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Circuit Circus: Defying SCOTUS and Disenfranchising Black Voters

CHARQUIA WRIGHT*

Law students are uniformly taught that federal circuit courts cannot and will not overrule Supreme Court precedent under any circumstance. This is not true. They can, with little fear of corrective mechanisms like en banc oversight, Supreme Court review, or congressional override. And in certain circumstances, they are bound to do so by the law of the circuit. Under the prudential law of the circuit doctrine in-circuit precedent binds circuit courts, even in scenarios where conflicting long-standing Supreme Court precedent exists. Circuits can only depart from erroneous circuit precedent if a later-decided SCOTUS or en banc decision obviates the circuit precedent.

This means that if in the year 2000, a circuit court refuses to obey an on-point Supreme Court precedent decided in 1997, then the circuit precedent, not the Supreme Court precedent, binds all later circuit panels in that circuit until the Supreme Court, or an en banc panel takes up the issue again or until Congress overrides the circuit precedent. However, these fail-safe apparatuses offer little deterrence value. Estimates of an individual panel's risk of SCOTUS and en banc review are as low as .002% and .008% respectively. In at least one case involving black vote denial plaintiffs in the Sixth Circuit, later-decided SCOTUS precedent was insufficient to override the precedential weight of circuit precedent despite irreconcilably conflicting with earlier circuit precedent.

Jurists believe the law of the circuit rule to be necessary to prevent intracircuit splits, and to encourage efficiency and robust discussion of an issue between circuits prior to SCOTUS review (otherwise known as percolation). Though intracircuit unity, judicial efficiency, and percolation are valuable prudential concerns, the current interpretation and in some cases the express language of the law of the

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circuit policy violates established Supreme Court precedent, which forbids lower federal courts from overruling the Supreme Court under any circumstance. Because this concept has become so deeply engrained in the legal conscience, scholars rarely engage its problematic aspects, allowing it to hide in plain sight.

Particularly worrisome is the application of the law of the circuit to statutory interpretation in the vote denial context: ruling that a certain class of plaintiffs lacks an implied private right of action to sue for vote denial under the Civil Rights Act bars all future Civil Rights Act plaintiffs from judicial recourse under that Act. The law of the circuit compounds this danger because circuit panels are prudentially bound by circuit precedent, even if that precedent conflicts with binding Supreme Court precedent, creating preventable problems that carry grave consequences.

*In light of the Supreme Court's most recent ruling in *Brnovich v. DNC* severely limiting the application of the vote denial provisions of § 2 of the Voting Rights Act, the Civil Rights Act of 1957 is emerging as one of the last bulwarks against vote denial. However, should the Sixth Circuit's SCOTUS defiance continue in vigor, we may continue to see further the demise of the remnants of the omnibus civil rights era legislation undergirding our enfeebled democracy.*

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I. INTRODUCTION

Federal Courts’ jurisdictional practices are often the site of racially disparate biases.¹ This procedural discrimination ordinarily goes unnoticed, obscured behind the web of statutory and constitutional laws that determine who may sue in federal court, and consequently establish who is visible in the eyes of federal law.² These laws do not exist in a vacuum. Other prudential rules interact with them and affect their implementation. Yet, some of these rules remain

¹ Conference, *The Supreme Court, Racial Politics, and the Right to Vote: Shaw v. Reno and the Future of the Voting Rights Act*, 44 AM. U. L. REV. 1, 45 (1994). Discussing race bias in standing determinations, Pamela Karlan commented that in civil rights cases, courts often apply “‘universal white persons’ standing,’ which means that white people have standing to challenge anything the Government does that they don’t like involving issues of racial justice.” *Id.* Lower courts are forced to abide by this biased ruling which prejudices minority plaintiffs at the standing phase in lower courts. *Id.*; Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 311–12 (2002) (“The Court apparently thinks that concrete, particularized harm is less essential in cases alleging that government programs impermissibly benefit racial minorities. In such situations, rigorous standing requirements do not apply.”). Girardeau Spann explains that the Supreme Court’s standing decisions have had a disparate impact on minority plaintiffs challenging systemic oppression. See Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1455 (1995). He explains that,

[i]n cases in which the plaintiff claims to have been harmed by a systemic practice that has a racially discriminatory impact, rather than by an isolated act of racial discrimination, the Supreme Court has typically denied standing if the plaintiff was a member of a racial minority group, but has granted standing if the plaintiff was white.

Id. Spann explains that the Supreme Court frequently uses doctrinal distractions to permit school resegregation. See Girardeau A. Spann, *The Conscience of a Court*, 63 U. MIA. L. REV. 431, 467–68 (2009). He lists several such distractions, including: “standard-of-review debate; the nature of qualifying diversity; the nature of narrow tailoring; the relevance of racial balancing; the effect of societal discrimination; the distinction between de facto and de jure discrimination; and the relevance of colorblindness.” *Id.*; see also Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 VAND. L. REV. 297, 307 (2015) (“[W]hite plaintiffs challenging racial classifications are subject to more lenient rules than minority plaintiffs challenging systemic racial injuries, which generate perceptions of racial bias in the federal judicial system.”); Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2288 (2018) (“This Article also brings a contemporary civil rights issue into dialogue with the decades-long debate about whether abstention is legitimate. If the doctrine permits systemic and structural irreparable constitutional harm to persist without intervention, then, absent a well-supported justification, *Younger* abstention is complicit in these practices, and its legitimacy is in a period of decline.”).

² See Spann, *supra* note 1, at 1455.

understudied to the detriment of the minoritized populations most likely to fall victim to their misapplication.

One such prudential rule is the law of the circuit. The law of the circuit—the horizontal *stare decisis* policy within a circuit—demands that a circuit panel follow prior in-circuit precedent absent a temporally intervening statute, en banc decision, or Supreme Court decision.³ This rule interfaces with implied private right of action jurisprudence in ways that disadvantage the groups that are least likely to be granted an implied private right of action and afforded a fair trial.⁴

Take for example a group of voters in Northeastern Ohio subjected to unnecessarily stringent voting requirements. They were denied relief under the Civil Rights Act of 1957 (CRA) in a case called *Northeastern Ohio Coalition for the Homeless (NEOCH) v. Husted*.⁵ In this case, the Sixth Circuit held that the Attorney General is the only litigant capable of bringing suit under this provision of the CRA.⁶ The circuit panel arrived at this conclusion, not by using the Supreme Court's test for determining whether an implied private right of action exists, but by citing to a circuit court decision, *McKay v. Thompson*, that completely ignores the Supreme Court's implied private right of action test and adopts its own test to determine whether a private plaintiff can sue.⁷

The *NEOCH* panel's gaffe cannot simply be attributed to incompetence or apathy. Nor is it a legal anomaly. Far from aberrational, the actions of the

³Michael Duvall, *Resolving Intra-Circuit Splits in the Federal Courts of Appeal*, 3 FED. CTS. L. REV. 17, 18, 20 (2009) (collecting cases, including *Union of Needletrades, Indus. & Textile Emps. v. INS*, 336 F.3d 200, 210 (2d Cir. 2003); *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc); *Jones v. Angelone*, 94 F.3d 900, 905 (4th Cir. 1996); *Williams v. Ashland Eng'g Co.*, 45 F.3d 588, 592 (1st Cir. 1995); *Nationwide Ins. Co. v. Patterson*, 953 F.2d 44, 46 (3d Cir. 1991); *Brown v. First Nat'l Bank in Lenox*, 844 F.2d 580, 582 (8th Cir. 1988); *Salmi v. Sec'y of Health & Hum. Servs.*, 774 F.2d 685, 689 (6th Cir. 1985); *Mother's Rest., Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1573 (Fed. Cir. 1983); *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc); *Brewster v. Comm'r*, 607 F.2d 1369, 1373 (D.C. Cir. 1979); *United States v. Lewis*, 475 F.2d 571, 574 (5th Cir. 1972)). The law of the circuit in the First, Second, Seventh, Tenth and D.C. Circuits allows individual panels to overturn prior Circuit precedent on the condition that such decisions must be circulated to all active judges for their approval prior to publishing. Amy E. Sloan, *The Dog that Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 *FORDHAM L. REV.* 713, 726–27 (2009). In every circuit except the Second and Seventh Circuit, formal en banc hearings far outnumber en banc hearings. *Id.* at 728. Informal en banc decisions that are not approved by a majority of the circuit court judges will still be valid but will go unpublished. *See United States v. Walton*, 255 F.3d 437, 443 (7th Cir. 2001) (citing *In re Bentz Metal Prods. Co.*, 231 F.3d 1029, 1033 (7th Cir. 2000)); *United States v. Allen*, 895 F.2d 1577, 1580–81 n.1 (10th Cir. 1990).

⁴*See supra* note 1.

⁵*Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 638 (6th Cir. 2016).

⁶*Id.* at 629–30.

⁷*McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000).

NEOCH panel were deemed mandated by the of the law of the circuit,⁸ which states that:

A panel of this court may not overturn binding precedent because a published prior panel decision “remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.”⁹

The law of the circuit allows circuit courts to flout Supreme Court precedent in two ways. First, courts and commentators read “intervene” to mean temporally intervene, that is to say only Supreme Court or en banc rulings made *after* an otherwise binding in-circuit decision may overrule an in-circuit court decision.¹⁰ Second, even when SCOTUS cases have temporally intervened, circuit judges still occasionally defer to conflicting in-circuit precedent, as if it merited super-deference.¹¹ This is due, in no small, part to the law of the circuit’s effect on the legal conscience.

For example, in the 2016 *NEOCH* case, the Sixth Circuit failed to apply the Supreme Court’s implied private right of action test for determining whether private enforcement is available under the CRA, even though SCOTUS reaffirmed this test in 2002,¹² two years *after* the errant circuit court decision, *McKay*, that the *NEOCH* court held was binding.¹³ Even the presence of subsequent inconsistent Supreme Court precedent mandating a completely different methodology than that outlined by the circuit panel was insufficient to overcome the *NEOCH* panel’s allegiance to in-circuit precedent.¹⁴

Because the Supreme Court denied certiorari, and the Sixth Circuit denied plaintiffs’ request for an en banc hearing, the plaintiffs in *NEOCH* were unable

⁸ Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1018 (2003) (“Thus, while a litigant may make persuasive arguments for overruling precedent, the panel is obliged by circuit rule to ignore them.”).

⁹ *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 630 (internal quotation marks omitted) (quoting *United States v. Elbe*, 774 F.3d 885, 891 (6th Cir. 2014)).

¹⁰ *See Miller v. Gammie*, 335 F.3d 889, 892–93 (9th Cir. 2003) (en banc) (“We now clarify our law concerning the sometimes very difficult question of when a three-judge panel may reexamine normally controlling circuit precedent in the face of an intervening United States Supreme Court decision, or an intervening decision on controlling state law by a state court of last resort. We hold that in circumstances like those presented here, where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the *later and controlling authority*, and should reject the prior circuit opinion as having been *effectively overruled*.” (emphasis added)); Barrett, *supra* note 8, at 1017–18; sources cited *supra* note 3.

¹¹ *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 630.

¹² *See infra* note 89 and accompanying text.

¹³ *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 630.

¹⁴ *See id.*

to advance their CRA claims.¹⁵ Supreme Court statutory interpretation precedent was suspended as to the *NEOCH* litigants before their claim had ever ripened due to the law of the circuit.¹⁶

The Supreme Court has long held that lower courts are not free to overrule Supreme Court precedent, and that both the holding and methodology of SCOTUS precedent bind lower federal courts.¹⁷ In practice, however, circuit panels sometimes disregard Supreme Court precedent in observance of the law of the circuit as was done by the panel in *NEOCH*.¹⁸

Unlike the Supreme Court which may overrule its own precedents in certain circumstances,¹⁹ and the federal district court, which may overrule its own

¹⁵ *Id.* at 612, *cert. denied*, 137 S. Ct. 2265 (2017).

¹⁶ *Id.* at 630.

¹⁷ *See, e.g.*, *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (“[I]t is this Court’s prerogative alone to overrule one of its precedents.” (citing *United States v. Hatter*, 532 U.S. 557, 567 (2001))); *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (“[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.”); *see also* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2025 (1994) (“A lower court must *always* follow a higher court’s precedents.”); Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 203 (2014) (noting that “the American federal system” is one that “treat[s] vertical precedent as absolutely binding” and that “[w]here a Supreme Court holding applies to a pending dispute, an inferior court has only one available course of action”); Paul W. Werner, Comment, *The Straits of Stare Decisis and the Utah Court of Appeals: Navigating the Scylla of Under-Application and the Charybdis of Over-Application*, 1994 BYU L. REV. 633, 639 (explaining that “stare decisis requires absolute adherence to decisions rendered by higher courts”). At the same time, scholars do in effect acknowledge (and often lament) that narrowing from below happens. Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 926 (2016); JAMES E. PFANDER, *ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES* 1–2, 38–44 (2009) (historically analyzing and supporting the proposition that “inferior tribunals must generally follow the precedents of their judicial superior”). *But see* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 856–60 (1994); Jennifer M. Bandy, Note, *Interpretive Freedom: A Necessary Component of Article III Judging*, 61 DUKE L.J. 651, 652–53 (2011).

¹⁸ *See* Re, *supra* note 17, at 921 (“Lower courts supposedly follow Supreme Court precedent—but they often don’t. Instead of adhering to the most persuasive interpretations of the Court’s opinions, lower courts often adopt narrower readings.”); *see also* Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover’s Justice Accused*, 7 J.L. & RELIGION 33, 82 (1989) (“But when push comes to shove, the judge may not only remove himself from the case, he may declare himself not to be bound as a judge by a lawless precedent. He may, in effect, ‘overrule’ (or, perhaps a better term, given the relationship of the courts, ‘underrule’) *Roe v. Wade*.”); *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 630 (“A panel of this court may not overturn binding precedent because a published prior panel decision ‘remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.’ *McKay v. Thompson* therefore binds this panel. The plaintiffs may not bring an action for a violation of § 10101(a).” (citations omitted) (quoting *United States v. Elbe*, 774 F.3d 885, 891 (6th Cir. 2014))).

¹⁹ *Bosse*, 137 S. Ct. at 2.

precedents,²⁰ the law of the circuit policy dictates that federal circuit courts *may not* overrule an in-circuit decision that has been wrongly decided, simply on the basis that it is wrong.²¹

Complicating matters further, the scale of this problem is nearly impossible to determine because circuit courts do not ordinarily announce their insubordination, which makes searching for it on a search engine unfeasible. Only jurists intimately familiar with the relevant case law will see these mistakes, leaving the lay populations affected totally oblivious.²²

Supporters justify the law of the circuit rule, in part, asserting that the first panel to handle an issue necessarily does so exhaustively, considering all binding precedent.²³ The *NEOCH* case study shows that this presumption is not always warranted.²⁴ Yet, the law of the circuit makes no provisions for when a circuit court of first review fails to consider relevant binding Supreme Court precedent.²⁵

Reliance interests, some might argue, make reliance on erroneous circuit precedent proper given the federal circuit court's unique role as the de facto court of last resort for most litigants.²⁶ As the argument goes, making horizontal precedent—precedent created by the court reviewing the case—binding ensures predictability within the circuit.²⁷ While this may be true concerning transactional or property issues,²⁸ where civil rights are concerned, fundamental fairness predominates over all other considerations.²⁹ Although circuit panels frequently disobey this precept by disingenuously distinguishing from otherwise on-point precedent,³⁰ in some instances, it is not possible to distinguish a case from erroneous precedent, particularly where categorical determinations are involved, as is true in the statutory interpretation of implied private rights of action.³¹

²⁰ Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 800 (2012).

²¹ See *supra* note 3.

²² See Re, *supra* note 17, at 949–50.

²³ See Daniel Kazhdan, *The Federal Circuit Should Be More Tolerant of Intra-Circuit Splits*, 26 FED. CIR. B.J. 105, 142–43 (2016).

²⁴ See *infra* note 89 and accompanying text.

²⁵ See Kazhdan, *supra* note 23, at 146.

²⁶ See *infra* note 47 and accompanying text.

²⁷ Kazhdan, *supra* note 23, at 145.

²⁸ *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“Considerations of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases . . . involving procedural and evidentiary rules.” (citations omitted) (citing *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965))).

²⁹ See *infra* Part III.

³⁰ Re, *supra* note 17, at 925–26; see Emery G. Lee III, *Precedent Direction and Compliance: Horizontal Stare Decisis on the U.S. Court of Appeals for the Sixth Circuit*, 1 SETON HALL CIR. REV. 5, 5–6 (2005).

³¹ Barrett, *supra* note 8, at 1021–22.

Taken seriously, the law of the circuit doctrine is very rigid³² and can be read to overrule Supreme Court precedent. Circuit courts have on occasion pledged undying allegiance to erroneous circuit court precedent that flatly rejects decades-old Supreme Court doctrine.³³ Because defiance of this magnitude can be particularly dangerous in the civil rights context,³⁴ it is important to problematize the entrenchment of the law of the circuit in instances where no viable reading of Supreme Court precedent supports the circuit court's holding or where substantive fairness dictates that nullification is in order.

In that same vein, it is important that the wording of the law of circuit be modified to reflect the supremacy of Supreme Court doctrine. When prior circuit precedent and Supreme Court doctrine conflict, circuit judges should not accord super-deference to the precedent in their circuit, especially when making crucial decisions affecting fundamental rights. The Supreme Court and circuit courts have the responsibility to revise this practice.

Existing corrective mechanisms, such as Supreme Court and en banc review, proved ineffectual for the *NEOCH* plaintiffs. Should this gaffe repeat itself in the voting rights context or elsewhere, it will not only work a lasting injustice upon plaintiffs, but also upon democratic legitimacy and democracy itself.

Despite the absurd and sometimes grave consequences of the rigid application of the law of the circuit doctrine to the civil rights context, there has been little scholarly discussion on the issue.³⁵ None of the law of the circuit

³² See Mead, *supra* note 20, at 789 (“Through a particularly rigid form of horizontal stare decisis, the circuit courts have chosen to adopt ‘law of the circuit,’ where a prior reported decision of a three-judge panel of a court of appeals is binding on subsequent panels of that court. In contrast, the practice among federal district courts is more varied and uncertain, but routinely involves little or no deference to the prior precedent of that same district court. . . . I argue that district courts can and should adopt stare decisis practices similar to their circuit court counterparts, based on the policies underlying stare decisis: predictability, fairness, appearance of justice, judicial economy, and collegiality.”).

³³ See *infra* note 89 and accompanying text.

³⁴ See *supra* note 1.

³⁵ Wyatt G. Sassman, *How Circuits Can Fix Their Splits*, 103 MARQ. L. REV. 1401, 1401–08 (2020) (“Few scholars have discussed the doctrine at all, and no one has yet connected it to the longstanding and ongoing debates about the negative effects of relying on the Supreme Court to address conflicts.”). Sassman states further, “I therefore propose relaxing the law of the circuit doctrine when a circuit’s prior decision has resulted in a conflict with another circuit.” *Id.* at 1401. He briefly discusses the Civil Rights Act in the introduction. He uses the Civil Rights Act of 1957 as an example of a circuit split, focusing mostly on the circuit split caused by the Sixth Circuit panel’s errant Civil Rights Act decision, rather than the invisibility aspect and the defiance of Supreme Court that I center in this Article. *Id.* at 1403–06; see also Paul D. Carrington, *The Obsolescence of the United States Courts of Appeals: Roscoe Pound’s Structural Solution*, 15 J.L. & POL. 515, 519 (1999) (“Because the law of the circuit is transitory and illusory, it has limited marginal value.”); Mead, *supra* note 20, at 788 (“Despite the significant role horizontal stare decisis plays in litigation, legal practitioners and scholars have paid relatively little attention to

scholarship centers the invisibility of civil rights plaintiffs at the intersection of civil rights jurisprudence and federal courts jurisprudence.³⁶ This Article seeks to fill that gap by providing a comprehensive analysis of the law of the circuit's effect on implied private right action determinations under the Civil Rights Act of 1957.³⁷ By locating the law of the circuit debate within the implied private right of action literature, this Article questions the wisdom of the law of the circuit and argues that the law of the circuit must be modified to except scenarios where lower court defiance of Supreme Court precedent will result.

Part II of this Article highlights the facial and interpretive contradictions between the law of the circuit and the Supreme Court's vertical stare decisis doctrine. Part III illustrates how this contradiction has materialized in vote denial challenges brought under the Civil Rights Act of 1957. Part IV suggests ways that the law of the circuit can be brought into alignment with binding Supreme Court precedent.

II. PROBLEMATIZING THE LAW OF THE CIRCUIT DOCTRINE

The Supreme Court has reiterated the supremacy of its rulings over lower courts.³⁸ Most recently, in *Bosse v. Oklahoma*, the Supreme Court held that lower courts are incapable of overturning Supreme Court precedent and that SCOTUS precedent is binding as to the holding and the reasoning of an

horizontal stare decisis at levels outside the Supreme Court. Some have studied narrow issues related to appellate courts.”); Caminker, *supra* note 17, at 820–21; Paulsen, *supra* note 18, at 83. See generally Kazhdan, *supra* note 23 (explaining that the law of the circuit should be relaxed in the Federal Circuit); Rebecca Hammer White, *Time for a New Approach: Why the Judiciary Should Disregard the “Law of the Circuit” when Confronting Nonacquiescence by the National Labor Relations Board*, 69 N.C. L. REV. 639 (1991); Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 LOY. L. REV. 535 (2010) (arguing that the law of the circuit should be abolished).

³⁶RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 23 (2001) (noting that rights in the United States “are almost always procedural (for example, to a fair process) rather than substantive (for example, to food, housing, or education)”). See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1052&context=uclf> [<https://perma.cc/J5JU-K45Z>].

³⁷52 U.S.C. § 10101(a)(2)(B) was formerly § 42 U.S.C. § 1971(a)(2)(B) and is referred to as such in much of the case law. Courts and scholars often refer to the vote denial prohibitions of the Civil Rights Act of 1957 as the Voting Rights Act of 1965 (52 U.S.C. § 10301 formerly cited as 42 U.S.C. § 1973). This is inaccurate. The two statutory schemes have different names.

³⁸See, e.g., *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (“[I]t is this Court’s prerogative alone to overrule one of its precedents.” (alteration in original) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997))).

opinion.³⁹ This is but one of the latest reminders from the Court that its rulings are to be respected above all others in federal law decisions.⁴⁰

A. The Law of the Circuit Diminishes the Supreme Court's Sole Authority to Overrule Its Decisions

Despite the Supreme Court's warning against circuit court insubordination, the law of the circuit allows circuits to circumvent SCOTUS supremacy. In the Sixth Circuit, the law of the circuit states: "Absent a change in the substantive law or an intervening Supreme Court decision which alters the outcome of those cases, it is inappropriate for a panel in this Circuit to break from earlier, controlling precedent."⁴¹ In the law of the circuit jurisprudence, an intervening opinion must be decided subsequent to the otherwise controlling circuit precedent in order to carry the day.⁴² Circuit precedent "can be effectively overruled by subsequent Supreme Court decisions that 'are closely on point,' even though those decisions do not expressly overrule the prior circuit precedent."⁴³

This means that "absent a[] [temporally] intervening inconsistent opinion from the U.S. Supreme Court," a circuit court must follow on point in-circuit precedent, which leaves open the possibility that a circuit court will be bound by in-circuit precedent that defied then-existing Supreme Court precedent.⁴⁴

³⁹*Id.* at 2–3. In *Bosse*, the Supreme Court overturned an Eighth Circuit decision allowing a capital sentencing jury to consider victim's family members' opinions on the appropriate sentence in direct violation of Supreme Court precedent prohibiting such an admission. *See generally id.*

⁴⁰*Id.* at 2; *see also* *Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 n.5 (2020) (Kavanaugh, J., concurring in part) ("To be clear, the *stare decisis* issue in this case is one of horizontal *stare decisis*—that is, the respect that this Court owes to its own precedents and the circumstances under which this Court may appropriately overrule a precedent. By contrast, vertical *stare decisis* is absolute, as it must be in a hierarchical system with 'one supreme Court.' In other words, the state courts and the other federal courts have a constitutional obligation to follow a precedent of this Court unless and until it is overruled by this Court." (first quoting U.S. CONST. art. III, § 1; and then citing *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989))).

⁴¹*Baynes v. Cleland*, 799 F.3d 600, 616 (6th Cir. 2015); *see also* *Salmi v. Sec'y of Health & Hum. Servs.*, 774 F.2d 685, 689 (6th Cir. 1985) (citing *Timmreck v. United States*, 577 F.2d 372, 376 n.15 (6th Cir.1978)).

⁴²*See, e.g.*, *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc) ("[W]hen existing Ninth Circuit precedent has been undermined by subsequent Supreme Court decisions, this court may reexamine that precedent without the convening of an *en banc* panel." (citing *LeVick v. Skaggs Cos.*, 701 F.2d 777, 778 (9th Cir.1983))).

⁴³*Id.* (quoting *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1123 (9th Cir. 2002)).

⁴⁴*Lewis v. Humboldt Acquisition Corp.*, 634 F.3d 879, 879 (6th Cir. 2011), *rev'd on other grounds*, 681 F.3d 312 (6th Cir. 2012) (en banc). Here we see the Sixth Circuit has using the terms "inconsistent Supreme Court precedent" and "intervening Supreme Court precedent" interchangeably to mean temporally intervening. *Id.*

This rule leaves no exception for circuit precedent that flatly ignores Supreme Court precedent.

B. *Justifications for the Law of the Circuit*

Despite the Court's assertion of supremacy over lower courts, almost every federal circuit abides by a version of the law of the circuit that does not make an exception for inconsistencies with prior, as opposed to later-intervening, Supreme Court doctrine.⁴⁵ In every federal court of appeals, the law of the circuit dictates that a circuit panel cannot overrule a prior circuit panel unless a later-occurring in-circuit en banc, a later-occurring Supreme Court decision, or a later-occurring federal statute intervenes to make such a ruling necessary.⁴⁶ This severely limits the instances in which a later circuit panel can overrule prior circuit precedent because both en banc and Supreme Court decisions are rarities.⁴⁷ Although statutorily implied private rights of action may be modified by legislation, Congress tends to be very slow-moving and often unwilling to revisit groundbreaking civil rights legislation frequently born of fleeting comradery, fragile alliances, and politically singular compromises under transient geopolitical circumstances.⁴⁸ Even in instances where prior circuit

⁴⁵ See *supra* notes 3, 32–34.

⁴⁶ See *supra* notes 3, 32–34 and accompanying text. Four circuits allow informal en banc proceedings to overrule precedent. *Id.* This informal procedure is only rarely used. *Id.* Some circuits allow panels to circulate new rulings that depart from circuit precedent. These new rulings do not always become precedential. Circuit policies vary as to their precedential affect.

⁴⁷ En banc decisions are extremely rare. See *United States v. Am.-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960) (“*En banc* courts are the exception, not the rule. They are convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit.”). The Supreme Court rarely grants certiorari to hear a case. *Supreme Court Procedure*, SCOTUSBLOG, <https://www.scotusblog.com/reference/educational-resources/supreme-court-procedure/> [<https://perma.cc/GB63-YAJU>] (“Of the 7,000 to 8,000 cert. petitions filed each Term, the court grants cert. and hears oral argument in only about 80.”); Sassman, *supra* note 35, at 1420 (“Based on these numbers, a panel of a federal appellate court that decided a case on the merits in 2016 risked about a .002% chance that the Supreme Court would review its work.”).

⁴⁸ See e.g. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523–24 (1980) (“Translated from judicial activity in racial cases both before and after *Brown*, this principle of ‘interest convergence’ provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites. . . . [T]he decision in *Brown* to break with the Court’s long-held position on these issues cannot be understood without some consideration of the decision’s value to whites, not simply those concerned about the immorality of racial inequality, but also those whites in policymaking positions able to see the economic and political advances at home and

panels have blatantly disregarded Supreme Court precedent, later in-circuit panels are bound by their decision.⁴⁹

Circuits have adopted this prudential rule in order to encourage doctrinal consistency within the circuit.⁵⁰ Fearing that creating an intra-circuit split would foment chaos, circuits only allow a reviewing panel to depart from earlier precedent when an inconsistent Supreme Court or en banc decision intervenes, making a contrary ruling necessary.⁵¹ Following this logic, the law of the circuit is necessarily rigid in order to preserve intra-circuit uniformity.⁵² Circuits also believe that this rule increases judicial efficiency by disincentivizing duplicative in-depth treatment of an issue,⁵³ and percolation by encouraging robust debate among the circuits on salient issues.⁵⁴

While appeals to judicial efficiency, intra-circuit uniformity, and percolation seem reasonable, they rest on the premise that it is usually “more

abroad that would follow abandonment of segregation. First, the decision helped to provide immediate credibility to America’s struggle with Communist countries to win the hearts and minds of emerging third world peoples. At least this argument was advanced by lawyers for both the NAACP and the federal government.”).

⁴⁹ See *Ne. Ohio Coal. for the Homeless v. Husted*, 847 F.3d 612, 630 (6th Cir. 2016).

⁵⁰ Kazhdan, *supra* note 23, at 145; Duvall, *supra* note 3, at 21; Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235, 1263 (2004); Emily R. Waldman, *Civil Procedure, The D.C. Circuit Review September 1995–August 1996*, 65 GEO. WASH. L. REV. 677, 686 (1997) (“The D.C. Circuit’s adherence to law-of-the-case and law-of-the-circuit reflects the court’s commitment to consistent decision making.”).

⁵¹ Kazhdan, *supra* note 23, at 144–45.

⁵² *Id.* at 146.

⁵³ John B. Oakley, *Precedent in the Federal Courts of Appeals: An Endangered or Invasive Species?*, 8 J. APP. PRAC. & PROCESS 123, 128 (2006) (“Screening systems suppress reevaluation by fast-tracking later like cases—indeed, this is what makes strict rules of the law of the circuit appealing as an efficiency device. But even when a later panel not only encounters but identifies a putatively binding precedent that it regards as unsound, there are substantial disincentives to devoting scarce judicial time to an overt challenge to the arguably mistaken precedent in the thin hope of provoking a rehearing en banc. There are also substantial incentives to distinguish the ostensible precedent on shaky if not candidly spurious grounds, and, because such distinction will largely turn on how the facts are characterized, to bury this departure from or narrowing of precedent in the nether world of cases decided by summary disposition or unpublished opinion.”).

⁵⁴ Sassman, *supra* note 35, at 1447–48 (“The idea behind percolation is that the federal courts benefit from allowing competing decisions to accumulate on an issue before the Supreme Court finally grants certiorari and resolves it. . . . They also argue that percolation improves decisionmaking in the courts of appeals by allowing courts to consider the views of other circuits. And they argue that percolation forces the lower appellate courts to take their job more seriously, since their decisions may remain law for longer than necessary and their views may be seriously considered by the Supreme Court. Finally, advocates argue that percolation helps conserve the Court’s administrative and political capital by justifying its decision to wait to review certain issues. Percolation may also serve federalism values.” (footnotes omitted)).

important that the applicable rule of law be settled than that it be settled right.”⁵⁵ This maxim—which normally justifies the Supreme Court’s horizontal stare decisis policy—does not absolve circuit courts of the obligation to follow Supreme Court precedent. As stated before, circuit courts have the affirmative duty to abide by Supreme Court precedent.⁵⁶ Additionally, they are charged with the task of “getting it right,” given that they are the de facto court of last resort on most issues.⁵⁷ Furthermore, the preference for settled law over correct and just law is highly questionable where the fundamental rights of marginalized populations are at stake and where path-dependent lock-in⁵⁸ may realistically disenfranchise thousands, if not millions.

The next section discusses the risks of applying the rigid law of the circuit doctrine to implied private right of action inquiries in vote denial cases brought under the Civil Rights Act of 1957.

III. THE LAW OF THE CIRCUIT PROPAGATES INJUSTICE

The following case study illustrates that the law of the circuit has the effect of compounding the injury of wrongly decided cases by binding later circuit panels to precedent that is incorrect. This harm is particularly noxious in

⁵⁵ *Kimble v. Marvel Ent., LLC*, 135 S. Ct. 2401, 2409 (2015) (internal quotation marks omitted) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)) (discussing the logic of horizontal stare decisis at the Supreme Court level).

⁵⁶ See *supra* note 38.

⁵⁷ Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 484 n.138 (2012) (“[B]ecause they will often have the last word on the resolution of a particular legal issue, percolation ‘encourages the lower courts to act as responsible agents’ in developing legal doctrine.” (quoting Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court’s Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 719 (1984))); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1375 (1995) (“[F]ederal courts of appeals are the courts of last resort for almost forty-nine thousand appeals every year”); Barrett, *supra* note 8, at 1046–47 (“The Court’s rules explicitly state that it will not grant review simply to correct error in the lower court’s decision.” (first citing Sup. Ct. R. 10; then citing ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 221 (6th ed. 1986))).

⁵⁸ S. Jay Plager & Lynne E. Pettigrew, *Rethinking Patent Law’s Uniformity Principle: A Response to Nard and Duffy*, 101 NW. U. L. REV. 1735, 1752 (2007) (“[B]ecause the common-law decision process is based on precedent, it suffers from ‘path dependency.’ As they explain it, path dependency is a consequence of the order in which cases raising similar legal issues come before an appellate court. If case *A* comes up first, and one party’s side is better lawyered than the other, the rule of law favoring the better-lawyered side will prevail. Thereafter, because of the binding precedent, all cases having similar facts will be decided for the side that won in the first case.”).

statutory interpretation cases involving implied private rights of action where it is often impossible to distinguish later rulings from earlier rulings.⁵⁹

A. *Civil Rights Act Voter Suppression Challenges and the Law of Circuit*

The next case study discusses the tension between substantive civil rights law, procedural implied private right of action law, and the prudential law of the circuit. This tension comes to a head when the law of the circuit dictates that private plaintiffs be denied an implied private right of action to sue for vote denial under the Civil Rights Act of 1957 (CRA).⁶⁰ In order to understand the repercussions of applying the law of the circuit to implied private right of action determinations under the CRA, it is important to understand the history of vote denial in the United States.

1. *The Importance of the Franchise*

Voting is crucial to determining who matters and who does not, who is disposable and who is not. Indeed, voting rights are “fundamental political rights . . . preservative of all rights.”⁶¹ If entire sectors of the population, particularly sectors that have been historically oppressed, are categorically or even disproportionately excluded from the vote, they can easily fall into spaces of exception where the law is suspended indefinitely as to those belonging to that group.⁶²

⁵⁹ For example, if a circuit court denies all private plaintiffs standing to bring a certain type of claim, then every later panel deciding cases containing that claim must throw the claim out for lack of jurisdiction whenever the plaintiff is private, irrespective of conflicting Supreme Court precedent that predates the errant circuit court decision. *Cf.* Barrett *supra* note 8, at 1022 (“Cases interpreting texts are often difficult to distinguish; thus, they too can have a significant impact on later litigants. If a court holds that ‘mere possession’ of a gun qualifies as ‘use’ of it under the federal drug trafficking statute, later defendants cannot persuasively argue that ‘use’ require ‘active employment.’”).

⁶⁰ See *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 630 (6th Cir. 2016).

⁶¹ *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (internal quotation marks omitted) (“By denying some citizens the right to vote, such laws deprive them of a ‘fundamental political right . . . preservative of all rights.’” (quoting *Reynolds v. Sims*, 377 U.S. 533, 562 (1964))).

⁶² For example, following the Civil War, newly freed black people were able to exercise the franchise for the first time. ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877*, at 228–63 (1988). They elected black congressmen who passed groundbreaking norms such as the Civil Rights Act, among others. *Id.* However, once blacks were disenfranchised by racially discriminatory grandfather clauses, literacy tests, and egregious acts of voter intimidation and violence, black congressmen lost their seats and black people were subjugated to quasi-slave status under Jim Crow laws. *Id.*; W.E.B. DUBOIS, *BLACK RECONSTRUCTION: AN ESSAY TOWARD THE HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA* 659–98 (1935); see also Achille Mbembé, *Necropolitics*, 15 *PUB. CULTURE* 11, 25–26 (2003).

Historically and in the present-day, widespread disenfranchisement has presented a formidable obstacle to minority groups seeking full citizenship status in the United States.⁶³ Prior to the Voting Rights Act of 1965 (VRA), fewer than one in four eligible black citizens were registered to vote in the deep South.⁶⁴ Mississippi merits special attention. Before the VRA was enacted, only 6.7% of eligible black voters in Mississippi were registered to vote.⁶⁵ After the passage of the VRA, this number increased to 59.8% in 1967 and 90.2% in 2012.⁶⁶ Black voter participation remained high while the VRA was fully enforceable, despite persistent and flagrant attempts to disenfranchise black voters.⁶⁷ The reason that the VRA was so effective was because, in its original form, it gave the Department of Justice and the Federal District Court of the District of Columbia oversight to preapprove all statutes affecting elections in states with an invidious history of voter suppression.⁶⁸

Despite the success of the VRA in minimizing widespread voter suppression, the Supreme Court gutted the VRA in *Shelby County v. Holder*.⁶⁹ It struck down the formula in the Act that determines which jurisdictions should be subject to extra federal voting rights oversight (“covered jurisdictions”).⁷⁰ Unsurprisingly, voter suppression has increased tremendously in jurisdictions

⁶³ Ellen Katz, Margaret Aisenbrey, Anna Baldwin, Emma Cheuse & Anna Weisbrodt, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 646 (2006); Glenn D. Magpantay & Nancy W. Yu, *Asian Americans and Reauthorization of the Voting Rights Act*, 19 NAT’L BLACK L.J. 1, 3–6 (2005). See generally James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205 (2007) (summarizing the process of reauthorizing the VRA and convincing Congress that vote denial remained a credible threat).

⁶⁴ Bernard Grofman & Chandler Davidson, *The Effect of Municipal Election Structure on Black Representation in Eight Southern States*, in QUIET REVOLUTION IN THE SOUTH 303 (C. Davidson & B. Grofman eds., 1994) (“Only 22.5% of eligible black voters were registered to vote in Alabama, Georgia, Mississippi, North Carolina, and South Carolina.”).

⁶⁵ U.S. COMM’N ON C.R., POL. PARTICIPATION 12 (1968); German Lopez, *How the Voting Rights Act Transformed Black Voting Rights in the South*, in *One Chart*, VOX (Aug. 6, 2015), <https://www.vox.com/2015/3/6/8163229/voting-rights-act-1965> (on file with the *Ohio State Law Journal*).

⁶⁶ Lopez, *supra* note 65.

⁶⁷ *Shelby County v. Holder*, 570 U.S. 529, 565 (2013) (Ginsburg, J., dissenting) (explaining that “intentional racial discrimination in voting remains so serious and widespread” in the South that the full VRA is still needed to prevent resurgence of voter suppression).

⁶⁸ 52 U.S.C. § 10303, *invalidated by Shelby County*, 570 U.S. at 557.

⁶⁹ 570 U.S. 529 (2013).

⁷⁰ *Id.* at 557. These jurisdictions include, Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, Virginia, and several counties in California, Florida, New York, North Carolina, South Dakota, and Michigan. *Jurisdictions Previously Covered by Section 5*, U.S. DEP’T OF JUST. (Aug. 6, 2015), <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5> [<https://perma.cc/DS9N-TBPR>].

that previously were covered under the VRA.⁷¹ Within one day of the *Shelby County* decision, Texas passed discriminatory voter ID laws that were previously denied preclearance, leading the way for states like Alabama, Virginia, Mississippi, and North Carolina who soon followed suit.⁷²

After *Shelby County*, voting rights litigators relied heavily on section 2 of the VRA when arguing vote denial cases.⁷³ Much to their dismay, the Supreme

⁷¹Dale Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since Shelby County*, 127 YALE L.J.F. 799, 800–01 (2018) (describing the “resurgence of registration and ballot restrictions sweeping the country after *Shelby County* was decided”); Caitlin Swain, *Why the South Matters Now: The Voting Rights Act, North Carolina, and the Long Southern Strategy*, 12 DUKE J. CONST. L. & PUB. POL’Y 211, 212 (2017) (“The late-June decision in *Shelby County v. Holder*, opened the door to a revival of voter suppression efforts. In North Carolina, the decision transformed the interests of the state, and the relative burden on African Americans and other voters of color by ending the state’s obligation to seek approval (or ‘preclearance’) for voting procedure from the U.S. Department of Justice before implementing the changes.”).

⁷²Michael Cooper, *After Ruling, States Rush to Enact Voting Laws*, N.Y. TIMES (July 5, 2013), <https://www.nytimes.com/2013/07/06/us/politics/after-Supreme-Court-ruling-states-rush-to-enact-voting-laws.html> [<https://perma.cc/CWH6-MJE7>]. Within hours of the Supreme Court’s decision in *Shelby Cnty. v. Holder*, Attorney General Greg Abbott announced SB 14, a strict voter ID law that had previously been denied preclearance because Texas was unable to prove that the law would not lead to minority voter suppression, would take effect. *The Effects of Shelby County v. Holder*, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), <https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder> [<https://perma.cc/9N58-RW9K>]; see *Texas v. Holder*, 888 F. Supp. 2d 113, 117 (D.D.C. 2012) (Texas denied preclearance), *vacated*, 570 U.S. 928 (2013); Press Release, Greg Abbott, Att’y Gen. of Tex., Statement by Texas Attorney General Greg Abbott on *Shelby County v. Holder* (June 25, 2013) (within hours of the Supreme Court’s decision in *Shelby County v. Holder*, Texas issued a statement saying that SB 14 would enter into full effect) [<https://perma.cc/SL53-AFSG>]; Lizette Alvarez, *Ruling Revives Florida Review of Voting Rolls*, N.Y. TIMES (Aug. 7, 2013), <https://www.nytimes.com/2013/08/08/us/ruling-revives-florida-review-of-voting-rolls.html> [<https://perma.cc/3SP9-7AUB>]; *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2355 (2021) (Kagan J., dissenting) (“On the very day *Shelby County* issued, Texas announced that it would implement a strict voter-identification requirement that had failed to clear Section 5. Other States—Alabama, Virginia, Mississippi—fell like dominoes, adopting measures similarly vulnerable to preclearance review. The North Carolina Legislature, starting work the day after *Shelby County*, enacted a sweeping election bill eliminating same-day registration, forbidding out-of-precinct voting, and reducing early voting, including souls-to-the-polls Sundays. (That law went too far even without Section 5: A court struck it down because the State’s legislators had a racially discriminatory purpose.)” (citations omitted)).

⁷³*Section 2 of the Voting Rights Act: Vote Dilution and Vote Deprivation*, SCOTUSBLOG, <https://www.scotusblog.com/election-law-explainers/section-2-of-the-voting-rights-act-vote-dilution-and-vote-deprivation/> [<https://perma.cc/5RR9-G2JS>] (“Furthermore, during the past few years, Section 2 vote deprivation claims have become more prevalent because of the Supreme Court’s 2013 decision in *Shelby County v. Holder*. *Shelby County* effectively nullified Section 5 of the Voting Rights Act, which had forestalled certain jurisdictions (primarily in areas with a history of discriminatory voting laws) from

Court in *Brnovich v. DNC* gutted section 2, excepting unintentional vote denial from its purview.⁷⁴

Defanging the VRA in this way allows voter suppression to go unchecked, gravely endangering the minority franchise and the lives of those who depend on it.⁷⁵

2. *How the Law of the Circuit Facilitates the Underenforcement of the CRA and the Abrogation of Supreme Court Precedent*

The Civil Rights Act of 1957 (CRA) has the potential to ameliorate some of the fallout resulting from the Supreme Court's decision to eviscerate arguably the most effective sections of the VRA in *Shelby County* and *Brnovich*. While the CRA is not the ideal avenue for challenging vote denial,⁷⁶ it contains robust prohibitions against vote denial that, if enforced, would protect against myriad disenfranchising techniques.⁷⁷

Yet, most courts have refused to allow private plaintiffs to sue under the CRA, holding that no private right of action exists under the CRA, giving only cursory attention to the issue, and wholly ignoring SCOTUS precedent in the

implementing proposed changes to their voting laws until they could demonstrate that the changes would not disadvantage minority voters. With Section 5 a nullity, litigants have turned to Section 2 to fill the void, but under Section 2 the burden now is on those challenging the voting process to prove that it causes vote deprivation on the base of race.”). *See generally* Danielle Lang & J. Gerald Hebert, *A Post-Shelby Strategy: Exposing Discriminatory Intent in Voting Rights Litigation*, 127 YALE L.J.F. 779 (2018).

⁷⁴ *Brnovich*, 141 S. Ct. at 2350; *see also id.* at 2351 (Kagan, J., dissenting); Steven D. Schwinn, *Brnovich v. DNC: Yet Another Blow to the Voting Rights Act*, 48 PREVIEW U.S. SUP. CT. CASES 11, 11 (2021).

⁷⁵ *See* sources cited *supra* note 71.

⁷⁶ Historically, litigators have been most successful using the Voting Rights Act to litigate vote denial claims, mainly because federal courts' interpretation of the Civil Rights Act of 1957's justiciability and substance has hobbled the vote denial prohibitions in the CRA to the point of nullity. *Shelby County v. Holder*, 570 U.S. 529, 561–62 (2013) (Ginsburg, J., dissenting) (“Congress learned from experience that laws targeting particular electoral practices or enabling case-by-case litigation were inadequate to the task. In the Civil Rights Acts of 1957, 1960, and 1964, Congress authorized and then expanded the power of ‘the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds.’”). Although the Attorney General was authorized to bring suit under the Civil Rights Act of 1957, nary a suit was brought. *See id.* at 561. Private plaintiffs were eventually forbidden from bringing suit under the Civil Rights Act of 1957. *See Good v. Roy*, 459 F. Supp. 403, 406 (D. Kan. 1978).

⁷⁷ Plaintiffs have tried to use the CRA to combat voter purges. *See, e.g.*, *Mont. Democratic Party v. Eaton*, 581 F. Supp. 2d 1077, 1078, 1081 (D. Mont. 2008). Plaintiffs have also used it to challenge racially discriminatory voter registration practices, and felon disenfranchisement. *Hayden v. Pataki*, No. 00 Civ. 8586, 2004 WL 1335921, at *5 (S.D.N.Y. June 14, 2004).

process.⁷⁸ The manner in which the Sixth Circuit justified its most recent refusal to permit private actions under the CRA exemplifies the inherent flaw of the law of the circuit, namely, that it requires the circuit court to apply prior circuit panel precedent on the same issue, even if that issue has been decided contrary to Supreme Court precedent.⁷⁹

While this scenario may sound outlandish, this is exactly what occurred in *Northeast Ohio Coalition for the Homeless* when a group of mostly black plaintiffs⁸⁰ attempted to bring a claim under the CRA after an earlier panel nearly two decades prior ruled that private plaintiffs in a completely different case could not seek relief under that provision of the CRA.⁸¹ In *NEOCH*, the plaintiffs challenged an Ohio voter identification law under a provision of the CRA prohibiting state actors from denying otherwise qualified individuals the right to vote due to immaterial “error[s] or omission[s]” on their registration.⁸²

⁷⁸ See *Good*, 459 F. Supp. at 405–06 (devoting merely 105 words to discussion of 52 U.S.C. § 10101(a)(2)(B)); *Dekom v. New York*, No. 12-CV-1318, 2013 WL 3095010, at *18 (E.D.N.Y. June 18, 2013) (devoting merely 114 words to discussion of 52 U.S.C. § 10101(a)(2)(B) and stating that “[t]he weight of authority suggests that there is no private right of action under Section 1971” (citing *Gilmore v. Amityville Union Free Sch. Dist.*, 305 F. Supp. 2d 271, 279 (E.D.N.Y. 2004))); *Hayden*, 2004 WL 1335921, at *5 (“[T]his section does not provide for a private right of action and is only enforceable by the United States in an action brought by the Attorney General.”), *aff’d on other grounds*, 449 F.3d 305 (2d Cir. 2006); see also *Cartagena v. Crew*, No. CV-96-3399, 1996 WL 524394, at *3 n.8 (E.D.N.Y. Sept. 5, 1996) (devoting merely 65 words to discussion of 52 U.S.C. § 10101(a)(2)(B)); *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000) (devoting merely 95 words to discussion of 52 U.S.C. § 10101(a)(2)(B)); *Spivey v. Ohio*, 999 F. Supp. 987, 996 (N.D. Ohio 1998) (devoting merely 260 words to discussion of 52 U.S.C. § 10101(a)(2)(B)); *Willing v. Lake Orion Cmty. Schs. Bd. of Trustees*, 924 F. Supp. 815, 818 (E.D. Mich. 1996) (devoting merely 113 words to discussion of 52 U.S.C. § 10101(a)(2)(B)); *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 52 U.S.C. § 10101(a)(2)(B) claims but disposing of the case on other grounds), *aff’d*, 381 Fed. Appx. 370 (5th Cir. 2010); *McKay v. Altobello*, No. 96-3458, 1996 WL 635987, *1–2 (E.D. La. Oct. 31, 1996) (devoting merely 193 words to discussion of 52 U.S.C. § 10101(a)(2)(B)). But see *Schwier v. Cox* (*Schwier I*), 340 F.3d 1284, 1296 (11th Cir. 2003) (applying the *Gonzaga/Blessing* analysis and holding that § 1983 encompasses § 1971).

⁷⁹ *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 629–30 (6th Cir. 2016).

⁸⁰ See *Just the Facts: Poverty and Homelessness in Our Community*, NE. OHIO COAL. HOMELESS, <https://www.neoch.org/poverty-stats-2017> [<https://perma.cc/TH4Y-KAEQ>]; see also NE. OHIO COAL. FOR THE HOMELESS, NO GOING BACK: LOCKED DOWN FOR A BETTER FUTURE (2020), <https://static1.squarespace.com/static/59e6491b9f8dce817446bdc6/t/60622fafdd8aed4a93bb6c9b/1617047473283/NEOCH+2020+Annual+Report.pdf> [<https://perma.cc/TLN8-LCH9>].

⁸¹ *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 629–30; Megan Hurd, *Promoting Private Enforcement of the Voting Rights Act and the Materiality Provision: Contrasting Northeast Ohio Coalition for the Homeless v. Husted and Schwier v. Cox*, 86 U. CIN. L. REV. 1379, 1394–96 (2018).

⁸² *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 629–30 (citing 52 U.S.C. § 10101(a)(2)(B)); Hurd, *supra* note 81, at 1389–90.

The plaintiffs in *NEOCH* were foreclosed from using the CRA to bring their vote denial claim because sixteen years earlier, another Sixth Circuit panel, in *McKay* (a case brought by a pro se litigant), ruled that no private right of action existed under CRA.⁸³ The *McKay* panel, however, failed to apply the Supreme Court’s tests for determining whether a private litigant can sue under a statute that does not expressly give or withhold such a right.⁸⁴ Devoting merely 95 words to the issue, the court in *McKay* reasoned that since the CRA gave explicit authority to the Attorney General for enforcement, all other plaintiffs were precluded from bringing suit under the CRA.⁸⁵ The court essentially substituted the Supreme Court’s implied private right of action tests with the *expressio unius est exclusio alterius* canon of interpretation.⁸⁶ “The maxim ‘*expressio unius est exclusio alterius*,’ that the mention of one thing in a statute impliedly excludes another thing, is used to determine legislative intent.”⁸⁷ The Sixth Circuit in *McKay* improperly assumed, under an *expressio unius* style of reasoning, that the provision explicitly granting the Attorney General the authority to sue, implicitly denied private plaintiffs the right to sue.⁸⁸ This methodology however explicitly contradicts the Supreme Court’s precedent on implied private rights of action, which lays out two specific tests that may be used in overlapping contexts, for determining whether a statute impliedly gives

⁸³ *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 629–30 (citing *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000)); *Hurd*, *supra* note 81, at 1391, 1394–96.

⁸⁴ *McKay*, 226 F.3d at 756 (devoting merely 95 words to discussion of the CRA, the court held that no private right of action existed under the CRA without applying the Supreme Court’s tests for determining whether an implied private right of action exists). *Contra* 10B FEDERAL PROCEDURE, LAWYERS EDITION § 28:95, Westlaw (database updated Mar. 2022) (“A private litigant has standing under the Civil Rights Act . . .”).

⁸⁵ *McKay*, 226 F.3d at 756.

⁸⁶ *See id.*

⁸⁷ 73 AM. JUR. 2D *Statutes* § 120 (2021).

⁸⁸ *See McKay*, 226 F.3d at 756.

private plaintiffs the right to sue.⁸⁹ Neither test was applied by the court in *McKay*.⁹⁰

Acknowledging the inconsistency between the Sixth Circuit's earlier decision in *McKay* and Supreme Court precedent, the *NEOCH* panel stated: "[T]he Supreme Court ha[s] found other VRA sections enforceable by private right of action despite their provision for Attorney General enforcement and that before the Attorney General language was appended to the [CRA], plaintiffs 'could and did' bring enforcement actions under 42 U.S.C. § 1983."⁹¹ Stated differently, the circuit court in *NEOCH* highlights the fact that the Supreme Court does not view an explicit grant of enforcement authority to the Attorney General as determinative when deciding whether an implied private right of action exists under a statute.⁹² The circuit court in *NEOCH* did not go so far as to highlight the *McKay* panel's failure to apply the Supreme Court's implied private right of action test.⁹³ It merely framed the decision as an unwise, yet valid exercise of the circuit court's discretion.⁹⁴ Yet, even the most sympathetic

⁸⁹ *Cort v. Ash*, 422 U.S. 66, 78 (1975). Alternatively, plaintiffs could have also established private standing under the Supreme Court's § 1983 jurisprudence. The Supreme Court established a test for determining whether a statute obligates a state to perform a duty under 42 U.S.C. § 1983. See *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283–85 (2002). The latter test establishes liability and standing. See *Blessing*, 520 U.S. at 340–41; *Gonzaga Univ.*, 536 U.S. at 283–85. The test in *Cort* establishes standing and requires that liability be established separately. See *Cort*, 422 U.S. at 78. The Sixth Circuit panel in *McKay* applied neither when determining that no private right of action existed under the CRA. *McKay*, 226 F.3d at 756. Some might argue that *Alexander v. Sandoval* endorses *expressio unius* negative implication in the implied private right of action context by citing to language in the opinion stating that "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." 532 U.S. 275, 290. The Court continues, saying,

Sometimes the [preclusive] suggestion is so strong that it precludes a finding of congressional intent to create a private right of action, *even though other aspects of the statute* (such as language making the would-be plaintiff "a member of the class for whose benefit the statute was enacted") suggest the contrary.

Id. (emphasis added). The Court tacitly acknowledges that "other aspects of the statute" must be examined, particularly the "text and structure of the statute." *Id.* And, neither of the reviewing courts in *NEOCH* or *McKay* applied the *Cort* four-part test or examined the text of the statute (particularly the remedy exhaustion language which necessarily contemplates private plaintiffs), which the Court in *Sandoval* considered indispensable to an implied private right of action analysis. *Id.*; *McKay*, 226 F.3d at 756; *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 630 (6th Cir. 2016); see *infra* text accompanying notes 119, 120.

⁹⁰ *McKay*, 226 F.3d at 756.

⁹¹ *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 630 (citing *Schwier I*, 340 F.3d 1284, 1295 (11th Cir. 2003)). Note that in this passage the *NEOCH* court conflates the VRA with the CRA. See *supra* note 37.

⁹² See *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 630.

⁹³ See *id.*

⁹⁴ See *id.*

portrayal of the Sixth Circuit's earlier decision in *McKay* reveals its problematic contradictions with preexisting Supreme Court precedent.

Due to its allegiance to the prudential law of the circuit rule, the circuit panel in *NEOCH* elided any discussion of the Supreme Court's implied private right of action case law.⁹⁵ In *Cort v. Ash*, *Blessing v. Freestone*, and *Gonzaga University v. Doe* (that latter of which was decided subsequent to *McKay* thereby qualifying as intervening precedent) the Supreme Court prescribed two tests for determining whether a private right of action is implied where a statute is silent.⁹⁶ The prior circuit panel did not apply either of these tests.⁹⁷ *Cort* and its progeny set out the test for implication of a private right of action under federal common law,⁹⁸ while *Blessing*, *Gonzaga* and their progeny determine whether the enforcement of a statute is proper under 42 U.S.C. § 1983.⁹⁹ Had either test been applied in *NEOCH*, the circuit court likely would have found that the CRA impliedly grants private plaintiffs the right to sue.

Under the four-factor test, set out in *Cort*, it is clear that the plaintiffs in *NEOCH* would have had an implied private right of action.¹⁰⁰ The first three factors concern statutory interpretation, while the last addresses federalism issues.¹⁰¹ The Supreme Court's decisions in both *Cort* and *Cannon v. University of Chicago* are instructive.

⁹⁵ See *id.* at 629–30.

⁹⁶ See *Schwier I*, 340 F.3d at 1296–97. The first test determines whether the statute itself and its attendant legislative history implicitly afford private plaintiffs the right to sue under the statute. The Court lays out the elements of this test in *Cort v. Ash*, 422 U.S. 66, 78 (1975), and *Cannon v. University of Chicago*, 441 U.S. 677, 689–709 (1979). This four-factor test looks to a statute's stated purpose, legislative history, statutory scheme, and federalism implications in order to determine whether Congress intended to imply a private right of action within the statutory scheme. See *Cort*, 422 U.S. at 78. The second test for determining whether an implied right of action exists under 42 U.S.C. § 1983, and gives a civil remedy to persons deprived of rights, privileges, or immunities by someone acting under the color of law. This test was established in two Supreme Court cases called *Blessing v. Freestone*, 520 U.S. 329, 337, 340–41 (1997) (mothers eligible for state child support sued the agency charged with the provision of state child support for failure to take "adequate steps to obtain child support payments from the fathers of their children"), and *Gonzaga Univ. v. Doe*, 536 U.S. 273, 279, 283–84 (2002) (a former university student sued Gonzaga University for Federal Educational Rights Privacy Act violations), and determines whether the statute at issue creates a duty enforceable under § 1983, thereby implying a private right of action. See *Hurd supra* note 81, at 1380–84; Donna L. Goldstein, Note, *Implied Private Rights of Action Under Federal Statutes: Congressional Intent, Judicial Deference, or Mutual Abdication?*, 50 *FORDHAM L. REV.* 611, 615–16 (1982). Attorney's fees are available under 42 U.S.C. § 1983 but are not available under the CRA. See *Cannon*, 441 U.S. at 685 n.6.

⁹⁷ See generally *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000).

⁹⁸ *Cort*, 422 U.S. at 78.

⁹⁹ *Blessing*, 520 U.S. at 340–41; *Gonzaga Univ.*, 536 U.S. at 283–84.

¹⁰⁰ See, e.g., Goldstein, *supra* note 96, at 615–16.

¹⁰¹ See *id.*

In *Cort*, a campaign finance case, the Supreme Court refused to find an implied private right of action to enforce 18 U.S.C. § 610, a securities law aimed at regulating corporate influence over elections.¹⁰² The plaintiff, a shareholder, attempted to sue a corporation allegedly breaking campaign finance laws, but was prevented from doing so because he could not prove that he was “one of the class for whose *especial* benefit the statute was enacted,” under the first factor of the implied private right of action analysis.¹⁰³ The Court held that “the legislation was primarily concerned with corporations as a source of aggregated wealth and therefore of possible corrupting influence, and not directly with the internal relations between the corporations and their stockholders.”¹⁰⁴

Analysis of the legislative history also revealed, under the second factor, a lack of intent to “vest in corporate shareholders a federal right to damages for violation” of the statute.¹⁰⁵ The Court further expounded that while legislative history need not explicitly grant a cause of action in order to satisfy this prong, an explicit denial of an implied private right of action in the legislative history is dispositive.¹⁰⁶

Thirdly, the Court determined that a private cause of action did not seem to advance the legislative purpose of the campaign finance law because the payment of derivative damages to shareholders would not rectify the deleterious effects of corporate influence on a federal election, nor would it “decrease the impact of the use of [corporate] funds upon an election already past.”¹⁰⁷

Finally, the Court held, shareholder suits fit squarely within the ambit of issues traditionally relegated to state law, making the creation of a federal common law right of action in the area inappropriate.¹⁰⁸

By contrast, in *Cannon v. University of Chicago*, the Supreme Court did find an implied private right of action within Title IX.¹⁰⁹ The plaintiff, a woman alleging gender discrimination in medical school admissions, was held to be a member of Title IX’s intended class of beneficiaries because, under the first prong of the implied private right of action test, the statutory language prohibiting gender discrimination creates a federal right in the plaintiff to be free from gender-based discrimination.¹¹⁰ As to the second factor, the Court held that Congress intended a broad remedial scheme under Title IX, an indicia of an intent to vest a right of action in private plaintiffs.¹¹¹ Under the third prong, the Court found that private lawsuits *would* help accomplish the statute’s stated

¹⁰² *Cort*, 422 U.S. at 80–85.

¹⁰³ *Id.* at 71, 78, 81–82 (internal quotation marks omitted) (quoting *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916)).

¹⁰⁴ *Id.* at 82.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 84.

¹⁰⁸ *Cort*, 422 U.S. at 84.

¹⁰⁹ *Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979).

¹¹⁰ *Id.* at 693–94.

¹¹¹ *Id.* at 703.

purpose of ending gender discrimination.¹¹² And finally, the Court held that “prohibition[s] against invidious discrimination” are the concern of the federal government, and make gender discrimination an area appropriate for the creation of a federal common law right of action, given that civil rights have been the concern of the government since the Civil War.¹¹³

Had this standard been applied in *NEOCH*, the Sixth Circuit likely would have held that all four factors were met. Much like the relevant statutory language in Title IX analyzed in *Cannon*, the language of the CRA prohibiting vote denial clearly indicates an intent to create a federal right in plaintiffs to be free from disenfranchisement.¹¹⁴ The legislative history of the CRA indicates that historically, the CRA has been enforced under 42 U.S.C. § 1983 as a private right of action.¹¹⁵ In *Schwier I*, the Eleventh Circuit noted that the “provision giving the Attorney General the right to bring a civil suit under [the CRA’s voting provision] was not added to [CRA] until 1957. Therefore, from the enactment of § 1983 in 1871 until 1957, plaintiffs could and did enforce the provisions of [CRA] under § 1983.”¹¹⁶ Refusing private enforcement here would therefore be an aberration from the historical norm and would contradict the legislative intent of the statute.¹¹⁷

Further proof of Congress’s intent to create a private right of action lies in the legislative scheme of the CRA which specifically contemplates private enforcement, requiring that an aggrieved party *exhaust* “any administrative or other remedies that may be provided by law,” an action that can only be taken by a private party.¹¹⁸ Finally, the court would likely find that the statute is within the ambit of federal concern because, similar to Title IX, it “prohibit[s] . . .

¹¹² *Id.* at 706–08.

¹¹³ *Id.*

¹¹⁴ *Compare* 52 U.S.C. § 10101(a)(2)(B) (“No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election . . .”), with Title IX, 20 U.S.C. § 1681 (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .”).

¹¹⁵ *Smith v. Allwright*, 321 U.S. 649, 658 (1944); *Chapman v. King*, 154 F.2d 460, 462 (5th Cir. 1946); *Brown v. Baskin*, 78 F. Supp. 933, 935 (D.S.C. 1948).

¹¹⁶ *Schwier I*, 340 F.3d 1284, 1295 (first citing *Smith*, 321 U.S. 649; then citing *Chapman*, 154 F.2d 460; and then citing *Brown*, 78 F. Supp. 933); see also *Morse v. Republican Party of Va.*, 517 U.S. 186, 233–34 (1996) (plurality opinion) (holding that § 1973h of the VRA can be enforced by a private right of action). The § 1983 analysis is treated separately. See *infra* at notes 120–30 and accompanying text.

¹¹⁷ See *Schwier I*, 340 F.3d at 1295.

¹¹⁸ 52 U.S.C. § 10101(d) (emphasis added).

invidious discrimination,” an issue often resolved by federal courts since the Civil War.¹¹⁹

As alluded to above, the voting rights provisions of the CRA can also be enforced under 42 U.S.C. § 1983, in addition to enforcement via the creation of an implied right of action under federal common law, because persons acting under the color of law committed the misconduct at issue.¹²⁰ Using § 1983, the Eleventh Circuit found an implied private right of action under the CRA.¹²¹ The *Gonzaga/Blessing* analysis must be used in order to determine whether the CRA creates rights that are enforceable by the individual under § 1983.¹²² If Congress does not “explicitly foreclose the action under § 1983,”¹²³ the relevant inquiry is whether Congress did so “impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement.”¹²⁴ The first inquiry is whether the statute contains “explicit ‘right- or duty- creating language.’”¹²⁵ The Eleventh Circuit held that the language in the CRA prohibiting baseless vote denial was clearly analogous to the rights-creating language of Title IX at issue in *Cannon* and Title VI at issue in *Gonzaga*,¹²⁶ which state that “[n]o person in the United States shall, on the basis of sex . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance,”¹²⁷ and that “[n]o person in the United States shall . . . be subjected to discrimination under any program or activity receiving federal assistance” respectively.¹²⁸

The second requirement is that the statute contains provisions that are “not so ‘vague and amorphous’ that its enforcement would strain judicial

¹¹⁹ See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 708 (1979); see also U.S. CONST. art. I, § 4 (giving Congress authority to alter the times, places, except places for choosing Senators, and manners of elections); U.S. CONST. amends. XIV, XV (further supporting the proposition that discrimination in voting is the concern of the federal government).

¹²⁰ *Schwier I*, 340 F.3d at 1296–97.

¹²¹ *Id.* at 1297.

¹²² *Id.* at 1292, 1296–97 (applying *Gonzaga Univ. v. Doe*, 536 U.S. 272, 284 (2002) and *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997) (“Even if a plaintiff demonstrates that a federal statute creates an individual right, there is only a rebuttable presumption that the right is enforceable under § 1983.”)).

¹²³ *Id.* at 1292.

¹²⁴ *Id.* (citing *Blessing*, 520 U.S. at 341).

¹²⁵ *Gonzaga Univ.*, 536 U.S. at 284 n.3 (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690 n.13 (1979), in which the Court held that a private right of Action existed under Title IX because Congress intended Title IX to read like Title VI and a private right of action existed under Title VI despite the absence of a provision explicitly giving individuals the right to sue and despite the language allowing the Attorney General to sue) (construing the first element in *Blessing*, 520 U.S. at 340–41, which states that “Congress must have intended that the provision in question benefit the plaintiff”).

¹²⁶ *Schwier I*, 340 F.3d at 1291.

¹²⁷ 20 U.S.C. § 1681 (emphasis added).

¹²⁸ 42 U.S.C. § 2000d (emphasis added).

competence.”¹²⁹ The Eleventh Circuit held that the CRA “clearly provides rights which are specific and not amorphous,” explaining that “[t]he statute protects an individual’s right to vote; specifically, the statute forbids a person acting under color of law to disqualify a potential voter because of his or her failure to provide unnecessary information on a voting application.”¹³⁰

The third and final factor is that the statute “giving rise to the asserted right must be couched in mandatory, rather than precatory terms” thereby “unambiguously impos[ing] a binding obligation on the States.”¹³¹ The Eleventh Circuit held that the language of the CRA which states that “[n]o person acting under color of law shall . . . deny the right of any individual to vote” was sufficiently mandatory under the *Blessing/Gonzaga* analysis.¹³² Based on the Eleventh Circuit’s *Blessing/Gonzaga* analysis, a private right of action can be brought under § 1983 to enforce the rights provided in the CRA.¹³³

The Sixth Circuit in *NEOCH* however failed to apply either of the Supreme Court’s on-point tests for determining whether an implied private right of action exists, including the *Gonzaga* test which was decided in 2002, two years after the errant Sixth Circuit ruling in *McKay*, making *Gonzaga* an intervening Supreme Court precedent within the meaning of the law of the circuit.¹³⁴ The *NEOCH* panel however held that the law of the circuit dictated that the panel adhere to circuit precedent which failed to apply either test.¹³⁵ The underlying mythology of circuit supremacy ran so deep that the *NEOCH* panel failed to even consider *Gonzaga* as intervening precedent.¹³⁶ Even though the *NEOCH* panel cited to Eleventh Circuit precedent relying heavily on *Gonzaga*, it explicitly rejected the use of 42 U.S.C. § 1983 to enforce a private right of action under the CRA due to the law of the circuit.¹³⁷

¹²⁹ *Blessing*, 520 U.S. at 340–41 (citing *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 431–32 (1987)).

¹³⁰ *Schwier I*, 340 F.3d at 1296–97.

¹³¹ *Blessing*, 520 U.S. at 341 (citing *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 510–11 (1990)).

¹³² *Schwier I*, 340 F.3d at 1297.

¹³³ *Id.*

¹³⁴ *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 629–30 (6th Cir. 2016).

¹³⁵ *Id.* at 630.

¹³⁶ *See id.* at 629–30.

¹³⁷ *Id.* at 630 (“[The Eleventh Circuit] later reached the opposite conclusion. It reasoned, in part, that the Supreme Court had found other [CRA] sections enforceable by private right of action despite their provision for Attorney General enforcement and that before the Attorney General language was appended to the statute, plaintiffs ‘could and did’ bring enforcement actions under 42 U.S.C. § 1983.” (citations omitted) (citing *Schwier I*, 340 F.3d at 1294–96)). This failure to consider binding SCOTUS precedent was not due to lack of zeal on the plaintiff’s part. Plaintiffs unsuccessfully requested that the binding Sixth Circuit decision in *McKay* be overturned en banc. Second Brief of Plaintiffs-Appellees/Cross-Appellants Northeast Ohio Coalition for the Homeless et al. at 70, *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612 (6th Cir. 2016) (Nos. 16-3603, 16-3691).

It may be tempting to believe that the Sixth Circuit's decision in *NEOCH* did not amount to a knowing departure from Supreme Court precedent. One could argue that the *NEOCH* court may have viewed the Supreme Court precedent in *Cort v. Ash* as obsolete given the Court's more recent decision in *Alexander v. Sandoval*.¹³⁸ In *Sandoval*, without overruling *Cort* or *Cannon*, the Supreme Court held that no implied private right of action existed to enforce Title VI disparate impact regulations.¹³⁹ Perhaps *Sandoval* was but a signal from the Supreme Court instructing lower courts to abandon implied private rights of action.¹⁴⁰ However, to the extent that the circuit courts felt that the Supreme Court has trended away from implying private rights of action, recognition of a trend is insufficient to justify overruling Supreme Court doctrine.¹⁴¹ The Supreme Court has made clear that its "decisions remain binding precedent until [the Court] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."¹⁴² Given that no case has ever overruled *Cort*, *Cannon*, *Blessing*, or *Gonzaga*, they remain good law for determining whether private plaintiffs have an implied right to sue.¹⁴³ Even if one were to concede that *Sandoval* overrules *Cort* and *Cannon*, *Blessing* and *Gonzaga* have not been questioned at all by SCOTUS, undoubtedly continuing in precedential vigor.¹⁴⁴ And had *Sandoval*'s test been applied by the Sixth Circuit, the court necessarily would have found that an implied private right of action exists. The test in *Sandoval* would have required the Sixth Circuit Court to look at "the text and structure,"¹⁴⁵ which would have required them to look

¹³⁸ See *supra* note 89. See generally *Alexander v. Sandoval*, 532 U.S. 275 (2001).

¹³⁹ *Id.* at 290–92.

¹⁴⁰ See *Re*, *supra* note 17, at 944 ("In many cases, the Justices implicitly decide or expressly opine on ancillary issues while resolving the case at hand. These decisions may concern matters of procedure, such as stay decisions or other preliminary rulings made below; or they may pertain to substantive legal questions not presently before the Court. In other cases, the Court comments negatively on a disfavored precedent, such as by asserting that the precedent is 'narrow' or that it is difficult to prevail under the precedent. Relatedly, the Court sometimes establishes a pattern of repeatedly narrowing a precedent, thereby tacitly establishing the precedent's disfavored status. Because these decisions, comments, and patterns lie outside the bounds of conventional precedent, they are often treated as dicta or otherwise denied precedential status. Nonetheless, the Justices routinely express deliberate views on ancillary topics in separate opinions or during oral argument, with the apparent intention that lower courts will pick up the message. And the lower courts often do just that, sometimes even using the term 'signal.'" (footnotes omitted)).

¹⁴¹ *Hohn v. United States*, 524 U.S. 236, 252–53 (1998) ("This is not to say opinions passing on jurisdictional issues *sub silentio* may be said to have overruled an opinion addressing the issue directly. Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." (citations omitted)).

¹⁴² *Id.*

¹⁴³ See *id.*

¹⁴⁴ See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002); *Blessing v. Freestone*, 520 U.S. 329, 348 (1997).

¹⁴⁵ See *supra* note 89.

at the remedy exhaustion language in the statutory scheme, which clearly contemplates private plaintiffs.

One may also argue that the Sixth Circuit court in *NEOCH* disregarded Supreme Court precedent because it did not feel bound by the Supreme Court's statutory interpretation precedent also called methodological *stare decisis*.¹⁴⁶ If this was the court's motivation, it was invalid according to Supreme Court precedent.¹⁴⁷ The Supreme Court has long held that both result and reasoning of an opinion are binding on lower courts.¹⁴⁸

¹⁴⁶ See generally Recent Case, *Statutory Interpretation—Stare Decisis—Seventh Circuit Uses Methodological Stare Decisis to Reverse Substantive Precedent—FTC v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019), 133 HARV. L. REV. 1444 (2020) (discussing statutory interpretation precedent at the circuit court level).

¹⁴⁷ *Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 n.6 (2020) (Kavanaugh, J., concurring in part) (“Notwithstanding the splintered 4–1–4 decision in *Apodaca*, its bottomline result carried precedential force. In the American system of *stare decisis*, the result and the reasoning each independently have precedential force, and courts are therefore bound to follow both the result and the reasoning of a prior decision.” (first citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996); then citing *Randall v. Sorrell*, 548 U.S. 230, 243 (2006) (plurality opinion); and then citing *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part))).

¹⁴⁸ See *id.* Maybe the *NEOCH* court tacitly rests its defiance on the Supreme Court's nonparty preclusion jurisprudence—which determines the due process limits of binding nonparties to the holdings of prior litigation—another possibility worth considering. See generally *Barrett supra* note 8. This, however, is also unlikely. In the following six scenarios, a claim against one party may bind another nonparty. *Taylor v. Sturgell* outlines six special relationships justifying nonparty preclusion. 553 U.S. 880, 893–95 (2008). First is the “test case” exception. *Id.* (citing DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 77–78 (2001)). A nonparty may agree to be bound by the outcome of an action between two others in a test case. *Id.* (citing 1 RESTATEMENT (SECOND) OF JUDGMENTS § 40 (1980)). For example, if defendants are dismissed from a suit based on a stipulation that each dismissed defendant “will be bound by a final judgment of [the] [c]ourt” on a specified issue,” then all former defendants are bound by the outcome of that suit. *Id.* (quoting *California v. Texas*, 459 U.S. 1096, 1097 (1983)). Second is the “pre-existing substantive legal relationship” exception. *Id.* at 894 (citing SHAPIRO, *supra*, at 78). “Qualifying relationships include, but are not limited to, preceding and succeeding owners of property, bailee and bailor, and assignee and assignor.” *Id.* (citing 2 RESTATEMENT (SECOND) OF JUDGMENTS §§ 43–44, 52, 55 (1980)). Third is the adequate representation exception. *Id.* (quoting *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996)). “[A] nonparty may be bound by a judgment because she was ‘adequately represented by someone with the same interests who [wa]s a party’ to the suit.” *Id.* (quoting *Richards*, 517 U.S. at 798). Class actions and suits brought by fiduciaries fit neatly into this exception. *Id.* (first citing *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989); and then citing *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 593 (1974)). Fourth, if a nonparty “assumed control” over litigation, he is bound by that judgment because the person had “the opportunity to present proofs and argument . . . [on] his day in court.” *Id.* at 895 (internal quotation marks omitted) (quoting *Montana v. United States*, 440 U.S. 147, 154 (1979)). Fifth, “preclusion is appropriate when a nonparty later brings suit as an agent for a party who is bound by a judgment.” *Id.* (citing *Chi., Rock Island*

According to the Sixth Circuit court, the prudential law of the circuit is so strict that even when faced with plainly contradictory out-of-circuit and Supreme Court precedent, the in-circuit precedent binds a reviewing court if the Supreme Court precedent did not postdate the controlling circuit decision.¹⁴⁹ Even in instances where intervening Supreme Court precedent does postdate controlling circuit precedent, the entrenchment of circuit supremacy in the legal conscience seems to make judges less likely to consider intervening precedent.¹⁵⁰ While the Supreme Court has acknowledged the importance of horizontal stare decisis at the circuit court level, it has never subordinated its own precedent to that of an errant circuit court. In situations where circuit precedent and Supreme Court precedent cannot be reconciled, the law of the circuit must be suspended, irrespective of the relative dates of the decisions. Failure to follow Supreme Court precedent, particularly where an implied private right of action is at issue, carries with it the dire risk of wrongful denial of judicial access to the plaintiff.¹⁵¹

Some scholars have argued that erroneous precedent should continue to carry precedential weight because of reliance interests—concerns that too many non-party members of the general public have relied on the existing erroneous precedent to order their affairs and that changing the precedent would do more

& Pac. Ry. Co. v. Schendel, 270 U.S. 611, 620, 623 (1926)). Finally, “a special statutory scheme may ‘expressly foreclose[.] successive litigation by nonlitigants . . . if the scheme is otherwise consistent with due process.’” *Id.* (quoting *Martin*, 490 U.S. at 762 n.2). Bankruptcy, probate and *quo warranto* actions, and other suits that may only be brought “on behalf of the public at large” fit this exception. *Id.* (quoting *Richards*, 517 U.S. at 804). The *NEOCH* plaintiffs fit none of the six recognized exceptions to the rule against nonparty preclusion, having had no relationship whatsoever with the pro se plaintiff or the claim in the earlier-litigated Sixth Circuit Court decision in *McKay*, ruling out the first five exceptions. *See Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 630 (6th Cir. 2016). As to the final exception, voting rights suits are not limited to the grievances of the public at large, and historically have been brought on behalf of aggrieved individuals. *See Shaw v. Hunt*, 517 U.S. 899, 904–05 (1996) (first citing *United States v. Hays*, 515 U.S. 737 (1995); then citing *Miller v. Johnson*, 515 U.S. 900, 909 (1995)) (dismissing plaintiffs for bringing a generalized grievance under the Equal Protection Clause). Under the Supreme Court’s nonparty preclusion precedent, the *NEOCH* plaintiffs as nonparties to *McKay* cannot justifiably be bound by that judgment. *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 630. Having ruled out eight major possibilities justifying the *NEOCH* court’s decision to follow circuit precedent instead of binding Supreme Court precedent, the only rationale left justifying the *NEOCH* court’s holding is that stated by the court in *NEOCH*, namely, the law of the circuit. *See id.* (“A panel of this court may not overturn binding precedent because a published prior panel decision “remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.” *McKay v. Thompson* therefore binds this panel.” (quoting *United States v. Elbe*, 774 F.3d 885, 891 (6th Cir. 1985))).

¹⁴⁹ *See Ne. Ohio Coal. for the Homeless*, 837 F.3d at 630.

¹⁵⁰ *See supra* Part III.A.2.

¹⁵¹ *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 638–39 (Keith, J., concurring in part, dissenting in part).

harm than good by disturbing certain settled legal expectations.¹⁵² This argument carries very little weight in this scenario. Here, it cannot be argued that the state, in reliance on *McKay* precedent, purged voters. In fact, the state never even attempted to make that argument. Commentators normally use this argument to justify horizontal stare decisis at the Supreme Court level, not to justify horizontal stare decisis at the circuit court level, especially when observing circuit precedent requires abrogation of long-standing Supreme Court precedent. Reliance interests are at their highest in cases involving property and contract issues, and are at their lowest in cases construing procedural and evidentiary rules.¹⁵³ The implied private rights of action at issue in *NEOCH* are more closely associated with procedure than with transactional issues, making reliance interests of less import when considering the weight of erroneous implied private right of action precedent.

Similarly, certain courts and commentators fiercely defend the proposition that stare decisis would not be stare decisis at all if courts did not adhere to wrongly decided precedent.¹⁵⁴ Judge Posner has reiterated that “no doctrine of deference to precedent is needed to induce a court to follow the precedents that it agrees with [S]tare decisis ‘imparts authority to a decision, depending on the court that rendered it, merely by virtue of the authority of the rendering court and independently of the quality of its reasoning.’”¹⁵⁵ While some may argue that this understanding of stare decisis controls the application of the law of the circuit in *NEOCH*, it is important to emphasize that the import given to stare decisis “depend[s] on the court that rendered it,” which implies the subordination of lower courts to Supreme Court precedent.¹⁵⁶ Even Judge Posner’s steadfast defense of following wrongly decided precedent excepts scenarios where lower court precedent conflicts with controlling Supreme Court precedent.¹⁵⁷

¹⁵² See *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases . . . involving procedural and evidentiary rules.” (citing *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965))).

¹⁵³ *Id.*

¹⁵⁴ *Tate v. Showboat Marina Casino P’ship*, 431 F.3d 580, 582–83 (7th Cir. 2005) (“The plaintiffs’ lawyer asks us to overrule *Harkins* because, he contends, it was decided incorrectly. But if the fact that a court considers one of its previous decisions to be incorrect is a sufficient ground for overruling it, then stare decisis is out the window, because no doctrine of deference to precedent is needed to induce a court to follow the precedents that it agrees with; a court has no incentive to overrule them even if it is completely free to do so. The doctrine of stare decisis ‘imparts authority to a decision, depending on the court that rendered it, merely by virtue of the authority of the rendering court and independently of the quality of its reasoning. The essence of stare decisis is that the mere existence of certain decisions becomes a reason for adhering to their holdings in subsequent cases.’” (quoting *Midlock v. Apple Vacations W., Inc.*, 406 F.3d 453, 457 (7th Cir. 2005))).

¹⁵⁵ *Id.*

¹⁵⁶ See *id.* at 583 (quoting *Midlock*, 406 F.3d at 457).

¹⁵⁷ *Id.*

In the same vein, contrarians may try to argue that chipping away at the practice of adhering to precedential errors, even at the circuit court level, may erode respect for horizontal precedent at the Supreme Court level. This argument undermines the lack of respect for vertical stare decisis shown by the Sixth Circuit panel in *NEOCH*, by following the precedent in *McKay*, instead of binding Supreme Court statutory interpretation precedent in *Cort*, *Cannon*, *Blessing*, and the intervening Supreme Court precedent in *Gonzaga*.

In the end, the plaintiffs in *NEOCH* were not allowed to argue their CRA claims at the circuit court level and the certiorari petition was denied as was their request for en banc review of their CRA claims.¹⁵⁸

B. Theoretical Analysis

The dangers of the law of the circuit are mimetic, requiring later circuit panels to reproduce the law-suspending errors of earlier circuit panels. Implied private right of action determinations are particularly vulnerable to the shortcomings of the law of the circuit doctrine.¹⁵⁹ Once an implied private right of action determination has been made as to a particular statute at the circuit court level, all plaintiffs attempting to use that statute are either categorically included or excluded from the courts based on that circuit court decision, unless the Supreme Court, an en banc panel, or Congress intervenes.¹⁶⁰ Even if a later panel can clearly establish that the earlier panel decision contravenes decades-old Supreme Court precedent, the later panel remains obliged under the law of the circuit to continue enforcing the wrongly decided circuit panel decision, unless a temporally intervening Supreme Court or en banc decision requires the later court to abandon the earlier court's decision.¹⁶¹

When an incorrect circuit court decision contrary to Supreme Court precedent deprives a plaintiff of their right to litigate a fundamental right, it becomes necessary to ask: “what does this rule make law do in the arc of history?”

A wrongful denial of an implied private right of action works a permanent suspension of the law as to the plaintiff foreclosed from the courts. When that suspension is extended to other plaintiffs, it locates entire subpopulations

¹⁵⁸ *Ne. Ohio Coal. for the Homeless v. Husted*, 137 S. Ct. 2265, 2265 (2017) (denying certiorari). They were able to bring other claims, but that is beside the point. Those claims did not reach all of the challenged behavior, only the behavior that they could prove was racially motivated under section 2 of the Voting Rights Act or unconstitutional under the Equal Protection Clause via *Anderson-Burdick* balancing test. *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 626–27, 630 (6th Cir. 2016). The CRA presents a much less convoluted inquiry than these two statutes.

¹⁵⁹ *See supra* Part III.A.

¹⁶⁰ *See supra* Part II.B.

¹⁶¹ *See, e.g., Baynes v. Cleland*, 799 F.3d 600, 616 (6th Cir. 2015) (“Absent a change in the substantive law or an intervening Supreme Court decision which alters the outcome of those cases, it is inappropriate for a panel in this Circuit to break from earlier, controlling precedent.” (citing *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 507 (6th Cir. 2004))).

outside of the law's aegis, in a state of exception—a “permanent spatial arrangement that remains continually outside the normal state of the law.”¹⁶² Achille Mbembé describes the archetypical state of exception—a lawless place designated for the subjugated and oppressed—where the operation of the law is suspended indefinitely and the racially subjugated inhabitants are subject to constant terror.¹⁶³

Philosophers have long warned of the dangers of this level of disenfranchisement. Agamben explained that “individuals who become politically disenfranchised consequently become slaughterable, but not murderable in the legal sense,” so that no legal consequences lie against anyone who kills them.¹⁶⁴ Butler similarly asserts that the politically disenfranchised are often “imagined as . . . already dead.”¹⁶⁵

At a certain point, suspensions of the law may be so severe that legal estrangement, a term coined by Monica C. Bell, sets in with minority populations.¹⁶⁶ Legal estrangement is the “subjective ‘cultural orientation’ among groups ‘in which the law and the agents of its enforcement, such as the police and courts, are viewed as illegitimate, unresponsive, and ill equipped to ensure public safety’—and the objective structural conditions . . . that give birth to this subjective orientation.”¹⁶⁷ If legal estrangement is not addressed at a systemic level, Bell warns that “current regimes can operate to effectively banish whole communities from the body politic.”¹⁶⁸

The consequences of haphazard application of the law of the circuit are too grievous to ignore. The rule itself must be modified to reduce its propensity to circumvent Supreme Court precedent and its propensity to disenfranchise marginalized populations.

C. *Implications of the Theory*

In the future, if this issue is not resolved, we could expect to see more instances of the law of the circuit being used to silence marginalized communities.

For example, on April 7, 2021, Kentucky enacted a bill that will limit absentee voting, accessible voting places, the overall availability of polling

¹⁶² Mbembé, *supra* note 62, at 12–13.

¹⁶³ *See id.* at 22.

¹⁶⁴ Megan H. Glick, *Animal Instincts: Race, Criminality, and the Reversal of the “Human,”* 65 AM. Q. 639, 641 (2013).

¹⁶⁵ *Id.* (quoting JUDITH BUTLER, *PRECARIOUS LIFE: THE POWERS OF MOURNING AND VIOLENCE* 150 (2006)).

¹⁶⁶ Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2066 (2017).

¹⁶⁷ *Id.* at 2066–67 (quoting David S. Kirk & Andrew V. Papachristos, *Cultural Mechanisms and the Persistence of Neighborhood Violence*, 116 AM. J. SOC. 1190, 1191 (2011)).

¹⁶⁸ *Id.* at 2067.

places, and protections against voter purges.¹⁶⁹ The bill's voter purge provisions fall neatly into the purview of the prohibition on immaterial errors and omissions contained in the Civil Rights Act of 1957. Yet, Kentucky voters disadvantaged by these voter purges will likely have more difficulty challenging these restrictions under the Civil Rights Act of 1957 because of the aberrational Sixth Circuit precedent limiting private plaintiffs' ability to challenge arbitrary vote denial under the Civil Rights Act of 1957. This precedent has been cemented by the law of the circuit despite decades-old Supreme Court precedent to the contrary.¹⁷⁰ Since the possibility of using section 2 of the VRA to challenge vote denial has been sharply curtailed by the Supreme Court's decision in *Brnovich*,¹⁷¹ potential victims of arbitrary vote denial, especially those in the Sixth Circuit, are likely left without judicial remedy, unless the law of the circuit is modified.

This issue could resurface in any circuit and in any subject area outside of voting rights litigation. It is therefore necessary to revise the law of the circuit to prevent this from reoccurring.

IV. REVISING THE LAW OF THE CIRCUIT

While entrusting the judiciary to police itself may seem futile, it may be the most realistic response to this issue. Instead of simply "trashing" the judicial system as incapable of self-correction, I craft an institutional policy change, which, if applied, may create a more self-reflexive judiciary.¹⁷² Thusly, in the Critical Race Theory tradition, this Article "demand[s] change only in ways that reflect the logic of the institutions [being] challenged," thereby subversively

¹⁶⁹ See H.B. 574, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021).

¹⁷⁰ See *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2356, 2361 (2021) (Kagan, J., dissenting).

¹⁷¹ See *id.* at 2350–51.

¹⁷² This the fundamental difference between Critical Legal Studies—some of which tends toward anarchy—and Critical Race Theory, which favors subversive legitimization. Compare Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293, 293, 303 (1984) ("Finally, since many CLS people are academics, it is appropriate to recall that they are often engaged as academics in the perfectly concrete and constructive enterprise of trying to understand human behavior, whether or not that understanding will directly help us reformulate legal practice."), with Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 103, 111 (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995) ("[P]opular struggles are a reflection of institutionally determined logic and a challenge to that logic. People can demand change only in ways that reflect the logic of the institutions they are challenging. Demands for change that do not reflect the institutional logic—that is, demands that do not engage and subsequently reinforce the dominant ideology—will probably be ineffective. The possibility for ideological change is created through the very process of legitimation, which is triggered by crisis.").

legitimizing the institution for the purpose of dismantling the injustice within it.¹⁷³

A. Closing the Loophole that Subordinates Supreme Court Precedent to Circuit Court Precedent

The loophole in the law of the circuit, allowing circuit courts to subordinate Supreme Court precedent to circuit court precedent is most readily addressed by a transformation of the legal conscience of the federal bench. Before any formal changes are made to the law of the circuit, it is important to emphasize that circuit panels should not consider themselves bound by the law of the circuit in scenarios where circuit precedent flatly and irreconcilably contradicts Supreme Court precedent.¹⁷⁴ Irrespective of the current wording of the law of the circuit, Supreme Court precedent is always binding whether or not it predates circuit precedent.¹⁷⁵ For example, in instances where the Supreme Court has prescribed a test for determining whether a litigant has an implied private right of action to sue, a circuit court is not free to follow an intervening circuit court decision obviating that test.¹⁷⁶ However, it is important that the wording of the law of the circuit be updated to reflect this reality. Circuits and the Supreme Court should step in to make this distinction clear.¹⁷⁷

B. Adding a Manifest Injustice or a Vertical Stare Decisis Exception to the Law of the Circuit to Prevent Untoward Disenfranchisement

In order to ensure that the law of the circuit does not create unjustified disenfranchisement, circuit courts should consider creating a manifest injustice exception to its application. While circuit courts belabor uniformity, efficiency, and percolation as the rationale for the law of the circuit, these courts should look to the law of the case for a less restrictive way to achieve these goals.¹⁷⁸ “The law-of-the-case doctrine generally provides that ‘when a court decides upon a rule of law, that decision should continue to govern the same issues in

¹⁷³ Crenshaw, *supra* note 172, at 111.

¹⁷⁴ See Miller v. Gammie, 335 F.3d 889, 892–93 (9th Cir. 2003).

¹⁷⁵ See *id.*

¹⁷⁶ See *supra* Part II.B.

¹⁷⁷ Dragich, *supra* note 35, at 540 (“[E]ither Congress or the Supreme Court could abolish the law of the circuit doctrine without running afoul of the inferiority mandate.”).

¹⁷⁸ Compare 18B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4478 (3d ed. 2021) (“Then-Judge Gorsuch wrote that ‘without something like’ the law of the case, ‘an adverse judicial decision would become little more than an invitation to take a mulligan, encouraging lawyers and litigants alike to believe that if at first you don’t succeed, just try again.’ That would waste judicial resources, augment delay, and undermine public confidence in the judiciary.” (quoting Entek GRB, LLC v. Stull Ranches, LLC, 840 F.3d 1239, 1250 (10th Cir. 2016))).

subsequent stages in the same case.”¹⁷⁹ As applied to federal courts of appeals, the doctrine describes “an appellate court’s decision not to depart from a ruling that it made in a prior appeal in the same case.”¹⁸⁰

The rationale for the law of the case doctrine is similar to the law of the circuit rationale: uniformity and judicial efficiency.¹⁸¹ Unlike the law of the circuit doctrine however, the law of the case doctrine includes an important exception that permits a circuit panel to depart from prior circuit decisions.¹⁸² In the event that the application of the law of the case will result in manifest injustice, a later panel may depart from its own earlier rulings or the rulings of an earlier panel which ruled on that issue in an ongoing matter.¹⁸³

It is curious then that earlier cases to which a litigant was not a party bind that litigant more so than the rulings in the litigant’s case. What principle justifies this ostensible conflict? Perhaps these differences are due to the fact that the law of the case applies to ongoing litigation, and may permissibly be more lenient because *res judicata* has not yet been memorialized in the case, much less *stare decisis*, while the law of the circuit merely actualizes intra-circuit *stare decisis* after a case is finalized. Even if one were to accept this rationale, shouldn’t the law of the circuit contain some limited exception where necessary to avoid working a grave injustice? It would follow then that at least some of the exceptions operative under the law of the case should be applied under the law of the circuit.

Furthermore, what neutral principle¹⁸⁴ justifies observing binding Supreme Court precedent that postdates binding circuit court precedent, while ignoring binding Supreme Court precedent that antedates binding circuit court precedent? Uniformity and respect for the decisions of the court of first review may be the most popular justification. However, the Supreme Court has never authorized these concerns to override a lower court’s duty to honor vertical *stare decisis*.

One might also reason that if the outcome of a case is manifestly unjust, an en banc panel will convene to overturn it, or certiorari will be granted. However,

¹⁷⁹ *Musacchio v. United States*, 136 S. Ct. 709, 716 (2016) (quoting *Pepper v. United States*, 562 U.S. 476, 506 (2011)); see also *Arizona v. California*, 460 U.S. 605, 618 (1983) (describing the law of the case doctrine).

¹⁸⁰ *Musacchio*, 136 S. Ct. at 716 (citing 18B CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4478 (2d ed. 2002)).

¹⁸¹ Kazhdan, *supra* note 23, at 144 (quoting Phillip M. Kannan, *The Precedential Force of Panel Law*, 76 MARQ. L. REV. 755, 757–58 (1993)).

¹⁸² *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983), *decision supplemented*, 466 U.S. 144 (1984) (“Under law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice.” (citing *White v. Murtha*, 377 F. 2d 428, 431–32 (5th Cir. 1967))); WRIGHT & MILLER, *supra* note 178, § 4478.

¹⁸³ WRIGHT & MILLER, *supra* note 178, § 4478.

¹⁸⁴ The legal orthodoxy has a small obsession with neutral principles. See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9–10 (1959); Bell, Jr., *supra* note 48, at 521–22. A quick search in LexisAdvance for the term “neutral principles” yielded 1,646 results.

both of these possibilities are exceedingly rare—with the Ninth Circuit granting en banc review in 8 cases out of 955 petitions in 2018 and the D.C. Circuit only hearing thirty-six cases en banc between 1991 to 2002.¹⁸⁵ En banc panels cannot be relied upon to rectify a problem of this magnitude. One study suggests that en banc review is even more rare for marginalized populations than for the general population.¹⁸⁶

The Supreme Court recognizes the probability of error correction as a rationale for relaxing its horizontal stare decisis rules in constitutional decisions. Recently, in *Ramos v. Louisiana*, the Supreme Court reiterated that horizontal stare decisis at the Supreme Court level is ““at its weakest when we interpret the Constitution” because a mistaken judicial interpretation of that supreme law is often ‘practically impossible’ to correct through other means.”¹⁸⁷ By the same logic, though outside of the constitutional interpretation context, the paucity of opportunities to correct a mistaken circuit court decision should justify suspending the law of the circuit where its application would lead to misapplication of binding Supreme Court precedent.

The fewer opportunities to correct mistakes in the case law, the more invisible those mistakes become. The problems created by the law of the circuit are unique because of their stealth. By their very nature, these problems go under the radar. In a case like *NEOCH*,¹⁸⁸ plaintiffs who have already been excluded from court and made invisible before the eyes of the law are further invisibilized by the difficulty of finding other similarly situated individuals who have been wrongfully excluded from court because a circuit court weighed its own precedent more heavily than Supreme Court precedent. Establishing the scope of this problem is nearly impossible. Circuit courts normally do not announce their defiance of Supreme Court precedent, which means that only the people closely following a case and intimately familiar with the relevant case law will see when a circuit court elevates its precedents above SCOTUS precedent, creating an environment where manifest injustice can abound undetected.

Unlike the law of the case, the law of the circuit only has narrow exceptions, none of which contemplate suspending the rule in the event of manifest injustice.¹⁸⁹ Since the manifest injustice exception is already applied in the law of the case in every federal circuit,¹⁹⁰ it would not take much to make this institutionally feasible under the law of the circuit.

¹⁸⁵ OFF. OF THE CIR. EXEC., UNITED STATES COURTS FOR THE NINTH CIRCUIT: 2018 ANNUAL REPORT 44 (2018), <https://cdn.ca9.uscourts.gov/datastore/judicial-council/publications/AnnualReport2018.pdf> [<https://perma.cc/DR6K-EZD5>]; Douglas H. Ginsburg & Brian M. Boynton, *The Court En Banc: 1991–2002*, 70 GEO. WASH. L. REV. 259, 259, 261 (2002).

¹⁸⁶ Sloan, *supra* note 3, at 755 (“[C]riminal defendants may not be getting the benefit of formal en banc review as frequently as civil litigants are.”).

¹⁸⁷ 140 S. Ct. 1390, 1405 (2020).

¹⁸⁸ *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 638–39 (6th Cir. 2016) (Keith, J., concurring in part and dissenting in part).

¹⁸⁹ *See supra* Part I.

¹⁹⁰ *See Arizona v. California*, 460 U.S. 605, 618 n.8 (1983).

The easiest resolution to this problem would be to add to the law of the circuit doctrine a manifest injustice exception styled after the manifest injustice exception to the law of the case. It would read as follows:

Only the Court sitting en banc may overrule published circuit precedent, absent an intervening Supreme Court decision, a change in the applicable law, or a manifestly unjust result.

Requiring that courts consider manifest injustice before applying the law of the circuit is consistent with the fundamental tenets of civil rights literature, which emphasizes substantive fairness over empty formalism.¹⁹¹

Furthermore, that no exception for manifest injustice exists in the law of the circuit doctrine contradicts fundamental principles of legal reasoning that predate the Republic. Blackstone, for example, stated:

The doctrine of the law then is this: that precedents and rules must be followed, *unless flatly absurd or unjust*: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration.¹⁹²

The absurdity and injustice characteristic of the current law of the circuit can easily be avoided, if the above precautions are taken.

Should circuits courts find that the manifest injustice exception is too broad,¹⁹³ they could alternatively modify the law of the circuit to except scenarios where in-circuit and Supreme Court precedent cannot be reconciled. A modified law of the circuit would read as follows:

Only the Court sitting en banc may overrule published circuit precedent, absent an irreconcilable conflict with binding Supreme Court precedent, or a change in the applicable law.

This would prevent the type of harm experienced by the plaintiffs in *NEOCH*, while appeasing the conservative tendencies of the judicial system.

¹⁹¹ See Charles L. Black, Jr., *The Lawfulness of the Desegregation Decisions*, 69 YALE L.J. 421, 422, 428–29 (1960). Fundamental fairness is given more weight in issues involving voting rights. See *Bush v. Gore*, 531 U.S. 98, 109 (2000) (per curiam). In *Bush v. Gore*, the Supreme Court stated “[w]hen a court orders a statewide [election] remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.” *Id.* This provides even more support for revising the application of the law of the circuit when fundamental fairness in the voting rights context.

¹⁹² 1 WILLIAM BLACKSTONE, COMMENTARIES *70 (emphasis added).

¹⁹³ See, e.g., *Tate v. Showboat Marina Casino P’ship*, 431 F.3d 580, 582–83 (7th Cir. 2005) (“The essence of stare decisis is that the mere existence of certain decisions becomes a reason for adhering to their holdings in subsequent cases.” (internal quotation marks omitted) (quoting *Midlock v. Apple Vacations W., Inc.*, 406 F.3d 453, 457 (7th Cir. 2005))).

Supporters of the current system might counterargue that these proposals “will generally result in too much volatility in federal law.”¹⁹⁴ Worried that manifest injustice could apply too broadly, they may prefer the supposed stability of the current system. Still others might argue that giving one circuit panel the authority to determine whether an opinion conflicts irreconcilably with Supreme Court precedent would give them too much discretionary muscle to sow seeds of precedential instability. To the contrary, however, it is more plausible that both proposals would create more stability in federal law. If applied in good faith, and as rigorously as the current law of the circuit is applied, the manifest injustice exception can prevent errant rulings like that in *McKay* from mushrooming to unprincipled levels of precedential import. Even more so, the proposal to except from the law of the circuit rulings that conflict irreconcilably with any valid Supreme Court precedent would add greater stability to the federal system by withholding precedential weight from errant opinions. It is worth noting that the current system is only stable insofar as a precedential circuit opinion cannot be distinguished from a later opinion.¹⁹⁵ This is rare, given that the high rate at which circuit courts distinguish their own precedents.¹⁹⁶ In practice, the manifest injustice exception to the law of the circuit would only apply to statutory interpretation precedent.

The notion that allowing a manifest injustice or vertical stare decisis exception to the law of the circuit would create instability, misses the reality that, under the current state of affairs, arbitrarily imposing path-dependent lock-in on matters of statutory interpretation of implied private rights of action risks more than just instability. It risks wrongfully depriving marginalized populations of fundamental rights.

While other proposals to modify the law of the circuit by adding an exception for circuit splits are advantageous, they require each of the thirteen circuits formal approval.¹⁹⁷ The benefit of both of the suggestions presented in this Article, is that, compared to law of the circuit proposals that involve circuit splits or some other external trigger, the policies presented here can legally be put into immediate practice. It takes no extra institutional capacity for individual

¹⁹⁴ Sassman, *supra* note 35, at 1451.

¹⁹⁵ Distinguishing does not “dampen the preclusive effect” of the law of the circuit. Barrett, *supra* note 8, at 1020. Precedential instability already exists where factual distinctions allow for the disingenuous application horizontal stare decisis. *See id.* at 1020–21.

¹⁹⁶ Lee, *supra* note 30, at 5–6; Oakley, *supra* note 53, at 128 (“But even when a later panel not only encounters but identifies a putatively binding precedent that it regards as unsound, there are substantial disincentives to devoting scarce judicial time to an overt challenge to the arguably mistaken precedent in the thin hope of provoking a rehearing en banc. There are also substantial incentives to distinguish the ostensible precedent on shaky if not candidly spurious grounds, and, because such distinction will largely turn on how the facts are characterized, to bury this departure from or narrowing of precedent in the nether world of cases decided by summary disposition or unpublished opinion.”); Barrett, *supra* note 8, at 1020–23.

¹⁹⁷ *E.g.*, Sassman, *supra* note 35, at 1406–07.

panels to observe these principles, given that vertical stare decisis supremacy is already memorialized in Supreme Court precedent.

V. CONCLUSION

When a circuit court decides that a statute only allows public litigants, like the Attorney General, to bring suit, the law of the circuit requires that every private plaintiff thereafter suing under that same statute be denied an implied private right of action unless legislation, or a later-occurring en banc or Supreme Court decision requires that the precedent be overturned. No matter how incorrect the decision, all future circuit panels will be bound by it. Even if the prior circuit panel's decision contradicts long-standing Supreme Court precedent, future circuit panels have no authority to overrule the prior panel under the prudential law of the circuit doctrine.

This rigidly applied prudential rule must be changed immediately in order to avoid grave injustice. In the interim, judges should not consider themselves bound by the law of the circuit in instances where circuit precedent contradicts Supreme Court precedent, irrespective of whether that precedent predates the binding circuit decision. After all, the law of the circuit is merely a policy, not a precedential mandate.¹⁹⁸

The law of the circuit's overly technical application can have serious consequences in statutory interpretation cases dealing with the most vulnerable plaintiffs.¹⁹⁹ As explained above, the Sixth Circuit in *NEOCH* failed to apply the Supreme Court's implied private right of action test to the CRA when deciding whether private plaintiffs may sue under the CRA, because a prior Sixth Circuit panel failed to do so in *McKay*.²⁰⁰ Citing the law of the circuit, the later panel in *NEOCH* held that it was bound by *McKay*, even though the *McKay* panel failed to apply Supreme Court's binding implied private right of action test.²⁰¹ Instead the *McKay* panel refused to allow private plaintiffs to sue under the CRA, reasoning that the statute explicitly granted the Attorney General the authority to sue, which in the court's view precluded all other possible plaintiffs from bringing suit by negative inference.²⁰² When faced with the issue again in *NEOCH*, the circuit court referenced, yet declined to follow, Supreme Court decisions that implied a private right of action in statutes containing an explicit

¹⁹⁸ *Id.* at 1408 n.39.

¹⁹⁹ See *supra* Part II.

²⁰⁰ *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 630 (6th Cir. 2016) (“A panel of this court may not overturn binding precedent because a published prior panel decision “remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.” *McKay v. Thompson* therefore binds this panel. The plaintiffs may not bring an action for a violation of § 10101(a).” (quoting *United States v. Elbe*, 774 F.3d 885, 891 (6th Cir. 2014))).

²⁰¹ *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 630.

²⁰² *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000) (citing 42 U.S.C. § 1971(c)).

grant of authority for the Attorney General to sue, reasoning that the prudential law of the circuit required them to ignore Supreme Court precedent in favor of circuit precedent.²⁰³ This case study illustrates the unyielding nature of the prudential law of the circuit doctrine in the statutory interpretation context.

Some variations of this policy expressly forbid circuit courts from following Supreme Court precedent that conflicts with circuit court precedent if the Supreme Court decision predates the conflicting circuit court decision.²⁰⁴ Even those articulations of the law of the circuit that do not expressly endorse abrogating Supreme Court precedent that predates the binding in-circuit precedent are ubiquitously interpreted in conformity with the variations that do.²⁰⁵

The rationale is that the prior circuit panel had the opportunity to thoroughly consider, construe, and apply then-existing Supreme Court precedent. In order to avoid unnecessarily duplicating these efforts, later circuit panels are instructed to defer to the earlier circuit panel ruling. Since this rule does not make exceptions for when the earlier precedent-establishing panel patently ignores then-existing Supreme Court precedent, the absurd scenario results where a later circuit panel is bound by circuit precedent that conflicts with Supreme Court precedent. Although an en banc or Supreme Court ruling can overturn controlling circuit precedent, circuit courts rarely go en banc and the Supreme Court seldom grants certiorari, leaving litigants at the mercy of circuit precedent decided long before their case ever ripened.

Although merely prudential, circuit courts have applied this rule rigidly, to the point of abrogating Supreme Court precedent. Circuit courts dutifully observe this policy, especially in scenarios where distinguishing is nearly impossible.

The potential precedent-suspending effects of this doctrine are evermore inflexible in the implied private right of action context. When applied to implied private right of action inquiries, the law of the circuit allows lower federal courts to preclude large groups from seeking judicial recourse, effectively locating entire populations outside of the aegis of the law. Given that implied private right of action decisions are categorical (i.e., their preclusive or inclusive effect extends to broad categories of people like “all private plaintiffs”) future circuit panels will not be able to depart from this precedent by simply distinguishing the case.²⁰⁶ The later panel will have to entrench the erroneous precedent, unless an en banc panel, Supreme Court decision, or legislation obviates said precedent.

²⁰³ *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 630 (“[T]he Supreme Court had found other VRA sections enforceable by private right of action despite their provision for Attorney General enforcement and that before the Attorney General language was appended to the statute, plaintiffs ‘could and did’ bring enforcement actions under 42 U.S.C. § 1983.” (quoting *Schwier I*, 340 F.3d 1284, 1295 (11th Cir. 2003))).

²⁰⁴ *See supra* Part II.A.

²⁰⁵ *See supra* Part II.A.

²⁰⁶ *See Barrett supra* note 8, at 1021–22.

This affront to binding Supreme Court precedent illuminates a deeper controversy within the legal system, that is, the tendency of courts to relegate plaintiffs vindicating civil rights to a space of exception. This socially dead state is called the “state of exception,” which is in essence a “permanent spatial arrangement that remains continually outside the normal state of law.”²⁰⁷ The space of exception is an outgrowth of a nation’s necropolitical power to earmark portions of its own citizenry as socially dead.²⁰⁸

It is imperative that both lethal and seemingly non-lethal legal decisions be situated along the spectrum of necropolitical instantiations of power, for out of these ostensibly mundane decisions arise the attitudes and biases that ultimately rationalize extrajudicial killings, mass incarceration, and genocide.

Once a litigant’s denial of justice is understood in terms of necropolitics, it becomes apparent that litigants subject to the rigidly applied law of the circuit are literally placed outside of the realm of the law into the space of exception, where the operation of the law is permanently suspended, all for the sake of prudence. This has the effect of making certain classes of civil rights plaintiffs and their claims invisible before the eyes of the law.

In order to prevent this outcome, the language of the law of the circuit should be modified to include a manifest injustice or vertical stare decisis exception.

²⁰⁷ Mbembé, *supra* note 62, at 12–13.

²⁰⁸ *Id.* at 21–22.