STUDENT NOTE: THE PERNICIOUS PROBLEM OF PLATFORM-ENABLED VOTER INTIMIDATION

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I. INTRODUCTION

From Reconstruction through the Civil Rights Era, voter intimidation typically took the form of flagrant, violent targeting of blacks and their

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political supporters.\(^1\) However, in recent decades, those attempting to suppress the vote have embraced more subtle, cynical, and creative methods.\(^2\) Increasingly, voters are being subjected to false information about voter requirements, aggressive questioning about citizenship, and anonymous threats of harm designed to deter them from voting.\(^3\)

As part of this transition to more inconspicuous forms of voter intimidation, individuals and political organizations have largely supplanted local law-enforcement officials and white-supremacist groups as the main perpetrators.\(^4\) Instead of polling places, these actors have taken to Internet platforms to suppress the franchise of minority voters. And for good reason: platforms are optimally suited for voter intimidation. Internet platforms allow for anonymous speech, amplify and polarize narratives, and can be manipulated through use of bots.\(^5\) The opaque environments these platforms form make it difficult for voters to confidently calculate risks to their safety and freedom when crowd-sourced threats and deception loom large.

Worse yet, voter intimidation on platforms often cannot be identified and removed quickly enough to offset its impact on voter behavior. Remedies available under current law—ex post relief limited to injunctions and complicated by burdensome mens rea requirements—generally do little to deter platform-enabled voter intimidation that occurs contemporaneously with elections. Consequently, eliminating this form of voter intimidation has thus far fallen on the platforms themselves, which appear ill-equipped and, sometimes, disincentivized to privately address the problem.

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1. See Rayford W. Logan, The Betrayal of the Negro: From Rutherford B. Hayes to Woodrow Wilson 57 (1954) (“[T]he fear of potential, and in some instances actual, intimidation prevented most Negroes from voting in the South . . . .”); see also id. at 378 (“Negroes, moreover, suffered open or concealed intimidation when they tried to vote.”).
5. Phillip N. Howard, How Political Campaigns Weaponize Social Media Bots, IEEE SPECTRUM (Oct. 18, 2018, 3:00 PM), https://spectrum.ieee.org/computing/software/how-political-campaigns-weaponize-social-media-bots [https://perma.cc/5VJJ-EMB5] (“‘Bots’ are just bits of software used to automate and scale up repetitive processes, such as following, linking, replying, and tagging on social media. [T]hey can . . . affect public discourse by pushing content from extremist, conspiratorial, or sensationalist sources, or by pumping out thousands of pro-candidate or anti-opponent tweets a day. These automated actions can give the false impression of a groundswell of support, muddy public debate, or overwhelm the opponent’s own messages.”).
This Note analyzes the challenges of deterring platform-based voter intimidation in search of viable alternatives. Part I of this Note provides a brief overview of voter intimidation in the United States and discusses its recent collision with social media and other third-party Internet forums. It details how the unique characteristics of platforms enable voter intimidation. It also provides illustrations from the last several federal election cycles. Part II surveys the landscape of criminal and civil voter-intimidation laws that were adopted prior to the Voting Rights Act of 1965. It finds that none of these laws are adequate to deter platform-enabled voter intimidation. Part III then examines Section 11(b) of the Voting Rights Act of 1965 (“VRA”), analyzing whether it can stem the rising tide of platform-enabled voter intimidation. Though Section 11(b)’s provisions are effective in a few circumstances, the Part concludes that the VRA is ill-suited to address most forms of platform-enabled voter intimidation. In turn, Part IV explores other viable remedies. It narrows the field of options to a Hobson’s choice between the status quo and the implementation of a costly multi-day election format at the national level which may or may not effectively mitigate the effects of same-day platform-enabled voter intimidation. This Note ultimately concludes that practical and constitutional limitations compel adoption of a “content takedown” response to voter intimidation that centers on collaboration between government regulators and large private platforms.

II. THE COLLISION OF VOTER INTIMIDATION AND INTERNET PLATFORMS

The rise of Internet platforms has substantially altered the form and substance of voter intimidation. During and prior to the Civil Rights Era, those seeking to undermine suffrage deployed physical violence as their instrument of choice. Mobs beat and murdered blacks and their political supporters. Perpetrators also targeted victims with economic coercion, malicious prosecution, and public identification—a historic analog to doxing. In Tennessee, landowners, merchants, banks, and corporations retaliated against black voters by refusing to transact with them for goods and services. In Florida, law enforcement officials guarded ballot boxes and arrested black

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6 Third-party Internet forums include “message board and group blogs.” DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 143 (2014).
7 See CONG. GLOBE, 42d Cong., 1st Sess. 197 (1871) (statement of Sen. Ames) (noting that 859 political murders of Republicans had occurred in Louisiana in recent years, none of which were prosecuted); see also Paynes v. Lee, 377 F.2d 61, 63 (5th Cir. 1967); United States v. Wood, 295 F.2d 772, 776 (5th Cir. 1961); Michael Kent Curtis, The Klan, the Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments & the State Action Syllogism, a Brief Historical Overview, 11 U. PA. J. CONST. L. 1381, 1399 (2009).
voters. In Louisiana, the Ku Klux Klan (“KKK”) generated and distributed handbills to identify the names and addresses of blacks who had registered to vote. These methods mostly met their overdue demise in the 1960s and 1970s, snuffed out through coordinated efforts of the federal legislative, judicial, and executive branches.

But voter intimidation lived on, undergoing a pernicious evolution. In place of in-person beatings and boycotts, arm’s length tactics took over. During the 1993 New York City mayoral race, signs were anonymously posted in Hispanic neighborhoods falsely reporting that federal immigration authorities would be monitoring polling places. In 1998, a South Carolina state representative mailed thousands of notices to individuals in predominantly black neighborhoods that warned voters “this election is not worth going to jail”—a familiar threat steeped in a long history of voter intimidation in the South. And in 2006, a mass-mailing service, acting under the direction of a candidate for U.S. Congress, sent out 14,000 letters falsely informing registered voters with Hispanic surnames that if they voted, their

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10 See United States ex rel. Katzenbach v. Original Knights of KKK, 250 F. Supp. 330, 342 (E.D. La. 1965) (describing intimidating KKK posters designed to identify specific individuals and businesses that the KKK was targeting); see also Voting Rights: Hearings Before the S. Subcomm. on the Judiciary, 89th Cong. 1292 (1965) (detailing a systematic campaign of intimidation in Haywood County, Tennessee in 1960, after more than one hundred whites developed and circulated a list of black citizens to be denied voting credit); Brief for the Campaign Legal Center as Amicus Curiae Supporting Plaintiffs at 21, League of United Latin Am. Citizens - Richmond Region Council 4614 v. Pub. Interest Legal Found., 2018 WL 3848404 (E.D. Va. Aug. 13, 2018) (No. 1:18-CV-00423) [hereinafter CLC Amicus Brief].


12 See President Lyndon Johnson, Address to Congress on Voting Rights (Mar. 15, 1965) (“At times, history and fate meet at a single time in a single place to shape a turning point in man’s unending search for freedom. So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma, Alabama. There, long-suffering men and women peacefully protested the denial of their rights as Americans.”); see PEOPLE FOR THE AM. WAY FOUND. & NAACP, supra note 11, at 3 (describing the coordinated passage of the 1965 Voting Rights Act as “among the crowning achievements of the civil rights era, and a defining moment for social justice and equality”).

13 PEOPLE FOR THE AM. WAY FOUND. & NAACP, supra note 11, at 10.

personal information would be collected by a government computer system that could be used to target illegal immigration.  

As these incidents have proliferated, so too has the use of Internet platforms. These platforms—which include social media sites and a fragmented landscape of third-party Internet forums—form vast universes of connected users. Their ubiquity endows them with unprecedented power to shape and control access to information, and their rise has fundamentally altered the process by which individuals communicate with one another. The Supreme Court has likened these platforms to “the modern public square” and recognized that they allow individuals to “explo[re] the vast realms of human thought and knowledge” and to “engag[e] in the legitimate exercise of First Amendment Rights” by accessing “the world of ideas.”

However, platforms also present risks that threaten to undermine suffrage. For one, they facilitate anonymous speech. When users believe that their acts will not be attributable to them, they are more likely to defy social norms and act destructively without fear of external sanction. In traditional legal contexts, the peril of anonymity has long served as a targeted evil for criminal and civil legislation. Many states, for example, have enacted anti-mask statutes to prevent crimes “daringly committed, under the protection of masks and other disguises.” At the federal level, the Ku Klux Klan Enforcement Act of 1871 (“the KKK Act”), a civil voter-intimidation statute, prefaces its ban on interference with the “support or advocacy . . . of the

15 United States v. Tan Duc Nguyen, 673 F.3d 1259, 1261 (9th Cir. 2012).
17 Howard Shelanski, Information, Innovation, and Competition Policy for the Internet, 161 U. PA. L. REV. 1663, 1682 (2013). Internet platforms have been described in varying terms. Compare id. at 1665 (“digital platforms [are] products or services through which end users and a wide variety of complementary products, services, or information (‘applications’) can interact”) with Laurence Meyer, Digital Platforms: Definition and Strategic Value, COMM. & STRATEGIES, 2d Quarter 2000, at 127, 128 (2000) (defining a digital platform as an “intermediation activity linked with the ‘assembly’ of content and services onto a coherent technical and commercial access platform”).
20 CITRON, supra note 6, at 57.
21 The Second Circuit used this language to describe New York’s anti-mask law. See Church of Am. Knights of the KKK v. Kerik, 356 F.3d 197, 205 (2d Cir. 2004); see also id. at 203 (“New York’s anti-mask law, reenacted in its current form in 1965, can be traced back in substance to legislation enacted in 1845 to thwart armed insurrections by Hudson Valley tenant farmers who used disguises to attack law enforcement officers.”).
election of any lawfully qualified person . . .” with language contemplating the role of anonymity in fostering violence against minorities and their supporters.\textsuperscript{22}

It should come as no surprise, then, that the anonymity facilitated by online platforms has proved an effective tool to exploit voters’ fear and to dissuade them from exercising their rights.\textsuperscript{23} In 2016, anonymous posters on the popular third-party forum, 4chan, coordinated plans to call Spanish-language radio stations and report that U.S. Immigration and Customs Enforcement (ICE) agents would be present at polling places.\textsuperscript{24} Two years later, Twitter suspended thousands of anonymous accounts that it suspected were involved in election disinformation campaigns coordinated by foreign governments.\textsuperscript{25}

The manipulative power of online platforms is not only fueled by the ability of users to mask their identities. Platforms also enable ideologically homogenized individuals and groups to connect and organize to facilitate mass-intimidation. Historically, these individuals and groups had to physically venture out into the community in search of those sympathetic to their causes. With the emergence of digital communications platforms, gone are the physical and time constraints on human organization.\textsuperscript{26} As professor Danielle Citron observes, networked communications have removed “practical barriers that once protected society from the creation of antisocial groups.”\textsuperscript{27} As a result, the number of hate organizations has more than doubled over the last two decades.\textsuperscript{28}

\textsuperscript{22} 42 U.S.C. § 1985(3) (2018) (“If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another . . .”).

\textsuperscript{23} See Cady & Glazer, supra note 2, at 218.

\textsuperscript{24} Craig Silverman, We’re Tracking All the Election Day Rumors, Hoaxes, And Debunkings, BUZZFEED (Nov. 8, 2016, 11:19 PM), https://www.buzzfeednews.com/article/craigsilverman/all-the-election-debunks [https://perma.cc/3EAZ-7VPQ]; see also Appendix 3.3.


\textsuperscript{26} CITRON, supra note 6, at 62–63.

\textsuperscript{27} Id.

\textsuperscript{28} Hate Groups Reach Record High, S. POVERTY L. CTR. (Feb. 19, 2019), https://www.splcenter.org/news/2019/02/19/hate-groups-reach-record-high [perma.cc/ANY2-3CF3]; see also Inst. for Operations Research and Mgmt. Sci., New
This dynamic also empowers political organizations, which are often responsible for mass voter intimidation. In September 2016, the Public Interest Legal Foundation (“PILF”), a law firm “dedicated to election integrity,” published a report titled Alien Invasion via Twitter and Facebook. This report “characterize[d] the existing voter registration system as an ineffective honor system” and offered “the names, home addresses, telephone numbers, and, in some cases, social security numbers” of 1,852 “illegal registrants” registered to vote in Virginia. The plaintiffs in the case alleged that several of the “suspected aliens” listed in the report were not “aliens” at all; they were citizens who had been removed from the voter rolls for administrative reasons. Nonetheless, PILF, allegedly with full knowledge of these inaccuracies, disseminated the report via Facebook and Twitter, spreading it to politically-aligned news outlets that then shared it with ideologically-aligned readers.

In addition to demonstrating the organizational properties of platforms, PILF’s use of Facebook and Twitter also indicates how social media and third-


See Cady & Glazer, supra note 2, at 215.

About Us, PUB. INT. LEGAL FOUND., https://publicinterestlegal.org/about-us/[perma.cc/4VKM-KXMY].


Id. at ¶ 6, 26.

See id. at ¶ 32. PILF’s publication closely mirrored the practice of voter caging—a voter intimidation tactic that involves “sending mail to addresses on the voter rolls, compiling a list of the mail that is returned undelivered, and using that list to purge or challenge voters’ registrations on the grounds that the voters on the list do not legally reside at their registered addresses.” Justin Levitt, A Guide to Voter Caging, BRENNAN CTR. FOR JUST. (June 29, 2007), https://www.brennancenter.org/analysis/guide-voter-caging [https://perma.cc/R2XN-A3C4].

party forums can amplify and polarize speech. As danah boyd of Data & Society observes, tools originally built for “online community, communication, and information access” have been “weaponized to radicalize people toward extremism, gaslight publics, [and] serve as vehicles of cruel harassment.”

Online groups hear reverberations of their own voices when they are homogenized, and engage in cruelty competitions. Although viewpoint polarization originates in narrow online contexts, the Internet can prolifically spread abuse. Extreme posts draw attention and go “viral” in part because filtering algorithms used by major platforms highlight popular information. This process “[l]ay[s] the groundwork for continued distribution” and contributes to what Citron terms “information cascades.”

Amplification and polarization enable speakers to stoke fear and hinder the free exercise of voting rights. During the 2016 presidential election, Facebook users made veiled and direct threats of violence targeting Clinton supporters. Their comments included “it’s LOCK AND LOAD if Donald J. Trump isn’t president,” and “I pray Trump wins as we veterans and military are ready to take our country back. You civilians either follow us or get out of the way. Your only other option is to be a qualified target.”

These menacing posts, directed to connections within the speakers’ social networks, were visible to the broader public because of the viewing permissions set on the users’ accounts. As a result, they were picked up by third parties and reshared.

Unsurprisingly, anonymized messages, amplified by extremist communities for their vitriolic value, were even more polarized. Users in 4chan’s far-right-wing discussion board “/pol/” actively promoted the physical coercion of voters, posting comments like “already intimidating voters at stations […] My SKS [semi-automatic rifle] is ready for whoever starts the process” and “What if we lose? Then we’ll meet IRL [in real life],” the latter comment appending a photo of grenades.

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35 See generally PUB. INTEREST LEGAL FOUND., ALIEN INVASION II (May 2017), https://publicinterestlegal.org/files/Alien-Invasion-II-FINAL.pdf [perma.cc/RUA9-LW5B].
37 CITRON, supra note 6, at 63 (citing CASS R. SUNSTEIN, REPUBLIC.COM 2.0 60 (2007)).
38 CITRON, supra note 6, at 66–67.
39 Id.
40 Id.
42 Id.; see also Appendix 1.2 and 1.5.
43 See Appendix 3.1 and 3.2.
the broader public, this messaging forum—a hotbed of polarized political hate—bled into the mainstream during the 2016 election when bloggers and outside news outlets republished the incendiary comments.

Finally, harnessing the attributes of anonymity, organization, polarization, and amplitude, malicious actors have deployed platform bots—software that creates content and interacts with people—over recent election cycles to manipulate voter behavior.44 During the 2016 presidential election, a well-known pro-Clinton Twitter bot, using the handle “@NeilTurner,” shared a doctored hoax image of an undocumented immigrant being arrested by an ICE agent at a polling station.45 The tweet, which was sent out to approximately 30,000 followers, spread rapidly throughout the Internet.46 Before the post was removed by Twitter, the photo was viewed and shared thousands of times, and was circulated widely among prominent news outlets.47

As researchers of computational propaganda have observed,48 platforms are particularly susceptible to these types of incidents because they operate without editors who would maintain quality or control the circulation

48 The Computational Propaganda Project at the University of Oxford describes computational propaganda as the functional use of algorithms and automation to “manipulate public opinion by amplifying or repressing political content, disinformation, hate speech, and junk news.” See The Computational Propaganda Project, OXFORD INTERNET INST., https://comprop.oii.ox.ac.uk/ [https://perma.cc/BCA6-B9C3].
of content.49 Compounding the problem, bots are cheap and easy to use.50 Their operation and design also shift rapidly, allowing them to spread information while avoiding detection and removal.51 These tools, along with the platform characteristics they channel, make social media sites and third-party forums the perfect avenues for voter intimidation and manipulation.

III. THE LIMITED LANDSCAPE OF VOTER INTIMIDATION LAWS PRIOR TO 1965

In stark contrast to the alarming rise of platform-enabled voter intimidation, there are few legal remedies to protect suffrage from disruptive speech.

Criminal laws, in general, are ill-suited for prevention of modern voter intimidation.52 Enforced by the U.S. Attorneys and the Department of Justice, these laws require a robust showing of a defendant’s intent to intimidate, the existence of a conspiracy, or both.53 Because voter intimidation is often subtle and without witness, these elements deter prosecutions.54 Aside from statutory requirements, practical considerations also limit the effectiveness of criminal laws in combating voter intimidation. Prosecutors must elicit public testimony from victimized voters in adversarial proceedings—a daunting challenge for prosecutions of anonymous intimidation directed at broad, faceless audiences.

49 See Howard, supra note 5.
50 See Bob Abeshouse, Troll Factories, Bots and Fake News: Inside the Wild West of Social Media, AL JAZEERA (Feb. 8, 2018), https://www.aljazeera.com/blogs/americas/2018/02/troll-factories-bots-fake-news-wild-west-social-media-180207061815575.html [https://perma.cc/7LM7-2YCF] (“Seth Turin’s software is one of many turn-key systems to pop up in recent years that make it easy to build and use bots on social media sites. A version of his platform can be purchased for as little as $300.”); Zack Whittaker, Bots Are Cheap and Effective. One Startup Trolls Them Into Going Away, TECHCRUNCH (Feb. 5, 2019, 10:10 AM), https://techcrunch.com/2019/02/05/kasada-bots/ [https://perma.cc/U3MC-55XU].
51 See Marwick & Lewis, supra note 44, at 38.
53 See, e.g., 18 U.S.C. § 241 (2012) (making it a felony for two or more persons to “conspire to injure, oppress, threaten, or intimidate” any person in the free exercise of any right or privilege secured by the Constitution); 18 U.S.C. § 594 (2012) (prohibiting the intimidation, threat, or coercion of voters “for the purpose of interfering” with their right to vote) (emphasis added); 52 U.S.C. § 20511(1) (2012) (prohibiting anyone from “knowingly and willfully” intimidating or coercing an individual voting or attempting to vote).
54 Pub. Integrity Section, supra note 52.
55 Id.
Prosecutors also face inherent resource limitations that make it difficult to justify prosecuting subtle online voter intimidation that has an imperceptible impact on an election that has already passed.\textsuperscript{56} Consequently, civil voter-intimidation statutes, which can be used by individuals, voting rights advocates, and political entities, offer a less constrained legal instrument to root out unlawful voter intimidation.\textsuperscript{57} These civil laws first surfaced in the wake of the Civil War as a response to the Ku Klux Klan’s widespread campaign of political violence against Southern blacks and their white supporters.\textsuperscript{58} Fearing a collapse of Reconstructionist policies, Northern Republicans passed the KKK Act. This law, designed to reach both state and private interference with the right to vote, provided:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another . . . to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.\textsuperscript{59}

The “Support and Advocacy” clause of the KKK Act is still in effect today. However, several Supreme Court decisions in the aftermath of its enactment have curtailed its use by private litigants.\textsuperscript{60} Its conspiracy element requires

\textsuperscript{56} See Heritage Explains Voter Fraud, HERITAGE FOUND., https://www.heritage.org/election-integrity/heritage-explains/voter-fraud [https://perma.cc/9J97-AYDL] (observing that overburdened prosecutors seldom have the resources to prosecute election offenses); Letter from the Leadership Conference on Civil & Human Rights to Attorney General Michael Mukasey, LEADERSHIP CONF. ON CIV. & HUM. RTS. (October 17, 2008), https://civilrights.org/resource/protect-voters-from-discriminatory-interference [https://perma.cc/C3NE-T3DE] (urging the Justice Department to shift its “limited resources” to preventing improper or illegal voter suppression).

\textsuperscript{57} See Cady & Glazer, supra note 2, at 179.

\textsuperscript{58} See Curtis, supra note 7, at 1399–1400.

\textsuperscript{59} 42 U.S.C. § 1985(3) (2012); see also Curtis, supra note 7, at 1399.

\textsuperscript{60} In 1882, the Supreme Court held that neither the Fourteenth Amendment nor the Privileges and Immunities Clause of Article IV furnished Congress with the authority to regulate actions by private persons. United States v. Harris, 106 U.S. 629, 640, 643 (1882). The Court’s decision in Harris “chilled civil claims under [the civil provision of the KKK Act], which was assumed to have the same constitutional inadequacies as the corresponding criminal provision.” Catherine E. Smith, (Un)masking Race-Based Intracorporate Conspiracies Under
“some showing of the defendant’s mindset”—a formidable obstacle to successful rights vindication.61 And, while some scholars have argued that the KKK Act lacks an intent requirement, courts have found otherwise, placing additional burdens on private litigants at the pleadings stage.62

In the 1950s, with the KKK Act in a dormant state and the civil rights era taking hold, Congress furnished black voters with an additional civil remedy to combat interference with voting behavior. It passed the Civil Rights Act of 1957, which sought to curtail “public and private interference with the right to vote on racial grounds.”63 Section 131(b) of the Act reads:

No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote . . . .64

This statutory language improved on the KKK Act by omitting a conspiracy requirement. However, its text expressly required that plaintiffs demonstrate intent on the part of each individual defendant to act “for the purpose of” intimidating voters. Following Section 131(b)’s enactment, this element proved an extremely onerous burden on plaintiffs litigating voter intimidation claims.65

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61 See 42 U.S.C. § 1985(3) (2012) (“If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another . . . .”).
62 See, e.g., Polidi v. Bannon, 226 F. Supp. 3d 615, 623 (E.D. Va. 2016) (“[A] plaintiff asserting a Section 1985 conspiracy must allege an agreement or a meeting of the minds by defendants to violate the claimant’s constitutional rights.”) (emphasis added) (internal quotation marks omitted).
64 52 U.S.C. § 10101(b) (2012).
65 See Voting Rights: Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary, 89th Cong. 11 (1965) [hereinafter Hearings on H.R. 6400] (statement of Att’y Gen. Katzenbach) (“But perhaps the most serious inadequacy [of Section 131(b)] results from the practice of district courts to require the Government to carry the very onerous burden of
IV. SECTION 11(b) OF THE VOTING RIGHTS ACT & PLATFORM-BASED VOTER INTIMIDATION

In response to Section 131(b) of the 1957 Civil Rights Act, Attorney General Nicholas Katzenbach spearheaded enactment of the Voting Rights Act of 1965, which was designed to confront “the use of onerous, vague, unfair tests and devices enacted for the purpose of disenfranchising Negroes.”\(^{66}\) The Act put into place a sweeping statutory scheme, including a civil voter-intimidation provision that “represent[ed] a substantial improvement over [Section 131(b)].”\(^{67}\)

This provision, Section 11(b) of the Voting Rights Act of 1965, was designed to prohibit voter intimidation without forcing harmed individuals to demonstrate that violators, in fact, had the intent to discriminate.\(^{68}\) It reads:

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 . . . . \(^{69}\)

On its face, Section 11(b) avoids the flaws of earlier voter intimidation statutes by eliminating the triggering language of the KKK Act’s conspiracy requirement (“[i]f two or more persons . . . conspire”) and Section 131(b)’s mens rea requirement (“for the purpose of”). Yet relatively few litigants have proof of ‘purpose.’ Since many types of intimidation, particularly economic intimidation, involve subtle forms of pressure, this treatment of the purpose requirement has rendered the statute largely ineffective.”\(^{66}\). Beyond Section 131(b)’s purpose requirement, a host of interpretative issues surfaced in lower court litigation of voter intimidation claims under the Civil Rights Act of 1957. Sherry Swirsky, Minority Voter Intimidation: The Problem that Won’t Go Away, \(11\) TEMP. POL. & CIV. RTS. L. REV. 359, 371 (2002) (“Courts applying [Section 131(b)] of the Act have reached conflicting conclusions on whether it reaches conduct by private individuals, which elections it covers, how much evidence of intimidation it requires, whether it may be enforced by private litigants, and if so, whether a private litigant must first exhaust state election board administrative remedies. Such inconsistency has posed an obstacle to meaningful enforcement of the provision.”).


\(^{67}\) Id. at 16.


\(^{69}\) 52 U.S.C. § 10307(b) (2012).
made use of Section 11(b)’s protections. Scholars have explained this dearth of caselaw as a function of how voter intimidation occurs in practice: Plaintiffs—individual and organizational—generally lack the incentive to litigate in-person incidents that only affect a few people on Election Day.

But platform-enabled voter intimidation presents a new kind of problem and a heightened scale of impact. Thus, the relative underdevelopment of Section 11(b)’s jurisprudence may present an opportunity to broaden voter protections. For Section 11(b) to reach and remedy modern, technologically advanced voter intimidation, three conditions must be met. First, platform-enabled voter intimidation must satisfy Section 11(b)’s statutory elements. Second, application of Section 11(b) to platform-enabled voter intimidation must not run afoul of the Constitution. Third, Section 11(b)’s relief adequately incentivize litigation against, and deter future violations by, perpetrators of voter intimidation.

A. Section 11(b)’s Statutory Reach to Platform-Enabled Voter Intimidation

Under a traditional legal analysis, evaluation of Section 11(b)’s applicability to platform-based voter intimidation comes before a broader inquiry into the First Amendment. This evaluation is highly context-dependent; a communication’s “intimidating,” “threatening,” or “coercive” character is informed by its surrounding technological-structural, socio-political, and social conditions. Because platforms can functionally obfuscate and distort these conditions, Section 11(b)’s statutory scheme can flounder at times. Still, its language seems suitable to reach at least some forms of platform-enabled voter intimidation.

To start, an open question exists as to whether Section 11(b)’s definition of “intimidation, threat, or coercion” reaches indirect and remote voter intimidation at all. Government attorneys Ben Cady and Tom Glazer argue convincingly that it does. They observe that methods of statutory interpretation, including ordinary usage, legislative history, and the

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70 See Cady & Glazer, supra note 2, at 237–43.
71 Id. at 179–80.
72 Id. at 182.
74 See generally Cady & Glazer, supra note 2.
interpretive canon of *in pari materia*, all support a broad reading of Section 11(b)’s language that extends “not only [to] physical and economic coercion of voters, but also [to] a broader range of conduct that is intended to force prospective voters to vote against their preferences, or refrain from voting, through activity reasonably calculated to instill some form of fear.” This reading is a natural one that harmonizes with the traditionally liberal interpretation courts accord to remedial legislation.

However, even granting a broad interpretation of Section 11(b)’s text, a more difficult question arises concerning whether defendants must intend to instill fear in target audiences to be held liable under the Act. As discussed in Part IV *supra*, Section 11(b), by design, omits an express textual command requiring plaintiffs to demonstrate a defendant’s purpose in proving voter-intimidation claims. Attorney General Katzenbach took great care to exclude the phrase “for the purpose of” from Section 11(b) to sidestep the shortfalls of Section 131(b). This decision was specifically calculated to relieve litigants of the “very onerous burden of proof” of showing a defendant’s motives. As Katzenbach observed, “defendants would be deemed to intend the natural consequences of their acts.”

Nonetheless, Katzenbach’s design may have failed to foreclose a mens rea requirement from yet again creeping into a federal civil voter-intimidation statute. Legislative history carries negligible weight in today’s textualist courts, especially when plain language is silent or contradictory. And Section 11(b) does not disclaim the need for victims to demonstrate a violator’s “purpose,” nor do the words “intimidate,” “threaten,” and “coerce” imply that courts should look only to the natural consequences of a defendant’s conduct. On the contrary, Black’s Law Dictionary defines “intimidate” as “unlawful coercion, extortion, duress, [or] putting in fear,” and notes that “[s]uch fear must arise from the willful conduct of the accused.”

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75 *Id.* at 201 (internal quotation marks omitted) (quoting U.S. ELECTION ASSISTANCE COMM’N, ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATIONS FOR FUTURE STUDY 14 (Dec. 2006)).


77 See *supra* Part IV (“Section 11(b) avoids the flaws of earlier voter intimidation statutes by eliminating the triggering language of . . . Section 131(b)’s intentionality requirement.”).


79 *Id.*; see also H.R. REP. NO. 89-439, at 30 (1965) (“The prohibited acts of intimidation need not be racially motivated; indeed, unlike [Section 131(b)] (which requires proof of a ‘purpose’ to interfere with the right to vote) no subjective purpose or intent need be shown.”).


person is guilty of coercion “[only] if [they act] with purpose to unlawfully restrict another’s freedom of action to his detriment . . . .”82

In turn, counter to Katzenbach’s design, some courts have required plaintiffs to demonstrate a defendant’s intent to “intimidate, threaten, or coerce” voters under Section 11(b).83 This reading presents obstacles to plaintiffs pressing claims against platform-enabled speakers premised on a theory of strict liability. Ordinarily, in the absence of a defendant’s stipulation of intent, courts would look to readily discernable facts that support a finding of a defendant’s mens rea.84 But platforms can obfuscate these indicators. Innocently worded messages can be designed to impose crippling intimidation on target audiences when speakers anticipate that their followers will spread their words far and wide.85 And other platform speakers can join, color, and distort an original speaker’s message through participatory application programming interfaces and “resharing.” In practice, the fog of a platform’s design and algorithmic logic can mask underlying motives.

Fortunately, there are methods for cutting through this haze—for imputing “purpose” to a platform-enabled speaker. The first is to borrow the “reasonable speaker” test from cases that deal with federal threat statutes and the “true threat” exception to free speech protections. Because these cases deal with conduct similar to and, at times, overlapping with the conduct at issue under Section 11(b), they provide a reasonable baseline for ascertaining a speaker’s intent in the absence of an express admission or some other form of clear evidence.

82 Coercion, BLACK’S LAW DICTIONARY (6th ed. 1979) (emphasis added).
83 See, e.g., Olagues v. Russoniello, 770 F.2d 791, 804 (9th Cir. 1985) (citing United States v. McLeod, 385 F.2d 734, 740–41 (5th Cir. 1967)) (“[T]he organizations’ claims under the Voting Rights Act against these officials do not appear to have merit. If the search of voting records intimidated bilingual voters, such intimidation would satisfy only one part of a two-pronged test for violations of [Section 11(b)]: the voters and organizations were intimidated, but the officials did not intend to intimidate.”). Not all courts have required intentionality under Section 11(b). See League of United Latin Am. Citizens - Richmond Region Council 4614 v. Pub. Int. Legal Found., No. 1:18-CV-00423, 2018 WL 3848404, at *4 (E.D. Va. Aug. 13, 2018) (“Defendants’ reference to nonbinding case law that reads specific intent and racial animus requirements into § 11(b) is also unpersuasive. These cases trace back to United States v. McLeod [385 F.2d 734, 738 (5th Cir. 1967)], which, in fact, adjudicated claims brought under the 1957 Civil Rights Act. Therefore, in the absence of plain statutory text, statutory history, or binding case law to the contrary, the Court does not find that a showing of specific intent or racial animus is required under § 11(b).”).
84 Cf. United States v. Bruce, 353 F.2d 474 (5th Cir. 1965) (observing that the intent element of Section 131(b) was satisfied when a defendant invoked his right to exclude from his property a black insurance collector, who had previously been given free access to the property, when the defendant discovered that the plaintiff was undertaking efforts to register black voters).
85 CITRON, supra note 6, at 66–67.
In the context of other statutes, courts that apply the “reasonable speaker” test impute intent to speakers who make statements “a reasonable person would foresee . . . would be interpreted by those to whom the maker communicates [them] as a serious expression of an intention to inflict bodily harm.”\textsuperscript{86} A prominent deployment of the “reasonable speaker” test occurred in the Ninth Circuit’s en banc ruling in \textit{Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists}.\textsuperscript{87} There, four abortion providers brought suit under the federal Freedom of Access to Clinic Entrances Act, “claiming that they were targeted with threats by several groups of anti-abortion activists.”\textsuperscript{88} The activists had printed “Deadly Dozen” posters, which identified and listed the names, addresses, and photographs of the plaintiff-doctors.\textsuperscript{89} Some of the posters also read “GUilty” and “WANTED.”\textsuperscript{90} After a Ninth Circuit panel found that the posters were protected speech and could not lose their protections by the context in which they were displayed, the circuit granted rehearing en banc and reversed.\textsuperscript{91} The court defined “true threat” as “a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person.”\textsuperscript{92}

Through this holding, the court expressly disavowed the view that defendants must “intend to, or be able to carry out . . . threat[s]” to be held liable for their statements.\textsuperscript{93} Rather, it observed that “the only intent requirement for a true threat is that the defendant intentionally or knowingly communicate the threat.”\textsuperscript{94} In the end, the anti-abortion activists were found liable because reasonable speakers in their position would foresee that the doctors identified by their posters would interpret their naming as a serious expression of the speakers’ intent to inflict bodily harm upon them.

Adapted to platform-enabled voter intimidation under Section 11(b), a modified version of the “reasonable speaker” test would ask whether reasonable users of a platform would foresee that their message would have an intimidating, threatening, or coercive effect on the voting behavior of its recipients. Under this approach, two factors would guide the inquiry into a

\textsuperscript{86} See, e.g., United States v. Kosma, 951 F.2d 549, 557 (3d Cir. 1991).
\textsuperscript{88} \textit{Am. Coal. of Life Activists}, 290 F.3d at 1062.
\textsuperscript{89} \textit{Id.} at 1064–65.
\textsuperscript{90} \textit{Id.} at 1064.
\textsuperscript{91} See generally \textit{id.}.
\textsuperscript{92} \textit{Id.} at 1077.
\textsuperscript{93} \textit{Id.} at 1075.
\textsuperscript{94} \textit{Am. Coal. of Life Activists}, 290 F.3d at 1075.
speaker’s intent: (1) the content of the speaker’s message and (2) the background conditions surrounding the speech. This approach is imperfect, but it captures some platform-enabled voter intimidation without sweeping in an excess of benign online user activity not calculated by speakers to impinge upon others’ voting rights.

An application of the test to several of the examples of intimidation identified in Part I is illustrative. Mac McDonald’s 2016 Election Day Facebook post reads, “I Pray Trump wins as we veterans and militia are ready to take our country back. You civilians either follow us or get out of the way. Your only other option is to be a qualified target.”\textsuperscript{95} The first factor—the content of McDonald’s message—is no doubt threatening. It can be read as offering an ultimatum: Vote for Trump or risk bodily insecurity. Without more, a reasonable speaker would foresee that the statement would have an intimidating effect on its recipients. Compared to a subjective standard of intent, it would not matter if McDonald’s friends and family testified that he often used the term “qualified target” to mean “someone who is ignorant and needs education.” The message speaks for itself.

On the other hand, the second factor—the message’s background conditions—could just as easily undermine the intimidation charge under the modified “reasonable speaker” test. Consider the social and technological-structural characteristics of the platform on which the post is made. McDonald directs his message to his “connections” on Facebook. If McDonald’s Facebook network is entirely comprised of ideologically and politically aligned individuals with similar backgrounds, and if McDonald’s profile-viewing permissions are set to private, meaning that only his Facebook connections can see his posts, then a reasonable speaker in McDonald’s position would foresee that his macho bravado would prompt grunted laughter among his audience, rather than fear. These conditions would operate to offset the message’s threatening content under the modified “reasonable speaker” test and would most likely render any resulting voter intimidation unintentional on McDonald’s part under Section 11(b).

For a second example, consider Dillian Billiot’s 2016 Election Day Facebook post. Beside a photograph of an AR-15 rifle and a pistol together on a mattress, the post reads “Where’s all my Militia brothers? I’m on standby ready to defend our constitution and fight for our freedom. I’ll volunteer for this country any day.”\textsuperscript{96} Here, the first factor—the message’s content—sends mixed signals: The text is innocuous, but the image forebodes violence against voters. The second factor—the message’s background conditions—is also potentially ambiguous. Assume that Billiot is an Internet celebrity with a large

\textsuperscript{95} Appendix 1.2.
\textsuperscript{96} Appendix 1.1.
following and that his profile-viewing permissions are set to public, such that Facebook’s algorithm predictably spreads his messages to a wide audience. Perpetrators of mass shootings are seldom public figures. A reasonable speaker in Billiot’s position, were Billiot a celebrity, might therefore have reason to believe that readers of his message would be unlikely to interpret it as a serious threat of violence. On the other hand, if Billiot’s message were spread far and wide across the web, there is a greater chance that it would be clicked and shared by his connections for the purpose of intimidating their audiences—audiences that lack familiarity with Billiot’s “celebrity” status. The likelihood of this “derivative intimidation” increases with the scale of Billiot’s network. As a result, a reasonable speaker in his position could foresee that his message might be “weaponized” by one of his connections as a tool of platform-enabled voter intimidation. In short, the background conditions of Billiot’s speech can conflict under the modified “reasonable speaker” test, complicating its ease of administration.

But courts are no strangers to complex balancing tests, which are commonplace throughout many areas of the law.97 Even with anonymous posts on 4chan, a court or a jury could ascertain whether a reasonable speaker in the position of the poster should have foreseen that the speaker’s message would have an intimidating, threatening, or coercive effect on the voting behavior of the message’s recipients. These fact-finders would simply look to the language used in the post, the comments to which the post responds, the responses the post elicits, and the discussion board to which the post is submitted as evidence.

Even beyond its suitability for determining the intent underlying platform-enabled speech, the modified “reasonable speaker” test offers the benefit of demonstrating that a victim of platform-enabled voter intimidation has reasonably been impacted by the speech in question. Of the few Section 11(b) claims that have been brought to date, several have been dismissed because plaintiffs were unable to show that the alleged intimidation had a reasonable, tangible impact on actual voters.98 A finding of intent under the modified “reasonable speaker” test would fulfill this element. It would not matter if alleged victims were temperamentally timid or overly sensitive. A finding of a speaker’s intent would suffice.

Looking beyond the modified “reasonable speaker” test, there are several other options for imputing intent to a platform-enabled speaker for


purposes of Section 11(b) liability, though none that are equally effective. For
one, courts could import the “reasonable listener” test from the same line of
federal threat-statute cases. Used in a minority of circuits, this test asks
whether “an ordinary reasonable recipient who is familiar with the context of
[a statement] would interpret it as a threat of injury.”99 Adapted to platform-
enabled voter intimidation under Section 11(b), a modified version of this test
would ask whether an ordinary recipient of an online communication, familiar
with its context, would be intimidated, threatened, or coerced by exposure to
it. And like the modified “reasonable speaker” test, it would similarly factor
(1) the content of the speaker’s message, and (2) the background
technological-structural, socio-political, and social conditions surrounding
platform-enabled speech.

In terms of its unique benefits, the modified “reasonable listener” test
has the advantage of expanding intent in narrow circumstances by measuring
it at the time a recipient encounters an intimidating post, rather than at the time
of its initial making. Rehashing the example of McDonald’s Facebook post,
assume that McDonald rightly calculates that his message will not intimidate,
threaten, or coerce any of his connections in his closed, private network. If,
unexpectedly, one of McDonald’s connections reshares his post to intimidate
a target outside of McDonald’s network, McDonald could still be liable under
the modified “reasonable listener” test, provided that the target outside his
network is familiar with the context of his statement and is reasonably
intimidated by it.

But this raises the question: How much familiarity must an ordinary
recipient of a platform-enabled communication have with the
communication’s context for intent to attach to the speaker under the
“reasonable listener” test? When the Fourth Circuit first adopted the standard
in 1973, it determined that a personal history between the maker and the
recipient of a particular threatening communication was a sufficient nexus to
establish “context familiarity.”100 But platform users frequently do not share a
“personal nexus” with other users that view their posts. Platform-enabled voter
intimidation, typically anonymous and generalized in character, would
therefore regularly skirt Section 11(b) liability.

Perhaps in recognition of this limitation, courts in recent cases have
embraced a more lenient standard of “context familiarity.” In United States v.
Turner, the Second Circuit found that three Seventh Circuit judges were

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99 United States v. Maisonet, 484 F.2d 1356, 1358 (4th Cir. 1973) (emphasis added); see also
Crane, supra note 87, at 1246 (describing the “reasonable speaker test” as the majority rule
and noting that the “reasonable listener test” has only been adopted in four circuits: the
Second, Seventh, Eighth, and Eleventh).
100 See Maisonet, 484 F.2d at 1358 (“Maisonet had been sentenced to prison by the judge to
whom he addressed the letter.”).
sufficiently familiar with the context of a blog post that threatened them to render the poster liable for intimidation, even though “[n]one of the three judges had ever heard of [the author] before reading [the] post.”101 The court found that the “seriousness of the threat” and the author’s “[o]ther posts readily accessible on the blog . . . provided context from which a reader might infer [the author’s] intentions in writing the post.”102 Under this application of the standard, an ordinary speaker encountering an anonymous threat on a platform could reasonably take stock of the seriousness of the threat (the content of the speech) and other readily accessible posts and information volunteered by the speaker (the background conditions surrounding the speech). Taking the example of @NeilTurner’s tweet detailed in Part I, a court would look to whether an ordinary voter who encountered the professionally doctored photo on Twitter and had access to @NeilTurner’s previous tweets would feel intimidated, threatened, or coerced by exposure to the bot’s post. If an ordinary reader would find the photograph credible and be deterred from voting out of fear of being targeted by immigration officials, the architect behind @NeilTurner could be held liable in a Section 11(b) “intent” jurisdiction.

But there are many other examples in which the modified “reasonable listener” test vastly underperforms the modified “reasonable speaker” test in terms of its reach to wrongful conduct. Assume, for example, that Mac McDonald intends to intimidate voters in coordination with other users. Provided that he sets his profile-viewing permissions to “network-viewable,” hundreds of his connections could reshare his “qualified target” remark to thousands of Facebook users, none of whom would have access to McDonald’s own posting history or profile information. Given McDonald’s ability to obscure the background conditions surrounding his speech, targets of “derivative intimidation” would not be able to achieve “context familiarity” with his original communication under the modified “reasonable listener” test. Therefore, such targets would be unable to hold McDonald liable in an “intent” jurisdiction under Section 11(b).

Although plaintiffs could try to hold users that reshare McDonald’s post liable, it is also not at all clear that the content of the original post could be attributed to these “derivative defendants.” There are plenty of reasons to reshare a post: to ratify it, to poke fun at it, or to draw critical attention to it. It bears repeating that a platform user’s intent is not always facially evident, even with respect to a retweet or a repost. Aside from this issue, ephemeral bots may lack platform histories entirely, making it difficult for plaintiffs to achieve any level of context familiarity at all. All told, the modified “reasonable

101 See United States v. Turner, 720 F.3d 411, 416 (2d Cir. 2013).
102 Id. at 416, 422.
listener” test would allow many instances of platform-enabled voter intimidation to occur with impunity, given the unique communicative properties of social media sites and other third-party online forums.

Another standard for imputing an online commenter’s intent, more extreme and overinclusive than employing the modified “reasonable listener” test, would be to import tort liability frameworks to the intent inquiry under Section 11(b). Strict liability, often rationalized on economic grounds, could be used as a libertarian instrument.103 Where platform-enabled actors cause harm to voters through use of compulsion, force, or the creation of a “dangerous condition,” rights-based norms could justify imputing intent automatically.104 In theory, this approach would ensure that speakers on Internet platforms who play some role in platform-enabled voter intimidation—whether by posting comments, spreading them, or “liking” them—could be enjoined through use of Section 11(b) in “intent” jurisdictions. Similarly, joint and several liability, which allows plaintiffs to hold independent tortfeasors liable for a single, theoretically divisible but practically indivisible harm, would ensure that plaintiffs would be able to bring suit against any defendant who played a role in the dissemination of an intimidating communication105 But both of these tort-liability models are likely to expand the scope of intent far beyond the tolerable limits of the First Amendment.106 A quick look at potential consequences of this move reveals its risks of overinclusiveness. Actors like the Southern Poverty Law Center, attempting to draw negative attention to reprehensible voter intimidation by resharing it, could be held liable. Similarly, the complicated algorithmic designs of platforms could render liable those third-party users that merely view an intimidating post, as “views” often contribute to a post’s visibility and virality. Such an expansive assignment of intent for purposes of Section 11(b) would disproportionately extend liability without fault.

In sum, shortfalls of the modified “reasonable listener” test and the tort-liability approach reveal the comparative strengths of using the modified “reasonable speaker” test to assign intent to platform-enabled users for purposes of Section 11(b) liability in intent jurisdictions. The modified “reasonable listener” test permits bad actors to skirt liability by narrowly sharing intimidating content with a wink and a nod. The tort-liability approach sweeps in bad actors, but also reaches vast amounts of innocuous expressive activity. The modified “reasonable speaker” test suffers from neither of these defects.

104 Id. at 205.
105 See id. at 139.
106 See infra Part IV.B.
B. Overcoming Constitutional Limitations

Even assuming a Section 11(b) suit against a perpetrator of platform-enabled voter intimidation could satisfy all the requisite statutory elements, the Constitution imposes its own limitations on private litigants’ use of federal civil voter-intimidation statutes to proscribe expression. For one, restrictions of platform-enabled speech would constitute content-based regulations under the First Amendment, and thus be subject to strict scrutiny in the absence of some categorical exception.\textsuperscript{107} To survive strict scrutiny, use of Section 11(b) must be “narrowly tailored to serve a compelling state interest.”\textsuperscript{108} The Supreme Court has recognized “a compelling interest in protecting voters from confusion and undue influence.”\textsuperscript{109} The key inquiry, then, is whether litigants’ use of Section 11(b) to proscribe platform-enabled voter intimidation is narrowly tailored to this compelling interest.

Generally, courts find speech regulations narrowly tailored and, thus, constitutional when they (1) advance the state interest, (2) are the least restrictive means available to advance the interest, (3) are not overinclusive, and (4) are not underinclusive.\textsuperscript{110} Under these parameters, use of Section 11(b) should generally pass constitutional muster. Taking Mac McDonald’s “qualified target” remark as an example, the post’s removal via injunction would need to be necessary to avoid undue influence over voters, removal would have to be the least restrictive means to avoid undue influence, removal would have to avoid restricting McDonald’s other protected speech, and removal would have to address all of McDonald’s speech that exerts undue influence over voters. All these requirements can arguably be met.

That’s not to say that all platform-enabled voter intimidation can be proscribed without running afoul of the First Amendment. In the case of @NeilTurner, even if the immigrant-voter tweet could have been lawfully removed when it was first posted, the First Amendment calculus changed when the photo was picked up and redistributed by other users and major news


\textsuperscript{109} Burson, 504 U.S. at 199.

outlets. At that point, removal could not diminish the post’s effect on voter behavior. An injunction would thus fail narrow tailoring.\(^{111}\)

Where applications of Section 11(b) do not survive the Court’s narrow-tailoring requirement, it is also unlikely that the First Amendment exception for “true threats” can salvage their constitutionality. In the original “true threat” case, *Watts v. United States*, the Supreme Court found that a 1917 federal law that prohibited “any person from knowingly and willfully making any threat to take the life of or to inflict bodily harm upon the President of the United States” could not be used to prosecute a defendant who, reacting to his Vietnam War draft order, announced:

They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.\(^{112}\)

In determining that the defendant’s speech was protected and not a “true threat,” the Court in *Watts* focused on the surrounding facts: that his declaration was made during a political debate, that his threat was conditional, and that the audience reacted to his statements with laughter.\(^{113}\) Given this context, the Court found that Watts’s speech—which mirrors much of the platform-enabled voter intimidation identified in Part I—aligned with “the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . .”\(^{114}\) This principle all but commands the constitutional protection of most platform-enabled voter intimidation—the government’s removal of which would not be narrowly tailored to the compelling state interest of protecting voters from confusion and undue influence.

Separate from the First Amendment limitations of narrow tailoring and the true threat exception, there also remains a question concerning Congress’s

\(^{111}\) Furthermore, neither the post’s falsity nor its intimidating character could suffice to bring it outside of the First Amendment’s protections. See United States v. Alvarez, 567 U.S. 709, 720 (2012) (explaining a certain statute’s “prohibition on false statements made to Government officials, in communications concerning official matters, does not lead to the broader proposition that false statements are unprotected when made to any person, at any time, in any context”); Virginia v. Black, 538 U.S. 343, 360 (2003) (“Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”) (emphasis added).


\(^{113}\) *Id.* at 707.

\(^{114}\) *Id.* at 708.
power to regulate purely private voter intimidation. The Elections Clause provides that “the 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 . . . .” The Supreme Court has interpreted this language to vest Congress with broad authority to regulate federal elections, including those in which state and local candidates run. But if the Elections Clause is the source of power for the Voting Rights Act, it is doubtful that Section 11(b) can reach private speech connected to purely state and local political contests. The Act’s own language seems to recognize this limitation. It only extends protections to voters for:

... any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

However, even though this constitutional limitation theoretically restricts the reach of Section 11(b), it seems of limited practical consequence in a world in which state and local elections are almost always conducted concurrently with

116 See Arizona v. Inter-Tribal Council of Arizona, 570 U.S. 1, 8–9 (2013); Ex parte Yarbrough, 110 U.S. 651, 661–62 (1884).
117 There are exceptions to this rule for “major parties and other people or groups who are either performing traditional public functions or entangled with the state.” See Tokaji, supra note 107, at 103–04 (citing Reitman v. Mulkey, 387 U.S. 369 (1967) and Smith v. Allwright, 321 U.S. 649 (1944)).
118 52 U.S.C. § 10307(c) (2012). Some scholars have suggested that the Necessary and Proper Clause could help Congress fill this “coverage gap” in Section 11(b). See Cady & Glazer, supra note 2, at 212 n.254 (quoting Foster v. Love, 522 U.S. 67, 71 n.2 (1997) for the proposition that the Elections Clause “gives Congress comprehensive authority to regulate the details of elections including the power to impose the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.”) (emphasis added) (internal citations omitted). But the Supreme Court has only ever held that the Necessary and Proper Clause “safeguard[s] the right of choice by the people of representatives in Congress secured by § 2 of Article I.” See United States v. Classic, 313 U.S. 299, 319–21 (1941) (emphasis added); see also Tokaji, supra note 107, at 104. But see Shelby Cty. v. Lynch, 799 F.3d 1173, 1181 (D.C. Cir. 2015) (Tatel, J., concurring) (“That Congress may enforce the Amendments only by ‘appropriate’ legislation, the County insists, means that the enforcement provisions guarantee ‘the constitutional right of sovereign States ... to regulate state and local elections as they see fit.’ But this claim finds no support in the constitutional text.”) (citations omitted).
federal elections for the ease of administration.\textsuperscript{119} Even if states did bifurcate these elections, all the examples of platform-enabled voter intimidation identified in this Note pertain to national-level elections.\textsuperscript{120} That makes sense, because the Internet’s global reach makes it particularly suitable for discussing issues of broad national and global import. Constitutional limits on federal regulatory power over private voter intimidation are therefore unlikely, in practice, to bar private litigants’ use of Section 11(b) to deter purely private platform-enabled voter intimidation.

C. Obtaining Adequate Relief Under Section 11(b)

Assuming victims of and objectors to platform-based voter intimidation can use Section 11(b) without overstepping statutory and constitutional limitations, does the relief available under Section 11(b) sufficiently incentivize litigation and deter future violations? Other civil voter-intimidation statutes authorize compensatory damages for “part[ies] so injured or deprived.”\textsuperscript{121} But similar language is absent from Section 11(b).\textsuperscript{122} Courts have thus drawn the line at declaratory and injunctive relief, removing a key incentive for bringing private suit.\textsuperscript{123}

Fortunately, Section 11(b)’s provisions have not been reduced to a total nullity. In 1976, Congress amended the Voting Rights Act with 52 U.S.C. § 10310(e), which provides that, “In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee, reasonable expert fees, and other reasonable litigation expenses as part of the

\textsuperscript{119} See Arizona v. Inter-Tribal Council of Arizona, 570 U.S. 1, 41 (2013) (Alito, J., dissenting) (“[T]he Elections Clause’s default rule helps to protect the States’ authority to regulate state and local elections. As a practical matter, it would be very burdensome for a State to maintain separate federal and state registration processes with separate federal and state voter rolls. For that reason, any federal regulation in this area is likely to displace not only state control of federal elections but also state control of state and local elections.”).

\textsuperscript{120} Appendix 1.1–3.3.

\textsuperscript{121} 42 U.S.C. § 1985(3) (2012).

\textsuperscript{122} See 52 U.S.C. § 10307(b) (2012).

\textsuperscript{123} See Allen v. State Bd. of Elections, 393 U.S. 544, 555 (1969); Olagues v. Russoniello, 770 F.2d 791, 805 (9th Cir. 1985). In Olagues, the Ninth Circuit observed that “[t]he legislative history [of the Voting Rights Act] nowhere suggests any action for damages, but instead observes that a private litigant is entitled to ‘the same remedy’ as the Attorney General . . . that [legislative] history points out that ‘[t]he sole consequence’ of the provision for a private cause of action under the Act is to broaden the scope of equitable relief which may be requested’ . . . .” 770 F.2d at 805 (citations omitted) (quoting S. REP. NO. 295, 94th Cong., 1st Sess. 39–43, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 774, 806–10).
costs.”¹²⁴ This language provides at least some financial impetus for nonprofit litigators to secure compliance with the law’s strictures.¹²⁵

But attorney’s fees, without more, hardly seem adequate to deter the rising tide of diffuse voter intimidation spread across a vast array of mostly anonymous platforms. Few Section 11(b) actions have been brought to date, as individual voters lack the financial incentives to sue.¹²⁶ Meanwhile, because voter intimidation has historically been isolated and difficult to prove, advocacy organizations have preferred to challenge conduct and laws with more tangible, far-reaching effects on constituencies.¹²⁷ However, the proliferation of voter intimidation on Internet platforms may somewhat change this calculus. Organizational plaintiffs can reasonably envision a greater return on investment by containing the rippling effects of “information cascades”—especially where deep-pocketed organizational speakers like PILF shed the cloak of anonymity to spread their message “far and wide.”¹²⁸

Still, it seems unlikely that any plaintiff—individual or institutional—would be willing to bear the burden of locating and extinguishing voter intimidation at the hands of individuals that surfaces on platforms.¹²⁹ Even if this voter intimidation was easily ascribable to a specific speaker, most of it would occur on Election Day, making it virtually impossible to enjoin in a timely manner.¹³⁰ Any judicially-imposed relief would therefore be substantively moot, and could not be litigated as an issue “capable of repetition, yet evading review” given the unique, factually-specific character of the intimidation.¹³¹

¹²⁶ Cady & Glazer, supra note 2, at 179; see also Delegates to Republican Nat’l Convention v. Republican Nat’l Comm., No. SACV 12-00927 DOC, 2012 WL 3239903, at *11 (C.D. Cal. Aug. 7, 2012) (“The Court has found only four dozen cases discussing [Section 11](b) of the Voting Rights Act.”).
¹²⁸ See CITRON, supra note 6, at 66–67; see generally LULAC Complaint, supra note 31.
¹²⁹ See, e.g., Appendix 1.1, 1.3–1.6, 3.1–3.2.
¹³⁰ See CITRON, supra note 6, at 221 (“Perpetrators cannot be sued or indicted if they cannot be identified.”); see also Appendix 1.1–3.3.
¹³¹ Compare the highly variable and fact-specific occurrence of voter intimidation with the consistent and relatively uniform issue of pregnancy termination addressed in Roe v. Wade, 410 U.S. 113, 125 (1973).
V. SOLUTIONS BEYOND EXISTING LAW

As Part IV, supra, explains, current law is ill-equipped to address most forms of platform-enabled voter intimidation. Unfortunately, prospects for alternative low-risk solutions are equally bleak. Traditional agency structures132 and hybrid administrative paradigms133 are poorly matched to the dynamic, fast-paced, and quasi-expressive nature of the problem. Platform self-policing offers some promise but may not be reliable or trustworthy given profitability considerations.134 And fundamental alterations to the existing electoral process would be expensive and might not blunt the effects of platform-enabled voter intimidation.

What would change look like under our existing election system? First, Congress could charge an agency with the mandate of stymying speech that “intimidates, threatens, or coerces” voters on social media sites and third-party forums. This agency’s tasks could include setting binding “voter intimidation standards” via rulemaking, providing content-moderation guidance to platform administrators via policy statements, and issuing interpretative decisions in response to direct petitioning from individual platforms. Lawmakers could also furnish the agency with online-content “take-down” authority, along with the ability to initiate enforcement actions against regulated entities that deliberately shirk compliance. In theory, this approach would afford significant advantages over the status quo—namely accountability, the enshrinement of national legal values, and nonarbitrary enforcement.135

But from where would the political will to create such an agency derive? The Trump administration has shown more interest in stripping the power of independent agencies than creating new ones.136 Furthermore, there is no existing “heir apparent” administrative body to which the directive could be tasked. The Federal Election Commission’s mandate has always been limited to campaign finance, and it already has fewer enforcement resources than problems to address.137

132 See infra notes 135–46 and accompanying text.
133 See infra notes 147–58 and accompanying text.
134 See infra notes 161–72 and accompanying text.
Even if the predicate political will did exist, it is unlikely that a traditional command-and-control regulatory model, a vestige of the New Deal era, could realistically pace dynamic, fast-moving platform-enabled speech.\textsuperscript{138} As Orly Lobel observes in her influential scholarship on regulatory limitations, traditional “command-and-control” processes are, by their nature, static and ossified, and generally employ “reactive, defensive, ex post” procedural responses to undesired conduct.\textsuperscript{139} For platform-enabled voter intimidation that sprouts rapidly and unpredictably throughout the web on Election Day, slow-moving, after-the-fact government regulation hardly seems like an adequate remedial instrument.

Still, there has been a substantial improvement over the past few years in the technological capacity of the private sector to identify and track certain bot-enabled voter-intimidation activities.\textsuperscript{140} The use of data-mining techniques and machine-learning tools has greatly eased this detection burden over the last few years.\textsuperscript{141} Setting aside budgetary constraints, this technology could easily be ported over from the private contractor base to government agencies.\textsuperscript{142} However, not all voter intimidation is perpetrated by malicious

election-commission-doesnt-work/ [https://perma.cc/B28F-HQZ9] (“The FEC’s budget has stagnated — but its oversight responsibilities have not. The agency’s enforcement division has shrunk to just 41 employees — down from 59 in 2010 — while the case backlog continues to grow (from 100 cases in 2010 to 329 in 2018.”).

\textsuperscript{138} See Julie E. Cohen, Between Truth and Power: The Legal Constructions of Information Capitalism 170 (2019) (“The institutions that we now have were designed around the regulatory problems and competencies of an era in which industrialism was the principal mode of development. The ongoing shift from an industrial mode of development to an informational one, and to an informationalized way of understanding development’s harms, has created existential challenges for regulatory models and constructs developed in the context of the industrial economy.”); see also Thomas Friedman, The Lexus and the Olive Tree: Understanding Globalization 39–58 (1999).


actors who emit identifiable network signatures. And not all automated tools are perfectly accurate.\textsuperscript{143} In practice, only so much platform-enabled voter intimidation can be flagged by algorithmic software suites on government terminals.

The practical limitations of automated intimidation-tracking software casts doubt on the constitutional validity of charging a traditional regulatory agency with thwarting platform-enabled speech. Even if Congress, in its enabling legislation, cabined the agency’s “take-down” and enforcement discretion with procedural checks to minimize the censorship of protected speech on platforms, the agency could not feasibly eradicate all platform-enabled voter intimidation. Such a failure would render its legal sanction underinclusive.\textsuperscript{144} It would also inevitably restrict some protected “core political speech” incident to its directive—an “overinclusive” regulation anathema to what Justice Clarence Thomas has called “the primary object of First Amendment protection.”\textsuperscript{145} These inadequacies would presumably render such an anti-intimidation protocol invalid under the Court’s existing “narrow tailoring” prong for First Amendment strict scrutiny.\textsuperscript{146}

Given these shortfalls, one might alternatively argue for the implementation of a hybrid institutional structure that uses what Professor Henry H. Perritt Jr. describes as “broad public law frameworks within which private regulatory regimes work out the details.”\textsuperscript{147} This “new governance” model could address many of the limitations of the traditional regulatory approach by transferring certain standard-setting and enforcement responsibilities to entities that can most effectively harness “participation, collaboration, active citizenship, proliferated production, dynamic learning, and adaptability.”\textsuperscript{148} Under this approach, a hybrid entity could be comprised of strategic and technical stakeholders from social media sites and third-party


\textsuperscript{144} See Volokh, supra note 110, at 2420.


\textsuperscript{146} See supra note 110 and accompanying text. Concededly, the Court, on occasion, has afforded legislatures considerable leeway when analyzing whether statutes that guard against corruption of the electoral process are narrowly tailored. See Burson v. Freeman, 504 U.S. 191, 208–09 (1992) (“[T]his Court never has held a State to the burden of demonstrating empirically the objective effects on political stability that are produced by the voting regulation in question. Elections vary from year to year, and place to place. It is therefore difficult to make specific findings about the effects of a voting regulation. Moreover, the remedy for a tainted election is an imperfect one. Rerunning an election would have a negative impact on voter turnout.”) (citations omitted).

\textsuperscript{147} Perritt, supra note 135, at 250.

\textsuperscript{148} Cf. Lobel, supra note 139, at 385–87, 433–36.
forums subject to its jurisdiction. It could exercise direct content take-down authority, or, alternatively, wield indirect notification tools to subject sites hosting noncompliant speech to legal sanction. A governmental appellate body, judicial or otherwise, could offer review of its initial determinations.\textsuperscript{149} And the hybrid entity could work in tandem with a governmental authority to define standards for government-instituted enforcement actions against platforms that repeatedly aid or abet voter intimidation.\textsuperscript{150}

However, like the traditional regulatory agency model, this approach would ultimately suffer from constitutional infirmities—both under the First Amendment and under the non-delegation doctrine, which proscribes delegation of legislative power to private entities.\textsuperscript{151} As a result, this hybrid institution would most likely need to be formed through voluntary commitments from leading industry players. Such an arrangement is not without precedent. In 2016, Facebook, Microsoft, YouTube, and Twitter entered into a voluntary agreement with the European Commission to remove the most “extremist” speech on their respective platforms within twenty-four hours of its posting.\textsuperscript{152} As part of this agreement, the companies developed a collective database for flagging and removing extremist content.\textsuperscript{153} But even hybrid institutions operating with implicit state sanction present inherent risks. Professor Jodi Short notes that implementations that place private actors in nominally traditional administrative roles can provide cover for devolution of the government’s central public-interest function.\textsuperscript{154} As a result, industry capture, factionalism, and interest-group pressure can cross over into

\textsuperscript{149} Perritt, supra note 135, at 303.

\textsuperscript{150} The outcomes of these enforcement actions could mirror the penalties available under Section 5 of the FTC Act. See 15 U.S.C. § 45 (2012).


\textsuperscript{154} See generally Jodi Short, The Paranoid Style in Regulatory Reform, 63 HASTINGS L. J. 633 (2012); see also ROGER G. NOLL, REFORMING REGULATION 40–43, 46 (1971) (expressing skepticism of the role for private actors in traditional regulatory contexts).
peripheral regulatory contexts. The stakes of these risks are elevated by the extensive intellectual capital already invested by the administrative agencies “in legitimizing the constitutionally suspect ‘headless fourth branch’ of government.”

How, then, can such an entity be formed without leaving the fox in charge of the henhouse? Jody Freeman, Director of the Environmental and Energy Law Program at Harvard Law, has asserted that legally enforceable contracts, the presence of powerful independent professionals within private organizations, the background threat of regulation by an agency, professional norms, and informal sanctions all work to deter the corrupting influence of private interest. Nevertheless, these proposed solutions seem unlikely to provide accountability in the context of government oversight of private regulation of platform-enabled voter intimidation. The problem’s scale and speed obfuscate it. Hosting platforms are vast environments constructed through algorithmic logic. They often operate as “unknowable black box[es],” even to developers. Civil servants simply lack the knowledge and capacity necessary to scrutinize standards and determinations voluntarily adopted under the guise of goodwill by a platform collective.

If one ought to be wary of a group of platforms governing together, does it make any more sense to trust them individually to independently self-police and adjudicate speech? In April 2018, Mark Zuckerberg, in an interview with Ezra Klein, described the creation of a Facebook Supreme Court in which “folks at Facebook make the first decision [to take down content] based on . . . community standards that are outlined, and then people get a second

156 See Short, supra note 154, at 656–57.
157 Freeman seems to implicitly recognize that certain contexts—e.g., informationalism—may be fundamentally incompatible with hybrid regulatory structures or “public/private interdependence.” See Freeman, supra note 155, at 665 (“Public/private regimes may engender doubts insufficiently addressed by the mere existence of agency oversight or the application of familiar procedural controls to private conduct. To be sure, requiring private actors to observe procedures usually demanded only of agencies may in some cases provide minimal accountability.”)
159 Id.
160 See COHEN, supra note 138, at 179 (“In an era when decision-making is mediated comprehensively by so-called “big data,” regulators seeking to fulfill antidiscrimination mandates must learn to contend with the methods by which regulated decisions are reached—with data and algorithms as instrumentalities for conducting (regulated) activity. In general, the existing regulatory toolkit is poorly adapted for scrutinizing data-driven algorithmic models.”)
opinion.”

Zuckerberg explained that this Facebook Supreme Court would be “made up of independent folks who don’t work for Facebook, who ultimately make the final judgment call on what should be acceptable speech in a community that reflects the social norms and values of people all around the world.”

Though the idea has been slow to develop amid criticism of the fanciful idea of global “social norms,” its driving force — the pervasive problem of hate speech on platforms — seems closely tied to the outbreak of online voter intimidation in recent years.

Facebook has also explored methods to expedite content removal in response to recent high-profile failures with “fake news” and election interference. During 2018, Facebook implemented an “Election War Room”—a Menlo Park conference room converted into a programming battle station to fight “suspicious spikes in spam and hate speech” during the midterm elections. This “War Room” targeted voter suppression efforts through use of threat intelligence, data science, and engineering resources pooled from across Facebook’s enterprise. Over the span of a week, “programmer-soldiers” removed 559 webpages and 251 accounts in the United States that were using fake identities to coordinate fake information campaigns. But, Facebook has not vowed to continue its “War Room” operations. And other platforms that have faced less public backlash seem to be failing in their efforts to police hosted voter intimidation. Although Twitter purged fake accounts and “outlined its efforts to ensure election

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162 Id.


164 See Lapowsky, supra note 163.


166 Id.

167 Id.

168 Id.
integrity” leading up to the 2018 midterms, it balked at the timely removal of hoax videos and doctored photographs. Even so, Twitter’s performance was, by all accounts, exemplary compared to that of 4chan, which openly abetted vulgar, cruel, and intimidating speech connected to the election. This type of content has become emblematic of 4chan; any hope the public may have for its voluntary removal by site administrators seems badly misplaced.

Assuming, then, that administrative law frameworks—old and new—are inadequate to combat platform-enabled voter intimidation and that more is needed than self-policing by platforms, what other method can be used to protect voters from confusion and undue influence? The last option is to transition to a multi-day election format at the national level. Because the two largest domestic social media providers—Facebook and Twitter—are currently incapable of removing voter intimidation at a rate necessary to nullify effects on voter behavior, the spreading of elections across a longer timeframe would dilute the impact of this speech and give platforms an extended opportunity to take it down. This proposal, though unorthodox,

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171 See Appendix 3.1–3.3.
172 With respect to these underperforming platforms, there is always the possibility of amending Section 230 of the Communications Decency Act to allow plaintiffs to bring certain claims directly against them. The legislative solutions discussed above would require conforming amendments to Section 230 in any case. But the edifice of reliance interests built up around Section 230’s “strong protective aura” would spawn herculean political opposition, buttressed by the unusually aligned interests of ISPs and edge service providers. See Kyle Langvardt, Regulating Habit-Forming Technology, 88 Fordham L. Rev. 129, 175 (2019). A more pragmatic alternative might be to simply threaten an amendment—what Daphne Keller describes as “jawboning.” See Keller, supra note 18, at 5. This tactic might lead platforms to augment or initiate self-enforcement efforts, even if actual revision of Section 230 could not be written into law.
would be within the constitutional power of Congress to enact.\textsuperscript{173} It would also be practically viable; most states already permit some form of early voting.\textsuperscript{174}

Of course, multi-day voting systems are not without their costs. Opening all polling places for additional days drives nationwide increases in staff, security, and facility costs.\textsuperscript{175} Meanwhile, the staggering of voting days by district or state can undermine electoral legitimacy. Delays in the announcement of results until all voting has concluded can undermine confidence in the competence of the election’s operation, whereas announcing results daily can affect voting behavior and promote attempts at manipulation.\textsuperscript{176} These legitimacy costs, at worst, can exceed the questionable benefits of starving platform-enabled voter intimidation of its viral oxygen. More time will also not change outcomes on bad-actor platforms like 4chan that operate as havens for hate speech. Nor will more time mitigate the effects of insidious, long-lead misinformation campaigns that occur over weeks instead of hours.

In the end, adopting a multi-day election format is a gamble. The monetary, political, and legitimacy costs will be high. The net benefits of providing high-impact platforms more time to eliminate hosted voter intimidation may be marginal, especially considering advances in automated content identification and take-down technologies that these platforms may achieve and implement in the coming years. If the juice is not worth the squeeze, it may be necessary to resort to traditional market pressure and old-fashioned jawboning to drive improved private enforcement of platforms’ rules against voter intimidation in the near term.

VI. CONCLUSION

Platform-enabled voter intimidation is unlikely to subside as social media sites and other third-party forums continue to assume important

\textsuperscript{173} See U.S. Const. art. II, § 1, cl. 4 (“The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”). In fact, the modern system of voting on the first Tuesday after the first Monday in November was initially adopted by Congress in 1845, only because “getting to and from polling places used to be a two-day ordeal, and voting on the weekend or Monday would have meant traveling on the Sabbath.” Juliet Lapidos, Doing Democracy Right, SLATE (Oct. 17, 2008, 5:39 PM), https://slate.com/news-and-politics/2008/10/why-are-other-countries-better-at-conducting-elections-than-we-are.html [https://perma.cc/A84M-3V2V].

\textsuperscript{174} Daniel White, These Are The States That Allow You to Vote Early, TIME (Sept. 15, 2016), http://time.com/4495435/early-voting-states/ [https://perma.cc/PB9T-S2SM].


\textsuperscript{176} Id.
communicative and informational functions in modern life. But the existing toolkit of federal voter-intimidation statutes, tailored to the vanishing evil of in-person voter intimidation, is inadequate to protect suffrage. Although Section 11(b) of the Voting Rights Act may be capable of deterring certain long-lead voter intimidation that is attributable to a specific organization, its enforcement mechanisms generally cannot keep pace with individualized threats of violence and anonymized misinformation campaigns that target voters on Election Day.

Furthermore, solutions beyond existing law—traditional administrative law paradigms, hybrid institutional models, and private enforcement—suffer from a combination of constitutional invalidity, logistical impracticability, and unprofitability. The best approach available in the absence of a constitutional revision is to embrace a multi-day election format that blunts the force of “same-day” platform-enabled voter intimidation. Nevertheless, this solution would do little to thwart extended and insidious misinformation campaigns that run the duration of the election cycle, much less to curb the intimidating speech on platforms like 4chan that pridefully abet it. In any case, certain voter intimidation cannot be unseen, even if it can be removed by Facebook and Twitter long before ballots are cast. In the end, the potential costs to electoral legitimacy of a multi-day model may exceed the marginal benefits it provides. In that case, the status quo—waiting for the algorithmic identification systems of leading platforms to pace users’ vast content generation—is the only option.
## APPENDIX

### 1.1

![Facebook post by Dillian Billiot](image)

*Where's all my Militia brothers? I'm on standby ready to defend our constitution and fight for our freedom. I'll volunteer for this country any day. #Freedom #America #Constitution #Rights #Militia #Power #WeThePeople #OneNation #WeAreStrongerThanAnyGovernment*

### 1.2

![Facebook post by Mac McDonald](image)

*The polls opened 12 minutes ago on the east coast. The battle for America has entered a major campaign in the long war of ideologies. The United States either stays a Christian nation or becomes a nation for Islam. I pray Trump wins as we veterans and militia are ready to take our country back. You civilians either follow us or get out of the way. Your only other option is to be a quantified target.*

### 1.3

![Facebook post by Jack Daniel Bridges](image)

*Kcop em locked and loaded folks. If Tensing is found not guilty If Hillary wins. LOCKED AND LOADED!*

### 1.4

![Facebook post by Missie Hendricks](image)

*THEY RIGGED THE PRIMARY & PEOPLE TOOK IT. IF THEY RIG TODAY'S ELECTION, IT'S WAR.*
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2.3

3.1

3.2

3.3

What if we lose?
Then we’ll meet irl.

BuzzFeed News reporter Joe Bernstein is watching the discussion threads on noted troll message boards 4chan and 8chan. He’s spotted two plans being hatched to spread false information. This one involves hoaxing Spanish-language media: