Where the Wild Things Are: the Polling Place, Voter Intimidation, and the First Amendment

James J. Woodruff, II, Florida Coastal School of Law

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I. INTRODUCTION

During each election cycle, the cries of voter intimidation rise from the mouths and pens of partisans. However, for all the noise that is generated, there are remarkably few successful voter intimidation prosecutions. A better method of deterring voter intimidation must be promulgated as the current laws languish and draw dust from infrequent use.

This Article explores the use of current regulations to control voter intimidation at the polling place on Election Day. Part II of this Article examines the definition of voter intimidation through the federal laws currently regulating such conduct. Part III outlines the various groups that regularly appear on Election Day and how they engage in conduct that may be viewed by some as voter intimidation. Part IV reviews the prosecution of voter intimidation since 2000. And Part V examines possible methods for reducing voter intimidation at the polling place.

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2 Associate Professor of Lawyering Process, Florida Coastal School of Law. South Texas College of Law, J.D.; Texas A&M University, B.S. I would like to thank Richard Hasen for his time and feedback. I would also like to thank Eugene Volokh for his time and guidance on First Amendment law.


5 The groups reviewed will be limited to those formed or having appeared since 2000.
II. WHAT IS VOTER INTIMIDATION?

The Federal Prosecution of Election Offenses, a prosecutor’s guide to federal election offenses, defines voter intimidation as deterring or influencing “voting activity through threats to deprive voters of something they already have, such as jobs, government benefits, or, in extreme cases, their personal safety.”\(^4\) This definition is a synthesis of federal election laws, some dating back to the nineteenth century.\(^5\)

What the definition fails to include is when federal jurisdiction over election activities is established. In some instances, in order to apply federal law there must be a federal candidate on the ballot.\(^6\) Other scenarios allow for the use of federal law regardless of the presence of a federal candidate.\(^7\)

In order to combat various election offenses, Congress has passed several voter protection laws over the years. Some voter intimidation statutes allow for civil injunctions,\(^8\) while others provide criminal penalties.\(^9\) Such a wide range of enforcement options provides many different solutions that law enforcement can use in its prosecution of voter intimidation cases. None of the laws against voter intimidation actually require the intimidation of a voter. They only require that a reasonable person would view the actions of the actor as intimidating.

A. Civil Injunction

The Civil Rights Act of 1957 was passed to ensure the full realization of the Fifteenth Amendment.\(^10\) The Act states in relevant part:

No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other

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\(^4\) Craig C. Donsanto & Nancy L. Simmons, Federal Prosecution of Election Offenses 54 (7th ed. 2007).

\(^5\) See, e.g., Enforcement Act of 1870, ch. 14, §§ 1–6, 16 Stat. 140–41 (1870) (requiring that all citizens qualified to vote be allowed to vote and banning the use of force, bribery, threats, and intimidation from interfering with voting).


\(^8\) See discussion infra Part II.A.

\(^9\) See discussion infra Part II.B.

\(^10\) This legislation had to overcome a filibuster, which included the longest individual speech in the history of the Senate, to become a law. See Filibuster and Cloture, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Cloture.htm (last visited Oct. 30, 2011) (discussing the filibuster speech by Sen. Strom Thurman). The speech by Sen. Strom Thurman (D-SC) lasted “24 hours and 18 minutes.” Id.
person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.\textsuperscript{11}

The plain language of the Civil Rights Act limits its application to federal elections.\textsuperscript{12} It provides no private cause of action for the intimidated voter.\textsuperscript{13}

The Voting Rights Act of 1965 was passed to fill perceived gaps in the Civil Rights Act of 1957.\textsuperscript{14} It states in relevant part:

\begin{quote}
No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 1973a (a), 1973d, 1973f, 1973g, 1973h, or 1973j(e) of this title.\textsuperscript{15}
\end{quote}

The Attorney General is tasked with the enforcement of voter intimidation cases under the Voting Rights Act.\textsuperscript{16} Similar to the Civil Rights Act, it provides no private cause of action for the intimidated voter.\textsuperscript{17} Neither the Civil Rights Act nor the Voting Rights Act provide for criminal penalties for acts of voter intimidation. Both limit prosecutions to injunctive relief.\textsuperscript{18}

\section*{B. Criminal Penalties}

Two of the federal voter intimidation statutes providing for criminal penalties require that the voter intimidation complained of occur during a

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\textsuperscript{12} But see Reddix v. Lucky, 252 F.2d 930, 933 (5th Cir. 1958) (holding that 42 U.S.C. § 1971 applied to “any state election”).
\textsuperscript{16} Id. § 1973j(d).
\textsuperscript{17} Id.
\textsuperscript{18} Id. §§ 1971(c), 1973(j)(d).
\end{flushright}
federal election. The first, 18 U.S.C. § 594, provides that any person who, through intimidation, threats, or coercion, interferes with a voter’s right to vote in a federal election has violated the law.\textsuperscript{19} The section also includes the attempt by any person to intimidate, “threaten, or coerce” a voter as a violation.\textsuperscript{20} Violating the section will result in a fine, imprisonment for up to one year, or both.\textsuperscript{21}

The other is the National Voter Registration Act of 1993.\textsuperscript{22} It provides for imprisonment of voter intimidators for five years, a fine, or both.\textsuperscript{23} The statute forbids any person from “knowingly and willfully” engaging in, or attempting to intimidate, threaten, or coerce any person for voting or attempting to vote in, an “election for Federal office.”\textsuperscript{24}

The remaining federal voter intimidation statutes apply to all federal and state elections. Not only do these statutes lack the office-specific language found in § 594, they also provide a wider range of penalties.

Section 241 protects a citizen’s “exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . .”\textsuperscript{25} Voting is a fundamental right under the laws of the United States.\textsuperscript{26} In order for the section to apply, there must be “two or more persons” conspiring to “injure, oppress, threaten, or intimidate” the voter.\textsuperscript{27} A non-violent violation of § 241 is punishable by a fine, up to ten years imprisonment, or both.\textsuperscript{28} If the violation is violent, then punishment may include a fine, an unlimited prison term, or capital punishment.\textsuperscript{29}

Section 242 criminalizes the willful deprivation of a person’s constitutional rights, privileges, or immunities by anyone acting “under color of law, statute, ordinance, regulation or custom . . .”\textsuperscript{30} Unlike § 241,
this section does not require “two or more persons” conspiring to deprive a person of her civil rights.\textsuperscript{31} Violation of the section may result in a fine, up to a year in prison, or both.\textsuperscript{32} If the violation involves bodily injury, then the perpetrator may receive any sentence, including death.\textsuperscript{33}

Section 245 prohibits the attempted or actual willful injury, intimidation, or interference of individuals because they are “voting or qualifying to vote . . . ”\textsuperscript{34} This section also prohibits the same conduct against election officials, candidates, and poll watchers.\textsuperscript{35} Penalties for a violation include a fine, imprisonment of up to one year, or both.\textsuperscript{36} However, if bodily injury occurs or the acts included the use of dangerous weapons, then imprisonment may be up to ten years.\textsuperscript{37} If the acts kill someone or an attempt to kill someone is made, then the perpetrator may receive the death penalty.\textsuperscript{38}

Military officers may not station troops at the polling place unless necessary to “repel armed enemies of the United States . . . ”\textsuperscript{39} Punishment for doing so includes a fine, imprisonment of up to five years, or both.\textsuperscript{40} The violator will also “be disqualified from holding any office of honor, profit, or trust under the United States.”\textsuperscript{41}

Additional restrictions on the military are provided by § 609.\textsuperscript{42} Under § 609, any officer, commissioned or not, who attempts to use or “uses military authority to influence” a service member’s vote may be fined, imprisoned for up to five years, or both.\textsuperscript{43} Section 609 also forbids the officer from requiring service members to march to the polling place.\textsuperscript{44}

Federal employees enjoy additional protections against voter intimidation under § 610.\textsuperscript{45} Any person who intimidates, threatens, commands, or coerces a Federal Government employee regarding the participation in political activity may face a fine, imprisonment of up to to

\textsuperscript{31} See id.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id. § 245(b)(5).
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} 18 U.S.C. § 592.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
three years, or both.\textsuperscript{46} Attempting to engage in the above stated conduct will also be considered a violation under § 610.\textsuperscript{47}

Section 1973gg-10 provides for prosecution of anyone who “knowingly and willfully” intimidates, threatens or coerces, or attempts to engage in such conduct, in the “urging or aiding” of any person to vote.\textsuperscript{48} A violation of this section is punishable by fine, up to five years of imprisonment, or both.\textsuperscript{49}

While the Federal Prosecution of Election Offenses manual has attempted to provide a concise definition of voter intimidation,\textsuperscript{50} the reality is much different. As the statutory provisions illustrate, the definition of voter intimidation is much broader and may not necessarily need to include the term “intimidate.”\textsuperscript{51} Regardless of such inconsistencies, the Federal Prosecution of Election Offenses’ definition for voter intimidation is sufficient for our purposes of analysis.

III. THE WILD THINGS

Several groups regularly make their appearances during modern general elections. Although voters no longer have to endure the “plug-uglies”\textsuperscript{52} or “free-staters,”\textsuperscript{53} there still exist groups that are recruited and brought to polling places across the United States to influence the election process. Some of these groups work independently while others may work as part of a larger effort to engage in certain conduct. Regardless of the organization behind the groups, they all produce the same result: they are a constant source of complaints from voters.

This Article will examine the most prevalent of these groups: the militants, the horde, “voter rights attorneys,” the knock and draggers, poll watchers, and poll workers.

\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{49} Id. § 1973gg-10(2)(B).
\textsuperscript{50} DONELSON & SIMMONS, supra note 4, at 54.
\textsuperscript{53} Id. at 33.
A. Militants

Members of a militant group usually share a common and narrow ideology. On a nationwide basis, such groups appear to be small in number. These groups are usually regional in nature with some loose form of nationwide interaction with other similarly-minded groups. Even nationwide militant organizations have rather small membership numbers relative to the size of the national population.

In the 2008 General Election, one such group, the New Black Panther Party for Self-Defense, made national headlines when two of its members, one brandishing a weapon, appeared at a Philadelphia polling place and made racist statements. The organization also appeared at polling places in Houston during the 2010 General Election and ejected white poll watchers and workers from the precincts.

B. The Horde

Unlike the smaller militant groups, the horde is comprised of large groups that gather at the polls. Among the common participants in the horde are campaign workers, union members, grassroots advocacy groups, and

55 See SOUTHERN POVERTY LAW CENTER, supra note 54, at 4–5.
56 Id.
initiative supporters. These groups show up to support their cause or candidate, but at times may become overly passionate about their position.

It is not uncommon to see the horde engaged in loud protests or yelling at voters as they pass by. At times, the horde is a smaller group that is actively engaged in busing and shepherding voters to the polls. Usually the intention of the horde is to shape the election by influencing the opinions of those who pass by on their way to the polls. This activity alone may appear innocuous, but at times their presence alone may discourage voters from entering the polling place to vote.

One example of the horde becoming overly aggressive occurred in Duval County during the 2008 General Election. At that time, a group supporting the Democratic Party candidates barred a young boy from using the library. The boy had exited his mother’s vehicle that had a McCain-Palin sticker affixed to it, but was not allowed entrance into the library by the group. He told the group barring his entry that he needed a book so that he could finish a report for school. They still would not allow him to pass. The boy eventually called the police and was allowed entry only after law enforcement arrived on the scene.

C. “Voter Rights Attorneys”

A common sight in recent election cycles has been the wearing of hats, shirts, buttons, and other paraphernalia proclaiming the wearer to be a “voter rights attorney,” “voter rights counselor,” “[candidate] voting team,”

59 Some of these participants even publish handbooks and manuals to help people organize campaigns. See, e.g., JIM BRITELL, ORGANIZE TO WIN: A GRASSROOTS ACTIVIST’S HANDBOOK (2010) (outlining the assumptions and misconceptions about campaigns, the essential elements of grassroots campaigns, tips on how to motivate others to help the cause, and the secrets of using e-mail and successful lobbying).

60 See StateOfTheYOUunion, Meet J. Christian Adams, YOUTUBE (July 1, 2010), http://www.youtube.com/watch?v=nekx_9cFRDQ.


63 Interview with Librarian (Oct. 16, 2010) (on file with author; interviewee’s name excluded due to confidentiality).

64 Id.

65 Id.

66 Id.

67 Id.
“[state] voter rights attorney,” “poll attorney,” or other similar message.68
These individuals, some flown in from other states,69 have attempted to
cloak themselves in the mantle of those civil rights lawyers who caused
great change in the 1960s. However, rather than protecting a
disenfranchised group’s right to vote, some of these individuals do quite the
opposite: they engage in tactics to ensure certain members of society do not
get to vote.

Most of the people wearing this paraphernalia are partisans attempting
to gain an edge in the pending election.70 Some have even spoken of the
“voting rights attorney” gaining the confidence of the voter in order to
“assist” the voter.71 This is clearly a method of deception.

Some political parties have taken it upon themselves to dress their poll
watchers in this paraphernalia.72 Thankfully, a number of states limit what
poll watchers may do while on duty,73 as the only reason for wearing such
slogans inside the polling room is to intimidate the election workers and
voters. Knowing this, the only reason a poll watcher might engage in the
wearing of “voter rights attorney” paraphernalia would be to gain an unfair
advantage in the election process through the intimidation of poll workers
and rival poll watchers. Through this deception, these poll watchers drop
the neutral façade a poll watcher is supposed to display and appear to poll
workers as non-partisan election officials.74

68 See generally Erika C. Birg, Lawyers on the Road: The Unauthorized Practice of Law and the
69 See Abby Goodnough & Don Van Natta, Bush Secured Victory in Florida by Veering from
tics/campaign/07florida.html? (quoting Jan Gawthrop, a New York lawyer, who was working as part
of the Democratic Party “voting rights attorney” program in Palm Beach, Florida during the 2004
General Election).
70 See Birg, supra note 68, at 306–07 (describing the partisan nature that was present with the Kerry-
Edwards and Bush-Cheney campaigns prior to Election Day in 2004).
71 See John Tanner, Effective Monitoring of Polling Places, 61 BAYLOR L. REV. 50, 80 (2010)
(stating that “monitors who . . . enjoy the trust of voters may assist multiple voters . . .”).
72 See Birg, supra note 68, at 307 (describing poll watchers’ paraphernalia).
73 E.g., FLA. STAT. ANN. § 101.131(1) (West, Westlaw through 2011 Legis. Sess.) (stating that poll
watchers “may not interact with voters”); OHIO REV. CODE ANN. § 3505.21 (West, Westlaw through
2011) (stating that poll watchers are only allowed to observe the proceedings and challenge voters).
74 See FLA. STAT. ANN. § 101.031 (West, Westlaw through 2011 Legis. Sess.) (noting that Florida
does not recognize a voting rights attorney as an authorized Election Day poll worker); Giovanni
available at http://articles.sun-sentinel.com/2008-11-10/news/0811080029_1_poll-worker-voting-
equipment-voting-machines (stating that a Florida voting rights attorney was present to assist every
voter); see also FLA. DEP’T OF STATE DIV. OF ELECTIONS, POLLING PLACE PROCEDURES MANUAL 4
(2010) (noting that poll workers “must remain nonpartisan during the early voting period and on
Election Day”); JERRY HOLLAND, PRECINCT MANUAL FOR POLL WORKERS 6 (2010) (clarifying that the
authorized members of the election board are the precinct manager, assistant manager, precinct
Just imagine being a voter who has just endured a group of lawyers wearing “voter rights attorney” paraphernalia yelling “the Republicans are going to challenge their vote!” Now imagine that you have entered the polling room and are confronted with the presence of another one of these similarly attired assailants. There is no escape; the fix is in.

The lawyers outside the polling room, patrolling the lines of voters and yelling at the incoming voters, are a diverse group. Many of these “lawyers” are from out-of-state. To make matters worse, some of them are not lawyers at all. Those holding themselves out as “voting rights attorneys” that are not licensed in the state in which they are assisting voters may also be engaged in the unlicensed practice of law.

D. The Knock and Draggers

“I don’t get off your doorstep until you get out to the polls and vote. That’s our message! That’s our message!”

A popular method of getting out the vote is a process known as the “knock and drag.” Campaigns from both major parties have used the tactic. It is simple, yet effective. Partisans go to the residences of those

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75 This was the case in Florida where groups of individuals wearing the same slogans yelled at voters entering the polling place that the Republicans were going to steal the election. See E-mail from Witness to Author (Oct. 18, 2010) (on file with author; interviewee’s name excluded due to confidentiality) (noting that in 2004, the witness observed “a team of 6 or 7 ‘Voting Rights Counselors’ accost[] every voter who entered the polling station telling them that the Republicans were going to challenge their right to vote”).

76 See generally Birg, supra note 68, 313–15 (discussing the various issues that arise when lawyers cross state lines to assist in Election Day activities); Allison R. Hayward, Election Day at the Bar, 58 CASE W. RES. L. REV. 59, 60–65 (2007) (discussing what lawyers do on Election Day and the unlicensed practice of law).

77 See Birg, supra note 68, at 307–08; Hayward, supra note 76, at 68–74.

78 Representative Jan Schakowsky, Speech to Democrats at the Heartland Café in Rogers Park, Illinois (Oct. 18, 2010).


they believe will vote in favor of the partisans’ candidate or position; the partisans then knock on the door and do not leave the elector’s residence until that person goes to the polls and votes.81

The basic mechanics of the knock and drag lend themselves to voter intimidation. While appearing at an elector’s residence and asking her if she has voted may be offensive to the elector, that conduct alone is not voter intimidation.

However, it does not take much for the “knock and dragger” to cross the line. As discussed in Part II, voter intimidation may occur when the intimidating action deprives a person of a right as established by “the Constitution or laws of the United States.”82 Persons have a right to determine whether they wish to exercise their vote.83 When the partisans enter on a voter’s premises and knock on the door, they are merely acting like any other door-to-door salesman. Annoying, yes; engaged in intimidation, no. However, intimidation does occur once that partisan makes the conscious effort to remain on the elector’s premises until that elector is forced to change his or her mind, go to the polls, and vote in order to be left alone.

E. Poll Watchers84

Poll watchers are common participants in Election Day activities.85 Each state establishes its own rules regarding the conduct allowed by poll watchers and how poll watchers are appointed.86

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81 See Fleisher, supra note 79.
84 Not all states refer to these individuals as poll watchers. For example, Ohio’s term for a poll watcher is “observer.” See Ohio Rev. Code Ann. § 3505.21 (West, Westlaw through 2011).
Poll watchers are allowed into the polling room to observe the election process, but they are not allowed to interact with the voters. They are allowed to speak with the precinct manager or the judge and to challenge the casting of a ballot through these communications with the manager. Poll watchers ensure that poll workers are complying with the state election laws and that voters get to vote. The poll watcher’s presence alone deters voters and poll workers from engaging in mischief, thereby ensuring the integrity of the election process.

Many left-wing groups have claimed that the mere presence of poll watchers who do not share their left-wing political philosophies constitutes intimidation. The most recent claims arose during the 2010 General Election, with the most publicly discussed occurring in Texas. In Texas, the claim was that the stationing of poll watchers by the Republican Party, Republican candidates, moderate groups, and right-wing groups was for the sole purpose of voter intimidation and suppression.

From a review of the media, it would appear that the mere presence of a person of a different race, religion, color, or political philosophy than the voter at a polling room or in the polling place is intimidating. The problem, of course, is that this conduct does not meet the requirements of

Westlaw through 2011 Legis. Sess.).


E. g., id. § 101.111.

See Summit Cnty. Democratic Cent. & Exec. Comm. v. Blackwell, 388 F.3d 547, 551 (6th Cir. 2004) (stating that “a strong public interest” exists in both “allowing every registered voter to vote freely” and “preclud[ing] voting by those who are not entitled to vote”).

In Noxubee County, Mississippi, the mischief of the poll workers was one of the subjects of litigation initiated by the Department of Justice in 2005. See generally Complaint, United States v. Brown, 494 F. Supp. 2d 440 (S.D. Miss. 2007) (No. 4:05 CV 33 TSL-AGN).


See McGregor, supra note 92.

voter intimidation as outlined by federal law or by the definition provided by the Department of Justice. Political parties and candidates will usually place poll watchers at precincts that may have a history of problems. It is in these precincts that the minority party or candidate will need a poll watcher to ensure that the minority voter is allowed to vote.

The fear mongering over voter intimidation has produced poll watchers that see intimidation where none exists. In Houston during the 2010 General Election, various claims were made on both sides of the political spectrum accusing each other of voter intimidation. One Democratic Party Incident Report made its way around the internet and appears to show evidence of Democratic National Committee poll watchers being trained to gin up intimidation charges. The report even went as far as to state that the poll watchers were “obviously trying to intimidate . . .” From the report, the more likely reason for the described behavior was a poorly trained poll watcher and equally poorly trained poll worker. A lack of training, and not malicious intent, appears to be the cause of many of these disputes.

F. Poll Workers

Poll workers are responsible for carrying out the election process at the polling place. They mark off the campaign-free zone, check registrations and identification, distribute ballots, and guide ballots to the ballot box. Most of these workers are temporary employees. They usually receive a few hours training and then are sent to operate the election process.

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95 See supra note 92 and accompanying text.
96 The minority voter may be an ethnic minority, language minority, religious minority, party affiliation minority, or any other manner of descriptive class.
99 Id.
101 Some states provide detailed training guidelines for their poll workers that outline their responsibilities. See, e.g., SEC’Y OF STATE, POLL WORKER TRAINING GUIDELINES (2006) (California).
102 See generally Jocelyn Friedrichs Benson, One Person, One Vote: Protecting Access to the Franchise Through the Effective Administration of Election Procedures and Protections, 40 URB. LAW. 269, 276 (2008) (describing that the 2006 poll workers’ training in Philadelphia had lasted only seventeen minutes).
order to ensure a higher standard of operations, those with past experience as poll workers are often sought to manage the polling place;\(^\text{104}\) the use of experienced poll workers helps maintain the election process.

Poll workers often fall under the gaze of the Department of Justice’s scrutiny for disenfranchising voters.\(^\text{105}\) Usually, the alleged intimidation problems arise based on racial or language issues\(^\text{106}\) and are not always intentional.

Regardless of the experience level of the poll worker, problems can still arise. These individuals are responsible for the integrity of the election process.\(^\text{107}\) It is not uncommon, especially with the advent of early voting, for these workers to be left, unattended, in a polling room with access to all the necessaries to engage in elections mischief. They can also operate to intimidate voters by keeping those legally entitled to vote from receiving or casting their ballots.\(^\text{108}\)

During the 2008 Primary Election, one poll worker was captured on video openly campaigning for the Obama campaign.\(^\text{109}\) She made statements such as, “This is Obama’s house!” and “If you’re voting for McCain, you all outta go somewhere else.” When confronted, she denied engaging in such conduct.\(^\text{110}\) While the actions of this poll worker might appear minor to some, there are precincts where members of certain political parties are a significant minority and may be intimidated by such a campaign presence in an allegedly non-partisan position.

IV. SUCCESSFUL FEDERAL PROSECUTIONS ARE AS COMMON AS . . . WELL, THEY ARE NOT THAT COMMON

The Federal Prosecution of Election Offenses manual states that “[i]ntimidation . . . is amorphous and largely subjective in nature, and lacks . . . concrete evidence.”\(^\text{111}\) Additionally, “[i]ntimidation is likely to be both subtle and without witnesses.”\(^\text{112}\) This means that in order to prosecute


\(^{105}\) See generally Weinberg & Utrecht, supra note 102, at 432 (discussing the issues that arise with poll workers and how those issues lead to disfranchisement).

\(^{106}\) Id. at 436.

\(^{107}\) See generally Heidelaugh, Fisher & Miller, supra note 85.

\(^{108}\) Complaint, supra note 90.


\(^{110}\) Id.

\(^{111}\) DONASANTO & SIMMONS, supra note 4, at 54.

\(^{112}\) Id.
these cases, the victim “must testify, publicly and in an adversarial proceeding.”

This lack of prosecution appears to be common among election-related offenses. For years, partisans have fought over the existence of voter fraud. Some claim that “voter fraud . . . [is] a fraud,” while others claim it exists. The key information those advocating the non-existence of voter fraud use is the lack of federal prosecutions for such crimes. Amazingly, the same partisans who claim voter fraud is a boogieman of the right shout loudly about the existence of voter intimidation. By using the same methodology as those who claim that voter fraud does not exist, there can be no conclusion other than that voter intimidation does not exist and is a scare tactic employed by the left.

During the last ten years, there have been fewer than a handful of successful federal prosecutions on the basis of voter intimidation. To further illustrate the point, since the passage of Voting Rights Act in 1965, there have been only four voter intimidation prosecutions under that Act. We will now examine the two most recent federal prosecutions in more detail.

A. United States v. Brown

The United States brought a lawsuit in the district court for the Southern District of Mississippi against Ike Brown and other defendants on behalf of the county’s minority population for various violations of the Voting Rights Act’s § 2 during the 2003 election cycle. Brown was the

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113 Id. This is a rather odd statement, as the voter intimidation laws do not require that anyone actually be intimidated. The Federal Prosecution of Election Offenses manual appears to discount any prosecution of cases other than where the actual intimidation of a voter occurs, arguably leaving a large body of the law unenforced.


118 See Alex Eichler, Right Warns of Voter Fraud, but Do Their Claims Have Merit?, ATLANTIC WIRE (Oct. 27, 2010), http://www.theatlanticwire.com/politics/2010/10/right-warns-of-voter-fraud-but-do-their-claims-have-merit/22519/ (noting that "commentators on the left maintain that the voter-fraud charges are all smoke and no fire—but that voter intimidation tactics could give Republicans an unfair advantage").


120 Brown, 494 F. Supp. 2d at 442.
Noxubee County Democratic Executive Committee chairman. Other defendants in the case included the Noxubee County Democratic Executive Committee (NCDEC), Carl Mickens, the Noxubee County Elections Commission, and Noxubee County.

Mickens and Noxubee County agreed to a consent decree that enjoined them from threatening, intimidating, and coercing voters, in addition to a laundry list of discriminatory practices. This consent decree was agreed to because Mickens and Noxubee County forbade voters to vote at a voting “booth that provid[ed] privacy;” cast absentee ballots without the ballot being examined prior to being placed in the ballot box; and vote for the candidate of their choice. They also subjected voters to threats, intimidation, and harassment; asked voters if they needed assistance to vote without such assistance having been requested; and engaged in “heavy-handed instruction” to influence the voter’s choice. Mickens and Noxubee County were enjoined “through December 31, 2012” from engaging in the various acts previously described as intimidation. The United States may move to extend the decree within ninety days of its expiration.

The remaining defendants, Brown and the NCDEC, went to trial and were found liable for § 2 violations, but not § 11(b) violations. During the

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121 Id.
122 Carl Mickens was the Circuit Clerk of Noxubee County, superintendent of elections, administrator of absentee ballots, and registrar of voters. See Consent Decree at 1, United States v. Brown, 494 F. Supp. 2d 440 (S.D. Miss. 2007) (No. 4:05 CV 33 TSL-AGN).
123 Id. at 1.
124 The consent decree entered into between the United States, Carl Mickens, and Noxubee County infers that the defendants engaged in racial discrimination by “qualifying candidates from outside . . . [the County],” taking actions to “disadvantag[e] or defeat[] white candidates,” registering voters from outside the county, “prohibiting white voters from voting in [the] Democratic Primary,” rejecting absentee ballots on grounds of race, counting absentee ballots on the basis of the voter’s race regardless of any ballot defect, restricting election information to candidates on the basis of race, providing absentee ballots based on race to voters who did not properly request such ballots, not providing absentee ballots based on race to voters who did properly request them, taking actions at the polling place “making it more likely that the voters’ ballot will be found defective or not counted,” prohibiting white candidates and “their poll watchers from observing challenges to absentee ballots,” enforcing the fifty foot campaign-free zone against only “white candidates and their supporters,” allowing non-residents to vote in the county or a district in which they did not reside, and not allowing “black teachers and students to cast an absentee ballot by mail.” Id at 4–7.
125 Id. at 10–11.
126 Id.
127 Id. at 15.
128 Id.
trial, evidence of voter intimidation was presented. This evidence included testimony that Brown ordered Eddie Coleman to “get away from the entrance” of the Shuqualak polling place when Coleman was going to vote.\(^{130}\) When Coleman refused, Brown summoned law enforcement.\(^ {131}\) Eventually, Coleman was allowed to enter and vote.\(^ {132}\) The court’s view of the testimony was that “at the time of the incident, [Brown] did not know whether Coleman had voted.”\(^ {133}\)

Evidence was also presented showing that Brown sent a press release to the local paper listing “the names of 174 voters.”\(^ {134}\) The press release stated that the 174 listed voters were ineligible to vote in the Democratic Party primary.\(^ {135}\) “Brown was reported as saying those voters might be challenged.”\(^ {136}\)

Government witnesses testified that black voters received unsolicited assistance that included the marking of the voter’s ballot “without consulting the voter[].”\(^ {137}\) Testimony also described how “an elderly white voter” sought help and had her blank ballot taken from her and run “through the machine,” thus “den[y]ing her the opportunity to cast a ballot.”\(^ {138}\)


On January 7, 2009,\(^ {139}\) the Civil Rights Division of the Department of Justice filed a lawsuit pursuant to the Voting Rights Act of 1965 seeking an injunction against Minister King Samir Shabazz, Malik Zulu Shabazz, the New Black Panther Party for Self-Defense, and Jerry Jackson.\(^ {140}\) On November 4, 2008, two members of the New Black Panther Party for Self-Defense stood “approximately eight to fifteen feet from the entrance” of the polling place at 1221 Fairmont Street, Philadelphia, Pennsylvania.\(^ {141}\) Samir

\(^{130}\) Id. at 472.
\(^{131}\) Id.
\(^{132}\) Id.
\(^{133}\) Id.
\(^{134}\) Id. at 474. *But see* United States v. N.C. Republican Party, No. 5:92-00161-F (E.D.N.C. 1992) (a case that was brought on the basis of a direct mailing by the North Carolina Republican Party that incorrectly stated that the voter could not vote if she had moved within thirty days of the election).
\(^{135}\) Brown, 494 F. Supp. 2d at 474.
\(^{136}\) Id.
\(^{137}\) Id. at 471.
\(^{138}\) Id.
\(^{139}\) See Letters from Spencer Fisher, Dep’t of Justice Att’y, to Defendants (Apr. 28, 2009) (regarding entry of Default Judgment) (on file with author).
\(^{141}\) Id. at 3.
Shabazz and Jerry Jackson were wearing “black berets, combat boots, bloused battle dress pants, rank insignia, ... New Black Panther Party for Self-Defense insignia, and black jackets.” One of the Panthers, Samir Shabazz, was wielding a nightstick. According to the complaint, both men made racial threats and insults while standing at the polling place entrance.

All the defendants received service of process and none of them filed an answer to the complaint. Notice of the clerk’s entry of default was entered by court order on April 17, 2009. Shortly after receiving notice of the clerk’s default judgment, the Department of Justice dismissed the case against all the defendants except Minister King Samir Shabazz—a rather odd litigation tactic considering the government had already won. This was the proverbial snatching of defeat from the jaws of victory. Judgment was entered against the sole remaining defendant, Minister King Samir Shabazz, on May 18, 2009. Shabazz was enjoined “from displaying a weapon within 100 feet of any open polling location on any election day in the City of Philadelphia, or from otherwise violating 42 U.S.C. § 1973i(b).”

143 Complaint, supra note 140, at 2.
144 Id. Bartle Bull testified during the U.S. Commission on Civil Rights investigation of the event. See generally Hearing on the Dep’t of Justice’s Actions Related to the New Black Panther Party Litigation and Its Enforcement of Section 11(b) of the Voting Rights Act Before the U.S. Comm’n on Civil Rights 53 (2010) [hereinafter Hearing on Department of Justice’s Actions].
145 Complaint, supra note 140, at 3. A video also captured the two men dressed as described in the complaint. The videographer or his companion asked the two Panthers what they were doing. In the background, you can see another poll watcher for the Democratic Party placing a cell phone call claiming the Republican-affiliated poll watchers were engaged in acts of intimidation against the New Black Panther Party Democratic-affiliated poll watcher. Election Journal, “Security Patrols Stationed at Polling Place in Philly,” YOUTUBE (Nov. 4, 2008), http://www.youtube.com/user/ElectionJournal/p/u/4/neGbKHyGuHU.
150 Judgment, supra note 149, at 1.
This rather odd progression of litigation resulted in an investigation by the U.S. Commission on Civil Rights. During the investigation into the handling of the New Black Panther case, the U.S. Commission on Civil Rights received testimony from Bartle Bull. During that testimony, Mr. Bull, a life-long Democratic Party supporter, stated that he had never seen “armed people blocking the doors to a polling place,” even during his work as a civil rights lawyer in Mississippi during 1966. Bull personally witnessed the actions of the New Black Panther Party members at 1221 Fairmont Street. He testified that during the approximately forty-five minutes that he was watching the activity, three voters who approached the polling place saw the Panthers and did not vote at that time.

On September 24, 2010, Christopher Coates testified before the U.S. Commission on Civil Rights. Coates is a career lawyer with the Department of Justice and had worked for the ACLU prior to joining the Department. He testified that the Department had a culture that led to race-specific, rather than race-neutral, enforcement of the civil rights laws. He also testified that during his career at the Department of Justice, when he attempted to bring cases against non-white defendants, opposition to any prosecution of a racial minority became apparent. The handling of the New Black Panther Party case is evidence that this culture continues to this day, even though the Voting Rights Act is facially race-neutral.

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151 Hearing on the Department of Justice’s Actions, supra note 144, at 54.
152 Mr. Bull’s political experience includes coordinating students for Adlai Stevenson at Harvard College in 1956, serving as Robert Kennedy’s New York State Campaign Manager for Kennedy’s presidential campaign in 1968, working on the Charles Evers campaign for Governor of Mississippi in the early 1970s, serving as chairman in New York State for Democrats for Governor Shiver, serving as Jimmy Carter’s New York State campaign manager in 1976, serving as chairman of New York Democrats for Edward Kennedy during his presidential campaign in 1980, and working for the Mario Cuomo, Hugh Carey, and Ramsey Clark campaigns. Id. at 54–55.
153 Id. at 56.
154 Id. at 58–59.
155 Id.
157 Christopher Coates served as a voting-rights litigator for more than thirty years. Id. at 4. He was appointed Chief of the Voting Rights Section in 2008. Id. at 7.
158 Id. at 2.
159 Id. at 5.
V. METHODS TO REDUCE VOTER INTIMIDATION AT THE POLLING PLACE ON ELECTION DAY

The main problem with the prosecution of voter intimidation under the criminal or civil statutes is that it does not adequately address the goal of the intimidator. Even if the prosecutor wins his or her case, courts are unlikely to overturn an election. 161 Both federal and state courts have a history of limiting relief in electoral disputes to disqualifying absentee ballots, 162 ordering recounts, 163 defining what counts as a vote, 164 or providing sanctions. 165 The goal of an intimidator, though, is to win an election—something that judicial actions allow even if the intimidator is prosecuted.

Those who organize groups to engage in voter intimidation probably know the rarity of such prosecutions and the hesitancy of courts to become involved in electoral issues. In fact, since prosecution is so rare, those who have engaged in the conduct are probably of the opinion that what they are doing is legal and would be shocked if they were threatened with arrest, or were arrested for, their offenses.

Barry Weinberg and Lyn Utrecht have argued that if the states do not adequately discharge their Election Day responsibilities, then the federal

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161 Less than ten contested elections have resulted in an invalidation or reversal of a federal or state election. See In re Paikuli, 8 Haw. 680, 685 (1890) (invalidating the election of the Representative for the District of Koolau); Allen v. Griffith, 169 S.W. 1003, 1005 (Ky. 1914) (invalidating the election for the office of jailor); O’Neal v. Barth, 102 S.W. 263, 263 (Ky. 1907) (invalidating the election results in accordance with Scholl v. Bell); Orr v. Kevil, 100 S.W. 314, 317 (Ky. 1907) (invalidating the city election in Princeton); Scholl v. Bell, 102 S.W. 248, 263 (Ky. 1907) (invalidating the county and city elections in Louisville and Jefferson County); Stewart v. Rose, 72 S.W. 271, 272 (Ky. 1903) (invalidating the election for the office of police judge in the town of Jellico); Barry v. Lauck, 45 Tenn. 588, 592 (1868) (invalidating the election of the office of Chancellor); Emery v. Robertson Cnty. Election Comm’n, 586 S.W.2d 103, 110 (Tenn. 1979) (invalidating the election of the sheriff and two county commission positions); McCormick v. Jester, 115 S.W. 278, 288–89 (Tex. Civ. App. 1908) (invalidating a county election regarding the prohibition of liquor by reversing the election results and changing the election’s outcome in favor of prohibition).

162 E.g., Gribble v. Willeford, 546 N.E.2d 994, 998 (Ill. App. 1989) (stating that a candidate won by one vote due to the overturning of a disqualified absentee ballot); In re April 10, 1984 Election of East Whiteland Twp., 483 A.2d 1033, 1036 (Pa. Commw. Ct. 1984) (holding that absentee ballots received after the deadline would not be counted).


165 E.g., United States v. Brown, 561 F.3d 420, 437–38 (5th Cir. 2009) (sanctioning defendants to a limited role in the upcoming election because of their history of engaging in election fraud and voter intimidation).
government should step in and expand the civil rights voting laws along with the Department of Justice’s observer program.\textsuperscript{166} Knowing that federal law enforcement is not going to actively prosecute voter intimidation cases, the additional criminal and civil penalties will not curtail the problem.\textsuperscript{167}

This leaves the matter in the hands of individuals, state legislatures, and state agencies.\textsuperscript{168} The state legislatures and agencies already regulate, through their statutes and administrative rules, much of what occurs at the polling places, and may be able to resolve many of the current issues through further regulation.\textsuperscript{169} In order to do this effectively, the new regulations will have to restrict speech around and at the polling place. Two primary locations where speech restrictions will be necessary to minimize the effect of voter intimidation are inside the polling room and outside the polling place. Also, because mail-in and electronic voting is a growing trend in the United States, I will briefly discuss it, as well as the proposed creation of a private cause of action against acts of voter intimidation.

\textbf{A. Inside the Polling Room}

The polling room is where voting actually takes place. Commonly found within the polling room are the voting booths, ballot box, ballots, poll workers with their equipment, and poll watchers. It may be located in a privately owned, non-governmental building or a government building.

One of the primary methods of regulating conduct in the polling room is through the regulation of speech. This means that any such regulation would have to meet the three-step test under First Amendment analysis. First, it must be determined whether the speech in question is protected under the First Amendment.\textsuperscript{170} Second, the type of forum must be determined; the constitutional standard is based on this distinction.\textsuperscript{171} And third, a determination must be made of whether the speech restriction meets the constitutional standard.\textsuperscript{172}

\textsuperscript{166} Weinberg & Utrecht, supra note 102, at 436.
\textsuperscript{167} But cf. Daniels, supra note 114, at 381–82 (2010) (arguing for the passage of federal legislation to deter voter deception).
\textsuperscript{169} Id. at 375–78.
\textsuperscript{170} Miller v. City of Cincinnati, 622 F.3d 524, 533 (6th Cir. 2010).
\textsuperscript{171} Id.
\textsuperscript{172} Id.
The speech at issue in our analysis is political speech by a private individual. It concerns a person’s ability to advocate for a person or cause. Such speech is clearly protected under the First Amendment. The proposed speech restrictions are based on content, but do not discriminate on the basis of viewpoint.

Next, the type of forum must be determined. Since its inception in the late 1880s, the polling room has been a non-public forum. It is not a location that has “immemorially been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” Nor has the government designated the location as a place for expressive activity. Since the change in the election procedures that swept the nation in the late 1800s, using a forum where speech was restricted and using secret ballots have been means to deter election fraud and voter intimidation. According to this tradition, the polling room is a temporary establishment with restricted access. It does not, and has not for over 120 years, been a venue for public debate. As such, it does not meet the necessary conditions to be considered a public forum and the government is allowed to reasonably restrict speech in a viewpoint-neutral manner.

1. Restriction on Poll Workers and Watchers

Poll watchers and workers should be limited in what messages they are allowed to express inside the polling room. Many jurisdictions already

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173 See Citizens United v. FEC, 130 S. Ct. 876, 898–99 (2010) (stating that the “First Amendment ‘has its fullest and most urgent application’ to speech uttered during a campaign for political office”) (citation omitted).
174 The speech being regulated is limited to that advocating a current candidate or cause.
175 The restrictions do not take political party or ideology into account. Both are treated equally.
180 See Burson, 504 U.S. at 206.
restrict the wearing of political party and campaign messages or images by poll watchers and workers. However, this restriction should be extended to messages that may be implicitly, but are not explicitly, affiliated with a campaign or party.

Restrictions should be made regarding the wearing of solicitation such as “voting rights attorney” or “poll attorney” by poll watchers, as the poll watcher is an official partisan position in the polling room. There is no fathomable reason for any poll watcher to wear such a slogan. The use of such a slogan is deceptive and meant only to gain an unfair advantage: to intimidate the poll workers and opposing poll watchers. As poll watchers are not allowed to communicate with voters, then what other possible reason for wearing such a slogan can exist? It is doubtful that the “voting rights attorneys” or “poll attorneys” need the slogan to remind them that they are lawyers, or at least playing them on Election Day.

Poll workers should also be pulled from a diverse group of individuals. Diversity could be based on racial, political, and language criteria. This would provide an additional safeguard against intimidation by reducing the ability of one party to dominate and control the polling place. In order to complete this task, an election supervisor should consult with party leadership of all major parties in the jurisdiction in order to ensure political diversity. Doing so would limit the effect of party switching merely to create fake political diversity.

Additionally, the use of language diversity could possibly help prevent misunderstandings between poll workers and voters who do not speak the same language. The non-English speaking voter need not speak the same language as the bilingual poll worker in order for a better understanding of communications difficulties to be understood in this instance. The main goal is to increase understanding in the polling room regarding the frustration felt by the non-English speaking voter.

2. Police Presence

A police presence should be responsive to any call for help from the polling place. The best method would be to have the police at the polling place to stop the intimidation process as it occurs. This is a rather controversial position, however, as several state statutes ban the presence of

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182 E.g., FLA. STAT. ANN. § 101.131(1) (West, Westlaw through 2011 Legis. Sess.); FLA. DEP’T OF STATE DIV. OF ELECTIONS, supra note 74, at 4 (restricing the wearing of campaign or party related messages by poll watchers).
police officers at the polling place, unless summoned.  \footnote{See Robert Brett Dunham, \textit{Defoliating the Grassroots: Election Day Restrictions on Political Speech}, 77 Geo. L.J. 2137, 2189 (1989).} At the very minimum, there should be a police presence within minutes of the location. This would allow for a faster response to disruptions at polling places and would lessen voter intimidation.

Such a police presence would have been useful in the 2010 General Election held in Houston, Texas. Following the events in Philadelphia in 2008, the New Black Panther Party made its presence known in Houston during the 2010 General Election. During that election, members of the New Black Panther Party entered polling rooms without permission and ejected white poll watchers and poll workers not affiliated with the Democratic Party.  \footnote{See supra note 58.} After ejecting the specified poll watchers and workers, the party members remained in the polling room during voting. \footnote{Id.} Law enforcement has not prosecuted any of these individuals as of the writing of this Article.

3. Same Day Voter Registration

Several states currently allow same day voter registration. \footnote{North Dakota has no voter registration requirement. Idaho, Iowa, Maine, Minnesota, Montana, New Hampshire, North Carolina, Wisconsin, Wyoming, and Washington, D.C. all allow for Election Day voter registration. Connecticut only allows Election Day registration for presidential elections. \textit{See Voter Registration Information}, PROJECT VOTE SMART, http://www.votesmart.org/voter_registration_resources.php (last visited Oct. 30, 2011); \textit{State by State Info}, DECLARE YOURSELF BY STATE, http://www.declareyourself.com/voting_faq/state_by_state_info_2.html (last visited Oct. 30, 2011).} While this has been championed as a means to increase access to the polls, it also gives additional resources to those who intimidate voters. \footnote{The history of same day voter registration is long and storied in the United States. The practice has repeatedly been abused by political machines, in addition to intimidation, through the use of floaters and repeaters. \textit{See generally} CAMPBELL, supra note 52 (describing the history of election fraud across the United States from before the founding of the Republic to the 2004 General Election).} As discussed earlier, voting intimidation can be used to force a person to vote. By allowing a person to register on Election Day, the pool of intimidation targets becomes limited only by the size of the local population. Therefore, a requirement that voters must register a reasonable number of days prior to Election Day should be maintained.
4. The Use of Cameras by Voters

Today, almost every cell phone has a camera embedded in it. A popular use of these cameras during the 2008 and 2010 elections was to photograph a marked ballot and then post the picture on a social network.\textsuperscript{188} This allowed the voter to show the world how he had cast his ballot.\textsuperscript{189} While this has become a popular use of social networks, it is also a possible method of verifying a voter’s vote.

Voter intimidation is of little value if there is no means to verify how well the intimidation tactics have worked. Technology has given the intimidators another method to follow up on their threats by requiring the victims to photograph their ballots. Removing cameras from the polling room will help remove the intimidators’ means of keeping an eye on their investment.

5. Voting Assistants

A traditional method of voter intimidation includes sending in an observer to ensure the voter votes as instructed.\textsuperscript{190} Many jurisdictions allow voters to seek assistance with voting from a person of their choice.\textsuperscript{191} Some jurisdictions restrict the voter’s use of an assistant to those individuals who are suffering from some type of disability.\textsuperscript{192}

All voting regulations should limit the use of assistants in some manner. This could include limiting the use of assistants to those with specific disabilities. Regardless, there should be some limit on how many times the same person can provide assistance to a voter. Such a restriction need not apply to poll workers who are called on to assist a voter. The limitation of


\textsuperscript{189} See, e.g., id. (noting that the pictures showed that Sen. Kendall Van Dyk had voted for himself).

\textsuperscript{190} Jared Janes, Voter Assistance Perplexes Elections Administrators, THE MONITOR (Oct. 31, 2010, 12:12 AM), http://www.themonitor.com/articles/perplexes-44069-voter-administrators.html (describing the testimony of two Hidalgo County election judges who overheard assistants instructing the elderly on how to vote); see also CAMPBELL, supra note 52, at 62, 67 (describing how poll workers would inspect the ballot to make sure the voter voted “correctly” and how Minor Tubbs had to run for his life after being the singular Republican vote in Smithville).

\textsuperscript{191} Such assistance allows states to comply with the Help America Vote Act. See 42 U.S.C. § 15481(a)(3) (2006).

\textsuperscript{192} E.g., FLA. STAT. ANN. § 101.051 (West, Westlaw through 2011 Legis. Sess.) (limiting assistance to “blindness, disability, or inability to read or write”).
those outside the polling room should be sufficient to reduce the effect of intimidation by those interested in the election’s outcome.

B. Outside the Polling Room

The area outside the polling room includes the polling place and its surrounding area. The polling place is the structure that contains the polling room. It, like the polling room, may be a government or non-government property. For example, if a polling room is located inside a library, there may be an area between the door to the polling place and the polling room. This area may fall under either a non-public or limited-public forum description, depending on the general use of the building being used as a polling place. The area outside the polling place may also fall under any of the three forum types created by the Supreme Court: traditional public, designated public, and non-public.193

A traditional public forum is a place “which by long tradition or by government fiat [has] been devoted to assembly and debate . . . .”194 A designated public forum is property made available by the government for the public to use as a forum for speech.195 The state may restrict speech, in a content-based manner, in a traditional or designated public forum if it shows that the restrictions are “necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”196 “The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”197

A non-public forum is neither a forum that the government has designated as a public forum nor a traditional public forum.198 Speech restrictions in this forum must be “reasonable and viewpoint-neutral.”199 Speech in non-public forums is also subject to regulation of time, place, and manner.200

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194 See Perry Educ. Ass’n, 460 U.S. at 45.
195 Id. at 45–46; see Pleasant Grove, 555 U.S. at 469–70.
196 See Perry Educ. Ass’n, 460 U.S. at 45.
197 Id. (citation omitted).
198 Id. at 46.
199 See Pleasant Grove, 555 U.S. at 470 (citation omitted).
200 Perry Educ. Ass’n, 460 U.S. at 46.
In 1888, Louisville, Kentucky became the first American jurisdiction to establish a campaign-free zone.\textsuperscript{201} Today, forty-seven states and the District of Columbia have campaign-free zones beginning at the entrance of the polling place and extending a fixed distance.\textsuperscript{202} These zones vary from state to state and range from ten feet to one hundred yards.\textsuperscript{203} The purpose of

\textsuperscript{201} Burson v. Freeman, 504 U.S. 191, 203 (1992) (plurality opinion).

\textsuperscript{202} Dunham, supra note 183, at 2143; see also ALA. CODE § 17-9-50 (West, Westlaw through 2011 Legis. Sess.) (30 feet); ALASKA STAT. ANN. § 15.15.170 (West, Westlaw through 2010 Legis. Sess.) (200 feet); ARIZ. REV. STAT. ANN. § 16-411 (West, Westlaw through 2011 Legis. Sess.) (75 feet); ARK. CODE ANN. § 7-1-103(a)(9) (West, Westlaw through 2011 Legis. Sess.) (100 feet); CAL. ELEC. CODE § 319.5 (West, Westlaw through 2011 Legis. Sess.) (100 feet); COLO. REV. STAT. ANN. § 1-13-714 (West, Westlaw through 2011 Legis. Sess.) (100 feet); CONN. GEN. STAT. ANN. § 9-236 (West, Westlaw through 2011 Legis. Sess.) (75 feet); DEL. CODE ANN. tit. 15 § 4933 (West, Westlaw through 2011 Legis. Sess.) (50 feet); D.C. CODE § 1-1001.10(b)(2)(A) (West, Westlaw through 2011 Legis. Sess.) (50 feet); FLA. STAT. ANN. § 102.031(4)(a) (West, Westlaw through 2011 Legis. Sess.) (100 feet); GA. CODE ANN. § 21-2-414(a)(3) (West, Westlaw through 2011 Legis. Sess.) (25 feet); HAW. REV. STAT. § 11-132 (West, Westlaw through 2011 Legis. Sess.) (200 feet); IDAHO CODE ANN. § 18-2318 (West, Westlaw through 2011 Legis. Sess.) (100 feet); ILL. COMP. STAT. ANN. 5/7-41(c) (West, Westlaw through 2011 Legis. Sess.) (100 feet); IND. CODE ANN. § 3-5-2-10 (West, Westlaw through 2011 Pub. Laws) (50-foot chute); IOWA CODE ANN. § 39A.4 (West, Westlaw through 2011 Legis. Sess.) (300 feet); KAN. STAT. ANN. § 25-2413 (West, Westlaw through 2010 Legis. Sess.) (250 feet); KY. REV. STAT. ANN. § 117.235 (West, Westlaw through 2010 Legis. Sess.) (300 feet); LA. REV. STAT. ANN. § 18:1462 (West, Westlaw through 2011 Legis. Sess.) (600 feet); ME. REV. STAT. ANN. tit. 21-A, § 682(2) (West, Westlaw through 2011 Legis. Sess.) (250 feet); MD. CODE ANN., ELEC. LAW § 16-206 (West, Westlaw through 2011 Legis. Sess.) (100 feet); MASS. GEN. LAWS ANN. ch. 54, § 65 (West, Westlaw through 2011 1st Ann. Legis. Sess.) (150 feet); MICH. COMP. LAWS ANN. § 168.744 (West, Westlaw through 2011 Legis. Sess.) (100 feet); MINN. STAT. ANN. § 204C.06 (West, Westlaw through 2011 Legis. Sess.) (100 feet); MISS. CODE ANN. § 23-15-895 (West, Westlaw through 2010 Legis. Sess.) (150 feet); MO. ANN. STAT. § 115.637 (West, Westlaw through 2011 Legis. Sess.) (25 feet); MONT. CODE ANN. § 13-35-211(1) (West, Westlaw through 2011 Legis. Sess.) (100 feet); NEB. REV. STAT. § 32-1524(2) (West, Westlaw through 2010 Legis. Sess.) (200 feet); NEV. REV. STAT. ANN. § 293.740(2) (West, Westlaw through 2009 Legis. Sess. & 2010 Special Sess.) (100 feet); N.H. REV. STAT. ANN. § 659:43 (West, Westlaw through 2011 Legis. Sess.) (a 10-foot corridor that extends to a distance at the discretion of the election moderator); N.J. STAT. ANN. § 19:34-15 (West, Westlaw through 2011 Legis. Sess.) (100 feet); N.M. STAT. ANN. § 1-20-16 (West, Westlaw through 2011 Legis. Sess.) (100 feet); N.Y. ELEC. LAWS § 17-130 (McKinney, Westlaw through 2011 Legis. Sess.) (100 feet); N.C. GEN. STAT. ANN. § 163-166.4 (West, Westlaw through 2010 Legis. Sess.) (50 feet); N.D. CENT. CODE ANN. § 16.1-10-06.2 (West, Westlaw through 2009 Legis. Sess.) (100 feet); OHIO REV. CODE ANN. § 3501.30(4) (West, Westlaw through 2010 Legis. Sess.) (100 feet); OKLA. STAT. ANN. tit. 26, § 7-108 (West, Westlaw through 2011 Legis. Sess.) (300 feet); 25 PA. STAT. ANN. § 3060(d) (West, Westlaw through 2011 Legis. Sess.) (10 feet); R.I. GEN. LAWS ANN. § 17-19-49 (West, Westlaw through 2010 Legis. Sess.) (50 feet); S.C. CODE ANN. § 7-25-180 (West, Westlaw through 2010 Legis. Sess.) (200 feet); S.D. CODIFIED LAWS § 12-18-3 (West, Westlaw through 2011 Legis. Sess.) (100 feet); TENN. CODE ANN. § 2-7-111 (West, Westlaw through 2011 Legis. Sess.) (100 feet); TEX. ELEC. CODE ANN. § 61.003 (West, Westlaw through 2011 Legis. Sess.) (100 feet); UTAH CODE ANN. § 20A-3-501 (West, Westlaw through 2011 Legis. Sess.) (150 feet); VA. CODE ANN. § 24.2-604 (West, Westlaw through 2011 Legis. Sess.) (40 feet); W. VA. CODE ANN. § 3-9-6 (West, Westlaw through 2011 Legis. Sess.) (300 feet); WIS. STAT. ANN. § 12.03(2)(b) (West, Westlaw through 2011 Legis. Sess.) (100 feet); WYO. STAT. ANN. § 22-26-113 (West, Westlaw through 2010) (100 yards).

\textsuperscript{202} See supra note 202 and accompanying text.
campaign-free zones is to discourage election fraud and voter intimidation.\textsuperscript{204}

The United States Supreme Court upheld the constitutionality of campaign-free zones in the case of \textit{Burson v. Freeman}.\textsuperscript{205} In \textit{Burson}, the State of Tennessee had passed a law that forbade campaigning within one hundred feet of entrances to buildings containing polling places.\textsuperscript{206} Mary Rebecca Freeman, the plaintiff, was politically active in Tennessee.\textsuperscript{207} She had run for office, managed campaigns, and worked on statewide campaigns.\textsuperscript{208}

Freeman sought a declaratory judgment finding that the Tennessee campaign-free zone ordinance violated both the Tennessee and United States Constitutions.\textsuperscript{209} The relevant part of the statute read as follows:

Within the appropriate boundary as established in subsection (a) [100 feet from the entrances], and the building in which the polling place is located, the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question are prohibited.\textsuperscript{210}

The trial court held that the statute did not violate either the United States or Tennessee Constitutions.\textsuperscript{211} The Tennessee Supreme Court, upon review, reversed the trial court by a four-to-one vote.\textsuperscript{212}

Upon reaching the United States Supreme Court, a plurality found that the campaign-free zone was a “facially content-based restriction on political speech in a public forum . . . .”\textsuperscript{213} Therefore, the State needed to show that the regulation was “necessary to serve a compelling state interest and that it [was] narrowly drawn to achieve that end.”\textsuperscript{214} The State asserted two compelling interests in support of speech restrictions: protecting citizens’

\textsuperscript{204} See \textit{Burson}, 504 U.S. at 206–08 (recognizing Tennessee’s compelling interests in shielding voters from “intimidation and election fraud” and holding that its “campaign-free zone” did not constitute an impermissible restriction on political expression).

\textsuperscript{205} Id. at 210. There had been challenges to campaign-free zones before the \textit{Burson} case. See \textit{generally} Dunham, supra note 183 (discussing the many state and federal cases that reviewed campaign-free zones prior to the Supreme Court’s opinion in \textit{Burson}).

\textsuperscript{206} \textit{Burson}, 504 U.S. at 193–94.

\textsuperscript{207} Id. at 194.

\textsuperscript{208} Id.

\textsuperscript{209} Id.

\textsuperscript{210} Id. at 193–94. The statute also provides a 300-foot campaign-free zone for certain counties based on population. Id. at 194 n.1. The Supreme Court did not undertake review of the 300-foot zone. Id.

\textsuperscript{211} Id. at 194.

\textsuperscript{212} Id. at 195.

\textsuperscript{213} Id. at 198.

\textsuperscript{214} Id.
right “to vote freely for the candidates of their choice” and ensuring the prevention of voter intimidation and election fraud in the election process.\textsuperscript{215} The Court then covered a brief history of elections in the United States and decided that “the States’ compelling interests in preventing voter intimidation and election fraud” were valid, compelling interests supporting the speech restrictions at and around the polling place.\textsuperscript{216} No firm limitation was placed on the zone, but a warning was given in dicta that at some point, the size of the zone may create “an impermissible burden.”\textsuperscript{217}

In the spirit of \textit{Burson}, an extension of most of the current campaign-free zones may be necessary. This extension should include the parking lot adjacent to the polling place and used by voters. The reason for the increased zone is to allow people the ability to exit their cars without suffering harassment and intimidation from campaigners.\textsuperscript{218} Such a restriction should satisfy the First Amendment’s requirements for restricting speech, as the state has a compelling interest in protecting voters from intimidation and such an extension of the campaign-free zone would be narrowly defined to the parking lot.

The campaign-free zone should also be extended to protect voters once they enter the line to vote. This is merely a narrowly tailored extension of the campaign-free zone concept and is similar to what is already used in New Hampshire.\textsuperscript{219} Voters who must stand in line to vote are a captured audience. If intimidators want to reduce the vote count in the precinct, all they have to do is get those standing in line to leave and give up their votes. If the intimidators want to ensure a certain vote count, they can use the line as the proverbial fish in the barrel.

If intimidators or campaigners want to get in line and vote in the precinct, there is little that can be done. However, this requires the intimidators or campaigners to limit their access to those immediately around them in line, thereby limiting their effectiveness.

While violations of these no-solicitation zones do occur, law enforcement and poll workers have been successful in enforcing the no-solicitation zones in most cases.\textsuperscript{220} The regulation of the zone by poll

\textsuperscript{215} \textit{Id.} at 198–99. An alternate description for preventing voter intimidation and election fraud is protecting an election’s integrity and reliability.

\textsuperscript{216} \textit{Id.} at 206.

\textsuperscript{217} \textit{Id.} at 210.

\textsuperscript{218} During the 2010 General Election, a campaigner aggressively approached voters as they exited their vehicles in a north Florida precinct.

\textsuperscript{219} N.H. REV. STAT. ANN. § 659:43 (West, Westlaw through 2011 Legis. Sess.).

\textsuperscript{220} See, e.g., TENN. CODE ANN. § 2-7-111 (West, Westlaw through 2011 Legis. Sess.); LEWIS CNTY. GOV’T, CAMPAIGN ACTIVITY AT THE POLLING PLACE 1–2 (2011), \textit{available at} http://lewiscountynh.com/Campaign%20Free%20Activity%20100%20ft.pdf (suggesting that the County Election Commission can contact the police or
workers also allows for the minimization of the effects of voter intimidation in a manner that does not require the participation of prosecutors for enforcement. This appears to be the key to successful regulation of voting locations.

C. Private Enforcement of the Civil Rights and Voting Rights Acts

Sherry A. Swirsky has argued for the creation of a private cause of action to enforce the Civil Rights and Voting Rights Acts. There was even a bill brought before the Senate by Sen. Barack Obama and Sen. Charles Schumer that would have created this new private cause of action. While the idea may sound favorable at first blush, it quickly loses its luster when examined in the culture of elections.

Elections are about power. Providing for a private cause of action under the Acts would definitely lead to the implementation of litigation to gain an advantage. Anything that can reduce the opposing party’s war chest is worth considering in the rough-and-tumble world of elections. The implementation of the private cause of action would provide nothing more than a chilling effect on those wishing to run for office.

By creating a private cause of action, the courts would be drawn into and made actors in selecting candidates, who would then be subject to intimidation by litigation. Such actions could also be used to keep voting rights organizations from actively participating in assisting in the election process. The filing of such a claim against the poorly funded voting rights organizations would lead to fewer services provided to the society’s members who are most in need of help on Election Day.

As all litigators know, as long as these cases are sufficiently pled, they will survive a motion to dismiss and draw media attention away from the actual issues. This would guarantee that the case survives for months and would create an added expense on any campaign. It would be interesting to see what effect filing such a lawsuit first would have on the outcome of the election. Would the public view the retaliatory lawsuit by the candidate’s opponent as a case of sour grapes by the late-to-file litigant? Furthermore,
these private actions could lead to a legal method of intimidating minority candidates and could grow to become the embodiment of James Crow, Esq.\textsuperscript{224}

**D. Vote-by-Mail and Electronic Voting**

In Oregon, an elector will not find a polling place on Election Day.\textsuperscript{225} In Washington, only one out of the thirty-nine counties had polling sites in the 2010 General Election.\textsuperscript{226} Both states have elected to do away with the traditional Election Day polling place.\textsuperscript{227} This may be the future of voting as additional states consider laws allowing their counties to switch to vote-by-mail schemes. A move to electronic voting (“e-voting”) cannot be far behind.

This move to vote-by-mail has taken place through the liberalization of absentee voting. In the past, in order to vote by absentee ballot, the voter had to claim an excuse that would keep him or her from the polling place on Election Day.\textsuperscript{228} Acceptable disabilities that allowed for an absentee ballot often included military deployment, age, or the inability to vote at the polls on Election Day because of religious obligations or illness.\textsuperscript{229} Recently, a number of states have removed the excuse requirement previously placed on the use of absentee ballots and now allow anyone to vote by absentee ballot as long as the ballot is timely requested.\textsuperscript{230}

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\textsuperscript{224} “Jim Crow [segregation] is dead, but his sophisticated cousin James Crow, Esq., is very much alive . . . . We must cease our premature celebration [about civil rights already achieved] and get back to the struggle. We cannot be satisfied with a few black faces in high places when millions of our people have been locked out.” Patricia Sullivan, 


\textsuperscript{225} OR. ADMIN. R. 165-007-0030 (2011).


\textsuperscript{227} See WASH. REV. CODE ANN. § 29A.48.010 (repealed 2011) (allowing for elections by mail); see also OR. REV. STAT. ANN. § 254.465 (West, Westlaw through 2011 Legis. Sess.) (adopted in 1998 and requiring that all elections be conducted by mail); OR. ADMIN. R. 165-007-0030 (2011) (Oregon Vote by Mail Procedures Manual).

\textsuperscript{228} N.Y. ELEC. LAW § 8-400 (McKinney, Westlaw through 2011 Legis. Sess.).

The move towards vote-by-mail and e-voting has offered a greater venue of influence to those wanting to engage in voter intimidation or voter fraud. Both forms of voting deprive the public of the safeguards provided in a polling room. Most significantly, the protections guaranteed by a secret ballot are lost. The safeguards provided by photo identification and the protection provided by poll workers and watchers are also lost. Such voting methods may also disenfranchise language minorities.

The use of e-voting has already come under fire in Michigan. During Michigan's 2004 presidential primary, Democrats could, in addition to traditional voting, either e-vote or vote-by-mail in the primary. The Service Employees International Union brought laptop computers to the work sites to ensure that its 17,000 members could vote. According to the New York Times, "[t]he organizers sent out word that union members could drop by during their lunch breaks. Alicia Robertson, 29, a dietary aide, was one of several who requested a ballot, with John Switalski, an organizer, guiding her on the keyboard." This illustrates the loss of security ensured by polling place voting. Equal protection concerns also arise from e-voting; Al Sharpton has referred to e-voting as a "high-tech poll tax" because it favors the wealthy over the impoverished.

One possible solution for protection of the mail-in voters is the requirement that they sign their ballot’s return envelope. If the signature on the returned ballot does not match that on the voter registration record, then the ballot is rejected. A witness’s signature could also be used to verify that the registered voter did in fact sign the ballot’s envelope. Additional protections are provided in the form of an acceptable identification requirement at the time of voter registration and at any time a voter’s signature on file is updated.

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233 Id.

234 Id.

235 Id.


237 Id. § 101.68(4).

238 See Help America Vote Act, 42 U.S.C. § 15483(b)(2)(A)(ii) (2006) (requiring states who receive federal funding under HAVA to require voters registering by mail to provide photo identification or other documentation showing the voter’s name and address).
VI. CONCLUSION

Stephen C. Shadegg described human nature best when he said, “[t]his being an imperfect world, populated by imperfect men, it would be naïve to expect that man’s sinful greed which prompts him to steal, lie, cheat and wage war would be submerged or held in check when the contest is for a political prize.” 239 To protect voters from weaknesses inherent in the human condition, it is necessary that we restrict speech in an attempt to ensure free and fair elections. Restricting electioneering, providing a police presence, restricting camera use in the polling rooms, and requiring diversity among poll workers are only a few proposals that may help ensure that all voters get to cast their ballots as they intend.

With the inadequate prosecutions by federal agencies, it falls to the states to resolve the voter intimidation issue. Many current methods, such as the campaign-free zone and secret ballots, have reduced voter intimidation drastically from that seen during America’s electoral past; however, more protections are needed. Relying on the federal government to protect voters from intimidation has proven to be inadequate. The lack of federal prosecutions alone speaks volumes about the effectiveness of federal laws covering voter intimidation.

239 STEPHEN C. SHADEGG, THE NEW HOW TO WIN AN ELECTION 173 (1972).