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 Works

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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, 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. The voting guide falsely suggested that prominent Maryland Democrats were endorsing Republican candidates in the hotly contested gubernatorial and U.S. Senate election. 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. 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

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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, BALTIMORE 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, BALTIMORE SUN, Mar. 18, 2007, at A23 (alleging that the Steele campaign bussed homeless men to hand out misleading flyers).

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.

\(^10\) 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, 31/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


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 PROTECTION2008: 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 KEYSSAR, 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{19} Threats of incarceration or


\textsuperscript{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.

\textsuperscript{16} 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.

\textsuperscript{17} 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.

\textit{Id.}


\textsuperscript{19} Dr. Martin Luther King, Jr., decried deceptive practices and intimidation in his \textit{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., \textit{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.

\textsuperscript{19} See, e.g., NAT’L NETWORK FOR ELECTION REFORM, DECEPTIVE PRACTICES AND VOTER INTIMIDATION 1, available at http://www.nationalcampaignforfai relections.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 “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
longstanding target of threatening tactics. \textit{Id.} 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.\textit{Id.} 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 campaigns\textit{Id.} and advancing political misinformation.\textit{Id.} 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.\textit{Id.} 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.\textit{Id.}
These deceptive practices regularly have as their main objective to misinform unwanted minority, elderly, disabled, and language-minority voters in an effort to suppress votes. 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. Additionally, the surge of computers, cell phones, and other technology continues to hinder the identification of persons engaging in e-deception. 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. 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. 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”).


30. See infra Part II.A.

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 used 35 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

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32. See sources cited supra note 28.
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. Most scholars and statutes conflate fraud with intimidation and deceptive practices, 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”).


[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 Amendment provides the means for governments to exercise their authority to address voter deception. In *Crawford v. Marion County Election Board*, 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. Likewise, the Supreme Court has found that states possess a compelling interest in preventing voter intimidation. 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. 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

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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.*


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. 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. 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. 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.

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

The 2008 presidential election cycle brought about a contested election in

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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.reformelelections.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 calls and misleading flyers. 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.

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. Accordingly, e-deception provides yet another concern. Indeed, emails touting the illegibility of voters because of foreclosures were prevalent and caused at least one Attorney General to try to provide accurate information. 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 unpunished.

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.” When the act of deception partners with the act of voting,


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 did 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).


the jurisprudence leaves open whether the practice of deliberately misleading a voter serves as a legally actionable deed. 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, and statutes exist for determining voter intimidation. Few have attempted to conquer the amorphous and arguably ambiguous definition of voter deception.

In an effort to encompass all illegal election activity, the Election Assistance Commission (EAC) created a definition of “election crimes.” The definition, however, is overbroad and only tangentially includes deceptive acts. 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. 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).
63. The EAC tasked Job Serebrov and Tova Wang to provide a report on the prevalence of voter fraud and voter intimidation. See Serebrov & 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. The bill prohibits a person from deceiving a voter regarding the time, place, or manner of the election. 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. 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.” Traditional forms of voter fraud involve voting multiple times under false names, vote buying, and election officials committing fraud through counting spoiled ballots. 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.” 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


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

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.” PIN acknowledges that some acts that may arguably constitute fraud may nonetheless not be recognized as a federal election crime. 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. Thus, the example of Prince George’s County, discussed earlier, although reprehensible and arguably involving deception, would not fall within a prosecuteable form of election fraud and, as such, would not be pursued or prosecuted.

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, 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.

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”).


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. Federal statutes define intimidation as those actions that involve threats and interfere with a voter’s right to exercise the franchise. Threats of prosecution and deportation for committing the act of voting illustrate the types of intimidating acts that currently encompass voter intimidation.

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. 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, 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...
suppression, 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.

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. 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* that Indiana had no history of in-person voter fraud. 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. The same, however, is true in the voter deception area and examples of deception are plentiful yet receive less attention.

II. DECEPTIVE LAWS

The Fifteenth Amendment 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 sex and age. A post-Civil

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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.


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. Despite this early effort to address intrusions in the right to vote, and later iterations that followed, 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. Prior to the passage of the VRA, prosecutors utilized 42 U.S.C. § 1971(b) to counter voter-intimidation. In many instances, prosecutors were thwarted by the statute’s requirement proof of “purposeful
discrimination.”\textsuperscript{98} Congress’s passage of the VRA,\textsuperscript{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.

\textit{\textbf{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.\textsuperscript{100} Ambiguities remain in the federal law context regarding deceptive practices.\textsuperscript{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

\textsuperscript{98} During the House Hearings on passage of the VRA, then-Attorney General Katzenbach said: “There has been case after case of similar intimidation—that is, beatings, arrests, lost jobs, lost credit, and other forms of pressure against Negroes who attempt to take the revolutionary step of registering to vote.” \textit{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).


\textsuperscript{100} \textit{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”).

\textsuperscript{101} For a discussion of election law statutes, see, for example, Pardo, \textit{supra} note 78; David C. Rothschild & Benjamin J. Wolinsky, \textit{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.\textsuperscript{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.\textsuperscript{103} However, PIN has not prosecuted persons for misleading or false information under this statute.

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.”\textsuperscript{105}

In \textit{United States v. Tobin},\textsuperscript{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.\textsuperscript{107} The court found that 18 U.S.C. § 241 was applicable and imprisoned the official for three months.\textsuperscript{108} This statute, however, has been rarely used in the voting context and only with varying

\textsuperscript{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. \textit{Id.} § 1973i(b).


\textsuperscript{105} 18 U.S.C. § 241. The Supreme Court has found that voting is a fundamental right. \textit{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.”).

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

\textsuperscript{107} Thomas B. Edsall, \textit{GOP Official Faces Sentence in Phone-Jamming}, \textit{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. \textit{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. \textit{Id.}

degrees of success. 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. This focus, however, continues to ignore the act of voter deception as a prosecuteable 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. 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) and


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.”).


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
history of the VRA. 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.


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. 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. In Brown, the court found that the defendants had violated Section 2 of the VRA. 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.

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. In United States v. New Black Panther Party, MS, 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. Among criticism, the newly elected

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.


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.


administration decided not to pursue the case and dropped the charges against the defendants.\footnote{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.\footnote{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 Gantt\footnote{135} was especially contentious and at times extremely race-based.\footnote{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.\footnote{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.

\footnote{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).

\footnote{133} Seper, supra note 132.

\footnote{134} See Bykofsky, supra note 131.

\footnote{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. \textit{Id.} He ran unsuccessfully for U.S. Senate against Jesse Helms in 1990 and in 1996. \textit{Id.}

\footnote{136} \textit{Id.}

\footnote{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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,\textsuperscript{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

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\item YouTube.com, Jesse Helms’s “Hands” ad, http://www.youtube.com/watch?v=KiyewCdXMzk.
\item \textsuperscript{139} \textit{JUSTIN LEVITT \& ANDREW ALLISON, REPORTED INSTANCES OF VOTER CAGING 3} (2007), \textit{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.
\item Chandler Davidson et al., \textit{Vote Caging as a Republican Ballot Security Technique}, 34 \textit{Wm. MITCHELL L. REV.} 533, 537-38 (2008) (discussing voter deception through vote caging methods).
\item \textsuperscript{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.
\item \textsuperscript{141} \textit{See INTRODUCTION, supra.} Samples of such flyers are available at \textit{NATIONAL CAMPAIGN FOR FAIR ELECTIONS, supra note 1}.\end{itemize}
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.\textsuperscript{142}

\textbf{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.\textsuperscript{143} The second category outlaws false information on candidates or issues, such as making a false statement about a candidate or a proposition,\textsuperscript{144} while the third category of statutes address both election administration and candidate or other substantive issues.\textsuperscript{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;\textsuperscript{146} and only fifteen find the offender guilty of a

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\item[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”).
\item[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).
\item[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”).
\item[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).
\item[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
\end{enumerate}
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misdemeanor.\textsuperscript{147} Of those states that include penalties for intimidation, only five states include “fraud” in their statutes penalizing intimidation.\textsuperscript{148} Only four states also penalize voter deception.\textsuperscript{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.\textsuperscript{150} The litany of statutes and their attributes leads at best to piecemeal enforcement.\textsuperscript{151} In most cases, the intimidation or fraud cases are

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than ten years, or both.
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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).
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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).
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149. 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.
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150. 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).
\end{quote}
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

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152. See, e.g., Ala. Code § 17-17-33 (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 intimidation and voter fraud. 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. 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, 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. 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. 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. 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.”

### B. First Amendment Concerns

Although an Equal Protection argument exists for persistent vigilance
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.”

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. 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.” The Supreme Court has also noted, “For speech concerning public affairs is more than self-expression; it is the essence of self-government.” Freedom of expression is at the root of our participatory democracy. 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. 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 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.”

For these reasons, the Supreme Court has continued to protect freedom of political speech 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.”

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.” 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.”

The Supreme Court has found various expressions to be protected political speech, inter alia, the right to peaceably assemble, the right to criticize
government officials, campaign finance, signage, circulating petitions for signatures with limited regard for truth, and speech regarding the American flag. Not all speech is protected, including some political speech, e.g., false commercial speech, electioneering within a certain distance of an entrance to a polling place on Election Day, and destroying secret service certificates.

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.” A statute is suspect under content-


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”).


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.

based scrutiny if it “threatens to suppress the expression of particular ideas or viewpoints.”[^56] 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 anonymous[^190] 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 messages.

[^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).


[^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).


[^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)).
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.”

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

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. 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.
Voter deception often arises from false information printed anonymously with no indication of the true author or distributor. The deceptive information also may be printed with seemingly official seal from a governmental agency. The documents could credibly be considered “anonymous leaflets,” 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. 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. For example, a primary challenge in enforcing existing voter intimidation and deceptive practices laws is the difficulty in identifying the culprit. In many instances, political and Election Day pamphlets are required to include some identifying information. 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.

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, BALT. SUN, Nov. 4, 2002, at 1A; Eric Siegel, Amid Stir, Voters Stream to Polls, BALT. 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.


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).


205. See supra Part III.B.2.


Much has been written about First Amendment rights and campaign finance. In the landmark case *Buckley v. Valeo,* the Supreme Court addressed whether restrictions on campaign contributions and expenditures, inter alia, violated free speech. 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.”

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.

The First Amendment does not require identification in most political speech. 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. Legislation addressing
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. 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. Recent cases under the Elections Clause reinforce Congress’s broad authority to regulate all aspects of the federal officials election.

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

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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 choosing [sic] Senators”).


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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{223} Conivery, 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

\textsuperscript{221} Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

\textsuperscript{222} Burson, 504 U.S. at 197 (citation omitted).

\textsuperscript{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).

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. 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 NVRA requires designated agencies, such as the Department of Motor Vehicles, social services agencies, libraries, and others, to ask clients if they would like to register to vote. 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. States should also require designated agencies to provide clients


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. 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 right to vote.

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., 521 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. Various federal statutes empower the government to seek modest penalties against persons who intimidate voters. 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.\textsuperscript{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.\textsuperscript{236} After reauthorization of the VRA in 2007, Congress did not address this issue.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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,\textsuperscript{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
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.