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Cover Page Footnote

J.D. Candidate, University of Washington School of Law, Class of 2022. Many thanks to Professor Lisa Manheim for her suggestions, advice, and guidance on this Comment. I would also like to thank Washington Law Review's Editorial Staff for their thoughtful edits, hard work, and dedication.

LET US NOT BE INTIMIDATED: PAST AND PRESENT APPLICATIONS OF SECTION 11(B) OF THE VOTING RIGHTS ACT

Carly E. Zipper*

Abstract: As John Lewis said, "[the] vote is precious. Almost sacred. It is the most powerful non-violent tool we have to create a more perfect union." The Voting Rights Act (VRA), likewise, is a powerful tool. This Comment seeks to empower voters and embolden their advocates to better use that tool with an improved understanding of its little-known protection against voter intimidation, section 11(b).

Although the term "voter intimidation" may connote armed confrontations at polling places, some forms of intimidation are much more subtle and insidious—dissuading voters from heading to the polls on election day rather than confronting them outright when they arrive. For example, thousands of Black and Brown voters were targeted in 2020 with misleading robocalls stating that the government used vote-by-mail records to track down old warrants, that credit card companies used vote-by-mail records to collect outstanding debts, and that the Centers for Disease Control (CDC) used vote-by-mail records to track people for mandatory COVID-19 vaccinations.

This Comment argues that section 11(b) of the Voting Rights Act has been underutilized since it was enacted in 1965. Section 11(b), which was intended to protect Black voters from racialized intimidation, provides a civil cause of action against state or private actors who "intimidate, threaten, or coerce any person for voting or attempting to vote." There are few published decisions interpreting section 11(b), and executive enforcement of this provision is insufficient.

Because voters of color are typical targets of intimidating conduct, a more robust enforcement of section 11(b) is essential to promoting equitable access to civic participation. This Comment therefore begins with an exploration of racialized voter intimidation in the United States. It goes on to investigate why section 11(b) is underdeveloped, and finally, it proposes that litigants should be aware of special considerations if they choose to bring section 11(b) actions.

INTRODUCTION

> [The] vote is precious. Almost sacred. It is the most powerful non-violent tool we have to create a more perfect union.[1]
>
> *–Congressman John Lewis*

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1. PBS NewsHour, *Georgia Rep. John Lewis: 'Your Vote Is Precious, Almost Sacred'*, YOUTUBE (Sept. 6, 2012), https://youtu.be/uWuhPU6GkZM [https://perma.cc/TY4G-KDKD].

> Mail-in voting sounds great, but did you know that if you vote by mail, your personal information will be part of a public database that will be used by police departments to track down old warrants and be used by credit card companies to collect outstanding debts? The CDC is even pushing to use records for mail-in voting to track people for mandatory vaccines.[2]
>
> *–Robocall to thousands of voters in Illinois, Ohio, New York, and Pennsylvania*

As John Lewis said, the vote is a precious, powerful tool. The Voting Rights Act (VRA),[3] likewise, is a powerful tool. This Comment seeks to empower voters and their advocates to better use that tool with an improved understanding of its little-known protection against voter intimidation, section 11(b).[4] In response to insidious voter intimidation, this important but underutilized provision should be applied with renewed vigor.

Although the term "voter intimidation" may connote armed confrontations at polling places, some forms of intimidation are much more insidious—dissuading voters from heading to the polls on election day rather than confronting them outright when they arrive.[5] That was certainly the case when Jacob Wohl and Jack Burkman sent intimidating robocalls to thousands of Black and Brown voters, suggesting that voting by mail would expose them to the risk of financial and bodily harm.[6]

Because voters of color are the typical targets of intimidation, a more robust enforcement of section 11(b) is essential to promote equitable access to civic participation. Section 11(b), which was intended to protect Black voters from racialized intimidation, provides a civil cause of action against state or private actors who "intimidate, threaten, or coerce any person for voting or attempting to vote."[7] Section 11(b), unlike other federal voter intimidation statutes, does not require proving the defendant's intent or conspiracy to intimidate—making it more plaintiff-

2. Nat'l Coal. on Black Civic Participation v. Wohl, 498 F. Supp. 3d 457, 465 (S.D.N.Y. 2020).

3. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

4. 52 U.S.C. § 10307(b).

5. Shaila Dewan, *Armed Observers, Chants of '4 More Years' at Polls: Is That Legal?*, N.Y. TIMES (Oct. 30, 2020), https://www.nytimes.com/2020/10/30/us/poll-watching-intimidation.html?smid=url-share [https://perma.cc/BU6T-2UQK] ("'It's always much more smoke than fire,' said Tova Wang, an elections expert and visiting fellow at the Harvard Kennedy School. 'I worry that it's more about deterring people and scaring people from the polls than it is about a real plan.'").

6. *See Wohl*, 498 F. Supp. 3d at 465.

7. 52 U.S.C. § 10307(b).

friendly than other voter intimidation laws.[8] Even so, there are few circuit court opinions that interpret section 11(b), and the federal government has brought minimal enforcement litigation under this section.[9] Section 11(b) of the VRA is underutilized, and this allows various forms of voter intimidation to proliferate.

This Comment proceeds in four parts. Part I provides a summary of voting rights in the United States. This Part focuses on historic suppression of Black Americans' voting rights and the powerful civil rights movement that produced the VRA. Then, it details the ratification and early history of the VRA. Finally, Part I concludes by examining the landmark 2013 decision *Shelby County v. Holder*,[10] which eviscerated sections 4 and 5 of the VRA and empowered states to pass increasingly restrictive voting laws.[11] After *Shelby County*, the remaining VRA provisions, including section 11(b), are more important than ever.

Part II explores the use of section 11(b) in federal courts and its enforcement by the United States Department of Justice. This Part investigates how case law interpreting section 11(b) is underdeveloped. Part II also shows that the Department of Justice has brought only minimal enforcement litigation under section 11(b), and, paradoxically, the defendants in those cases were almost always Black.

Part III suggests three reasons why section 11(b) is underutilized. First, modern voter intimidation is difficult to pin down: in cases involving online disinformation and misinformation, it is difficult to identify defendants and track the effects of their conduct. Second, there are insufficient incentives for litigants to bring these claims given the short timeline between the events in question and the election they seek to influence. Third, litigants bringing section 11(b) claims will likely face constitutional challenges involving unresolved First Amendment questions. Plaintiffs should be aware of these three obstacles at the outset of litigation.

Part IV argues that plaintiffs bringing section 11(b) claims should be prepared for interpretive questions related to the intent behind the defendants' intimidating or threatening conduct, even though 11(b) does not expressly contain an intent requirement. Part IV emphasizes the role of advocates in framing the courts' understanding of this underdeveloped cause of action. It urges that lawyers thoughtfully frame the relevant issues and facts to reach their clients' goals while also advocating for

8. Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. REV. L. & SOC. CHANGE 173, 204 (2015).

9. *See infra* Part II.

10. 570 U.S. 529 (2013).

11. *Id.* at 557; *see infra* Part I.

greater voting rights protections.

I. TWO STEPS FORWARD, ONE STEP BACK: THE HISTORY OF RACIALIZED VOTER INTIMIDATION IN THE UNITED STATES

Because voter intimidation in the United States is starkly racialized,[12] this Part begins by examining the historic suppression of Black Americans' voting rights. Section I.A examines why the Fifteenth Amendment did not do enough to protect Black Americans' right to vote, how Jim Crow laws codified voter intimidation and suppression for nearly a century, and how the powerful civil rights movement produced the VRA in 1965. Section I.B describes the VRA's legislative history, structure, and its first twenty-odd years of existence. Section I.C examines recent changes in VRA jurisprudence after the landmark *Shelby County* decision of 2013, which drastically shifted the landscape for voting rights in the United States and increased the importance of protecting voters from intimidation and threatening conduct.

A. Voting Rights in the United States Before the VRA

Although "[t]here is no right more basic in our democracy than the right to participate in electing our political leaders,"[13] that right was inaccessible to Black Americans throughout most of American history. Beginning in 1619 when the first enslaved Africans were kidnapped and brought to Jamestown, Virginia, Black people in the United States were excluded from political participation.[14] By the time of the Founding, some free Black men could vote, and thousands more free Black men were later able to vote during the nineteenth century.[15] However, that small period of progress proved short lived.[16]

In the years leading up to the Civil War, Black suffrage was increasingly restricted: most states denied Black people the right to vote, and even those that did not were free to impose barriers on that right.[17] In

12. *See* Sherry A. Swirsky, *Minority Voter Intimidation: The Problem That Won't Go Away*, 11 TEMP. POL. & C.R.L. REV. 359, 360 (2002).

13. McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 191 (2014).

14. Chandler Davidson, *The Voting Rights Act: A Brief History*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 7, 7 (Bernard Grofman & Chandler Davidson eds., 1992).

15. *Id.*

16. *Id.*

17. *Id.*

New York, for example, where Black men could vote, they had to meet minimum property-ownership qualifications.[18] Property qualifications barred most Black men from voting due to legal and social barriers that prevented them from buying land.[19] Following the Civil War, disenfranchisement persisted in both the North and the South—as "whites in [the North] voted against equal suffrage in eight out of eleven referendums on the issue."[20] It was this political climate that abolitionists were up against when they fought for the Fifteenth Amendment.

1. The Fifteenth Amendment Prohibited Denial of the Right to Vote Based on Race, but Its Practical Effect Was Hindered

The Fifteenth Amendment was ratified in 1870, stating that "[t]he 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 race, color, or previous condition of servitude."[21] Section 2 of the Amendment vested Congress with the power to enforce its substantive guarantee "by appropriate legislation."[22] Congress immediately enacted the Enforcement Act of 1870,[23] which created the first enforcement mechanisms for the Fifteenth Amendment. In the years that followed, Black voter registration and turnout swelled, and elected office became more diverse—and more representative—than it had ever been before.[24]

However, federal courts interpreted the Enforcement Act narrowly. For example, in *United States v. Reese*,[25] the United States Supreme Court held that the Enforcement Act was appropriate only to the extent that it mirrored the Fifteenth Amendment's protections against abridgement of voting rights due to *race, color, and previous conditions of servitude*—remarking that "[t]he Fifteenth Amendment does not confer the right of

18. *Id.*

19. *See, e.g.*, Roy W. Copeland, *In the Beginning: Origins of African American Real Property Ownership in the United States*, 44 J. BLACK STUD. 646 (2013) (describing how many states prohibited Black men from owning property outright or required government documentation that most did not have, such as birth certificates; showing that even without those formal legal barriers, social barriers such as white refusal to sell land to Black buyers or white violence directed at Black landowners prevented Black citizens from acquiring property).

20. Davidson, *supra* note 14, at 8.

21. U.S. CONST. amend. XV, § 1.

22. *Id.* § 2.

23. Enforcement Act of 1870, ch. 114, 16 Stat. 140; *see also* United States v. Amsden, 6 F. 819, 824 (D. Ind. 1881) (holding section 5 of the 1870 Enforcement Act, which made voter intimidation a misdemeanor, unconstitutional because it lacked reference to racial discrimination).

24. In 1872, for example, 324 Black men were elected to state and federal legislative positions. Davidson, *supra* note 14, at 10.

25. 92 U.S. 214 (1875).

suffrage upon any one."[26] The Court thereby allowed states to abridge voting rights on other grounds, so long as they did not expressly base such abridgement on the protected classifications outlined in the Fifteenth Amendment.[27] With this decision, the Court paved the way for the facially neutral, but effectively discriminatory, practices of the Jim Crow era.

Following *Reese*, states were empowered to enact thinly veiled discriminatory voting laws. And in a vicious cycle, as more discriminatory voting laws were enacted, Congress became less representative, and it became less likely that further legislation would strengthen the Enforcement Act's protections.[28] What followed was one of the most discriminatory periods in American history.

2. Jim Crow Laws Systematically Disenfranchised Black Voters

The Jim Crow era is commonly defined as the period between the end of Reconstruction[29] in 1877 and the beginning of the civil rights movement in the 1950s.[30] During this period, the southern states systematically prevented equality for Black Americans in all aspects of life; one crucial aspect of this racist system was preventing Black people from participating in democracy.[31]

Southern disenfranchising conventions[32] were a breeding ground for blatant suppression of the Black vote, particularly by way of literacy tests, poll taxes, and grandfather clauses.[33] Unsurprisingly, early Jim Crow laws

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26. *Id.* at 217.

27. *Id.* at 217–18.

28. Davidson, *supra* note 14, at 10–11.

29. Reconstruction is the period of American history after the Civil War, when southern states that had seceded were re-integrated into the Union. Eric Foner, *Reconstruction*, ENCYC. BRITANNICA (Nov. 5, 2021), https://www.britannica.com/event/Reconstruction-United-States-history [https://perma.cc/PRY9-MUGC].

30. Melvin I. Urofsky, *Jim Crow Law*, ENCYC. BRITANNICA (Feb. 12, 2021), https://www.britannica.com/event/Jim-Crow-law [https://perma.cc/32ZT-SV4F]. 1877 is when the Supreme Court held in *Hall v. DeCuir*, 95 U.S. 485 (1877), that states could not prohibit segregation by common carriers. Urofsky, *supra*.

31. Urofsky, *supra* note 30.

32. Conventions were held in many southern states to devise ways of preventing Black citizens from voting. *See, e.g.*, 33 CONG. REC. 3223 (1900) (statement of Sen. Benjamin R. Tillman) ("We did not disfranchise the [n-words] until 1895. Then we had a constitutional convention convened which took the matter up calmly, deliberately, and avowedly with the purpose of disfranchising as many of them as we could under the fourteenth and fifteenth amendments.").

33. Davidson, *supra* note 14, at 11–13. Literacy test: requiring voters to pass a test showing a certain level of literacy before allowing them to vote. Poll tax: requiring voters to pay a tax before allowing them to vote. Grandfather clause: requiring voters to show that their grandfather had voted before allowing them to vote.

caused a rapid decline in Black voter registration: in 1896, when Louisiana's grandfather clause was passed, 44.8% of eligible Black voters were registered, while only 4% of eligible Black voters were registered in 1900.[34] But that decline does not mean Black Americans were not already fighting to regain the franchise.

The National Association for the Advancement of Colored People (NAACP) won an early victory in 1915, when the United States Supreme Court found Oklahoma's grandfather clause unconstitutional.[35] The NAACP went on to challenge the white primary[36] in Texas repeatedly, and after a protracted series of cases,[37] the Supreme Court finally held in *Smith v. Allwright*[38] that the white primary was unconstitutional under the Fifteenth Amendment.[39] That 1944 case was championed by Thurgood Marshall, who would later become the first Black Supreme Court Justice.[40]

In the two decades that followed *Smith*, Black Americans fought in the streets and in court for equal citizenship. Three civil rights acts were passed: first in 1957,[41] then in 1960,[42] and again in 1964.[43] But while these acts made strides in other important respects, their voting provisions were "tentative, piecemeal efforts that failed to breach the barriers maintained by southern white supremacists."[44]

The Twenty-Fourth Amendment, which outlawed poll taxes, was adopted in 1964.[45] Shortly thereafter, the Supreme Court decided *Reynolds v. Sims*,[46] holding that certain forms of vote dilution[47] violate the

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34. *A History of the Voting Rights Act*, ACLU, https://www.aclu.org/issues/voting-rights/voting-rights-act/history-voting-rights-act [https://perma.cc/5GGQ-CG43].

35. Guinn v. United States, 238 U.S. 347, 364–65 (1915).

36. A white primary is a primary election in which only white voters were allowed to participate. *White Primary*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/white%20primary [https://perma.cc/2AP5-XTPV].

37. *See* Nixon v. Herndon, 273 U.S. 536 (1927); Nixon v. Condon, 286 U.S. 73 (1932); Grovey v. Townsend, 295 U.S. 45 (1935).

38. 321 U.S. 649 (1944).

39. *Id.* at 664–66.

40. *See, e.g.*, WIL HAYGOOD, SHOWDOWN: THURGOOD MARSHALL AND THE SUPREME COURT NOMINATION THAT CHANGED AMERICA (2015) (detailing Marshall's nomination and confirmation to the Supreme Court).

41. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634.

42. Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86.

43. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

44. Davidson, *supra* note 14, at 13.

45. U.S. CONST. amend. XXIV.

46. 377 U.S. 533 (1964).

47. Vote dilution, also known as gerrymandering, occurs when states dilute non-white votes by

Fourteenth Amendment's Equal Protection Clause, and further stated: "[S]ince the right to exercise the franchise [of voting] in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[48]

B. The Voting Rights Act and Its Early Challenges

The early 1960s saw a groundswell of activism in the Deep South, culminating in the famous Selma to Montgomery March, which was described as "the field on which a decisive battle for the vote [was] . . . fought."[49] The activists chose Selma, Alabama, because of its "extraordinary" registration requirements[50] and because its sheriff "could be counted on to overreact to peaceful civil rights demonstrations."[51] As the activists expected, unjustified police violence erupted and press coverage was massive.[52] The violence continued for weeks, and pressure mounted on President Johnson, who had already announced his intent to sponsor voting rights legislation in January of 1965.[53]

On Sunday, March 7, 1965, activists set out to march from Selma to Montgomery.[54] John Lewis, the civil rights leader and future Congressman who organized the march, recalled that "[m]any of the men and women gathered [to march] had come straight from church."[55] He described the atmosphere as "somber and subdued, almost like a funeral procession."[56] Marchers took a "sacred path" through the streets of Selma to the Edmund Pettus Bridge, where they were confronted by "a sea of

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"drawing district lines that give whites a majority in a disproportionate share of districts, thus ensuring that minority voters are unable to elect a candidate of their choice." Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1666 (2001).

48. *Reynolds*, 377 U.S. at 562.

49. Davidson, *supra* note 14, at 15. Activism in Selma began as a registration drive in Dallas County, a county with over 15,000 voting-age Black citizens, but where only 335 Black citizens were registered to vote in fall of 1964. *Id.*

50. *Id*. Dallas County (where Selma is located) allowed voters to register only two days out of each month, required them to fill in more than fifty pieces of discrete information in a form, hand-write a part of the U.S. Constitution from dictation, read sections of the Constitution and answer questions about them, answer questions about the government system, and swear loyalty to the state of Alabama and the United States.

51. *Id*.

52. *Id*.

53. *Id*. at 15–16.

54. JOHN LEWIS & MICHAEL D'ORSO, WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT 323 (1998).

55. *Id*. at 325.

56. *Id.*

blue-helmeted, blue-uniformed . . . state troopers" and "a crowd of about a hundred whites, laughing and hollering, waving Confederate flags."[57] Upon realizing that the marchers could go no further without being attacked, Lewis led the marchers in a prayer.[58]

Police sprayed demonstrators with tear gas and hit them with clubs, injuring at least 90 of the 600 marchers.[59] Following this display of racist brutality, Lewis spoke to a crowded church full of "more than six hundred people, many bandaged from the wounds of that day"—he called for continued activism and directly challenged President Johnson for prioritizing foreign engagements over the civil rights of Black Americans in the United States.[60] A week later, President Johnson announced the Voting Rights Act of 1965 in a stirring speech about Congress's past failure with respect to voting rights.[61] Black activism and sacrifice led directly to the passage of the VRA.

1. Getting the VRA Through Congress

When he presented the VRA to Congress, President Johnson acknowledged prior voting rights failures and swore that this bill would accomplish what others failed to.[62] The VRA's protections against voter intimidation were considered crucial and were a conscious departure from previous bills.[63]

In a House Judiciary Committee hearing, United States Attorney General Nicholas Katzenbach testified on the lack of an intent requirement in section 11(b).[64] Katzenbach testified that the "most serious inadequacy" of prior statutes outlawing voter intimidation was "the practice of some district courts to require the Government to carry a very onerous burden of proof of 'purpose.'"[65] Katzenbach went on to argue that

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57. *Id.* at 325–26.

58. *Id.* at 327.

59. *Id.* at 330; *see also* Davidson, *supra* note 14, at 16.

60. LEWIS & D'ORSO, *supra* note 54, at 330–31.

61. Lyndon B. Johnson, U.S. President, Special Message to the Congress: The American Promise (March 15, 1965), https://www.presidency.ucsb.edu/documents/special-message-the-congress-the-american-promise [https://perma.cc/9ZFD-7LWM] ("The last time a President sent a civil rights bill to the Congress it contained a provision to protect voting rights in Federal elections. That civil rights bill was passed after 8 long months of debate. And when that bill came to my desk from the Congress for my signature, the heart of the voting provision had been eliminated. This time, on this issue, there must be no delay, no hesitation and no compromise with our purpose.").

62. *See generally id.*

63. *Voting Rights Act of 1965: Hearings on H.R. 6400 Before the H. Comm. on the Judiciary*, 89th Cong. 11–12 (1965) (statement of Nicholas deB. Katzenbach, Att'y Gen. of the United States).

64. *Id.*

65. *Id.* at 12.

under the new section 11(b), "defendants would be deemed to intend the natural consequences of their acts."[66] Finally, he emphasized that the lack of an intent requirement was "a deliberate and . . . constructive departure from the language and construction of [prior voter intimidation statutes]."[67]

Southern white politicians of both parties opposed the VRA, calling the bill "grossly unjust and vindictive in nature," "totalitarian," and "unconstitutional."[68] Nonetheless, the VRA's advocates were steadfast, and the House approved the bill by a vote of 328 to 74.[69] The Senate approved the bill the next day by a vote of 79 to 18.[70]

2. Overview of the VRA

The VRA was enacted in 1965[71] as the United States' most robust federal statute protecting voting rights from infringement by government actors and private actors alike.[72] The VRA created a constellation of provisions relating to election administration (sections 2, 4, and 5) as well as protections from public and private voter intimidation (section 11(b)). Together, these provisions sought to ensure that U.S. elections were accessible to those who had historically been excluded, most pressingly the Black community.

Historically, sections 4 and 5, which worked together, were the most impactful sections of the VRA. Section 4 established covered jurisdictions and banned literacy tests at the polls.[73] Covered jurisdictions were those with the worst histories of racial voter discrimination: Alabama, Georgia, Louisiana, Mississippi, and forty counties in North Carolina, Alaska, and Virginia.[74] Section 5, in turn, required covered jurisdictions to secure federal preclearance before enacting certain new voting regulations.[75] The

66. *Id.*

67. *Id.*

68. Davidson, *supra* note 14, at 18 (first quoting Sen. Herman E. Talmadge, then quoting Sen. Strom Thurmond, then quoting Rep. Howard W. Smith).

69. *Id.* at 17.

70. *Id.*

71. *See generally* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

72. Allen v. State Bd. of Elections, 393 U.S. 544, 557 (1969) ("It is consistent with the broad purpose of the Act to allow the individual citizen standing to insure that his city or county government complies with the § 5 approval requirements.").

73. § 4, 79 Stat. at 438–39.

74. LAURIE COLLIER HILLSTROM, DEFINING MOMENTS: THE VOTING RIGHTS ACT OF 1965, at 96–97 (Kevin Hillstrom & Cherie D. Abbey eds., 2009).

75. § 5, 79 Stat. at 439; 52 U.S.C. § 10304(a).

federal preclearance process required covered jurisdictions to receive a declaratory judgment from the District Court for the District of Columbia stating that a proposed voting law change comported with section 5 before the jurisdiction could enact the change.[76] Preclearance was intended to ensure that proposed changes had no discriminatory intent or impact *before* allowing them to take effect.[77]

Another potent section of the VRA is section 2. This section originally mirrored the language of the Fifteenth Amendment and continued with its broad, sweeping assertion that no state practice "shall be imposed . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race."[78] Section 2 has been invoked to protect voters from racial gerrymandering in redistricting, and in the years since *Shelby County* nullified section 4, section 2 is increasingly important for challenging racially discriminatory voting laws.[79]

Section 11(b) of the VRA is relatively less well known compared to sections 2, 4, and 5. Section 11(b) provides that "[n]o 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."[80] Section 11(b) thus prohibits voter intimidation by state or private actors. Like other civil rights statutes, the VRA can be enforced by private citizens under 42 U.S.C. § 1983.[81] Plaintiffs bringing a claim under that statute can recover attorneys' fees under 42 U.S.C. § 1988.[82]

3. Early Judicial, Executive, and Legislative Responses to the VRA

Almost immediately after the VRA became law, states challenged it in court. In the 1966 case *South Carolina v. Katzenbach*,[83] South Carolina challenged the law by suing the United States Attorney General. The central issue was whether the VRA's coverage formula and preclearance

76. 52 U.S.C. § 10304(a).

77. *See id.* § 10304(b)–(d).

78. *Id.* § 10301(a).

79. *See, e.g.*, Brnovich v. Democratic Nat'l Comm., 594 U.S. __, 141 S. Ct. 2321 (2021) (reversing a Ninth Circuit decision that held two Arizona voting laws unconstitutional under section 2 of the VRA).

80. 52 U.S.C. § 10307(b).

81. 42 U.S.C. § 1983.

82. *Id.* § 1988(b) ("In any action or proceeding to enforce a provision of section[] . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . .").

83. 383 U.S. 301 (1966).

provision were constitutional.[84] The United States Supreme Court held that the provision was constitutional under the Fifteenth Amendment, reasoning that the Fifteenth Amendment constitutes a broad directive and a grant of power to Congress to enact "any rational means" it deems necessary to end voter discrimination.[85] The *Katzenbach* decision specifically mentioned that Congress could encroach on state sovereignty and treat states differently with respect to this issue so long as its coverage formula was "rational in both practice and theory."[86]

Meanwhile, the VRA's impacts on access to voting were borne out empirically. A 2009 study found that between the 1964 and 1968 presidential elections, Black voter registration rates in the South rose by 67%.[87]

The VRA's reach continued to be upheld and extended across the following two decades, even if not enthusiastically. In 1970, President Nixon reluctantly signed an extension of the VRA.[88] President Nixon originally opposed extending the VRA and had considerable support in Congress for his view.[89] The Nixon Administration attempted instead to pass a watered-down version of the VRA by deleting section 5, but when that bill did not pass the Senate, Nixon was forced to sign a stronger VRA in 1970 that included a permanent nationwide ban on the use of literacy tests.[90] A few months later, the Supreme Court upheld the new VRA's nationwide ban on literacy tests in a five-four decision.[91] In 1975, President Ford signed another extension of the VRA.[92] This time, Congress modified the Act to require all jurisdictions with a non-English speaking population of 5% or more to provide voting materials and

84. *Id.* at 307.

85. *Id.* at 324. The *Katzenbach* Court wrote that VRA was an "uncommon exercise of congressional power." *Id.* at 334.

86. *Id.* at 330. Justice Black dissented, arguing that the preclearance requirement should have been struck down due to its encroachment on state sovereignty. *Id.* at 359–62 (Black, J., dissenting).

87. Desmond Ang, *Do 40-Year-Old Facts Still Matter? Long-Run Effects of Federal Oversight Under the Voting Rights Act*, 11 AM. ECON. J.: APPLIED ECON. 1, 1 (2019).

88. Davidson, *supra* note 14, at 29.

89. The North Carolina Senator Sam Ervin introduced several amendments that would have weakened section 5. *Id.*

90. J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007*, 86 TEX. L. REV. 667, 686–87, 754 (2008); KEVIN J. COLEMAN, CONG. RSCH. SERV., R43626, THE VOTING RIGHTS ACT OF 1965: BACKGROUND AND OVERVIEW 18–19 (2015).

The ban otherwise would have needed periodic reauthorization and only applied to covered jurisdictions. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 438 (codified as amended in scattered sections of 52 U.S.C.) (banning literacy tests for covered jurisdictions under section 4 of the 1965 VRA).

91. *See* Oregon v. Mitchell, 400 U.S. 112, 118 (1970).

92. HILLSTROM, *supra* note 74, at 108.

assistance in other languages.[93]

Despite opposition from the executive branch,[94] Congress resolved to perpetuate the VRA; under congressional pressure, President Reagan signed a twenty-five-year extension in 1982.[95] The 1982 extension expressly disallowed vote dilution and did not require plaintiffs to show the defendant's discriminatory intent to prevail on this issue.[96] The 1982 extension also provided for disability accommodations in voting and assistance for illiterate voters—a marked reversal from the days of literacy tests.[97] While President Reagan characterized the 1982 extension as evidence of bipartisan support for voting rights, that extension was mostly championed by Democratic legislators.[98]

The VRA was next reauthorized in 2006. The 2006 reauthorization was signed by President George W. Bush after overcoming Republican objections in Congress.[99] It made private civil actions more tenable by allowing plaintiffs to recover reasonable expert fees and other litigation expenses in addition to attorney's fees.[100] The enacting legislature acknowledged that "[s]ignificant progress" toward equality had been made since 1965 in such measures as registration, voter turnout, and representation.[101] However, it went on to find that "continued evidence of racially polarized voting" in covered jurisdictions demonstrated the need for reauthorization to combat "second generation barriers constructed to prevent minority voters from fully participating in the electoral process."[102]

Scholars have argued that "the high visibility, traceability, and accessibility characteristic of the legislative process ultimately played to

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93. *Id.*

94. During his 1980 presidential campaign, Ronald Reagan called the VRA "humiliating to the South" and promised to "restore to state and local governments the power that properly belongs to them." RAYMOND WOLTERS, RIGHT TURN: WILLIAM BRADFORD REYNOLDS, THE REAGAN ADMINISTRATION, AND BLACK CIVIL RIGHTS 29 (1996).

95. HILLSTROM, *supra* note 74, at 109–10.

96. *Id.*

97. *Id.*

98. *See* JESSE H. RHODES, BALLOT BLOCKED: THE POLITICAL EROSION OF THE VOTING RIGHTS ACT 94–95 (Keith J. Bybee ed., 2017).

99. The objections had to do, in part, with the requirement to print ballots in languages other than English. Carl Hulse, *Rebellion Stalls Extension of Voting Rights Act*, N.Y. TIMES (June 22, 2006), https://www.nytimes.com/2006/06/22/washington/22vote.html?searchResultPosition=3 [https://perma.cc/NJG5-MR9R].

100. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 6, 120 Stat. 577, 581 (codified as amended at 52 U.S.C. § 10310(e)).

101. *Id.* § 2(b)(1).

102. *Id.* § 2(b)(1)–(3).

the advantage of the civil rights movement and its congressional allies"—while judicial appointments and administrative policy allowed the VRA's opponents to roll the Act back in less visible ways.[103] This dynamic likely has influenced the evolution of the VRA in the modern era and paved the way for modern rollbacks, including the well-known Supreme Court decision *Shelby County v. Holder*.[104]

C. The Modern Era: Section 11(b) Regains Importance as Sections 4, 5, and 2 Recede

Although *Shelby County* dealt with sections 4 and 5 of the VRA, it provides context for why section 11(b) has taken on renewed importance. There is not necessarily a direct overlap between sections 4, 5, and 2 of the VRA, which prohibit a complicated set of election-related state actions, and section 11(b), which prohibits a largely separate set of intimidating actions taken by either private or public actors. But for a voter, these challenges are cumulative: dealing with a broad range of privately and publicly imposed hurdles is more onerous than dealing with only a narrower subset of problems. Simply put, when *Shelby County* effectively ended preclearance, it removed one layer of protection for voters of color. Without that layer, it is more important to utilize the protections that still stand.

1. Shelby County v. Holder*: Basics of the Case*

The 2013 Supreme Court decision *Shelby County v. Holder* is notorious for rejecting a major portion of the VRA.[105] Specifically, the Court held section 4 of the VRA unconstitutional.[106] That section, together with section 5, ensured that certain jurisdictions would be subject to federal preclearance before altering their voting procedures.[107] Such preclearance requirements were intended to apply to jurisdictions with the worst histories of racial voter discrimination and were effected through two

103. RHODES, *supra* note 98, at 95–96.

104. 570 U.S. 529 (2013).

105. *See, e.g.*, Ryan P. Haygood, *Hurricane SCOTUS: The Hubris of Striking Our Democracy's Discrimination Checkpoint in* Shelby County *& the Resulting Thunderstorm Assault on Voting Rights*, 10 HARV. L. & POL'Y REV., S11, S14 (2015) (arguing that in the *Shelby County* decision, "the Supreme Court accorded Congress no deference, ignored controlling precedent, and waved aside the voluminous record of contemporary voting discrimination that Congress appropriately relied upon when it reauthorized the VRA in 2006"); Andres A. Gonzalez, C*reating a More Perfect Union: How Congress Can Rebuild the Voting Rights Act*, 27 BERKELEY LA RAZA L.J. 65, 74 (2017) (describing *Shelby County* as "a blow to the heart of the VRA").

106. *Shelby Cnty.*, 570 U.S. at 557.

107. 52 U.S.C. § 10304.

separate VRA provisions: section 5 contained the preclearance requirement, and section 4 contained the coverage formula that determined which jurisdictions were subject to section 5's requirement.[108]

Shelby County, Alabama, alleged that sections 4(b) and 5 were unconstitutional and requested a permanent injunction[109] against their enforcement.[110] The County claimed that Congress's 2006 reauthorization exceeded its authority under the Fifteenth Amendment,[111] thus violating the Tenth Amendment[112] of the U.S. Constitution, which reserves for the states all powers not specifically granted to the federal government.[113] The County, relying on *Katzenbach*[114] and *Northwest Austin Municipal Utility District Number One v. Holder*,[115] also argued that the VRA treated states differently without a "rational" basis to do so.[116] It argued that the 2006 reauthorization could not be "rational" because it was based on data from 1964, 1968, and 1972.[117] The Supreme Court agreed, overturning the District of Columbia Circuit.[118]

To understand the *Shelby County* decision and the subsequent status of the VRA, it is important to acknowledge the 2006 reauthorization of the VRA. With an extensive record before it, the 2006 Congress determined that "40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment and to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution."[119] Nonetheless, the Supreme Court rejected the 2006 reauthorization in *Shelby County*, partly

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108. *Id.*

109. An injunction is "[a] court order commanding or preventing an action." *Injunction*, BLACK'S LAW DICTIONARY (11th ed. 2019).

110. *Shelby Cnty.*, 570 U.S. at 529.

111. "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 race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XV.

112. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

113. Brief for Petitioner at i, *Shelby Cnty.*, 570 U.S. 529 (No. 12-96).

114. *Supra* section I.B.3. Recall under *Katzenbach*, Congress could encroach on state sovereignty and treat states differently to remedy voting inequities so long as its reason for treating states differently was "rational in both practice and theory." South Carolina v. Katzenbach, 383 U.S. 301, 330 (1966).

115. 557 U.S. 193 (2009).

116. Brief for Petitioner, *supra* note 113, at 5.

117. *Id.* at 5, 10.

118. *Shelby Cnty.*, 570 U.S. 529.

119. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(7), 120 Stat. 577, 578.

on the grounds that it was based on insufficient and outdated data.[120]

Chief Justice Roberts, writing for the majority, reasoned that the preclearance requirements departed from basic principles of federalism by burdening some states more than others.[121] This disparate burden, the Court found, was a violation of the "equal sovereignty" principle as articulated in *Northwest Austin*.[122] The Court in *Northwest Austin* wrote that "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."[123] Roberts acknowledged that the data from the 1960s was sufficient to support section 4 when it came before the Court in *Katzenbach* in 1966[124]—that at the time, the coverage formula "made sense."[125] But he was persuaded that, after so much time had passed, the Act's disparate treatment was no longer "sufficiently related to the problem that it target[ed]" when it came before Congress in 2006, at which time registration rates were basically equal between Black and white citizens.[126] Based on that reasoning, the Court held that section 4(b)'s coverage formula was facially unconstitutional—effectively striking down section 5 as well.[127]

In one of her most memorable dissents, Justice Ginsburg criticized the majority's holding in *Shelby County*, stating that "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[128] She argued that the majority inexplicably expanded the equal sovereignty principle beyond its

120. 570 U.S. at 551 ("Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. And voter registration and turnout numbers in the covered States have risen dramatically in the years since." (internal citations omitted)).

121. *Id.* at 535.

122. *Id.* at 544–46 (citing Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)).

123. *Nw. Austin*, 557 U.S. at 203.

124. *Shelby Cnty.*, 570 U.S. at 551 ("Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. There is no longer such a disparity." (internal citation omitted)).

125. *Id.* at 546.

126. *Id.* at 551.

127. Although the court "issue[d] no holding on § 5 itself," the result of holding section 4 unconstitutional was that section 5 was rendered inoperable. *Id.* at 557; *see also id.* at 559 (Thomas, J., concurring) ("While the Court claims to 'issue no holding on § 5 itself,' its own opinion compellingly demonstrates that Congress has failed to justify 'current burdens' with a record demonstrating 'current needs.' By leaving the inevitable conclusion unstated, the Court needlessly prolongs the demise of that provision." (internal citations and quotation marks omitted)).

128. *Id.* at 590 (Ginsburg, J., dissenting).

domain,[129] and placed an unreasonable and unusual burden on defenders of legislation.[130] Many academics agreed with Justice Ginsburg and sought alternative ways to protect voters using other provisions of the VRA; specifically, section 2 became a popular alternative.[131]

2. Voter Protections After Shelby County

In the wake of the *Shelby County* decision, conditions for voters across the nation changed dramatically. While the preclearance protections of sections 4 and 5 were not the only protections afforded by the VRA, they stood out in their proactive, preventative nature. The preclearance provisions were also especially effective. They "led to gradual and significant increases in voter participation [that] persisted for over 40 years, bolstering turnout by 4–8 percentage points" since their inception.[132] And without these provisions, the remainder of the VRA has been the subject of renewed interest for voter advocates and scholars.

Although it became clear at oral argument for *Shelby County* that Justice Kennedy believed section 5 was unnecessary for the VRA to succeed, section 5's dormancy changed conditions for voters overnight. Section 5 was unnecessary, in Kennedy's view, because section 2 allows discriminatory voting changes to be blocked through preliminary injunctions.[133] But immediately after *Shelby County* obviated section 5, many states enacted new laws that previously would have been unlawful.[134] For example, Texas announced a strict voter identification document (ID) requirement the same day *Shelby County* was decided.[135]

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129. Ginsburg wrote that the Court inappropriately relied on dicta from *Northwest Austin* when it was bound instead by controlling precedent from *Katzenbach*, which found that the equal sovereignty principle "applies only to the terms upon which States are admitted to the Union." *Id.* at 587 (Ginsburg, J., dissenting) (quoting South Carolina v. Katzenbach, 383 U.S. 301, 328–29 (1966)).

130. *Id.* at 580–81 (Ginsburg, J., dissenting).

131. *See, e.g.*, Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 COLUM. L. REV. 2143 (2015) (noting that the *Shelby County* decision struck down section 5 of the VRA and arguing for the use of section 2 actions instead).

132. Ang, *supra* note 87, at 3.

133. Transcript of Oral Argument at 36–37, *Shelby Cnty.*, 570 U.S. 529 (No. 12-96).

134. Tomas Lopez, *'*Shelby County*': One Year Later*, BRENNAN CTR. FOR JUST. (June 24, 2014), http://www.brennancenter.org/analysis/shelby-county-one-year-later#_ednref6 [https://perma.cc/QTU9-8R79]; *see also Voter ID Chronology*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 29, 2021), https://www.ncsl.org/research/elections-and-campaigns/voter-id-chronology.aspx [https://perma.cc/ZY8S-89NF] (listing all voter ID laws in effect between 2000 and 2020; showing increase in states with strict voter ID laws after *Shelby County*).

135. Ryan J. Reilly, *Harsh Texas Voter ID Law "Immediately" Takes Effect After Voting Rights Act Ruling*, HUFFINGTON POST (Apr. 7, 2014), http://www.huffingtonpost.com/2013/06/25/texas-voter-id-law_n_3497724.html [https://perma.cc/Z9WZ-7ZW9].

Texas also announced it would immediately instate a 2011 redistricting plan[136] that was denied preclearance in 2012 due to evidence that "the plan was enacted with discriminatory intent."[137] And Texas was not alone: similar voter ID laws soon followed in Alabama[138] and Virginia.[139] The 2016 election was the first national election in fifty years without the protection of sections 4 and 5 of the VRA, and scholars have argued that voter suppression played a role in the outcome of that election.[140]

After *Shelby County*, section 2 of the VRA remains in effect. However, section 2 is vulnerable because of unsettled questions regarding its application and constitutionality. In deciding section 2 claims, lower courts apply a two-part test that "asks if an electoral practice (1) causes a disparate racial impact (2) through its interaction with social and historical discrimination."[141] However, there is much disagreement "over basic questions like whether the test applies to specific policies or systems of election administration; whether it is violated by all, or only substantial, disparities; and whether disparities refer to citizens' compliance with a requirement or to their turnout at the polls."[142]

Moreover, section 2 of the VRA lies on "thin constitutional ice."[143] In the recent case *Brnovich v. Democratic National Committee*,[144] the U.S. Supreme Court avoided deciding whether section 2 is constitutional, but nonetheless upended section 2 by creating a list of several new factors for courts to consider when ruling on these claims.[145]

Brnovich consolidated challenges to two Arizona policies: first, the policy of throwing out in-person ballots cast in the wrong precinct, and second, a statute that criminalized absentee ballot collection by any person

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136. *Id.*

137. Texas v. United States, 887 F. Supp. 2d 133, 161 (D.D.C. 2012), *vacated*, 570 U.S. 928 (2013).

138. ALA. CODE § 17-9-30 (2018).

139. VA. CODE ANN. § 24.2-643 (2015).

140. *See, e.g.*, Matthew Murillo, *Did Voter Suppression Win President Trump the Election?: The Decimation of the Voting Rights Act and the Importance of Section 5*, 51 U.S.F. L. REV. 591, 608–09 (2017) (arguing that the absence of section 5's preclearance provisions were one reason for Trump's narrow victory in Wisconsin and North Carolina in 2016); *see also* SCOTT SIMPSON, THE LEADERSHIP CONF. EDUC. FUND, THE GREAT POLL CLOSURE 4 (Jeff Miller ed., 2016), http://civilrightsdocs.info/pdf/reports/2016/poll-closure-report-web.pdf [https://perma.cc/2BC4-5FG6] (finding empirically that 165 out of the 381 counties studied, or 43%, reduced voting locations in the 2016 election after *Shelby County* removed the preclearance requirement from those jurisdictions).

141. Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1566 (2019).

142. *Id.*

143. *Id.*

144. 594 U.S. __, 141 S. Ct. 2321 (2021).

145. *Id.* at 2338.

other than a postal worker; an election official; or a voter's caregiver, family member, or household member.[146] The Democratic National Committee (DNC) challenged the policy and statute under section 2 of the VRA, alleging they "adversely and disparately affect[ed]" voters of color.[147] The DNC also brought a Fifteenth Amendment challenge, alleging the ballot-collection statute was "enacted with discriminatory intent."[148] In upholding Arizona's policy and statute, the Court resolved a circuit split between the Ninth Circuit, which held "that anything beyond a de minimis statistical disparity qualifies as a discriminatory burden" under section 2, and the Fourth, Fifth, Sixth, and Seventh Circuits, which interpreted section 2 such that "'disproportionate racial impact alone' is insufficient; the challenged practice must also abridge 'the *opportunity* to vote.'"[149]

Arizona argued that the Ninth Circuit's interpretation of section 2 (invalidating laws and policies with disparate racial impacts that were "more than . . . de minimis"[150]) was overbroad and "raise[d] serious constitutional concerns."[151] Those concerns were, first, that invalidating state voting laws under section 2 based on "insubstantial" disparate racial impacts would exceed Congress's powers to enforce the Fifteenth Amendment, and second, that fashioning state laws to avoid "insubstantial" disparate impacts would itself be an Equal Protection Clause violation because legislators would have to consider race when drafting the law.[152] On that basis, Arizona argued that facially race-neutral voting regulations should be exempt from section 2, so long as they did not impose anything more than an "ordinary burden" on voters of color.[153] "Disparate *participation* does not imply disparate *opportunity*," Arizona argued, "and [section] 2 is an equal-opportunity statute, not an equal-outcome mandate."[154] While the Court did not adopt this argument whole cloth, it remains to be seen whether section 2 will survive future constitutional challenges.

Although section 2 is the most commonly argued-for alternative to

146. *Id.* at 2325.

147. *Id.* at 2334.

148. *Id.*

149. Petition for Writ of Certiorari at 33, *Brnovich*, 141 S. Ct. 2321 (No. 19-1257) (emphasis in original) (quoting Ohio Democratic Party v. Husted, 834 F.3d 620, 637–38 (6th Cir. 2016)).

150. Brief of State Petitioners at 25, *Brnovich*, 141 S. Ct. 2321 (No. 19-1257) (quoting Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989, 1054 (9th Cir. 2020)).

151. Brief of State Petitioners, *supra* note 150, at 24.

152. *Id.* at 24–27.

153. Brief of Private Petitioners at 19, *Brnovich*, 141 S. Ct. 2321 (No. 19-1257) (emphasis omitted).

154. *Id.* at 20 (emphasis in original).

sections 4 and 5, a few scholars also see potential in section 11(b) of the VRA to offer additional voter protections (albeit of a different kind) after *Shelby County*.[155] Section 11(b) provides a cause of action for voters to bring voter intimidation claims against public and private actors. The statute prohibits actual or attempted "intimidation," "threats," and "coercion" against a person, either "for voting or attempting to vote" or "for urging or aiding any person to vote or attempt to vote."[156]

Section 11(b) is not the only federal statute that reaches voter intimidation by private actors. It was preceded by section 2 of the Enforcement Act of 1871 ("KKK Act")[157] and section 131(b) of the Civil Rights Act of 1957.[158] Because the scope of section 11(b) is largely untested, its similarities and differences with the other voter intimidation statutes are illustrative.[159] Section 11(b) shares language with section 131(b) of the Civil Rights Act, but unlike section 131(b), section 11(b) of the VRA has no intent requirement.[160] Section 11(b) shares language with section 131(b) of the Civil Rights Act, but unlike section 131(b), section 11(b) of the VRA has no intent requirement.[161] Similarly, the KKK Act prohibits "force, intimidation, or threat" with respect to voting, but while it lacks the intent requirement, it requires a conspiracy between defendants.[162] By contrast, "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."[163] Scholars have argued that this language creates opportunities for litigators to build new precedent

155. *See, e.g.*, Cady & Glazer, *supra* note 8 (arguing for a renewed focus on bringing section 11(b) claims following *Shelby County*); *cf.* Hans A. von Spakovsky, *The Myth of Voter Suppression and the Enforcement Record of the Obama Administration*, 49 U. MEM. L. REV. 1147, 1171 (2019) (arguing that "actual voter suppression" is rare if not absent from American elections because the Obama administration did not bring any enforcement actions under section 11(b)).

156. 52 U.S.C. § 10307(b).

157. 42 U.S.C. § 1985(3) ("[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.").

158. 52 U.S.C. § 10101(b).

159. Cady & Glazer, *supra* note 8, at 191.

160. 52 U.S.C. § 10101(b).

161. *Id.* § 10101(b).

162. 42 U.S.C. § 1985(3).

163. Cady & Glazer, *supra* note 8, at 193.

through skillful impact litigation.[164] But despite well-documented examples of conduct that a jury could find objectively intimidating,[165] and section 11(b)'s enhanced accessibility for plaintiffs as compared to other federal voter intimidation statutes, section 11(b) is still used infrequently.

3. Expiry of Anti-Intimidation Consent Decree

One more recent development makes section 11(b) increasingly important: the 2017 expiry of a consent decree[166] that restricted Republican poll monitoring for nearly four decades.[167] The Republican National Convention (RNC) entered the federal consent decree after its New Jersey branch organized aggressive poll watching during a 1981 governor's race.[168] The New Jersey RNC recruited off-duty police officers to form a "Ballot Security Task Force" that patrolled polling places in predominantly Black and Brown neighborhoods.[169] The officers wore arm bands and carried firearms and radios, obstructing voters from accessing the polls.[170]

The Democratic National Committee (DNC) sued the RNC for these acts, and the parties settled the case by entering a consent decree in 1982.[171] Importantly, the consent decree bound the national RNC, not just the New Jersey RNC.[172] The terms of the consent decree were modified in 1987 after midwestern regional RNC leadership produced memoranda indicating clearly nefarious intentions: "this program will eliminate at least 60,000–80,000 folks from the rolls . . . If it's a close race . . . which I'm assuming it is, this could keep the [B]lack vote down considerably."[173] As modified, the consent decree "added a preclearance provision that prohibit[ed] the RNC from assisting or engaging in ballot security activities unless the RNC submit[ted] the program to the Court and to the

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164. *Id.* at 191.

165. *See supra* notes 5–6 and accompanying text.

166. "In a consent decree, a court-ordered settlement, the court orders an injunction against the defendant and continues to oversee the case to ensure the injunction is followed. If the defendant does not follow the order, other penalties are available to the judge." TOVA ANDREA WANG, THE POLITICS OF VOTER SUPPRESSION: DEFENDING AND EXPANDING AMERICANS' RIGHT TO VOTE 55 (2012).

167. Democratic Nat'l Comm. v. Republican Nat'l Comm., No. 18-1215, 2019 WL 117555 (3d Cir. Jan. 7, 2019).

168. *Id.* at *1.

169. Democratic Nat'l Comm. v. Republican Nat'l Comm., No. 81-03876, 2016 WL 6584915, at *2 (D.N.J. Nov. 5, 2016).

170. *Id.*

171. *Democratic Nat'l Comm.*, 2019 WL 117555, at *1.

172. *Id.*

173. Democratic Nat'l Comm. v. Republican Nat'l Comm., 671 F. Supp. 2d 575, 580 (D.N.J. 2009), *aff'd*, 673 F.3d 192 (3d Cir. 2012).

DNC with 20 days' notice and the Court determine[d] that the program complie[d] with the Consent Decree and applicable law."[174] Like the VRA's former preclearance requirement, the consent decree required the RNC to justify ballot security initiatives and efforts before undertaking them.

Originally, the consent decree had no expiration date, but the District Court of New Jersey imposed an expiration date in 2009.[175] After the 2009 order, the consent decree was set to expire on December 1, 2017, unless the DNC showed by a preponderance of the evidence that the RNC had violated its terms.[176] Such a violation would extend the consent decree by eight years.[177] The DNC, seeking to extend the decree, moved to hold the RNC in contempt shortly before the 2016 presidential election.[178] After issuing eight orders limiting discovery on that motion, the district court found that the DNC had not met its burden to extend the decree, and ordered that the consent decree expired.[179] This order was affirmed on appeal.[180]

It is significant that the 2020 election was the first nationwide election in forty years without preclearance for the RNC's "ballot security" measures. The consent decree's preclearance mechanism may have prevented many actionable examples of voter intimidation while it remained in effect. The expiration of the consent decree therefore helps to illustrate the increasing importance of section 11(b) claims, particularly when coupled with *Shelby County*'s functional elimination of the VRA's preclearance requirement, which applied directly to governmental actors.

II. SECTION 11(B) ACTIONS IN FEDERAL COURTS

Since the Voting Rights Act took effect in 1965, there have been relatively few published decisions interpreting section 11(b).[181] Shortly after the statute's enactment, civil rights defendants used section 11(b) to remove their cases to federal court after being prosecuted for voter registration efforts.[182] This resulted in a few circuit court decisions on civil

174. *Democratic Nat'l Comm.*, 673 F.3d at 198.

175. *Democratic Nat'l Comm.*, 671 F. Supp. 2d at 623.

176. *Id.*

177. *Id.*

178. Democratic Nat'l Comm. v. Republican Nat'l Comm., No. 18-1215, 2019 WL 117555, at *1 (3d Cir. Jan. 7, 2019).

179. *Id.*

180. *Id.*

181. *See infra* Part II.

182. Whatley v. City of Vidalia, 399 F.2d 521, 521 (5th Cir. 1968).

rights removal between 1965 and 1972 that either directly applied section 11(b) or compared other statutes to it when ruling on the removal issue.[183] It was not until 2014 that another circuit court considered an 11(b) issue—but even then, the issue was not thoroughly discussed by the Second Circuit.[184] Moreover, the Department of Justice brings minimal enforcement litigation under section 11(b)—and that litigation has disproportionately pursued Black defendants.[185]

A. Section 11(b) Is Underdeveloped at the Circuit Court Level

Research has uncovered six circuit court opinions interpreting section 11(b) of the Voting Rights Act, with only one opinion being published so far in the twenty-first century.[186] The Fifth Circuit published three of these cases—not surprising, given that until 1981, that Circuit heard cases arising from district courts in nearly the entire Deep South.[187] After the VRA was enacted in 1965, the first circuit court to discuss its 11(b) provision was the Fifth Circuit in 1968.[188]

That 1968 case was *Whatley v. City of Vidalia*,[189] where the Fifth Circuit held that Black citizens who were prosecuted for encouraging others to register to vote were entitled to remove their claims to federal court by citing section 11(b) of the VRA.[190] This case shows how the VRA provided enhanced access to federal courts. Criminal defendants removing their cases to federal court on civil rights grounds must allege that they were "denied or cannot enforce" their federal civil rights in state court.[191] Under Supreme Court precedent, the removal statute was interpreted to require "that the very act of prosecuting them for the protected activity would violate an express prohibition of the federal statute."[192] By creating a cause of action for voter intimidation that

183. *Infra* section II.A.

184. Dekom v. Nassau Cnty., 595 F. App'x 12 (2d Cir. 2014) (summary order).

185. *Id.*

186. *Whatley*, 399 F.2d 521; New York v. Davis, 411 F.2d 750 (2d Cir. 1969); New York v. Horelick, 424 F.2d 697 (2d Cir. 1970); *Dekom*, 595 F. App'x 12; Perkins v. Mississippi, 455 F.2d 7 (5th Cir. 1972); Dodson v. Graham, 462 F.2d 144 (5th Cir. 1972).

187. Before the Eleventh Circuit was created in 1981, the Fifth Circuit included Texas, Louisiana, Mississippi, Alabama, Georgia, and Florida. *Brief History*, U.S. CT. OF APPEALS FOR THE FIFTH CIR., http://www.ca5.uscourts.gov/about-the-court/circuit-history/brief-history [https://perma.cc/9K2P-AMA7].

188. *Whatley*, 399 F.2d 512.

189. 399 F.2d 521 (5th Cir. 1968).

190. *Id.* at 521–22, 526.

191. *Id.* at 523 (citing Georgia v. Rachel, 384 U.S. 780, 788 (1966)); *see also* City of Greenwood v. Peacock, 384 U.S. 808 (1966).

192. *Whatley*, 399 F.2d at 525–26.

encompasses public and private acts directed at both voting and aiding others to vote or register to vote, the VRA's section 11(b) created the necessary "express prohibition"[193] that allowed the *Whatley* defendant to obtain a federal trial.

After *Whatley*, the Fifth Circuit's interpretation was questioned by the Second Circuit. The Second Circuit disagreed with the reasoning in *Whatley*, finding that section 11(b) was implicitly addressed in the Supreme Court case *City of Greenwood v. Peacock*[194] and that 11(b) could not be a basis for civil rights removal.[195] "However, that Court subsequently conceded that 'citation in a footnote would be a rather elliptical way to decide such an important question' and left it open."[196]

In 1972, the Fifth Circuit went on to decide *Dodson v. Graham*.[197] In that case, plaintiffs challenged election results under section 5 of the VRA, and as an alternative, under section 11(b).[198] The District Court for the Northern District of Georgia at Atlanta dismissed the complaint, and the Fifth Circuit affirmed, discussing section 5 thoroughly but only briefly mentioning section 11(b).[199]

Finally, after a forty-two-year dry spell, another 11(b) action made its way into a published circuit court opinion in 2014. In *Dekom v. Nassau County*,[200] the Second Circuit affirmed the district court's dismissal of the plaintiff's action for failure to state a claim.[201] The plaintiff, who was seeking admission to a local Republican Convention as a proxy for another voting member, was allegedly yelled at by one of the defendants.[202] The Second Circuit affirmed the district court's dismissal because the plaintiff did not have an independent right to vote in the

193. *Id.* at 523, 526.

194. 384 U.S. 808 (1966).

195. New York v. Davis, 411 F.2d 750, 754 n.3 (2d Cir. 1969) ("While we do not disagree with the recent decision in [*Whatley*], we cannot accept the view of the majority opinion that the *Peacock* court did not take account of § 11(b) of the Voting Rights Act of 1965, which was enacted subsequent to initiation of the state prosecutions there sought to be removed. Mr. Justice Stewart, writing for the majority, referred to § 11(b) . . . , and Mr. Justice Douglas made it a principal basis for the dissent." (internal citations omitted)).

196. Perkins v. Mississippi, 455 F.2d 7, 36–37, 37 n.66 (5th Cir. 1972) (quoting New York v. Horelick, 424 F.2d 697, 702–03, 703 n.4 (2d Cir. 1970)).

197. 462 F.2d 144 (5th Cir. 1972).

198. *Id.* at 148.

199. *Id.* ("We agree with the District Court that the record is bereft of anything that could possibly be construed to constitute intimidation, threats, or coercion (or an attempt at such) within the meaning of § 11(b) of the Voting Rights Act of 1965 . . . .")

200. 595 F. App'x 12 (2d Cir. 2014).

201. *Dekom*, 595 F. App'x at 13 (summary order).

202. *Id.* at 14–15.

primary, and he was permitted entry when he produced the proxy.[203]

While these circuit court decisions are important examples of how legal ambiguity can result in barriers to access to justice, they tell us little about how a plaintiff can succeed on the merits of a section 11(b) claim.

The one circuit court decision that does interpret section 11(b) conflated the statute with other, prior civil rights statutes that had intent requirements.[204] In *Olagues v. Russoniello*,[205] the Ninth Circuit read a specific intent requirement into 11(b), despite the lack of any such requirement in the statute.[206] This interpretation was given fewer than 100 words of explanation in the opinion.[207] In granting plaintiffs' motion to dismiss, the Ninth Circuit reached back to a Fifth Circuit decision[208] that interpreted the 1957 Civil Rights Act, not the VRA, despite the fact that the plaintiffs brought claims under both statutes.

B. Public Enforcement of Section 11(b) Has Been Minimal

While history has overwhelmingly shown that Black voters are more often the targets of intimidation, research suggests that the only two government enforcement actions under section 11(b) have alleged intimidation by *Black defendants* against *white voters*.[209] These two cases, brought by the Department of Justice (DOJ) during George W. Bush's second term as President, highlight both the inadequate enforcement of this provision in the communities most affected by intimidation and the courts' unwillingness to engage in thorough analyses of section 11(b) claims.

In *United States v. Brown*,[210] the United States alleged, and the Mississippi District Court found, "the proof establishes a specific racial

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203. *Id.*

204. Olagues v. Russoniello, 797 F.2d 1511, 1522 (9th Cir. 1986) ("Apparently, the appellants contend that the Government also violated [section 11(b) of the VRA and section 131(b) of the Civil Rights Act of 1957]. Under these sections no person may intimidate, or attempt to intimidate any person from voting or from aiding someone to vote. In the instant case, there is evidence that the investigation did intimidate the appellants. However, that is insufficient. The appellants failed to raise a material issue of fact as to whether the government officials did in fact *intend* to intimidate them." (emphasis in original) (citing United States v. McLeod, 385 F.2d 734, 740–41 (5th Cir. 1967))), *vacated*, 484 U.S. 806 (1987).

205. 797 F.2d 1511 (9th Cir. 1986), *vacated*, 484 U.S. 806 (1987).

206. *Olagues*, 797 F.2d at 1522.

207. *Id.*

208. *McLeod*, 385 F.2d at 740–41.

209. *Cases Raising Claims Under Section 11(b) of the Voting Rights Act*, U.S. DEP'T OF JUST. (Sept. 9, 2019), https://www.justice.gov/crt/cases-raising-claims-under-section-11b-voting-rights-act#philadelphia [https://perma.cc/2WHD-VMNP].

210. 494 F. Supp. 2d 440 (S.D. Miss. 2007), *aff'd*, 561 F.3d 420 (5th Cir. 2009).

intent by [B]lack election officials to disenfranchise white voters" under section 2 of the VRA.[211] Alongside that finding, the Court dismissed the Government's contention "that [the defendant's] public 'threat' to challenge . . . white voters if they attempted to vote . . . violates [s]ection 11(b) of the Voting Rights Act of 1965."[212] Without explaining its reasoning or citing any supporting precedent, the district court stated in a footnote that it "does not view the publication [of a list of white voters to be challenged] as the kind of threat or intimidation that was envisioned or covered by [s]ection 11(b)."[213]

Then, in 2009, the United States filed a complaint against the New Black Panther Party and some of its leaders in the Eastern District of Pennsylvania.[214] That complaint sought injunctive and declaratory relief under section 11(b) of the VRA and alleged that defendants "wore military style uniforms" on election day in 2008 and brandished "a nightstick, or baton" outside a polling place, "approximately eight to fifteen feet from the entrance."[215] The government also alleged that defendants "made statements containing racial threats and racial insults" and "made menacing and intimidating gestures, statements, and movements directed at individuals who were present to aid voters."[216]

The United States later voluntarily dismissed its complaint against all defendants except Minister King Samir Shabazz.[217] With respect to Shabazz, the Government moved for,[218] and was granted, default judgment after Shabazz failed to respond or appear.[219] The Government requested the court enjoin Shabazz from "displaying a weapon within 100 feet of any open polling location on any election day in Philadelphia, Pennsylvania, or from otherwise engaging in coercing, threatening, or intimidating behavior in violation of [s]ection 11(b)."[220]

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211. *Id.* at 486.

212. *Id.* at 477 n.56.

213. *Id.*

214. Complaint, United States v. New Black Panther Party for Self-Defense, No. 09-cv-00065 (E.D. Pa. May 18, 2009).

215. *Id.* at 2–3.

216. *Id.* at 3.

217. Notice of Voluntary Dismissal, *New Black Panther Party*, No. 09-cv-00065. Minister Shabazz allegedly brandished a weapon and attempted to block physical access to a polling place. Complaint, *supra* note 214, at 2–3.

218. Memorandum of Law in Support of Motion for Default Judgment at 1, *New Black Panther Party*, No. 09-cv-00065.

219. *New Black Panther Party*, No. 09-cv-00065 (order granting default judgment); *see also* Jud. Watch, Inc. v. U.S. Dep't of Just., 800 F. Supp. 2d 202, 207 (D.D.C. 2011) (describing the procedural history of *New Black Panther Party* in the context of a Freedom of Information Act ruling).

220. Memorandum of Law in Support of Motion for Default Judgment, *supra* note 218, at 5.

The Government's briefing in support of its motion for default judgment against Shabazz analyzed the requirements of 11(b) perhaps more thoroughly than any other government-produced litigation document on this cause of action. First, the Government distinguished section 11(b) from the Civil Rights Act of 1957, emphasizing section 11(b)'s lack of a specific intent requirement.[221] Then, it noted that "[t]he few district court opinions pertaining to [s]ection 11(b) have not provided much guidance as to what constitutes a violation."[222] To argue that Shabazz's actions constituted a violation, the Government suggested that the terms "intimidate, threaten, or coerce" should be given their plain meaning and that the Fifth Circuit interpreted the same words, in the 1957 Civil Rights Act, in a manner that would encompass Shabazz's actions.[223]

Though the court entered default judgment in the claim against Shabazz, that does not mean it attributed any weight to the Government's argument on the merits. Hence, neither section 11(b) claim brought by the DOJ provides much guidance as to what constitutes a successful claim on the merits. Also, it is clear from the two enforcement actions that the DOJ disproportionately asserted claims on behalf of white voters against Black individuals and groups. This enforcement philosophy is poorly aligned with the needs of communities of color and, by extension, the needs of the American democratic experiment.

III. THREE REASONS WHY SECTION 11(B) IS UNDERUTILIZED

Understanding why section 11(b) is underutilized and underdeveloped requires looking beyond the doctrine to realities on the ground. This analysis may, in turn, inform future litigants considering claims under this provision. To that end, this Comment identifies three potential reasons for the deficiency.

First, modern forms of voter intimidation are hard to pin down, with difficult-to-identify, loosely-affiliated perpetrators and diffuse effects. Second, these claims face an all-too-common obstacle for election-related litigation: plaintiffs lack sufficient incentives to bring these claims given the often-tight window between intimidating conduct and the election that conduct is intended to affect. Third, and perhaps most importantly, plaintiffs face significant constitutional issues that are unknown and

221. *Id.* at 9.

222. *Id.* at 10; *see also id.* at 10 n.4 ("The extant cases perhaps provide better guidance as to what does not constitute threats, intimidation, or coercion under Section 11(b), though even in that regard there is little consistency in the case law." (emphasis in original)).

223. *Id.* at 10–11 (citing United States v. McLeod, 385 F.2d 734, 739–41 (5th Cir. 1967)).

difficult to predict. Namely, the Supreme Court has not defined the exact scope of the true threats exception to the First Amendment in two significant ways: whether true threats must threaten physical harm, and whether true threats must be intended as threats by the speaker.

It is beyond the scope of this Comment to provide a thorough analysis of these questions. Instead, the goal of this Part is to identify obstacles that litigants should be aware of when they bring 11(b) claims.

A. Modern Voter Intimidation Is Increasingly Diffuse

The early twenty-first century, which has been dominated in many ways by social media, has created new, unregulated forums for disinformation, misinformation, and intimidation.[224] This modern era is characterized by increasing polarization and partisan hostility,[225] as well as reckless or malicious falsehoods regarding election administration and security that threaten elections' fairness.[226] This has led to voter intimidation that is "amorphous and largely subjective in nature, and lacks . . . concrete evidence."[227]

The same online atmosphere that created the modern era of polarization also created openings for individuals to anonymously express generalized threats that could suppress turnout even without regard to whether they are actually carried out. In 2016, for example, some voters professed on 4chan and Facebook that they would resort to violence if their preferred candidate was not elected.[228] It is unknown whether such violent discourse suppressed turnout—as in any election, countless factors converge to influence each individual vote. To determine whether generalized, non-targeted threats had an influence is a tall order, and not one that would

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224. Ravi Somaiya, *How Facebook Is Changing the Way Its Users Consume Journalism*, N.Y. TIMES (Oct. 26, 2014), https://www.nytimes.com/2014/10/27/business/media/how-facebook-is-changing-the-way-its-users-consume-journalism.html?smid=url-share [https://perma.cc/VHP8-B6KZ]; Mike Isaac, *Facebook Finds New Disinformation Campaigns and Braces for 2020 Torrent*, N.Y. TIMES (Oct. 21, 2019), https://www.nytimes.com/2019/10/21/technology/facebook-disinformation-russia-iran.html?searchResultPosition=2 [https://perma.cc/3P9Z-Z3JN].

225. *Political Polarization in the American Public*, PEW RSCH. CTR. (June 12, 2014), https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/ [https://perma.cc/DYL5-QWZU]; Levi Boxell, Matthew Gentzkow & Jesse M. Shapiro, *Cross-Country Trends in Affective Polarization* (Nat'l Bureau of Econ. Rsch., Working Paper No. 26669, 2020), https://www.nber.org/papers/w26669 [https://perma.cc/56RT-589Q].

226. *See, e.g.*, Gilda R. Daniels, *Voter Deception*, 43 IND. L. REV. 343 (2010) (detailing voter deception as a form of voter intimidation).

227. DEP'T OF JUST., FEDERAL PROSECUTION OF ELECTION OFFENSES 50 (Richard C. Pilger ed., 8th ed. 2017).

228. *See* Jessica Reaves, *Election Day: Some Decry "Rigging," "Intimidation," and Threaten Violence*, ANTI-DEFAMATION LEAGUE (Nov. 8, 2016), https://www.adl.org/blog/election-day-some-decry-rigging-intimidation-and-threaten-violence [https://perma.cc/4A9J-CN3E].

necessarily entitle a particular plaintiff to relief against a particular defendant.

These generalized threats, especially when shared widely on social media alongside real violence, can easily create a hostile environment and stoke worries about threats, harassment, and aggressive poll watching. When President Trump said, "go into the polls and watch very carefully," he accomplished something, regardless of whether any polling place intimidation actually occurred—Trump's words implied that Biden voters would find intimidation at their polling place on election day.[229] Dissuading voters from showing up is perhaps the whole point of these statements. Further, the credibility of this violent rhetoric was reinforced in 2021 when Trump's supporters stormed the Capitol in an attempt to stop the certification of his successor.[230]

The effect of this conduct, again, is diffuse, but it has the potential to be far-reaching. The broader an intimidation campaign becomes, the harder it is to litigate. Litigation requires identifying at least one particular defendant as well as a particular harm done to the plaintiff.[231] But if an intimidation campaign is waged online, it is much harder to identify particular plaintiffs affected by the conduct and particular defendants to hold accountable. And even where it is possible to identify the parties involved, litigation cannot go back and undo the affected election outcome, so some perpetrators may choose to risk litigation to promote their desired outcome. The next Part will explore that phenomenon.

B. There Are Insufficient Incentives for Plaintiffs to Bring Section 11(b) Claims

Like many civil rights statutes, the success of the VRA depends in large part on individuals bringing actions for injunctive relief when their rights have been violated.[232] However, given the cyclical and nearly-irreversible nature of elections, plaintiffs have insufficient incentives to bring suit under section 11(b) of the VRA.

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229. Danny Hakim, Stephanie Saul, Nick Corasaniti & Michael Wines, *Trump Renews Fears of Voter Intimidation as G.O.P. Poll Watchers Mobilize*, N.Y. TIMES (Nov. 3, 2020), https://www.nytimes.com/2020/09/30/us/trump-election-poll-watchers.html [https://perma.cc/C8WP-ZF2K].

230. Zolan Kanno-Youngs, Sabrina Tavernise & Emily Cochrane, *As House Was Breached, a Fear 'We'd Have to Fight' to Get Out*, N.Y. TIMES (Jan. 17, 2021), https://www.nytimes.com/2021/01/06/us/politics/capitol-breach-trump-protests.html?action=click&module=Related Links&pgtype=Article [https://perma.cc/9AQ9-XHSS].

231. *Suit*, BLACK'S LAW DICTIONARY (11th ed. 2019).

232. 52 U.S.C. § 10308; *see also* 28 U.S.C. § 1343 (creating private cause of action "under any Act of Congress providing for the protection of civil rights, including the right to vote").

For example, Jacob Wohl and Jack Burkman orchestrated a robocall campaign in advance of the 2020 election for which they are now facing criminal charges and civil lawsuits, including a suit for section 11(b) claims.[233] The conservative operatives sent misleading robocalls to 85,000 people, mostly in communities of color, suggesting that the government would use voter registration information to enforce a mandatory coronavirus vaccine.[234] The National Coalition on Black Civic Participation sued Burkman and Wohl for voter intimidation under section 11(b).[235] In granting the plaintiffs' motion for a temporary restraining order, Judge Victor Marrero of the Southern District of New York ordered Wohl and Burkman to call back all their original targets and inform them that the earlier call was untrue.[236] Luckily, Judge Marrero's ruling in *National Coalition on Black Civic Participation v. Wohl*[237] came down before election day. However, it is easy to imagine such a remedy being unavailable or ineffective, especially when litigation happens after election day.

For obvious reasons, it is difficult for plaintiffs to obtain legal recourse that applies to the same election they were prevented from voting in by way of intimidation. Rather, private enforcement relies on plaintiffs bringing claims after the fact seeking declaratory judgments, injunctions, or small awards of money damages. The deterrence value of these actions may be enough to motivate some plaintiffs, but not all.

While one might expect that the federal government would pursue litigation to enforce section 11(b), federal enforcement has been largely absent, save for a short period where the DOJ brought actions against Black defendants for harassment of white voters. It is beyond the scope of this Comment to determine why the DOJ has avoided section 11(b)

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233. Nat'l Coal. on Black Civic Participation v. Wohl, 498 F. Supp. 3d 457, 463 (S.D.N.Y. 2020).

234. *Id.* at 465; *see also* Stephanie Saul, *Deceptive Robocalls Try to Frighten Detroit Residents About Voting by Mail.*, N.Y. TIMES (Aug. 27, 2020), https://www.nytimes.com/2020/08/27/us/elections/deceptive-robocalls-try-to-frighten-detroit-residents-about-voting-by-mail.html?searchResultPosition=2 [https://perma.cc/5NWA-9MMT]; Kathleen Gray, *Two Conservative Operatives Charged in a Robocall Scam Are Ordered to Call 85,000 People Back*, N.Y. TIMES (Oct. 29, 2020), https://www.nytimes.com/2020/10/29/us/elections/two-conservative-operatives-charged-in-a-robocall-scam-are-ordered-to-call-85000-people-back.html?searchResultPosition=1 [https://perma.cc/7HUG-7SFN].

235. *Wohl*, 498 F. Supp. 3d at 463.

236. *Id.* at 489–90 ("In order to mitigate the damage Defendants have caused and thus endeavor to return the robocall recipients to the position they were in before Defendants placed those calls, the Court considers it necessary for Defendants to issue a message to all recipients of the robocalls informing them about this Court's finding that Defendants' original message contained false statements that have had the effect of intimidating voters, and thus interfering with the upcoming presidential election, in violation of federal voting-rights laws.").

237. 498 F. Supp. 3d 457 (S.D.N.Y. 2020).

enforcement, but the same challenges that face private plaintiffs could similarly exert pressure on the government. However, the modern era shows that voter intimidation is not a thing of the past, and creative lawyers both in public and private practice must hold bad actors accountable and deter future intimidation.

C. Unresolved Constitutional Questions Await Plaintiffs Bringing 11(b) Claims

Constitutional questions remain unresolved with respect to voter intimidation. It may be that these constitutional questions remain unanswered, at least in part, due to the consent decree binding the RNC until 2018. The consent decree likely prevented some of the most egregious forms of voter intimidation before they took place, thereby contributing to the dearth of case law on 11(b) claims. But particularly after the expiration of the consent decree, litigants should prepare for constitutional arguments to come to a head in the near future.[238]

Activists for both parties rely on First Amendment protections to advocate for their political interests.[239] In the words of the United States Supreme Court, statutes such as the VRA "must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech."[240] However, the First Amendment's protections of speech are not absolute.[241]

This section discusses the true threats exception as it relates to section 11(b), with a particular emphasis on open constitutional questions. The uncertainty surrounding Section 11(b) may contribute to its underdevelopment despite an increased prevalence of intimidating conduct.

1. Whether True Threats Must Be Threats of Physical Harm

Scholars have argued that the lack of an intent requirement in 11(b) means its protection from intimidation would "almost surely be deemed a

238. *See* Cady & Glazer, *supra* note 8, at 209.

239. Interestingly, it has been argued that voter intimidation statutes "protect expressive interests that the First Amendment protects but do so by granting speech rights that the First Amendment does not grant and by imposing speech-facilitating duties that the First Amendment does not require." Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2308 (2021).

240. Watts v. United States, 394 U.S. 705, 707 (1969) (per curiam).

241. DAVID L. HUDSON, JR., LEGAL ALMANAC: THE FIRST AMENDMENT: FREEDOM OF SPEECH § 3:1 (2012), Westlaw (database updated Oct. 2012).

content-based regulation of speech, hence subject to strict scrutiny unless it falls within some categorical exception."[242] The most obvious exception worth considering is the true threats exception, which allows the government to regulate threatening speech without running afoul of the First Amendment.[243] True threats are "those statements 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."[244]

The true threats exception would clearly allow the government to regulate any threats of physical violence intended to intimidate voters.[245] However, as noted above, modern voter intimidation is increasingly diffuse, with non-violent harms being threatened and misleading information[246] being used to dissuade voters from registering or voting.[247]

The true threats exception does not cover hyperbole,[248] but it has been held to cover generalized intimidation "where a speaker directs a threat to a . . . group of persons with the intent of placing the victim in fear of bodily harm or death."[249] In the seminal true threats case, *Virginia v. Black*,[250] the court found cross-burning to be a true threat because it was credibly associated with racist violence against Black and Jewish communities.[251] *Black* is important because it shows that threats need not be individualized nor directly communicated. However, it is unclear whether a threat that *does not* evoke fear of violence, death, or bodily harm would be considered a true threat.[252]

Overall, even though this area is unresolved, "there is good reason to believe that many if not all applications of [section 11(b)] would be consistent with the First Amendment."[253] In the district court ruling in *National Coalition on Black Civic Participation v. Wohl*, Judge Marrero rejected the defendants' argument that their robocalls were protected by

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242. Daniel P. Tokaji, *True Threats: Voter Intimidation and the Constitution*, 40 HARBINGER 101, 105 (2015).

243. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 359–60 (2003) (suggesting in dicta that a speaker's intent to intimidate is relevant to whether speech is a true threat).

244. *Id.* at 359 (citing *Watts*, 394 U.S. at 708).

245. Tokaji, *supra* note 242, at 102.

246. *See, e.g.*, United States v. Alvarez, 567 U.S. 709, 715 (2012) (holding that falsity does not exempt speech from First Amendment protections).

247. *See supra* notes 229–230 and accompanying text.

248. *See Watts*, 394 U.S. at 708.

249. *Black*, 538 U.S. at 344.

250. 538 U.S. 343 (2003).

251. *Id.* at 354–56.

252. Tokaji, *supra* note 242, at 107–08.

253. *Id.* at 109.

the First Amendment.[254] Marrero described the defendants' First Amendment theory as "a fundamental threat to democracy" and wrote that "[t]he First Amendment cannot confer on anyone a license to inflict purposeful harm on democratic society or offer refuge for wrongdoers seeking to undermine bedrock constitutional principles. Nor can it serve as a weapon they wield to bring about our democracy's self-destruction."[255]

Judge Marrero analyzed the First Amendment issue by first determining that section 11(b) was a content-based speech restriction.[256] He went on to apply the Second Circuit's objective test and emphasized that "the Second Circuit has indicated that threats of serious nonphysical harm are true threats unprotected by the First Amendment."[257] While the robocall at issue in that case did not indicate that voters would be physically harmed, it did imply that consequences of mail-in voting would include warrant execution, debt collection, and mandatory vaccination.[258]

Judge Marrero relied[259] on the Supreme Court's stated policy for prohibiting true threats: that the exception "protects individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur."[260] He reasoned that "[t]he threat of severe nonbodily harm can engender as much fear and disruption as the threat of violence" and cited binding Second Circuit authority interpreting the true threats exception to require a threat of "injury" (as opposed to violence).[261] *National Coalition on Black Civic Participation v. Wohl* illustrates the questions plaintiffs must be prepared to field when bringing voter intimidation claims under section 11(b) and provides an example of some arguments that have successfully overcome First Amendment defenses.

2. Whether True Threats Must Be Intended by the Speaker as Threats

In addition to the open question about whether threats of non-physical harm can constitute true threats, it is also unclear whether only statements *intended* as threats by the speaker can constitute true threats. Whether true threats must be intended as such has not been resolved by the Supreme

254. Nat'l Coal. on Black Civic Participation v. Wohl, 498 F. Supp. 3d 457, 464 (S.D.N.Y. 2020).

255. *Id.*

256. *Id.* at 478.

257. *Id.* at 479.

258. *Id.* at 465.

259. *Id.* at 479–80.

260. Virginia v. Black, 538 U.S. 343, 360 (2003).

261. *Wohl*, 498 F. Supp. 3d at 479–80.

Court and has prompted significant scholarship.[262] Depending on the answer to this question, it is possible that the true threats exception would require proving intent for any 11(b) claim to be successful—functionally removing one aspect of 11(b) that sets it apart from its sister statutes and conferring an additional burden on plaintiffs bringing 11(b) claims.

Intent to intimidate was one pillar of the *Virginia v. Black* decision. There, the Court emphasized that true threats "encompass those statements 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."[263] However, as Judge Marrero noted in *Wohl*, the word "encompass" leaves open the possibility that true threats include more than what is described in *Black*.[264]

Moreover, *Black* was a criminal case, and section 11(b) imposes only civil liability, so even if *Black* requires intent to threaten, that holding may not extend to section 11(b) claims.[265] Judge Marrero noted, without resolving the intent question, that "even if the Constitution requires a showing of subjective intent in criminal cases, that requirement may not apply in civil cases."[266] This interpretation relied on the U.S. Supreme Court's 2015 decision, *Elonis v. United States*,[267] where the Court read an implicit scienter requirement into a criminal statute's definition of "threat" based on the "general rule" that criminal statutes should be interpreted "to include broadly applicable scienter requirements, even where the statute by its terms does not contain them."[268] Such a rule of construction does not, to this author's knowledge, extend to civil statutes. As a result, it is reasonable to think there may be some daylight between the true threats exception as applied to civil versus criminal speech restrictions.

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262. *See, e.g.*, Paul T. Crane, Note, *"True Threats" and the Issue of Intent*, 92 VA. L. REV. 1225, 1226, 1269 (2006) (pointing out uncertainty as to whether a true threat requires a specific mens rea, and arguing that specific intent to threaten should be required); Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 333–34 (2001) (arguing for a specific intent requirement for true threats exception to apply).

263. *Black*, 538 U.S. at 359 (emphasis added) (citing Watts v. United States, 394 U.S. 705, 708 (1969)).

264. *Wohl*, 498 F. Supp. 3d at 479.

265. Tokaji, *supra* note 242, at 108–09.

266. *Wohl*, 498 F. Supp. 3d at 480.

267. 575 U.S. 723 (2015).

268. *Id.* at 734 (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994)).

IV. LOOKING FORWARD: LITIGANTS SHOULD CONSIDER INTENTIONALITY AND PHYSICALITY WHEN BRINGING SECTION 11(B) CLAIMS

Unfortunately, while section 11(b) "is to be given an expansive meaning,"[269] that meaning remains untested. This poses a challenge for counsel representing targets of voter intimidation—especially when litigating misinformation, disinformation, and non-physical threats. But by understanding section 11(b)'s nuance and history, today's movement lawyers can successfully influence the construction of this increasingly important provision.

For example, confusion about the differences between section 11(b) and the other voter intimidation actions may result in a specific intent requirement being read back into the statute—even though the legislative history clearly shows intent should not be required. Recall that the Ninth Circuit conflated section 11(b) with other, prior civil rights statutes, which had an intent requirement.[270] Litigators must therefore think strategically about how to characterize defendants' conduct and the goals of their clients, because an overzealous reliance on proving defendants' intent could backfire and preemptively insert the intent requirement back into the statute despite Congress's apparent intention not to include it.

Counsel should likewise prepare statutory interpretation arguments to support their positions on issues prone to confusion or bad law. Of course, legislative history weighs strongly against an intent requirement.[271] But advocates must also carefully craft arguments pointing to the plain meaning of words like "intimidate" that foreclose an interpretation that would require specific intent. While the Black's Law Dictionary definition of "intimidation" does not include an intent requirement,[272] defendants may argue that intimidation connotes intentionality in its ordinary meaning. By anticipating this argument, advocates can promote their clients' goals while pushing for clarity and justice as the courts consider many of these questions for the first time.

Section 11(b) litigants should also carefully consider the physicality and intentionality of the threats at issue as they prepare for constitutional arguments. Given the dearth of case law and the recent changes to the Supreme Court's composition, it is likely that the First Amendment

269. Jackson v. Riddell, 476 F. Supp. 849, 859 (N.D. Miss. 1979).

270. *See supra* section II.A. This problematic interpretation was based on a Fifth Circuit decision that interpreted the 1957 Civil Rights Act, not the VRA. Olagues v. Russoniello, 770 F.2d 791, 804 (9th Cir. 1985).

271. *See supra* section I.B.1.

272. *Intimidation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

question will be an important one for plaintiffs moving forward. While the *Wohl* decision, of course, is not binding, advocates should examine Judge Marrero's handling of the First Amendment questions in that case. Judge Marrero's reasoning illustrates that section 11(b) advocates have a strong argument for applying the true threats exception even for non-physical threats without proving a defendant's intent to threaten.

Finally, careful communication with clients is key. Given the lack of sufficient incentives,[273] section 11(b) plaintiffs may not have much to gain personally from litigation. Therefore, plaintiffs who are the victims of voter intimidation are likely pursuing litigation not only for themselves, but with a broader goal in mind. Without damages or personal redress as a motivator, it is imperative to prepare clients for a lengthy and difficult litigation process and inform them about the obstacles identified in this piece. Clients deserve a thorough explanation of the broader landscape their case fits into, with the understanding that courts are considering many of these questions for the first time. This is especially true for plaintiffs motivated by personal ideals of justice, democracy, and altruism.

CONCLUSION

The Voting Rights Act is a powerful tool that should be used to protect the democratic process. By exploring section 11(b)'s past, present, and future applications, this Comment seeks to empower voters and their advocates to push the boundaries on what this provision means to the VRA, and to insist on elections free of intimidation.

When litigating voter intimidation that has more in common with Jacob Wohl's misleading robocalls[274] than the archetypal armed confrontation, advocates should consider bringing section 11(b) claims. But plaintiffs bringing these claims face significant obstacles: modern voter intimidation is increasingly diffuse, election cycles create insufficient incentives, and unresolved statutory and constitutional questions will need to be litigated. For this reason, advocates must anticipate and attempt to preemptively dissuade courts from making legal determinations that will negatively affect their present clients while promoting positive developments in the jurisprudence of voter protection. This is especially true in an area as politically charged and polarizing as this one.

Misinformation, disinformation, and non-physical threats can prevent voters from accessing the polls just as effectively as physical threats. Even so, we saw on January 6, 2021, that voting-related physical violence is not

273. *See supra* section III.B.

274. *Id.*

a thing of the past. Voters have every reason to take intimidation, threats, and coercion seriously in the modern era—so seriously that they may avoid going to the polls altogether. This is why it is imperative that advocates work diligently to pursue justice on behalf of voters experiencing intimidation, and why section 11(b) is a powerful tool moving forward.