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PROTECTING THE INTEGRITY OF THE POLLING PLACE: A CONSTITUTIONAL DEFENSE OF POLL WATCHER STATUTES

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In 2004, two challenges were made to the constitutionality of Ohio's poll watching statutes. Set against the backdrop of that litigation, this Article assesses the constitutionality of these Ohio regulations, and poll watching statutes in general. The authors first outline the charges made in the Ohio litigation, including violations of the Equal Protection clause and of the right to vote as protected by the Fourteenth Amendment. Next, the legitimacy of these claims are analyzed, with the authors ultimately concluding that: (1) poll watching statutes are "reasonable" regulations that do not warrant the application of strict scrutiny; (2) poll watchers are not state actors, and thus the Equal Protection clause is inapplicable; and (3) those issues notwithstanding, challenges to poll watching statutes will inevitably face significant issues of standing. Finally, the authors suggest that the use of injunctive relief—originally approved of in the Ohio litigation but later rejected on appeal—is inappropriate in the context of election law, where decisions of the court may themselves be determinative in the outcome of elections.

The Constitution of the United States provides that the "Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ."[1]

I. INTRODUCTION

On Election Day 2008, many American voters encountered what has become an increasingly conspicuous—and increasingly contentious—presence in the polling place: the poll watcher. Statutes permitting poll watchers have been part of the American voting process for well over a century.[2] Only recently, however, has their role as a critical election participant been magni-

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[1] U.S. CONST. art. I, § 4.

[2] *See generally* HUGH A. BONE, AMERICAN POLITICS AND THE PARTY SYSTEM 522 (2d ed. 1955) ("Most election laws permit each party to have 'watchers.'").

fied. Following the hotly-contested 2000 presidential election, both political parties increased their use of poll watchers in 2004, leading to allegations of voter intimidation. Just days before voters were to cast their vote for President of the United States, two federal district court judges in Ohio granted temporary injunctions barring the enforcement of a long-standing Ohio statute, which allowed poll watchers (called "poll challengers" under Ohio law) to be present at poll locations.[3] On the morning of the election, just hours before the polls were set to open, the Sixth Circuit stayed the lower courts' injunctions.[4]

The 2004 Ohio litigation ignited a debate over the constitutionality of poll watcher statutes and the appropriateness of federal court intervention in this common aspect of the electoral process. Poll watchers and challenges to voters at the polls are historically permissible under most state election laws, but poll watching campaigns had escaped serious challenge until the 2004 election. Therefore, the constitutionality of state laws allowing for poll watchers and voter challenges at the polls is ripe for evaluation.

Poll watching is exclusively a creation of state law. Consequently, the role of poll watchers differs slightly from state to state. Poll watching takes various forms, but most commonly, poll watchers are volunteers designated by a specific candidate, political party, or election official to monitor procedures and events at voting precincts.[5] These poll watchers fulfill a distinct function—both different and apart—from public election officials, who are charged with conducting fair and impartial elections.[6] Because most poll watchers are selected and assigned by private parties, they may perform their duties with a partisan focus. In addition to monitoring the implementation of election procedures, poll watchers also monitor the voter verification process and provision of ballots for the voters to cast, and raise challenges concerning suspected ineligible voters. Poll watchers shine a partisan light on polling place procedures to prevent voter fraud—by the polling place official, the putative voter, or a combination of both—from diluting legal votes.

This Article explores the constitutionality of state laws permitting poll watchers to be present at the polls on Election Day and to challenge voters. This Article first outlines the 2004 litigation in Ohio, which initially enjoined poll watching. Second, it discusses the constitutional issues—the right to vote under the Fourteenth Amendment, the Equal Protection requirement of the Fourteenth Amendment and the issue of Article III standing—implicated in the 2004 Ohio litigation. This Article then analyzes the consti-

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[3] *See* Spencer v. Blackwell, 347 F. Supp. 2d 528 (S.D. Ohio 2004); Summit County Democratic Cent. and Exec. Comm. v. Blackwell (*Summit County I*), 2004 U.S. Dist. LEXIS 22539 (N.D. Ohio Oct. 31, 2004).

[4] Summit County Democratic Cent. and Exec. Comm. v. Blackwell (*Summit County II*), 388 F.3d 547 (6th Cir. 2004).

[5] Allison R. Hayward, *Election Day at the Bar*, 58 CASE W. RES. L. REV. 59, 67 (2007).

[6] *See* Preisler v. Calcaterra, 243 S.W.2d 62, 65 (Mo. 1951) ("Challengers and watchers are in no sense public officials charged by law with the responsibilities of conducting fair and impartial elections, 'free and open.'").

tutionality of state poll watcher statutes under each of these constitutional provisions and concludes that: (1) the active presence of poll watchers does not impose a severe burden on the right to vote and is justified by the state's interest in preventing voter fraud; (2) the decision of where to place poll watchers is private—not state—action, and therefore not subject to Equal Protection standards; and (3) facial challenges to these statutes lack sufficient standing. Finally, this Article discusses the inadequacy of last-minute, pre-election injunctions to address poll watching challenges when long-standing election laws are involved.

II. Case Study: The 2004 Ohio Poll Watcher Litigation

In 2004, Ohio faced two challenges to its voting process. First, the State experienced a significant increase in the number of newly registered voters since the 2000 election.[7] Many of these newly minted voters would be casting their ballots for the first time in the 2004 election. There was also growing concern that fraudulent voter registrations contributed to this increase.[8] Second, Ohio election officials began implementing new federal election requirements aimed at preventing the perceived problems that arose in Florida during the 2000 presidential election. In 2002, Congress enacted the Help America Vote Act (hereinafter "HAVA"), which mandated several reforms to ensure that all eligible voters' ballots would be counted.[9] While the Act did not directly impact state laws regarding poll watching, it did require that voters whose eligibility was challenged at the polls be permitted to cast a provisional ballot that would be counted once their eligibility was verified.[10]

Ohio law provides for election judges to be present in each polling place.[11] The political party whose candidate for Governor garnered the most votes in the district in the previous gubernatorial election selects a presiding judge from these judges.[12] These election judges are responsible for overseeing the verification of voters and for determining voters' eligibility prior to the issuance of ballots. Concerns and challenges regarding a person's eligi-

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[7] Spencer v. Blackwell, 347 F. Supp. 2d 528, 535 (S.D. Ohio 2004) ("Defendant Burke testified that . . . there have been approximately 84,000 registered since January 2004 and an untold number registered since the last election.").

[8] *See, e.g.*, David A. Lieb, Associated Press, *Political Group Paid Felons for Voter Drive*, Boston Globe, June 25, 2004, at A8; Joe Mahr, *Voter Fraud Case Traced to Volunteer*, Tol. Blade, Oct. 19, 2004, at A1; Steven Oravecz, *Elections Board Questions Cards*, Trib. Chron. (Warren, Ohio), May 5, 2004, at 1A; Michael Scott, *Dead Man on Voter Rolls Sparks Inquiry*, Plain Dealer, Sept. 23, 2004, at A1.

[9] Help America Vote Act of 2002, 42 U.S.C. §§ 15301–15545 (Supp. V 2005).

[10] § 15482. The Act requires election officials to give a voter a provisional ballot even if his or her name is not on the voting rolls or if an election official believes he or she is ineligible to vote. *Id.*

[11] *See* Ohio Rev. Code Ann. § 3501.22(A) (2004).

[12] *Spencer,* 347 F. Supp. 2d at 529–30 (citing Ohio Rev. Code §§ 3501.22(A), 3501.01(G) (2004)).

bility may be raised by election officials, election judges, poll watchers, or by any other voter who is lawfully in the polling place.[13]

As summarized above, poll watchers are individuals who have been appointed by the political parties to monitor the activities at a particular polling site, to ensure that all laws are complied with, and to challenge persons they believe are ineligible to vote. Under Ohio law, each political party may appoint one poll watcher per polling place within each county.[14] These appointed poll watchers' names must be submitted to the county board of elections at least eleven days before Election Day.[15] The appointed poll watchers are given a certificate and take an oath, but are considered representatives of the candidate or party that appointed them. Poll watchers do not receive public compensation for this service. With respect to challenges of persons seeking to vote, Ohio law provides that a potential voter may be challenged for: (1) not being a citizen; (2) not residing in Ohio for thirty days immediately preceding the election; (3) not being a resident of the county or precinct at which he or she has arrived to vote; or (4) not being of legal voting age.[16] When a poll watcher believes that a particular person is unqualified to vote, the poll watcher must immediately notify the presiding election judge and state the particular grounds for the challenge. The election judge must then conduct a brief inquiry to determine the status of the voter.[17] The decision to qualify a voter so challenged is made at the discretion of the presiding election judge. Under HAVA, however, even if the presiding election judge rules a person ineligible to vote at that precinct, that person may still request a provisional ballot.[18]

On October 22, 2004, concerned that the increase in new voter registrations and changes in the election procedures would provide a greater opportunity for voter fraud, the Hamilton County Republican Party filed to have 251 additional poll watchers placed in selected precincts throughout Hamilton County, Ohio.[19] These additional poll watchers were meant to supplement the large number of poll watchers that the Republican Party had previously appointed to serve in the county during the 2002 election.[20] In other counties throughout the state, both Republicans and Democrats filed to have additional poll watchers present at various polling locations.[21]

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[13] *See* OHIO REV. CODE ANN. § 3501.20 (2004).
[14] *Id.* § 3505.21.
[15] *Id.*
[16] *Id.* § 3505.20.
[17] *Id.* The presiding judge administers an oath to the voter, and the election judges then ask him or her a series of questions depending on the basis upon which he or she has been challenged. *Id.*
[18] *See* 42 U.S.C. § 15482 (Supp. V 2005).
[19] *See* Spencer v. Blackwell, 347 F. Supp. 2d 528, 539 (S.D. Ohio 2004).
[20] *See id.*
[21] Tom Beyerlein, *State GOP to Put Poll Watchers In,* DAYTON DAILY NEWS, Oct. 23, 2004, at A1.

On October 27, 2004, mere days before the 2004 presidential election, Marian and Donald Spencer, two registered Ohio voters, filed a lawsuit seeking a preliminary injunction against the appointment and authorization of these Republican Party poll watchers. The lawsuit, filed in the U.S. District Court for the Southern District of Ohio, specifically sought to enjoin Ohio Secretary of State J. Kenneth Blackwell from enforcing the state statute that permitted appointed poll watchers in the polling places.[22] The plaintiffs were registered African-American voters who resided in a primarily African-American neighborhood.[23] A nearly identical lawsuit, seeking a preliminary injunction against the Republican poll watchers, and also naming Secretary of State Blackwell, was filed in the U.S. District Court for the Northern District of Ohio the following day.[24]

In *Spencer v. Blackwell*, the plaintiffs alleged that the presence of poll watchers in predominantly African-American districts would intimidate voters from exercising their constitutional right to vote.[25] The plaintiffs also alleged that the Ohio statute providing for poll watchers lacked sufficient procedures and instructions to direct and guide the watchers.[26] In *Summit County I*, the plaintiffs alleged that permitting poll watchers to observe at the polls would deny the plaintiffs due process and equal protection of the laws.[27]

A. Standards for Assessing the Constitutionality of Poll Watching Statutes

When assessing the constitutionality of state restrictions on the right to vote, the Ohio courts were guided by the U.S. Supreme Court's decision in *Anderson v. Celebrezze*, a case challenging Ohio's early filing deadline for independent candidates.[28] In striking down Ohio's early filing deadline as violative of the petitioner's voting and associative rights, as protected by the First and Fourteenth Amendments, the Court established a balancing test wherein a court must weigh "the precise interests put forward by the State as justification for the burden imposed by the rule."[29]

The Court's holding in *Burdick v. Takushi*, a case challenging Hawaii's ban on write-in voting, further illuminates the implications of the *Anderson*

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[22] *See Spencer*, 347 F. Supp. 2d at 528.

[23] *See id.* at 529.

[24] *See* Summit County Democratic Cent. and Exec. Comm. v. Blackwell (*Summit County I*), 2004 U.S. Dist. LEXIS 22539, at *4-5 (N.D. Ohio Oct. 31, 2004). This challenge lacked the racial element of the *Spencer* claim, but sought the same end—the enjoinment of poll watching.

[25] 347 F. Supp. 2d 528, 530 (S.D. Ohio 2004) (presenting evidence at trial that two-thirds of the Republican challengers would be placed in predominantly African-American precincts).

[26] *Id.* at 531.

[27] *See* Summit County I, 2004 U.S. Dist. LEXIS 22539, at *4–5.

[28] 460 U.S. 780 (1983).

[29] *Id.* at 789.

test.[30] There the Court emphasized that the *Anderson* test creates a "more flexible standard" that differs from traditional notions of strict, intermediate-level, and rational basis scrutiny.[31] Under the *Anderson* balancing test, the level of review varies depending on the burden imposed on the voter.[32] Only if a burden is found to be severe will the Court apply strict scrutiny in its analysis, which requires that the law in question be narrowly tailored to advance a compelling state interest.[33]

The *Burdick* Court cautioned that use of strict scrutiny should not be an automatic standard for every law affecting the right to vote:

> [T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently. Accordingly, the mere fact that a State's system creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.[34]

Thus, when a law is found to impose a lesser burden—a reasonable, nondiscriminatory restriction, for instance—then the State's important regulatory interests generally suffice to justify the restrictions.[35] This approach reflects the importance of the two competing constitutional values at stake—the individual's right to vote and the State's responsibility to regulate the voting process.

B. The District Courts' Analysis of the Poll Watching Statutes in Ohio

In assessing the plaintiffs' claims, both the *Spencer* and *Summit County I* courts applied the *Anderson* balancing test and weighed the severity of the burden presented by the presence of poll watchers in the polling place on the plaintiffs' right to vote against the importance of the State's interest.[36] Although cast against the backdrop of questions of racial discrimination, the *Spencer* court's analysis steered clear of the race issue, instead focusing on the experience of new voters generally.[37] Ultimately, the court found that the "bewildering array of participants" that would be present at the polls, com-

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[30] 504 U.S. 428 (1992). The Court found that Hawaii's prohibition on write-in voting was not a severe burden on the right to vote, and ultimately upheld the law. *See id.* at 438–40.

[31] *Id.* at 434.

[32] *Id.*

[33] *Id.*; *see also* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) ("Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest.").

[34] *Burdick,* 504 U.S. at 433. (internal citations omitted).

[35] *See, e.g.*, Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1616 (2008) (upholding Indiana's voter identification law requiring a photo ID to vote as a reasonable and not unduly burdensome means of curbing voter fraud).

[36] *Spencer*, 347 F. Supp. 2d at 534 (*citing Anderson*, 460 U.S. at 789).

[37] *See id.* at 535.

bined with the presence of inexperienced poll watchers, would create a situation of intimidation that would constitute a severe burden on the right to vote.[38] The court also recognized that Ohio had a compelling interest in preventing voter fraud within its borders.[39] Upon finding a severe burden to the right to vote and a compelling state interest, the court then applied the *Anderson* test to determine whether the law was "narrowly tailored" to fit the State's interest.[40] Applying strict scrutiny, the court held that the law was not the least burdensome method of accomplishing the State's interest.[41] The court also held that the Ohio law authorizing official election judges to exclusively monitor election law compliance at the polling places was an adequate means to accomplish the State's interest.[42] Additionally, the court found that other safeguards against fraud were already in place.[43] Consequently, the court posited that Ohio's poll watching restrictions would not cut constitutional muster even under the more lenient intermediate scrutiny, as, in the judge's opinion, the evidence did not suggest that the presence of poll watchers would further Ohio's interest in preventing voter fraud anymore than a system without them.[44]

The *Summit County I* court, applying a similar analysis under *Anderson*, first considered the magnitude of the plaintiffs' asserted injury, concluding that the potential threat of polling-place intimidation presented a severe burden on a citizen's right to vote.[45] Like its Southern District counterpart, the Northern District recognized a valid state interest in preventing voter fraud, but, in applying strict scrutiny, concluded that there were less burdensome ways for the state to achieve that interest.[46] Again like its Southern District counterpart, the Northern District suggested that Ohio's interests could be adequately protected through other measures, including election official challenges, already in place.[47]

On the morning of November 2, Election Day 2004, Defendant Blackwell and members of the Summit County Board of Elections filed emergency appeals from both of the district courts' orders. These emergency appeals were consolidated before the Sixth Circuit Court of Appeals.[48] The Sixth Circuit—with a three judge panel—stayed the orders of both district courts. In staying the orders, the Sixth Circuit panel found that the plaintiffs ultimately failed to prove that having poll watchers at the polling place con-

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[38] *Id.*
[39] *Id.* at 536.
[40] *Id.*
[41] *Id.* at 536–37.
[42] *Id.* at 537.
[43] *Id.*
[44] *Id.*
[45] *See* Summit County Democratic Cent. and Exec. Comm. v. Blackwell (*Summit County I*), 2004 U.S. Dist. LEXIS 22539, at *18–19 (N.D. Ohio Oct. 31, 2004).
[46] *See id.* at *19–21.
[47] *See id.*
[48] *See* Summit County Democratic Cent. and Exec. Comm. v. Blackwell (*Summit County II*), 388 F.3d 547 (6th Cir. 2004).

stituted a severe burden on the plaintiffs' right to vote.[49] A major factor considered by the appellate panel was that poll watchers can only initiate the challenge process; the process is ultimately administered and decided by the presiding judges at precinct polling locations.[50] The court acknowledged that, under Ohio law, presiding judges are members of the majority political party.[51] Further, the appellate panel found that the mere "possibility" of long lines and crowded polling places was not a significant enough inconvenience to impose a severe burden upon the right to vote.[52] In so finding, the court implicitly suggested that the lower courts employed an unduly high level of scrutiny in making their determinations. The panel also recognized the State's compelling interest in preventing voter fraud as weighing against the granting of an injunction, especially in light of the plaintiff's last-minute challenge to the long-standing law that allowed political party-appointed poll watchers.[53]

In his concurring opinion, Judge Ryan agreed that the temporary restraining orders should be stayed, but on grounds that the plaintiffs lacked standing.[54] In addition, he found that the plaintiffs had presented no evidence to the district courts, except for "unsubstantiated predictions and speculation," upon which injunctive relief could be sustained.[55] On an Election Day emergency appeal by the plaintiffs to the U.S. Supreme Court, Justice Stevens—assigned to receive emergency appeals from the Sixth Circuit—recognized the seriousness of the plaintiffs' allegations, but found that there was insufficient evidence in the record to make a determination of the plaintiffs' claims.[56]

The ensuing analysis examines the 2004 litigation on the Ohio statutes, which are similar to other states' poll watcher statutes.[57] We present the Ohio litigation as a foundation for our subsequent constitutional analysis of poll watchers in general because it was an issue of first impression before the courts.

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[49] *See id.* at 551.

[50] *Id.*

[51] *Id.*

[52] *See id.*

[53] *See id.*

[54] *Id.* (Ryan, J., concurring).

> The plaintiffs have offered no evidence that the injury they allege will occur tomorrow, has ever occurred before in an Ohio election or that there has been any threat by the defendants or anyone else that such injury will occur. The "injury" the district courts found that the plaintiffs will suffer tomorrow is wholly speculative, conjectural, and hypothetical.

Id. at 552. (Ryan, J., concurring).

[55] *Id.* Judge Rodgers, who wrote for the majority, also raised the standing issue, but due to the nature and immediacy of the issue, assumed without deciding that plaintiffs had standing to bring their case. *Id.* at 550.

[56] *See* Spencer v. Pugh, 543 U.S. 1301, 1302 (2004).

[57] After this litigation, the Ohio poll watcher statute was modified, although not in any substantive way.

III. Assessing Constitutional Issues Regarding Poll Watching and Poll Watchers through the 2004 Ohio Litigation

Evaluating the delicate balance between an individual's right to vote and a state's responsibility to regulate elections has proven difficult for the U.S. Supreme Court and the lower federal courts.[58] This subject has also provided fertile ground for debate among academics and commentators.[59] In *Baker v. Carr*, the U.S. Supreme Court declared that "[a] citizen's right to vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution . . . ."[60] Indeed, the right to vote is "of the most fundamental significance."[61]

The individual's right to vote, however, is in tension with both the state's right and duty to regulate the electoral process.[62] Indeed, voting regulations are vital to protecting the franchise itself, as a right to vote without the necessary structure to administer the conduct of elections renders those votes—and thus that right—ineffective.[63] Consequently, the Court has recognized that "States may, and inevitably must, enact reasonable regulations

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[58] Courts have gone back and forth on the constitutionality of a number of voting restrictions. *Compare, e.g*, Breedlove v. Suttles, 302 U.S. 277 (1937) (upholding a Georgia poll tax) *with* Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (holding that the imposition of a poll tax was inconsistent with the Equal Protection Clause of the Fourteenth Amendment).

[59] *See generally* Samuel Issacharoff et al., When Elections Go Bad: The Law of Democracy and the Presidential Election of 2000 (2001).

> The general equitable principles that govern [cases seeking to permanently enjoin a particular election practice] can be stated relatively simply, although in practice they can raise difficult questions. Having found a statutory or constitutional violation, the courts are to order relief that remedies the violation as completely as possible. . . . At the same time, precisely because regulation of the political process trenches so intimately on core state decisionmaking, the courts are required to give states a fair opportunity to propose a remedy before imposing one of their own devising.

Id. at 159–60.

[60] 369 U.S. 186, 208 (1962) (recognizing historical instances where a state has impaired the right to vote through means such as stuffing the ballot box or refusing to count the votes in arbitrarily selected precincts).

[61] Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979) (stating that overly burdensome state restrictions on ballot access impairs the voters' ability to express their political opinion).

[62] Under Article I, Section 4 of the Constitution, the individual states have the right to enact procedural requirements regarding elections, and the Court has long acknowledged that this right allows individual states to regulate various aspects of the election process, and not just the "time and place" as provided for in the Federal Constitution. *See* U.S. Const. art. I, § 4 ("The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ."); *see also* Smiley v. Holm, 285 U.S. 355, 366 (1932) (finding that the "comprehensive words" of Article I, Section 4 of the Constitution "embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, [and] duties of inspectors and canvassers").

[63] *See Burdick*, 504 U.S. at 433 (Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections . . . .").

of parties, elections and ballots to reduce election- and campaign-related disorder."[64] The attempt to balance these two competing interests is at the heart of election law jurisprudence.

A. The Right to Vote Standard under the 14th Amendment

Justice Stevens recently reiterated the standard for assessing the constitutionality of state restrictions on the right to vote in *Crawford v. Marion County Election Board*.[65] *Crawford* involved a challenge to an Indiana law requiring voters to present a form of photo identification prior to being allowed to vote. Individuals without an acceptable form of photo identification were given a provisional ballot and then required to present a photo ID or execute an appropriate affidavit within 10 days after the election in order to have their ballot counted.[66] Citing its precedent in *Anderson v. Celebrezze*, the Court affirmed the use of a balancing test, which measured the interests of the state in regulating its elections against the burdens imposed on an individual's right to vote.[67] Furthermore, the Court reaffirmed the sliding scale of scrutiny it had established through *Anderson* and *Burdick*, noting that when a law is found to impose a lesser burden of only "reasonable, nondiscriminatory restrictions," then "the State's important regulatory interests are generally sufficient to justify" the restrictions.[68] Ultimately, the *Crawford* Court determined that the Indiana statute's burden on the right to vote was outweighed by the State's interest and therefore the petitioners failed to establish a right to relief.[69]

As the balancing test set forth in *Anderson* and *Burdick* and affirmed in *Crawford* reflects the contemporary test for assessing the constitutionality of an election regulation, it is appropriate that the interests involved be more fully explored.

1. Determining the State Interests in Poll Watching Statutes

Under the *Anderson* balancing test, a court must analyze the "precise interests" proffered by the State. This analysis includes measuring the strength of the interests.[70] This strength of the interest will be assessed under a sliding scale standard, from "rationally based" interests to "compelling" interests. Rationally-based interests proffered by a State are legitimate, pro-

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[64] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) (holding that a Minnesota law preventing a candidate from appearing on the ballot as a candidate for more than one party was a reasonable and not overly burdensome regulation means of curbing election-day confusion).

[65] 128 S. Ct. 1610 (2008).

[66] *Id.* at 1613–14.

[67] *Id.* at 1616.

[68] *Id.* (citing *Anderson*, 460 U.S. at 788).

[69] *Id.* at 1621.

[70] *Anderson*, 460 U.S. at 789.

vided the burden imposed by its statute on the right to vote is low.[71] Compelling interests proffered by a state can be legitimate even though the burdens imposed by its statute on the right to vote may be severe, assuming that the legislation is narrowly tailored to meet those interests.[72]

The Supreme Court has repeatedly held that the prevention of election fraud is a compelling state interest.[73] Fraudulent voting dilutes the pool of votes, thereby distorting election results and undercutting the value of each legitimately-cast ballot. As the Supreme Court noted in *Purcell v. Gonzalez,* voter fraud impairs individuals' right to vote "as effectively as by wholly prohibiting the free exercise of the franchise."[74]

The serious and irreparable harm of voter fraud has been illustrated in several reports. The bipartisan Commission on Election Reform, led by former President Jimmy Carter and former Secretary of State James A. Baker, published a report (hereinafter the "Carter-Baker Report") that documented instances of voter fraud, and noted that 180 election fraud investigations had been initiated by the U.S. Department of Justice and state and local officials since 2002.[75] The Carter-Baker Report notes that a number of fraudulent votes were cast by ineligible felons and the deceased in the Washington state gubernatorial election in November 2004, which was decided by a margin of only 129 votes.[76]

In 2008, the Milwaukee Police Department released a report detailing incidents of voter "irregularities" in the 2004 General Election it investigated as part of a special task force with federal and state law enforcement agencies. The report identified at least 300 instances of fraudulent votes by ineligible felons, non-citizens, and people who voted twice, used fake names or addresses, or voted in the names of the dead.[77] Disturbingly, the report

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[71] *Id.* at 788 ("[T]he state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions").

[72] *See* Timmons, 520 U.S. at 358-60.

[73] *See* Crawford, 128 S. Ct. at 1612 ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters."); *see also* Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) ("'A State indisputably has a compelling interest in preserving the integrity of its election process'" (quoting Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 231 (1989)); Burson v. Freeman, 504 U.S. 191, 199 (1992) (affirming that "a state has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process").

[74] 549 U.S. at 4 (quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964)).

[75] COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS at 45 (Sept. 2005), *available at* http://www.american.edu/ia/cfer/report/full_report.pdf (on file with Harvard University Langdell Library) (citing Press Release, U.S. Department of Justice, Department of Justice to Hold Ballot Access and Voting Integrity Symposium (Aug. 2, 2005)).

[76] *Id.* at 4, 35.

[77] SPECIAL INVESTIGATIONS UNIT, MILWAUKEE POLICE DEP'T, REPORT OF THE INVESTIGATION INTO THE NOVEMBER 2, 2004 GENERAL ELECTION IN THE CITY OF MILWAUKEE (2005), *available at* http://graphics.jsonline.com/graphics/news/MPD_2004voterfraudprobe_22608.pdf.

claimed that Milwaukee Election Commission employees permitted "obviously ineligible voters to cast ballots in the races that were contested."[78]

Other incidents of voter fraud have also been documented. The U.S. District Court for the Southern District of Indiana in *Indiana Democratic Party v. Rokita* listed reported cases of voter fraud in Missouri, Florida, Maryland, Georgia, Illinois and Pennsylvania.[79] A congressional investigation in 1997 also made significant findings, discovering over 4000 ineligible voters who cast ballots in a closely contested House of Representatives election in California.[80] Recently, individuals in Missouri,[81] Washington,[82] and Texas[83] have been investigated, indicted, and in some cases convicted of fraud related to elections and voter registration.

It is important to note that the compelling interest at play here is as much in preventing voter malfeasance as it is in detecting it. Pre-emptive action is particularly important in the area of election administration, where accuracy in the vote totals can tip the balance in a close election. The Su-

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[78] *Id.* at 17. The Milwaukee Police Department concluded that there was a planned effort by paid campaign workers to illegally manipulate election results:

> It is difficult for the investigators to believe that paid professional campaign staff members, who were tasked with assisting in the registration of new voters and the facilitation of those voters to, among other things, vote by Absentee ballot, the chosen method of voting for most of the individuals listed, would not have had a working knowledge of the voter eligibility requirements in the State of Wisconsin. . . . The belief of the *investigators* is that each of these persons had to commit multiple criminal acts in an effort to reach their ultimate goal of voting, showing that the act was a conscious, intentional effort to commit a crime. . . . There does remain a strong possibility that the discovery of these random staffers voting illegally is the proverbial 'tip of the iceberg' as it relates to an illegal organized attempt to influence the outcome of an election in the state of Wisconsin.

Id. at 52–53.

[79] 458 F. Supp. 2d 775, 793–94 (S.D. Ind. 2006).

[80] *See NewsHour: Contested Contest* (PBS television broadcast Oct. 22, 1997), *transcript available at* http://www.pbs.org/newshour/bb/congress/july-dec97/dornan_10-22.html (last accessed on Nov. 15, 2008); John Fund, Op-Ed., *'This Will Make Voter Fraud Easier': Why does Mrs. Clinton want driver's licenses for illegal aliens?*, WALL ST. J., Nov. 2, 2007, at A12.

[81] During the 2006 election in Missouri, members of the Association of Community Organizers for Reform Now (ACORN) were charged with felonies for submitting over 1700 fraudulent voter registration forms. *See* Keith Ervin, *Felony Charges Filed Against 7 in State's Biggest Case of Voter-Registration Fraud*, SEATTLE TIMES, July 26, 2007, http://seattletimes.nwsource.com/html/localnews/2003806904_webvotefraud26m.html. Charges were ultimately filed against seven ACORN members in what Secretary of State Sam Reed called "the worst case of voter-registration fraud in the history of the state . . . ." *Id.*

[82] Washington's gubernatorial election in 2004 came down to an incredibly small margin. Because of poll watchers, election officials were alerted to the fact that many provisional ballots were actually being dropped into the voting box, rather then being sent to the board of elections for an official determination. *See* Keith Ervin, *Provisional-Vote Flaws Revealed*, SEATTLE TIMES, Jan. 5, 2005, at B1.

[83] In Texas, Raymond Villarreal, the Refugio County Commissioner, was charged and convicted for committing election fraud. The State Attorney General's Office stated that Villarreal filled out false addresses on voters' absentee ballot applications, diverting them to himself. Villarreal was sentenced to 90 days in jail and five years probation. KRISTV.com, Refugio Commissioner Busted for Voter Fraud (Oct. 9, 2007), http://www.kristv.com/global/story.asp?s=7191073.

preme Court has recognized that, in this context, a state need not "sit on its heels" and wait until harm is incurred before enacting a law aimed at preventing the harm.[84] State statutes providing for poll watching, then, can be seen as a pre-emptive move aimed at promoting the State's compelling interest in deterring and preventing voter fraud, and providing a reasonable means to protect against it. Poll watchers shine a light on the official election process; they mitigate legitimate concerns about the impartiality of election officials and the occurrence of innocent errors by polling staff. Because election officials have significant authority over the conduct of elections, well-trained poll watchers can provide a "check and balance" in polling precincts where there are concerns about official partisan bias. Poll watchers can also be helpful in preventing more than intentional fraud, by identifying and bringing to the election officials' attention mistakes in registration or eligibility, which election officials may inadvertently overlook.

2. Identifying Relevant Burdens on the Right to Vote

On a practical level, it is obvious that all "[e]lection laws will invariably impose some burden upon individual voters."[85] The fact that a regulation impinges on an individual's right to vote does not itself compel strict scrutiny.[86] As the Court noted in *Crawford*, "[b]urdens . . . arising from life's vagaries, however, are neither so serious nor so frequent as to raise any question about the constitutionality" of a given election regulation.[87]

Thus, most burdens that are imposed by election regulations do not rise to the level required to trigger strict scrutiny. The Court in *Crawford* concluded, "[i]n neither *Norman* nor *Burdick* did we identify any litmus test for measuring the severity of a burden that a state law imposes on a political

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[84] *See* Munro v. Socialist Workers Party, 479 U.S. 189, 196–97 (1983) ("Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights."). In *Munro*, the Court applied intermediate scrutiny to a Washington law restricting ballot access to candidates who received less than 1% of the vote in primary balloting, claiming that the restrictions on the individual were not so burdensome as to outweigh the state's interest in restricting access to the general ballot. *Id.* at 198-99.

[85] Burdick v. Takushi, 504 U.S. 428, 433 (1992). Every law that regulates an election, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends." Anderson v. Celebrezze, 460 U.S. 780, 788 (1983).

[86] *Burdick*, 504 U.S. at 433 ("[T]he mere fact that a State's system 'creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.'" (quoting Bullock v. Carter, 405 U.S. 134, 143 (1972)).

[87] *Crawford*, 128 S. Ct. at 1620. The Court here, referring to a photo identification requirement within the challenged statute, held that rare situations, arising out of everyday occurrences—a wallet stolen days (or even hours) before the election, or a voter not resembling his photograph because he grew a beard, for instance—are not sufficient burdens to outweigh the compelling state interest. *Id.*

party, an individual voter, or a discrete class of voters."[88] While the Court's election law jurisprudence has eschewed rigid categorization of burdens, some conclusions can be drawn regarding how burdens will be assessed. Burdens that bear little relevance to voter qualifications can be deemed invidious, even if there is a supposedly rational basis behind the regulation.[89] On the other hand, "evenhanded restrictions that protect the integrity and reliability of the electoral process itself" will generally not be deemed invidious.[90] Indeed, the Court did not find a severe burden on voting in *Burdick* when it upheld a Hawaii law that prohibited write-in voting.[91] Similarly, the Court did not find a severe burden on voting when it upheld a New York law requiring voters to register eight months before the presidential primary, and an entire eleven months before non-presidential primaries.[92] Moreover, the Court found that an Oklahoma requirement that voters register with a specific political party before voting in a primary election was a minimal burden on voting that failed to justify strict scrutiny review.[93]

To trigger strict scrutiny, then, the plaintiffs in the 2004 Ohio poll watching litigation needed to demonstrate that the active presence of poll watchers at the polls imposed a severe burden on their right to vote. To this end, they asserted, and the district courts accepted, that the presence of a significant number of people at the polls—whether officials or non-officials—can be intimidating, particularly for a large body of new voters. They also asserted, and the district courts accepted, that the presence of poll watchers would lead to delays in voting at polling places. Both of these burdens, the plaintiffs claimed, could be compounded by "inexperienced" or poorly-trained poll watchers.[94] These potential burdens were sufficient, in the assessment of the district courts, to outweigh the compelling interests of the State and to justify the injunctions against the operation of the Ohio poll watching law.

However, when examined within the context of the State election process, the Sixth Circuit concluded that the district courts erred in finding that poll watchers severely burden an individual's right to vote. Following the lead of the district courts, the Sixth Circuit disregarded the issue of intimidation based on racial discrimination, looking instead at how the statute af-

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[88] *Id.* at 1616 (citing Norman v. Reed, 502 U.S. 279 (1992) (upholding an Illinois state law limiting new political parties' access to the ballot)).

[89] *Id.* (citing Harper v. Va. Bd. of Elections, 383 U.S. 663, 666–67 (1966) (invalidating Virginia poll taxes)); *see also* Carrington v. Rash, 380 U.S. 89 (1965) (invalidating a Texas statute prohibiting members of the military, while moving to a different state on military duty, from voting in state elections, even when bona fide residence is established); Nixon v. Herndon, 273 U.S. 536 (1927) (invalidating a Texas prohibition on blacks from voting in primary elections).

[90] *Crawford*, 128 S. Ct. at 1616.

[91] *See Burdick*, 504 U.S. at 441.

[92] *See* Rosario v. Rockefeller, 410 U.S. 752, 760–62 (1973).

[93] *See* Clingman v. Beaver, 544 U.S. 581, 590 (2005).

[94] Spencer v. Blackwell, 347 F. Supp. 2d 528, 535 (S.D. Ohio 2004).

fected voters generally.[95] In this light, the Sixth Circuit viewed the statute as a routine election regulation rather than a significant restriction on the franchise. Under the 2004 Ohio statute, poll watchers were only permitted to initiate the challenge process by alerting an election official; they were not permitted to adjudicate such challenges themselves.[96] Moreover, poll watchers could only initiate challenges based upon four voter qualifications: citizenship, residency in Ohio, residency in the county or precinct, and age. Once the challenge was initiated, the remainder of the process, including the final determination regarding eligibility, was left to the election judge. Furthermore, the burdens imposed by the election challenge process were mitigated by HAVA, which requires that a provisional ballot be issued to voters whose qualifications have been challenged.[97]

The assertions in the 2004 Ohio cases that the presence of poll watchers would stymie efficiency of the electoral system were also unpersuasive to the appellate court. The Sixth Circuit concluded that the mere allegation of inefficiency was not sufficient to find a severe burden on the right to vote.[98] Indeed, as noted in reference to the Indiana statute in *Crawford*, even assuming that this burden were real, rather than speculative, such a burden would be insufficient to declare the entire law unconstitutional and enjoin the operation of the law.[99] As it turned out, Ohio voters ex-

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[95] *Summit County II*, 388 F.3d at 551. The Sixth Circuit stated:

> [n]either district court relied upon racial discrimination as a basis for finding a likelihood of success on the merits. Instead, the courts below found a likelihood that the right to vote would be unconstitutionally burdened by having challengers present at the polling place, and that the presence of such challengers was not a sufficiently narrowly tailored way to accomplish legitimate government interests.

Id. The Authors recognize that the question of racial intimidation may well make it before the court in the future. However, given the tendency of the Ohio courts to take a broader perspective—one that looks at the voter in general—we think it is most use to analyze the poll watcher statutes through this lens.

[96] *Summit County II*, 388 F.3d at 551. Ohio is not alone in this regard. *See also* GA. CODE ANN. § 21-2-230 (West 2005) (stating that any voter may challenge the eligibility of another voter; however, the challenge must be made in writing and clearly specify the grounds for the challenge); TEX. ELEC. CODE ANN. § 33.058 (Vernon 2003) (stating poll watchers may not converse with voters); VA. CODE ANN. § 24.2-651 (West 2006) (establishing that any qualified voter may challenge another voter, but only by filling out and signing a form with which an officer of election will challenge the voter directly).

[97] The Supreme Court in *Crawford* noted that the severity of the burden was mitigated by the required access to provisional ballots, particularly the "fail-safe voting" measures contained in HAVA. 128 S. Ct. at 1618.

[98] *Summit County II*, 388 F.3d at 551 ("Longer lines may of course result from delays and confusion [from more vigorous poll watching] . . . [b]ut such a possibility does not amount to the severe burden upon the right to vote that requires that the statutory authority for the procedure be declared unconstitutional.").

[99] *Crawford*, 128 S. Ct. at 1623. Furthermore, this hesitancy in enjoining the operation of an election statute is appropriate when the election regulation is being challenged on the eve of Election Day after being in effect and unchallenged for many years. *See infra* notes 138–50 and accompanying text.

perienced none of the forecasted delays or inefficiencies on Election Day 2004.[100]

3. Balancing the State Interest against the Burdens

The last step of the *Anderson* test balances the State interests against the burdens imposed on the voters. There is no doubt that the State has a legitimate interest in preventing voter fraud.[101] Each fraudulently cast ballot undermines the legitimacy of an election, canceling out a legally-cast ballot for the opposition, and distorting outcomes. It also undermines an individual's fundamental right to vote by diluting each vote's value.

Poll watching statutes, conversely, do place some burden on the right to vote, but that burden, as the Sixth Circuit correctly noted, is hardly "severe." Indeed, upon examination, the alleged burdens of poll watcher statutes are not attributable to the presence of poll watchers performing legitimate observation and challenge functions. Actual intimidation of voters, of course, is likely to constitute a violation of federal voting rights laws, and perhaps criminal laws.[102] On the other hand, legally authorized challenges by poll watchers would not constitute an unconstitutional burden upon the right to vote. Moreover, federally or state-mandated provisional ballots mitigate the potential burden upon persons whose eligibility to vote has been challenged at the polling place.

Given the importance of the State's interest in preventing voter fraud, and the speculative nature of the burden to voting, the Sixth Circuit appropriately applied intermediate scrutiny when making its decision in *Summit County II*. Permitting poll watchers to observe within the polling place is a reasonable and relevant means towards achieving this interest in preventing the dilution of eligible votes by ineligible votes. The speculative burden on the voting process—a delay caused by the presence of poll watchers—is not

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[100] *See* Andrew Gumbel, *Fraud Fears on Hold as Voters Flock to Polls*, INDEP., Nov. 3, 2004, at 7.

> Right down to the wire, the prognosticators were foreseeing trouble, particularly over a Republican plan to station thousands of vote 'challengers' in polling stations to question anyone and everyone about their eligibility to cast a ballot. . . . In the end, the fuss may have been about very little. At least in the first several hours of voting, the challengers barely made their presence felt at all.

Id.; *see also* Jerry Zremski, *Drama Lacking for Monitors at Polling Places*, BUFF. NEWS, Nov. 3, 2004, at A6 ("[N]one of the poll-watchers in Ohio or Florida reported the kind of chaos that had been feared.").

[101] *Crawford*, 128 S. Ct. at 1619 ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters.").

[102] *See*, *e.g.*, Press Release, Department of Justice, United States Attorney Watching For Federal Election Law Violations (Oct. 28, 2008), *available at* http://www.usdoj.gov/usao/cae/press_releases/docs/2008/10-24-08ElectionLawPRESSRELEASE.pdf ("On October 8, 2002, the United States Attorney General established a Department-wide Ballot Access and Voting Integrity Initiative. The goals of this Initiative are to increase the Department's ability to deter voter intimidation, suppression, discrimination and election fraud and to prosecute these offenses whenever and wherever they occur . . . .").

sufficient to warrant the grant of injunctive relief against the use of poll watchers. Under the standard enunciated by the Court in *Crawford,* poll watcher statutes are constitutional state regulations of the electoral system.

B. Equal Protection under the 14th Amendment

Poll watching statutes have also been challenged on the grounds that they violate the Equal Protection clause of the Fourteenth Amendment.[103] Although none of the courts involved in the 2004 Ohio poll watcher litigation addressed this issue directly, it is useful to assess this claim here. The Equal Protection Clause prohibits government conduct that invidiously discriminates against a discrete and insular minority.[104] The first step of any Equal Protection analysis begins with determining what action is being challenged and whether it can be attributed to the state. If there is no state action, the Equal Protection Clause does not apply.[105]

The plaintiffs in the Ohio poll watcher litigation asserted that the allegedly targeted placement of poll watchers in precincts where there was a significant African-American population discriminated against them based on race.[106] However, in Ohio, as in other states, the placement of poll watchers is not state action because it is performed by a private entity. Under the Ohio statute, political parties select individuals to represent them as poll watchers, assign them to specific precincts, and then submit the list of assigned poll watchers to the Secretary of State's office.[107] Parties are not required to utilize poll watchers, but, should they do so, they control the selection and assignment of their poll watchers.

The perfunctory state action prescribed by the statutory process is to accept the list of poll watchers whom the parties have selected, administer an oath, and issue a certificate indicating their status as poll watchers.[108] The State engages in a similar process when it licenses professionals like attorneys.[109] The process solemnizes the responsibility taken by the poll watcher

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[103] *See, e.g.*, Spencer v. Blackwell, 347 F. Supp. 2d 528, 528 (S.D. Ohio 2004); Summit County Democratic Cent. and Exec. Comm. v. Blackwell (*Summit County I*), 2004 U.S. Dist. LEXIS 22539 (N.D. Ohio Oct. 31, 2004). The plaintiffs in both cases lay grounds for a racial discrimination claim under the Equal Protection Clause.

[104] *See* U.S. v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (laws that facially discriminate against insular and discrete minorities, such as racial minorities, are subjected to exacting judicial scrutiny and presumed unconstitutional).

[105] *See generally* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (holding that a private club's racial discrimination did not constitute State action); Shelley v. Kraemer, 334 U.S. 1 (1948) (prohibiting states from enforcing racially restrictive residential covenants because such enforcement would be State action).

[106] *Spencer*, 347 F. Supp. 2d at 529; *see also Summit County I*, 2004 U.S. Dist. LEXIS 22539, at *4-5 (recounting Plaintiffs' request that the Defendants be enjoined "from condoning, authorizing, conducting, or ordering" poll watcher ballot challenges).

[107] OHIO REV. CODE ANN. § 3501.22(A) (2008).

[108] § 3501.21.

[109] Although attorneys often serve a public function, they are still considered private actors who do not function under color of law unless they work in concert with government

and provides documentation of their acknowledgement of the responsibility. As essentially a "licensing" process, the State is not delegating its authority to these privately selected poll watchers. It does not assume liability for their actions.

The U.S. Supreme Court has recognized that political parties can be considered state actors in certain situations. In *Smith v. Allwright*, for instance, the political parties' privately-conducted primaries served as the sole means for nominating candidates for the Texas general election ballot.[110] The Supreme Court held that in limiting ballot access solely to the winners of these primaries, the State essentially delegated full authority of a key government function—determining who can stand for election—to the respective political parties and retained no oversight.[111] There is no similar delegation of authority under the poll watcher statute.

The State may recognize poll watchers that have been selected by political parties, but this does not, at least on its own, indicate a delegation of a government function. Poll watchers are "agents of the party that appoints them to protect its political interests at the polls, and who the law permits to be present in the voting room for that purpose . . . ."[112] Political parties and candidates have important interests at stake in elections, and poll watchers serve to protect those interests by preventing fraud, misconduct, and technical discrepancies that could alter the valid results of an election. Poll watchers, unlike election judges and officials, are not agents of the state. They are purely private actors.[113]

The State, meanwhile, retains complete control over the administration of the election. Political parties may appoint the poll watchers that initiate the challenges, but the State selects the election judges and officials who have authority to adjudicate them. The consequences of a challenge are under the discretion of the state-appointed election judges. Authority to limit access to the voting booth, consequently, remains vested in the State through its agents (election officials), not in political parties through poll watchers.

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officials. *See, e.g.*, Polk County v. Dodson, 454 U.S. 312 (1981) (recognizing that an appointed criminal defense attorney, even though paid and supervised by the state, does not act "under color of" state law during the course of a normal defense).

[110] 321 U.S. 649 (1944) (invalidating the Texas Democratic Party's use of "all white" primaries as well as all white primaries in several other states). The Court concluded that:

> The privilege of membership in a party may be . . . no concern of a State. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the State makes the action of the party the action of the state.

Id. at 664–65 (citations omitted).

[111] *See id.* at 663–64. *See also* Terry v. Adams, 345 U.S. 461, 481–82 (1953) (extending *Allwright* and outlawing, under the Fifteenth Amendment, the use of unofficial primaries held by the Jaybird Party, a local county organization that excluded African Americans).

[112] Preisler v. Calcaterra, 243 S.W.2d 62, 65–66 (Mo. 1951) (quoting *In re* Parrish, 63 A. 460, 461 (Pa. 1906)).

[113] *See id.* at 65 ("Challengers and watchers are in no sense public officials . . . . They may or may not be in attendance at the polls. Their function is *partisan*, not nonpartisan in character.").

It seems unlikely, based on the foregoing analysis, that poll watchers would be construed as state agents. Absent a finding to the contrary, any claim under the Equal Protection Clause of the Fourteenth Amendment would lack the requisite state action necessary to make the clause applicable.

C. Standing, Facial Challenges, and Preliminary Injunctions

Collateral to fundamental questions concerning the constitutionality of poll watchers are procedural issues of standing and the proper use of preliminary injunctive relief as a remedy in last-minute, pre-election challenges to voting laws. These issues arise typically in litigation involving state election laws, such as the poll watcher statute challenged in the 2004 Ohio poll watcher litigation. We discuss these issues in this Article because they present complexities that are commonly applicable and may be relevant in future litigation involving poll watching or other election regulations. For the purposes of this Article, standing and preliminary injunctive relief are analyzed within the context of the Ohio cases.[114]

This section first argues that the plaintiffs in the Ohio poll watcher decisions lacked standing because they were unable to present any evidence that they had suffered any injury-in-fact. Second, it argues that the use of preliminary injunctions and temporary restraining orders under the circumstances of those cases was inappropriate, not only because the plaintiffs failed to show irreparable harm, but also because the use of such provisional remedies by the courts in election cases may be determinative of election outcomes in and of themselves.

1. Standing: The Speculative Nature of Plaintiffs' Injury

Standing is an "irreducible constitutional minimum" that is necessary to fulfill the case-or-controversy requirement of Article III of the U.S. Con-

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[114] Federal standing, as opposed to standing governed by state law, is the sole focus of this section because the Ohio poll watcher decisions were filed in federal court. Moreover, the states are not bound by Article III limitations; standing requirements for civil suits can vary from state to state. N.Y. State Club Ass'n, Inc. v. City of N.Y., 487 U.S. 1, 8 n.2 (1988) ("The States are thus left free as a matter of their own procedural law to determine whether their courts may issue advisory opinions or to determine matters that would not satisfy" Article III, Section 2 of the U.S. Constitution). Thus, if a plaintiff challenges a state voting law on federal constitutional grounds in state court, the plaintiff may be permitted to proceed with the suit even if Article III standing requirements are not met. Nevertheless, if a plaintiff that lacks Article III standing attempts to appeal a state decision to the U.S. Supreme Court, the Court will most likely dismiss the appeal for lack of standing. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 804 (1985) ("Standing to sue in any Article III court is, of course, a federal question which does not depend on the party's prior standing in state court.") (internal citations omitted); *N.Y. State Club Ass'n*, 487 U.S. at 8 n.2 (stating that the Court has dismissed appeals from state court decisions in the past when the complaining party lacked standing to contest the validity of the subject law in federal court).

stitution.[115] The purpose of the Article III standing requirement is to ensure that the individual seeking redress has suffered actual harm caused by the defendant's wrongful conduct or action so that the exercise of federal jurisdiction is not gratuitous or inconsistent.[116] A plaintiff seeking to invoke federal jurisdiction bears the burden of establishing standing to assert his claim.[117] In order to establish standing, the plaintiff must show (1) that he has suffered an actual or imminent "injury-in-fact" to a legally protected interest, (2) that a causal connection exists between the injury and the defendant's conduct, and (3) that a favorable decision likely would redress the plaintiff's injury.[118]

Challenges to elections laws or regulations are frequently brought concurrently by two types of plaintiffs: individuals asserting individualized harm, and organizations asserting the claims on behalf of their members. An association has standing to assert a claim on behalf of its members so long as (1) its members have standing to sue, (2) the interests at stake are relevant to the organization's purpose, and (3) participation of the individual members is not necessary to pursue the claim or obtain relief.[119] Generally, individual participation of members is unnecessary when the organization seeks only declarative, injunctive, or some other form of prospective relief for its members.[120] In the Ohio litigation in the Northern District, the challenge to the poll watcher statute was brought by an organization, the Summit County Democratic Committee ("SCDC") on behalf of its members. While the Sixth Circuit and both district courts decided the cases on their merits, the cases should have more simply been dismissed for lack of standing.

In *Summit County I* and *Spencer,* the district courts held that the individual plaintiffs had standing because their allegations of deprivation of equal protection and due process had sufficiently established an imminent and particularized injury caused by the potentially unconstitutional voter challenge scheme. Citing *Sandusky County Democratic Party v. Blackwell*,[121] both district courts concluded that when a voter cannot know beforehand if his or her vote will be challenged at the polls, standing may be established by the fact that such challenges inevitably will occur.[122] The *Summit County I* court further held that the SCDC had standing to file suit

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[115] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (commenting on U.S. CONST. art. III, § 2, cl. 1); Warth v. Seldin, 422 U.S. 490, 498 (1975).

[116] *See* Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 99 (1979).

[117] *Lujan*, 504 U.S. at 561.

[118] *Warth,* 422 U.S. at 498–99.

[119] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000) (citing Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977)).

[120] United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 546 (1996) (citing *Hunt*, 432 U.S. at 343).

[121] 387 F.3d 565 (6th Cir. 2004).

[122] *See Summit County I,* 2004 U.S. Dist. LEXIS 22539, at *13–14 (citing *Sandusky*, 387 F.3d at 573); *Spencer*, 347 F. Supp. 2d at 534 (same).

on behalf of its members once the court determined that the challenges were inevitable and would likely injure Democratic voters.[123]

This "inevitability" standard is far too low to further the interest of limiting judicial action so that the exercise of judicial power does not become arbitrary or result in advisory opinions that involve no actual controversy. Indeed, if courts are not required to find an actual or imminent, concrete injury to a particular plaintiff, and instead must only conclude that injury will inevitably be suffered by some party at some point in time, then the principle of standing becomes superfluous. The disfavor of this predictive approach—especially in regard to challenges to election regulations—was evident in the Supreme Court's decision in *Crawford* to eschew speculative challenges in favor of those asserting more concrete harm.[124]

To justify the use of injunctive relief, a party must do more than speculate about the possibility of some vague harm; they must identify an injury-in-fact. "Injury-in-fact" has been defined as an "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."[125] In cases dealing with election regulations, the concrete and particularized injury asserted is the denial of one's right to vote under the Fourteenth Amendment. The plaintiffs in the Ohio litigation asserted that the presence of poll watchers and their ability to challenge voters would prevent plaintiffs from casting a ballot. This assertion fails to meet the definitional standard in three ways.

First, while the right to vote is deemed fundamental, the Supreme Court has clearly affirmed that it can be conditioned by eligibility requirements.[126] A state permissibly may deny citizens' eligibility to vote based upon nondiscriminatory criteria, and such denials are not invasions into a legally protected interest of a voter.[127] The courts inevitably must allow a degree of regulation that burdens the right to vote, provided the governmental interest is sufficiently compelling, in order to facilitate effective election management.[128]

Second, there is no concrete or particularized injury arising from the poll watchers' presence at the polls or their challenges to individual voters' eligibility to vote. The poll watcher, as discussed earlier, does not have the authority to prevent any individual from voting. Poll watchers can only challenge the qualifications of a voter, with the ultimate decision regarding their

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[123] *See Summit County I,* 2004 U.S. Dist. LEXIS 22539 at *14–15.

[124] *See Crawford*, 128 S. Ct. at 1623–24 (upholding a statute requiring voters to present identification, reasoning that the plaintiffs failed to provide evidence that any particular individual was incapable of obtaining an ID, and thus would be harmed by the statute).

[125] *Lujan*, 504 U.S. at 560 (internal quotations and citations omitted).

[126] *See Crawford*, 128 S. Ct. at 1616; *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 788.

[127] *See, e.g., Anderson,* 460 U.S. at 788.

[128] *See* Storer v. Brown, 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.").

eligibility resting in the hands of the election judge. Even if the election judge questions the voter's eligibility, the voter is able to cast a provisional ballot, which will be counted once the voter's eligibility is verified. While this process may produce some delay, delay does not equal injury. If a poll watcher's challenges become obtrusive to the voting process, the precinct election judge has the authority to remove the watcher.[129]

To side-step the lack of a concrete and particularized injury, the Ohio district courts relied on the *Sandusky* decision to conclude that the "inevitable" fact that poll watchers would challenge voters was a sufficient injury to merit the use of injunctive relief. However, the application of *Sandusky* under the facts in these cases is misguided. *Sandusky* involved the review of a former Ohio election provision that authorized election officials to deny a voter the opportunity to cast a ballot or even a provisional ballot.[130] The effect of the statute was a complete deprivation of the right to vote. Hence, the court determined that the possibility of mistakes, human or otherwise, was almost a certainty, and such a mistake could deny a voter the right to cast any ballot, provisional or otherwise.[131] The fact that such mistakes provided an election official with the ability to deny a person the right to cast even a provisional ballot was a harm that was real and imminent.[132] In absence of the threat of complete deprivation of the right to vote, the application of the *Sandusky* standard was inappropriate.

The lack of individual standing causes, in a similar fashion, the assertion of standing by the SCDC to also fail. The first prong of an organizational standing standard is that the members of the organization would have standing to sue.[133] As discussed above, individual voters would not be able to demonstrate an "injury-in-fact" by the mere presence of poll watchers in the polling place. Therefore, without individual standing, the SCDC failed to meet the requirements for organizational standing on behalf of its members.

The Sixth Circuit acknowledged that plaintiffs' standing argument was very weak in the Ohio litigation.[134] Due to time constraints, and in the interest of providing certainty through a decision on the merits, the court did not undertake an analysis of the plaintiffs' lack of standing.[135] However, Judge Ryan in his concurring opinion concluded that the plaintiffs had failed to

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[129] Memorandum from Pat Wolfe, Director of Elections, Ohio State Department to All County Boards of Election (Oct. 20, 2004), http://www.acluohio.org/issues/votingrights/memo.pdf; *see also* Spencer, 347 F. Supp. 2d 528, 531 (S.D. Ohio 2004).

[130] *Sandusky*, 387 F.3d 565 (2004).

[131] *Id.* at 574.

[132] *Id.*

[133] *See Friends of the Earth*, 528 U.S. at 180-81 (citing *Hunt*, 432 U.S. at 343).

[134] *Summit County II*, 388 F.3d at 550 (noting that there "is significant question as to the plaintiffs' standing").

[135] On this matter, the court said:

> "Standing in this case is a difficult issue, considering the nature of the alleged injuries. However, I assume without deciding that the plaintiffs have standing, given the short time in which we have to consider this issue, and the nonspeculative possibility that at least some actual injury will occur, in the form of greater delay and inconve-

demonstrate that they had suffered any injury-in-fact because there was a total absence of evidence to suggest an injury that was not speculative or hypothetical.[136] The dialogue set forth in the Sixth Circuit's lead and concurring opinions suggests that plaintiffs would have had difficulty proving standing, and, with more time to dedicate to the issue, the court may have found standing to be lacking.[137]

2. *Use of a Preliminary Injunction or Temporary Restraining Orders*

Preliminary injunctions and Temporary Restraining Orders ("TROs") are reserved for emergency circumstances where the rights of a party are in urgent need of protection.[138] Typically, courts are cautious when granting a request for preliminary injunctive relief.[139] The underlying rationale for preliminary injunctive relief, which includes both preliminary injunctions and TROs, is to maintain the status quo until a full hearing on the merits can be held to determine whether a permanent injunction should be granted.[140] Preliminary injunctive relief is appropriate where "the exigencies of the situation demand" speedy action to protect the plaintiffs' rights.[141] To obtain a

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nience in voting. To the extent that the lower court relied on additional 'injury,' such injury is speculative."

Id.

[136] *Id.* at 551–52 (Ryan, J., concurring). Judge Ryan stated:

> [P]laintiffs have failed to demonstrate that they have suffered any 'injury in fact' that is 'actual or imminent, not conjectural or hypothetical'. . . . In neither of the cases before us have the plaintiffs shown that the intimidation, chaos, confusion, 'pandemonium,' or inordinate delay they allege will occur tomorrow is [anything but] conjectural or hypothetical.

Id.

[137] *See id.*

[138] Hoechst Diafoil Co. v. Nan Ya Plastics Corp., 174 F.3d 411, 422 (4th Cir. 1999) (citing Granny Goose Foods, Inc. v. Local 70, Brotherhood of Teamsters, 415 U.S. 423, 439 (1974)). A preliminary injunction is intended to preserve the status quo pending a final trial on the merits, whereas a TRO maintains the status quo until a preliminary injunction hearing can be held. *Id.* Federal Rule of Civil Procedure 65 governs use of TROs and preliminary injunctions. FED R. CIV. P. 65; *see also* Nat'l Steel Car, Ltd. v. Canadian Pac. Ry., Ltd., 357 F.3d 1319, 1324 (Fed. Cir. 2004); Buffalo Forge Co. v. Ampco-Pittsburgh Corp., 638 F.2d 568, 569 (2d Cir. 1981) (quoting Med. Soc'y of N.Y. v. Toia, 560 F.2d 535, 538 (2d Cir. 1977)) (preliminary injunctive relief "is an extraordinary and drastic remedy which should not be routinely granted."); Canal Auth. of State of Fla. v. Callaway, 489 F.2d 567 (5th Cir. 1974).

[139] *Nat'l Steel Car, Ltd.*, 357 F.3d at 1324.

[140] *Hoechst Diafoil*, 174 F.3d at 422; Hollon v. Mathis Indep. Sch. Dist., 491 F.2d 92 (5th Cir. 1974); Am. Radio Ass'n v. Mobile S.S. Ass'n, Inc., 483 F.2d 1 (5th Cir. 1973); King v. Saddleback Junior Coll. Dist., 425 F.2d 426 (9th Cir. 1970). *But see* Chi. United Indus., Ltd. v. City of Chi., 445 F.3d 940, 944 (7th Cir. 2006) (describing the view that TROs and preliminary injunctions are intended to "preserve the status quo" as "much, and rightly, criticized"); United States v. Richberg, 398 F.2d 523 (5th Cir. 1968) (stating that the purpose of TROs is "to prevent future violations").

[141] Wetzel v. Edwards, 635 F.2d 283, 286 (4th Cir. 1980). Some courts have also held a heightened standard is applicable when a TRO or preliminary injunction seeks to change the status quo compared to the standard employed when such relief seeks to maintain the status

preliminary injunction, a plaintiff must show not only that he will suffer irreparable harm without the relief, but also that there is a substantial likelihood he will succeed on the merits of the case.[142] The threatened injury to the plaintiff must outweigh the harm that would be suffered by the defendant because of the injunction.[143] Additionally, plaintiffs must show that the equitable relief, if granted, will not adversely affect the public interest.[144]

Preliminary injunctions and TROs may, in certain scenarios, be necessary to protect voters' rights, such as when a newly enacted law completely prevents voters from casting a valid ballot. However, in situations like the 2004 Ohio poll watcher litigation, granting injunctive relief is improper. In *Summit County I* and *Spencer*, the plaintiffs sought a TRO and a preliminary injunction to prevent poll watchers from being present in the polling places. What made these requests for injunctive relief improper was the extreme delay in bringing the challenge to the statute. The Ohio statute permitting partisan poll watchers had been in effect for over fifty years, but was challenged just days before the 2004 election.[145] When a plaintiff delays in bringing a claim it suggests that the threat of immediate irreparable harm is not likely, and that such extreme injunctive action is unnecessary.[146] Indeed, a plaintiff's inability to supply a reasonable explanation for the delay is enough to justify denial of a preliminary injunction.[147] Moreover, it is evident that in some cases, the timing of a motion for a temporary restraining order or preliminary injunction is simply "tactical maneuvering" where the request for injunctive relief is sought at a point that causes the greatest harm

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quo. *See* SCFC ILC v. Visa USA, Inc., 936 F.2d 1096, 1097 (10th Cir. 1991) (party seeking injunctive relief must show that the four preliminary injunction factors "weigh heavily and compellingly in favor of granting the injunction"); Phillip v. Fairfield Univ., 118 F.3d 131, 133 (2d Cir. 1997). *But see* United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth., 163 F.3d 341, 348 (6th Cir. 1998) (rejecting Tenth Circuit's "heavy and compelling" standard and applying traditional preliminary injunction test).

[142] *Hoechst Diafoil*, 174 F.3d at 416–17.

[143] *Id.*

[144] *Id.*

[145] *See* OHIO REV. CODE ANN. § 3505.21 (2004) (Historical and Statutory Notes, referring to 1953 H 1 and Pre-1953 H 1 Amendments). There is reason to believe that they have been around even longer. An Ohio Appeals Court opinion from 1932, for instance, refers to election challengers and witnesses being allowed at mayoral polling places at the discretion of the Board of Elections pursuant to Gen. Code § 4785-120, which is believed to be the earliest version of the Ohio poll watcher statute. State ex rel. Witt v. Bernon, 11 Ohio Law Abs. 318, 318 (Ohio App. 8 Dist. 1932).

[146] *See* Citibank, N.A. v. Citytrust, 756 F.2d 273, 276 (2d Cir. 1985); *see also* Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1193 (5th Cir. 1975) (affirming district court's denial of temporary injunctive relief where movant, among other things, delayed three months in making its request); Wireless Agents, L.L.C. v. T-Mobile, USA, Inc., No. 3:05-CV-0094-D, 2006 WL 1540587, at *3 (N.D. Tex. June 6, 2006).

[147] *See* Citibank, 756 F.2d at 276; *see also* Tough Traveler, Ltd. v. Outbound Products, 60 F.3d 964, 968 (2d Cir. 1995) (stating that a "presumption of irreparable harm is inoperative if the plaintiff has delayed either in bringing suit or in moving for preliminary injunctive relief.").

to procedural fairness for the defendant.[148] Such behavior should not be rewarded by the courts, especially when doing so may influence the outcome of an election.

In addition, plaintiffs seeking injunctive relief in the context of a challenge to an election law will likely face difficulty in showing that irreparable harm will occur. Voting regulations, especially those enacted in the days leading up to an election, may warrant use of injunctive relief, especially if someone would be kept from casting a valid, eligible ballot. Following the passage of HAVA, however, the risk of total disenfranchisement has been severely curtailed. As the *Crawford* Court suggested, the use of provisional ballots mitigates complete irreparability of the harm by allowing an apparently ineligible voter to cast a ballot that can later be validated.[149] And while state electoral systems and the courts should promote the casting of regular ballots to increase voter confidence in the legitimacy of the system, provisional ballots provide an adequate remedy in the situation.[150]

In the absence of some showing that an irreparable harm will occur, injunctive relief is inappropriate for claims challenging the legitimacy of election regulations. Given a state's interest in regulating its own elections, courts should not disrupt the status quo by suspending voting regulations, especially on the eve of Election Day. A decision to do so may have a determinative effect on the outcome of the election. In light of the severity of the consequences, courts should maintain the status quo by denying plaintiffs' request for injunctive relief until a full hearing on the constitutionality of the election regulation can be conducted.

IV. Conclusion

As the polls closed down on Election Day 2008, there was a noticeable lack of chaos given the anticipation surrounding the battle for the presidency. While poll watchers receded to the background in this election, due no doubt to the significant margin of victory by President-elect Barack Obama, there is little doubt that they will someday return to the center of the controversy. What is not so certain is whether the courts will accept a plaintiff's last-minute challenge to a poll watcher statute as a legitimate claim for relief, or whether the courts will simply view the challenge as a strategic, last-minute ploy to gain the upper-hand in a tightly-contested campaign. Will such a challenge ultimately fail on the merits, under the constitutional

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[148] Century Time Ltd. v. Interchron Ltd., 729 F. Supp. 366, 368–69 (S.D.N.Y. 1990) (holding that plaintiff was unlikely to demonstrate irreparable harm because two months had passed between the date that the plaintiff knew the action would not settle and the filing of a motion for preliminary injunction).

[149] 128 S. Ct. at 1621.

[150] This conclusion would not apply for those laws that would change a voter's eligibility requirements, such that they would be unable to validate their provisional ballot. Eligibility requirements are not at issue in the context of poll watcher statutes.

standard first established in *Anderson*, and recently followed in *Crawford*? Or will such a challenge be dismissed for lack of standing? The 2004 claims against the poll watcher statutes in Ohio, which ultimately proved unsuccessful, nonetheless give us a roadmap of how such litigation may be framed. They also emphasize the reasons why such statutes—enacted to promote the integrity of the election process by providing practical deterrents against voter fraud and election official misconduct—should withstand constitutional attack.