

## VOTER INTIMIDATION IN THE CONTEXT OF EXISTING CIVIL RIGHTS FRAMEWORKS

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In *Voters Strike Back: Litigating Against Modern Voter Intimidation*,<sup>1</sup> Ben Cady and Tom Glazer make an important contribution to the discourse among voting rights advocates over the best ways to vindicate the fundamental right to vote in the modern era, especially after *Shelby County v. Holder*.<sup>2</sup> Their thorough review of modern voter intimidation tactics should inspire all election monitors and voting rights activists to be vigilant in the face of this potentially pernicious conduct.

I would simply add the following observations.

First, the First Amendment issues flagged by the authors may warrant greater scrutiny than the article suggests. The fundamental right to vote can become meaningless if it cannot be exercised without enduring violence, intimidation, and harassment. At the same time, the First Amendment protects the right to peaceful political protest especially in traditionally public fora such as sidewalks. Both rights lie at the heart of our democracy, and both must be adequately accommodated.<sup>3</sup>

Second, in reading the introduction of the piece, one should not be left with the impression that the preclearance formula eviscerated by *Shelby County* was the only, or even the primary, tool that civil rights advocates had used in combating discriminatory voting practices. Starting long before *Shelby County*, voting rights organizations have relied upon section 2 of the Voting Rights Act,<sup>4</sup> which prohibits

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1. Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. Rev. L. & Soc. Change 173 (2015).

2. 133 S. Ct. 2612 (2013).

3. See, e.g., *Burson v. Freeman*, 504 U.S. 191, 196–211 (1992) (plurality op.) (prohibiting electioneering within 100 feet of polling place entrance was narrowly tailored to serve a compelling state interest in preventing voter intimidation and election fraud).

4. 52 U.S.C.A. § 10301 (West 2014).

voting restrictions that have a discriminatory impact, and they have relied upon section 2 especially in states that were never covered by the preclearance formula.<sup>5</sup> Indeed, the modern forms of voter intimidation which the piece covers are often a part of the sociopolitical and historical context in which these forms of voter suppression operate. Section 2 claims can help place these incidents in a larger context, by demonstrating how these incidents, in combination with other social and political factors, fuel the rise of voter suppression laws or exacerbate their impact. Specifically, incidents of voter intimidation can constitute one of the contextual “Senate Factors” used to establish that a discriminatory voting restriction has violated section 2.<sup>6</sup> Challenges under both the federal and state constitutions have also been used both before and after *Shelby County*.<sup>7</sup>

Third, I appreciated how the piece traced the historical, and often ugly, roots of these modern forms of voter intimidation. I would simply add that it is no coincidence that the more recent bumper crop of voter intimidation identified in the piece<sup>8</sup> immediately followed record-breaking turnout by African American voters and the election (and re-election) of the nation’s first African American President.<sup>9</sup>

Fourth, the piece notes that “[d]amages are not available to plaintiffs in section 11(b) . . . cases, because the statutes do not authorize them,” citing *Olagues v. Russoniello*.<sup>10</sup> I would not necessarily rule out the possibility of seeking compensatory or punitive damages if a section 11(b) claim is brought, in addition to, or as an alternative to, declaratory or injunctive relief. *Olagues*’s focus, and thus its holding, was limited to whether the statute allowed “statutory damages”—a

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5. See generally Ellen Katz, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 738–755 (2006) (listing all section 2 lawsuits from 1982 to 2005, including those in non-covered states).

6. See, e.g., *Ohio State Conf. of the NAACP v. Husted*, 768 F.3d 524, 556–557 (6th Cir. 2014) (early voting cutbacks likely violated section 2, where among other factors, the use of poll watchers contributed to the overall suppression of minority voting), *vacated on other grounds*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014); *Ohio State Conf. of NAACP v. Husted*, 43 F. Supp.3d 808, 833 (S.D. Ohio 2014) (use of voter fraud billboards contributed to atmosphere of racial intimidation relevant to section 2 claim).

7. See generally Samuel Issacharoff, *Voting Rights at 50*, ALABAMA L. REV. (forthcoming 2015) (surveying challenges to voting restrictions under federal constitution); Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89 (2014) (surveying challenges to voting restrictions under state constitutions).

8. See Cady & Glazer, *supra* note 1, at 216–222 (2015) (describing voter intimidation tactics largely in late 2000’s through 2012); *id.* at 224 (describing the rise of voter intimidation groups in 2012).

9. See Paul Taylor & Mark Hugo, *Six take-aways from the Census Bureau’s voting report*, PEW RESEARCH CTR. (Nov. 22, 2015, 5:51 PM), <http://www.pewresearch.org/fact-tank/2013/05/08/six-take-aways-from-the-census-bureaus-voting-report/>.

10. 770 F.2d 791, 804–05 (9th Cir. 1985).

unique form of damages in which a preset amount of damages is written into the statute, designed to approximate the damage caused and “are in effect bounties—means of inducing private persons to enforce a regulatory law.”<sup>11</sup> If a court feels that equitable relief is not appropriate in a particular case,<sup>12</sup> and the voter intimidation incident in question is akin to tortious conduct unprotected by the First Amendment (e.g., a private individual making threats near the polling place), compensatory damages may be entirely appropriate.<sup>13</sup> Impact litigation not only includes obtaining necessary injunctive relief, but also the establishment of favorable case law even if such cases involve compensatory damages.<sup>14</sup>

Lastly, though the piece at times notes that voter intimidation has tended to emanate from certain partisan organizations, strengthening our democracy is not a partisan issue, and people of all political stripes should agree that our democracy is best served when more people vote, not fewer.

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11. *Redman v. RadioShack Corp.*, 768 F.3d 622, 627 (7th Cir. 2014) (Posner, J.).

12. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (finding equitable relief not appropriate in certain circumstances).

13. *Cf. Issacharoff*, *supra* note 7, at 19–23 (citing example of voter intimidation litigated under common-law tort theory where compensatory damages were awarded).

14. *See, e.g., Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (holding that damages may be recovered for Fourth Amendment violations).