VOTERS STRIKE BACK: LITIGATING AGAINST MODERN VOTER INTIMIDATION

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ABSTRACT

After Shelby County v. Holder*, voting rights advocates are exploring how other provisions of the Voting Rights Act can be used to protect voters' rights. This article argues for a renewed focus on litigating voter intimidation claims under existing law—particularly section 11(b) of the Voting Rights Act. Section 11(b) is seldom used, and few cases have tested its scope and application. Yet it authorizes an expansive voter intimidation claim that is viable against individuals and groups practicing modern-day forms of voter intimidation. As a civil claim that can be invoked by individual voters, voting rights advocates, and party committees, section 11(b) presents an opportunity to create new precedent and to use existing law to strengthen protections against voter intimidation. Such protections are particularly needed now to respond to the rise of new conservative-leaning "ballot security" groups, whose aggressive tactics to combat alleged voter fraud have renewed concerns about voter intimidation.*

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I.
INTRODUCTION

The Voting Rights Act of 1965 ("VRA") is widely regarded as "the most important and successful civil rights law of the 20th century."[1] It sparked a revolution in ballot access. In 1964, turnout for black voters was nearly eleven percent lower than the population at large.[2] Five decades later, in the 2012 presidential election, black turnout surpassed white turnout for the first time in American history.[3] Along with significant demographic changes, this democratization of voting has redefined the landscape of American elections.[4]

However, the Supreme Court's 2013 decision in *Shelby County v. Holder*[5] "effectively eviscerated" the VRA's central provision.[6] Before *Shelby*, jurisdictions with a history of discriminatory election practices were required to seek "preclearance" from the Department of Justice ("DOJ") before changing their voting laws.[7] Congress designed this provision to prevent covered jurisdictions from amending their laws "for the purpose or with the effect of denying or abridging the right to vote on account of race or color."[8] In *Shelby*, the Court held that the formula Congress used to determine which jurisdictions were subject to preclearance was unconstitutional.[9] Congress has not revised the formula, so the preclearance process has ceased. Many states that were once subject to preclearance have enacted new voting restrictions.[10]

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1. 152 CONG. REC. S7949 (daily ed. July 20, 2006) (statement of Sen. Feinstein).

2. SOC. SCI. DATA ANALYSIS NETWORK, TRENDS IN VOTER TURNOUT 2 (2012).

3. *See* Hope Yen, *In a First, Black Voter Turnout Rate Passes Whites*, ASSOCIATED PRESS (Apr. 28, 2013), http:bigstory.ap.org/article/first-black-voter-turnout-rate-passes-whites.

4. *See* Paul Taylor & Mark Hugo Lopez, *Six Take-Aways from the Census Bureau's Voting Report*, PEW RES. CTR. (May 8, 2013), http://www.pewresearch.org/fact-tank/2013/05/08/six-take-aways-from-the-census-bureaus-voting-report/ ("Non-whites were 26.3% of all voters in the 2012 election, a record high share. But they compose an even higher share of all U.S. adults age 18 and older—33.9%. By 2020 this share will rise to 37.2%, and by 2060 it will be 54.8%, according to Census Bureau projections. If the racial voting patterns from the 2012 election persist, the electoral playing field for future Republican presidential candidates will become increasingly difficult. (GOP candidate Mitt Romney received just 17% of the non-white vote.)").

5. Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

6. *From Selma to* Shelby County*: Working Together to Restore the Protections of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 1 (2013) (testimony of Wendy R. Weiser, Director, Democracy Program, Brennan Center for Justice).

7. *See Shelby*, 133 S. Ct. at 2624.

8. 52 U.S.C.A. § 10303(a)(1)(A) (West 2014).

9. *See Shelby*, 133 S. Ct. at 2631.

10. *See After Ruling, States Rush to Enact Voting Laws*, N.Y. TIMES, July 5, 2013, at A9 (describing efforts among southern states to enact new voter identification laws after the *Shelby* decision). *See also Everything That's Happened Since Supreme Court Ruled on Voting Rights Act*,

In the wake of *Shelby*, civil rights advocates and the DOJ have been exploring how other provisions of the VRA can be used to protect voters' rights.[11] For example, shortly before the *Shelby* decision, the DOJ denied preclearance for Texas's restrictive voter identification law. A federal court, ruling against the state on appeal, held that the law would likely have a "retrogressive effect" on racial minorities in the state.[12] Once *Shelby* invalidated the court's decision, the DOJ and several civil rights organizations brought a new challenge under section 2 of the VRA, which contains a blanket prohibition on racial discrimination against voters.[13] The DOJ has also begun to invoke section 3, which gives courts the discretion to craft preclearance requirements for individual jurisdictions on a case-by-case basis, in its litigation.[14]

This article argues that voting rights advocates have overlooked another important VRA provision: section 11(b), which authorizes both the DOJ and private individuals to bring an expansive civil claim for voter intimidation.[15] Section 11(b) is seldom used in litigation, and there is little case law exploring

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PROPUBLICA (Nov. 4, 2014), http://www.propublica.org/article/voting-rights-by-state-map (tracking post-*Shelby* changes in voting laws in pre-clearance and non-preclearance states).

11. Eric H. Holder, Jr., Attorney Gen. of the U.S., Remarks to the National Urban League Annual Conference (July 25, 2013) ("I have already directed the Department's Civil Rights Division to shift resources to the enforcement of a number of federal voting laws not affected by the Supreme Court's decision—including the remaining provisions of the Voting Rights Act, prohibiting voting discrimination based on race, color, or language."). *See also, e.g.*, Nicholas Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55; Tom Curry, *Let the Lawsuits Begin: Advocates Pivot Strategy Following Voting Rights Act Ruling*, NBCNEWS.COM (June 29, 2013), http://nbcpolitics.nbcnews.com/_news/2013/06/29/19192537-let-the-lawsuits-begin-advocates-pivot-strategy-following-voting-rights-act-ruling (illustrating different states' reactions to changes in voting laws); Abby Rapoport, *Get to Know Section 3 of the Voting Rights Act*, AM. PROSPECT (Aug. 29, 2013), http://prospect.org/article/get-know-section-3-voting-rights-act; Jesse Wegman, *Plan B for Voting Rights*, N.Y. TIMES, Aug. 31, 2013, at SR10 (describing renewed interest among legal scholars in the Elections Clause of the U.S. Constitution following *Shelby County*).

12. Texas v. Holder, 888 F. Supp. 2d 113, 144–45 (D.D.C. 2012), *vacated*, 133 S. Ct. 2886 (2013) (remanding for further consideration in light of *Shelby*). The district court, in denying Texas's request for a declaratory judgment in support of its voter ID law, called it "the most stringent in the country" and stated that it "will almost certainly have retrogressive effect: it imposes strict, unforgiving burdens on the poor, and racial minorities in Texas are disproportionately likely to live in poverty." *Id.* at 144.

13. The district court ruled for the plaintiffs, holding that the law was unconstitutional and a violation of section 2 of the VRA; however, as of publication, the state's appeal was pending before the Fifth Circuit. *See* Veasey v. Perry, 71 F. Supp. 3d 627 (S.D. Tex. 2014), *aff'd in part, vacated in part, remanded sub nom.* Veasey v. Abbott, No. 14-41127, 2015 WL 4645642 (5th Cir. Aug. 5, 2015).

14. In early 2014, the city of Evergreen, Alabama, agreed to a court order with DOJ subjecting it to section 3. *See* Adam Liptak, *Judge Reinstates Some Federal Oversight of Voting Practices for an Alabama City*, N.Y. TIMES, Jan. 14, 2014, at A1. DOJ has also invoked section 3 in litigation with North Carolina and Texas. *Id.* For a scholarly analysis of the use of section 3 in voting rights litigation, see generally Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992 (2010).

15. Voting Rights Act of 1965 § 11(b), 52 U.S.C.A. § 10307(b) (West 2014).

its scope.[16] But as a cause of action available to private persons, voting rights groups, and party committees, section 11(b) presents litigators with an opportunity to create new precedent and to strengthen the VRA's protections.[17] The architects of the VRA regarded section 11(b) as an important part of the statute and a significant improvement over existing prohibitions on voter intimidation. It is time to start using it.

Voter intimidation has been a recurring problem throughout the history of the United States.[18] Until the early 1960s, blacks routinely faced physical violence and economic reprisal for even attempting to register to vote.[19] That type of overtly racist intimidation dramatically declined after the federal government enacted new civil rights laws and began enforcing them aggressively. Today, voter intimidation is a significantly less pernicious influence on American elections than it was during the civil rights era.

Nevertheless, voter intimidation periodically reemerges as a problem. The 2010 mid-term elections saw the formation of new "ballot security" groups. Typically, these groups have been rooted in conservative politics and associated with the Tea Party movement.[20] For example, one of the highest-profile ballot security groups, True the Vote ("TTV"), sought to be an umbrella organization, serving as a platform for communication and training between local Tea Party groups and sympathetic election officials—usually themselves quite conservative.[21] Ballot security groups like TTV have engaged in aggressive conduct against traditionally liberal constituencies such as minorities and students.[22] For example, during a 2012 special election in Wisconsin, TTV volunteers reportedly flooded into minority precincts; followed vans transporting voters to the polls; photographed individual voters' license plates; directed

16. *See* Appendix (listing cases). *See also* Delegates to Republican Nat'l Convention v. Republican Nat'l Comm., No. SACV 12-00927 DOC, 2012 WL 3239903, at *8–13 (C.D. Cal. Aug. 7, 2012) (noting that there are very few reported cases applying section 11(b)).

17. Section 11(b) of the VRA is one of three federal statutory provisions that create a civil cause of action for voter intimidation. The other two provisions are section 131 of the Civil Rights Act of 1957, 52 U.S.C. § 10101(b) (West 2014), and section 2 of the Enforcement Act of 1871 (commonly known as the Ku Klux Klan Act), 42 U.S.C. § 1985(3) (2012). These two statutes require that additional elements be proven in addition to the core elements of section 11(b). In most cases, Civil Rights Act and Enforcement Act claims will be unnecessary, although, as discussed, situations may exist where plaintiffs should consider bringing them in addition to their section 11(b) claim. *See infra* Part V.B.2.

18. *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 200–07 (1992).

19. *See, e.g.*, United States v. Beaty, 288 F.2d 653 (6th Cir. 1961); United States v. Wood, 295 F.2d 772 (5th Cir. 1961); United States v. Clark, 249 F. Supp. 720 (S.D. Ala. 1965).

20. *See infra* Part IV.B (discussing the rise of ballot security groups).

21. *See* Hatty Lee, *Infographic: True the Vote's Spreading Campaign to Intimidate Voters in 2012*, COLORLINES, (Aug. 23, 2012), https://www.colorlines.com/articles/how-tea-partys-building-poll-watcher-network-november.

22. *See infra* Part IV.A (discussing recent reports of voter intimidation).

voters to the wrong polling places; and hovered over voting tables, aggressively challenging voters' eligibility.[23]

Such conduct is emblematic of modern voter intimidation. Today, voters are rarely overtly threatened with physical or economic harm as they were during the civil rights era; instead, voters are deterred from voting through subtler tactics, such as aggressive poll-watching, anonymous threats of harm, frivolous and excessive voter registration challenges, and coercion by employers.[24] This shift towards subtler methods of intimidation mirrors what has been seen in the employment context, where instances of overt discrimination have declined with the rise of tougher anti-discrimination laws.[25]

These activities are troubling for two reasons. First, they risk suppressing the turnout of particular voting blocs at the polls, potentially swaying election results. Many individuals targeted by ballot security groups are voters who have little experience with public institutions and little time to navigate complex election bureaucracies. Such individuals are particularly likely to forgo voting in the face of increased obstacles.[26] Second, ballot security groups often appear to target minority voters, who have been subject to a long and troubling history of disenfranchisement.[27] Disproportionate burdens on these groups' fundamental voting rights are repugnant to a twenty-first century democracy.

The usual response to these aggressive tactics has been to file complaints with election officials or law enforcement agencies, but this often results in

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23. Mariah Blake, *The Ballot Cops*, ATLANTIC MONTHLY, Oct. 23, 2012, at 64.

24. *See infra* Part IV.A.

25. *See* Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 397 (2010) ("Discrimination has gone underground. In other ways, it has transformed into unrecognizable subtleties that are easy to conceal and far more difficult to uncover. Employers are quite savvy at concealing even the appearance of impropriety. Since modern discrimination emanates from the intersection of complex systems, it has become virtually unrecognizable, making it extremely difficult to identify its character, form, and origin.").

26. *See, e.g.*, R. Michael Alvarez, Delia Bailey & Jonathan N. Katz, *The Effect of Voter Identification Laws on Turnout* 1, 17 (Cal. Inst. of Tech., Soc. Sci. Working Paper 1267R, 2008) (finding that the strictest voter ID requirements reduce voter turnout and "impose significant negative burdens on voters," especially less educated and low income voters); Robert M. Stein & Greg Vannahme, *Engaging the Unengaged Voter: Vote Centers and Voter Turnout*, 70 J. POL. 487–97 (citing studies suggesting that costs related to voting, such as time spent voting, have a significant negative impact on the likelihood of voting, and also citing studies suggesting that convenience is more influential to the infrequent voter's decision to vote). *See also* Crawford v. Marion County Election Board, 472 F3d 949, 951 (7th Cir. 2007) ("The benefits of voting to the individual voter are elusive . . . and even very slight costs in time or bother or out-of-pocket expense deter many people from voting, or at least from voting in elections they're not much interested in."), *aff'd*, 553 U.S. 181 (2008); Frank v. Walker, No. 2:11-cv-01128, slip op. at 37 (E.D. Wis. filed Apr. 29, 2014) (concluding on the basis of expert trial testimony that "even small increases in the cost of voting can deter a person from voting, since the benefits of voting are slight"); Texas v. Holder, 888 F. Supp. 2d 113, 127 (D.D.C. 2012) (citing the Alvarez study), *vacated*, 133 S. Ct. 2886 (2013) (remanding for further consideration in light of *Shelby*).

27. *See, e.g.*, Stephanie Saul, *Looking, Very Closely, for Voter Fraud*, N.Y. TIMES, Sept. 16, 2012, at A1.

minimal legal action.[28] Section 11(b), however, prohibits this kind of disenfranchisement and empowers victims to strike back against intimidation, threats, and coercion engineered to suppress their votes.

The federal case law on voter intimidation is limited. But this is an instance where the law's relative underdevelopment—in combination with the broad scope of section 11(b) and the often-egregious nature of this ballot security activity—presents an opportunity. Section 11(b) could be a powerful tool for voting rights litigators—both to enjoin ballot security groups from intimidating conduct and to create a body of law that can deter future intimidation. Some scholars have called on Congress to enact new voter intimidation statutes, arguing that the existing laws are too weak and may be ineffectual against present-day forms of intimidation.[29] Yet, while this article does not dispute the desirability of such legislation, congressional action on this issue may be unlikely for some time.[30] A more pragmatic approach is needed. With a careful strategy, litigators can create new precedent and take full advantage of the protections afforded by existing law. Even if such efforts fail, such a failure would only underscore the political case for new legislation.

That voting rights litigators have not more aggressively sought to test the boundaries of section 11(b) is likely due to a combination of factors. An individual voter does not have much incentive to file a voter intimidation lawsuit on her own behalf, particularly if she was ultimately able to cast her ballot. For organizational plaintiffs, like civil rights groups or political organizations, simple cost-benefit analysis may not always justify a voter intimidation suit. After all, the number of individuals affected by voter intimidation is low compared to those affected by higher-profile issues like voter identification and the availability of early voting.[31] And such suits may be even less attractive to

28. For example, election officials in Harris County, Texas, received more than fifty complaints against the Tea Party group King Street Patriots related to their poll-watching activities in the 2010 general election. Yet Harris County election officials took no formal legal action against the group. *See* Paul Knight, *The Queen of King Street*, TEX. OBSERVER (Feb. 3, 2011), http://www.texasobserver.org/the-queen-of-king-street/.

29. *See, e.g.*, Gilda R. Daniels, *Voter Deception*, 43 IND. L. REV. 343, 381–86 (2010); Jordan T. Stringer, *Criminalizing Voter Suppression: The Necessity of Restoring Legitimacy in Federal Elections and Reversing Disillusionment in Minority Communities*, 57 EMORY L.J. 1011, 1042–44 (2008); Sherry A. Swirsky, *Minority Voter Intimidation: The Problem That Won't Go Away*, 11 TEMP. POL. & CIV. RTS. L. REV. 359, 377–80 (2002).

30. *See, e.g.*, Susan Davis, *Congress Unlikely to Act on Voting Rights Ruling*, USA TODAY, June 25, 2013, http://www.usatoday.com/story/news/politics/2013/06/25/congress-reacts-voting-rights-rulling/2456477/; Meredith Shiner, *Can Congress Fix the Voting Rights Act?*, ROLL CALL (June 25, 2013), http://www.rollcall.com/news/can_congress_fix_the_voting_rights_act-225935-1.html; John Stanton, *Nobody in Congress Thinks They Can Fix the Voting Rights Act*, BUZZFEED (June 25, 2013), http://www.buzzfeed.com/johnstanton/nobody-in-congress-thinks-they-can-fix-the-voting-rights-act#.vp14e7Xmw.

31. *See, e.g.*, Applewhite v. Commonwealth, No. 330 M.D. 2012, 2014 WL 184988, at *8 (Pa. Commw. Ct. Jan. 17, 2014) (holding that Pennsylvania's voter identification law violated the fundamental state constitutional right to vote in part because "the overwhelming evidence reflects that there are hundreds of thousands of qualified voters who lack compliant ID").

would-be challengers given the untested nature of the claims discussed in this article. So, while voter intimidation can make news when it happens, it is rare for litigants to actually challenge it in court. With that in mind, the authors hope that this article will help lower the cost of bringing a voter intimidation suit by explaining how the law works and laying out a viable path for bringing claims.

Part II begins by reviewing the legislative histories of section 11(b) and two important predecessor statutes: the Ku Klux Klan Act (the "KKK Act") and the Civil Rights Act of 1957. It explains how these statutes were the product of a political consensus that expansive federal power was necessary to secure voting rights for individual citizens. Part II concludes by explaining how Congress carefully designed section 11(b) of the VRA to be as expansive as possible.

Part III shows how section 11(b) reaches a wide variety of contemporary ballot security activity. This Part describes the elements of the three major statutes authorizing civil voter intimidation claims; analyzes the ordinary meaning of the key statutory term "intimidate, threaten, or coerce"; reviews the federal case law; and explores federal agency guidance.[32] Part III then describes why plaintiffs in section 11(b) cases are not required to prove racial motivation, which historically posed a significant hurdle for victims under a predecessor statute, section 131(b) of the Civil Rights Act of 1957.[33] It then explains how, as a constitutional matter, the First Amendment does not limit section 11(b); rather, Congress used its expansive authority under the Elections Clause to reach a wide range of private conduct in both state and federal elections that threatens the fundamental right to vote. It concludes with a review of some successful efforts to invoke section 11(b) in court.

Part IV surveys the contemporary voter intimidation landscape in the United States, which has been shaped primarily by three developments. First, in step with broader social trends, voter intimidation has shifted from overtly racist violence and threats to tactics that are more "subtle, cynical, and creative."[34] Second, voter intimidation activity has shifted from local sheriffs, white supremacist groups, and political campaigns to conservative ballot security groups.[35] Third, this Part examines how "voter fraud" has emerged as a pretext for justifying the intimidation of what one scholar has thoughtfully termed "unwanted voters."[36] This Part reviews each of these developments.

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32. *See infra* Part III.A.1.e.

33. *See infra* Part III.A.2.a.

34. PEOPLE FOR THE AM. WAY FOUND. & NAACP, THE LONG SHADOW OF JIM CROW: VOTER INTIMIDATION AND SUPPRESSION IN AMERICA TODAY 1 (2004) [hereinafter PFAW & NAACP]. *See infra* Part IV.A.

35. *See infra* Part IV.B.

36. *See infra* Part IV.C. The term "unwanted voters" was coined by Professor Gilda R. Daniels. Gilda R. Daniels, *A Vote Delayed Is a Vote Denied: A Preemptive Approach to Eliminating Election Administration Legislation that Disenfranchises Unwanted Voters*, 47 U. LOUISVILLE L. REV. 57, 58 (2008) (discussing "the disabled, elderly, poor, or minority voter"). The term is used in this article to describe any voter whose exercise of the franchise provokes an organized backlash from state or local governments or from private individuals.

Part V concludes by offering practical advice to litigators in advancing voter intimidation claims, including suggestions on structuring legal arguments, selecting parties, and formulating relief.[37]

II.
LEGISLATIVE HISTORY OF THE FEDERAL VOTER INTIMIDATION LAWS

The right to vote has changed significantly over the course of American history. Who possesses this right, how they may exercise it, and for what offices they may vote has changed from state to state and era to era. While the arc of American history has bent towards an expansion of the franchise, this expansion has not always come easily, often meeting fierce resistance from those in and out of government. Along the way, at several key moments, Congress played an important part in expanding the franchise. Congress passed the KKK Act during Reconstruction and the Voting Rights Act during the civil rights era.[38] These were defining national episodes. And these statutes were correspondingly ambitious in scope, seeking in a real way to define the terms of national citizenship. In doing so, these laws grappled directly with the long history of exclusion in American politics.

The history behind the voter intimidation provisions is particularly important because the provisions themselves have so rarely been used.[39] In the absence of clear precedent, litigators and judges are likely to turn to legislative history as an interpretative tool.[40] Indeed, among the handful of voter intimidation cases that federal courts have decided and reported, several reference the historical circumstances of the statutes' passage[41] or the text of their congressional reports.[42]

Furthermore, the legislative histories of the KKK Act and the Voting Rights Act show Congress acting with a keen awareness of history. In both cases, Congress understood itself to be correcting the nation's past mistakes iteratively,

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37. *See infra* Part V.

38. President Ulysses S. Grant signed the Ku Klux Klan Act, Pub L. No. 42-22, 17 Stat. 13, into law on April 20, 1871. President Dwight D. Eisenhower signed the Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634, into law on September 9, 1957. President Lyndon Baines Johnson signed the Voting Rights Act, Pub. L. No. 89-110 , 79 Stat. 437, into law on August 6, 1965.

39. *See infra* Part III.A.1.a.

40. *See generally* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 856–61 (1992) (describing the role of legislative history when interpreting "a statute that evoked strong political support and opposition in Congress and was enacted with language that is unclear or silent about an important issue that faces a court").

41. *See, e.g.*, James v. Humphreys Cnty. Bd. of Election Comm'rs, 384 F. Supp. 114, 118 (N.D. Miss. 1974) ("The county has a history of opposing voting rights for black citizens, and prior to the adoption of the Voting Rights Act of 1965, very few, if any, blacks were registered to vote.").

42. *See, e.g.*, Willingham v. Cnty. of Albany, 593 F. Supp. 2d 446, 462 (N.D.N.Y. 2006) (using the House Report to parse section 11 of the Voting Rights Act in the absence of any cases addressing an issue).

by building and expanding on solutions it had tried before but had not quite gotten right. And in both cases, Congress demonstrated a clear intent to stamp out any interference with a citizen's lawful right to vote. Therefore, in the absence of binding precedent, the legislative record presents an opportunity for voting rights litigators to ensure that these laws are as protective as Congress originally intended them to be.

A. History of Exclusion

The Ku Klux Klan Act and the Voting Rights Act are part of a recurring dynamic in federal election law in which Congress and the President take steps to expand the franchise in the face of onerous limitations by state and local governments. This dynamic is partly a consequence of the framers' decision not to include any express right to vote in the Constitution.[43] The framers certainly believed in the legitimacy of representative democracy and the importance of self-governance, but they were deeply skeptical of universal suffrage, as that concept is now understood. Delegates to the Constitutional Convention heavily debated how broadly to afford voting rights. Conservatives, including James Madison, argued that property ownership should be a prerequisite.[44] Advocates of broader suffrage opposed and ultimately defeated the inclusion of such a requirement but declined to offer any affirmative provision to assure a more expansive franchise.[45] The compromise was constitutional silence, as the framers left the exact scope of the franchise to the states.[46] The Supreme Court only later held that the right to vote was implied in the Federal Constitution.[47]

Efforts to limit the franchise then, as now, often reflected deeper social anxieties.[48] For example, property owners believed that the landless lacked a

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43. Every reference to the franchise in the Constitution is expressed in the negative. For example, the Nineteenth Amendment states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. CONST. amend. XIX. This has periodically led to calls for a Right-To-Vote constitutional amendment that would assert the franchise in affirmative terms. *See, e.g.*, MOLLIE HAILEY, FAIRVOTE, A CONSTITUTIONAL RIGHT TO VOTE: THE PROMISE OF HOUSE JOINT RESOLUTION 44 (2013).

44. ALEXANDER KEYSSAR, THE RIGHT TO VOTE 18 (2d ed. 2009) ("Madison . . . argued that the corruption of Parliament in England had occurred because the 'qualification of suffrage' was too low in the 'cities and boroughs.' Madison also maintained that 'the freeholders of the country would be the safest depositories of republican liberty . . . .'").

45. *Id.* at 19.

46. *Id.* James Madison, in The Federalist number 52, explains that the framers avoided addressing the scope of suffrage because, "To have reduced the different qualifications in the different States to one uniform rule, would probably have been as dissatisfactory to some of the States as it would have been difficult to the convention." Instead, he presumed that voting qualifications would be "fixed by the State constitutions." THE FEDERALIST NO. 52 (James Madison).

47. *See* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (describing the right to vote as a "fundamental political right, because [it is] preservative of all rights").

48. "The same reasoning which will induce you to admit all men who have no property, to vote, with those who have, . . . will prove that you ought to admit women and children; for, generally speaking, women and children have as good judgments, and as independent minds, as

"stake in society" and thus "would constitute a menace to the maintenance of a well-ordered community."[49] With such beliefs widely shared, it is unsurprising that federal actions to expand voting rights often prompted a fierce backlash from states, localities, and citizens unwilling to accept the unwanted voters. Indeed, voting rights were one of the most important flashpoints in Reconstruction and the civil rights era—periods that saw America coming to terms with what it meant to be a more inclusive nation.

Congress intended the Ku Klux Klan Act and the Voting Rights Act to combat these deeply rooted historical and cultural forces. These laws intervene on a granular level, to the level of individual citizens, for the purpose of securing the rights of national citizenship. They make it a federal crime to deprive individuals of the right to vote.[50] They create private rights of action in federal courts.[51] They set federal standards for the administration of elections.[52] In essence, they interject the full force of the federal government between eligible voters and those individuals and groups who seek to keep them from voting.

B. Reconstruction and the Ku Klux Klan Act

As the arguments described above might suggest, the franchise was extremely limited at the time of the founding. Between the founding and the Civil War, states gradually adopted reforms to increase the size and scope of the electorate.[53] However, women and racial minorities continued to be denied the

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those men who are wholly destitute of property; these last being to all intents and purposes as much dependent upon others, who will please to feed, clothe, and employ them, as women are upon their husbands, or children on their parents . . . Depend upon it, Sir, it is dangerous to open so fruitful a source of controversy and altercation as would be opened by attempting to alter the qualifications of voters; there will be no end of it. New claims will arise; women will demand the vote; lads from twelve to twenty-one will think their rights not enough attended to; and every man who has not a farthing, will demand an equal voice with any other, in all acts of state. It tends to confound and destroy all distinctions, and prostrate all ranks to one common level." KEYSSAR, *supra* note 44, at 1 (quoting John Adams).

49. *Id.* at 8.

50. Section 2 of the Ku Klux Klan Act created federal criminal penalties for conspiring to deprive an individual of equal protection under the law. The Supreme Court struck down the criminal component of these provisions in *United States v. Harris*. Enforcement Act of 1871 § 2, 17 Stat. 13, *invalidated in part by* United States v. Harris, 106 U.S. 629 (1883). Section 12 of the Voting Rights Act establishes criminal penalties for violations of that Act's terms. Voting Rights Act of 1965 § 12, 52 U.S.C.A. § 10308 (West 2014).

51. Section 1 of the Ku Klux Klan Act conveys jurisdiction in the federal courts for violations. Enforcement Act of 1871 § 1, 28 U.S.C. § 1343(a) (2014). Section 12(f) of the Voting Rights Act does the same. 52 U.S.C.A. § 10308(f).

52. For example, section 10 of the Voting Rights Act prohibits poll taxes. *See* 52 U.S.C.A. § 10306. Subsequent amendments to the VRA created affirmative duties for election officials, such as section 203, which requires that they offer multilingual balloting options. *See* 52 U.S.C.A. § 10503(b)(2).

53. In particular, states steadily phased out property requirements for voting. *See* KEYSSAR, *supra* note 44, at 24 ("By the end of the 1850s, only two property requirements remained in force anywhere in the United States, one applying to foreign-born residents of Rhode Island and the other to African Americans in New York.").

franchise.[54] Thus, the attempt to enfranchise African American men during Reconstruction represented a rapid and dramatic expansion of voting rights.

According to Eric Foner, a historian of the Reconstruction period whose work is often cited by the courts,[55] two sea changes occurred in American politics during Reconstruction. The first was a broad-based effort to bring African Americans into the political process.[56] When the Civil War began, only six states permitted African Americans to vote,[57] but, within a decade, Congress had adopted the Thirteenth, Fourteenth, and Fifteenth Amendments. The second change was a new willingness by the federal government to exercise power on a national scale. According to Foner, Reconstruction cemented "the federal government as the main protector of citizens' rights."[58] As just one example, the Fourteenth Amendment created the country's first legally binding definition of national citizenship.[59] The result of these changes was a period of unprecedented electoral success for African Americans. Before the Civil War, no blacks had been elected to federal office, but during Reconstruction, "[f]ifteen African-Americans were elected to the United States House of Representatives and two to the United States Senate from previously confederate states."[60]

Many southern whites responded to these sweeping changes with a sustained campaign of voter intimidation through terrorism and violence.[61] Political violence, common in the South since the end of the Civil War, increased in response to each of the federal government's actions during

54. *See generally id.* at 43–49.

55. *See, e.g.*, Hayden v. Pataki, 449 F.3d 305, 351 n.3 (2d Cir. 2006); United States v. Nelson, 277 F.3d 164, 190 (2d. Cir. 2006); Cotter v. City of Boston, 193 F. Supp. 2d 323, 328 (D. Mass. 2002); United States v. Contreras, 134 F. Supp. 2d 820, 826 (S.D. Tex. 2000) (citing Foner's scholarship on Reconstruction).

56. Eric Foner, *The Supreme Court and the History of Reconstruction—and Vice-Versa*, 112 COLUM. L. REV. 1585, 1586–87 (2012) ("Reconstruction represented a remarkable repudiation of the prewar tradition that defined the United States as a 'white man's Government'; it created for the first time an interracial democracy in which rights attached to persons not in their capacity as members of racially defined groups but as members of the American people.").

57. KEYSSAR, *supra* note 44, at 69.

58. Foner, *supra* note 56, at 1587. ("The laws and amendments of Reconstruction gave the national state the authority to intervene in local affairs to protect the basic rights of all American citizens. This principle also represented a repudiation of the previous traditions of American history. Before the Civil War, most Americans believed that a powerful national government posed a danger to their liberties and that local and state authorities could best protect the rights of citizens. The laws and amendments of Reconstruction opened the door for future Congresses and the federal courts to define and redefine the guarantee of equality, a process that has occupied the courts for the better part of the last half-century.").

59. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

60. Daniels, *supra* note 36, at 62 n.24 (2008).

61. KEYSSAR, *supra* note 44, at 84. Foner has described the rise of political violence in the Reconstruction South as "counter-revolutionary terror." *Id.*

Reconstruction.[62] The Ku Klux Klan attacked one-tenth of the black members of the 1867–68 constitutional conventions.[63] Even the simple act of voting could provoke violence.[64] And while the Klan during this time is mostly remembered for white supremacy, it was fundamentally a political movement: violence and harassment was also directed at white Republicans and Union sympathizers.[65]

Congress responded with a series of laws known collectively as the Enforcement Acts, starting with the Enforcement Act of 1870.[66] The purpose of these laws was "to guarantee the rights protected by the Fourteenth and Fifteenth Amendments, particularly, the right to vote."[67] Section 1 declared an affirmative right to vote, which, at the time, had not yet been articulated by the Supreme Court.[68] Many of the Act's other provisions criminalized interference with voting rights.[69]

Nonetheless, political violence continued in the South, prompting Congress to revisit the issue with the Enforcement Act of 1871,[70] commonly known as the Ku Klux Klan Act.[71] The law's purpose was to protect individuals' rights of national citizenship, including the right to vote.[72] The Act's criminal provisions

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62. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 425 (1988).

63. *Id.* at 426.

64. *Id.* at 427 ("Alabama freedman George Moore reported how, in 1869, Klansmen came to his home, administered a beating, 'ravished a young girl who was visiting my wife,' and wounded a neighbor. 'The cause of this treatment, they said, was that we voted the radical [Republican] ticket.'").

65. Keyssar has described the Klan at this time as the "military, or paramilitary, arm of the Democratic Party." KEYSSAR, *supra* note 44, at 84. *See also* Mark Fockele, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U. CHI. L. REV. 402, 407–11 (1979) (describing the political threat of the Ku Klux Klan); Ken Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 TEX. L. REV. 527, 535 (1985) ("They also leveled terror on white sympathizers of the Negro cause, invariably members of the Republican or 'Radical' Party.").

66. Enforcement Act of 1870, 16 Stat. 140 (1870).

67. Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2137 (1993).

68. Enforcement Act § 1 ("[A]ll citizens of the United States who are or shall be otherwise qualified by law to vote at any election . . . shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.").

69. For example, section 2 criminalized the failure of election officials to perform any act "required to be done as a prerequisite or qualification for voting" on the basis of "race, color, or previous condition of servitude." *Id.* § 2.

70. Lawrence, *supra* note 67 at 2140–41 & n.96 ("Among the precipitating events of the passage of the Ku Klux Klan Act was a presidential message calling upon Congress to enact legislation to combat violence in the southern states.").

71. Enforcement Act of 1871, Pub L. No. 42-22, Ch. 22, 17 Stat. 13 (1871).

72. The sponsor of the voter intimidation language explained that its object was to prevent "deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope

prompted the greatest controversy, particularly the creation of federal penalties for a wide range of conduct that had previously been governed by state law.[73] The law's supporters understood that this entailed a newly expansive view of federal power.[74] Much of the legislative debate surrounding the enactment of the KKK Act related to the question of how broadly to deploy that power. While the Democratic Party was staunchly opposed to the Act, the Republicans were split between "radical" and "moderate" factions.[75] The moderates expressed concern that the sweeping federalization of criminal conspiracies would overreach into areas that had historically been the province of state law.[76] The factions compromised by restricting the reach of several of the Act's provisions to deprivations of "equal protection" under the law, as expressed in the Fourteenth Amendment.[77]

Today, the KKK Act is best remembered for sections 1983 and 1985, which create claims that allow "aggrieved individuals [to] file suit against their assailants" for deprivations of constitutional rights.[78] The voter intimidation claim—which is also contained in section 1985— has remained comparatively obscure.[79] It creates a private right of action against conspiracies "to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy" in a federal election.[80] Notably, while many of the Act's legal claims are limited to deprivations of "equal protection" under the law, Congress included no such restrictions on the Act's voter intimidation provision. While there is nothing in the congressional record specifically explaining this formulation, given how heavily debated the inclusion of the equal protection language was, its absence from the voter intimidation provision

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of the remedies of this section." Lawrence, *supra* note 67, at 2145 (citing CONG. GLOBE, 42d Cong., 1st Sess. 478 (1871) (remarks of Rep. Shellabarger)).

73. Lawrence, *supra* note 67, at 2141–42 ("In 1871 . . . the Ku Klux Klan Act was seen as a federal criminal statute designed to create a federal role in suppressing violence in the southern states. The debate over the criminal provisions of the Ku Klux Klan Act was among the most dramatic early expositions of the federalism problem. The legislation as originally proposed would have made federal crimes of a long litany of common law crimes such as murder, manslaughter, robbery, assault and arson. The bill was viewed as the most extreme shift of power from the states to the federal government by any of the Reconstruction-Era constitutional amendments or statutes.").

74. *See* FONER, *supra* note 62, at 455–56 (collecting quotes from Republican supporters espousing a broad conception of federal power to protect rights of national citizenship).

75. *See* Fockele, *supra* note 65, at 412–17 (describing the radical and moderate positions).

76. *Id.* at 414–17; Gormley, *supra* note 65, at 538 (describing the moderates' view that "[n]ot every run-of-the-mill conspiracy should be swept under federal law").

77. *See* Fockele, *supra* note 65, at 417–20 (describing the amended compromise bill); Gormley, *supra* note 65, at 539–40 ("The critical change in section two was the injection of the 'equal protection' and 'equal privileges and immunities' language that was incorporated in the final version of the Act.").

78. FONER, *supra* note 62, at 457.

79. *See* Gormley, *supra* note 65, at 551 n.78 (describing the voter intimidation provision of § 1985(3) as "often-neglected").

80. Enforcement Act of 1871 § 2, 42 U.S.C. § 1985(3) (2012).

indicates that Congress never doubted its authority to directly regulate interference in federal elections.

For a brief time, these laws succeeded in tamping down the activities of the Klan and similar organizations.[81] However, shifting political winds quickly undermined their successes. The Supreme Court issued a series of decisions striking down many of the criminal provisions of the Enforcement Act of 1870 as unconstitutional.[82] Meanwhile, the nation's appetite for Reconstruction waned.[83] Reconstruction came to an end in 1877 as part of a political compromise to resolve the contested 1876 presidential election.[84] Newly installed President Rutherford B. Hayes ordered federal troops in the South to withdraw from southern political affairs.[85] By the 1880s, the Enforcement Acts were seen as accomplishing very little, and Republicans in Congress pushed, but ultimately failed, to reinstate protections for black voters.[86] Many states once again erected institutional barriers to black voters, whose participation declined precipitously as the era of Jim Crow began.

C. The Voting Rights Act

After Reconstruction, an elaborate system of poll taxes, literacy tests, grandfather clauses, and other discriminatory policies barred many blacks from even registering to vote.[87] As a consequence, voting rights featured prominently throughout the civil rights movement of the 1950s and 1960s, and civil rights campaigners advocated forcefully for increased access to the ballot.[88] In 1957, in an address to nearly thirty thousand people at the Lincoln Memorial, Martin Luther King, Jr., declared, "Give us the ballot and we will fill our legislative halls with men of good will."[89] In 1965, at the conclusion of the Selma-to-

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81. *See* FONER, *supra* note 62, at 458–59.

82. *See* United States v. Reese, 92 U.S. 214, 218 (1876) (striking down sections 3 and 4 of the 1870 Act, which criminalized election registration misconduct, because the Fifteenth Amendment guaranteed only a negative right to be free from discrimination in the exercise of the franchise rather than a positive right to vote). *See also* James v. Bowman, 190 U.S. 127, 142 (1903) (striking down section 5 of the 1870 Act); United States v. Cruikshank, 92 U.S. 542, 554–55 (1876) (holding that the state action limitation of the Fourteenth Amendment could not support criminal liability against private actors).

83. *See* FONER, *supra* note 62, at 577 ("Privately, [President] Grant told the cabinet [in 1876] that the Fifteenth Amendment had been a mistake: 'It had done the Negro no good, and had been a hindrance to the South, and by no means a political advantage to the North.'").

84. *See generally id.* at 575–87 (discussing the presidential election of 1876, the political compromise, and the withdraw of federal troops).

85. *Id.* at 582.

86. KEYSSAR, *supra* note 44, at 86–87.

87. *See, e.g.*, Gabriel J. Chin & Randy Wagner, *Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 83–85, 90, 97 (2008) (describing the decline of African American political power after Reconstruction and the use of the poll tax as a tool of disenfranchisement).

88. KEYSSAR, *supra* note 44, at 206–07.

89. *Id.* at 207.

Montgomery March, King explained, "Our whole campaign in Alabama has been centered around the right to vote. In focusing the attention of the nation and the world today on the flagrant denial of the right to vote, we are exposing the very origin, the root cause, of racial segregation in the Southland."[90]

As had been the case during Reconstruction, faced with the collapse of institutional barriers to racial equality, organized groups and recalcitrant state and local governments once again staged a campaign of violence and intimidation aimed at blacks and their political allies. And once again, the right to vote was a flashpoint. In 1959, the Federal Commission on Civil Rights explained: "The critical source of nonvoting by blacks was the brazen refusal of southern authorities to permit blacks to register, as well as their willingness to intimidate those who tried."[91] As Keyssar explains, "[African Americans] who were adamant about registering [to vote] could lose their jobs, have loans called due, or face physical harm. More than a few were killed."[92] Voting rights workers, both white and black, were targeted as well.[93] The federal government faced pressure to respond.[94]

The Civil Rights Act of 1957 was a compromise measure designed to pass through Congress without driving a wedge between the Northern and Southern factions of both parties.[95] It had modest aims:

> The bill created a national Civil Rights Commission, elevated the Civil Rights section into a full-fledged division of the Justice Department, and authorized the attorney general to seek injunctions and file civil suits in voting rights cases. The operative heart of the measure was a strengthening of the machinery that the Justice Department and federal judges could utilize to respond to violations of existing voting rights laws, including the Fifteenth Amendment.[96]

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90. Martin Luther King, Jr., Address at the Conclusion of the Selma to Montgomery March (Mar. 25, 1965).

91. KEYSSAR, *supra* note 44, at 208–09.

92. *Id.* at 207.

93. Most famously, in June 1964, James Earl Chaney, Andrew Goodman, and Michael Schwerner were lynched by white supremacists in Mississippi while they were organizing civil rights activity, including voter registration drives. Many historians have written about this episode. *See generally, e.g.*, SETH CAGIN, WE ARE NOT AFRAID: THE STORY OF GOODMAN, SCHWERNER, AND CHANEY, AND THE CIVIL RIGHTS CAMPAIGN FOR MISSISSIPPI (1988).

94. *See* Louis Menand, *The Color of Law: Voting Rights and the Southern Way of Life*, NEW YORKER (July 8, 2013), http://www.newyorker.com/magazine/2013/07/08/the-color-of-law ("The primary goal [of civil rights campaigners], though, was to provoke official reaction sufficiently violent to compel the White House to produce a voting-rights bill with enforcement bite."). *See generally* ROBERT A. CARO, MASTER OF THE SENATE 850–70 (2002).

95. The Democrats were particularly nervous about alienating the southern wing of the party, which was strongly segregationist. *See* CARO, supra note 94, at 850–70.

96. KEYSSAR, *supra* note 44, at 208.

Among these provisions was section 131(b), the 1957 Act's voter intimidation provision, which "states clearly that it is unlawful for a private individual as well as one acting under color of law to interfere or attempt to interfere with the right to vote at any general, special, or primary election concerning Federal offices."[97]

Several factors limited the efficacy of the 1957 Civil Rights Act and its voter intimidation provisions in particular. The Justice Department was unable or unwilling to aggressively enforce the law's protections.[98] The courts restricted the legislation's reach, issuing inconsistent and often limiting interpretations.[99] Prosecutors also had difficulty showing "purposeful discrimination," which the statute required.[100] It quickly became clear that the Act was not working as intended. In 1961, the Federal Commission on Civil Rights "reported that 'in some 100 counties in eight Southern States,' discriminatory laws, arbitrary registration rulings, and threats of 'physical violence or economic reprisal' still kept most 'Negro citizens from exercising the right to vote.'"[101]

By the mid-1960s, the political landscape had changed. In light of the 1957 Civil Rights Act's failure, as well as public outrage over events such as the "Bloody Sunday" attack by Selma police on peaceful protestors crossing the Edmund Pettus Bridge, support for robust federal action to protect minority voting rights increased significantly.[102] President Lyndon Johnson, Attorney General Nicholas Katzenbach, and the civil rights campaigners pushed for a

97. STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 852 (Bernard Schwarz ed. 1970) (discussing 52 U.S.C.A. § 10101(b) (West 2014))

98. Daniels, *supra* note 36, at 64 n.32 (stating that the Civil Rights Act of 1957 was "seen primarily as a symbolic measure with little enforcement"). *See also* KEYSSAR, *supra* note 44, at 208 ("Well-intentioned as the bill surely was, it had few teeth and little impact: the Justice Department was sluggish in initiating suits, southern federal judges were sometimes unreceptive, and the entire strategy of relying on litigation inescapably meant that progress would be slow.").

99. Swirsky, *supra* note 29, at 371 ("Specifically, courts applying Section 1971(b) of the Act have reached conflicting conclusions on whether it reaches conduct by private individuals, which elections it covers, how much evidence of intimidation it requires, whether it may be enforced by private litigants, and if so, whether a private litigant must first exhaust state election board administrative remedies. Such inconsistency has posed an obstacle to meaningful enforcement of the provision.").

100. Daniels, *supra* note 36, at 360–61. In the House hearings leading up to the passage of the Voting Rights Act, Attorney General Nicholas Katzenbach testified "that [p]erhaps the most serious inadequacy [of the existing voter intimidation statutes] results from the practice of district courts to require the Government to carry a very onerous burden of proof of 'purpose.' Since many types of intimidation, particularly economic intimidation, involve subtle forms of pressure, this treatment of the purpose requirement has rendered the statute largely ineffective." *Id.* at 361 n.98.

101. KEYSSAR, *supra* note 44, at 210.

102. *See, e.g.*, GARY MAY, BENDING TOWARD JUSTICE 85–99, 149 (2013) ("Although passage of the Voting Rights Bill was by no means guaranteed, Martin Luther King was in a stronger position than he knew. His strategy had worked brilliantly. By provoking Sheriff Clark into committing mayhem, which culminated in Bloody Sunday, King had aroused the nation and Congress to action.").

more meaningful response to minority disenfranchisement.[103] The result was the Voting Rights Act of 1965. Unlike the 1957 law, Congress and the President passed the VRA with an appreciation for the limitations of previous voting rights legislation[104] and the political consequences of muscular action.[105]

Sections 2 and 5 of the VRA were undoubtedly the Act's most significant provisions. Section 2 generally prohibited discriminatory voting practices.[106] Section 5 subjected certain jurisdictions with a history of racial discrimination to additional federal oversight through the preclearance process.[107] Next to these sections, the voter intimidation provisions were relatively modest.

Nevertheless, section 11(b) was a deliberate attempt to expand the existing laws against voter intimidation, including by eliminating any legal requirement of racial targeting.[108] Katzenbach drafted much of the VRA's language, and he intended section 11(b) to reach more broadly than section 131(b) of the 1957 Act. In testimony before the Senate Judiciary Committee, Katzenbach explained that the VRA "represents a substantial improvement over [section 131(b) of the 1957 Act], which now prohibits voting intimidation. Under [the VRA] no subjective 'purpose' need be shown, in either civil or criminal proceedings, in order to prove intimidation under the proposed bill. Rather, defendants would be deemed to intend the natural consequences of their acts. This variance from the language of § 1971(b) is intended to avoid the imposition on the Government of the very onerous burden of proof of 'purpose' which some, district courts have—wrongfully, I believe—required under the present law."[109] The VRA's House Report expressly adopts Katzenbach's reasoning: "The prohibited acts of intimidation need not be racially motivated; indeed, unlike [section 131(b)] (which requires proof of a 'purpose' to interfere with the right to vote) no subjective purpose or intent need be shown."[110]

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103. *Id.* at 95–123, 149–70 (describing the Johnson administration's efforts to pass the voting rights bill). *See also* Menand, *supra* note 94 (quoting Johnson as saying to Katzenbach: "I want you to write me the goddamnest toughest voting rights act that you can devise").

104. Swirsky, *supra* note 29, at 373 & n.102 (2002) ("The Voting Rights Act . . . was enacted in 1965 in response to the perceived inadequacies of the existing voting laws.").

105. KEYSSAR, *supra* note 44, at 213 (describing the political realignment following the passage of the Voting Rights Act).

106. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301 (West 2014).

107. 52 U.S.C.A. § 10304.

108. The text of section 11(b) reads: "No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote . . . ." 52 U.S.C.A. § 10307(b).

109. Voting Rights, Part 1: Hearings on S. 1564 Before the S. Comm. on the Judiciary, 89th Cong. 16 (1965).

110. STATUTORY HISTORY OF THE UNITED STATES, *supra* note 97, at 1502.

Combined with active enforcement by the Department of Justice, the VRA was enormously effective.[111] However, with its decision in *Shelby*, the Supreme Court severely handicapped the section 5 preclearance process. In comparison, section 11(b) has seen little use. The Department of Justice has brought only a handful of voter intimidation cases since the VRA's passage.[112]

III.
THE FEDERAL VOTER INTIMIDATION CLAIMS

In this Part, we describe the various civil law voter intimidation claims available under federal law, especially section 11(b). Because plaintiffs have so rarely invoked section 11(b), few courts have had occasion to address its scope. But because of its availability to voting rights groups, party committees, and individual citizens, section 11(b) creates a significant opportunity to build new precedent and strengthen the VRA's protections. In particular, section 11(b), properly understood, is likely broad enough to cover a great deal of contemporary ballot security activity.

Section 11(b) reads in its entirety:

> No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under [certain other provisions] of this title.[113]

In short, the statute prohibits "intimidation," "threats," or "coercion" against a person, either "for voting or attempting to vote" or "for urging or aiding any person to vote or attempt to vote." Attempts to do the same are also prohibited. And Congress carefully and deliberately excluded any intent requirement from this provision, such that plaintiffs need only show that the conduct in question was objectively intimidating without necessarily proving anything about the defendant's underlying motivation or state of mind.[114]

Section 11(b) of the VRA is one of three major federal statutes authorizing civil claims for voter intimidation. The other two statutes are section 131(b) of

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111. KEYSSAR, *supra* note 44, at 212 ("In Mississippi, Black registration went from less than 10 percent in 1964 to almost 60 percent in 1968, in Alabama, the figure rose from 24 percent to 57 percent. In the region as a whole, roughly a million new voters were registered within a few years after the bill became law, bringing African-American registration to a record 62 percent.").

112. *See* Appendix (listing cases).

113. Voting Rights Act of 1965 § 11(b), 52 U.S.C.A. § 10307 (West 2014).

114. *See infra* Part III.A.2 (analyzing the role of intent under each of the three statutes).

the Civil Rights Act of 1957[115] and section 2 of the Enforcement Act of 1871 (the "KKK Act").[116] Like section 11(b), section 131(b) also prohibits "intimidation," "threats," and "coercion" of voters, but contains a more stringent intent requirement including that the defendant's conduct be racially motivated.[117] The KKK Act prohibits "force, intimidation, or threat"—similar language as "intimidate, threaten, or coerce." It lacks an intent requirement, but requires a conspiracy among the defendants.[118] In most cases, there is no practical reason for voter intimidation plaintiffs to bring anything but a section 11(b) claim.[119] Yet this Part discusses all three statutes. This is because understanding the KKK Act and section 131(b) claims is useful for understanding how section 11(b) expanded upon the protections afforded by existing law.

Section 11(b)[120] and the KKK Act[121] afford a private right of action, while courts have disagreed about the availability of a private right of action under section 131(b).[122] None of the three statutes requires state action on the part of

115. Civil Rights Act of 1957 § 13(b), 52 U.S.C.A. § 10101(b) (West 2014) ("No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.").

116. Enforcement Act of 1871 § 2, 42 U.S.C. § 1985(3) (2012) ("[I]f two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.").

117. *See infra* Part III.A.2 (analyzing the intent requirements of the three statutes).

118. 42 U.S.C. § 1985(3).

119. One possible exception may be where plaintiffs are seeking damages, the recovery of which the KKK Act authorizes. *See id.* ("[T]he party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.").

120. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 555–56 (1969); Gray v. Main, 291 F. Supp. 998, 999–1000 (M.D. Ala. 1966).

121. 42 U.S.C. § 1985(3) ("[T]he party so injured or deprived may have an action for the recovery of damages . . . .").

122. A private right of action is clearly available in the Eleventh Circuit. *See* Schwier v. Cox, 340 F.3d 1284, 1296 (11th Cir. 2003). District courts have also found it available in the Third and Ninth Circuits. *See* Delegates to the Republican Nat'l Convention v. Republican Nat'l Comm., No. SACV 12–00927 DOC(JPRx), 2012 WL 3239903, at *5 n.3 (C.D. Cal. Aug 7, 2012); Brooks v. Nacrelli, 331 F. Supp. 1350, 1351–52 (E.D. Pa. 1971). It is unavailable in the Sixth Circuit. *See* McKay v. Thompson, 226 F.3d 752, 756 (6th Cir. 2000). District courts have also declined to find a private right of action in the Second, Fifth, and Tenth Circuits. *See* Broyles v. Texas, 618 F. Supp. 2d 661, 697 n.11 (S.D. Tex. 2009); Gilmore v. Amityville Union Free Sch. Dist., 305 F. Supp. 2d 271, 279 (E.D.N.Y. 2004); Good v. Roy, 459 F. Supp. 403, 406 (D. Kan. 1978). The First, Fourth, Seventh, Eighth, and D.C. Circuits have not addressed the question.

the defendants; the KKK Act, by its express terms, applies to private conspiracies,[123] and section 11(b) and 131(b) ban any person from intimidating voters "whether acting under color of law or otherwise."[124]

Unlike section 131(b), which requires that plaintiffs prove racial motivation, or the KKK Act, which requires a conspiracy among the defendants, all a section 11(b) claim requires is a nexus between the defendant's conduct and a voting-related activity and a showing that the defendant's conduct was objectively intimidating, threatening, or coercive. Though there are few published decisions analyzing these terms,[125] their ordinary or natural meaning is straightforward—and is the same today as when the VRA was enacted.[126] To "intimidate" is to make another person fearful, especially in order to influence his or her conduct.[127] To "threaten" is to express an intention to harm another.[128] And to "coerce" is to compel another person's conduct using force (whether that force be physical, economic, or moral).[129] If ballot security groups engage in any such tactics, those groups can be liable for voter intimidation under section 11(b).

A. Elements of the Claims

1. "Intimidate, Threaten, or Coerce"

a. Published Decisions Analyzing "Intimidate, Threaten, or Coerce"

The case law on the federal civil voter intimidation claims consists of roughly two dozen published decisions.[130] In eight of the cases, courts ruled in

123. 42 U.S.C. § 1985(3).

124. 42 U.S.C. § 1985(3); 52 U.S.C. § 10101(b) (West 2014). One district court has stated, in dicta, that § 11(b) and § 131(b) are enforceable only against "action by the United States or a particular state" and not against "individual action." United States v. Harvey, 250 F. Supp. 219, 225 (E.D. La. 1966). However, this decision is an outlier and is contrary to established precedent. Congress may protect the right to vote in federal elections against private interference. United States v. Williams, 341 U.S. 70, 77 (1951) (citing *Ex parte* Yarbrough, 110 U.S. 651 (1884)).

125. *See infra* Part III.A.1.a.

126. *See infra* Part III.A.1.b.

127. *See infra* Part III.A.1.b.

128. *See infra* Part III.A.1.b.

129. *See infra* Part III.A.1.b.

130. *See* Appendix (listing and summarizing cases). Though only nine of the twenty-two reported voter intimidation cases involved § 11(b) claims, § 11(b) may be equated with § 131(b) and the KKK Act per the doctrine of *in pari materia*, which allows courts to interpret two similar statutes consistently. *See* Northcross v. Bd. of Ed. of Memphis City Schs., 412 U.S. 427, 428 (1973) (holding that where a statutory term has similar language to a term in a previously enacted statute, and where the two statutory provisions share a common purpose, the term should be interpreted in light of the previously enacted statute); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PENN. L. REV. 1007, 1039 (1989) ("Where a federal law is similar to (*in pari materia* with) another federal law, the Court will presumptively interpret the former law consistently with the other and will rely on prior interpretations of one to interpret the other.").

the plaintiff's favor on at least one claim.[131] Notably, except for one case that also involved a KKK Act claim,[132] each of the successful cases involved only section 131(b) claims. There are few cases addressing section 11(b) and no successful ones. In unreported cases, however, plaintiffs have brought section 11(b) claims that have led to successful outcomes such as emergency injunctive relief and favorable consent decrees.[133]

Few of the published voter intimidation cases analyze the statutory terms "intimidate, threaten, or coerce."[134] But two broad concepts emerge with respect to these terms. First, and unsurprisingly, the overt displays of force and violence that epitomize the voter intimidation of the 1950s and 1960s clearly constitute "intimidation," "threats," or "coercion." Physical violence,[135] economic coercion,[136] baseless prosecution,[137] and threats thereof[138] all reach this threshold. Second, plaintiffs must show a sufficient nexus between the alleged conduct and a voting-related activity. Courts have found that intimidation targeted at a range of activities—including voter registration, informational meetings about voting, and completing absentee ballot applications—is

131. Paynes v. Lee, 377 F.2d 61 (5th Cir. 1967); United States v. McLeod, 385 F.2d 734 (5th Cir. 1967); United States v. Bruce, 353 F.2d 474 (5th Cir. 1965); United States v. Beaty, 288 F.2d 653 (6th Cir. 1961); United States v. Wood, 295 F.2d 772 (5th Cir. 1961); United States v. Clark, 249 F. Supp. 720 (S.D. Ala. 1965); United States by Katzenbach v. Original Knights of the Ku Klux Klan, 250 F. Supp. 330 (E.D. La. 1965); United States v. Deal, 6 Race Rel. L. Rep. 474 (W.D. La. 1961).

132. *See* Paynes v. Lee, 377 F.2d 61 (5th Cir. 1967).

133. *See infra* Part III.D (discussing successful, unreported section 11(b) cases).

134. *See, e.g.*, Delegates to Republican Nat'l Convention v. Republican Nat'l Comm., No. SACV 12–00927 DOC(JPRx), 2012 WL 3239903, at *11–12 (C.D. Cal. Aug. 7, 2012) (noting that there are few voter intimidation cases and stating that the term "intimidate, threaten, or coerce" might reach beyond the conduct at issue in the 1960s voter intimidation cases, but that plaintiffs failed to argue why it reached defendants' conduct).

135. *Wood*, 295 F.2d 772 (courthouse official beat black voter registration volunteer in front of black residents trying to register); *Original Knights of the Ku Klux Klan*, 250 F. Supp. 330 (pattern of violence against black citizens).

136. *Beaty*, 288 F.2d 653 (white landowners evicted and refused to deal in good faith with black tenant farmers for purpose of interfering with their voting rights); *Deal*, 6 Race Rel. L. Rep. 474 (white business owners refused to engage in business transactions with black farmers who attempted to register to vote); *Bruce*, 353 F.2d 474 (white landowners ordered black defendant, an insurance collector active in encouraging voter registrations, to stay off their property, preventing him from reaching business clients).

137. United States v. McLeod, 385 F.2d 734 (5th Cir. 1967) (baseless arrests and prosecutions of black citizens seeking to vote and voter registration volunteers); *Wood*, 295 F.2d 772 (baseless arrest and prosecution of voting rights volunteer); United States v. Clark, 249 F. Supp. 720 (S.D. Ala. 1965) (baseless arrests and prosecutions of black citizens seeking to vote and voter registration volunteers).

138. Paynes v. Lee, 377 F.2d 61 (5th Cir. 1967) (white citizens threatened to "destroy" and "annihilate" black man who tried to register to vote); *Original Knights of the Ku Klux Klan*, 250 F. Supp. 330 (pattern of threats against black citizens).

sufficiently related to voting.[139] In contrast, courts have rejected claims where the connection to the act of voting was more tenuous.[140]

In the KKK Act, the terms "force, intimidation, or threats" is used in two other provisions: one prohibiting conspiracies to prevent an officer of the United States from performing his or her duties[141] and another prohibiting conspiracies to deter parties from participating in legal proceedings as witnesses or jurors.[142] However, no case law interpreting these terms existed when section 11(b) and section 131(b) were passed.[143]

One issue the courts have left unanswered is whether plaintiffs must show proof of actual intimidation or whether it is simply enough to show that a defendant's conduct was objectively intimidating. Some courts have dismissed claims where plaintiffs could not identify specific individuals who were deterred from voting.[144] Other courts have allowed intimidation to be inferred from the nature of the defendants' actions without requiring the plaintiffs to identify any particular victim.[145]

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139. *McLeod*, 385 F.2d 734 (voter registration meetings); *Bruce*, 353 F.2d 477 (registering to vote); Willingham v. Cnty. of Albany, 593 F. Supp. 2d 446 (N.D.N.Y. 2006) (stating that filling out absentee ballot applications could give rise to a § 11(b) claim); *Original Knights of the Ku Klux Klan*, 250 F. Supp. at 353 (stating that § 1971(b) "may be extended against interference with any activity having a rational relationship with the federal political process").

140. Gill v. Farm Bureau Life Ins. Co., 906 F.2d 1265 (8th Cir. 1990) (insurance company did not engage in voter intimidation against agent by not renewing contract with agent who was fundraiser for candidate opposing the candidate the company supported); Coleman v. Miller, 912 F. Supp. 522 (N.D. Ga. 1996) (holding that the display at polling places of state flag, which incorporates Confederate symbol, did not constitute voter intimidation where plaintiff failed to offer evidence of effect of flag on African Americans' voting practices).

141. Enforcement Act of 1871 § 2, 42 U.S.C. § 1985(1) (2012).

142. 42 U.S.C. § 1985(2).

143. Based on the Westlaw "Notes of Decisions" for 42 U.S.C. § 1985 (June 13, 2015). The authors entered "42 USC 1985(1)" and "42 USC 1985(2)" under "Search Notes of Decisions" and reviewed the cases. If such § 1985(1) and § 1985(2) cases existed, courts could rely on them to interpret § 11(b) and § 131(b) under the doctrine of *in pari materia*. *See supra* note 130.

144. United States v. Edwards, 333 F.2d 575, 579 (5th Cir. 1964) (finding that only one "isolated" incident occurred and plaintiffs failed to show that incident actually reduced the number of African Americans who registered to vote); Brooks v. Nacrelli, 331 F. Supp. 1350, 1353 (E.D. Pa. 1971) ("Plaintiffs have failed to show that the challenged activities have, in fact, had an intimidating effect upon the voters of the City of Chester. There was, for example, no testimony from any registered voter that he is hesitant to vote or to vote in a certain way because of the presence of the policemen on Election Day . . . .").

145. *See, e.g.*, United States v. Wood, 295 F.2d 772, 781 n.9 (5th Cir. 1961) ("On the basis of the record in this Court and in view of the conditions and circumstances prevailing in Mississippi, it is most unlikely that, if the appellees are allowed to proceed with Mr. Hardy's trial, further Negro registration will take place."); United States v. Clark, 249 F. Supp. 720, 728 (S.D. Ala. 1965) (reasoning that the "inevitable effect" of the conduct at issue in the case is deterrence of African Americans from voting).

b. Ordinary Meaning of "Intimidate," "Threaten," and "Coerce"

In statutory interpretation, words are given their ordinary or natural meaning.[146] Courts "follow the common practice" of consulting dictionary definitions to discern ordinary meaning, often looking to how a word was defined when the statute was adopted.[147] To ascertain the ordinary meaning of "intimidate," "threaten," and "coerce," the authors referenced the five dictionaries most frequently consulted by the Supreme Court,[148] including both current editions and editions contemporaneous with the enactment of the VRA.[149]

The definitions of "intimidate," "threaten," and "coerce" are consistent, both among the various dictionaries and between 1965 and today. To "intimidate" is to make another person fearful, especially in order to influence his or her conduct. To "threaten" is to express an intention to harm another. To "coerce" is to compel another person's conduct using force (such as physical, economic, or moral force). The definitions in Webster's Third New International Dictionary, the general usage dictionary most commonly cited by the Court,[150] are typical. Webster's Third defines "intimidate" as "to make timid or fearful; inspire or

146. *Leocal v. Ashcroft*, 543 U.S. 1, 8–9 (2004) (quoting *Smith v. United States*, 508 U.S. 223, 228 (1993)).

147. *See, e.g.*, *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 225–28 (1994) (relying on dictionaries to ascertain a term's meaning, and reviewing current editions of dictionary and edition in use when the statute was enacted).

148. The authors consulted the general usage dictionaries most often consulted by the Court during the 2000–2001 to 2009–2010 terms—which were, in order, Webster's Third New International Dictionary, Webster's Second New International Dictionary, the Oxford English Dictionary, and the American Heritage Dictionary—as well as Black's Law Dictionary, which was the most frequently cited legal dictionary. Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court's Use of Dictionaries in the Twenty-First Century*, 94 MARQ. L. REV. 77, App. C (2010) (listing instances where the Court cited each dictionary).

149. For definitions of "intimidate" and "intimidation," see WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1184 (1961); WEBSTER'S INTERNATIONAL DICTIONARY: SECOND EDITION 1301 (1959); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 383 (11th ed. 2004); BLACK'S LAW DICTIONARY 957 (4th ed. 1951); BLACK'S LAW DICTIONARY 898 (9th ed. 2009); THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 638 (5th ed. 1964); CONCISE OXFORD ENGLISH DICTIONARY 744 (12th ed. 2011); and THE AMERICAN HERITAGE DICTIONARY 444 (5th ed. 2013). For definitions of "threat," see WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2382 (1961), WEBSTER'S INTERNATIONAL DICTIONARY: SECOND EDITION 2633 (1959); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 744 (11th ed. 2004); BLACK'S LAW DICTIONARY 294–95 (4th ed. 1951); BLACK'S LAW DICTIONARY 1618 (9th ed. 2009); THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 1350 (5th ed. 1964); CONCISE OXFORD ENGLISH DICTIONARY 1502 (12th ed. 2011); and THE AMERICAN HERITAGE DICTIONARY 849 (5th ed. 2013). For definitions of "coerce" and "coercion," see WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 439 (1961); WEBSTER'S INTERNATIONAL DICTIONARY: SECOND EDITION 519 (1959); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 139 (11th ed. 2004); BLACK'S LAW DICTIONARY 324 (4th ed. 1951); BLACK'S LAW DICTIONARY 294–95 (9th ed. 2009); THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 232 (5th ed. 1964), CONCISE OXFORD ENGLISH DICTIONARY 278 (12th ed. 2011); and THE AMERICAN HERITAGE DICTIONARY 168 (5th ed. 2013).

150. Kirchmeier & Thumma, *supra* note 148, at 82.

affect with fear; frighten, especially to compel to action or inaction (as by threats)."[151] The relevant definition of "threat" in *Webster's Third* is "an expression of an intention to inflict evil, injury, or damage on another, usually as punishment for something done or left undone."[152] The relevant definition of "coercion" is "the act of coercing; use of physical or moral force to compel to act or assent."[153] Thus, the ordinary and natural meaning of these terms is unambiguous.

c. "Intimidate," "Threaten," and "Coerce" in Other Federal Civil Rights Statutes

The terms "intimidation, threats, and coercion" or nearly identical terms are used in several other federal civil rights statutes, including section 203 of the Civil Rights Act of 1964 ("Title II"),[154] section 217 of the Fair Housing Act ("FHA"),[155] and section 503 of the Americans with Disabilities Act ("ADA").[156] Decisions involving these statutes illustrate that courts have consistently read such terms to encompass more subtle forms of conduct, in addition to the types of violent, overt, and physical intimidation that prevailed at the time the statutes were enacted.

In an FHA case in the Seventh Circuit, for example, the defendant argued that vandalism of the plaintiff's property, including the scrawling of a racial slur, did not amount to "threatening, intimidating, or interfering" within the meaning of the statute because "it is far less ominous, frightening, or hurtful than burning a cross in the neighbor's front yard or assaulting the neighbor physically."[157] Yet the Seventh Circuit Court of Appeals rejected this argument and held that the plaintiffs stated a valid claim. Writing for the panel, Judge Richard Posner reasoned that, even if the defendant's conduct was less "ominous, frightening, or hurtful" than the most extreme examples of its kind, "[t]hat cannot be the test. There are other, less violent but still effective, methods by which a person can be

151. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1184 (1961).

152. *Id.* at 2382.

153. *Id.* at 439.

154. *See* Civil Rights Act of 1964 (Title II) § 203, 42 U.S.C. § 2000a-2 (2012) ("No person shall . . . intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 2000a or 2000a-1 of this title [prohibiting discrimination or segregation in places of accommodation].").

155. *See* Fair Housing Act of 1968 § 217, 42 U.S.C. § 3617 (2012) ("It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of . . . any right granted or protected by section 3603, 3604, 3605, or 3606 of this title [prohibiting discrimination in the sale or rental of housing, real estate-related transactions, and brokerage services].").

156. Americans with Disabilities Act of 1990 § 503, 42 U.S.C. § 12203(b) (2012) ("It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of . . . any right granted or protected by this chapter.").

157. Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 330 (7th Cir. 2004).

driven from his home and thus 'interfered' with in his enjoyment of it [such as] a *pattern* of harassment, invidiously motivated."[158] In a similar case, in which city officials in Richmond, Virginia, allegedly intimidated plaintiffs by conducting excessive investigations of a rental property, a federal district court upheld the plaintiff's section 217 claim using the same reasoning.[159] The court held that, although the city's conduct did not involve the kinds of physical violence present in earlier cases:

> Neither the cases nor the legislative history of [section 217] attempt to define the minimum level of intimidation or coercion necessary to violate this statute. The fact that the City's behavior is not as severe or egregious as some other cases under [section 217] does not mean that, as a matter of law, what the City did was not violative of the provision.[160]

Courts have reached similar holdings in several other FHA cases as well.[161] In section 1985(2) and ADA section 503 cases, courts have reached similar results as in the FHA cases described above. The Second Circuit Court of Appeals, for example, held that a plaintiff with epilepsy stated a section 503 claim where, after sending the company a letter asking to be shifted to a job where she would not have to drive, the company president sent her a letter accusing her of "slanderous" allegations and threatening legal action if she "continue[d] this behavior."[162] This case did not fit the mold of traditional ADA retaliation claims because the plaintiff did not suffer an adverse employment action. Nevertheless, the court held that a jury could conclude that the plaintiff was intimidated by the company president's "short, sharp, letter of rebuke."[163] In a section 1985(2) case, a district court held that emotional distress, not merely physical injury, can give rise to a section 1985(2) witness intimidation claim.[164] The court reasoned

158. *Id.*

159. *See* People Helpers, Inc. v. City of Richmond, 789 F. Supp. 725, 733 n.5 (E.D. Va. 1992).

160. *Id.*

161. *See, e.g.*, Walker v. City of Lakewood, 272 F.3d 1114, 1129 (9th Cir. 2001) (holding that plaintiff stated § 217 claim where city failed to renew plaintiff's firm's contract with city because firm brought fair housing complaint against city, and reasoning that § 217 "does not require a showing of force or violence or coercion, interference, intimidation, or threats to give rise to liability" because "[w]hen Congress intended to require such a showing, such as in the FHA's criminal provision, it did so"); Krueger v. Cuomo, 115 F.3d 487, 491 (7th Cir. 1997) (holding that sexual harassment violates § 217's ban on intimidation, threats, coercion, and interference); Fowler v. Borough of Westville, 97 F. Supp. 2d 602, 613 (D.N.J. 2000) (denying defendant's motion for summary judgment in § 217 claim where police conducted excessive stops outside group home and surveillance of group home, and questioned and harassed residents). *But see* Sporn v. Ocean Colony Condo. Ass'n, 173 F. Supp. 2d 244, 252–254 (D.N.J. 2001) (holding that "'shunning' is not the kind of behavior that interferes with FHA rights").

162. Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 213–16 (2d Cir. 2001).

163. *Id.* at 223.

164. Silverman v. Newspaper & Mail Deliverers' Union of N.Y. and Vicinity, No. 97 Civ. 0040(RLE), 1999 WL 893398, at *4 (S.D.N.Y. Oct. 11, 1999).

that Congress passed the KKK Act not only to respond to Klan violence but also to address improper interference with the judicial process.[165]

These decisions indicate a pattern in judicial interpretation. Courts have not limited the terms "intimidation," "threats," and "coercion" to the most egregious conduct occurring when the statutes were passed. Instead, courts have read them more broadly, consistent with their ordinary meanings.[166]

d. "Intimidate," "Threaten," and "Coerce" Under State Law

At least two state civil rights statutes use the terms "intimidate, threaten, or coerce" or similar terms.[167] The most frequently cited of these statutes is the Massachusetts Civil Rights Act ("MCRA"). Section 11H of the MCRA authorizes a cause of action against persons who "interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution of laws of the United States, or of rights secured by the constitution or laws of the commonwealth [of Massachusetts]."[168] In Massachusetts, a significant body of case law interpreting the terms "threats," "intimidation," and "coercion" has developed.[169] The Supreme Judicial Court of Massachusetts defines "threat" as "the intentional exertion of pressure to make another fearful or apprehensive of injury or harm;"[170] "intimidation" as "putting [one] in fear for the purpose of compelling or deterring conduct;"[171] and "coercion" as "the application to another of force 'to constrain him to do against his will something he would not otherwise have done.'"[172] Courts have interpreted "intimidation, threats, and coercion"

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165. *Id.* The court cited a D.C. Circuit decision holding that "restoration of civil authority, including restoration of the federal courts' ability to proceed without improper interference," was a "major" reason Congress passed the KKK Act. McCord v. Bailey, 636 F.2d 606, 615 (D.C. Cir. 1980).

166. *See supra* Part III.A.1.b (describing the ordinary meanings of the terms).

167. Mass. Civil Rights Act, MASS. GEN. LAWS ANN. ch. 12, § 11H (West 2014); CAL. ELEC. CODE § 18540 (West 2014).

168. MASS. GEN. LAWS ANN. ch. 12, § 11H.

169. The Westlaw page for section 11H lists 257 citing decisions, many interpreting the phrase "threats, coercion, or intimidation." Westlaw page for MASS. GEN. LAWS ANN. ch. 12, § 11H (follow "Notes of Decisions" hyperlink). *See, e.g.*, Damon v. Hukowicz, 964 F. Supp. 2d 120, 149–51 (D. Mass. 2013) (plaintiff satisfied "threat" prong of MCRA claim where defendant police officers indicated intent to arrest plaintiff under circumstances when they would not have had valid grounds for arrest), Kennie v. Nat'l Res. Dep't, 866 N.E.2d 983, 988–90 (Mass. App. Ct. 2007) (town official's statement to property owner that he would do "whatever it takes" to prevent a dock from being installed was not intimidation because it was "no more than a promise of vigorous opposition"); Sarvis v. Boston Safe Deposit & Trust Co., 711 N.E.2d 911, 918 (Mass. App. Ct. 1999) (arrests and detention of plaintiffs were "intrinsically coercive and, thus, sufficient to meet the plaintiffs' burden on that prong [of the MCRA]").

170. *See* Planned Parenthood League of Mass., Inc. v. Blake, 631 N.E.2d 985, 990 (Mass.), *cert. denied*, 513 U.S. 868 (1994).

171. *Id.*

172. Kennie v. Nat'l Res. Dep't, 889 N.E.2d 936, 943 (Mass. 2008) (quoting *Planned Parenthood*, 631 N.E.2d at 990).

relatively broadly. For example, it does not require the use or threat of physical force.[173] However, the MCRA has never been applied in a voter intimidation case.

The most in-depth analysis of the term "intimidation" in the voter intimidation context in state law is found in *United States v. Nguyen*, a case from the Ninth Circuit Court of Appeals interpreting a criminal provision of the California election code.[174] The provision, section 18540, criminalizes the use of any "tactic of coercion or intimidation, to induce or compel any other person to refrain from voting."[175] During a congressional campaign, a mass mailing service sent 14,000 letters to newly registered voters with Hispanic surnames in the district. The letters warned that if the recipients voted in the election, their personal information would be collected by the government and made available to organizations that were "against immigration."[176] Nguyen, the losing candidate in the election, was convicted of obstruction of justice for failing to disclose the full extent of his knowledge regarding the mailing of the letter and appealed his conviction on the ground that the warrant for the search of his campaign headquarters—which had yielded incriminating information about his connection to the letter—was not supported by probable cause.[177]

The Ninth Circuit affirmed Nguyen's conviction, holding that the magistrate had probable cause to believe that Nguyen's conduct constituted "intimidation" under section 18540.[178] The court relied on a California state court case holding that "the type of intimidation envisioned by section [18540] is not limited to displays or applications of force, but can be achieved through manipulation and suggestion."[179] The court stated that "an individual may violate [the statute] through subtle, rather than forcefully coercive means, although this intimidation must be intentional."[180] Because "the letter targeted immigrant voters with threats that their personal information would be provided to anti-immigration groups if they exercised their right to vote, and was mailed by a campaign with a

173. Broderick v. Roache, 803 F. Supp. 480, 487 (D. Mass. 1992) (holding that "scheme of harassment" which induces plaintiff to give up secured rights "violate[s] MCRA," "even [when] carried out by nonphysical threats or intimidation" and citing cases).

174. United States v. Nguyen, 673 F.3d 1259 (9th Cir. 2012).

175. CAL. ELEC. CODE § 18540 (West 2014).

176. *Nguyen*, 673 F.3d at 1261.

177. *Id.*

178. *Id.* at 1265.

179. *See id.* (citing Hardeman v. Thomas, 208 Cal. App. 3d 153, 168 (1989) ("We have learned in our modern, advertisement-oriented society that subtle manipulation and suggestion can be a forceful and effective form of influence on our actions.")).

180. *Id.* at 1265. While *Nguyen* states that "intimidation must be intentional," it should be noted that *Nguyen* was a criminal case, where an element of intent is typically presumed. This contrasts with section 11(b), which is a civil claim that lacks an intent requirement. *See infra* Part III.A.2.b.

vested interest" in those voters staying home on election day, the court held, there was a fair probability that mailing the letter violated the statute.[181]

Nguyen is instructive because the court considered the question at the heart of this article: how a statute prohibiting "intimidation" applies to contemporary ballot security tactics.[182] The Ninth Circuit's recognition that the term "intimidation" as used in a voter intimidation criminal statute encompasses not only "forcefully coercive" conduct, but also "manipulation and suggestion," can serve as a guidepost for courts and advocates seeking to understand how to apply the term in the context of modern-day ballot security activity.

e. Federal Agency Interpretations of "Intimidate," "Threaten," and "Coerce"

Two federal agencies have defined voter intimidation in instructive ways. The Department of Justice, which is charged with enforcing 18 U.S.C. § 594, the criminal voter intimidation statute, recognizes a relatively broad definition of voter intimidation—one that goes well beyond physical force and threats of violence. DOJ's *Elections Prosecution Manual* defines voter intimidation as conduct designed to "deter or influence voting activity through threats to deprive voters of something they already have, such as jobs, government benefits, or, in extreme cases, their personal safety."[183] The definition recognizes that voter intimidation is "likely to be both subtle and without witnesses" and that evidence of voter intimidation includes not only threats, duress, and economic coercion, but any "aggravating factor that tends to improperly induce conduct on the part of the victim."[184] Similarly, according to the manual, criminal voter intimidation statutes prohibit not only physical and economic coercion of voters, but also a broader range of conduct that is "intended to force prospective voters to vote against their preferences, or refrain from voting, through activity reasonably calculated to instill some form of fear."[185]

The United States Election Assistance Commission ("EAC") has issued a report that defines criminal "acts of coercion" in a voting context. As an example, the EAC includes "knowingly challenging a person's right to vote without probable cause or on fraudulent grounds, or engaging in mass, indiscriminate, and groundless challenges of voters solely for the purpose of preventing voter[s] from voting or to delay the process of voting."[186] This interpretation indicates that EAC would likely consider frivolous and excessive

181. *Id.*

182. The letter is a classic example of the "offsite threat of prosecution or harm," one category of modern-day voter intimidation tactics. *See infra* Part IV.A.2.

183. U.S. DEP'T OF JUSTICE, FEDERAL PROSECUTION OF ELECTION OFFENSES 54 (2007) [hereinafter DOJ ELECTIONS PROSECUTION MANUAL].

184. *Id.* at 55.

185. *Id.* at 57.

186. U.S. ELECTION ASSISTANCE COMM'N, ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATIONS FOR FUTURE STUDY 14 (December 2006), [hereinafter EAC GUIDANCE].

voter registration challenges—a tactic of contemporary ballot security groups[187]—to be an act of coercion.

2. Intent and Racial Motivation

Two distinct questions of intent are relevant in federal civil voter intimidation claims. The first is whether the defendant's acts were racially motivated. Here the law is straightforward: plaintiffs in section 131(b) cases must prove the defendant's conduct was racially motivated, while plaintiffs in section 11(b) and KKK Act claims need not prove racial motivation. The second question is—putting racial motivation aside—to what extent must the plaintiff make any showing of the defendant's intent? Here, section 131(b) expressly requires that the proscribed "[i]ntimidation, threats, or coercion" be undertaken "for the purpose of interfering with" the plaintiff's right to vote.[188] In contrast, Congress deliberately omitted an intent requirement from section 11(b) with the goal of making such claims easier to bring. The KKK Act is similarly silent on intent, but requires some showing of the defendant's mindset through its conspiracy requirement.

a. Only Section 131(b) Claims Require a Showing of Racial Motivation

Section 131(b) requires the plaintiff to prove that the defendant's conduct was racially motivated.[189] This requirement is derived from the statute's requirement that the "[i]ntimidation, threats, or coercion" be undertaken "for the purpose of interfering with" the plaintiff's right to vote,[190] in conjunction with the fact that "the purpose of section 1971 is to prevent racial discrimination at the polls."[191] Section 131(b) claims have been denied where plaintiffs failed to allege or provide evidence of racial discrimination.[192] Racial motivation can be inferred, however, where an action affects a disproportionate number of minority voters.[193]

In contrast, section 11(b) claims require no showing that the defendant's conduct was racially motivated. This is clear from the provision's main text;

187. *See infra* Part IV.A.3.

188. Civil Rights Act of 1957 § 131(b), 52 U.S.C.A. § 10101(b) (West 2014).

189. Brooks v. Nacrelli, 331 F. Supp. 1350, 1352 (E.D. Pa. 1971), *aff'd*, 473 F.2d 955 (3d Cir. 1973); Gremillion v. Rinaudo, 325 F. Supp. 375 (E.D. La. 1971); Powell v. Power, 320 F. Supp. 618 (S.D.N.Y.), *aff'd*, 436 F.2d 84 (2d. Cir. 1970); Cameron v. Johnson, 262 F. Supp. 873 (S.D. Miss. 1966), *aff'd*, 390 U.S. 611 (1968).

190. 52 U.S.C.A § 10101(b) (West 2014).

191. *Brooks*, 331 F. Supp. at 1352.

192. *Id.* (holding that the presence at the polls of non-uniformed policemen, who were also Republican Party committeemen, did not constitute a violation of § 1971(b) in part because there was no allegation of racial discrimination).

193. Toney v. White, 476 F.2d 203, 208 (5th Cir. 1973) (finding racial motivation in a Voting Rights Act challenge to a registrar's purge of voting rolls where 1377 black voters had their registrations cancelled as opposed to only ten white voters).

unlike section 131(b), enacted eight years earlier, section 11(b) contains no intent language.[194] Congress deliberately excluded this language to expand the availability of the claim. According to the House Report for section 11(b): "The prohibited acts of intimidation need not be racially motivated; indeed, unlike [section 131(b)] (which requires proof of a 'purpose' to interfere with the right to vote) no subjective purpose or intent need be shown."[195] The House Report notes that the Judiciary Committee revised the original bill to extend its coverage "to intimidation of any person seeking to vote, whether or not his right to vote is secured by some provision of the act."[196] Put another way, section 11(b) protects all voters, regardless of their race. Further, while most of the Voting Rights Act was passed pursuant to the Fifteenth Amendment, which prohibits racial restrictions on voting, the House Report for section 11(b) specifically invokes "article I, section 4 [the Elections Clause of the Constitution], and the implied power of Congress to protect Federal elections against corrupt influences, neither of which requires a nexus with race."[197] One district court case mistakenly held that racial motivation is an element of section 11(b).[198] This reading is demonstrably incorrect in light of the statute's plain meaning and legislative history.

The KKK Act similarly does not require any allegation of racial motivation. Due to the statute's intricate wording, it is easy to misread a requirement of "class-based animus" into the statute.[199] But § 1985(3) actually contains two separate causes of action: an equal protection claim and a voter intimidation claim.[200] To establish liability under the equal protection claim, plaintiffs must

194. Section 131(b) states: "No person, whether acting under the color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person *for the purpose of* interfering with the right of such other person to vote . . . ." 52 U.S.C. § 10101(b) (emphasis added). Section 11(b), enacted eight years later, simply states: "No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce *any person for voting or attempting to vote* . . . ." Voting Rights Act of 1965 § 11(b), 52 U.S.C.A. § 10307(b) (West 2014) (emphasis added).

195. H.R. Rep. No. 89-439, at 30 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2462.

196. *Id.*

197. *Id.*

198. Willing v. Lake Orion Cmty. Schs. Bd. of Trustees, 924 F. Supp. 815, 820 (E.D. Mich. 1996) (dismissing section 11(b) claim for failure to allege racial discrimination).

199. *See, e.g.*, Garrett Epps, *The Klan Act: How An Obscure Law Could Cut Down on Bullying at the Polls*, THE ATLANTIC MONTHLY (Oct. 9, 2012), http://www.theatlantic.com/national/archive/2012/10/the-klan-act-how-an-obscure-law-could-cut-down-on-bullying-at-the-polls/263374/ ("Over the years, the courts have interpreted the statute to require a 'class-based animus'—that is, the conspiracy must aim at individuals because of their race or something like it—national origin or perhaps immigration status.").

200. Enforcement Act of 1871 § 2, 42 U.S.C. § 1985(3) (2012) (stating that a party may have a cause of action "[i]f two or more persons in any State or Territory *conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws*, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; *or* if two or more persons *conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote*, from giving

satisfy the two-part test from the Supreme Court's decision in *Griffin v. Breckenridge*, which requires plaintiffs to show "class-based, invidiously discriminatory animus behind the conspirators' action."[201] Because litigation under § 1985(3)'s equal protection claim is so much more common than litigation under its voter intimidation claim, the legal literature often states that § 1985(3) claims require a showing of class-based animus without distinguishing between the two claims.[202] The Supreme Court, however, has unambiguously explained that the *Griffin* class-based animus test applies only to § 1985(3)'s equal protection claim.[203] Consequently, a voter intimidation claim under the KKK Act should be available to any voter regardless of any reference to suspect-class considerations. This interpretation is consistent with the KKK Act's legislative history; floor debates on the Act indicate that Congress was concerned not only with the Klan's targeting of blacks, but also political supporters of the Reconstruction-era Republicans.[204]

b. Section 11(b) Requires No Showing of Intent

Section 11(b) does not require a plaintiff to make any showing with regard to the defendant's intent. Section 131(b), in contrast, expressly requires a plaintiff to prove that the defendant acted "for the purpose of interfering with the right of [the plaintiff] to vote."[205] Section 11(b) borrows much of its language from section 131(b), but eliminates the "for the purpose of" clause.[206] Congress removed this clause to eliminate any intent requirement from section 11(b) and thereby make it easier to bring voter intimidation claims. The House Report is quite clear about this: "[U]nlike [Section 131(b)] (which requires proof of a 'purpose' to interfere with the right to vote) no subjective purpose or intent need be shown."[207] Attorney General Nicholas Katzenbach, who drafted much of the

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his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States . . . .") (emphasis added)).

201. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971).

202. *See, e.g.*, Gormley, *supra* note 65, at 548 (1985) ("In order to preserve the original understanding of the Klan Act, plaintiffs in section 1985(3) actions would be required to show the same 'racial, or perhaps otherwise class-based, invidiously discriminatory animus' which had been stressed by the authors of the limiting amendment." (quoting *Griffin*, 403 U.S. at 102)).

203. *See* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 267 (1993) (stating that the two-part *Griffin* test applies to "the first clause of § 1985(3)"); Kush v. Rutledge, 460 U.S. 719, 726 (1983) (declining to extend the rationale of *Griffin* to the other § 1985 claims because they are not similarly limited by the equal protection clause).

204. *See* Fockele, *supra* note 65, at 410–11.

205. Civil Rights Act of 1957 § 131(b), 52 U.S.C. § 10101(b) (West 2014). Courts have rejected section 131(b) claims where they found that defendants acted in good faith and lacked intent to interfere with voting rights. Olagues v. Russoniello, 797 F.2d 1511, 1522 (9th Cir. 1986); United States v. McLeod, 385 F.2d 734, 750 (5th Cir. 1967).

206. Voting Rights Act of 1965 § 11(b), 52 U.S.C.A. § 10307(b) (West 2014).

207. H.R. Rep. No. 89-439, at 30 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2462. *See also* Daniels, *supra* note 36, at 360–61 (quoting Congressional testimony of Attorney General Nicholas

VRA's language, explained to the Senate Judiciary Committee that plaintiffs did not need to prove a "subjective 'purpose'" to establish liability under section 11(b); instead, "defendants would be deemed to intend the natural consequences of their acts."[208] There has nevertheless been some confusion about this aspect of section 11(b) in the courts. For example, in *Olagues v. Russoniello*—a case in which the plaintiffs alleged that a U.S. Attorney intimidated voters during an investigation of voter registration fraud—the Ninth Circuit affirmed the district court's dismissal of plaintiffs' section 131(b) and section 11(b) claims because, while there was evidence "that the investigation did intimidate the appellants," "[plaintiffs] failed to raise a material issue of fact as to whether the government officials did in fact *intend* to intimidate them."[209] However, *Olagues* made a mistake common in the voter intimidation cases: it failed to distinguish section 11(b) from section 131(b). *Olagues* cited *United States v. McLeod* for the proposition that a voter intimidation claim requires proof that the defendant "did in fact intend to intimidate."[210] But *McLeod* was exclusively a section 131(b) case, filed by the Department of Justice in 1963 before the VRA even passed.[211]

The most logical reading of section 11(b), in light of its legislative history and its textual changes from section 131(b), is that it reaches any objectively intimidating conduct without regard to the defendant's intent. As Katzenbach explained, defendants are "deemed to intend the natural consequences of their acts."[212] Defenses based on the defendant's mindset are inapposite. For example, where voters feel threatened by a confrontational poll-watcher, and it was reasonable for them to feel that way under the circumstances, it is no defense for the poll-watcher to claim that he or she did not intend to intimidate but was merely seeking to identify and prevent voter fraud. Instead, if that poll-watcher's conduct was objectively intimidating, based on the facts and circumstances, there has been a violation of the VRA.

Courts can and should consider a wide variety of factors in determining whether the challenged conduct was objectively intimidating. Such factors might include testimony from the victim that he or she was actually intimidated, public statements by any ballot security organization with which the volunteer affiliated, and, potentially, any history of discrimination or disenfranchisement in the area.

Katzenbach that "[p]erhaps the most serious inadequacy [of the existing voter intimidation statutes] results from the practice of district courts to require the Government to carry a very onerous burden of proof of 'purpose.' Since many types of intimidation, particularly economic intimidation, involve subtle forms of pressure, this treatment of the purpose requirement has rendered the statute largely ineffective").

208. Voting Rights, Part 1: Hearings on S. 1564 Before the S. Comm. on the Judiciary, 89th Cong. 16 (1965).

209. 797 F.2d 1511, 1522 (9th Cir. 1986).

210. *Id.* (citing United States v. McLeod, 385 F.2d 734, 740–41 (5th Cir. 1967)).

211. *McLeod*, 485 F.2d at 738.

212. Voting Rights, Part 1: Hearings on S. 1564 Before the Senate Comm. on the Judiciary, 89th Cong. 16 (1965).

Unlike section 11(b), the legislative history of the KKK Act provides no guidance with respect to intent. The intent of the perpetrators was simply not as salient of an issue as it was when Congress passed section 11(b). While it is clear that no racial-motivation requirement attaches, the text of the KKK Act suggests a higher standard of intent than section 11(b). The operative language in the KKK Act targets those who "conspire to prevent by force, intimidation, or threat, any citizen" from voting.[213] The description of a conspiracy to prevent voting suggests a deliberate attempt to interfere with voting rights. Thus, KKK Act claims likely require a level of intentionality greater than section 11(b). Yet the precise standard is unclear.

3. Conspiracy

The third and final element—conspiracy—is unique to the KKK Act. In a KKK Act claim, courts apply general principles of conspiracy law, often looking to the elements of civil conspiracy for guidance.[214] While the precise elements of civil conspiracy vary between jurisdictions, the most important elements are an "agreement" between the parties to inflict a wrongful injury and an "overt act" in furtherance of that agreement's objective.[215] One type of conspiracy that mirrors the relationship between modern-day ballot security groups and their local affiliates[216] is the "hub-and-spoke" model.[217] Where local ballot security groups are only loosely tied to a central "hub," their relationship may still constitute a conspiracy for KKK Act purposes.

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213. Enforcement Act of 1871 § 2, 42 U.S.C. § 1985(3) (2012).

214. *See, e.g.*, Bush v. Butler, 521 F. Supp. 2d 63, 68 (D.D.C. 2007) (applying civil conspiracy principles to a § 1985(3) claim).

215. *Id. See also* BLACK'S LAW DICTIONARY (9th ed. 2009) (defining conspiracy as an "agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective, and (in more states) action or conduct that furthers the agreement"). For example, in the D.C. Circuit, the elements of civil conspiracy are "(1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; (4) which overt act was done pursuant to and in furtherance of the common scheme." Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983). Agreement can be proven by circumstantial evidence to show the parties acted in concert towards a common goal. Blumenthal v. United States, 332 U.S. 539, 557 (1947); Am. Tobacco Co. v. United States, 328 U.S. 781, 809–10 (1946); United States v. Iriarte-Ortega, 113 F.3d 1022, 1024 (9th Cir. 1997). Coordination between conspirators is considered strong circumstantial proof of an agreement because "as the degree of coordination between conspirators rises, the likelihood that their actions were driven by an agreement increases." *Id.*

216. For a discussion of how modern-day ballot security groups are organized, see *infra* Part IV.C.

217. A hub-and-spoke conspiracy is defined by an arrangement in which a single member or group (the "hub") directs the function of the conspiracy through agreements with two or more other members or groups (the "spokes"). United States v. Chandler, 388 F.3d 796, 807 (11th Cir. 2004). A conspiracy may be found when the central hub of conspirators "recruits separate groups of co-conspirators to carry out the various functions of the illegal enterprise." *Chandler*, 388 F.3d at 807 (citing Kotteakos v. United States, 328 U.S. 750, 755 (1946)).

B. Remedies

At a minimum, injunctive relief is available under all three statutes.[218] Courts have read section 131(b)—the text of which authorizes "preventative relief, including an application for a permanent or temporary injunction, restraining order, or other order"[219]—to empower courts to tailor sweeping equitable remedies. For example, in *United States v. McLeod*—in which the court found that county officials used frivolous prosecutions to intimidate voters—the Fifth Circuit Court of Appeals ordered that all fines be returned and all convictions be expunged; that the individuals prosecuted receive all costs including attorney's fees; and that the district court "take whatever additional action is necessary to return individuals to their status quo ante."[220] Noting that "[i]n construing the language 'or other order' this Court has always been willing to tailor the remedy to fit the evil presented," the Court cited other examples of closely tailored remedies under section 131(b).[221]

Furthermore the KKK Act explicitly authorizes compensatory damages.[222] Compensatory damages will generally be rare in voter intimidation cases, but are not impossible to imagine. For example, a plaintiff may be able to recover for emotional distress in severe cases of intimidation[223] or recover wages lost due to fighting a frivolous voter registration challenge.[224] Damages are not available to plaintiffs in section 11(b) or 131(b) cases, because the statutes do not authorize them.[225]

Attorney's fees are available to prevailing parties in KKK Act claims under 42 U.S.C. § 1988, the civil rights attorney's fee statute.[226] Attorney's fees are also presumably available to prevailing parties in section 11(b) and 131(b)

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218. *See* Civil Rights Act of 1957 § 131(c), 52 U.S.C.A. § 10101(c) (West 2014) (authorizing injunctive relief in section 131(b) claims); Mizell v. North Broward Hosp. Dist., 427 F.2d 468, 473 (5th Cir. 1970) (finding that § 1985(3) permits injunctive relief); United States by Katzenbach v. Original Knights of the Ku Klux Klan, 250 F. Supp. 330 (E.D. La. 1965) (granting injunctive relief under section 11(b)); James v. Humphreys Cnty. Bd. of Election Comm'rs, 384 F. Supp. 114 (N.D. Miss. 1974) (granting injunctive relief under section 11(b)).

219. 52 U.S.C.A. § 10101(c).

220. United States v. McLeod, 385 F.2d 734, 749–50 (5th Cir. 1967).

221. *Id.* at 748.

222. Enforcement Act of 1871 § 2, 42 U.S.C. § 1985(3) (2012) ("[T]he party so injured or deprived may have an action for the recovery of damages . . . .").

223. *See, e.g.*, Seaton v. Sky Realty Co., 491 F.2d 634 (7th Cir. 1974) (awarding compensatory damages for emotional distress in civil rights case brought under the Fair Housing Act).

224. *See, e.g.*, Jane Mayer, *The Voter-Fraud Myth*, NEW YORKER (Oct. 29, 2012), http://www.newyorker.com/magazine/2012/10/29/the-voter-fraud-myth (describing burden on Ohio voters whose registrations were challenged by the Tea Party during 2012 election).

225. *See also* Olagues v. Russoniello, 770 F.2d 791, 804–05 (9th Cir. 1985) (ruling that "statutory damages" were not available in a section 11(b) case because not authorized by statute, and stating in dicta that no damages were available to litigants under the Voting Rights Act).

226. 42 U.S.C. § 1988(b) (2012) (authorizing attorney's fee awards for proceedings to enforce § 1985, among other statutes).

claims under a 1975 law enacted by Congress amending the Voting Rights Act to allow for attorney's fee awards.[227]

C. The Constitutionality of Section 11(b)

Given the vulnerability of sections 4 and 5 of the VRA to a constitutional challenge in the *Shelby County* decision, voting rights advocates seeking to apply section 11(b) should be prepared to defend the law on constitutional grounds.[228] Fortunately, section 11(b) and the interpretation advanced in this article are on sound constitutional footing.

1. Section 11(b) and the First Amendment

Anti-intimidation statutes have been challenged under the First Amendment as an unconstitutional restriction of protected speech. Voting rights advocates seeking to take advantage of the broad scope of section 11(b) should be prepared to respond to such arguments.

The Supreme Court considered the implications of the First Amendment on anti-intimidation laws in *Virginia v. Black*, which addressed the constitutionality of a state statute criminalizing cross burning.[229] In a heavily fractured decision, Justice Sandra Day O'Connor wrote for the Court that, "Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate."[230] The Court examined the longstanding rule that the First Amendment permits restrictions on "true threats," which are a type of expression "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[231] As the Court explained, "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."[232] This presents a potential difficulty for section 11(b), as Congress apparently meant to prohibit intimidation that occurs without regard to the speaker's intent.

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227. 52 U.S.C.A. § 10310(e) (West 2014). There is some ambiguity as to the availability of attorney's fee awards in cases involving "purely local elections" because the statute authorizes attorney's fee awards in "any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." *Id. See, e.g.*, Leroy v. City of Houston, 831 F.2d 576, 579 & n.3 (5th Cir. 1987). This ambiguity may extend to section 11(b) as Congress specifically invoked the Elections Clause rather than the Fourteenth or Fifteenth Amendments. *See* STATUTORY HISTORY OF THE UNITED STATES, *supra* note 97, at 1502. This issue has not been litigated.

228. *See supra* notes 5–10 and accompanying text for a discussion of *Shelby* and its impact on the VRA.

229. Virginia v. Black, 538 U.S. 343 (2003).

230. *Id.* at 362.

231. *Id.* at 359.

232. *Id.* at 360.

And yet, the relationship between intent and intimidation is deeply unclear. Many courts have read *Black* narrowly to apply only to the particular context of the Virginia statute.[233] In the wake of that case, a split emerged among the lower courts. Nearly all of the federal circuits apply an objective standard to the true threats doctrine that asks only "whether a reasonable observer would perceive the threat as real."[234] So, too, do most state courts of last resort that have addressed this issue.[235] In contrast, the Ninth and Tenth Circuits, and a smaller number of states, require "proof that the speaker subjectively intended the speech as a threat."[236]

When evaluating section 11(b) under the First Amendment, this distinction is important. If the sole justification for the regulation of intimidating speech is the true threats exception to the First Amendment, and if intimidation is not a true threat unless the speaker actually intends to instill a sense of fear in the victim, section 11(b) loses much of its practical utility. After all, one of the defining characteristics of modern voter intimidation is the pretext that the aggressor is simply upholding the voting laws.[237] In contrast, under the prevailing objective standard, victims can rely more on context, including their experiences of the conduct and the history of their community.

Twelve years after *Black*, the Supreme Court was faced with the distinction between subjective and objective standards of intent in *Elonis v. United*

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233. *See, e.g.*, United States v. Mabie, 663 F.3d 322, 332 (8th Cir. 2011) ("[T]he Court determined that the statute at issue in *Black* was unconstitutional because the intent element that was included in the statute was effectively eliminated by the statute's provision rendering any burning of a cross on the property of another prima facie evidence of an intent to intimidate."); United States v. Jeffries, 692 F.3d 473, 479 (6th Cir. 2012) ("[*Black*] says nothing about imposing a subjective standard on other threat-prohibiting statutes, and indeed had no occasion to do so: the Virginia law itself required subjective 'intent.'").

234. United States v. Jeffries, 692 F.3d 473, 479 (6th Cir. 2012). *See also* United States v. Clemens, 738 F.3d 1, 10–12 (1st Cir. 2013); United States v. Turner, 720 F.3d 411, 420 (2d Cir. 2013); United States v. Kozma, 951 F.2d 549, 557 (3d Cir. 1991); United States v. White, 670 F.3d 498, 508 (4th Cir. 2012); United States v. O'Dwyer, 443 Fed. App'x 18, 20 (5th Cir. 2011) (applying the objective test developed in United States v. Morales, 272 F.3d 284, 288 (5th Cir. 2001)); United States v. Stewart, 411 F.3d 825, 828 (7th Cir. 2005); United States v. Mabie, 663 F.3d 322, 332–33 (8th Cir. 2011); United States v. Martinez, 736 F.3d 981, 986–88 (11th Cir. 2013).

235. *See, e.g.*, People v. Lowery, 257 P.3d 72, 74 (Cal. 2011); State v. Johnston, 127 P.3d 707, 710 (Wash. 2006); *Citizen Publ'g Co. v. Miller*, 115 P.3d 107, 114 (Ariz. 2005). *See also* Petition for a Writ of Certiorari, Elonis v. United States, 2014 WL 645438 at *18–19 (Feb. 14, 2014) (citing cases from seventeen state courts of last resort that apply an objective test).

236. United States v. Cassel, 408 F.3d 622, 633 (9th Cir. 2005). *See also* United States v. Heineman, 767 F.3d 970, 982 (10th Cir. 2014) ("[W]e adhere to the view that *Black* required the district court in this case to find that Defendant intended to instill fear before it could convict him of violating [the criminal threat statute]."); O'Brien v. Borowski, 961 N.E.2d 547, 557 (Mass. 2012); State v. Miles, 15 A.3d 596, 599 (Vt. 2011); State v. Grayhurst, 852 A.2d 491, 515 (R.I. 2004).

237. *See infra* Part IV.C (discussing how the prevention of voter fraud has emerged as the leading justification for conduct that intimidates voters).

States.[238] In that case, the Court heard the appeal of a man who posted a series of violent Internet messages about his wife and was convicted under a federal criminal statute prohibiting "any communication containing any threat . . . to injure the person of another."[239] The Third Circuit affirmed the district court's use of an objective standard and upheld the conviction.[240] On appeal to the Supreme Court, Elonis argued that the true threats exception requires a subjective standard.[241] However, as it did in *Black*, the Court decided the case narrowly. The Court refused to apply an objective standard—what the Court called a "negligence standard"—chiefly because criminal conviction typically requires "*awareness* of some wrongdoing."[242] In short, finding statutory silence on the element of intent, the Court interpreted the statute in light of the general principles of criminal law. However, the Court said essentially nothing about the broader First Amendment issues, leaving the doctrinal split among the lower courts in place.[243]

2. Section 11(b) and the Elections Clause

While the scope of the true threats doctrine remains unclear, it may not matter for section 11(b) in light of an alternative source of constitutional authority: the Elections Clause. The Elections Clause states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the *Congress may at any time by Law make or alter such Regulations*, except as to the Places of chusing [sic] Senators."[244] The Clause authorizes Congress to legislate broadly in connection with elections. As the Court explained in *Smiley v. Holm*:

> It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relating to notices, registration, supervision of voting, *protection of voters*, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns: in short, to enact the numerous requirements

238. 135 S. Ct. 2001 (2015).

239. *Id.* at 2004.

240. United States v. Elonis, 730 F.3d 321, 335 (3d Cir. 2013).

241. Reply Brief for the Petitioner, United States v. Elonis, 135 S. Ct. 2001 (2015) (No. 13-983), 2014 WL 5488911, at *15–19.

242. *Elonis*, 135 S. Ct. at 2011.

243. The Court stopped short of stating what standard of *mens rea*, or level of culpability, section 875(c) requires, but Justices Alito and Thomas each wrote separately to endorse a recklessness standard, which would require for a conviction only that the speaker "disregards a risk of harm of which he is aware." *Elonis*, 135 S. Ct. at 2015 (Alito, J., concurring in part and dissenting in part).

244. U.S. CONST. art. I, § 4 (emphasis added).

> as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.[245]

Indeed, the Supreme Court relied on the Elections Clause in *Ex Parte Yarbrough*, which upheld the constitutionality of the KKK Act's anti-voter-intimidation provision.[246] Even restrictive interpretations of the Elections Clause would allow Congress to legislate regarding the apparatus of voting and the casting of ballots, of which the protection of voters from intimidation is an essential aspect.[247] The Court recently reaffirmed the reach of the Elections Clause in *Arizona v. Inter Tribal Council of Arizona, Inc.*, where it held that federal law preempted an Arizona law requiring evidence of citizenship when registering to vote.[248] There, the Court reiterated that "the Elections Clause empowers Congress to regulate *how* federal elections are held."[249]

Therefore, the robust interpretation of section 11(b) expressed by the House Report and advocated in this article could conceivably place the First Amendment's true threats doctrine in direct conflict with the Elections Clause. But, in the words of Justice Thomas's dissent from *Virginia v. Black*, this could be a situation where "the First Amendment gives way to other interests"—specifically, Congress's interest in protecting voters from interference with the act of casting their ballots.[250] While there do not seem to be any cases testing Congress's authority under the Elections Clause against another provision of the Constitution, the Elections Clause must prevail in this instance for the simple rule of statutory interpretation favoring the specific over the general.[251] The First Amendment's Free Speech Clause is a broad provision written in general terms. It covers an enormous amount of speech and conduct in American life. In contrast, the Elections Clause is a relatively narrow provision that specifically grants Congress authority to control the mechanisms of holding elections. The

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245. Smiley v. Holm, 285 U.S. 355, 366 (1932) (emphasis added).

246. The Ku Klux Cases (*Ex Parte* Yarbrough), 110 U.S. 651, 660–62 (1884).

247. *See* Arizona v. Inter Tribal Council of Arizona, Inc., 133 S. Ct. 2247, 2268 (2013) (Thomas, J., dissenting) (arguing that it is "difficult to maintain that the [Elections] Clause gives Congress power beyond regulating the casting of ballots and related activities"). *See also* Bradley A. Smith, *The Power to Regulate Elections, Not Campaigns*, WASH. POST (Apr. 8, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/08/the-power-to-regulate-elections-not-campaigns/ (exploring the difference between "elections" and "campaigns" for the purposes of the Elections Clause).

248. *Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. at 2260.

249. *Id.* at 2257; *see also id.* at 2253 ("The Clause's substantive scope is broad. 'Times, Places, and Manner,' we have written, are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections.'" (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

250. 538 U.S. at 399 (Thomas, J., dissenting).

251. *See, e.g.*, Fourco Glass v. Transmirra Prods., 353 U.S. 222, 228–29 (1957) ("However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'" (quoting Ginsberg & Sons v. Popkin, 285 U.S. 204, 208 (1932)).

Elections Clause speaks more directly than the First Amendment to the question of what types of conduct Congress may prohibit in connection with the act of voting.

3. The Reach of the Elections Clause to State and Local Elections

Relying on the Elections Clause to authorize section 11(b) is potentially limiting in one important way. The Clause refers to "elections for Senators and Representatives"[252]—in other words, *federal* elections. Thus, one could argue that section 11(b) does not reach purely state and local elections (i.e., elections that do not include at least one race for federal office). No case has challenged the reach of the Clause in this way, but there is at least one reason to think that it is not so limited. Specifically, from the voters' perspective, there is very little distinction between state and federal elections. In either case, they report to the same polling place and deal with the same officials. If a voter is harassed at the polls voting for their local officials, that voter is unlikely to feel safe at the same polling place on a different day voting for their congressman. Similarly, those who are permitted to intimidate voters at the polls in state and local elections may be emboldened to do the same in federal elections. Therefore, for Congress to effectuate its purpose under the Elections Clause, it must be able to provide the same level of protection to purely state and local elections as it can to federal elections. This theory is reflected in the House Report on section 11(b), which states that, while the Elections Clause is limited to federal elections, Congress's Elections Clause power is plenary within its scope; and, "where intimidation is concerned, it is impractical to separate its pernicious effects between Federal and purely local elections."[253] For this reason, Congress's authority under the Elections Clause is very likely augmented by the Necessary and Proper Clause.[254]

D. Unreported Cases Involving Successful Voter Intimidation Claims

For most plaintiffs challenging voter intimidation, success is defined as stopping the defendant's conduct. Obtaining an election day injunction through emergency litigation or entering into a settlement in which the defendant agrees to abstain from certain conduct is a successful outcome. There have been at least three recent unreported cases in which litigants have used the voter intimidation claims to achieve these goals. Though without precedential value, these cases

252. U.S. CONST. art. I, § 4 (emphasis added).

253. STATUTORY HISTORY OF THE UNITED STATES, *supra* note 97, at 1502–03.

254. *See, e.g.*, United States v. Classic, 313 U.S. 299, 319–21 (1941) (relying on the Elections Clause and the Necessary and Proper Clause to affirm Congress's authority to regulate congressional primary elections). *See also* Foster v. Love, 522 U.S. 67, 71 n.2 (1997) ("The [Elections] Clause gives Congress 'comprehensive' authority to regulate the details of elections, including the power to impose 'the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.'" (quoting Smiley v. Holm, 285 U.S. 355, 366 (1932)).

show how litigants have used these statutes to fight back against modern-day voter intimidation.

In *Democratic National Committee v. Republican National Committee*, the defendants allegedly engaged in voter caging[255] by compiling a list of voters to challenge, which was rife with inaccuracies, and publicized their intent to challenge the voters on the list.[256] According to the complaint, they posted signs outside polling places stating that the polls were being monitored by the "National Ballot Security Task Force."[257] Further, volunteers allegedly dressed as law enforcement officers, stood outside the polls, and harassed voters.[258] The Democratic National Committee ("DNC") filed suit, bringing claims under section 11(b), section 131(b), and the KKK Act.[259] Rather than proceed to trial, the DNC and Republican National Committee ("RNC") signed a consent decree that was highly favorable to the DNC. The consent decree restricted the RNC's ability to engage in certain ballot security activities.[260] Five years later, when the RNC violated the decree, the court added a provision requiring the RNC to obtain court pre-clearance of any ballot security programs.[261] The RNC remains bound to the consent decree today.[262] It expires on December 1, 2017, but if, before that date, the DNC proves that the RNC violated the decree, it will extend for eight years from the date of the violation.[263]

Daschle v. Thune also involved aggressive poll-watching. In *Daschle*, a Democratic U.S. Senate campaign alleged that individuals associated with the Republican campaign intimidated Native American voters at polling places during early voting in Charles Mix County, South Dakota. The Plaintiffs alleged that those individuals followed Native American voters within polling places, stood closely behind Native American voters and took notes, and engaged in loud conversations about Native Americans being prosecuted for voting

255. "Voter caging" is the practice of sending mail to addresses on the voter rolls, compiling a list of addresses from which mail is returned undelivered, and using that list to purge or challenge voter registrations on the ground that the voters do not reside at their registered addresses. The practice is controversial because it is notoriously unreliable. JUSTIN LEVITT & ANDREW ALLISON, BRENNAN CTR. FOR JUSTICE, A GUIDE TO VOTER CAGING 1–2 (2007).

256. Complaint at 10–11, Democratic Nat'l Comm. v. Republican Nat'l Comm., No. 2:81-cv-03876-DRD-SDW (D.N.J. filed Feb. 11, 1982), *available at* https://www.brennancenter.org/sites/default/files/legacy/Democracy/dnc.v.rnc/1981%20complaint.pdf.

257. *Id.* at 11–12.

258. *Id.*

259. *Id.* at 14–15.

260. *See* Consent Decree at ¶ 2(a)–2(g), Democratic Nat'l Comm. v. Republican Nat'l Comm., No. 2:81-cv-03876-DRD-SDW (D.N.J. Nov. 1, 1982), *available at* https://www.brennancenter.org/sites/default/files/legacy/Democracy/dnc.v.rnc/1982%20consent%20decree.pdf.

261. Democratic Nat'l Comm. v. Republican Nat'l Comm., 673 F.3d 192, 197–98 (3d Cir. 2012).

262. *See id.* at 220 (affirming district court denial of defendant's motion to vacate or modify decree), *cert. denied*, 133 S. Ct. 931 (2013).

263. Democratic Nat'l Comm. v. Republican Nat'l Comm., 671 F. Supp. 2d 575, 623 (D.N.J. 2009).

illegally.[264] The evening before election day, the court granted a temporary restraining order enjoining all poll watchers acting on behalf of the defendant in the county from engaging in such conduct the next day.[265]

A third case, *United States v. North Carolina Republican Party*, involved a different voter intimidation tactic: offsite threats of legal harm. During a general election between incumbent Republican Senator Jesse Helms and Democrat Harvey Gantt—an African American candidate—the state Republican Party in North Carolina allegedly sent approximately 150,000 postcards to voters in predominantly African American precincts falsely claiming that voters were required to have lived in the same precinct for thirty days prior to the election and stating that it is a "federal crime to knowingly give false information about your name, residence or period of residence to an election official."[266] The Justice Department sued the state party and others, alleging that the mailings violated section 11(b) and 131(b) because the mailings were for the purpose of, and had the effect of, interfering with the right to vote.[267] The Justice Department and the defendants entered into a consent decree prohibiting the defendants from engaging in ballot security programs targeted at minority voters without pre-approval of both the court and DOJ.[268]

A fourth recent case, *United States v. New Black Panther Party for Self-Defense*, generated significant political controversy but is of little interest legally. On January 7, 2009, the DOJ filed a complaint against three individuals and the New Black Panther Party for Self-Defense alleging, in part, that on election day 2008 the defendants threatened voters outside a Philadelphia polling place in violation of section 11(b).[269] After President Barack Obama took office, the DOJ's dropped most of the charges, and the court entered a default judgment against one of the defendants for failing to appear.[270] The case was controversial; some conservative activists alleged that racial and political considerations played a role in the DOJ's handling of the case.[271] But, because of the lack of substantive court action, the case and subsequent analyses have

264. Complaint at 5–6, Daschle v. Thune, No. 4:04-cv-04177-LLP (D.S.D. Nov. 1, 2004).

265. Temporary Restraining Order at 2, *Daschle* (No. 4:04-cv-04177-LLP).

266. Democratic Nat'l Comm. v. Republican Nat'l Comm., 671 F. Supp. 2d 575, 581 (D.N.J. 2009). S*ee also* Anita S. Earls, LeeAnne Quatrucci & Emily Wynes, *Voting Rights in North Carolina: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 577, 589–90 (2008).

267. Democratic Nat'l Comm. v. Republican Nat'l Comm., 671 F. Supp. 2d 575, 581 (D.N.J. 2009).

268. *Id.*

269. Complaint at 1, 4–5, United States v. New Black Panther Party for Self-Defense, 2:09-cv-00065-SD (E.D. Pa. Jan. 7, 2009).

270. *New Black Panther Party for Self-Defense*, 2:09-cv-00065-SD (May 18, 2009) (order granting default judgment and injunctive relief).

271. *See, e.g.*, Charlie Savage, *Racial Motive Alleged in Justice Dept. Decision*, N.Y. TIMES, July 6, 2010, at A11.

shed little light on the viability of section 11(b) in the context of modern-day ballot security tactics.[272]

IV.
VOTER INTIMIDATION IN THE UNITED STATES TODAY

The VRA and other laws, together with changing social norms, largely ended the most flagrant instances of voter intimidation seen during Reconstruction and Jim Crow. Nevertheless, some voters remain at risk even today. Modern voter intimidation differs in three important respects from the past, all of which make it more difficult to adequately police. First, voter intimidation tactics have shifted from overtly racist violence and threats toward tactics that are more "subtle, cynical, and creative."[273] Second, intimidation is now less likely to come from local law enforcement officials and white supremacist groups than it is from political organizations such as conservative ballot security groups. And third, voter fraud has become a pretextual justification for intimidating conduct.

A. "Subtle, Cynical, and Creative" Methods of Intimidation

Modern voter intimidation has shifted away from overtly racist violence and threats toward methods that are more "subtle, cynical, and creative," yet similar in effect.[274] Voter intimidation court opinions from the civil rights era contain searing examples of physical violence, harassment, and economic retaliation. For example, one decision from 1961 describes how a courthouse official struck a voter registration volunteer from the Student Nonviolent Coordinating Committee and then charged him with "disturbing the peace."[275] Another case from 1967 describes how two white men allegedly went to the home of a black man who had tried to register and threatened to "destroy" and "annihilate" him if he tried to register again.[276] This type of voter intimidation diminished during the 1960s as the federal government strengthened civil rights laws and

272. The New Black Panther Party episode has, ironically, prompted calls from some conservatives that the Voting Rights Act is under-enforced. *See Voting Rights Act After the Supreme Court's Decision in* Shelby County*: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. On the Judiciary*, 113th Cong. 16 (2013) (testimony of J. Christian Adams).

273. PFAW & NAACP, *supra* note 34, at 1.

274. *See id.* at 1–2 ("In every national American election since Reconstruction, every election since the Voting Rights Act passed in 1965, voters—particularly African American voters and other minorities—have faced calculated and determined efforts at intimidation and suppression . . . . Today, more subtle, cynical and creative tactics have taken their place. . . . Over the past two decades, the Republican Party has launched a series of 'ballot security' and 'voter integrity' initiatives which have targeted minority communities.").

275. United States v. Wood, 295 F.2d 772, 776 (5th Cir. 1961).

276. Paynes v. Lee, 377 F.2d 61, 63 (5th Cir. 1967).

increasingly enforced them.[277] No reported case after 1967 involves these types of overtly violent tactics.

But in the wake of these changes, a new style of voter intimidation emerged. Voters are rarely threatened directly with physical or economic harm. Instead, individuals and groups cloak intimidation within existing frameworks of law and administrative process,[278] threaten voters anonymously,[279] or otherwise obscure the nature of their intimidation. This shift towards subtler tactics mirrors what has been seen throughout the anti-discrimination context. For example, once employers, businesses, and others realized that overt workplace discrimination could get them into serious legal trouble, they grew more careful about what they said and wrote. But discrimination did not disappear; it simply went underground.[280]

Below are four major tactics that are commonly used to intimidate voters: aggressive poll-watching, offsite threats of prosecution or harm, frivolous and excessive challenges to voter registration, and employer coercion.[281]

1. Aggressive Poll-Watching

Most states have long had laws permitting volunteers to serve as poll-watchers under certain circumstances.[282] These laws have been around for many years, but only recently have they become the subject of legal challenges.[283]

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277. *See, e.g.*, KEYSSAR, *supra* note 44, at 212 ("Within a few months of the [VRA's] passage, the Justice Department dispatched examiners to more than thirty counties in four states; scores of thousands of blacks were registered by the examiners, while many more were enrolled by local registrars who accepted the law's dictates to avoid federal intrusion. . . . In the [Deep South] as a whole, roughly a million new voters were registered within a few years after the bill became law, bringing African-American registration to a record 62 percent.").

278. *See, e.g.*, *infra* notes 283–94 and accompanying text (discussing examples of aggressive poll-watching); notes 301–11 and accompanying text (discussing frivolous and excessive voter registration challenges).

279. *See, e.g.*, *infra* notes 295–300 and accompanying text (discussing examples of offsite threats of prosecution or harm).

280. *See* Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 397 (2010) ("Discrimination has gone underground. In other ways, it has transformed into unrecognizable subtleties that are easy to conceal and far more difficult to uncover. Employers are quite savvy at concealing even the appearance of impropriety. Since modern discrimination emanates from the intersection of complex systems, it has become virtually unrecognizable, making it extremely difficult to identify its character, form, and origin." (citation omitted)).

281. This is not intended as an exclusive list. There may be many types of conduct that could qualify as voter intimidation but are not discussed in this article.

282. *See, e.g.*, HUGH A. BONE, AMERICAN POLITICS AND THE PARTY SYSTEM 522 (2d ed. 1955) ("Most election laws permit each party to have 'watchers.'").

283. In 2004, the first constitutional challenges were filed against a poll-watching statute when plaintiffs sued to enjoin the use of volunteer poll-watchers in Ohio during the 2004 general election. Two federal district court judges originally granted the injunctions. *See* Spencer v. Blackwell, 347 F. Supp. 2d 528, 529 (S.D. Ohio 2004); Summit Cnty. Democratic Cent. & Exec. Comm. v. Blackwell, No. 5:04CV2165, 2004 WL 5550698, at *8 (N.D. Ohio Oct. 31, 2004). However, these injunctions were overturned by the court of appeals. *See* Summit Cnty. Democratic Cent. & Exec. Comm. v. Blackwell, 388 F.3d 547, 551 (6th Cir. 2004).

While their exact role varies from state to state, poll-watchers are most commonly "volunteers designated by a specific candidate, political party, or election official to monitor procedures and events at voting precincts."[284] Poll-watchers recruited by well-organized political campaigns are often lawyers and have usually participated in some form of campaign-sponsored training on the state's election laws and procedures.[285] Though commonly partisan, poll-watchers can serve a valuable role at the polling place by ensuring that proper election procedures are followed and quickly reporting problems at the polls to overburdened election officials.[286]

However, aggressive poll-watching tactics have become a recurring problem in recent years. For example, in 2010, in Houston, Texas, volunteers from the King Street Patriots, a Tea Party affiliate, reportedly followed voters after they checked in,[287] stood directly behind voters as they filled out their ballots,[288] tried to peer at their ballots,[289] blocked lines of people trying to cast ballots,[290] and hovered behind voters, "writing down [voters'] every move as if [they were] doing something illegal."[291] Houston election officials received fifty-six complaints, many of which were for voter intimidation related to the group's

284. *See* Heather S. Heidelbaugh, Logan S. Fisher & James D. Miller, *Protecting the Integrity of the Polling Place: A Constitutional Defense of Poll Watcher Statutes*, 46 HARV. J. ON LEGIS. 217, 218 (2009) (internal citation omitted).

285. *See* Mike Baker, *Obama Prepping Thousands of Lawyers for Election*, WASH. TIMES (June 26, 2012), http://www.washingtontimes.com/news/2012/jun/26/obama-prepping-thousands-lawyers-election/?page=all ("The Obama-aligned attorneys, most of whom are not election experts by trade, undergo training and have materials to show them how to help at the polls on Election Day.").

286. The authors worked as voter protection organizers in Central Florida during the 2012 early voting period and on Election Day. In our observation, many polling places in the Central Florida region (and throughout the U.S.) experienced problems that impeded voting, such as long lines, broken machines, understaffing, provision of misinformation to voters, blocked access, and unscheduled closures. In many cases, election workers were unable to address these issues. The poll-watchers served a valuable role by observing problems like these and either resolving them on-site or filing reports with regional voter protection headquarters, which would then prioritize the reports and bring the most serious issues to the attention of local elections officials. *See also, e.g.*, NEW YORK CITY BOARD OF ELECTIONS, POLL WATCHER'S GUIDE 2 ("To ensure fair and honest elections, New York State law provides for appointing Poll Watchers to observe voting at the polls."); ILLINOIS STATE BOARD OF ELECTIONS, A GUIDE FOR POLLWATCHERS 13 ("It is the duty of all election judges and pollwatchers collectively to protect [the right to vote].").

287. Pam Fessler, *Morning Edition: Efforts to Prevent Voter Fraud Draw Scrutiny* (Nat'l Public Radio broadcast Oct. 26, 2010), *available at* http://www.npr.org/templates/story/story.php?storyId=130822279.

288. Chasen Marshall, *King Street 'Patriots': Voter Intimidation Continues at Polling Stations Around Houston*, HOUSTON PRESS POLITICAL ANIMALS BLOG (Oct. 21, 2010, 11:01 AM), http://blogs.houstonpress.com/news/2010/10/voter_intimidation_continues_a.php.

289. Fessler, *supra* note 287.

290. Blake, *supra* note 23, at 60.

291. Ryan Reilly, *TPM Muckraker: County Clerk's Office Dismisses Voter Intimidation Allegations in TX*, TALKING POINTS MEMO (Oct. 25, 2012, 3:08 PM), http://talkingpointsmemo.com/muckraker/county-clerk-s-office-dismisses-voter-intimidation-allegations-in-tx.

conduct.[292] During the same time period, Tea Party affiliates in St. Paul, Minnesota, organized volunteer "surveillance squads" to follow buses that took voters to the polls and to photograph and videotape any suspected irregularities at polling places.[293] And during the June 2012 gubernatorial recall election in Wisconsin, volunteers from True the Vote ("TTV") reportedly followed vans that were transporting voters to the polls, photographed voters' license plates, directed voters to the wrong polling places, and hovered over voting tables, aggressively challenging voters' eligibility.[294] Such tactics cross the line into voter intimidation despite being cloaked in the legal framework of poll-watching laws.

2. Offsite Threats of Prosecution or Harm

Voter intimidation also occurs away from the polling place. Such conduct is often directed toward large groups of voters—predominantly minority groups and communities—rather than individuals. Offsite threats can impact thousands of voters at once and often derive from an anonymous source.

Offsite threats can be communicated by a variety of means, including billboards, robocalls, flyers, or mailings. Such tactics typically exploit people's fears to discourage them from voting in the first place. For example, during the 2004 election, flyers were distributed in an African American neighborhood in Milwaukee stating, "If anybody in your family has ever been found guiulty [sic] of anything you can't vote in the presidential election," and claiming that violators would be imprisoned for ten years and have their children taken away.[295] In 2006, an associate of Tan Nguyen, a Republican congressional candidate in California, mailed letters to about 14,000 individuals in Orange County with Hispanic surnames who were born outside of the U.S., warning them that voting on Election Day would include them in a government computer system accessible to organizations that were "against immigration" and that illegal voting could result in deportation.[296] The Ninth Circuit upheld a magistrate's finding that the mailing was voter intimidation, applying a California criminal voter intimidation statute with language similar to section 11(b).[297] And during the 2012 election cycle, wealthy conservative activists paid for more than 140 anti-voter-fraud billboards in lower-income, minority neighborhoods in Ohio and Wisconsin. The billboards stated "Voter Fraud Is A

292. Abby Rapoport, *What's the Truth about True the Vote?*, AM. PROSPECT (Oct. 10, 2012), http://prospect.org/article/whats-truth-about-true-vote.

293. Ian Urbina, *Fraudulent Voting Re-emerges as a Partisan Issue*, N.Y. TIMES, Oct. 26, 2010, at A17.

294. Blake, *supra* note 23, at 64.

295. Stringer, *supra* note 29, at 1011 (citing John Barry, *This Election Will Be Decided by New Voters . . . if They Get to Vote*, SIERRA CLUB VOTES, Oct. 29, 2004, http://web.archive.org/web/20041031000244/http:/www.sierraclubvotes.org/johnbarry/102904/.).

296. United States v. Nguyen, 673 F.3d 1259, 1261 (9th Cir. 2012).

297. *Id.* at 1265.

Felony!" that could lead to fines and prison time.[298] One billboard included photos of three individuals behind bars, two of whom were African American.[299] The billboards were eventually removed after extensive media coverage and an ensuing public outcry.[300]

3. Frivolous and Excessive Voter Registration Challenges

Forty-six states permit private citizens to challenge a registered voter's eligibility, either at the polling place or through an administrative process at the board of elections or clerk's office.[301] Most of these laws were adopted many years ago with the stated rationale of preventing voter fraud.[302] The act of challenging a voter's registration in and of itself does not constitute voter intimidation. But when such challenges are aggressively confrontational or target particular groups of voters with flimsy justifications, they cross the line into voter intimidation.

There are several recent examples of confrontational voter challenges at polling places. During a 2011 special election, Empower Massachusetts, a ballot security group, reportedly engaged in belligerent voter challenges targeted at Hispanics and people with disabilities. According to one report, a local official said the challenges were "unnecessary," and another witness said that citizens came away from the polling place shaken and in tears and that "[s]ome people left saying, 'I'll never vote again.'"[303] During the 2010 recall election in Wisconsin, voting "slowed to a crawl" at Lawrence University in Appleton due to "disruptive" challenges made by three elections observers, including one from TTV.[304]

The 2012 election cycle also saw a large number of offsite registration challenges that raised concerns about intimidation. TTV and its local volunteers

298. Kim Palmer, *Ohio Voter Fraud Billboards to Come Down, Sponsor Remains Anonymous*, HUFFINGTON POST (Oct. 21, 2012), http://www.huffingtonpost.com/2012/10/21/ohio-voter-fraud-billboards_n_1998359.html; Rachel Weiner, *Venture Capitalist Behind Fraud Billboards*, WASH. POST (Oct. 31, 2012), http://www.washingtonpost.com/blogs/post-politics/wp/2012/10/31/venture-capitalist-gop-donor-behind-fraud-billboards/.

299. *Politics Nation with Al Sharpton*, (MSNBC television broadcast Oct. 2012), *available at* http://thegrio.com/2012/10/05/ohio-voter-fraud-billboard-accused-of-intimidating-black-voters/.

300. Palmer, *supra* note 298.

301. WENDY WEISER & VISHAL AGRAHARKAR, BRENNAN CTR. FOR JUSTICE, BALLOT SECURITY AND VOTER SUPPRESSION: WHAT IT IS AND WHAT THE LAW SAYS 2 (2012).

302. *See* TERESA JAMES, PROJECT VOTE, CAGING DEMOCRACY: A 50-YEAR HISTORY OF PARTISAN CHALLENGES TO MINORITY VOTERS, 7–9 (2007), *available at* http://projectvote.org/images/publications/Voter%20Caging/Caging_Democracy_Report.pdf (contending that the roots of Florida and Ohio's early challenge statutes lie in post-Reconstruction efforts to disenfranchise African Americans). For a summary of a typical challenge process at the polling place, see Heidelbaugh, Fisher & Miller, *supra* note 284, at 220 (describing the Ohio polling place challenge process).

303. Tom Driscoll, *The Lady Doth Protest Too Much, Methinks*, METROWEST DAILY NEWS (Apr. 21, 2011), http://www.metrowestdailynews.com/article/20110421/News/304219931.

304. Saul, *supra* note 27.

developed proprietary software to compile challenge lists using "driver's license records, property records and other databases."[305] Volunteers then used those lists to initiate registration challenges with local election officials.[306] In Hamilton County, Ohio, Tea Party groups challenged 2100 voter registrations, with some groups particularly focusing their efforts on students.[307] Many of these challenges were groundless; for example, Tea Party groups called into question hundreds of student registrations for failure to specify dorm-room numbers, but election officials roundly rejected these challenges.[308] Nevertheless, some voters received challenge notices in the mail stating that they were required to attend a court hearing to defend against the challenge.[309] Many such hearings were sparsely attended.[310] Ohio's chief elections official, a Republican, criticized the frivolous challenges and expressed concern that such efforts can "border on voter intimidation."[311]

4. Employer Coercion

Employer coercion has been a concern since at least the late nineteenth century, when some employers would watch over their employees as they filled out their ballots.[312] Employer coercion again became an issue in the 2012 presidential election when, during a conference call with small-business owners, presumptive Republican nominee Mitt Romney asked his audience to "make it very clear to your employees what you believe is in the best interest of your enterprise and therefore their job and their future in the upcoming elections."[313] In the weeks before the election, several executives warned their employees that President Obama's re-election would cause job losses. On October 8, 2012, for

305. *See id.* The software also targeted addresses with a high number of registrations, which may have had the effect of targeting disproportionately minority, multi-generational homes. *See* Dan Harris and Melisa Patria, *Is True the Vote Intimidating Minority Voters from Going to the Polls?*, ABC NIGHTLINE, Nov. 2, 2012, http://abcnews.go.com/Politics/true-vote-intimidating-minority-voters-polls/story?id=17618823&singlePage=true.

306. *Id.*

307. Michael Finnegan, *Tea Party Questions Ohio Voter Rolls*, SEATTLE TIMES (Sept. 27, 2012), http://seattletimes.com/html/nationworld/2019281946_ohiovoting28.html.

308. *Id.*

309. Mayer, *supra* note 224.

310. *Id.* ("Some experts worry that voters who have been needlessly challenged will feel too intimidated even to show up. 'People have other things to do with their lives than respond to inaccurate complaints accusing them of being criminals,' Justin Levitt, a professor at Loyola Law School in Los Angeles, said.").

311. Brentin Mock, *Are True the Vote's Poll Watching Activities Illegal?*, COLORLINES (Oct. 8, 2012), http://colorlines.com/archives/2012/10/are true the votes activities illegal.html ("When you cry wolf, and there's no wolf, you undermine your credibility, and you have unjustly inconvenienced a legally registered voter, and that can border on voter intimidation.").

312. Burson v. Freeman, 504 U.S. 191, 201 n.7 (1992).

313. Mollie Reilly, *Mitt Romney Encouraged Business Owners to Advise Employees How to Vote*, HUFFINGTON POST (Oct. 17, 2012), http://www.huffingtonpost.com/2012/10/17/mitt-romney-employees-voting_n_1975636.html.

example, David Siegel, the founder and CEO of Westgate Resorts, wrote his 8000 employees:

> The economy doesn't currently pose a threat to your job. What does threaten your job, however, is another 4 years of the same Presidential administration. Of course, as your employer, I can't tell you whom to vote for, and I certainly wouldn't interfere with your right to vote for whomever you choose. . . . You see, I can no longer support a system that penalizes the productive and gives to the unproductive. My motivation to work and to provide jobs will be destroyed, and with it, so will your opportunities.[314]

Similar communications were distributed by the executives of ASG Software Solutions and Koch Industries.[315] These emails raised concerns that employers were illegally pressuring employees to vote for certain candidates.[316]

A recent Ohio case shows how employer coercion can rise to the level of legally actionable voter intimidation. Before the 2012 general election, a supervisor at Q-Mark, an Ohio company, allegedly "threatened Q-Mark employees with termination if President Obama was re-elected," "informed Q-Mark employees that Obama supporters would be the first employees terminated if President Obama was re-elected," and "engaged Q-Mark employees in conversation aimed at discovering the employees' political affiliations."[317] A Q-Mark employee alleged that, the day after the election, she "stated at work that she had voted a straight democratic (sic) ticket" and was fired two days later for that reason.[318] The employee, Patricia Kunkle, sued Q-Mark in federal court for "wrongful discharge in violation of public policy" under Ohio law.[319] The stated public policy was prohibiting employers from threatening or intimidating employees to vote for particular candidates, based on the federal voter intimidation criminal statute and an Ohio criminal statute banning employer

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314. Hamilton Nolan, *The CEO Who Built Himself America's Largest House Just Threatened to Fire His Employees if Obama's Elected*, GAWKER (Oct. 9, 2012), http://gawker.com/5950189/the-ceo-who-built-himself-americas-largest-house-just-threatened-to-fire-his-employees-if-obamas-elected?.

315. Mike Elk, *Koch Sends Pro-Romney Mailing to 45,000 Employees While Stifling Workplace Political Speech*, THESE TIMES (Oct. 14, 2012), http://inthesetimes.com/article/14017/koch_industries_sends_45000_employees_pro_romney_mailing (email to Georgia Pacific employees from Koch Industries President and COO Dave Robertson); Sal Gentile, *Exclusive: CEO Suggests Employees' Jobs May Be at Stake if Romney Doesn't Win*, UP WITH CHRIS HAYES BLOG (Oct. 14, 2012), http://www.msnbc.com/up-with-steve-kornacki/exclusive-ceo-suggests-his-employees-may-los (email to ASG Software Solutions employees from President and CEO Arthur Allen).

316. *See* Steven Greenhouse, *Here's a Memo From the Boss: Vote This Way*, N.Y. TIMES, Oct. 26, 2012, at A1.

317. Kunkle v. Q-Mark, Inc., No. 3:13–cv–82, 2013 WL 3288398, at *1 (S.D. Ohio June 28, 2013) (internal quotation marks omitted).

318. *Id.* (internal quotation marks omitted).

319. *Id.*

interference with voting.[320] In June 2013, the court denied Q-Mark's motion for partial judgment on the pleadings.[321] The parties later settled.[322]

B. The Rise of Conservative Ballot Security Groups

Historically, voter intimidation occurred on a local or regional level and was carried out by loose and shifting affiliations of law enforcement officials, political parties, and employers.[323] But more recently, as electioneering itself has grown increasingly sophisticated and professionalized, so too has voter intimidation.

By the 1980s, the national Republican Party had begun to engage in intimidation of Democratic voting blocs.[324] However, in 1981, the DNC successfully sued the RNC for voter intimidation in New Jersey, resulting in a consent decree that limited the scope of the RNC's ballot security program.[325] In 1987, after the RNC was implicated in a voter caging scheme in Louisiana—one that was intended, in the words of an internal RNC memo, to "keep the Black vote down"[326]—the court expanded the scope of the consent decree to ensure the RNC "shall not engage in, and shall not assist or participate in, any ballot security program" without prior court authorization.[327] Since then, the DNC has repeatedly sought to enforce its terms with varying degrees of success.[328] In 2008, the RNC filed a motion to vacate the decree,[329] but the court denied it,[330] and, in 2012, the Third Circuit Court of Appeals affirmed the district court's denial of the RNC's motion to vacate.[331]

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320. *Id.* at *2

321. *Id.* at *6.

322. Order Granting the Parties' Joint Motion for Approval of Settlement of Plaintiff's Unpaid Overtime Claims, *Kunkle*, 2012 WL 3288398 (No. 3:13-cv-82), 2013 WL 6913250, at *1. For further analysis of this case, see Jason R. Bent, *Curtailing Voter Intimidation by Employers After* Citizens United, 43 STETSON L. REV. 595, 625 (2014).

323. *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 200–06 (1992). *See also* voter intimidation cases cited in Appendix.

324. PFAW & NAACP, *supra* note 34, at 10–14 (cataloguing instances of voter intimidation by the Republican Party).

325. Consent Decree, Democratic Nat'l Comm. v. Republican Nat'l Comm., No. 2:81-cv-03876-DRD-SDW (D.N.J. Nov. 1, 1982), *available at* http://www.brennancenter.org/legal-work/dnc-v-rnc-consent-decree.

326. *See* Democratic Nat'l Comm. v. Republican Nat'l Comm., 673 F.3d 192, 197 (3d Cir. 2012) (citations omitted) (quoting an internal RNC memorandum).

327. Democratic Nat'l Comm. v. Republican Nat'l Comm., No. 86-3972 (D.N.J. July 29, 1987) (Settlement Stipulation and Order of Dismissal).

328. *See* Democratic Nat'l Comm. v. Republican Nat'l Comm., 673 F.3d 192, 196–99 (3d Cir. 2012) (reviewing the history of enforcement actions under the consent decree).

329. Defendant Republican National Committee's Memorandum in Support of its Motion to Vacate or Modify Consent Decree, No. 81-3876 (D.N.J. Nov. 3, 2008).

330. Democratic Nat'l Comm. v. Republican Nat'l Comm., 671 F. Supp. 2d 575, 622 (D.N.J. 2009).

331. Democratic Nat'l Comm. v. Republican Nat'l Comm., 673 F.3d 192, 196–99 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 931 (2013).

With the *DNC v. RNC* consent decree in place, the RNC abandoned its ballot security program.[332] Ballot security duties were functionally outsourced to the Republican National Lawyers Association ("RNLA"), a nominally independent political organization created in 1985 at least partly in response to the decree.[333] Serving as "the party's overarching anti-fraud enforcement agency,"[334] the RNLA began organizing Republican poll-watchers and campaigning against voter fraud.[335] While the RNLA remained active, its ballot security activities slowed over time as other outside groups took up the issue.

After the election of President Obama in 2008, ballot security advocates found a new home in the Tea Party movement. Conservative activists formed dozens of independent, nominally non-partisan ballot security groups at the state and local level—including groups such as Verify the Vote Arizona, the Ohio Voter Integrity Project, and the Voter Integrity Project of North Carolina[336]—and many Tea Party organizations incorporated ballot security into their other political activities.[337] Unlike the RNC and RNLA, these groups are unhindered by either the consent decree or the political sensitivities of an official relationship with a national political party. While such groups are not formally affiliated with the Republican Party, many Republican elected officials have welcomed their arrival by appearing at their sponsored events[338] and even, in some cases, amending state law to empower election day voter eligibility challenges by poll-watchers.[339]

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332. Blake, *supra* note 23, at 62.

333. CHANDLER DAVIDSON, TANYA DUNLAP, GALE KENNY & BENJAMIN WISE, CTR. FOR VOTING RIGHTS & PROTECTION, REPUBLICAN BALLOT SECURITY PROGRAMS: VOTE PROTECTION OR MINORITY VOTE SUPPRESSION—OR BOTH? 43–44 (2004) [hereinafter CVRP REPORT], *available at* http://www.votelaw.com/blog/blogdocs/GOP_Ballot_Security_Programs.pdf.

334. *Id.* at 46.

335. *Id.*

336. *About VTV*, VERIFY THE VOTE ARIZONA, http://verifythevoteaz.org/about-tv/; *About Us*, OHIO VOTER INTEGRITY PROJECT, http://ohiovoterintegrityproject.org/about-us/ (last visited Apr. 16, 2015); *About*, VOTER INTEGRITY PROJECT NC, http://voterintegrityproject.com/about/ (last visited Apr. 16, 2015).

337. *See, e.g.*, Christen Varley, *Pre-Election Newsletter – Poll Observer Instructions*, GREATERBOSTONTEAPARTY.COM (Oct. 31, 2010), http://greaterbostonteaparty.com/?m=201010 (announcing a poll-watcher training to combat voter fraud hosted by the Greater Boston Tea Party and Empower Massachusetts).

338. *See* Ryan J. Reilly, *Tea Party-Backed Anti-Voter Fraud Effort Touts Non-Partisanship At First National Conference*, TALKING POINTS MEMO (Mar. 28, 2011), http://talkingpointsmemo.com/muckraker/tea-party-backed-anti-voter-fraud-effort-touts-non-partisanship-at-first-national-conference?m=1 (describing list of Republican officials and supporters attending national True the Vote conference).

339. Republican-controlled legislatures recently passed laws in North Carolina and Wisconsin to make it easier for poll-watchers to challenge voters at the polls. *See* Jason Stein, *Scott Walker Signs Bill Allowing Election Observers Close to Voters,* MILWAUKEE J.-SENTINEL (Apr. 2, 2014), http://www.jsonline.com/news/statepolitics/scott-walker-signs-bill-allowing-election-observers-close-to-voters-b99238940z1-253573081.html ("The law would allow observers to stand 3 to 8 feet from the table where voters announce their names and addresses and are issued voter numbers, or from the table where people register to vote."); Reid Wilson, *27 Other Things*

By the 2012 general election, TTV had emerged as the most prominent ballot security group. Growing out of a Houston-based Tea Party group called the King Street Patriots,[340] TTV described its mission as to "inspire and equip volunteers for involvement at every stage of our electoral process," including "examining the registry" and "recruiting, training, and mobilizing election workers and poll watchers."[341] In the months leading up to the 2012 general election, TTV coordinated with other national conservative groups—such as Judicial Watch, Champion the Vote, and Tea Party 911[342]—and also served as an unofficial umbrella organization for many local and regional groups. Such groups referred to themselves as "empowered" by TTV[343] and described TTV as "almost like a parent group."[344] TTV provided extensive training materials to local affiliates[345] and furnished them with access to its extensive database of voter registration data.[346] TTV also hosted summits for its members and affiliates.[347] TTV described these events as "a full day of training, networking

the North Carolina Voting Law Changes, WASH. POST (Sept. 8, 2013), http://www.washingtonpost.com/blogs/govbeat/wp/2013/09/08/27-other-things-the-north-carolina-voting-law-changes/ (explaining change to North Carolina law increasing the number of poll-watchers each campaign may deploy and loosening restrictions on who may serve as a poll-watcher in each precinct).

340. In March 2012, a Texas state court held that KSP was a political action committee that could no longer claim non-profit status because it organized poll-watching activities for the direct purpose of aiding Republican candidates. *See King Street Patriots v. Texas Democratic Party*, No. D-1-GN-11-002363 (Tex. Dist. Mar. 27, 2012).

341. *About True the Vote*, TRUE THE VOTE (Apr. 14, 2014, 11:00:32 AM), http://www.truethevote.org/aboutus/.

342. Press Release, Judicial Watch, *2012 Election Integrity Project* (Feb. 9, 2012), http://www.judicialwatch.org/projects/2012-election-integrity-project/ ("The Election Integrity Project will be conducted in partnership with True the Vote and the Election Law Center."); *Partners*, CHAMPION THE VOTE, http://championthevote.com/partners.html (last visited Apr. 16, 2015) ("Tools Used: Online Voter Registration Tool, Voter Lookup Tool, Register One Pledge"); *Tea Party Training*, TEA PARTY 911, http://www.teaparty911.com/training.htm#true_the_vote_training (last visited Apr. 16, 2015) ("Go to True the Vote for Resources").

343. Rapoport, *supra* note 292.

344. *Id.* ("On a radio program, one of the leaders of Honest Elections Illinois, one of the 'empowered' groups, described [TTV] as 'almost like a parent group but not exactly.'").

345. Catherine Engelbrecht, *All Citizens Have a Stake in the Integrity of Elections*, TRUE THE VOTE (May 1, 2012), http://web.archive.org/web/20130830000549/http://www.truethevote.org/news/all-citizens-have-a-stake-in-the-integrity-of-elections.

346. TTV has created an online infrastructure to "crowd-source" the examination of voter registration records with the help of local affiliates. This infrastructure enables TTV to create challenge lists by cross-referencing data in the public domain—such as state driver's license databases and state jury lists—with state voter registration databases. Volunteers search for inconsistencies, which they in turn send to state officials for investigation. Steven Rosenfeld, *Going Undercover at the GOP's Voter Vigilante Project to Disrupt the Nov. Election*, ALTERNET, Aug. 24, 2012, http://www.alternet.org/news-amp-politics/going-undercover-gops-voter-vigilante-project-disrupt-nov-election.

347. *True the Vote 2013 National Summit,* TRUE THE VOTE, http://www.truethevotesummit.com/ (last visited Apr. 16, 2015) (event page for TTV's 2013 National Summit).

and inspiration from liberty-minded front line leaders."[348] At these events, TTV conducted trainings, recruited volunteers, and heard speeches from Tea Party leaders and Republican politicians.[349]

During this time, some TTV leaders defined their mission in confrontational, militaristic terms. One TTV official stated that he wanted to make the experience of voting "[l]ike driving and seeing the police following you."[350] At one summit, the King Street Patriots' chief trainer called on the audience to take the law into their own hands:

> In 2012, we need a patriot army to stand shoulder to shoulder on the wall of freedom and shout defiantly to those dark powers and principalities, 'If you want to steal this election, you have to get past us. We will not yield another inch to your demonic deception . . . If you won't enforce our laws, we'll do it ourselves, so help us God.'[351]

On another occasion, the trainer stated that his volunteers "put on the armor of God's protection, they carry the shield of knowledge and discipline, the sword of truth" and compared election day to a "Vietnam firefight."[352]

C. Voter Fraud as a Pretext for Intimidation

Ballot security groups typically cite voter fraud as the primary justification for their activities. TTV described its mission as "helping [to] stop corruption where it can start—at the polls."[353] It sought to accomplish this task by "[a]ggressively pursuing fraud reports to ensure prosecution when appropriate."[354] One leading proponent of this view is Hans von Spakovsky, a senior legal fellow at the conservative Heritage Foundation and member of TTV's advisory council.[355] Von Spakovsky has made a career out of decrying the evils of voter fraud in American elections and has argued that TTV serves "an obvious need" to combat this fraud.[356]

Two historical developments helped give rise to conservatives' concerns about voter fraud.[357] The first was John F. Kennedy's victory in the 1960

348.*True the Vote Ohio Summit in Columbus August 25th* OHIO LIBERTY COALITION, http://www.ohiolibertycoalition.org/true-the-vote-ohio-summit-in-columbus-august-25th/ (last visited Apr. 16, 2015).

349. Reilly, *supra* note 338; Rosenfeld, *supra* note 346.

350. Mock, *supra* note 311.

351. Blake, *supra* note 23.

352. Patrick Michels, *King Street Patriots Go National*, TEXAS OBSERVER (Dec. 28, 2011), http://www.texasobserver.org/king-street-patriots-go-national/.

353. *True the Vote 2013 National Summit*, TRUE THE VOTE, (Jul. 12, 2015, 11:23 PM), http://www.truethevotesummit.com/Home/About.

354. *Id.*

355. Mayer, *supra* note 224.

356. *Id.*

357. Blake, *supra* note 23.

Presidential election, which Republicans claimed was tainted by fraud orchestrated by the Illinois Democratic machine.[358] The second was the civil rights legislation of the mid-1960s—the Civil Rights Act of 1964 and Voting Rights Act of 1965—which, "by banning discriminatory voting practices, stoked fear in some quarters about the rising power of black voters."[359] In recent years, conservative scholars like von Spakovsky have deliberately amplified concerns about voter fraud as a way to delegitimize political opposition. According to Richard Hasen, von Spakovsky is one of the major causes of "the myth that Democratic voter fraud is common, and that it helps Democrats win elections, [which] has become part of the Republican orthodoxy."[360]

These concerns about widespread electoral fraud are unpersuasive. There is simply no evidence that voter fraud is a pervasive problem in American elections.[361] As the Brennan Center for Justice has written:

> [F]raud by individual voters is a singularly foolish and ineffective way to attempt to win an election. Each act of voter fraud in connection with a federal election risks five years in prison and a $10,000 fine, in addition to any state penalties. In return, it yields at most one incremental vote. That single extra vote is simply not worth the price.[362]

As a result, the types of voter fraud targeted by conservative ballot security groups—such as double voting (people voting twice), dead people voting, voters registering at fraudulent addresses, felons voting, and noncitizens voting—rarely occur.[363] To the extent that voter fraud is an issue at all, it occurs in the form of absentee ballot fraud, about which conservative groups are comparatively

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358. *Id.*

359. *Id.*

360. Mayer, *supra* note 224.

361. *See, e.g.*, JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, THE TRUTH ABOUT VOTER FRAUD 3 (2007). *See also* Frank v. Walker, 773 F.3d 783, 787–95 (7th Cir. 2014) (dissenting opinion of Posner, J.) (reviewing and critiquing justifications for photo ID laws based on voter-impersonation fraud); THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 56 & n.175 (2014) [hereinafter PCEA REPORT]; LORRAINE C. MINNITE, THE MYTH OF VOTER FRAUD 5–6 (2010) ("Voter fraud is a politically constructed myth."); Natasha Khan & Corbin Carson, *Comprehensive Database of U.S. Voter Fraud Uncovers No Evidence that Photo ID Is Needed*, NEWS21 (Aug. 12, 2012), http://votingrights.news21.com/article/election-fraud/ ("A News21 analysis of 2,068 alleged election-fraud cases since 2000 shows that while fraud has occurred, the rate is infinitesimal, and in-person voter impersonation on Election Day, which prompted 37 state legislatures to enact or consider tough voter ID laws, is virtually non-existent."); Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES (Apr. 12, 2007), http://www.nytimes.com/2007/04/12/washington/12fraud.html?pagewanted=all&_r=0 (describing a DOJ study, which "turned up virtually no evidence of any organized effort to skew federal elections, according to court records and interviews").

362. LEVITT, *supra* note 361, at 7.

363. *See id.* at 12–22.

silent.[364] With respect to registration fraud, while there have been several instances of fraud on registration forms—for example, people filling out forms as "Mickey Mouse" or "Bart Simpson"—it is "extraordinarily difficult to find reported cases in which individuals have submitted registration forms in someone else's name in order to impersonate them at the polls."[365] The bipartisan Presidential Commission on Election Administration reaffirmed this conclusion, explaining simply that "[f]raud is rare."[366]

Nevertheless, the specter of voter fraud remains a powerful motivating force for ballot security groups. Any voter intimidation claim against such a group will almost certainly implicate the subject of voter fraud at some point.

V. ADVANCING A VOTER INTIMIDATION CLAIM

Election administration and voting rights have reemerged as controversial political and legal issues. Following seven-hour lines and other problems at the polls on election day 2012, President Obama commissioned a bipartisan panel of election experts to recommend reforms to the voting process.[367] In June 2013, the Supreme Court handed down its decision in *Shelby County v. Holder*, bringing the largest changes to election law since the passage of the VRA nearly fifty years prior.[368] Since then, states have worked furiously to overhaul their own election laws—often for thinly veiled partisan purposes—and these efforts have met with resistance from the courts.[369] And ballot security groups have proliferated, taking an active role in elections and reacting to what they perceive as a delegitimizing permissiveness in voting.[370] In this highly charged environment, voting rights advocates must develop new strategies to ensure that all eligible citizens can vote.

This article argues that several existing voter intimidation statutes, particularly section 11(b) of the VRA, should be part of this effort. These statutes authorize private citizens, advocacy groups, and party committees to file

364. *See* Adam Liptak, *Error and Fraud at Issue as Absentee Voting Rises*, N.Y. TIMES, Oct. 6, 2012, at A1 (describing absentee ballot fraud and quoting local election officials who say it is much more common than in-person fraud). Conservatives have shown comparatively little interest in policies to restrict absentee voting, possibly because Republican voters have historically utilized it more heavily than Democratic voters. *See id.* ("Republicans are in fact more likely than Democrats to vote absentee. In the 2008 general election in Florida, 47 percent of absentee voters were Republicans and 36 percent were Democrats."). *See also* Richard Hasen, *A Détente Before the Election*, N.Y. TIMES (Aug. 5, 2012), http://campaignstops.blogs.nytimes.com/2012/08/05/a-dtente-before-the-election/ (noting that Republicans rarely talk about restricting the use of absentee voting, which "would likely cut back on voting by loyal Republican voters, especially elderly and military voters").

365. LEVITT, *supra* note 361, at 20.

366. PCEA REPORT, *supra* note 361, at 56 & n.175.

367. *Id.* at 5–8. The Commission maintains a website at https://www.supportthevoter.gov/.

368. Shelby County v. Holder, 133 S. Ct. 2612 (2013).

369. Steven Yaccino & Lizette Alvarez, *New G.O.P. Bid to Limit Voting in Swing States*, N.Y. TIMES, Mar. 29, 2014, at A1.

370. See *supra* Part IV.B.

suit against individuals and organizations that intimidate, threaten, or coerce voters.[371] Because there is so little case law on these statutes, litigators have an opportunity to create new precedent and strengthen their practical application. This Part argues that the voter intimidation statutes provide useful protection against some of the more troubling activities of ballot security groups. Finally, this Part provides some practical advice to litigators pursuing these claims.

A. Federal Voter Intimidation Claims Against Modern-Day Ballot Security Groups Are Viable

There is some skepticism in the scholarship about the existing voter intimidation claims. For example, one commentator argues that the Civil Rights Act of 1957 and the VRA "are ill-equipped to prevent the kinds of subversive tactics that predominate in contemporary campaigns."[372] Similarly, Professor Gilda Daniels asserts that the existing voter intimidation statutes are "dramatically underperforming."[373] These reservations are understandable given how infrequently voter intimidation claims have been brought in court[374] and how cursory the treatment of such claims can be, sometimes by the parties themselves.[375]

However, these criticisms also measure the voter intimidation statutes against the far larger problem of voter suppression. This article does not suggest that any of the statutes it discusses are a panacea for all attempts to mislead and suppress eligible voters. Rather, it argues for the far more modest proposition that there are laws already on the books that can help to address one aspect of the problem: voter intimidation. Against such conduct, these statutes remain good law. And based on the existing case law and interpretive sources, the voter intimidation claims easily encompass some of the more egregious practices of ballot security groups discussed in Part IV, such as over-inclusive registration purges and confrontational poll-watching.

1. The Terms "Intimidate, Threaten, or Coerce" Are Broad Enough to Encompass Many Instances of Modern Voter Intimidation

The crux of any voter intimidation claim is proving "intimidation," "threats," or "coercion." Only a handful of courts have considered the scope of these terms and whether particular challenged conduct falls within the meaning of the statutes.[376] And, indeed, there is ample debate in the media and political

371. See *supra* Part III for a detailed discussion of the operation of these laws.

372. Stringer, *supra* note 29, at 1028.

373. Daniels, *supra* note 36, at 381.

374. *See* Appendix.

375. *See, e.g.*, United States v. Brown, 494 F. Supp. 2d 440, 477 n.56 (S.D. Miss. 2007) (noting that plaintiffs gave little attention to their section 11(b) claim).

376. *See, e.g.*, Delegates to the Republican Nat'l Convention v. Republican Nat'l Comm., No. SACV 12–00927 DOC(JPRx), 2012 WL 3239903, at *11–13 (C.D. Cal. Aug. 7, 2012).

community about whether ballot security groups are engaging in voter intimidation, with the answer often falling along political lines.[377] If more voter intimidation claims are brought, the courts will need to wrestle with the meaning of these terms more thoroughly than they already have.[378]

The various interpretive tools available are discussed in more depth in Part III and are thus revisited only briefly here. In short, in evaluating the scope of "intimidation," "threats," and "coercion," the courts have available to them the ordinary meaning of those terms, their prior treatment by state and federal courts in the context of other laws, and their interpretation by knowledgeable third parties, like the Department of Justice and the Election Assistance Commission.[379] These sources indicate that there is a spectrum of conduct that could be described in regular conversation as voter intimidation, but that only some of it is legally cognizable. There are clear cases and ambiguous cases, and a variety of different factors determine which is which. The most obvious cases of illegal voter intimidation will involve a deliberate pattern of harassment at the polling place, perhaps even reaching the point of violence. In such cases, the defendant's conduct is obviously objectively intimidating and there will be evidence, such as affidavits, from voters who were actually intimidated. Such cases were more common during the civil rights era, and courts may be tempted to look at these cases for guidance in defining the reach of the voter intimidation statutes.

But it would be a mistake to rely solely on those cases for guidance. Many courts, both state and federal, have interpreted other statutes with similar prohibitions on "intimidation," "threats," and "coercion." Those cases define such conduct more broadly than the archetypal threats of physical violence at the polling place. They note that not all acts of illegal intimidation are equally "severe or egregious."[380] Voter intimidation "is not limited to displays or applications of force, but can be achieved through manipulation and suggestion."[381] This is consistent with the ordinary meaning of "intimidation"

377. On the left, Congressman Elijah Cummings (D-Md.) has sparred with TTV for years, noting in one letter to the group that its activities "could amount to a criminal conspiracy to deny legitimate voters their constitutional rights." Michael Finnegan, *Congressman Opens Voting Rights Probe of Tea Party Group*, L.A. TIMES (Oct. 5, 2012), http://articles.latimes.com/2012/oct/05/news/la-pn-voting-rights-tea-party-20121004. On the right, TTV has been defended as an "anti-voter fraud group" whose only goal is "to ensure the veracity of each and every vote." *See, e.g.*, BREITBART NEWS, *Democrats Target Anti-Fraud Group True the Vote*, BREITBART.COM (Oct. 7, 2012), http://www.breitbart.com/big-government/2012/10/07/true-the-vote-cummings/. Some figures on the right have expressed concern about conservative ballot security groups, however. Notably, in 2012, Ohio Secretary of State Jon Husted expressed concern about the Ohio Voter Integrity Project's challenge effort. Mock, *supra* note 311 ("When you cry wolf, and there's no wolf, you undermine your credibility, and you have unjustly inconvenienced a legally registered voter, and that can border on voter intimidation.").

378. *See supra* Part III.A.1.a.

379. *See supra* Part III.A.1.

380. People Helpers, Inc. v. City of Richmond, 789 F. Supp. 725, 733 n.5 (E.D. Va. 1992).

381. United States v. Nguyen, 673 F.3d 1259, 1265 (9th Cir. 2012).

and "threats," which reaches more broadly than the instilling of fear of physical or imminent harm.[382]

Of course, the challenged conduct can eventually reach a point where it is so subtle that it can no longer be considered objectively intimidating, even if the victim may have actually been intimidated.[383] For example, the mere presence of a police officer at the polling place, while perhaps intimidating to some individuals, cannot reasonably be called objectively intimidating by itself. The line between what is and is not intimidation can be fine, and it is why courts must carefully examine the totality of the circumstances in each case to determine whether conduct is objectively intimidating.

2. Congress Intended that the Voter Intimidation Laws Be Interpreted Expansively

As courts consider what constitutes voter intimidation under the law, they must do so with an eye to the circumstances of the laws' enactment. Indeed, in assessing the scope of the KKK Act and the Voting Rights Act, courts have often looked at their place in history.[384] Both those historical circumstances and the legislative record show that Congress intended for the voter intimidation laws to reach broadly.

As discussed in Part II, the KKK Act and the VRA were significant pieces of legislation passed during two of the defining periods of American history: Reconstruction and the civil rights era, respectively.[385] Both periods were characterized by national debates about the power and reach of the federal government. And both laws represented high-water marks of the muscular exercise of federal power.

Following the Civil War, Congress passed the KKK Act to address a campaign of politically motivated terror and violence directed against supporters of the national government, including the federal courts and citizens voting in federal elections.[386] Passage followed heated congressional debate about the appropriateness of using federal power to address what had historically been the

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382. *See supra* Part III.A.1.b.

383. *See, e.g.*, Brooks v. Nacrelli, 473 F.2d 955, 958 (3d Cir. 1973) (affirming district court's dismissal of claim that presence of non-uniformed, off-duty police officers serving as Republican poll workers intimidated voters); Delegates to the Republican Nat'l Convention v. Republican Nat'l Comm., No. SACV 12–00927 DOC(JPRx), 2012 WL 3239903, at *11–13 (C.D. Cal. Aug. 7, 2012) (dismissing voter intimidation claim by delegates to Republican convention where the state Republican Party conditioned delegate status upon putative delegate signing affidavit to vote for a particular nominee).

384. *See, e.g.*, McCord v. Bailey, 636 F.2d 606, 615 (D.C. Cir. 1980) (discussing reasons for passage of KKK Act); James v. Humphreys Cnty. Bd. of Election Comm'rs, 384 F. Supp. 114, 118 (N.D. Miss. 1974) (discussing African American voter registration before the VRA).

385. *See supra* Part II.

386. KEYSSAR, *supra* note 44, at 84. *See also* Fockele, *supra* note 65, at 407–11 (describing congressional concern about the Klan's political activities).

province of state law.[387] Ultimately, moderate Republican holdouts came to support the law once equal protection language was added to several of its provisions to ensure consistency with the Fourteenth Amendment.[388] However, no such language was added to the voter intimidation provision—presumably because there was no question that Congress had authority to regulate direct interference with federal elections. The result was a powerful law that is still routinely invoked today against conspiracies by private actors to deprive individuals of their constitutional rights. A cramped reading of the law's reach would run afoul of congressional intent—a mistake which, as historian Eric Foner notes, is all too common with respect to a variety of Reconstruction-era legislation.[389]

The VRA arrived at a similar moment in history, when the country was engaged in another great debate over the role of the federal government in protecting individual voters. In particular, Congress intended section 11(b) to refine and expand upon existing law to prohibit a broader set of conduct and facilitate successful legal challenges to voter intimidation.[390] By removing the "for the purpose of" language from section 131(b), Congress was trying to make section 11(b) claims more useful and avoid the risk that voter intimidation litigation would get bogged down in notoriously difficult questions of intent. The practical effect of section 11(b) is to shift the focus of the evidentiary questions away from the defendant's mindset and toward the objective nature of the defendant's conduct and its effect on the victim.

B. Practical Advice to Litigators

The thesis of this article is that the federal voter intimidation laws present an underexplored opportunity for voting rights advocates to strengthen the protection of voters, particularly against ballot security groups. To that end, this section builds on the previous discussions to provide some practical advice to litigators seeking to advance these voter intimidation claims.

Any federal-law voter-intimidation suit should seek to vindicate the rights of the victim and to prohibit future acts of voter intimidation by the defendant. Against an organizational defendant, such as a ballot security group, that may

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387. Fockele, *supra* note 65, at 411–17 (describing congressional debate between moderate and radical Republicans about appropriate reach of federal power in drafting the KKK Act); Gormley, *supra* note 65, at 537–38 & n.19 ("Strong objections were raised to the original version of section two by the moderate faction of the Republican Party. They believed it went too far in meddling with matters within the exclusive domain of the States.").

388. Fockele, *supra* note 65, at 417–20; Gormley, *supra* note 65, at 539–40.

389. *See generally* FONER, *supra* note 62 (arguing that historical misunderstanding of Reconstruction has led to overly narrow interpretation of Reconstruction-era legislation).

390. *See* STATUTORY HISTORY OF THE UNITED STATES, *supra* note 97, at 1502 ("The prohibited acts of intimidation need not be racially motivated; indeed, unlike [section 131(b)] (which requires proof of a 'purpose' to interfere with the right to vote) no subjective purpose or intent need be shown.").

entail obtaining an injunction against certain activities during a given election and, ideally, obtaining a *DNC v. RNC*-style consent decree circumscribing the defendant's conduct over a longer period. In addition, such suits should seek to develop the law strategically in a way that is maximally helpful to all voters. That means choosing fact patterns carefully with an eye towards obtaining a judicial decision that interprets the voter intimidation laws expansively. By developing the case law in a strategic fashion, voting rights advocates can aid future litigants and, more importantly, deter ballot security groups and others from intimidating voters.

In other words, at least in its early stages, voting rights litigators should consider an impact litigation strategy. "Impact litigation" refers to "cases in which the attorney's goals go beyond relief for the individual client and encompass some notion of effecting reform for all other [similarly situated] individuals."[391] One often-cited defining feature of impact litigation is that lawyers identify a policy goal first and choose their clients second.[392] The paradigmatic example of impact litigation is the series of school desegregation cases brought by the NAACP Legal Defense Fund in the mid-twentieth century.[393]

Under this model, litigants should consider the most likely parties, the importance of a good fact pattern, the strategy of which claims to bring, and possible counterarguments to be addressed.

1. The Parties

Individuals or organizations can bring voter intimidation claims. While it is certainly possible that individuals could hire private attorneys to file voter intimidation claims, given the underdeveloped nature of this case law, and the low dollar amounts presumably at stake, it is unlikely that many individuals would find the effort worthwhile.

In contrast, it is more likely that civil rights organizations or political entities would bring claims strategically with an eye towards the larger voting rights context. There are several reasons why this is the case. First, such groups have a vested interest in election law. Civil rights organizations like the NAACP Legal Defense Fund and the American Civil Liberties Union view the expansion of voting rights as part of their core mission. And partisan groups such as the Democratic National Committee or a Democratic political campaign may be interested in filing a voter intimidation claim given the conservative lean of the ballot security movement and its associations with the Republican Party. Indeed, both sorts of groups have actively sought to raise concerns about voter

391. Charles J. Ogletree & Randy Hertz, *The Ethical Dilemmas of Public Defenders in Impact Litigation*, 14 N.Y.U. REV. L. & SOC. CHANGE 23, 23 n.2 (1986).

392. Kevin R. Johnson, *Lawyering for Social Change: What's A Lawyer to Do?*, 5 MICH. J. RACE & L. 201, 221 (1999).

393. *Id.* at 220–21.

intimidation in recent years, including by some of the specific organizations discussed in this article.[394]

Organizational plaintiffs must choose their defendants carefully. Small suits against individual actors can help build a record of early victories. However, such suits may not be easy to find. In practice, the most problematic forms of voter intimidation, like aggressive poll-watching and registration challenges, require some kind of institutional support. Many states require that poll-watchers be associated with a particular campaign.[395] And compiling a challenge list requires the sort of large databases and cooperative effort that only an organization can provide.

A challenge to an organizational defendant offers several practical advantages for voter intimidation plaintiffs. First, such a defendant presents more opportunities to develop an evidentiary record. For example, in the run-up to the 2012 general election, reporters and bloggers attended ballot security trainings and repeatedly uncovered that inaccurate information was being disseminated to poll-watchers.[396] Moreover, suing an organization may allow plaintiffs to bring in statements made by that organization's members and leadership. Many ballot security organizations describe their efforts in hostile and even militaristic terms, which would prove useful at trial.[397] Another advantage for plaintiffs is that a lawsuit against an institutional defendant opens the door to more powerful remedies. The *Daschle* and *DNC v. RNC* cases are good examples. In both cases, the plaintiffs were able to secure meaningful injunctive relief—against a U.S. Senate campaign in the former case and the Republican National Committee in the latter—that limited the defendants' ability to intimidate voters.

2. Claims to Bring

As previously discussed, there are three federal statutes that create a civil cause of action for voter intimidation: section 2 of the KKK Act, section 131(b)

394. For example, Barack Obama's presidential campaign criticized True the Vote for "questionable practices and possibly illegal intimidation tactics." *See* Memorandum from Bob Bauer Re: Update on Voter Misinformation Activities and Efforts to Protect the Vote (Oct. 2012), http://secure.assets.bostatic.com/pdfs/BauerMemo/BauerMemo.pdf.

395. *See* Heather S. Heidelbaugh, Logan S. Fisher & James D. Miller, *Protecting the Integrity of the Polling Place: A Constitutional Defense of Poll Watcher Statutes*, 46 HARV. J. ON LEGIS. 217, 218 (2009) ("[M]ost commonly, poll watchers are volunteers designated by a specific candidate, political party, or election official to monitor procedures and events at voting precincts.").

396. *See, e.g.*, Deborah Charles, *Will Poll Watchers Help or Hinder Voting?*, REUTERS (Nov. 2, 2012), http://www.reuters.com/article/2012/11/02/us-usa-campaign-pollwatchers-idUSBRE8A116G20121102 (noting inaccurate training of Republican poll-watchers in Iowa, New Mexico, and Wisconsin); Bill Turque, *Wisconsin Republicans Give Dubious Training to Poll-Watchers*, WASH. POST (Oct. 30, 2012), http://www.washingtonpost.com/blogs/post-politics/wp/2012/10/30/wisconsin-republicans-give-dubious-training-to-poll-watchers/.

397. *See supra* Part IV.B (quoting militaristic language of ballot security groups).

of the Civil Rights Act of 1957, and section 11(b) of the Voting Rights Act. Part III of this article discusses the various elements of each of the voter intimidation claims. To briefly review: section 11(b) of the Voting Rights Act of 1965 requires only that plaintiff prove that a defendant engaged in "intimidation," "threats," or "coercion" in connection with voting.[398] Section 131(b) of the Civil Rights Act of 1957 further requires evidence of racial motivation and intent to interfere with the victim's right to vote.[399] The KKK Act does not require proof of racial motivation, but does require evidence of a conspiracy.[400] Thus, as a simple question of establishing liability, claimants should always bring a section 11(b) claim. The only question is whether it is worth also bringing a section 131(b) or KKK Act claim.

Given that a handful of courts have elided the distinctions between section 131(b) and section 11(b) claims, plaintiffs may consider not bringing a section 131(b) claim at all. Filing both claims could risk confusing the issues and prompt a court to miss the ways in which a section 11(b) is easier to establish.

There is a stronger case for bringing a KKK Act claim. While a KKK Act claim requires proof of conspiracy,[401] in many instances the existence of such a conspiracy should be simple to prove given the level of coordination that goes into modern poll-watching and registration challenges. Furthermore, as a matter of remedies, a KKK Act claim may more reliably provide for monetary remedies than a section 11(b) claim. While all three claims provide for injunctive relief,[402] the KKK Act also makes compensatory damages available.[403] Such an award could serve as a deterrent to future voter intimidation or could help drive settlement. Nevertheless, it is unclear how exactly such an award would be calculated in the voting rights context. The KKK Act also makes available attorneys' fees.[404] There is greater legal certainty about how such fees would be calculated as opposed to damages and they could provide similar strategic value for deterrence and settlement leverage. Furthermore, attorneys' fees are often a major source of revenue for nonprofit litigators, which could make it easier for civil rights organizations like the NAACP to justify filing suit. While there is a strong argument that attorneys' fees are also available for a successful section 11(b) claim, the law is not settled.[405]

Another reason to bring a KKK Act claim is for the purpose of political messaging. Liability under the Act carries the additional stigma of conspiracy and its association with the KKK's legacy of politicalized racism. Given the highly coordinated and organizational nature of much ballot security activity, the

398. *See supra* Part III.A.2.b.
399. *See supra* note 115.
400. *See supra* note 118 and accompanying text.
401. *See supra* Part III.A.3.
402. *See supra* notes 218–219 and accompanying text.
403. *See supra* notes 222–225 and accompanying text.
404. *See supra* note 226 and accompanying text.
405. *See supra* note 227 and accompanying text.

Act creates the opportunity to brand a particular ballot security group or party committee with these deeply embarrassing associations.[406] Similar to compensatory damages, the threat of such associations could strengthen the law's deterrent effect and help drive settlement.

3. Arguing a Claim

The federal civil claims for voter intimidation reach much of the conduct engaged in by modern ballot security groups. But given the inconsistent use of these claims, voting rights litigators are advised to pick their cases carefully to avoid self-defeating court decisions. The most promising claims would target aggressive poll-watching conducted as part of a larger ballot security operation.

To prove that the defendant's conduct is objectively intimidating, voting rights litigators should consider a wide array of evidence. They should seek to obtain affidavits or testimony from the victims describing the defendants' conduct and affirming they were in fact intimidated,[407] as well as affidavits or testimony from witnesses. They should also consider the historical, geographic, and socioeconomic contexts that might have made the defendant's conduct seem particularly intimidating. Defendants can be expected to raise at least three counterarguments: first, that the voter intimidation statutes prohibit only the most egregious conduct occurring when the statutes were passed, such as physical violence and cross-burning, and not the more subtle tactics of modern ballot-security groups; second, that the defendant was acting in accordance with poll-watching statutes, which are ubiquitous among the states; and third, that he or she was merely trying to prevent voter fraud and did not intend to intimidate voters.[408]

With respect to the first argument, this article has already established that the ordinary meanings of "intimidation," "threats," and "coercion" reach beyond the most extreme forms of voter intimidation, and that, in other civil rights cases, courts have read the terms broadly, consistent with their ordinary meanings.[409]

With respect to the second argument, adherence to a statute authorizing poll-watching cannot be a defense. One court, in addressing a section 131(b) claim, has explained that intimidation is not limited to only *per se* unlawful acts; rather, "acts otherwise lawful may become unlawful and be enjoined under [section 131(b)] if the purpose and effect of the acts is to interfere with the right to

406. In the lead-up to the 2012 general election, the idea that True the Vote might be violating the KKK Act drew attention from political reporters. *See, e.g.*, Epps, *supra* note 199; Mock, *supra* note 311.

407. *See* DOJ ELECTIONS PROSECUTION MANUAL, *supra* note 183, at 54 (stressing the "amorphous and largely subjective" nature of voter intimidation, which makes testimony by victims "crucial"). *See also* Brooks v. Nacrelli, 331 F. Supp. 1350, 1353 (E.D. Pa. 1971) (noting the plaintiffs' failure to produce "testimony from any registered voter that he is hesitant to vote or to vote in a certain way because of" the challenged conduct).

408. *See* BONE, *supra* note 282, at 522.

409. *See supra* Part V.A.1.

vote."[410] Furthermore, as the *DNC v. RNC* and *Daschle v. Thune* episodes illustrate, the courts have been willing to enjoin organizations whose poll-watchers cross the line into voter intimidation.[411] The same logic applies to frivolous and excessive voter registration challenges; adherence to a statute authorizing voter registration challenges cannot be a defense against voter intimidation. The EAC has expressed concern about the potential for intimidation through the challenge process,[412] noting that, among experts, "[a]buse of challenger laws and abusive challengers seem to be the biggest intimidation/suppression concerns."[413]

And with respect to the third argument, voting rights plaintiffs must be careful to explain how section 11(b) lacks the intent requirement of section 131(b).[414] The legislative history and textual comparison with section 131(b) will be essential in making this argument.[415] If the court understands how section 11(b) changed this standard and why, the factual case should be much easier to make.

VI.
CONCLUSION

Some commentators have speculated that federal voter intimidation claims would be ineffectual against modern-day forms of intimidation. These accounts describe the voter intimidation laws as minor provisions, almost as afterthoughts.[416] This article seeks to tell a different story. The federal voter intimidation claims are potentially powerful tools. Now that civil rights advocates are seeking to make use of previously underused provisions of the Voting Rights Act, section 11(b) should be part of this effort, given the recurring problem of voter intimidation in American elections.

Particular ballot security groups may come and go. Yet the underlying conditions for voter intimidation will likely remain in place for years to come. Today, rates of voting among African Americans in presidential elections are at an all-time high.[417] In the decades ahead, minority groups will gradually comprise a greater percentage of the population, and white voters will eventually

410. United States by Katzenbach v. Original Knights of Ku Klux Klan, 250 F. Supp. 330, 348 (E.D. La. 1965).

411. *See supra* notes 255–65 and accompanying text.

412. *See* EAC GUIDANCE, *supra* note 186, at 14.

413. ELECTION ASSISTANCE COMM'N, STATUS REPORT ON THE VOTING FRAUD-VOTER INTIMIDATION RESEARCH PROJECT 5 (2006), *available at* http://usatoday30.usatoday.com/news/pdf/2006-10-11-election-report.pdf.

414. *See supra* Part III.A.2.b.

415. *See supra* note 212 and accompanying text.

416. *See, e.g.*, Daniels, *supra* note 36, at 385–86; Stringer, *supra* note 29, at 1042–44; Swirsky, *supra* note 29, at 377–80.

417. Yen, *supra* note 3.

become a minority.[418] In Texas, for example, where TTV was formed, Latino voters are expected to become the majority around 2030.[419] As described earlier in this article, whenever a minority group votes in significantly greater numbers, voter intimidation often follows.[420]

Thankfully, the 89th Congress anticipated this very challenge. With the Voting Rights Act, Congress enacted a comprehensive framework to protect the right to vote. Section 11(b) is a vital piece of this framework because it ensures that newly enfranchised citizens can actually exercise the guarantees of the broader statutory scheme. Section 11(b) has been used only rarely, and very little case law has explored its contours. Yet, for the reasons described in this article, the potential remains to create new precedent and strengthen the protections afforded by the voter intimidation laws. The time for a renewed approach to section 11(b) is now.

418. Phil Taylor & D'Vera Cohn, *A Milestone En Route to a Majority Minority Nation*, PEW RESEARCH CENTER SOCIAL & DEMOGRAPHIC TRENDS (Nov. 7, 2012), http://www.pewsocialtrends.org/2012/11/07/a-milestone-en-route-to-a-majority-minority-nation/ ("Non-Hispanic whites, 63% of the current population, will decrease to half or slightly less than half the population by 2050.").

419. Christy Hoppe & Holly K. Hacker, *Hispanic Population Boom Will Reshape Texas Politics, But Question Is When*, DALLAS MORNING NEWS (Nov. 11, 2012), http://www.dallasnews.com/news/politics/headlines/20121111-hispanic-population-boom-will-reshape-texas-politics-but-question-is-when.ece.

420. *See supra* Part II.

APPENDIX: VOTER INTIMIDATION CASE LAW AND SELECTED UNPUBLISHED CASES

This chart documents published decisions in voter intimidation cases in which plaintiffs brought section 11(b), section 131(b), and KKK Act claims, as well as selected unreported cases.

Case Name	**Citation**	**Summary**	**KKK Act Claim**	**Section 131(b) Claim**	**Section 11(b) Claim**	**Full or Partial Judgment for Plaintiff**
United States v. Beaty	288 F.2d 653 (6th Cir. 1961)	Where government sought injunction restraining defendant white landowners from evicting or refusing to deal in good faith with black tenant farmers for purpose of interfering with their voting rights, failure to grant injunction was abuse of discretion.		X		✓
United States v. Wood	295 F.2d 772 (5th Cir. 1961)	Where courthouse official beat black SNCC volunteer in front of black residents trying to register and conducted baseless arrest and prosecution of volunteer, government stated a valid claim of intimidation of black residents of Mississippi county.		X		✓
United States v. Deal	6 Race Rel. L. Rep. 474 (W.D. La. 1961), *also cited in K.K.K.*, 250 F. Supp. 330	Restraining order granted against business owners refusing to gin cotton, sell goods or services, or engage in ordinary business transactions with black farmers who attempted to register to vote.		X		✓
United States v. Edwards	333 F.2d 575 (5th Cir. 1964)	No abuse of discretion in denying preliminary injunction where complaint charged that sheriff struck black citizens waiting for other black citizens to register, where it was isolated incident		X		

		unconnected with registration and likelihood of recurrence not proved.				
United States v. Bd. of Educ. of Greene Cnty., Miss.	332 F.2d 40 (5th Cir. 1964)	No abuse of discretion in denying preliminary injunction where district court found that school district refused to rehire black teacher due to her alleged incompetency and involvement in litigation rather than for purpose of interfering with her right to vote.		X		
United States v. Clark	249 F. Supp. 720 (S.D. Ala. 1965)	Injunction granted against local officials who engaged in "baseless arrests" and "unjustified prosecutions" against black citizens seeking to vote and volunteers.		X		✓
United States by Katzenbach v. Original Knights of the K.K.K.	250 F. Supp. 330 (E.D. La. 1965)	Injunction granted against defendants who directed violence, threats, harassment, and economic coercion against black citizens for the purpose of deterring their registering to vote.		X		✓
United States v. Bruce	353 F.2d 474 (5th Cir. 1965)	Government stated a valid claim where white landowners ordered black defendant, an insurance collector active in encouraging voter registration, to stay off their property.		X		✓
United States v. Harvey	250 F. Supp. 219 (E.D. La. 1966)	Denied injunction against white landowners who evicted black tenant farmers who had registered to vote, due to lack of evidence that evictions were for purpose of voter intimidation, in light of landowner's legitimate reasons for evicting tenants.		X	X	
United States v.	371 F.2d 368 (5th Cir.	Affirming grant of summary judgment to		X		

Leflore Cnty.	1967)	defendants on ground that, in prosecuting group of black citizens for disturbing the peace, county was justifiably enforcing its criminal law, not seeking to intimidate voters.				
Paynes v. Lee	377 F.2d 61 (5th Cir. 1967)	Where white defendants threatened black man who tried to register, district court erred in dismissing claim seeking damages for lack of jurisdiction, as KKK Act authorized such claims even where defendants did not act under color of law.	X	X		✓
United States v. McLeod	385 F.2d 734 (5th Cir. 1967)	(1) District court erred in denying claim where local officials conducted "baseless arrests and prosecutions" against black citizens seeking to register to vote and voter registration volunteers. (2) District court did not err in denying claim that surveillance of meetings intimidated voters, where there was evidence of legitimate motive to preserve order.		X		✓
Whatley v. City of Vidalia	399 F.2d 521 (5th Cir. 1968)	Petition for removal granted. In dicta, court states that sections 131(b) and 11(b) are "more . . . sweeping" prohibitions than similar provision of section 203 of Civil Rights Act of 1964 (42 U.S.C. § 2000a-2).		X	X	
Gremillion v. Rinaudo	325 F. Supp. 375 (E.D. La. 1971)	Granting motion to dismiss for lack of federal claim where police chief was present in polling place wearing his uniform, but assisted both black and white voters, and no black voters testified that their			X	

		vote was influenced by officer's presence.				
Brooks v. Nacrelli	473 F.2d 955 (3d Cir. 1973)	Affirming district court's dismissal of claim that presence of non-uniformed, off-duty police officers as Republican poll workers intimidated voters, as there was no evidence of actual intimidation.	X	X	X	
Jackson v. Riddell	476 F. Supp. 849 (N.D. Miss. 1979)	Petition for removal denied. In dicta, court states that section 11(b) "is to be given an expansive meaning."			X	
Democratic Nat'l Comm. v. Republican Nat'l Comm.	(D.N.J. 1982) (Civ. No. 81-3786) (settlement agreement)	Consent decree favorable to DNC reached after DNC filed voter intimidation complaint based on (1) RNC's compilation of inaccurate voter caging list and announcement through news media that it would be used to challenge voters; and (2) RNC's deployment of individuals dressed as police officers to polls.	X	X	X	
Olagues v. Russoniello	797 F.2d 1511 (9th Cir. 1986), *vacated as moot* 108 S. Ct. 52 (1987)	Affirmed district court's dismissal of voter intimidation claim against prosecutors who conducted voter fraud investigation of individuals who requested bilingual ballots, on ground that prosecutors acted in good faith and did not intend to intimidate.		X	X	
Pincham v. Ill. Judicial Inquiry Bd.	681 F. Supp. 1309 (N.D. Ill. 1988)	Dismissing plaintiff's voter intimidation claim where plaintiff made no allegation that defendants intended to intimidate plaintiff.			X	
Gill v. Farm Bureau Life Ins. Co.	906 F.2d 1265 (8th Cir. 1990)	Affirmed district court's dismissal of claim against insurance company that fired agent because agent was fundraiser for candidate opposing candidate company	X			

		supported, on ground that plaintiff did not allege he was intimidated from voting.				
Coleman v. Miller	912 F. Supp. 522 (N.D. Ga. 1996)	Granted summary judgment against plaintiffs' claim that display of Georgia state flag (with its Confederate symbol) intimidates blacks and deters them from voting, on ground that plaintiff failed to demonstrate actual effect on voting practices.		X		
Willing v. Lake Orion Cmty. Schs. Bd. of Trustees	924 F. Supp. 815 (E.D. Mich. 1996)	Dismissed section 131(b) claim for lack of state action, and dismissed section 11(b) and § 1985(3) claims for failure to allege racial discrimination, in case where plaintiff alleged technical violations in school board election.		X	X	
Daschle v. Thune	CIV 04-4177 (D.S.D. Nov. 2, 2004) (temporary restraining order)	Granting temporary restraining order prohibiting individuals acting on behalf of defendant candidate from following Native American voters to the polls or copying the license plate numbers of Native American voters driving to or from the polls.	X		X	
Willingham v. County of Albany	593 F. Supp. 2d 446 (N.D.N.Y. 2006)	Granting summary judgment to defendants where plaintiffs alleged abuses of absentee ballot process; while plaintiff was not required to allege racial discrimination, plaintiff offered no evidence that voters were actually intimidated, threatened, or coerced.			X	
United States v. Brown	494 F. Supp. 2d 440, 447 n.56 (S.D. Miss. 2007)	Where county Democratic chairman published list of 174 voters who he claimed would be subject to			X	

		challenge if they voted in Democratic primary, no intimidation found because conduct is not the type of intimidation envisioned by section 11(b). Court notes that plaintiffs gave little attention to the section 11(b) claim.				
AFSCME Council 25 v. Land	583 F. Supp. 2d 840, 846 (E.D. Mich. 2008)	Denying injunction against state and local officials who issued directive prohibiting union members from wearing election-related paraphernalia to polls, as plaintiff did not offer any evidence that directive was issued for purpose of interfering with right to vote.		X	X	
United States v. New Black Panther Party for Self-Defense	CIV 09-65 (E.D. Pa. May 18, 2009) (default judgment)	Entering default judgment against defendant, who was charged with intimidating voters by stationing uniformed and armed personnel at polling place, making loud racial slurs, and attempting to block entrance to polling place.			X	
Delegates to Republican Nat'l Convention v. Republican Nat'l Comm.	2012 U.S. Dist. LEXIS 110681, *39-42, 2012 WL 3239903 (C.D. Cal. Aug. 7, 2012)	Where Ron Paul supporter was removed from RNC delegation when he refused to sign affidavit promising he would vote for Romney, claim dismissed because plaintiffs make no argument as to why "intimidate, threaten, or coerce" covers conduct of this nature. Court stresses narrowness of its holding.		X		