congress should be presumed aware when it legislates. In other words, Congress knows that a statute like HAVA will not be enforceable unless it unambiguously confers individual rights. It therefore has reason to expect that requirements will not be privately enforced if they do not confer such a right. But this argument proves too much, for any judicial alteration to the rules governing rights of action (either implied or under § 1983) necessarily changes the default rule against which Congress legislates. Thus, if this argument were accepted, then all the decisions discussed in Part II that modified right-of-action doctrine are necessarily wrong. Moreover, there is little reason to believe that members of Congress are paying such close attention to the changing nuances of private-right-of-action doctrine. Accordingly, the modest change in the rule for private rights action that I

overrule the courts by taking away the right of action that they have allowed.

The other objection to my argument for private enforceability has to do with judicial competence in cases where the legal mandate is open to reasonable competing interpretations. At least in some cases, federal election law disputes may involve vague or ambiguous requirements. State and local election officials may be in a better position to evaluate the harms and benefits that would flow from a particular decision. By contrast, the argument goes, federal judges are likely to be inexperienced in running elections and therefore ill-equipped to balance competing harms. To concretize this problem, it is helpful to return to the set of facts that gave rise to *Brunner*.<sup>346</sup> Recall that the Ohio Republican Party claimed that the secretary of state was violating a statute requiring her to enter into an agreement to “match” voter registration information against other records “to the extent required to enable each such official to verify the accuracy of the information provided.”<sup>347</sup> Even assuming that this statute can be read as a mandate that election officials conduct registration matching, the statute is not very precise about when and how this matching should be done.<sup>348</sup> For example, what if there are minor discrepancies between the information in different databases? Under what circumstances is matching “required” to verify voter registration information? May a state dispense with matching entirely if it has a voter identification requirement to verify voter eligibility, as in Ohio?<sup>349</sup> Those who worry about judicial competence might contend that such judgments should be left to election officials, not made by federal judges.

There is considerable force to the concern that federal judges may act beyond their competence by supplanting the discretionary judgments of state and local election officials. But this is not a persuasive argument against allowing private enforcement of election statutes as a general matter. After all, the standard for determining whether there should be a private right of action under § 1983 already takes into consideration the specificity of the statutory mandate. Under *Golden Transit*, one of the three factors is whether the interest protected is sufficiently specific as to be judicially enforceable.<sup>350</sup> I do not propose that this factor be eliminated from the test. In addition, concerns regarding judicial competence may be taken into consideration when courts get to the merits of a dispute, and not simply when determining whether a right of action exists. In the dispute over the maintenance of state registration databases, for example, a court might well interpret HAVA to leave some discretion in election officials to determine whether and how to conduct matches. They might be more deferential to determinations made by election management bodies that are insulated from partisan politics (as in Wisconsin) than they are to determinations made by party-

---

advocate cannot plausibly be said to upset Congress’s expectations.

346. *Brunner v. Ohio Republican Party*, 129 S. Ct. 5 (2008) (per curiam).

347. *Ohio Republican Party v. Brunner*, 544 F.3d 711, 713-14 (6th Cir.) (en banc) (quoting 42 U.S.C. § 15483(a)(5)(B)(i) (2006)), *vacated*, 129 S. Ct. 5 (2008).

348. See Tokaji, *Voter Registration and Institutional Reform*, *supra* note 19, at 6-7.

349. *Id.*

350. *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 108 (1989).

affiliated state election officials (as in Ohio).<sup>351</sup> Judicial competence is therefore a serious concern, but it does not necessarily counsel against a private right of action; rather it may instead be considered at the merits stage in determining and applying the appropriate legal standard.

#### CONCLUSION

Election cases are different.<sup>352</sup> They frequently involve collective interests, or public rights, that are not easily individuated. And they are cases for which a federal judicial forum is often vital, given the pervasive decentralization and partisanship of American election administration and the absence of an administrative body able to ensure the consistent implementation of the law. In *Brunner*, the Court failed to consider these distinctive aspects of federal election law disputes.<sup>353</sup> In fact, *both* the lower courts *and* the Supreme Court got it wrong in that case—even though they arrived at diametrically opposite conclusions. The lower courts incorrectly applied existing precedent, most notably *Gonzaga*, which clearly foreclosed private enforcement of HAVA's matching requirement given the absence of an unambiguously conferred individual right.<sup>354</sup> But the Supreme Court was also incorrect in failing to reconsider this precedent to account for the especially important role the federal courts play in electoral disputes. Though faithfully applying existing doctrine, the Supreme Court missed the opportunity to correct—or at least limit—a line of precedent that has unfortunate consequences in the realm of election law. In the appropriate case, the Court should revisit *Brunner* and relax the standard for private enforcement of federal election statutes under § 1983.

---

351. Tokaji, *Voter Registration and Institutional Reform*, *supra* note 19, at 8. I have chosen these states because they are ones in which database matching actually arose in 2008 and because they have contrasting methods of selecting their state election authorities. I have elsewhere argued that courts should be more deferential to election management bodies that are insulated from partisan politics than they are to election officials who have conflict of interest by virtue of their party affiliation. See Tokaji, *Lowenstein Contra Lowenstein*, *supra* note 11.

352. See generally Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999) (considering the possibility of special constitutional principles in the context of democratic politics).

353. *Brunner v. Ohio Republican Party*, 129 S. Ct. 5 (2008) (per curiam).

354. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002).