

RETURN OF THE STATES

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In the wake of *Shelby County v Holder*¹ and the hundreds of restrictions on voting rights passed by state legislatures in the last five years,² Ben Cady and Tom Glazer’s article, *Voters Strike Back*,³ provides a timely and comprehensive review of the causes of action available for voter intimidation. It provides guidance to litigators on how to use these currently underutilized provisions to protect voters, at a time when their rights are under renewed attack. Cady and Glazer’s article provokes two questions—one normative and one practical. First, should the courts treat voter intimidation committed under color of state law in the same way as that committed by private actors? I posit the answer should be yes. And second, how can litigators encourage the courts to stop ignoring the clear language and legislative history of section 11(b) of the Voting Rights Act?⁴ The first step is to follow Cady and Glazer’s suggestion to only plead a section 11(b) violation, but litigators should also more clearly articulate the relevant language and history of that provision.

I. THE POWER OF THE DARK SIDE

The most striking difference between the language of the Ku Klux Klan Act’s voter intimidation provision, § 1985(3),⁵ and the anti-intimidation provisions of the Civil Rights Act of 1957⁶ and the Voting Rights Act of 1965⁷ is the inclusion of the phrase “under color of law” in the later two provisions. In 1871, at the height of

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

2. *States with New Voting Restrictions Since 2010 Election*, BRENNAN CENTER FOR JUSTICE (July 7, 2015), <http://www.brennancenter.org/new-voting-restrictions-2010-election>.

3. Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. REV. L. & SOC. CHANGE 173 (2015).

4. 52 U.S.C.A. § 10307(b) (West 2014); *see also* Cady & Glazer, *supra* note 3, at 190 (“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.’”).

5. 42 U.S.C. § 1985(3) (2012).

6. 52 U.S.C.A. § 10101(b) (West 2014).

7. 52 U.S.C.A. § 10307(b) (West 2014).

Reconstruction, the principal threat to the right to vote came from disgruntled Southerners trying to prevent black men from exercising their rights under the Fifteenth Amendment. By the Civil Rights Act of 1957, after eighty years of grandfather clauses,⁸ literacy tests,⁹ white primaries,¹⁰ and poll taxes,¹¹ it had become clear that the state posed at least as much of a threat to voting rights as private citizens. In fact, the state will generally be able to pose a greater threat to the franchise than any individual, because of the sheer efficiency of a state deploying its laws, policies, or practices to prevent citizens from voting.¹² Further, there is an additional, expressive harm inflicted on a polity when its state officials undermine the very democracy that they have been elected to protect.

State sponsored voter intimidation is not only an affront to democracy, but it is exactly the kind of action that the courts are uniquely qualified to stop.¹³ Whatever one's views about the level of activism in which the courts should engage, all proponents of democracy should support judicial intervention to prevent breakdowns of the political process. It is discouraging then, that the cases, summarized in Cady and Glazer's appendix, that have dealt with voter intimidation by the state, have almost all been a resounding failure.

II. IT'S A TRAP

Cady and Glazer highlight that section 11(b) was included in the 1965 VRA precisely because 131(b), enacted eight years earlier, had been interpreted by

8. *See, e.g.*, the grandfather clause at issue in *Giles v. Harris*, 189 U.S. 475 (1903).

9. *See, e.g.*, the literacy test at issue in *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45 (1959).

10. *See, e.g.*, the white primary at issue in *Nixon v. Herndon*, 273 U.S. 536 (1927).

11. *See, e.g.*, the poll tax at issue in *Breedlove v. Suttles*, 302 U.S. 277 (1937).

12. For example, though the Ku Klux Klan in Mississippi was regularly committing violence against African Americans in an attempt to stop them from voting. In 1868, Senator Hiram Revels, the first African American senator, was elected by the people of Mississippi. Mississippi imposed a new constitution in 1890 that included both a literacy test and poll tax requirement, and no African Americans were elected to the U.S. Congress again until 1987. *See Black-American Representatives and Senators by State and Territory, 1870–Present*, UNITED STATES HOUSE OF REPRESENTATIVES, <http://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Black-American-Representatives-and-Senators-by-State-and-Territory/> (showing that Hiram Revels' term of office as a Senator for Mississippi was 1869–1871) (last visited Oct. 11, 2015). MICHAEL NEWTON, *THE KU KLUX KLAN IN MISSISSIPPI: A HISTORY* 22 (2010) (explaining that “the KKK was ‘one of the most effective means for carrying elections for the Democrats’” due to violence and threats of violence by KKK members); *Id.* at 53 (“The [Constitutional] convention’s final product, imposed on Mississippi without a popular vote, established a two-dollar poll tax, mandated two years’ residency in the state . . . denied ballots to convicted felons or tax-defaulters . . . [and] required that any voter must ‘be able to read any section of the constitution of this State’”).

13. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980) (“Malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out Obviously our elected representatives are the last persons we should trust with identification of [this] situation[.]”).

district courts to require “the very onerous burden of proof of ‘purpose.’”¹⁴ Section 11(b) removes any reference to “purpose” in its text and the House Report is explicit in its reasoning for removing the word: “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.”

Curiously, as highlighted by Cady and Glazer, section 11(b) has been interpreted to require that the defendants intended to intimidate the plaintiffs.¹⁵ This patently incorrect reading of section 11(b) began in *Olagues v. Russoniello* in 1986 and has remained the consensus interpretation for section 11(b) since that case, including most recently in 2008.¹⁶ Aside from ignoring the plain text of the section and the clear legislative history, this reading makes it even more difficult to win an intimidation case against a governmental actor because of the well-documented difficulties in establishing the purpose of a collective entity.¹⁷ And, as set out above, it is precisely against state actors that this provision is most needed.

III. A NEW HOPE?

There is, at least, some hope in the face of the perverse current interpretation of section 11(b), but effective use of that provision will require litigators to urge the courts to draw a line between the Civil Rights Act of 1957 and the Voting Rights Act of 1965. Even if the intent requirement cannot completely be removed from section 11(b), litigators can ask the courts to impose a standard akin to those used in criminal law, such as recklessness, negligence, or perhaps even deliberate indifference, when reviewing a state’s imposition of a law or policy that has the effect of intimidating or coercing citizens with respect to voting.¹⁸ In addition, litigators should heed Cady and Glazer’s advice to advance only a section 11(b) claim, and leave out section 131(b), to force the courts to make a distinction between the claims,¹⁹ and should forcefully explain the text and history of the

14. Cady & Glazer, *supra* note 3, at 190 (citing Voting Rights, Part 1: Hearings on S. 1564 Before the S. Comm. on the Judiciary, 89th Cong. 16 (1965)).

15. *Id.* at 205 (citing *Olagues v. Russoniello*, 797 F.2d 1511, 1522 (9th Cir. 1986)).

16. *Am. Fed’n of State, Cnty. & Mun. Employees, Council 25 v. Land*, 583 F. Supp. 2d 840, 846 (E.D. Mich. 2008).

17. *United States v. O’Brien*, 391 U.S. 367, 383 (1968) (“Inquiries into congressional motives or purposes are a hazardous matter.”).

18. Justice Marshall noted, albeit in dissent, in *City of Mobile v. Bolden*, 446 U.S. 55, 105 (1980) (Marshall, J., dissenting), that even if he had to apply an intent standard in a vote dilution case under Section 2 of the Voting Rights Act he would “impose upon the plaintiffs a standard of proof less rigid than that provided by *Personnel Administrator of Mass. v. Feeney*. . . .” The standard under *Feeney* was that “a state legislature, selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

19. Cady & Glazer, *supra* note 3, at 234 (“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

former as distinct from the latter. With governments across the country competing to enact the most restrictive voting rights laws,²⁰ and considering many of the twelve federal circuits have not considered section 11(b), there is ample material for litigators to draw on in asking courts to make section 11(b) the powerful force it was always intended to be.

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.”).

20. *See Voting Laws Roundup*, BRENNAN CENTER FOR JUSTICE (June 3, 2015), <https://www.brennancenter.org/analysis/voting-laws-roundup-2015#Restrictive> (“Since the 2010 election, 21 states have new laws making it harder to vote — ranging from photo ID requirements to early voting cutbacks to registration restrictions — and 15 states will have them in place for the first time in a presidential election in 2016.”).