

VOTER DECEPTION

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ABSTRACT

In our recent electoral history, deceptive practices have been utilized to suppress votes in an attempt to affect election results. In most major elections, citizens endure warnings of arrest, deportation, and even violence if they attempt to vote. In many instances, these warnings are part of a larger scheme to suppress particular voters, whom I call “unwanted voters,” from exercising the franchise. Recent advancements in technology provide additional opportunities for persons to deceive voters, such as calls alerting citizens that Republicans (Whites) vote on Tuesday and Democrats vote (Blacks) on Wednesday.

In spite of this resurgence of deception, the statutes that are available for enforcement have in many instances remained dormant. Even worse, they are sometimes used against the very community that they were originally written to protect. This dormancy has revealed a need for clarity. This article exposes the deficiencies in the current state of the law governing voter intimidation and deceptive practices. Moreover, it attempts to correct those deficiencies within the confines of the Constitutional framework.

INTRODUCTION

Because [of] the confusion caused by unexpected heavy voter registration, voters are asked to apply to the following schedule:

Republican voters are asked to vote at your assigned location on Tuesday.

Democratic voters are asked to vote at your assigned location on Wednesday.

Thank you for your cooperation, and remember voting is a privilege.

—Franklin County, Where Government Works¹

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1. NATIONAL CAMPAIGN FOR FAIR ELECTIONS, EXAMPLES OF DECEPTIVE FLYERS 2004, at 1, 3, available at http://lccr.3cdn.net/f51ce1b593630cc86c_a7m6b9axu.pdf. In 2004, a flyer containing this information was distributed in Franklin County, Ohio.

In 2006, on Election Day in Prince George's County, Maryland, which is predominately African American,² voters arriving at the polls received a voting guide announcing that prominent African Americans had endorsed the Republican candidates, including an African American U.S. Senate candidate.³ The voting guide falsely suggested⁴ that prominent Maryland Democrats were endorsing Republican candidates in the hotly contested gubernatorial and U.S. Senate election.⁵ After the election, newly elected Senator Benjamin L. Cardin, whom the African Americans had actually endorsed, testified before the U.S. Senate Judiciary Committee regarding this false campaign literature and urged the U.S. Attorney General to investigate.⁶ The Department of Justice, however, did not pursue the matter. Unfortunately, this is symptomatic of most claims involving deceptive practices.

In the last half century, the U.S. Congress has journeyed into the world of

2. U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS: PRINCE GEORGE'S COUNTY, MD. (2008), <http://quickfacts.census.gov/qfd/states/24/24033.html>.

3. NATIONAL CAMPAIGN FOR FAIR ELECTIONS.ORG, EXAMPLES OF DECEPTIVE FLYERS 2006, at 1, 1, available at http://lccr.3cdn.net/58d2ee098f70fd887b_vom6bxgc8.pdf. The guide was entitled "Ehrlich-Steele Democrats" and labeled an "Official Voter Guide." On the cover were three prominent African American politicians: a former and the present county executive and former congressman and President of the National Association for the Advancement of Colored People (NAACP) Kweisi Mfume. Under their names read "[t]hese are OUR choices." *Id.*; *Prevention of Deceptive Practices and Voter Intimidation in Federal Elections: Hearing on S. 453 Before S. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Sen. Cardin).

4. Laura Vozzella, *Michael Steele's Sorry. So Sorry.*, BALT. SUN, Mar. 4, 2009, at A2.

5. NATIONAL CAMPAIGN FOR FAIR ELECTIONS, *supra* note 3. These prominent African Americans had endorsed candidate Ben Cardin for the U.S. Senate. See Matthew Hay Brown, *Senate Bill Outlaws Campaign Trickery; Cardin Backs Curb on Bogus Endorsements*, BALT. SUN, Feb. 1, 2007, at B5. Additionally, the guide included a "Democratic Sample Ballot" that included the correct date and times for the elections and endorsed Democratic candidates on all levels—local, county, state, and federal. NATIONAL CAMPAIGN FOR FAIR ELECTIONS, *supra* note 3, at 2. Yet, the guide neglected to endorse the Democratic candidates for governor and U.S. Senate. *Id.* It endorsed the re-election of the Republican governor and the election of African American Republican U.S. Senate candidate Michael Steele. *Id.* The guide included a notation that Ehrlich and Steele campaigns had "Paid and Authorized" the publication and distribution of this campaign literature. *Id.* Media accounts also attributed the Ehrlich and Steele campaigns to knowingly distributing this false information. See, e.g., Paul Rogat Loeb, Editorial, 'Election Fraud' Cry Useful Tool for GOP, BALT. SUN, Mar. 18, 2007, at A23 (alleging that the Steele campaign bussed homeless men to hand out misleading flyers).

6. At the Senate hearing, Senator Cardin said that, "[t]his type of deceptive literature is despicable and outrageous. It is clearly designed to mislead African-American voters about prominent endorsements by well-respected politicians." *Prevention of Deceptive Practices and Voter Intimidation in Federal Elections: Hearing on S. 453 Before S. Comm. on the Judiciary*, *supra* note 3 (statement of Sen. Cardin).

election administration on three distinct and important occasions: the passage of the Voting Rights Act of 1965 (VRA),⁷ the National Voter Registration Act of 1993 (NVRA),⁸ and the Help America Vote Act (HAVA).⁹ Despite recent debates, new legislation, and the continued enforcement of various voting statutes, problems persist in the operation of our participatory democracy.¹⁰ Legislation has done little to forward the debate on the preeminence and resurgence of voter intimidation and deceptive tactics. The most recent legislation, NVRA and HAVA, dealt primarily with election administration issues, such as voter registration and machinery.¹¹ An overlooked area involving

7. The Voting Rights Act, 42 U.S.C. § 1973 (2006). This Act, which has been heralded as the most effective piece of congressional legislation in our nation's history, outlawed practices such as literacy tests, empowered federal registrars to register citizens to vote, and gave the Attorney General the power to bring widespread litigation instead of the piecemeal approach of the past. As a result, wide disparities between Blacks and Whites in voter registration narrowed considerably throughout the South and the number of African American elected officials increased tremendously. *See* S. REP. 94-295, at 11 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 777 (noting that the VRA was "hailed by many to be the most effective civil rights legislation ever passed" in this country).

8. 42 U.S.C. § 1973gg (2006). The stated purpose of the NVRA is to increase voter registration and participation. *Id.* The law also provides uniform standards for maintaining the list of registered voters, conducting voter purges and provides additional safeguards under which registered voters would be able to vote notwithstanding a change in address in certain circumstances. *Id.* § 1973gg-3.

9. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (2002) (codified at 42 U.S.C. §§ 15301-15545 (2006)). The stated purpose of HAVA is

to establish a program to provide funds to States to replace punch card voting systems, to establish the Election Assistance Commission to assist in the administration of Federal elections and to otherwise provide assistance with the administration of certain Federal election laws and programs, to establish minimum election administration standards for States and units of local government with responsibility for the administration of Federal elections, and for other purposes.

Id.

10. During the 2008 election, nonpartisan organizations chronicled numerous voting irregularities in voter registration, felon disenfranchisement, long lines at the polls, poll watcher challenges, unwarranted challenges to student voters, and deceptive practices. *See, e.g., Hearing on Lessons Learned from the 2008 Election Before Subcomm. on Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 1 (2009) (statement of Tova Andrea Wang, Vice President, Research, Common Cause); *id.* (statement of Hilary O. Shelton, Director, Washington Bureau, NAACP); *see also Protecting the Right to Vote: Oversight of the Department of Justice's Preparations for the 2008 General Election: Hearing Before S. Judiciary Comm.*, 111th Cong. 1 (2008) (statement of Gilda R. Daniels, Assistant Professor, University of Baltimore School of Law).

11. "HAVA defined minimum election administration standards that all states must follow, notably in the areas of voter identification and database management." Debra Milburg, Note, *The National Identification Debate: "Real ID" and Voter Identification*, 3 I/S: J.L. & POL'Y FOR INFO. SOC'Y 443, 458 (2008); *see also* Bruce E. Cain, *Election Administration: Still Broken After All*

voter access concerns the proliferation of deceptive acts and voter intimidation. Each of these phenomena requires exemplification.

A person or group intentionally places an anonymous flyer in a mailbox, leaves a voicemail message, distributes a campaign publication on Election Day, or sends an email prior to early voting—all containing misleading and false information. The information is often plausible: it could address the expected massive turnout at an election and, thus, the need to extend voting to Tuesdays for Republicans (Whites) and Wednesdays for Democrats (Blacks).¹²

Deceptive practices tend to target racial and language minorities and are a throwback to the post-Reconstruction, Jim Crow-era tactics that sought to deny minority citizens the right to freely participate in the electoral process.¹³ Voter intimidation became a primary and deadly issue after the Civil War and during Reconstruction,¹⁴ when newly freed slaves were systematically denied their right

These Years, 8 ELECTION L.J. 219 (2009) (reviewing VOTING IN AMERICA, VOL. 3, AMERICAN VOTING SYSTEMS IN FLUX: DEBACLES, DANGERS, AND BRAVE NEW DESIGNS (Morgan E. Felchner ed., 2008)); Daniel P. Tokaji, *The Birth and Rebirth of Election Administration*, 6 ELECTION L.J. 118 (2007) (reviewing ROY G. SALTMAN, THE HISTORY AND POLITICS OF VOTING TECHNOLOGY: IN QUEST OF INTEGRITY AND PUBLIC CONFIDENCE (2006)).

12. See, e.g., NATIONAL CAMPAIGN FOR FAIR ELECTIONS, *supra* note 1. The now infamous flyer from Franklin County, Ohio, pretended to come from the County Board of Elections urging Republicans and Democrats to vote on different days; the Republican-designated day was the true Election Day. *Id.* Deceptive election flyers often falsely indicate the wrong date for an election. *Id.*; see also *infra* note 32 (showing a flyer distributed prior to the November 4, 2008 federal election falsely alerting voters that in an emergency General Assembly session the Virginia legislature “adopted the following [sic] emergency regulations to ease the load on local electoral [sic] precincts and ensure a fair electoral process” that Republicans would vote on Tuesday, November 4, and Democrats on Wednesday, November 5; the flyer was distributed in the predominately minority areas of Hampton Roads, VA). Additionally, at George Mason University in Fairfax, Virginia, observers described “official-looking flyers” stating that due to the projection of high voter turnout, Democrats should vote the day after the general election, November 5. Thomas Frank & Richard Wolf, *Pranks, Mischief Reach Higher Level at Colleges*, USA TODAY, Nov. 5, 2008, at 10A (detailing bogus emails sent to students at George Mason University stating that voting on campus had been moved back one day and discussing problems at other campuses such as Ohio State and Florida State where students received text messages to the same effect, and at Virginia Tech, where students received mass-emails via Facebook regarding bogus changes to voting schedules); see also ELECTION PROTECTION 2008: HELPING VOTERS TODAY, MODERNIZING THE SYSTEM FOR TOMORROW, PRELIMINARY ANALYSIS OF VOTING IRREGULARITIES 12 (2008), available at www.866ourvote.org/tools/documents/files/0077.pdf.

13. ALEXANDER KEYSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 258-59 (2000) (describing tactics that segregationists used during the Jim Crow era to “thwart” Black political participation, including literacy tests, grandfather clauses, poll taxes, “understanding test[s]” purges and in some instances murder).

14. See, e.g., TRACY CAMPBELL, DELIVER THE VOTE: A HISTORY OF ELECTION FRAUD, AN AMERICAN POLITICAL TRADITION—1742-2004, at 46 (2005) (stating that in the mid-1800s violent action meant to intimidate voters had reached disturbing levels); see also Gilda R. Daniels, *A Vote*

to vote in Southern states through the use of violence and threatening tactics.¹⁵ The South enacted measures, such as poll taxes, literacy tests, and all-White primaries that would limit the effect of the new and populous electorate.¹⁶ Efforts to disenfranchise African American voters persisted after the Civil War to counter the efforts of newly freed slaves effort to obtain equal access to the ballot.¹⁷ Indeed, during the Civil Rights Movement, the primary disenfranchising and intimidating efforts were organized around registering voters and providing access to the electoral process. In 1957, Dr. Martin Luther King, Jr., emphasized the “conniving methods” that were used to prohibit Negroes from registering to vote.¹⁸ Although historical accounts of voter intimidation are often full of death threats and fear, today’s intimidation and deception tend to exist in a less fatal form, but continue to target minority communities.¹⁹ Threats of incarceration or

Delayed Is a Vote Denied: A Preemptive Approach to Eliminating Election Administration Legislation that Disenfranchises Unwanted Voters, 47 U. LOUISVILLE L. REV. 57 (2008).

15. RAYFORD W. LOGAN, *THE BETRAYAL OF THE NEGRO: FROM RUTHERFORD B. HAYES TO WOODROW WILSON* 91 (Da Capo Press 1997) (1954). At the dawn of the twentieth century, segregationists employed the country’s most violent measures to ensure White political supremacy. *Id.* In 1900, South Carolina Senator “Pitchfork” Ben Tillman, who led that state’s push for segregation, said, “[w]e have done our level best, . . . we have scratched our heads to find out how we could eliminate the last one of them. We stuffed ballot boxes. We shot them We are not ashamed of it.” *Id.*

16. KEYSSAR, *supra* note 13, at 111-12.

In short order, other states followed suit, adopting—in varying combinations—poll taxes, cumulative poll taxes . . . literacy tests, secret ballot laws, lengthy residence requirements, elaborate registration systems, confusing multiple voting-box arrangements, and eventually, Democratic primaries restricted to white voters. Criminal exclusion laws also were altered to disfranchise men convicted of minor offenses, such as vagrancy and bigamy.

Id.

17. See ERIKA WOOD, BRENNAN CENTER FOR JUSTICE, *RESTORING THE RIGHT TO VOTE* 7-8, available at http://www.soros.org/initiatives/usprograms/focus/justice/articles_publications/publications/restoring_20080226/Brennan_RestoringVote_2008.pdf.

18. Dr. Martin Luther King, Jr., decried deceptive practices and intimidation in his *Give Us the Ballot* speech. Dr. King stated: “[A]ll types of conniving methods are still being used to prevent Negroes from becoming registered voters. The denial of this sacred right is a tragic betrayal of the highest mandates of our democratic tradition.” Dr. Martin Luther King, Jr., *Give Us the Ballot*, Address at the Prayer Pilgrimage for Freedom (May 17, 1957), available at http://mlk-kpp01.stanford.edu/primarydocuments/Vol4/17-May-1957_GivesUsTheBallot.pdf.

19. See, e.g., NAT’L NETWORK FOR ELECTION REFORM, *DECEPTIVE PRACTICES AND VOTER INTIMIDATION* 1, available at <http://www.nationalcampaignforfairelections.org/page/-/Deceptive%20Practices%20Network%20Issue%20Paper.pdf> (describing deceptive and intimidating voting practices in minority communities including the following: In 1998, in South Carolina, a state representative mailed 3,000 brochures to African American neighborhoods, claiming that law enforcement agents would be “working” the election, and warning voters that “this election is not worth going to jail!!!!!!”). The African American community has been and continues to be a

deportation instead of death often accompany voter intimidation and deception efforts.²⁰ For example, in 2006, in certain counties in Virginia with considerable minority populations, voters received automated calls misinforming them that they would be arrested if they tried to vote on Election Day and falsely reported that their polling places had changed.²¹ Consequently, conniving methods continue to exist and adopt new forms.

In the 2008 federal election, the country also saw the proliferation of the use of the Internet in both political campaigns²² and advancing political misinformation.²³ The government's inability to prosecute offenders for printed flyers or other traditional methods of conducting deceptive practices maximizes the possibility of propagating misinformation via the Internet.²⁴ The resulting blow to public confidence discourages citizens from participating in the electoral process.

Voter deception involves, *inter alia* the distribution of misinformation regarding the time, place, and manner of elections as well as voter eligibility.²⁵

longstanding target of threatening tactics. *Id.*

20. *See, e.g., id.* In 2006, roughly 14,000 Democratic voters with Spanish surnames in Orange County, California received letters before the November 7 election falsely warning that immigrants could face jail time or deportation for vote. *Id.*

21. *See* LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INCIDENTS OF DECEPTIVE PRACTICES AND VOTER INTIMIDATION IN THE 2006 ELECTIONS, available at http://lccr.3cdn.net/d6af26cb31ff5ee166_v1m6x6x5.pdf.

22. *See, e.g.,* Matthew Fraser & Soumitra Dutta, *Obama and Facebook Effect: His Masterful Use of Web Tools Helped Him Win the Presidency*, *MEDIAWEEK*, Nov. 24, 2008, at 10, available at 2008 WLNR 25922891; Joe Garofoli, *Obama Eyes New Role for Internet*, *S.F. CHRON.*, Nov. 24, 2008, at A1; Laura Olsen, *Obama Team Capitalizes on Link to Youth*, *CHI. TRIB.*, Nov. 26, 2008, at 7C.

23. *See, e.g.,* Ben Conery, *Electronic Scams Attempt to Keep New Voters at Home*, *WASH. TIMES*, Nov. 5, 2008, at B02 (discussing voter-suppression tactics where the perpetrators utilized text messages and Facebook and detailing Facebook messages that said election schedules had changed or that various parties were supposed to vote on different days). The article also discusses problems at Drexel University where students were told via flyers that they "would be arrested at the polls if they had unpaid parking tickets." *Id.* Overall, however, according to the article, incidents of voter suppression were far less prominent and on a much lesser scale than in past elections. *Id.*; *see also* Common Cause, The Lawyers Committee for Civil Rights Under Law and the Century Foundation, *Deceptive Practices 2.0: Legal and Policy Responses* (on file with author); Dan Morain, *Some Obama Links Will Mislead*, *L.A. TIMES*, Aug. 30, 2008, at A18; Joy-Ann Reid, *Bogus Emails Raise Anxiety Over Voter ID Law*, *S. FLA. TIMES*, Oct. 3, 2008, at A1.

24. The use of computers and other electronic mechanisms in the distribution of political information has created yet another difficulty in thwarting these activities. Federal and state laws are ill-equipped for Internet based deception. *See infra* Part I.A.2.

25. The prevalence of deceptive practices and misinformation in the political arena has raised the profile of several websites dedicated to providing accurate information. *See, e.g.,* FactCheck.org, <http://www.factcheck.org/> (last visited Oct. 7, 2009); PolitiFact.com, <http://www.politifact.com/truth-o-meter/> (last visited Oct. 7, 2009); Snopes.com; <http://www.snopes.com/>

These deceptive practices regularly have as their main objective to misinform unwanted minority, elderly, disabled, and language-minority voters²⁶ in an effort to suppress votes.²⁷ Generally, the proliferation of misleading documents is utilized to confuse and thwart eligible voters from participating in the electoral process.

Many flyers are falsely disseminated in the name of an official governmental agency.²⁸ Additionally, the surge of computers, cell phones, and other technology continues to hinder the identification of persons engaging in e-deception.²⁹ Although these examples are a departure from heated campaign battles, their reach is far and their impact discernible.

Efforts to deny voters the opportunity to participate in the electoral process are not often investigated or litigated for myriad reasons, including the lack of clear statutory authority and willingness to enforce.³⁰ Although the intent of these practices is often clear and invidious, i.e., to suppress minority votes, it is often difficult to know how many people are affected by voter intimidation or deception.³¹ The anonymous nature of deceptive flyers and electronic documents

politics/politics.asp (last visited Oct. 7, 2009) (containing a section on its website specifically addressing political myths).

26. See Daniels, *supra* note 14, at 58 (defining unwanted voters as “the disabled, elderly, poor, or minority voter”).

27. See, e.g., *Prevention of Deceptive Practices and Voter Intimidation: Hearing Before the S. Comm. on the Judiciary*, *supra* note 3 (statement of John Trasviña, President and General Counsel, Mexican Am. Legal Def. and Educ. Fund); Ian Urbina, *Democrats Fear Disillusionment in Black Voters*, N.Y. TIMES, Oct. 27, 2006, at A1, available at <http://www.nytimes.com/2006/10/27/us/politics/27race.html?pagewanted=all>.

28. Prior to the 2008 federal election in Virginia, an anonymous flyer with the state seal, distributed in minority areas in Hampton Roads, Virginia, indicated that Republicans would vote on Tuesday and Democrats on Wednesday. Julian Walker, *State Police Investigate Source of Phony Election Flier*, VA.-PILOT, Oct. 30, 2008, available at <http://hamptonroads.com/2008/10/state-police-investigate-source-phony-election-flier>. Police investigated the source of the flyer and instead of filing charges decided that it was a “joke that got out of control.” *Id.*; Julian Walker, *Officials Find Source of Fake Election Flier, Won't Press Charges*, VA.-PILOT, Nov. 3, 2008, available at <http://hamptonroads.com/2008/11/officials-find-source-fake-election-flier-wont-press-charges>. Virginia is one of the few states that actually has a statute outlawing deceptive practices in voting, classifying it as a Class 1 misdemeanor. See VA. CODE ANN. § 24.2-1005.1 (2007).

29. Although convicted for an illegal voter suppression scam, Allen Raymond, author of *How to Rig an Election: Confessions of a Republican Operative* (2008), stated in a *National Journal* article that “[a]n e-mail is far more traceable than an anonymous flier.” See, e.g., David Herbert, *Voter Suppression Hits the Web*, NAT'L J. ONLINE, Oct. 29, 2008, www.nationaljournal.com/njonline/print_friendly.php?ID=no_20081027_9705.

30. See *infra* Part II.A.

31. People for the American Way Foundation, *The Long Shadow of Jim Crow: Voter Suppression in America* 3-4 (2004), available at <http://67.192.238.59/multimedia/pdf/Reports/thelongshadowofjimcrow.pdf> (noting that approximately four million Americans were denied the right to vote in 2000 and included voter deception and intimidation as causes).

makes it immensely difficult to determine the source of publication and tends to thwart investigations and prosecutions.³² These practices, however, have significant consequences for individual voters attempting to exercise their fundamental right to vote. Moreover, these practices threaten the integrity and legitimacy of the democratic process.

Despite this resurgence of suppression, the federal government has underutilized its ability to litigate these types of cases. In fact, the Justice Department said that it lacked the authority to pursue these cases, despite their potential impact on the fundamental right to vote.³³ The federal government has statutes at its disposal to prevent voter intimidation and deceptive practices.³⁴ But statutes penalizing voter intimidation are rarely used³⁵ and have historically been unsuccessful.³⁶

Legal scholars have addressed the effect of voter identification and voter fraud on voter confidence and the integrity of the democratic system.³⁷ Law

32. See sources cited *supra* note 28.

33. Hearing Before the S. Judiciary Comm., *supra* note 10.

34. See *infra* Part II.A.

35. For example, the Department of Justice has brought only four cases in the history of Section 11(b) in the VRA's forty-five-year history. See *infra* Part II.A.2.

36. See discussion *infra* Part II.A.1-2.

37. See, e.g., Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1750-51 (2008) (arguing the use of photo identification requirements bears little correlation to the public's beliefs about the incidence of fraud); Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. U. L. REV. 1023, 1066 (2009) (arguing that "the history of the right to vote has been a steady struggle between those who wish to constrain or restrict the vote by raising the cost and those who wish to make the vote more accessible by lowering the costs" and these costs must be factored into voting rights jurisprudence to ensure free and accessible elections); Chad Flanders, *How to Think About Voter Fraud (and Why)*, 41 CREIGHTON L. REV. 93, 97 (2007) (proposing "that the right of participation, though perhaps only denied to a few when new voter requirements are put in place, is the most relevant (and serious) harm to analyze in the voter fraud debate"); Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1 (2007); Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 631 (2007) (arguing that "policymakers should instead examine empirical data to weigh the costs and benefits of [I.D.] requirement[s]" because "[e]xisting data suggest that the number of legitimate voters who would fail to bring photo identification to the polls is several times higher than the number of fraudulent voters, and that a photo-identification requirement would produce political outcomes that are less reflective of the electorate as a whole"); Richard Tyler Atkinson, Note, *Underdeveloped and Overexposed: Rethinking Photo ID Voting Requirements*, Note, 33 J. LEGIS. 268, 269 (2007) (arguing "that photo ID requirements fail to fulfill their primary purpose (the prevention of fraud); in fact, photo ID requirements decrease legitimate voter turnout (and therefore may increase the impact of fraud)"); Andrew N. DeLaney, Note, *Appearance Matters: Why the State Has an Interest in Preventing the Appearance of Voting Fraud*, 83 N.Y.U. L. REV. 847 (2008) (arguing that the state has an interest not only in preventing voting fraud, but also in preventing the appearance of voting fraud), and arguing the constitutionality of photo identification

review articles have also discussed voter intimidation on the state and local levels.³⁸ Most scholars and statutes conflate fraud with intimidation and deceptive practices,³⁹ without illuminating the nuances that make deceptive practices an identifiable and worthy cause of action. The lack of a well-defined statute coupled with poor enforcement and deficient deterrents necessitate a reasoned view of ways to uphold the democratic principles of equal access to the

requirements in elections); Samuel P. Langholz, Note, *Fashioning a Constitutional Voter-Identification Requirement*, 93 IOWA L. REV. 731, 731 (2008) (examining “the results of these legal challenges and suggest[ing] the parameters in which a state legislature can fashion a constitutional voter-identification requirement”); Aaron J. Lyttle, Note, *Constitutional Law—Get the Balance Right: The Supreme Court’s Lopsided Balancing Test for Evaluating State Voter-Identification Laws*; Crawford v. Marion County Election Board, 128 S. Ct. 1610 (2008), 9 WYO. L. REV. 281, 283 (2009) (arguing that the Supreme “Court adopted a lopsided balancing test, placing greater emphasis on states’ interests in preventing fraud than on the risk of burdening voting rights” and “the Court’s failure to weigh voters’ interests against those of the state leaves the prior confusion untouched, thus endangering voting rights”); Milburg, *supra* note 11, at 466 (discussing “recent developments and ongoing controversies concerning the REAL ID Act of 2005” and “explores the ramifications of a national identification card on the recent state trend of requiring identification at the polls”).

38. See, e.g., Anita S. Earls et al., *Voting Rights in North Carolina: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 577, 588 (2008) (discussing voting rights violations in North Carolina from 1982 to 2006 and summarizes the various barriers that minority voters in North Carolina voters still face, including intimidation against minority voters and lack of proper accommodations for disabled voters); Patrick J. Troy, *No Place to Call Home: A Current Perspective on Troubling Disenfranchisement of College Voters*, 22 WASH. U. J.L. & POL’Y 591, 616 (2006) (discussing voter intimidation of college students and proposing solutions to that problem, such as locating polling places on campus and creating a national standard for voter residency requirements); Katie Fowler, Note, *Deceptive Voting Practices and Voter Intimidation in the Wake of United States v. Charleston County*, 2 CHARLESTON L. REV. 733, 749 (2008) (tracing the presence vote dilution among minority voters in at large elections in South Carolina before *United States v. Charleston County*, 316 F. Supp. 2d 268 (D.S.C. 2003), and the impact that decision had on such voting systems).

39. See, e.g., U.S. ELECTION ASSISTANCE COMM’N, ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATIONS FOR FUTURE STUDY 13-14 (2006), http://www.eac.gov/clearinghouse/docs/reports-and-surveys-2006electioncrimes.pdf/attachment_download/file, which defines election crimes, i.e., vote fraud, intimidation and deception as follows:

[I]ntentional acts or willful failures to act, prohibited by state or federal law, that are designed to cause *ineligible* persons to participate in the election process; eligible persons to be excluded from the election process; ineligible votes to be cast in an election; eligible votes not to be cast or counted; or other interference with or invalidation of election results. Election crimes generally fall into one of four categories: acts of deception, acts of coercion, acts of damage or destruction, and failures or refusals to act.

Id. at 13 (emphasis added); see also Jocelyn Friedrichs Benson, *Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud*, 44 HARV. C.R.-C.L. L. REV. 1, 1 (2009) (defining election-related fraud into categories of “voter-initiated” and “voter-targeted”).

franchise.

The Equal Protection Clause of the Fourteenth Amendment⁴⁰ provides the means for governments to exercise their authority to address voter deception. In *Crawford v. Marion County Election Board*,⁴¹ the Supreme Court found that Indiana had a compelling interest in preventing fraud, in part because doing so preserved public confidence and legitimate votes from dilution.⁴² Likewise, the Supreme Court has found that states possess a compelling interest in preventing voter intimidation.⁴³ A comparable state interest applies to voter deception. When the state or federal government has a compelling interest in protecting an individual's right but fails to protect that right, the Constitution should not leave it unguarded.⁴⁴ Although various federal and state statutes remain at the government's disposal to combat deceptive practices, the Equal Protection Clause should intervene to prevent states from outlawing vote dilution ensuing from fraud while under-enforcing vote dilution ensuing from voter deception. A similar result should occur when analyzing voter deception.

This Article exposes the deficiencies in the current state of the law governing voter intimidation and deceptive practices. It attempts to correct the legal deficiencies within the confines of the constitutional framework. This Article provides a legal framework for voter intimidation and deception as well as solutions to addressing the quagmire of federal laws that unfortunately do not sufficiently deter these activities. It also presents a careful analysis of the conceptual and legal issues concerning deceptive practices. Part I provides contemporaneous examples of voter deception and illustrates the need for comprehensive and strategic legal definitions for deceptive practices. Part II discusses the gaps in existing statutes, the lack of enforcement of those statutes, and the government's current focus on voter fraud and using statutes against communities that are traditionally victims of deception. Part III argues for a Constitutional response under the Equal Protection Clause and recognizes First Amendment and other Constitutional constraints. Part IV proposes a legislative response that provides additional protections for individuals or groups victimized

40. U.S. CONST. amend. XIV, § 1. The Equal Protection Clause of the Fourteenth Amendment provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

41. 553 U.S. 181 (2008).

42. *Id.* at 184 (discussing the state's ability to impose burdens on voters through stricter voter identification standards and finding the state's justification for requiring voter ID, preventing voter fraud, compelling).

43. *See* *Burson v. Freeman*, 504 U.S. 191, 210 (1992) (finding that the state could place constraints on electioneering near polling places on Election Day).

44. *See, e.g.*, Pamela S. Karlan, *Framing the Voting Rights Claims of Cognitively Impaired Individuals*, 38 MCGEORGE L. REV. 917, 930 (2007) (discussing the balance between the right to vote of cognitively impaired individuals and the existing constitutional and legal framework that governs each citizen's right to vote; arguing that the state must begin to balance disabled voters' interest in participation within the electoral system and the broader public interest in maintaining the integrity of the political system).

by voter deception and offers a private right of action and improved criminal and civil penalties to strengthen existing laws.

I. DEFINING DECEPTION

Elections in this new millennium have witnessed a revival of voter intimidation and deceptive practices across the country.⁴⁵ In every federal election since the year 2000, suppressors have falsely instructed citizens under the guise of governmental authority and in some instances using threats and penalties to disseminate false information in predominately minority areas.⁴⁶ In 2004, the “Milwaukee Black Voters League,” an organization that does not exist, distributed a flyer warning people found guilty of any infraction, including traffic tickets, to stay away from the polls or face possible imprisonment.⁴⁷ The flyer read:

If you’ve already voted in any election this year, you can’t vote in the presidential election; If anybody in your family has ever been found guilty of anything, you can’t vote in the presidential election; If you violate any of these laws, you can get ten years in prison and your children will get taken away from you.⁴⁸

During the 2008 federal election, many states endured instances of intimidation and deception targeting the minority community.⁴⁹ These examples illustrate the traditional deceptive practices of disseminating false information in minority communities.⁵⁰

The 2008 presidential election cycle brought about a contested election in

45. *See supra* notes 1-6 and accompanying text.

46. *See* NAT’L NETWORK FOR ELECTION REFORM, *supra* note 19, at 2.

47. *Id.*

48. *Id.*

49. ELECTION PROTECTION 2008, *supra* note 12, at 1. Since 2004, the Election Protection campaign, which is comprised of approximately eighty organizations including the Lawyers Committee for Civil Rights Under Law, People for the American Way Foundation Latino Justice, and the NAACP have chronicled deceptive practices and voter intimidation taking place across the country. *Id.*; *see also* NAT’L NETWORK FOR ELECTION REFORM, *supra* note 19, at 3 (describing a 2003 election in Philadelphia, where voters in African American areas were systematically challenged by men carrying clipboards, driving a fleet of some 300 sedans with magnetic signs designed to look like law enforcement insignia); Tim Shipman & Tom Leonard, *Turnout Hits Record as Fraud Claims Dog Polling Day*, DAILY TELEGRAPH (LONDON), Nov. 5, 2008, at 2 (providing a broad overview of reported Election Day problems in the United States relevant to intimidation, suppression, and deception).

50. *See* Tova Andrea Wang, *Election 2004: A Report Card*, AM. PROSPECT, Jan. 1, 2005, <http://www.reformelections.org/commentary.asp?opedid=824> (describing deceptive acts in Ohio in 2004, where newly registered voters were falsely warned that if the NAACP, the John Kerry Presidential campaign, America Coming Together, or a local congressional campaign registered them to vote, that they were not eligible to vote).

which citizens were bombarded with robo calls⁵¹ and misleading flyers.⁵² The nature of these calls was similar to traditional deceptive flyers in that they contained false information and were generally targeted at both minority and Democratic voters, but involved less cost and more impact.⁵³

Suppressors also used electronic deception to intimidate and deceive voters. In Texas, an Internet message instructed voters to cast a straight Democratic ticket and separately punch Barack Obama's name, which would negate their vote.⁵⁴ Accordingly, e-deception provides yet another concern. Indeed, emails touting the ineligibility of voters because of foreclosures were prevalent and caused at least one Attorney General to try to provide accurate information.⁵⁵ Although the Maryland Attorney General and others utilized the media in an attempt to correct the misinformation, in most instances, these types of accounts remain unparsed and unprosecuted.

A. A Deceptive Definition

Deception is defined as "the practice of deliberately making somebody believe things that are not true; an act, trick, or device intended to deceive or mislead somebody."⁵⁶ When the act of deception partners with the act of voting,

51. See, e.g., Jennifer Duck, *Dems Claim GOP Launched 'Dirty' Phone Campaign*, ABC NEWS, Nov. 6, 2006, available at <http://abcnews.go.com/Politics/story?id=2633458&page=1>; Sam Stein, *Wave of McCain Robocalls Reported, Some May Violate State Law*, HUFFINGTON POST, Oct. 16, 2008, http://www.huffingtonpost.com/2008/10/16/massive-rnc-robocall-may_n_135348.html. Robo calls are a fairly new technological advance that allow an individual or group to make multiple phone calls to promote a political message and can be used to disseminate misleading information to masses in an effort to sway voters. See Charles Babington & Alec MacGillis, *It's a Candidate Calling. Again: Republicans Deny Subterfuge as Phone Barrages Anger Voters*, WASH. POST, Nov. 7, 2006, at A8.

52. Susan Q. Stranahan, *Broken Elections, Stolen Votes—Part V*, CENTER FOR PUB. INTEGRITY, July 7, 2008, http://www.buyingofthepresident.org/index.php/stories/broken_elections_stolen_votes_part_five/.

53. In Missouri in 2006, the Secretary of State reported that citizens had received robo calls informing them that their polling places had changed when they had not and warning voters to bring voter ID or they would not be permitted to vote. See OFF. OF THE SECRETARY OF STATE, *VOTERS FIRST: AN EXAMINATION OF THE 2006 MIDTERM ELECTION IN MISSOURI 17* (2007), <http://www.sos.mo.gov/elections/VotersFirst/2006/VoterFirst-Complete.pdf>.

54. See Herbert, *supra* note 29 (arguing that voters are being suppressed through communications on the Web this campaign season by capitalizing on new technologies and taking advantage of an electorate that increasingly consumes political news online).

55. See MD. OFF. OF THE ATT'Y GEN., *REPORT ON THE ATTORNEY GENERAL'S TASK FORCE ON VOTING IRREGULARITIES* (2008), http://www.oag.state.md.us/Reports/Voting%20Task%20Force%20Repor4_28.pdf.

56. ENCARTA WORLD ENGLISH DICTIONARY (N. Am. Ed. 2009), available at <http://encarta.msn.com/encnet/features/dictionary/DictionaryResults.aspx?texttype=3&search=deception> (containing a basic definition for the act of deception).

the jurisprudence leaves open whether the practice of deliberately misleading a voter serves as a legally actionable deed.⁵⁷ Consequently, voter deception is the act of knowingly deceiving voters regarding the time, place, or manner of conducting elections or the qualifications for or restrictions on voter eligibility.

In considering deceptive deeds, one must also consider their relation to fraud and intimidation, particularly because those areas have far more protections than deceptive practices and include some similarities. Voter deception is, in many ways, similar to voter fraud and voter intimidation, yet some distinctions exist. Scholars have sought to define vote fraud,⁵⁸ and statutes exist for determining voter intimidation.⁵⁹ Few have attempted to conquer the amorphous and arguably ambiguous definition of voter deception.⁶⁰

In an effort to encompass all illegal election activity, the Election Assistance Commission (EAC)⁶¹ created a definition of “election crimes.”⁶² The definition, however, is overbroad and only tangentially includes deceptive acts.⁶³ In the EAC’s broad definition, only the terms “intentional acts . . . designed to cause . . . eligible votes not to be cast or counted” tangentially address deceptive practices.⁶⁴ Indeed, it speaks more to intimidation or fraud than deception. The

57. See *infra* Part II.A.1-2.

58. See, e.g., Ansolabehere & Persily, *supra* note 37, at 1758-59 (analyzing through surveying the impact of voter fraud and its relation to participation in the political process and finding that the use of photo identification requirements bears little correlation to the public’s opinion about the incidence of fraud); Flanders, *supra* note 37, at 95 (framing the debate as the seriousness of voter fraud versus the deterrence of voters in passing laws to deter this activity such as photo identification requirements at the polls).

59. See *infra* Part II.A.1.

60. See e.g., Overton, *supra* note 37, at 636 (arguing the need for empirical data and less anecdotes in imposing voter ID laws).

61. U.S. ELECTION ASSISTANCE COMM’N R., *supra* note 39.

62. See Job Serebrow & Tova Wang, *Voting Fraud and Voter Intimidation Report to the U.S. Election Assistance Commission on Preliminary Research & Recommendations*, 6 ELECTION L.J. 330, 332 (2007) (defining “election fraud” as “any intentional action, or intentional failure to act when there is a duty to do so, that corrupts the election process in a manner that can impact on election outcomes”); Tova Andrea Wang, *A Rigged Report on U.S. Voting*, WASH. POST, Aug. 30, 2007, at A21.

63. The EAC tasked Job Serebrow and Tova Wang to provide a report on the prevalence of voter fraud and voter intimidation. See Serebrow & Wang, *supra* note 62, at 331. The final report was met with some criticism. See Wang, *supra* note 62. In the report, however, the EAC broadly defines election crimes. See *supra* note 39 and accompanying text.

64. A 2007 EAC report defined election crimes, which would include voter fraud and voter intimidation, but not voter deception as

any intentional action, or intentional failure to act when there is a duty to do so, that corrupts the election process in a manner that can impact on election outcomes. This includes interfering in the process by which persons register to vote; the way in which ballots are obtained, marked, or tabulated, and the process by which election results are canvassed and certified.

EAC definition serves as a medley of actions that allow voter deception to remain ignored as a serious offense to the democratic process.

In 2007, then-newly elected Senator Barack Obama and senior statesman Senator Charles Schumer unsuccessfully attempted to fill this void. In the 110th Congress, Senators Obama and Schumer introduced the Deceptive Practices and Voter Intimidation Prevention Act of 2007, which would criminalize many of the tactics of voter deception and increase the penalty from one to five years for anyone convicted of voter intimidation.⁶⁵ The bill prohibits a person from deceiving a voter regarding the time, place, or manner of the election.⁶⁶ Further, it requires the Attorney General to provide “accurate” election information when deception allegations are proven and to report to Congress on allegations of deception after each federal election.⁶⁷ Because this bill speaks to voter deception, it specifically reinforces the need for stricter penalties and greater clarification. In some instances, however, it tends to fall short of its goal.

1. *Deception as Fraud.*—Generally, voter fraud involves “obtaining and marking ballots, the counting and certification of election results, or the registration of voters.”⁶⁸ Traditional forms of voter fraud involve voting multiple times under false names, vote buying, and election officials committing fraud through counting spoiled ballots.⁶⁹ Intimidation and deceptive practices, however, do not fall squarely within the definition of voter fraud. One scholar suggests that courts should evaluate voter fraud in two separate categories: “voter-initiated” and “voter-targeted.”⁷⁰ Although voter-initiated acts refer generally to voter fraud and voter-targeted to what is generally considered voter suppression, the joining of these acts tends to negate the deceptive practices for

Serebrov & Wang, *supra* note 62, at 332. See U.S. ELECTION ASSISTANCE COMM’N R., *supra* note 39, at 14.

65. Deceptive Practices and Voter Intimidation Act of 2007, S. 453, 110th Cong. § 3 (2007).

66. *Id.* The Act also designates the Civil Rights Division of the Justice Department as the federal agency responsible for correcting misinformation that comes to its attention and to provide Congress with a report of any deceptive practices allegation within ninety days of any election for federal office, including primaries, and run-offs. S. 453, § 4.

67. The Deceptive Practices and Voter Intimidation Prevention Act of 2007 has remained dormant in the Senate. A House version of the bill, H.R. 1281, passed June 25, 2007 out of the House. A 2005 version of the bill in the House would have provided a private right of action for deceptive practices under 42 U.S.C. § 1971(c) (2006) and provides criminal penalties. Deceptive Practices and Voter Intimidation Prevention Act of 2005, H.R. 4463, 109th Cong. § 2(a)(2) (2005); see *infra* Part IV.A.

68. CRAIG C. DONSANTO & NANCY L. SIMMONS, FEDERAL PROSECUTION OF ELECTION OFFENSES 3 (U.S. Dep’t of Just., Crim. Division, Pub. Integrity Sect., 7th ed. 2008), available at www.justice.gov/criminal/pin/docs/electbook-rvs0807.pdf.

69. LORRAINE C. MINNITE, THE POLITICS OF VOTER FRAUD 6 (2007), available at <http://www.bradblog.com/Docs/politicsofvoterfraudfinal.pdf>.

70. See Benson, *supra* note 39, at 1 (arguing that courts should consider the initiators of the fraud who commits the acts and the effects on our democracy).

the more politically feasible voter fraud.⁷¹ The level of voter fraud has long been debated and serves as an impetus for recent legislation meant to deter alleged fraudulent activity.⁷²

The Public Integrity Section of the Department of Justice (PIN), which is primarily responsible for pursuing vote fraud cases, defines “election fraud” as “involv[ing] a substantive irregularity relating to the voting act—such as bribery, intimidation, or forgery—which has the potential to taint the election itself.”⁷³ PIN acknowledges that some acts that may arguably constitute fraud may nonetheless not be recognized as a federal election crime.⁷⁴ It specifically points to instances of “distributing inaccurate campaign literature” as an example of “reprehensible” actions that generally fall outside the scope of federal statutes.⁷⁵ Thus, the example of Prince George’s County, discussed earlier, although reprehensible and arguably involving deception, would not fall within a prosecutable form of election fraud and, as such, would not be pursued or prosecuted.⁷⁶

Both voter fraud and voter deception are types of electoral interference that seek to affect electoral outcomes. Both fraud and deception involve untruths; deception involves limiting the number of voters; and voter fraud attempts to increase those numbers falsely. Scholars have debated the wisdom of election laws passed to address voter fraud,⁷⁷ but the need for stronger and more potent voter suppression and, in particular, voter deception laws is left wanting. Consequently, voter fraud and voter deception enjoy different outcomes and should require different legislative strategies, definitions, and penalties.⁷⁸

71. *Id.* State legislatures have focused much of their attention on combating voter fraud through the implementation of various voter identification laws. MINNITE, *supra* note 69, at 61. The voter identification debate has been characterized as a strictly partisan fight. *Id.* at 3. States that passed voter identification laws were Republican-controlled. *Id.* at 6. Most Democratic-controlled governments rejected voter identification legislation that made it more difficult for citizens to cast a ballot. *Id.*; *see id.* at 5 (finding that “[t]he claim that voter fraud threatens the integrity of American elections is itself a fraud”).

72. LORI MINNITE & DAVID CALLAHAN, *SECURING THE VOTE: AN ANALYSIS OF ELECTION FRAUD 13-17* (2003) (discussing the lack of relationship between election fraud and requiring photo identification); *cf.* JOHN FUND, *STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY* (2004) (discussing recent examples of electoral tampering through voter fraud).

73. *See* DONSANTO & SIMMONS, *supra* note 68, at 24.

74. *See id.* at 47.

75. *Id.*

76. *See* discussion *supra* Part I.A.

77. *See, e.g.,* Overton, *supra* note 37, at 681 (concluding that voting identification requirements may prevent fraud but also prevent legitimate voters from casting a ballot).

78. A. David Pardo, *Election Law Violations*, 45 AM. CRIM. L. REV. 305, 308, 329 (2008) (discussing election fraud statutes, voter intimidation, and campaign finance and provides alternative theories of prosecution, such as the Travel Act, 18 U.S.C. § 1952 (2006), used to prosecute interstate travelers); *see also* Benson, *supra* note 39, at 1 (discussing how courts should adjudicate “voter-initiated” and “voter-targeted” fraud differently).

2. *Deception as Intimidation.*—Voter intimidation involves threats, force, or interference in the balloting process in a manner that intimidates the voter from participating in the election process.⁷⁹ Federal statutes define intimidation as those actions that involve threats and interfere with a voter's right to exercise the franchise.⁸⁰ Threats of prosecution and deportation for committing the act of voting illustrate the types of intimidating acts that currently encompass voter intimidation.⁸¹

The main distinction between voter intimidation and voter deception is that intimidation of voters carries with it a connotation of some type of threat, e.g., incarceration or deportation.⁸² Although the two areas overlap (and may, in fact, be considered synonymous in many cases), deception is more focused on misinformation or purposely disseminating misinformation,⁸³ while intimidation is characterized by more threatening actions. This distinction, however, could allow a broad definition of voter suppression because the nature of the actions seeks to dissuade voters from participating in the electoral process. The efforts to thwart voter participation through deception and intimidation are similar and fit more securely in an analysis of overall attempts at suppression rather than fraud. Although voter intimidation and deception are similar and statutes exist specifically for intimidation and fraud, no federal legislation directly addresses deception.

B. Voter Suppression

Voter intimidation and deceptive practices fall generally within voter

79. Wendy Weiser & Margaret Chen, *Voter Suppression Incidents 2008*, BRENNAN CENTER FOR JUST., Nov. 3, 2008, http://www.brennancenter.org/content/resource/voter_suppression_incidents (last visited Oct. 8, 2009). The Brennan Center compiled a list of Voter Intimidation and Deceptive Practices that occurred across the country in the 2008 federal election, many included actions from "officials" intimidating voters. *Id.* For example, in New Mexico a private investigator responding to an allegation from Republican Party operatives questioned voter's eligibility to vote in a June primary. *Id.* The Mexican American Legal Defense and Education Fund sued on behalf of the investigated citizens who were deemed eligible voters. *Id.* Other federal and state statutes that define voter intimidation are discussed *infra* Part II.B.

80. See 42 U.S.C. § 1971(b) (2006).

81. See NAT'L NETWORK FOR ELECTION REFORM, *supra* note 19, at 2.

82. See DONSANTO & SIMMONS, *supra* note 68, at 53.

83. Press Release, Sen. Barack Obama, Obama Bill Would Make Election Fraud, Voter Intimidation Illegal (June 7, 2007), *available at* <http://sweetness-light.com/archive/legislation-you-get-from-an-acorn-organizer>. The unsuccessful Obama bill, co-sponsored by New York Sen. Charles Schumer, linked deceptive practices and intimidation, defining "deceptive practices" as "involv[ing] the dissemination of false information intended to prevent voters from casting their ballots, *intimidate* the electorate, and undermine the integrity of the electoral process." Deceptive Practices and Voter Intimidation Prevention Act of 2007, S. 453, 110th Cong. § 2 (2007) (emphasis added).

suppression,⁸⁴ which seeks to decrease the number of eligible voters and, generally, take the electoral power away from individuals or groups; it also often uses deception or threats to accomplish this goal. PIN admits that no federal statute currently exists that criminalizes voter suppression.⁸⁵

The nature of voter suppression and the ability to document examples of voter deception reinforce the need to prohibit the act of diluting the votes of eligible voters under the Equal Protection Clause. Although voter intimidation and deception are similar and statutes exist specifically for intimidation and fraud, no federal legislation directly addresses deception.⁸⁶ Although documented occasions of voter deception exist, few instances exist in the voter fraud context. In fact, the Court noted in *Crawford v. Marion County Election Board*⁸⁷ that Indiana had no history of in-person voter fraud.⁸⁸ Yet, it passed legislation arguing that it was compelled to provide protections for its citizens against actions that it perceived as a threat to the democratic process.⁸⁹ The same, however, is true in the voter deception area and examples of deception are plentiful yet receive less attention.⁹⁰

II. DECEPTIVE LAWS

The Fifteenth Amendment⁹¹ of the U.S. Constitution prohibits the denial of the right to vote on the basis of “race, color or previous condition of servitude.” Other amendments prohibit discrimination based on sex⁹² and age.⁹³ A post-Civil

84. PIN defines voter suppression as follows:

Voter suppression schemes are designed to ensure the election of a favored candidate by blocking or impeding voters believed to oppose that candidate from getting to the polls to cast their ballots. Examples include providing false information to the public—or a particular segment of the public—regarding the qualifications to vote, the consequences of voting in connection with citizenship status, the dates or qualifications for absentee voting, the date of an election, the hours for voting, or the correct voting precinct. Another voter suppression scheme, attempted recently with partial success, involved impeding access to voting by jamming the telephone lines of entities offering rides to the polls in order to prevent voters from requesting needed transportation.

DONSANTO & SIMMONS, *supra* note 68, at 61.

85. *Id.*

86. *See supra* Part II.

87. 128 S. Ct. 1610 (2008).

88. *Id.* at 1617-18.

89. *Id.* at 1619.

90. *See infra* Part II.B.

91. U.S. CONST. amend. XV, §§1, 2. The Fifteenth Amendment of the U.S. Constitution states: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation.” *Id.*

92. U.S. CONST. amend. XIX, § 1. The Nineteenth Amendment of the U.S. Constitution states: “The right of citizens of the United States to vote shall not be denied or abridged by the

War statute, 18 U.S.C. § 241, sought to address efforts to deprive Blacks of their Constitutional rights, including the right to vote.⁹⁴ Despite this early effort to address intrusions in the right to vote, and later iterations that followed,⁹⁵ the need to combat efforts to thwart participation through voter intimidation and deception remains.

It was not until 1939 that Congress specifically sought to penalize intimidating acts that could deny eligible citizens the right to vote with the passage of the Hatch Act. In addition to addressing the appropriate level of political activity for federal employees, the law also made it illegal to intimidate voters in federal elections.⁹⁶ Prior to the passage of the VRA, prosecutors utilized 42 U.S.C. § 1971(b) to counter voter-intimidation.⁹⁷ In many instances, prosecutors were thwarted by the statutes requirement proof of “purposeful

United States or by any State on account of sex.” *Id.*

93. U.S. CONST. amend. XXVI. The Twenty-sixth Amendment of the U.S. Constitution provides that persons who are eighteen or older are eligible to vote. *Id.*

94. *See* 18 U.S.C. § 241 (2006). This statute provides in part:

If two or more persons conspire to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . . [t]hey shall be fined under this title or imprisoned not more than ten years, or both

This includes protections for the right to vote. *See Wilkins v. United States*, 376 F.2d 552, 554 (5th Cir. 1967).

95. *See infra* Parts II.A-B.

96. *See, e.g.*, S. REP. NO. 1, 76th Cong., 1st Sess. 12, 25, 39 (1939); 84 CONG. REC. 9604 (1939). The portion of the Hatch Act that addresses voter intimidation is codified at 18 U.S.C. § 594 (2006) and states in part:

[S]uch other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives . . . at any election held solely or in part for the purpose of electing such candidate, shall be fined under this title or imprisoned not more than one year, or both.

Id.

97. The case law indicates that several pre-VRA cases were successful. *See, e.g.*, *United States v. Beaty*, 288 F.2d 653, 655-56 (6th Cir. 1961) (finding relief against economic coercion, involved eviction of black sharecroppers); *United States v. Wood*, 295 F.2d 772, 781 (5th Cir. 1961) (granting relief against state prosecution of a black engaged in voter-registration work); *United States v. Clark*, 249 F. Supp. 720, 828 (S.D. Ala. 1965) (granting relief against baseless arrests and unjustified prosecutions). Others may have been thwarted by the inability to prove purposeful discrimination. *See, e.g.*, *United States v. Bd. of Educ. of Greene County, Miss.*, 332 F.2d 40, 46 (5th Cir. 1964) (affirming a decision involving a school board’s refusal to rehire a black teacher who took part in voter registration activities); *United States v. Edwards*, 333 F.2d 575, 578-79 (5th Cir. 1964) (affirming a trial court’s decision involving a physical attack on blacks who sought to register to vote).

discrimination.”⁹⁸ Congress’s passage of the VRA,⁹⁹ and in particular Section 11(b) of that legislation, made it clear that the government was not required to prove that the acts were purposefully discriminatory. Since the passage of Section 11(b), however, the federal government has rarely used this provision to pursue voter intimidation and attempts to use it as a means to prevent and deter voter intimidation have been largely unsuccessful.

A. *Dormant Federal Statutes*

In analyzing existing federal statutes and enforcement, neither clear definition nor authority exists for prosecuting the act of voter deception. In some instances, well-respected governmental authorities have said that the federal government lacks the authority to pursue deceptive practices.¹⁰⁰ Ambiguities remain in the federal law context regarding deceptive practices.¹⁰¹ The justified focus on the twentieth-century issue of voter intimidation to allow access, and the twenty-first century focus on vote fraud in some instances to deny access, necessitates congressional and state legislative attention.

Additionally, 42 U.S.C. § 1971(b) and Section 11(b) of the VRA, as well as the

98. During the House Hearings on passage of the VRA, then-Attorney General Katzenbach said: “There has been case after case of similar intimidation—beatings, arrests, lost jobs, lost credit, and other forms of pressure against Negroes who attempt to take the revolutionary step of registering to vote.” *Voting Rights: Hearings on H.R. 6400 Before the Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. 9 (1965) (statement of Att’y Gen. Nicholas Katzenbach).

Attorney General Katzenbach also said that

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

Id. at 11.

99. President Lyndon B. Johnson called the VRA of 1965, “one of the most monumental laws in the entire history of American freedom.” DAVID J. GARROW, *PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965*, at 132 (1978) (citing *PUBLIC PAPERS OF THE PRESIDENTS, LYNDON B. JOHNSON, 1965*, at 840-43); *see also* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970); Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982); Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246 (2006); *see generally* *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008), *prob. juris. noted*, 129 S. Ct. 894 (mem.), *rev’d and remanded*, 129 S. Ct. 2504 (2009).

100. *See* CRAIG DONSANTO, *FEDERAL PROSECUTION OF ELECTION OFFENSES* 749, 795 (7th ed., 1689 PLI/Corp. 2008) (stating although some acts are “reprehensible” they are beyond the reach of federal statutes, such as “distributing inaccurate campaign literature”).

101. For a discussion of election law statutes, *see*, for example, Pardo, *supra* note 78; David C. Rothschild & Benjamin J. Wolinsky, *Election Law Violations*, 46 AM. CRIM. L. REV. 391 (2009).

NVRA, statutes that the U.S. Department of Justice Civil Rights Division enforces, do not contain criminal penalties.¹⁰² A major shortcoming lies in the lack of criminal penalties.

1. *Federal Criminal Penalties and Enforcement.*—The federal criminal statute falls far short of enforcement and meaningful penalties for voter intimidation and deception. PIN enforces criminal use of threats or violence to coerce voters in voter registration, voting or uses voter registration applications in a fraudulent manner.¹⁰³ However, PIN has not prosecuted persons for misleading or false information under this statute.¹⁰⁴

PIN believes that a plausible vehicle for broad acts of voter suppression and more specific acts of intimidation prosecutions is 18 U.S.C. § 241, which considers it a felony to “conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him the Constitution or laws of the United States.”¹⁰⁵

In *United States v. Tobin*,¹⁰⁶ the federal government charged a Republican Party official with jamming phone lines in an effort to affect the hotly contested 2002 U.S. Senate election in New Hampshire.¹⁰⁷ The court found that 18 U.S.C. § 241 was applicable and imprisoned the official for three months.¹⁰⁸ This statute, however, has been rarely used in the voting context and only with varying

102. Section 1971(c) authorizes the Attorney General to bring civil actions for “preventive relief” against violations of § 1971(b). 42 U.S.C. § 1971(c) (2006). Section 11(b) of the VRA does not include criminal penalties. *Id.* § 1973i(b).

103. *See* 18 U.S.C. § 241 (2006).

104. Most recently, PIN prosecuted a Republican operative in a voter suppression scam in New Hampshire using 18 U.S.C. § 241. *United States v. Tobin*, No. 04-CR-216-01-SM, 2005 WL 3199672 at *1, *3 (D.N.H. Nov. 30, 2005) (holding that a conspiracy to interfere with a person’s right to vote violates 18 U.S.C. § 241).

105. 18 U.S.C. § 241. The Supreme Court has found that voting is a fundamental right. *See Wesberry v. Sanders*, 376 U.S. 1 (1964) (holding that apportionment of congressional districts so that single congressman represented from two to three times as many Fifth District voters as were represented by each of congressmen from other Georgia districts grossly discriminated against voters in Fifth District in violation of the constitutional requirement that representatives be chosen by people of the several states); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (“[T]he right of suffrage is a fundamental matter in a free and democratic society. . . . any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”).

106. 2005 WL 3199672, at *1, *3 (holding that a conspiracy to interfere with a person’s right to vote violates § 241).

107. Thomas B. Edsall, *GOP Official Faces Sentence in Phone-Jamming*, WASH. POST, May 17, 2006, at A10. One of the Republican Party’s top priorities in 2002 was to retain the New Hampshire Senate seat. *Id.* *Tobin*, the Republican National Committee regional political director, was “[o]vercome by his desire for success in the election,” he used his position to make the phone jamming scheme successful instead of stopping it. *Id.*

108. ALLEN RAYMOND, *HOW TO RIG AN ELECTION: CONFESSIONS OF A REPUBLICAN OPERATIVE* 236 (2008). The defendant, Allen Raymond chronicled his actions in a book. *Id.* at 1.

degrees of success.¹⁰⁹ Nonetheless, PIN believes that voter suppression infractions should be prosecuted and that 18 U.S.C. § 241 is the proper mechanism until Congress passes a statute that is more directly on point.¹¹⁰ This focus, however, continues to ignore the act of voter deception as a prosecutable offense and threat to the democratic process.

Although a civil statute, the NVRA's provision, 42 U.S.C. § 1973gg-10(1), prohibits the fraudulent and intimidating acts surrounding the voter registration process and includes imprisonment and monetary fines as punishment.¹¹¹ But it does not include penalties for deceptive practices, such as anonymous leaflets that indicate the wrong date for the election.

2. *Federal Civil Penalties and Enforcement.*—In the civil law context, two federal statutes currently govern voter intimidation: 42 U.S.C. § 1971(b)¹¹² and

109. See *United States v. Classic*, 313 U.S. 299, 309-10 (1941) (interpreting § 20 to apply to the deprivation of the constitutional rights of qualified voters to choose representatives in Congress).

110. See *DONSANTO & SIMMONS*, *supra* note 68, at 63 (arguing that “suppression schemes [represent] an important law enforcement priority, that such schemes should be aggressively investigated, and that, until Congress enacts a statute specifically criminalizing this type of conduct, 18 U.S.C. § 241 is the appropriate prosecutive tool by which to charge provable offenses.”).

111. 42 U.S.C. § 1973gg-10(1) provides:

A person, including an election official, who in any election for Federal office—

(1) knowingly and willfully intimidates, threatens, or coerces, or attempts to intimidate, threaten, or coerce, any person for—

(A) registering to vote, or voting, or attempting to register or vote;

(B) urging or aiding any person to register to vote, to vote, or to attempt to register or vote; or

(C) exercising any right under this subchapter; or

(2) knowingly and willfully deprives, defrauds, or attempts to deprive or defraud the residents of a State of a fair and impartially conducted election process, by—

(A) the procurement or submission of voter registration applications that are known by the person to be materially false, fictitious, or fraudulent under the laws of the State in which the election is held; or

(B) the procurement, casting, or tabulation of ballots that are known by the person to be materially false, fictitious, or fraudulent under the laws of the State in which the election is held, shall be fined in accordance with title 18 (which fines shall be paid into the general fund of the Treasury, miscellaneous receipts (pursuant to section 3302 of title 31), notwithstanding any other law), or imprisoned not more than 5 years, or both.

42 U.S.C. § 1973gg-10(a) (2006).

112. The bill that preceded these statutes and governed intimidation was the Hatch Act of 1939, which dealt with political activities of federal employees and also prohibited intimidation of voters in federal elections. *DONSANTO & SIMMONS*, *supra* note 68, at 57. The intimidation provision was a response to irregularities in the 1938 election, including economic pressure on participants in Works Progress Administration programs. Hatch Act of 1939: Information, at <http://www.answers.com/topic/hatch-act-of-1939> (last visited Mar. 14, 2010). 42 U.S.C. § 1971(b) (2006) reads as follows:

Section 11(b) of the VRA.¹¹³ These statutes give the government the ability to deter voter intimidation. The statutes' language gives prosecutors the potential to litigate against persons who interfere with the right to vote. But they have remained underutilized and leaves the purpose of the statutes unfulfilled and open to political interpretation.

In its present form, the VRA prohibits voter intimidation, but it does not include criminal penalties for such acts.¹¹⁴ Moreover, other issues, such as giving false information or voting more than once, are criminalized in § 1973i(c)-(e) and other violations under § 1973.¹¹⁵ Although § 1971(b) prohibits interfering with a constitutional right such as attempting to vote, it has been much more successful at other times, particularly in the Civil Rights era.¹¹⁶ Conversely, Section 11(b) is rarely used and has remained highly unsuccessful.¹¹⁷ The Department of Justice has brought only four lawsuits under Section 11(b) in the

No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.

42 U.S.C. § 1971(b) (2006). Section 1971(c) authorizes the Attorney General to bring civil actions for "preventive relief" against violations of § 1971(b).

113. Section 11(b) of the VRA reads as follows:

No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any other person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate

42 U.S.C. § 1973i.

114. *Id.*

115. *See id.*

116. Early suits under § 1971(b) sought injunctive relief against persons who used economic and physical threats against eligible voters. For example, in *United States v. Original Knights of the Ku Klux Klan*, 250 F. Supp. 330, 349-50 (E.D. La. 1965), the three-judge district court panel held that the defendants violated § 1971(b). The defendants admitted that they had engaged in economic coercion and other efforts to prevent blacks in Washington Parish from registering to vote. *Id.* at 337. The court rejected the defendants' contentions that § 1971(b) does not apply to private individuals and that the statute is unconstitutional. *Id.* at 349, 355. *See also* *United States v. Chappell* (sought and obtained injunctive relief against segregated voter lists); *Bell v. Home* (M.D. Ga. 1965) (sought and obtained injunctive relief against acts of intimidation, including the arrest of blacks who had refused to leave a "white" polling place).

117. *See* Paul Winke, *Why the Preclearance and Bailout Provisions of the Voting Rights Act Are Still a Constitutionally Proportional Remedy*, 28 N.Y.U. REV. L. & SOC. CHANGE 69, 117 n.290 (2003) (noting that section 11(b) prohibits intimidation by individuals but not by jurisdictions).

history of the VRA.¹¹⁸ All were brought for various violations that are contemporaneously classified as voter suppression; most are pure voter intimidation cases and only one could arguably classify as a voter deception case.¹¹⁹

The more contemporary Section 11(b) cases are informative in ascertaining the Department's philosophy towards prosecuting under the statute, which the courts have interpreted as a voter intimidation statute because of its prohibition against threats.¹²⁰ The most recent cases involve the Department of Justice filing complaints against racial minorities.¹²¹ The choice of enforcement is revealing about the impact on future enforcement of voter intimidation and deceptive practices. For example, in *United States v. Brown*, the U.S. Department of Justice, Civil Rights Division, Voting Section brought the first case pursuant to Section 2 of the VRA¹²² on behalf of white voters in Noxubee, Mississippi.¹²³

118. The first, *United States v. Harvey*, 250 F. Supp. 219, 222 (E.D. La. 1966), was filed in 1965 and was unsuccessful. *Id.* at 237. The Department alleged that, in violation of Section 11(b) and Section 1971(b), the defendants terminated sharecropping and tenant-farming relationships with blacks who had registered to vote, evicted such persons from rental homes, and discharged them from salaried jobs. *Id.* at 222. Concluding that the intimidation statutes exceeded Congress' power and that, in any event, the Department had failed to prove intimidation, the court granted judgment for the defendants. *Id.* at 226, 237.

119. *Id.* at 221 (voter intimidation); *United States v. N.C. Republican Party* (voter deception); *United States v. Brown*, 494 F. Supp. 2d 440 (S.D. Miss. 2007) (voter intimidation), *aff'd*, 561 F.3d 420 (5th Cir. 2009); Complaint, *United States v. New Black Panther Party for Self-Defense*, No. 09-0065 (E.D. Pa. Jan. 7, 2009), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/BlackPanther-Complaint-1-7-09.pdf> (voter intimidation).

120. See, e.g., *Brown*, 494 F. Supp. 440 (voter intimidation).

121. *Id.* (DOJ brought a Section 2 and Section 11(b) challenge against racial minorities for alleged voter intimidation); Complaint, *United States v. New Black Panther Party for Self-Defense*, No. 09-0065 (E.D. Pa. Jan. 7, 2009) (DOJ filed a voter intimidation challenge against members of the New Black Panther Party).

122. The VRA contains two primary enforcement provisions. Section 2 prohibits discrimination in voting based on race, color, language, or minority status. Section 5 requires specified jurisdictions to submit all of their voting administration changes to the Attorney General or U.S. District Court for the District of Columbia prior to implementation. Congress included a national prohibition against discrimination in voting in Section 2 of the Act. The provision imposes a prohibition against racial discrimination in any voting standard, practice or procedure, including redistricting plans. Under Section 2, "[p]laintiffs must demonstrate that . . . the devices result in unequal access to the electoral process." *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986).

123. *Brown*, 494 F. Supp. 2d 422. The District Court judge noted that this was certainly "an unconventional, if not unprecedented use of the Voting Rights Act." *Id.* at 443. The court opined:

[D]efendants proclaim it "preposterous" that the Justice Department—a Justice Department they maintain has for decades been wholly unresponsive to complaints of voting discrimination by black citizens—would have the temerity to come into this court claiming that blacks in Noxubee County, who were oppressed by the white establishment for 135 years and who finally gained the reins of power a mere 12 years

Under a cloud of criticism, the Department brought a voter intimidation lawsuit against African American defendants.¹²⁴ This was an interesting choice, because in most acts of voter intimidation and deception, African Americans and members of other minority communities are the victims, not the perpetrators.¹²⁵ In *Brown*,¹²⁶ the court found that the defendants had violated Section 2 of the VRA.¹²⁷ Regarding the Section 11(b) claim, the district court found that Brown's actions during a 2003 Democratic primary had "a racial element," but did not constitute a threat that affected the right to vote.¹²⁸

George W. Bush's administration brought a second case against African Americans shortly after the 2008 elections, using its Section 11(b) authority that involved poll watchers in Philadelphia, Pennsylvania.¹²⁹ In *United States v. New Black Panther Party, MS*,¹³⁰ the Department alleged that members of the New Black Panther Party brandished weapons and made racial slurs at both black and white voters outside a polling place.¹³¹ Among criticism,¹³² the newly elected

ago, have discriminated against whites in that county.

Id. at 480. The defendants further argued that white citizens in Noxubee County could not demonstrate the critical requirements under the VRA, including a history of official discrimination, under-representation in elections, discrimination in "education, employment or health," and an unresponsive government. *Id.* at 483. The defendants further argued that Section 2 was "being launched as a missile without an enemy." *Id.* at 480.

124. See Adam Nossiter, *U.S. Says Blacks in Mississippi Suppress White Vote*, N.Y. TIMES, Oct. 11, 2006, at A18, available at <http://www.nytimes.com/2006/10/11/us/politics/11voting.html>; Peter Whoriskey, *Alleged Voting Rights Violation with Twist Goes to Trial*, WASH. POST, Jan. 16, 2007, at 2, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/15/AR2007011501196.html>.

125. LOGAN, *supra* note 15. The overwhelming accounts of voter intimidation and particularly voter deception target minority communities. See *supra* notes 15-19.

126. 561 F.3d 420.

127. *Id.* at 434-35.

128. *United States v. Brown*, 494 F. Supp. 2d 440, 477 n.56 (S.D. Miss. 2007), *aff'd*, 561 F.3d 4420 (5th Cir. 2009).

129. Press Release, Dep't of Just., Justice Department Seeks Injunction Against New Black Panther Party (Jan. 7, 2009), available at <http://www.justice.gov/opa/pr/2009/January/09-crt-014.html>.

130. *United States v. New Black Panther Party for Self-Defense*, No. 09-0065 (E.D. Pa. Jan. 7, 2009), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/BlkPants-Judgmt-5-18-09.pdf>. In its complaint the Department alleged that the defendants violated Section 11(b) through "armed and uniformed personnel at the entrance to the polling location," "[t]he loud and open use of racial slurs," and essentially creating an "intimidating and threatening presence" outside the polls. Complaint at 4-5, *United States v. New Black Panther Party for Self-Defense*, No. 09-0065 (E.D. Pa. Jan. 7, 2009), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/BlackPanther-Complaint-1-7-09.pdf>.

131. The members of the New Black Panther Party outside the polling place described themselves as "security" and "concerned citizens." Youtube.com, "Security" Patrols Stationed at Polling Places in Philly, http://www.youtube.com/watch?v=neGbKHyGuHU&feature=player_

administration decided not to pursue the case and dropped the charges against the defendants.¹³³ It is not clear that the New Black Panther Party members actually intimidated voters, particularly as the police allowed one member of the New Black Panther Party to remain at the polls.¹³⁴ Nonetheless, the presence of a weapon outside of a polling site could threaten or intimidate a voter from entering. The government's dismissal of this case either demonstrated its inability to prove the necessary elements of the statute (i.e., threats, intimidation, coercion) or a political decision not to prosecute. Regardless, the government's decision to pursue and abandon this case demonstrates the powerlessness of the statute in its present form.

The federal government has brought only one case under the civil enforcement statute that arguably involved intimidation and deception. The hotly contested 1990 U.S. Senate race involving incumbent Jesse Helms and challenger Harvey Gantt¹³⁵ was especially contentious and at times extremely race-based.¹³⁶ It is commonly held that Helms regained the lead in a faltering campaign when he aired an advertisement that played to the fears and prejudices of North Carolina citizens.¹³⁷

embedded. The police removed one member of the party who held a nightstick, but allowed a second member to remain. Stu Bykofsky, *Sometimes, Intimidation Is in Eye of Beholder*, PHIL. DAILY NEWS, June 8, 2009, Local, at 6.

132. Jerry Seper, *Career Lawyers Overruled on Voting Case*, WASH. TIMES, May 29, 2009, at A1, available at <http://www.washingtontimes.com/news/2009/may/29/career-lawyers-overruled-on-voting-case/> (noting that career lawyers, who sought to pursue sanctions against the members of the New Black Panther Party, were overruled by political appointees). See Editorial, *Protecting Black Panthers; The Obama Administration Ignores Voter Intimidation*, WASH. TIMES, May 29, 2009, at A20 (arguing that the members' conduct was in clear violation of the VRA because the Act prohibits "any 'attempt to intimidate, threaten or coerce,' any voter or those aiding voters" and criticizing the Department of Justice for dropping such a "blatant intimidation" case).

133. Seper, *supra* note 132.

134. See Bykofsky, *supra* note 131.

135. Harvey Gantt was a civil rights pioneer. He was the first African American admitted to Clemson University in 1963, and he graduated with honors from Clemson and received a master's degree in city planning from the Massachusetts Institute of Technology. Harvey Gantt, NEWSOBSERVER.COM, http://projects.newsobserver.com/under_the_dome/profiles/harvey_gantt. He served as mayor of Charlotte, North Carolina from 1983 to 1987 and on the city council from 1974 to 1983. *Id.* He ran unsuccessfully for U.S. Senate against Jesse Helms in 1990 and in 1996. *Id.*

136. *Id.*

137. In the "White Hands" advertisement, the commercial begins with a white male—showing only his hands—opening a letter and then throwing it away. The announcer then says,

You needed that job, and you were the best qualified. But they had to give it to a minority because of a racial quota. Is that really fair? Harvey Gantt says it is. Gantt supports Ted Kennedy's racial quota law that makes the color of your skin more important than your qualifications. You'll vote on this issue next Tuesday. For racial quotas, Harvey Gantt. Against racial quotas, Jesse Helms.

In a continuation of these tactics and an example of classic voter deception, predominately African American communities received 125,000 postcards containing misleading information on voter eligibility and threatening them with vote fraud prosecutions.¹³⁸ After the election, a Department of Justice lawsuit resulted in a consent decree prohibiting the state's Republican Party "from targeting voters based on their 'racial minority status,' and required it to obtain prior court approval for its anti-fraud activities."¹³⁹ The Department settled the case based on its authority to protect against race discrimination under Section 2 of the VRA, but arguably not under its authority contained within the civil penalties.¹⁴⁰

The federal government's lack of enforcement of voter intimidation and its most recent application to traditional beneficiaries of the VRA are quite instructive. Department of Justice officials questioned whether Section 11(b) could apply to deceptive practices, such as the Senator Cardin example,¹⁴¹ but the officials used the statute against black citizens, in the face of overwhelming evidence that vote intimidation is typically committed against minorities, not by them. Granted, the federal Section 11(b) cases did not involve anonymous actions or publications; however, the need to enjoin practices promulgated against minority communities that intimidate and deceive voters is evident. The choice and lack of enforcement of Section 11(b) and other statutes to address

YouTube.com, Jesse Helms's "Hands" ad, <http://www.youtube.com/watch?v=KIyewCdXMzk>. After airing the "White Hands" political advertisement, Senator Helms moved up considerably in the polls and ultimately won the election. See ABC News Services, *Sen. Jesse Helms Dead at 86: Polarizing North Carolina Lawmaker Known as 'Senator No'*, July 4, 2008, <http://abcnews.go.com/US/story?id=5309543&page=1>.

138. Press Release, N.C. Democratic Party, North Carolina Democrats Announce Unprecedented Election Protection Program (Aug. 3, 2007), available at http://www.ncdp.org/north_carolina_democrats_election_protection; see U.S. ELECTION ASSISTANCE COMM'N, *supra* note 39, at 13-14 (defining election crimes to include dissemination of false information regarding eligibility to vote).

139. JUSTIN LEVITT & ANDREW ALLISON, REPORTED INSTANCES OF VOTER CAGING 3 (2007), available at http://www.brennancenter.org/pager-i/d/download_file_49609.pdf. Such direct mail marketing campaigns are also known as "vote caging" schemes, utilized to indicate potential vote challenges. Vote caging is

a three-stage process designed to identify persons in another party or faction whose names are on a voter registration list, but whose legal qualification to vote is dubious, and then to challenge their qualification either before or on Election Day. Ostensibly, caging is an attempt to prevent voter fraud. In practice, it may have the effect of disenfranchising voters who are legitimately registered.

Chandler Davidson et al., *Vote Caging as a Republican Ballot Security Technique*, 34 WM. MITCHELL L. REV. 533, 537-38 (2008) (discussing voter deception through vote caging methods).

140. Although this case could serve as a classic voter intimidation or deception case, the case was brought and settled under a purposeful discrimination theory under Section 2 of the VRA.

141. See INTRODUCTION, *supra*. Samples of such flyers are available at NATIONAL CAMPAIGN FOR FAIR ELECTIONS, *supra* note 1.

other voter suppression tactics evidence the need for more protections. With only a few Section 11(b) cases in the history of the statute and a lack of a federal statute that unequivocally addresses deceptive practices, the impotence of the civil statutes and the indecision of the criminal statutes in their current configuration are clearly revealed. In fact, the government has yet to bring a successful intimidation case under the civil statute.¹⁴²

B. State Voter Intimidation and Deceptive Practices Statutes

States have instituted an array of statutes seeking to address voter intimidation, fraud, and deception. Thirty-nine states have statutes that specifically bar some form of voter intimidation, deceptive practices, or both. Most laws can be divided into three categories, based on the type of false information that is outlawed. The first category of statutes outlaw the dissemination of false information regarding election administration, such as registration and polling site activity.¹⁴³ The second category outlaws false information on candidates or issues, such as making a false statement about a candidate or a proposition,¹⁴⁴ while the third category of statutes address both election administration and candidate or other substantive issues.¹⁴⁵ Of the thirty-nine states that have laws addressing some form of voter intimidation and deceptive practices, only nine states consider a violation of their voter intimidation statutes as a felony;¹⁴⁶ and only fifteen find the offender guilty of a

142. See *United States v. Brown*, 494 F. Supp. 2d 440, 477 n.56 (S.D. Miss. 2007), *aff'd*, 561 F.3d 420 (5th Cir. 2009) (noting the government's lack of pursuit and triumph and that "the Government has given little attention to this claim, and stat[ing] that it has found no case in which plaintiffs have prevailed under this section").

143. See, e.g., VA. CODE ANN. § 24.2-1005.1 (West 2007) (considering it a misdemeanor to knowingly communicate false election information to a registered voter about the time, date or place of voting and also prohibiting false information regarding a voter's polling site or registration status).

144. See, e.g., WIS. STAT. ANN. § 12.05 (West 2004) (prohibiting "false representation[s] pertaining to a candidate or referendum which [are] intended . . . to affect voting at an election").

145. For example, Louisiana precludes the dissemination of any "oral, visual, or written material containing . . . a false statement about a candidate . . . or about a proposition." LA. REV. STAT. ANN. § 18:1463 (2004) as well as information regarding voting or registration. *Id.* §§ 18:1461, 18:1461.1. The parsing of various types of false information to election administration, candidates, and the like helps to ensure that these laws are not overbroad and consistent with the state's compelling interest. See *supra* Part II.B (discussing constitutional considerations).

146. Perhaps the most stringent state is South Carolina, which imposes a ten-year sentence of imprisonment and possibly a fine for a violation of its voter intimidation statute. The South Carolina statute reads:

A person who, at any of the elections, general, special, or primary, in any city, town, ward, or polling precinct, threatens, mistreats, or abuses a voter with a view to control or intimidate him in the free exercise of his right of suffrage, is guilty of a felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more

misdemeanor.¹⁴⁷ Of those states that include penalties for intimidation, only five states include “fraud” in their statutes penalizing intimidation.¹⁴⁸ Only four states also penalize voter deception.¹⁴⁹

On the issue of e-deception, a few states include laws that are broadly construed such that they may apply to the traditional means of deception *and* online voting deception.¹⁵⁰ The litany of statutes and their attributes leads at best to piecemeal enforcement.¹⁵¹ In most cases, the intimidation or fraud cases are

than ten years, or both.

S.C. CODE ANN. § 7-25-80 (1976).

147. The majority of states that impose penalties for voter intimidation only find offenders guilty of misdemeanors; most impose a class A misdemeanor. *See, e.g.*, ALA. CODE § 17-17-33 (1975) (class A misdemeanor for intimidation, threats, etc.); ARK. CODE ANN. § 7-1-103 (West 2010) (class A misdemeanor for intimidation, threats, etc.); TENN. CODE ANN. § 2-19-115 (West 2009) (class A misdemeanor for “force or threats”); VA. CODE ANN. § 24.2-607 (2006) (class 1 misdemeanor for any person who “hinder[s], intimidate[s] or interfere[s] with any qualified voter”). Delaware allows a civil action against the offender and allow the petitioner to recover \$500. DEL. CODE ANN. tit. 15, § 5162 (West 2006).

148. *See* CAL. ELEC. CODE § 18573 (West 2003) (stating that a person is “guilty of a felony” if he or she “defrauds any voter at any election by deceiving and causing him or her to vote for a different person for any office than he or she intended or desired to vote for”); IDAHO CODE ANN. § 18-2305 (West 1972) (determining that “[a] person who . . . defrauds any elector . . . is guilty of a misdemeanor”); MD. CODE ANN. ELEC. LAW § 16-201 (2009) (maintaining that “[a] person may not willfully and knowingly [i]nfluence or attempt to influence a voter’s decision through . . . fraud”); S.C. CODE § 7-25-190 (2009) (pronouncing that “[a] person . . . who by force, intimidation, deception, [or] fraud . . . controls the vote of any voter . . . is guilty of a felony”); W. VA. CODE ANN. § 3-9-10 (West 2002) (declaring that “[a]ny person who shall, by . . . fraud . . . prevent or attempt to prevent any . . . voter . . . from freely exercising his right of suffrage at any election” is guilty of a misdemeanor).

149. Florida, Illinois, Kansas, and Minnesota penalize voter deception. *See* FLA. STAT. ANN. § 104.0615 (West 2008) (including in the purview of the statute false information to induce or compel an individual to vote or refrain from voting); 10 ILL. COMP. STAT. ANN. 5/29-4 (West 2003) (penalizing “[a]ny person who, by . . . deception . . . knowingly prevents” another from voting or registering to vote); KAN. STAT. ANN. § 25-2415 (1974) (including the mailing or publishing of false information as proscribed voter intimidation); MINN. STAT. ANN. § 204C.035 (2006) (prohibiting a person from “knowingly deceiv[ing] another person” about election information).

150. *See, e.g.*, ALA. CODE § 17-17-38 (1975) (prohibiting “[a]ny person . . . by any . . . corrupt means, [from] attempt[ing] to influence any elector in giving his or her vote, deter[ring] the elector from giving the same, or disturb[ing] or hinder[ing] the elector in the free exercise of the right of suffrage”). For a comprehensive analysis of current laws and their applicability to online voter deception, see Common Cause, *supra* note 23.

151. *See, e.g.*, *Kamins v. Bd. of Elections for D.C.*, 324 A.2d 187 (D.C. 1987) (finding that certain write-in voters should have been counted and remanded for other proceedings); *Pabey v. Pastrick*, 816 N.E.2d 1138, 1151 (Ind. 2004) (granting relief to plaintiff for proving “that a deliberate series of actions occurred”); *Rogers v. Holder*, 636 So. 2d 645 (Miss. 1994) (upholding election results despite known departures from absentee voting provisions).

brought, while the deceptive practices are allowed to continue without penalty or investigation.

Although most state voter intimidation statutes contain language similar to the federal statutes prohibiting intimidation, e.g., “[i]t shall be unlawful . . . to intimidate, threaten, or coerce,”¹⁵² the best-structured statutes that would encompass deception do not limit the illegal actions to those containing threats. Those statutes highlight the intentional falsehood to manipulate voters regarding an election administration matter, such as the date of the election. Nonetheless, state statutes that specifically address deceptive practices can serve as a model for other legislation. A Kansas statute that became effective in 2001, serves as a model for states seeking to encompass the distinct instances of voter suppression, including deception. Statutes that include criminal or harsh civil penalties can have a deterrent effect and lessen the impact of these practices.

Whether on the state or federal level, the need for a more precise criminalization of deceptive practices is warranted. Most statutes addressing some form of “election crimes” ignore the impact and harm that voter deception causes. Although some statutes exist for either voter fraud or intimidation, few comprehensive laws address documented and resurgent deceptive practices. Thus, acts of voter dilution can best be addressed through vigorous enforcement and more inclusive interpretation of existing statutes.

III. ENDING DECEPTION

The history of election regulation in America “reveals a persistent battle against two evils: voter intimidation and election fraud.”¹⁵³ Voter intimidation and deceptive practices have in large part not been regulated or litigated in the United States.¹⁵⁴ Any revisions or new regulations must adequately include constitutional considerations that secure and protect the right to vote. Although the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides the authority to combat voter deception, Congress should also strengthen existing statutes to address deceptive practices.

A. *Equal Protection Clause*

Governments have a significant interest in protecting their citizens from deceptive practices. The U.S. Supreme Court has found compelling interests in

152. See, e.g., ALA. CODE § 17-17-33 (1975) (effective January 1, 2007) (barring intimidation and threats for the election of “any candidate for state or local office or any other proposition at any election”). The statute also qualifies intimidation as a class A misdemeanor. *Id.*

153. *Burson v. Freeman*, 504 U.S. 191, 206-10 (1992) (holding that a Tennessee statute prohibiting the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to any polling place was narrowly tailored to serve a compelling state interest in preventing voter intimidation and election fraud, as required by the First Amendment).

154. See *supra* Part II.A.

laws that sought to prevent voter intimidation¹⁵⁵ and voter fraud.¹⁵⁶ The right to vote and participate in the political process free from intimidation and fraud is strikingly similar to issues surrounding deceptive practices. Voting is different from other rights in a democratic society, in that the right to vote and to do so without interference is a linchpin of our democracy.¹⁵⁷ Accordingly, efforts to distort, mislead, connive, and deceive are worthy of federal constitutional protections. The Equal Protection Clause of the Fourteenth Amendment, as well as various existing federal and state statutes, assist the government in its pursuit of free access to the franchise.

In *Crawford v. Marion County*,¹⁵⁸ the U.S. Supreme Court found that Indiana had two legitimate reasons for adopting a voter identification law that limited the number of acceptable forms of identification to government-issued photo identifications.¹⁵⁹ The Court found that Indiana's desire to deter and detect voter fraud and its interest in promoting voter confidence were sufficient to find the voter identification statute constitutional.¹⁶⁰ These ideals are paramount in the need to provide governmental protection against deceptive practices. Governmental entities possess a need to deter and detect voter deception and the lack of enforcement of deceptive practices adversely affects voter confidence, particularly in incidents such as the Franklin County, Ohio, flyer that appeared to have the stamp of a legitimate governmental office.¹⁶¹ These kinds of acts tend to cause voters to question the integrity of the electoral process. Regarding public confidence, the *Crawford* Court found that public confidence "encourage[d] citizen participation in the democratic process."¹⁶²

B. First Amendment Concerns

Although an Equal Protection argument exists for persistent vigilance

155. See *Burson*, 504 U.S. at 206.

156. See *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1623 (2008) (holding that purported state interests for an Indiana statute requiring government-issued photo identification to vote were sufficient to justify the limitation imposed on voters).

157. See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (declaring that "the political franchise of voting is . . . regarded as a fundamental political right, because [it is] preservative of all rights").

158. 128 S. Ct. 1610 (2008).

159. *Id.* at 1616-17.

160. *Crawford*, 128 S. Ct. at 1617, 1624. Each of Indiana's asserted interests is unquestionably relevant to its interest in protecting the integrity and reliability of the electoral process. See *id.* at 1617 (noting that the opponents of the law did not "question the legitimacy of the interests the State has identified").

161. See *supra* Part I.A.

162. *Crawford*, 128 S. Ct. at 1620 (holding that state's interests identified as justifications for Indiana statute requiring government-issued photo identification to vote were sufficient to justify any limitation imposed on voters). Indiana's interest in protecting public confidence in elections, although closely related to its interest in preventing voter fraud, has independent significance because such confidence encourages citizen participation in the democratic process.

regarding voter deception, other constitutional constraints must also be considered. The Supreme Court has held that “[t]he freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state.”¹⁶³

In considering voter intimidation and deceptive practices, the fundamental right to vote and political speech are firmly juxtaposed. This juxtaposition requires balancing the right to vote with free speech and must be considered when addressing the dearth of all-inclusive voter suppression legislation. In constructing and strengthening state and federal legislation, one must not only consider the rights and freedoms of the affected citizenry, but also the rights of the deceiver.

1. *First Amendment and Political Speech.*—The First Amendment of the U.S. Constitution protects the right to speak freely.¹⁶⁴ This right to speak freely, however, should not include the right to speak falsely with intent to impair another’s rights. A major purpose of the First Amendment is to protect “the free discussion of governmental affairs.”¹⁶⁵ The Supreme Court has also noted, “For speech concerning public affairs is more than self-expression; it is the essence of self-government.”¹⁶⁶ Freedom of expression is at the root of our participatory democracy.¹⁶⁷ The First Amendment serves the greater purpose of promoting a democratic government and serves the people’s interest in having the information they need to enable self-government.¹⁶⁸ Historically, the First Amendment has

163. *Thornhill v. Alabama*, 310 U.S. 88, 95, 101-02 (1940) (citations omitted) (noting that “[t]he freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment”).

164. U.S. CONST. amend. I (providing “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”). The Fourteenth Amendment to the U.S. Constitution makes the First Amendment applicable to the states. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964).

165. *Mills v. Alabama*, 384 U.S. 214, 218, 220 (1966) (holding that the Alabama Corrupt Practices Act as providing criminal penalties for publication of newspaper editorial on election day urging people to vote a certain way on specific issues violated the constitutional protection of free speech and press).

166. *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (holding that the statute is unconstitutional as punishing false statements against public officials 1) if made with ill will without regard to whether they were made with knowledge of their falsity or in reckless disregard of whether they are true or false or 2) if not made in reasonable belief of their truth).

167. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640-41 (1994) (holding that people should decide for themselves “the ideas and beliefs deserving of expression, consideration, and adherence” and noting that “[o]ur political system and cultural life rest upon this ideal”).

168. Carl E. Schneider, *Free Speech and Corporate Freedom: A Comment on First National*

“preserve[d] an uninhibited marketplace of ideas in which truth will ultimately prevail.”¹⁶⁹ The First Amendment protections are paramount on issues involving political debate.¹⁷⁰

For these reasons, the Supreme Court has continued to protect freedom of political speech¹⁷¹ and upholds statutes that affect this fundamental right only if such restrictions “are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”¹⁷²

The Supreme Court defines core speech protected under the First Amendment as “both the expression of a desire for political change and a discussion of the merits of the proposed change.”¹⁷³ In limiting political speech, the legislative body “must . . . be prepared . . . to articulate and support its argument with a reasoned and substantial basis demonstrating the link between the regulation and the asserted governmental interest.”¹⁷⁴

The Supreme Court has found various expressions to be protected political speech, inter alia, the right to peaceably assemble,¹⁷⁵ the right to criticize

Bank of Boston v. Bellotti, 59 S. CAL. L. REV. 1227, 1238, 1267, 1269 (1986) (arguing that in *Bellotti*, “the Court confirmed its discovery that commercial speech is not unprotected by the [F]irst [A]mendment and announced a novel doctrine that corporate speech is not unprotected by the [F]irst [A]mendment”).

169. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390, 400-01 (1969) (holding that the FCC’s order requiring that a person who is attacked on the air receive the opportunity to rebut was authorized by Congress and enhanced freedom of speech under the First Amendment rather than infringing this right).

170. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (finding that the First Amendment “has its fullest and most urgent application precisely to the conduct of campaigns for political office”).

171. This protection applies to written materials and verbal communications. See *Lamont v. Postmaster Gen.*, 381 U.S. 301, 302, 305 (1965) (finding a statute unconstitutional that requires the post office department to detain and destroy unsealed mail from foreign countries that is determined to be communist political propaganda unless addressee returns a reply card indicating his desire to receive such piece of mail).

172. *United States v. Grace*, 461 U.S. 171, 177, 183 (1983) (quoting *Perry Educ. Ass’n v. Perry Local Educator’s Ass’n*, 460 U.S. 37, 45 (1983)) (holding that statute denying “‘display’ of any flag, banner, or device designed or adapted to bring public notice to a party, organization, or movement” in or on the grounds of the Supreme Court building was unconstitutional because it could not be justified as a reasonable place provision).

173. *Meyer v. Grant*, 486 U.S. 414, 421-22, 428 (1988) (holding that a prohibition against paying circulators violated the First Amendment).

174. *Mitchell v. Comm’n on Adult Entm’t Establishments of Del.*, 10 F.3d 123, 132 (3d Cir. 1993) (citation omitted).

175. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578 (1980) (indicating that “[p]eople assemble in public places not only to speak or to take action, but also to listen, observe, and learn; indeed, they may ‘assembl[e] for any lawful purpose’”) (quoting *Hague v. CIO*, 307 U.S. 496, 519 (1939)).

government officials,¹⁷⁶ campaign finance,¹⁷⁷ signage,¹⁷⁸ circulating petitions for signatures¹⁷⁹ with limited regard for truth,¹⁸⁰ and speech regarding the American flag.¹⁸¹ Not all speech is protected, including some political speech, e.g., false commercial speech,¹⁸² electioneering within a certain distance of an entrance to a polling place on Election Day,¹⁸³ and destroying secret service certificates.¹⁸⁴

The Supreme Court has also noted that “[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.”¹⁸⁵ A statute is suspect under content-

176. *Bond v. Floyd*, 385 U.S. 116, 132, 136-37 (1966) (right to oppose national foreign policy and other governmental actions or criticize government officials).

177. *Fed. Election Comm’n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 440 (2001) (concluding that “[s]pending for political ends and contributing to political candidates both fall within the First Amendment’s protection of speech and political association”); *see also* *Buckley v. Valeo*, 424 U.S. 1, 44 (1976) (holding that provisions limiting individual contributions to campaigns were constitutional despite First Amendment objections).

178. *Sambo’s of Ohio, Inc. v. City Council of Toledo*, 466 F. Supp. 177, 179 (1979) (noting that communication by signs and posters is considered to be “a pure matter of speech”).

179. *Meyer v. Grant*, 486 U.S. 414, 421 (1988) (“The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change.”).

180. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) (“Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker.”).

181. The Court has upheld decisions recognizing the communicative nature of conduct relating to flags, including attaching a peace sign to the flag, refusing to salute the flag, and displaying a red flag. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 404 (1989) (citing *Spence v. Washington*, 418 U.S. 405, 409-10 (1974)) (upholding attaching peace flag to sign); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632, 636 (1943) (finding that refusing to salute the flag is constitutionally protected); *Stromberg v. California*, 283 U.S. 359, 368-70 (1931) (finding that displaying a red flag is constitutionally protected).

182. *United States v. Bell*, 414 F.3d 474, 479-80 (2005) (“The threshold inquiry is whether the commercial speech involves unlawful activity or is misleading.”)

183. *Burson v. Freeman*, 504 U.S. 191, 206, 211 (1992). In *Burson*, the Court recognized that the exercise of free speech rights conflicts with the fundamental right to cast a ballot in an election free from intimidation and fraud. *Id.* at 211. Given the conflict between these two rights, the Court held that “requiring solicitors to stand 100 feet from the entrances to polling places does not constitute an unconstitutional compromise.” *Id.*

184. *United States v. O’Brien*, 391 U.S. 367, 375 (1968). The Court held that “[a] law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers’ licenses, or a tax law prohibiting the destruction of books and records.” *Id.*

185. *Regan v. Time, Inc.*, 468 U.S. 641, 648-49, 659 (1984) (holding that the purpose requirement contained in a statute that regulated publication or production of illustrations of federal currency was unconstitutional).

based scrutiny if it “threatens to suppress the expression of particular ideas or viewpoints.”¹⁸⁶ But a statute is suspect under content-neutral scrutiny when it is “intended to serve purposes unrelated to the content of the regulated speech, despite their incidental effects on some speakers but not others.”¹⁸⁷

A statute similar to the one used in Kansas serves as an example of content-neutral nondiscriminatory regulation on political speech. Indeed, the Kansas statute provides a complete description of voter deception, including electronic deception. This statute makes it a crime to intimidate, threaten, coerce, or attempt to intimidate “for the purpose of interfering with the right . . . to vote” and specifically outlaws deceptive practices by criminalizing “mailing, publishing, broadcasting, telephoning, or transmitting by any means false information.”¹⁸⁸ It is sufficiently broad, but not unduly burdensome or vague. It specifically outlaws certain practices that are generally deemed voter suppression, and it also specifically identifies actions that constitute voter deception. The statute is limited in scope and addresses the state’s need to protect its citizens from voter deception.

2. *Political Speech and Anonymity.*—The anonymous nature of voter deception makes it difficult to prosecute. Moreover, the advent of electronic deception exacerbates this difficulty.¹⁸⁹ The Constitution protects the ability to remain anonymous¹⁹⁰ but does not protect against some false speech,¹⁹¹ while protecting others.¹⁹² For example, it can protect a candidate’s ability to stretch the truth, but no such protection exists for intentionally distributing false political

186. *Leathers v. Medlock*, 499 U.S. 439, 443, 447 (1991) (holding that Arkansas’s extension of its generally applicable sales tax to cable television services alone, or to cable and satellite services, while exempting print media, does not violate First Amendment).

187. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121-22 n.* (1991).

188. KAN. STAT. ANN. § 25-2415 (2000). Kansas defines voter intimidation as threats, coercion or inter alia, publishing false information, which is probably the most closely targeted statute that addresses voter deception. *See id.*

189. *See generally* Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497 (2009) (discussing the difficulty in pursuing hate speech conducted via the Internet).

190. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995).

191. *United States v. Bell*, 414 F.3d 474, 480 (2005) (“The threshold inquiry is whether the commercial speech involves unlawful activity or is misleading.”).

192. The Court will protect a candidate’s promise to the electorate. *See Brown v. Hartlage*, 456 U.S. 45, 53, 55 (1982), which holds:

The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates’ personal qualities and their positions on vital public issues before choosing among them on election day.

Id. at 53 (quoting *Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976)).

information.

Although the Supreme Court has prescribed protections to allow for political privacy in publishing material for public consumption and in developing legislation to counter deceptive practices, legislators must consider the nature of the actions that regularly involve the distribution of anonymous political literature. The Supreme Court has held, “[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority.”¹⁹³

McIntyre v. Ohio Elections Commission demonstrates how the dissemination of knowingly false information differs from expressing one’s political opinion.¹⁹⁴ The Court noted the importance of anonymous political literature¹⁹⁵ and the state’s authority to limit the right to free speech to protect against false or misleading information and fraud.¹⁹⁶ The Court determined that the proper analysis involved the application of “‘exact[ing] scrutiny’ and [would] . . . uphold the restriction only if it is narrowly tailored to serve an overriding state interest.”¹⁹⁷

Laws requiring identification of an author on political literature were primarily developed to protect citizens and enable them to assess the information’s validity and integrity.¹⁹⁸ But preventative measures must not come at the expense of eligible voters and should not involve efforts to outwit voters. The Supreme Court has found that voter intimidation severely burdens on the right to vote and efforts to prevent intimidation must involve a compelling state interest.¹⁹⁹

193. *McIntyre*, 514 U.S. at 357.

194. The Supreme Court reviewed Ohio’s blanket prohibition against distributing anonymous campaign literature. The Court considered whether the promotion was constitutional as applied to the plaintiff’s distribution of unsigned flyers opposing a school tax. *Id.* at 337-38, 340.

195. The Court noted, “‘Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.’” *Id.* at 341 (quoting *Talley v. California*, 362 U.S. 60, 64 (1960)).

196. *See id.* at 348; *see also* Rachel J. Grabow, Note, *McIntyre v. Ohio Elections Commission: Protecting the Freedom of Speech or Damaging the Electoral Process?*, 46 CATH. U. L. REV. 565, 570 (1997) (detailing the First Amendment case law that addresses anonymous speech and assesses the right to distribute anonymous literature under the Supreme Court’s First Amendment rulings); Note, *Gutter Politics and the First Amendment*, 6 VAL. U.L. REV. 185, 198 (1972); Erika King, Comment, *Anonymous Campaign Literature and the First Amendment*, 21 N.C. CENT. L.J. 144 (1995).

197. *McIntyre*, 514 U.S. at 347.

198. *See* Grabow, *supra* note 196, at 583-85 (indicating that identification statutes were often held valid because of the state’s interests “in facilitating the flow of information to the public and maintaining the civility and integrity of the electoral process”).

199. *See* *Burson v. Freeman*, 504 U.S. 191, 206 (1992). In *Burson*, the Court addressed whether Tennessee’s statute prohibiting the distribution of campaign paraphernalia or soliciting votes within one hundred feet of the polling place violated the First and Fourteenth Amendments.

Voter deception often arises from false information printed anonymously with no indication of the true author or distributor.²⁰⁰ The deceptive information also may be printed with seemingly official seal from a governmental agency.²⁰¹ The documents could credibly be considered “anonymous leaflets,”²⁰² which the Supreme Court has decided are afforded some constitutional protections.

The state needs to lessen the tensions between voter intimidation, voter fraud, and other measures that undermine voter confidence, like voter deception.²⁰³ Additionally, the Constitution places even broader limits on deceptive practices. The state has a compelling interest in ensuring that information regarding the time, place, and manner of elections and voter eligibility are accurately communicated. Protecting the accuracy of these statements to preserve the integrity of the franchise and ensure access to voting is a compelling state interest. Although political speech is strongly encouraged in this democratic society, the Supreme Court has carved out a restriction on that speech where the state is attempting to protect against harmful false information. Clearly, no right exists for distributing false information that addresses the time, place, and manner of elections, but just as clearly, no penalties exist.

3. *Contrasting Campaign Finance as Speech.*—The anonymous nature of voter intimidation and deceptive acts and the protections provided against those acts lie in stark contrast to campaign finance laws, where a contributor’s identity is required under federal statute.²⁰⁴ For example, a primary challenge in enforcing existing voter intimidation and deceptive practices laws is the difficulty in identifying the culprit.²⁰⁵ In many instances, political and Election Day pamphlets are required to include some identifying information.²⁰⁶ Courts have found that the requirement to include identifying information within the province of the First Amendment is compelling, as was the state’s interest in addressing voter fraud and promoting the ability to investigate false claims.²⁰⁷

Id. The Court found that the legislation passed constitutional muster. *Id.* at 211.

200. See Howard Libit & Tim Craig, *Politicking Heats Up as Election Day Nears*, BALTIMORE SUN, Nov. 4, 2002, at 1A; Eric Siegel, *Amid Stir, Voters Stream to Polls*, BALTIMORE SUN, Nov. 6, 2002, at 27A. A flyer was distributed in Pennsylvania falsely indicating that Republicans would vote on November 2 and Democrats would vote on November 3 to cut down on lines. NATIONAL CAMPAIGN FOR FAIR ELECTIONS, *supra* note 1, at 1.

201. See NATIONAL CAMPAIGN FOR FAIR ELECTIONS, *supra* note 1.

202. *McIntyre*, 514 U.S. at 350.

203. The Court has also found that states have a compelling interest in preventing voter fraud and intimidation. See *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1617, 1624 (2008).

204. See, e.g., 2 U.S.C. § 431 (2006). Federal campaign finance laws regulate the money spent by political actors to influence federal campaigns.

205. See *supra* Part III.B.2.

206. Some states require that the sponsor of the political literature be identified. See *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 126 (2003), *overruled by Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

207. See *Seymour v. Elections Enforcement Comm’n*, 762 A.2d 880, 885 (Conn. 2000).

Much has been written about First Amendment rights and campaign finance.²⁰⁸ In the landmark case *Buckley v. Valeo*,²⁰⁹ the Supreme Court addressed whether restrictions on campaign contributions and expenditures, *inter alia*, violated free speech.²¹⁰ The Court ruled that the restrictions on expenditure limits

necessarily reduce[d] the quantity of expression by restricting the number of issues discussed It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates. The restrictions . . . limit political expression “at the core of our electoral process and of First Amendment freedoms.”²¹¹

Consequently, the lack of attention to the perennial occurrence in the minority community and the lack of protection rise in sharp contrast to the well-documented and legislated campaign finance rules barring anonymous political literature. Indeed, any communications, published media or electronic media, endorsing or criticizing a candidate must meet strict restrictions, including acknowledging the source responsible for the information.²¹²

The First Amendment does not require identification in most political speech.²¹³ The false, misleading political speech involved in voter deception does not fall within this constitutional protection. Governments have a compelling interest in preventing voter deception and can construct laws that are narrowly tailored to meet those goals. The presence of deceptive practices and intimidation seeks to quiet the voices of voters. Statutes must protect the ability to challenge and correct voter suppression activities.²¹⁴ Legislation addressing

208. See, e.g., Yasmin Dawood, *Democracy, Power, and the Supreme Court: Campaign Finance Reform in a Comparative Context*, 4 INT’L J. CONST. L. 269 (2006); Candice J. Nelson, *Problems in the Laboratories*, 2 ELECT. L.J. 403 (2003) (reviewing MONEY, POLITICS AND CAMPAIGN FINANCE REFORM LAW IN THE STATES (David Schultz ed., 2002)); Christopher J. Ayers, Comment, *Perry v. Bartlett: A Preliminary Test for Campaign Finance Reform*, 79 N.C. L. REV. 1788 (2001).

209. 424 U.S. 1 (1976).

210. The case centered on interpretations of the Federal Election Campaign Act, and the Court found that provisions limiting individual contributions to campaigns were constitutional despite First Amendment objections. *Id.* at 35.

211. *Id.* at 19, 39 (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)).

212. I.R.C. § 501(c)(4)(A) (“Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.”).

213. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 354, 357 (1995).

214. Voter intimidation undermines not only an individual’s ability to participate in the electoral process but also affects group right to access the ballot. Voting is in large part a group right. In traditional electoral schemes, such as one person, one vote cases, courts determine the

voter deception falls squarely within constitutional parameters for restrictions on political speech. The First Amendment does not protect one's ability to lie or obstruct the democratic process. States must narrowly tailor their laws to address the distribution of misleading fraudulent information and protect citizens' right to speak freely.

C. Election Clause Powers

Governments have the power to legislate and restrict political speech. Although laws exist, the patchwork of applicable language and lack of penalties require strengthening and, in some instances, creating laws to address these actions. Despite the government's relative inaction or questionable actions in enforcing voter intimidation statutes, Congress is keenly stationed to provide protections against the knowing propagation of false election materials and has the constitutional authority to do so.²¹⁵ Notwithstanding the states' authority to develop election administration laws governing the time, place, and manner of elections, Congress maintains authority to make or alter the states' regulations for the election of federal offices.²¹⁶ Recent cases under the Elections Clause reinforce Congress's broad authority to regulate all aspects of the federal officials election.²¹⁷

Congress's ability to use its Elections Clause power to "protect voters" from false information in federal elections is clear.²¹⁸ As the Supreme Court held in *Burson v. Freeman*,²¹⁹ the states have "a compelling interest in protecting voters from confusion and undue influence" and in safeguarding "the integrity of its election process."²²⁰ Consequently, Congress has the authority to act under either

right as related to a particular group. *See, e.g.*, Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2282 n.30 (1998) (arguing that one person, one vote cases "should be viewed as cases about group political power . . . rather than purely about individual rights").

215. Congress has the power to regulate elections under the Elections Clause of the U.S. Constitution. U.S. CONST. art. I, § 4, cl. 1 (specifying that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators").

216. Congress can regulate the elections of Representatives and Senators. *See, e.g.*, *United States v. Gradwell*, 243 U.S. 476, 482 (1917); *Ex parte Siebold*, 100 U.S. 371, 383-84 (1879); *United States v. Manning*, 215 F. Supp. 272, 286-87 (W.D. La. 1963); *Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691, 693-94 (Ky. Ct. App. 1944).

217. *Cook v. Gralike*, 531 U.S. 510, 523-24 (2001) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)) (finding that the Elections Clause "encompasses matters like 'notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns'").

218. *See Ass'n of Cmty. Org. for Reform Now v. Miller*, 129 F.3d 833, 838 (6th Cir. 1997).

219. 504 U.S. 191 (1992).

220. *Id.* at 199 (quoting *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 228-29,

its Elections Clause or other constitutional powers to protect its citizens from voter deception.

IV. A LEGISLATIVE RESPONSE

The Supreme Court stated that “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”²²¹ Likewise, voter suppression affects groups—racial, ethnic or language minorities—and the freedom to participate without restraint in the democratic process. Groups’ ability to vote is thwarted when deceptive practices and other suppressive measures are allowed to continue without penalty. Congress can use its constitutional authority to address the current inequities in the lack of enforcement regarding voter deception.

The Supreme Court has held, “the government may regulate the time, place, and manner of the expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication.”²²² The nature of voter deception, i.e., anonymity, targeting racial and language minorities, and intentionally distributing false information in an attempt to deter targeted voters from the polls, all contribute to the need for better statutory construction and enforcement. The “right to vote freely for the candidate of one’s choice is of the essence of a democratic society.”²²³ Connivery, falsehoods, and misleading voters thwart and negate those freedoms.

The present voter intimidation and deceptive practices statutes are dramatically underperforming. Policy reasons for addressing the weaknesses of the federal statutes—such as allowing unfettered access to the electoral process, providing accurate information to voters, inspiring voter confidence, and ultimately promoting fundamental democratic ideals—also continue to exist. Although recognizing its authority to do so under the Fourteenth Amendment and other applicable constitutional amendments, Congress must either strengthen existing statutes or adopt new legislation that covers the breadth of new millennium attempts to intimidate and deceive voters.

The lack of clarity and enforcement illustrates the need for legislation that clearly defines deceptive practices and develops mechanisms to ensure that such acts are investigated and that legislation contains appropriate penalties. The most important principles to consider are whether the person or party intentionally distributed false information regarding the time, place, and manner of an election or falsely described voter eligibility. A thorough statute should also contain extraordinary penalties if the distribution was knowingly disseminated through a political party affiliation, campaign, or candidate. In this instance, conspiracy

231 (1989)).

221. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

222. *Burson*, 504 U.S. at 197 (citation omitted).

223. *Id.* at 199 (citation omitted).

principles should apply. Moreover, any voter suppression statute should contain both a private right of action and civil and criminal penalties. In addition, if the government opts to impose separate laws for voter deception, where the misinformation included threats of incarceration or deportation, prosecutors should also charge the perpetrators under applicable voter intimidation statutes.²²⁴

A more focused voter deception statute need not include a requirement of racial or purposeful discrimination. It should, however, include accelerated penalties for evidence that the illegal practice targeted a particular racial, ethnic, or language group. It is much more difficult to prove that an act of violence was precipitated with thoughts of racial animus or hatred than proving that an individual knowingly disseminate false information related to the voting process. If a purposeful component is required, most perpetrators would argue that the distribution was based on political affiliation instead of racial identity.²²⁵ The mere act of purposefully distributing false information should satisfy any statute. The government should implement a tiered system to ensure that penalties will deter deceptive practices.

A. A Proactive Approach

Any attempt at fashioning anti-voter deception legislation must include a proactive approach to addressing and correcting the misinformation. The government's approach must contain both proactive and reactive components to ensure that citizens' ability to participate in the political process is not diminished. Although it has not traditionally served in the capacity as educator, in the deceptive practices context, governmental agencies must correct misinformation in a timely manner in order to limit its impact on the affected community.

Currently, no statute or administrative regulation requires the government to provide corrective information. Such a requirement would constitute a proactive approach to governing and election administration. In comparison to regulation and protection in areas such as food and product safety, the government allows voter deception to linger unanswered. The federal government transmits information on food safety and product liability to curb the harm to the general public,²²⁶ and the same should occur for the fundamental act of voting. When

224. The federal government could utilize 42 U.S.C. 1971(b) (2006) or 18 U.S.C. 594 (2006). *See supra* notes 97-97, 102 and accompanying text. States can utilize their broadly written statutes that contain an intent component as well as the presence of threats in the absence of specific legislation. *See supra* Part II.

225. This type of response has been raised in redistricting cases. *See e.g.*, *Georgia v. Ashcroft*, 539 U.S. 461, 469-70 (2003) (involving state legislators attempting to reapportion partisan districts and increase minority voting strength).

226. *See generally* U.S. Consumer Product Safety Comm., Recalls and Product Safety News, <http://www.cpsc.gov/cpscpub/prerel/prerel.html> (last visited Oct. 10, 2009). If the federal government can employ a process for notifying citizens of problems with food, toys and other consumer products, it can develop a similar notification process for voter suppression and

voter suppression occurs, the federal or state government, or both, should have a central office that receives such information at the state and federal levels and provides corrected information to the public, especially the affected community. Some states have already seen it as their responsibility to correct misinformation about the time, place, and manner of elections.²²⁷ The federal government should use websites, toll-free numbers, press releases, and other means to address deceptive voter practices. Additionally, federal agencies have been slow to respond to false voter information. The government should utilize state agencies and local media to develop public service announcements that warn of the distribution of false election information in the locale and provide the correct information to insure that the democratic process is not contaminated.

Moreover, the federal government has the components necessary to engage in a regular voter education program through the use of existing laws. For example, the NVRA²²⁸ requires designated agencies,²²⁹ such as the Department of Motor Vehicles, social services agencies, libraries, and others, to ask clients if they would like to register to vote.²³⁰ But registering is merely the first important step in realizing one's electoral potential. The federal government must take the next step and require those agencies designated under the NVRA to provide basic voter education information through signage and state-generated brochures.²³¹ States should also require designated agencies to provide clients

correcting and exposing misinformation.

227. See Donna Marie Owens, *Election Officials Vigilant Over Voter Intimidation, Suppression*, Oct. 27, 2008, <http://www.publicbroadcasting.net/wesm/news.newsmain/article/0/0/1398250/WESM.LocalRegional.News/Election.Officials.Vigilant.Over.Voter.Intimidation.Suppression> (Maryland Attorney General Doug Gansler announced that citizens in predominately African-American neighborhoods had received flyers that said, "If you owe back child support or you owe parking tickets or you're an immigrant, you may be arrested, if you come to vote on Election Day."); see also MD. ATT'Y GEN. OFF., REPORT ON THE ATTORNEY GENERAL'S TASK FORCE ON VOTING IRREGULARITIES (2008), http://www.oag.state.md.us/Reports/VotingTaskForceRepor4_28.pdf.

228. 42 U.S.C. § 1973gg-1 (2006); see also *supra* note 8.

229. *Id.* § 1973gg-5 (requiring that "[e]ach state shall designate agencies" where voters can register to vote and allowing the state to include "public libraries, public schools, offices of city and county clerks (including marriage license bureaus), fishing and hunting license bureaus, government revenue offices, unemployment compensation offices, and offices not described in paragraph (2)(B) that provide services to persons with disabilities" to be places where people can register to vote).

230. See *supra* note 7. The NVRA has met much criticism as an under-utilized statute. Critics have also argued that the Department of Justice—the statute's primary enforcer—has in past administrations left many portions of the Act unenforced and thus has left thousands of citizens unregistered. See, e.g., Steve Carbo et al., *Ten Years Later: A Promise Unfulfilled; The National Voter Registration Act in Public Assistance Agencies, 1995-2005*, DEMOS, July 2005 (Nonprofit advocacy groups Demos, ACORN, and Project Vote found that most public assistance agencies did not incorporate voter registration into their services as the NVRA requires.).

231. The proposed legislation proposed in this Article would also require state election agencies to supply NVRA-designated agencies with various information regarding the time, place

with information from the state's election official regarding primary and general election dates, as well as where to find additional information about the proper polling place.

Much misinformation centers on citizens receiving information containing the wrong date for an election. Each NVRA-designated agency and other election-related agencies could advertise primary and general election day information. They could also provide citizens with clear information about the methods of voting, i.e., absentee, early voting, election day procedures, and provisional ballots, which directly prevent and address deceptive practices as well as promote public participation and confidence. Accordingly, the government should encourage and inform its citizens about election day occurrences and dispel any myths prior to the election relating to eligibility, time, place, and manner requirements for casting a ballot. Once the government receives a credible report regarding the distribution of false information, it must act expeditiously to correct that information.

B. Private Right of Action

Any legislation that addresses deceptive acts must include a private right of action. Wronged individuals or groups should have the ability to pursue legal action in order to deter future occurrences. In most other contexts, such as product liability or food safety, the consumer is allowed to pursue legal action against a manufacturer or producer.²³² The federal government has created the Consumer Protection Agency, which is responsible for protecting consumers from, inter alia, false advertising, and faulty products. In the voting context, citizens currently do not have an opportunity to litigate wrongs perpetrated against them for deceptive acts.

With this private right of action, the statute should also allow plaintiffs to recover costs and attorney fees. A person who is dissuaded from voting via this misinformation for fear that she is ineligible or believes the document originated from a governmental agency has been defrauded of an opportunity to exercise the

and manner of voting. For example, Section 203 of the VRA requires covered jurisdictions to provide all election-related materials in languages covered under Section 203. 42 U.S.C. § 1973aa-1a(b) 2006). States must provide identical information in both English and the covered language, e.g., Spanish or Hmong. *Id.* Here, as opposed to providing that information only at the voter registrar or other election-related office, the information would also disseminate to social services agencies. As with Section 203, the state governments should also provide a toll-free hotline to report deceptive acts. Once the state receives and verifies the information and finds it credible, it must begin to broadcast corrected information. Additionally, any signage or brochures must include websites including appropriate contact information where citizens can report deceptive acts and provide copies of deceptive documents.

232. See IND. CODE § 34-20-2-1 (2008); MICH. COMP. LAWS ANN. § 600.2947 (West 2009); OHIO REV. CODE ANN. § 2305.10 (West 2009); see also *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002); *In re ConAgra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689 (N.D. Ga. 2008); *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988).

fundamental right to participate in the democratic process and should have the ability to pursue legal actions against the responsible individuals.

C. Criminal and Civil Penalties

Disseminating information to a protected racial group with the intent to suppress votes is an overt act of discrimination, and governments should penalize those who disseminate this information with criminal and civil penalties.²³³ Various federal statutes empower the government to seek modest penalties against persons who intimidate voters.²³⁴ Advocates realized the weakness of

233. Jordan T. Stringer, Comment, *Criminalizing Voter Suppression: The Necessity of Restoring Legitimacy in Federal Elections and Reversing Disillusionment in Minority Communities*, 57 EMORY L.J. 1011, 1042, 1047-48 (2008) (offering the following suggestions to deter voter suppression: 1) “the use of phone harassment legislation should continue as an innovative prosecutorial” technique, 2) “prosecutors should extend” the technique to “robo-calls,” 3) “Congress should amend mailfraud legislation” to include mailings that “defrauds someone of his or her right to vote,” 4) “Congress should [pass] the legislation [proposed by] Senators Schumer and Obama,” and 5) Congress “should resolve the conflicting perspectives of voter access and voter security in the name of electoral integrity and constitutional fidelity.”); *see also* Pardo, *supra* note 78, at 329-30 (discussing election fraud and arguing for use of the Travel Act, 18 U.S.C. § 1952 (2006), which is used to prosecute offenders whose conspiracies require interstate travel, and the Mail Fraud Statute, 18 U.S.C. § 1341 (2006), which is used when mail fraud is involved in election fraud or intimidation schemes); Rothschild & Wolinsky, *supra* note 101.

234. *See, e.g.*, 42 U.S.C. § 1971(c) (2006) (empowering the Attorney General to bring a civil action to prevent or enjoin the activity and noting that “the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order”); *supra* Part I.A.2. 42 U.S.C. § 1973j(a) allows the Attorney General to bring a civil action and seek up to \$5,000 and impose five-year prison sentence.

Id. § 1973j(d) provides,

Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 1973, 1973a, 1973b, 1973c, 1973e, 1973h, 1973i, or subsection (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order

Id.

18 U.S.C. § 594 (2006) imposes a fine or one year of prison upon persons who intimidate, threaten or coerce persons from exercising the right to vote. Section 594 provides:

Whoever intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose . . . shall be fined under this title or imprisoned not more than one year, or both.

See Rothschild & Wolinsky, *supra* note 101, at 393-427 (providing an exhaustive list of applicable civil, criminal and administrative laws that the federal government has available to combat voter

Section 11(b) and argued for strengthening the VRA, and specifically suggested that Congress strengthen its voter intimidation laws.²³⁵ They expressly suggested that persons who engaged in harassment or intimidation of minority voters should face criminal sanctions and that Congress should provide a private right of action for individuals who have suffered from this illegal intimidation. They also suggested that the injured individuals should be eligible to receive injunctive relief, statutory damages, and attorneys' fees.²³⁶ After reauthorization of the VRA in 2007, Congress did not address this issue.²³⁷ Conversely, the NVRA includes a private right of action, but most litigation pertaining to this statute has included other voter access-related issues, such as the state's unwillingness or inability to comply with its voter registration requirements.²³⁸ None of the litigation involved voter intimidation or voter deception.

The Obama/Schumer bill would have increased monetary penalties from \$5,000 to \$100,000 and would have increased possible prison time from one year to five years.²³⁹ These types of increases would make the statute meaningful and would hopefully exhibit the seriousness associated with the actions.

Additionally, if the government seeks to criminalize deception, it should also strengthen civil penalties. The existing penalties could serve as a deterrent for individuals. When groups engage in deceptive practices, e.g., the Republican Party in the Jesse Helms example,²⁴⁰ statutes must impose stricter penalties. If prosecutors can link deceptive actions to a political campaign, such as the 2006 example of Prince George's County, Maryland,²⁴¹ it should consider escalating penalties, especially if it can demonstrate that the candidate or members of the political party knew that the information contained intentionally false information.

CONCLUSION

The establishment of the democratic form of government and the framers' view of the importance of having the people voice their content or discontent through the ballot have sustained much debate and controversy. Deceptive practices undermine a citizen's right to participate freely in the democratic

intimidation and other election law violations).

235. See VERNON FRANCIS ET AL., LAWYER'S COMM. FOR CIVIL RIGHTS UNDER LAW, PRESERVING A FUNDAMENTAL RIGHT: REAUTHORIZATION OF THE VOTING RIGHTS ACT (2003), http://faculty.washington.edu/mbarreto/courses/Voting_Rights.pdf.

236. *Id.* at 14.

237. See 42 U.S.C. § 1973 (2006).

238. See *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1412-13 (9th Cir. 1995) (action trying to enjoin California from failing to comply with NVRA); *Ass'n of Cmty. Org. for Reform Now v. Edgar*, 880 F. Supp. 1215 (N.D. Ill. 1995) (private action brought against Illinois for failure to comply with provisions of NVRA).

239. Deceptive Practices and Voter Intimidation Act, S. 453, 110th Cong. § 3 (2007).

240. See *supra* notes 123-24.

241. See *supra* Part I.A.

process. When the right to vote is stolen via fraudulent, intimidating, or deceptive acts, not only are the particular voter or group of citizens disenfranchised, but their confidence in the democratic process is also undermined. The pervasive inability or disinterest in prosecuting these acts leads the perpetrators to believe that their actions can continue without penalty and regard for their injury to democracy.

This right to participate embodies the essence of the democratic voting process. When this access is thwarted by connivery, deception, intimidation, or fraud, the fabric of the nation begins to unravel. Securing the threads of our democratic fabric, through enforcement of constitutional rights and statutory protections, tightens the bonds of freedom and protects the confidence and access that citizens need and require to participate free from deceptive practices. Governmental entities should wrap themselves in the protections afforded under various constitutional provisions, including the Equal Protection Clause, to protect its citizens from these acts. Where Congress lacks the willingness to pursue such acts, the affected citizenry should have the opportunity to pursue a private right of action in an effort to preserve the legitimacy of the democratic process.