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Watching the Watchers: An Analysis of Poll Watcher Statutes in the United States

Eli Geffin

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INTRODUCTION

To followers of Mississippi politics, the 2014 Mississippi Republican Senate primary election was an unusual one. Thad Cochran, who had represented Mississippi in the U.S. Senate for almost forty years, was challenged from the right by Chris McDaniel, a younger candidate backed by many far-right voters and interest groups.¹ In the initial primary, McDaniel received about 1,000 more votes than the long-serving Senator.² However, neither candidate was able to secure over 50% of the electorate, forcing a runoff.³ Faced with an existential political crisis, Cochran employed a novel strategy. He began to court Mississippi's historically marginalized black voters. Black voters in Mississippi had conventionally leaned overwhelmingly Democratic, which is why they had typically been ignored by Republican candidates until 2014.⁴ Strategizing that his best path to victory was to expand the electorate, the Cochran campaign began encouraging black voters to participate in the Republican primary by voting for him, who, he argued, would better represent their interests than the more conservative McDaniel.

Sensing this strategic threat, the McDaniel campaign, and the political actors who supported it, began a counteroffensive. Among other things, conservative groups like Freedom Works and the Tea Party Patriots launched a political gambit with the stated purpose of ensuring

¹ Ashley Parker & Johnathan Martin, G.O.P. Senator Courts Blacks in Mississippi Primary Race, New York Times, June 20, 2014, available at <http://www.nytimes.com/2014/06/21/us/politics/cochran-asking-blacks-to-rescue-him-in-republican-primary.html>.

² 2014 Senatorial Republican Primary Election Results, Dave Leip's Atlas of U.S. Presidential Elections, June 16, 2014, available at <http://uselectionatlas.org/RESULTS/state.php?year=2014&off=3&elect=2&fips=28&f=0>.

³ GOP Sen. Cochran Forced into Runoff Against Tea Party-Backed Challenger, Fox News, June 4, 2014, available at <http://www.foxnews.com/politics/2014/06/04/mississippi-republican-senate-primary-going-to-runoff/>.

⁴ Supra note 1.

the integrity of the runoff primary in Mississippi.⁵ Part of this effort was the deployment of “poll watchers” to observe the operations of polling places on Election Day and to ensure Mississippi law was being followed. These observers were largely dispatched to districts in which Cochran was courting Democrats, which also happened to be mostly majority black districts. Rather than a genuine crusade to ensure the integrity of Mississippi polling places, some viewed this “voter integrity” effort as a thinly veiled attempt to dissuade and intimidate black Democratic voters in the state. In fact, liberal groups like the NAACP were so concerned about voter intimidation that they sent their own representatives to Mississippi polls ensure against such intimidation.⁶

This controversial political strategy was made possible by Mississippi’s permissive poll watcher regulations. Mississippi maintained (and as of 2015, continues to maintain) very liberal regulations governing private Election Day observers. Mississippi law allows an apparently unlimited number of poll watchers (called “challengers”), nominated by either a political party or a candidate, to serve in their precincts.⁷ These “challengers”, as well as any qualified elector within a precinct, may challenge the eligibility of any other voter in that precinct on Election Day.⁸

While Cochran ultimately secured the Republican nomination, the controversy over poll watchers and their regulation continues. Increased partisan wrangling over election regulation for political advantage has thrust the debate over poll watchers to the vanguard of the political fray.⁹

⁵ Sheryl Gay Stolberg & Theodore Schleifer, Conservatives Plan to Use Poll Watchers in Mississippi, New York Times, June 22, 2014, available at http://www.nytimes.com/2014/06/23/us/conservatives-plan-to-use-poll-watchers-in-mississippi.html?_r=1.

⁶ Deborah B. Berry, NAACP Will Monitor Tea Party Poll Watchers, USA Today, June 23, 2014, available at <http://www.usatoday.com/story/news/politics/elections/2014/2014/06/23/naacp-tea-party-mississippi-senate-race/11293199/>.

⁷ Miss. Code. Ann. § 23-15-571(1) (West).

⁸ Id. at § 23-15-571(3).

⁹ See, e.g., A.J. Vicens & Natasha Khan, Controversy Over Poll Watchers Simmers, AZ Daily Sun, Nov. 3, 2012, available at http://azdailysun.com/news/local/state-and-regional/controversy-over-poll-watchers-simmers/article_340926c0-7984-5166-ba46-2200a6746760.html.

The issue typifies the tension commonly found within election law between the right of qualified electors to vote and the need to exclude unqualified electors. Those on the right see more permissive poll watching statutes as a means of preventing in-person voter fraud and preserving the integrity of the voter rolls. Those on the left see permissive poll watching statutes as a contrivance for intimidating and harassing rightful voters, especially those in minority districts. This Note attempts to uncover the legal standard federal courts use in assessing the constitutionality of poll watcher statutes, to analyze the current landscape of these statutes among the states, and to create a model statute which balances the concerns of both sides of the debate.

WHAT IS A POLL WATCHER?

Poll watchers, sometimes called “challengers” or “observers”, are generally private citizens appointed by a political party, candidate, the state, or other organization to observe the casting, counting, or securing of ballots in during local, state, and federal elections.¹⁰ Who is eligible to be a poll watcher and what powers each poll watcher can exercise on Election Day is determined by individual state regulations.¹¹ Principally, however, poll watchers have some capacity to challenge or report observed violations of election law by electors or poll workers.¹²

Poll watchers are generally part of a larger scheme of private election monitoring employed in some capacity by almost every state. Peter K. Schalestock, in an article for the William Mitchell Law Review, usefully divided private election monitoring temporally into three forms: pre-Election Day monitoring, “day of” Election Day monitoring, and posts-Election Day

¹⁰ Barry H. Weinberg & Lyn Utrecht, Problems in America’s Polling Places: How They Can Be Stopped, 11 Temp. Pol. & Civ. Rts. L. Rev. 401, 424 (2002); Gilda R. Daniels, Outsourcing Democracy: Redefining Public-Private Partnerships in Election Administration, 88 Denv. U. L. Rev. 237, 240 (2010).

¹¹ See infra, note 24.

¹² Daniels, supra note 10, at 240.

monitoring.¹³ Pre-Election Day monitoring involves oversight by private monitors of voter registrations before Election Day.¹⁴ “Day of” Election Day monitoring involves oversight by private monitors of voter behavior at the polls as well as the counting of ballots.¹⁵ Post-Election Day monitoring involves oversight by private monitors of the counting of absentee ballots.¹⁶ While all three types of election monitors can influence voting rights and election integrity, in order to engage in a sufficiently detailed analysis, this Note will focus exclusively on the balance between voter intimidation and the prevention of in-person voter fraud as it relates to “day of” Election Day monitors. Moreover, again for the sake of adequate detail, this Note will focus on regulations of poll watchers and their actions on Election Day while the polls are open.

THE LEGAL DEBATE

Because the regulation of poll watchers has only recently become a politically contentious issue, federal courts have had little opportunity or reason to define the constitutional limits of statutes regulating “day of” private election monitors. Moreover, the legal arguments in support of and against liberal poll watching regulations are still being molded. Some legal arguments and patterns of judicial scrutiny have emerged, however, from the few cases that have addressed the constitutionality of these regulations.

Opponents of overly permissive poll watcher regulations object to such regulations on several constitutional grounds. First, some challengers contend that overly permissive poll watching statutes allow election observers to effectively deprive a lawful voter of his or her right

¹³ See Peter K. Schalestock, Monitoring of Election Practices by Private Actors, 34 Wm. Mitchell L. Rev. 563, 570 (2008).

¹⁴ See Id.

¹⁵ See Id.

¹⁶ See Id.

to vote without due process of law, in violation of the 14th Amendment.¹⁷ This argument contends that the ability of private citizens to challenge an elector's ballot will cause some ballots casts by qualified electors to be challenged and ultimately go uncounted. Moreover, opponents of permissive poll watcher regulations argue that the presence of private watchers, even without the authority to challenge votes, will intimidate potential voters and make them less likely to appear at polling places on Election Day. The potential for intimidation is heightened still if a precinct's poll watchers are from a different region or of an overwhelmingly different racial background than the precinct's voters. Poll watching statutes have also faced Equal Protection challenges. These challenges arise when poll watchers are disproportionately stationed in majority-minority districts – usually African-American districts. Challengers argue that the disproportionately high number of poll watchers in minority districts denies racial minorities in those districts equal protection under the law in the pursuit of their right of franchise.¹⁸

Defenders of permissive poll watcher regulations argue that the burden on voting rights imposed by poll watchers is necessary to insure the integrity of the voting process and to guard against voter fraud.¹⁹ This end is compelling, they argue, because when unqualified electors are permitted to vote within a district, the legitimate votes of all the qualified electors in that district are diluted and their fundamental right to vote is therefore violated.²⁰ Many argue that private citizens (as opposed to government employees) are necessary to guarantee election integrity because they serve as a check on the administration of elections by the government.²¹ In other

¹⁷ See, e.g., Summit Cnty. Democratic Cent. & Executive Comm. v. Blackwell, No. 5:04CV2165, 2004 WL 5550698, at *5 (N.D. Ohio Oct. 31, 2004).

¹⁸ See, e.g., Spencer v. Blackwell, 347 F. Supp. 2d 528, 529 (S.D. Ohio 2004).

¹⁹ See, e.g., supra note 10.

²⁰ Id.

²¹ See, e.g., Bruce Parker, Citizen Poll Watchers Expose Need for Scrutiny of Elections, The Daily Signal, Sept. 13, 2013, available at <http://dailysignal.com/2014/09/13/citizen-poll-watchers-expose-need-scrutiny-elections/>.

words, private citizen poll watchers not only serve to stop other citizens from violating election law, but also to stop government election officials from allowing other citizens to violate election law.²²

JUDICIAL ANALYSIS OF “DAY OF” POLL WATCHING STATUTES

Federal courts in recent cases have embraced both sides of this debate in determining the constitutionality of poll watching statutes, balancing individual electors’ fundamental right to vote with the state’s interest in regulating elections and preventing violations of state election law. In general, states have the authority to enact laws permitting and restricting the presence of poll watchers at polling places subject to Congressional override.²³ The time, place, and manner of federal congressional elections is constitutionally delegated to the states.²⁴ Thus, states are permitted to regulate voting, provided those regulations do not violate the Constitution.²⁵ Courts have held that poll watching statutes, and state election regulations in general, do not violate the Constitution simply because they impose some burden on voting rights or ballot access.²⁶

Instead, courts have recently employed the *Anderson* balancing test to determine the constitutional validity of “day of” poll watching statutes. Under this test the “severity of the burden” on the elector’s voting rights is balanced against the state’s interest in enforcing its election laws.²⁷ The test requires the court to consider (1) the “character and magnitude of the asserted injury” to the elector’s rights under the First and Fourteenth Amendments, and (2) the “precise interests” the state uses to justify the burden on voting rights it imposes and the

²² Id.

²³ See Summit Cnty. Democratic Cent. & Executive Comm. v. Blackwell, 388 F.3d 547, 551 (6th Cir. 2004), Summit Cnty., 5:04CV2165, 2004 WL 5550698, at *5, Spencer, 347 F. Supp. 2d at 534.

²⁴ Const. Art. I § 4, cl. 1.

²⁵ Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986).

²⁶ Spencer, 347 F. Supp. 2d at 534, stay granted, 388 F.3d 547 (6th Cir. 2004).

²⁷ Id.

“legitimacy and strength of each of those reasons.”²⁸ The court must determine if the poll watcher regulation imposes a “severe burden” or some “lesser burden” on voting rights.²⁹ A regulation imposing a “severe burden” is subject to strict scrutiny and is only constitutional if it is “narrowly drawn to serve a compelling state interest.”³⁰ A regulation imposing a “lesser burden” need only further an “important state regulatory interests” to remain constitutional.³¹

The manner in which poll watcher statutes are analyzed under this framework is best exemplified by three 2004 cases out of Ohio. In *Spencer v. Blackwell* and *Summit Cnty. Democratic Cent. & Executive Comm. v. Blackwell*, the Southern and Northern District Courts respectively for the State of Ohio entered a temporary restraining order barring enforcement of Ohio’s poll watcher statute.³² The plaintiffs in these cases, all African American Ohio voters, sought to restrain the state of Ohio from allowing poll watchers (called “challengers” under Ohio law) from monitoring polls during the 2004 election on Due Process and Equal Protection grounds. The Ohio law being challenged allowed concerns regarding a voter’s eligibility to be voiced at the polls by, *inter alia*, poll watchers or “any other voter who [is] lawfully in the polling place.”³³ When these cases were adjudicated, poll watchers in Ohio were appointed by political parties and were tasked with being present at the polls, monitoring its activities, and challenging voters who they suspected were ineligible.³⁴ When a poll watcher believed that a voter was an unqualified elector under Ohio law, he was permitted to notify the presiding

²⁸ *Id.* (citing *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

²⁹ *Id.* (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-60 (1997)); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

³⁰ *Id.*

³¹ *Id.*

³² *Spencer*, 347 F. Supp. 2d at 528; *Summit Cnty.*, 04CV2165, 2004 WL 5550698, at *5.

³³ Heather S. Heidelbaugh, Logan S. Fisher, & James D. Miller, *Protecting the Integrity of the Polling Place: A Constitutional Defense of Poll Watcher Statutes*, 46 Harv. J. on Legis. 217, 219-220 (2009).

³⁴ *Id.* at 220.

election judge who, in turn, was required to conduct an inquiry into that voter's eligibility.³⁵

In analyzing the “character and magnitude” of the petitioners’ injuries, the Southern District and Northern District took slightly different paths. The Southern District found that the liberality with which Ohio law authorized and governed challengers imposed a “severe” burden on Ohioans’ right to vote.³⁶ The court found that the absence of statutory guidance “governing the procedures and limitations for challenging voters” would create a “bewildering array” of participants at polling places.³⁷ This lack of statutory guidance created an “enormous risk of chaos, delay, intimidation, and pandemonium inside the polls and in the lines out the door.”³⁸ The court also found compelling the fact that the state did not require challengers to have “any experience in the electoral process” and found that inexperienced challengers at the polls would only add to the potential for chaos and disarray.³⁹

The Northern District handled the issue more summarily. The court accepted the plaintiffs’ arguments that the regulation may cause “voters to be denied their right to vote without an opportunity to be represented by counsel, to rebut evidence, to confront the challenger, [or] to introduce evidence in his or her favor.”⁴⁰ They agreed that the Ohio law left open the potential for voter intimidation, which would interfere with electors’ “fundamental right” to vote. Therefore, the court concluded, the character and magnitude of the plaintiff’s asserted injury was “substantial”.⁴¹

Having found the plaintiffs’ asserted injury severe and substantial, the courts next turned

³⁵ Id. Ohio has since altered its poll watcher regulations to only allow challenges by precinct election officials. Ohio Rev. Code Ann. § 3505.20 (West). Private, unelected citizens may still act as poll watchers (called “observers”) and monitor polling places, but they are not authorized to challenge an elector’s eligibility. Id. at §3505.21.

³⁶ Spencer, 347 F. Supp. 2d at 535.

³⁷ Id.

³⁸ Id.

³⁹ Id.

⁴⁰ Summit City, 04CV2165, 2004 WL 5550698, at *6.

⁴¹ Id.

to the state's interest. On this matter, both the Northern and Southern Districts found the state's interest in preventing voter fraud to be a compelling one.⁴² In support, the Northern District Court noted that "unfettered voter fraud negates the impact of individual votes and destroys the legitimacy of the electoral process."⁴³

However, applying strict scrutiny to the poll watcher statute in question, both courts found that the Ohio law was not narrowly tailored to serve the admittedly legitimate state interest. They each determined that the potential for voter fraud could have been adequately defended against by Ohio's election officials and judges and, furthermore, that Ohio maintained other regulations that protected against voter fraud, such as pre-election day voter registration scrutiny.⁴⁴ Consequently, Ohio's poll watcher provisions were not the "least restrictive means" for achieving the state's end of preventing voter fraud.⁴⁵ In the Southern District, the court noted that, because there was no evidence that the existence of challengers would do anything at all to prevent voter fraud, Ohio's practice of certifying poll watchers would not even have passed under intermediate scrutiny.⁴⁶

These decisions did not stand for long, however. Both were consolidated and reversed on appeal by the 6th Circuit in *Summit Cnty. Democratic Cent. & Executive Comm. v. Blackwell*.⁴⁷ In assessing whether a TRO should issue, the 6th Circuit majority disagreed with the District Courts, finding it unlikely that the plaintiffs would succeed on the merits of either case.⁴⁸ More specifically, the 6th Circuit was not convinced that the presence the poll watchers permitted by the Ohio statute would burden the right to vote of electors in the state. The Court found

⁴² *Summit Cnty.*, 5:04CV2165, 2004 WL 5550698, at *6; *Spencer*, 347 F. Supp. 2d at 536.

⁴³ *Summit Cnty.*, 04CV2165, 2004 WL 5550698, at *6.

⁴⁴ *Summit Cnty.*, 5:04CV2165, 2004 WL 5550698, at *6; *Spencer*, 347 F. Supp. 2d at 536-7.

⁴⁵ *Spencer*, 347 F. Supp. 2d at 537.

⁴⁶ *Id.*

⁴⁷ *Summit Cnty.*, 388 F.3d at 551.

⁴⁸ *Id.*

determinative that challengers under the statute could “only *initiate* an inquiry process by” election officials and noted that the District Court decisions did not rest on the validity of the procedures to be used by these election officials once a challenge had been made.⁴⁹ While the Court acknowledged that vigorous employment of such a challenge procedure by one side or another during an election may lead to long lines, this inconvenience does not amount to the “severe” burden on voting rights that would give rise to strict scrutiny.⁵⁰ Judge Ryan, in his concurrence, noted that the petitioners put forth no evidence of the “possible chamber of horrors in voting places throughout the state” that they had predicted despite some form of challenger law being on the books for decades.⁵¹ He would require more than “unsubstantiated predictions and speculations.”⁵²

Judge Cole, in his dissent, agreed with the District Courts in their analysis concerning the burden that the Ohio statute imposed on voting rights. Judge Cole asserted that “[w]hen the fundamental right to vote without intimidation or undue burden is pitted against the rights of those seeking to prevent voter fraud, we must err on the side of those exercising the franchise.”⁵³ Like the Northern and Southern Districts, the dissent believed that existing election protocols in Ohio adequately protected against voter fraud.⁵⁴ Implicit in Judge Cole’s opinion is his belief that challengers appointed in a partisan manner in particular created a severe burden on voting rights, rather than the general potential for polling place chaos presented by the law. Judge Cole includes the ability of “ordinary voters” to challenge potential voter fraud in his list of Ohio protocols which would adequately protect the state’s regulatory purpose (prevention of voter

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Id. at 552 (Ryan, J. concurring).

⁵² Id.

⁵³ Id. (Cole, J., dissenting).

⁵⁴ Id. at 552-53.

fraud) in the absence of partisan appointed challengers.⁵⁵ Thus, it is the partisan nature of the statutorily permitted challengers, rather than the amount of people at Ohio polling places with the ability to challenge potential voter fraud, which concerns the dissent.

To be clear, this one line of cases probably does not represent the entire universe of analysis which will be applied by federal courts to poll watcher statutes going forward. They do, however, give us valuable insights into what matters judges may find significant as they adjudicate more political disputes over such regulations. These insights can be used to create a model poll watcher statute that will stand up to challenges from both the left and right.

To consolidate from the Ohio cases, we can predict that judges, in adjudicating constitutional challenges to poll watcher statutes, will employ some form of the *Anderson* balancing test, in which the severity of the perceived or actual threat to voting rights will be balanced against the government's interest and the narrowness of the regulation. On the challengers' side, judges may take into account the level of statutory guidance governing the behavior of poll watchers, the expertise or amount of training each poll watcher must possess, the potency of the powers statutorily granted to the poll watchers, the potential of the scheme to cause chaos and disarray at the polls, and the means voters possess to refute a challenge. Some courts may require specific evidence that poll watchers will create an unreasonable restraint on legitimate electors' voting rights.

While most courts will agree that the prevention of voter fraud is a compelling state interest, they will also look to whether the statute is sufficiently tailored to achieve that interest. They may consider whether the statute itself or other separate regulations sufficiently protect against voter fraud in the absence of poll watchers and may require evidence that the presence of poll watchers will create some marginal benefit in bolstering the integrity of election results.

⁵⁵ Id.

Some courts may choose to err on the side of protecting voting rights in resolving these cases, while other judges may refuse to grant this presumption.

SURVEY OF STATE POLL WATCHING STATUTES

Ohio does not stand alone in its regulatory scheme governing its poll watchers. In fact, forty-eight states allow some form of private election monitoring.⁵⁶ Thirty-nine states permit some system of “day of” Election Day poll watchers.⁵⁷ In order to construct a model poll watcher statute, one must first survey the landscape of current poll watcher regulations. For simplicity’s sake, this analysis will focus on two axes of regulations governing “day of” poll watchers: “Who can become/appoint a poll watcher?” and “What conduct may/must poll watcher engage in?”

A. Who can appoint and who can become and poll watcher?

Rules governing by whom poll watchers may be appointed may weigh greatly on the effectiveness, intrusiveness, and constitutionality of a poll watcher regulation. On the one hand, statutes outlawing poll watchers or restricting who may appoint them will create polling places in which electors’ voting rights are relatively well protected, but which are also vulnerable to in-person voter fraud. On the other hand, while statutes allowing for unlimited unappointed poll watchers may create a system with high voter integrity, they may also create a chaotic environment at polling places and unduly burden the voting rights of the state’s voters. Such a system may also strain and divert state resources as election officials endeavor to address each poll watcher’s challenges. Most, but not all states occupy some middle ground between these extremes.

Starting at one pole, West Virginia and California have promulgated some of the most

⁵⁶ *Supra*, note 13 at 572.

⁵⁷ *Id.* at 577-8.

restrictive statutes regulating poll watchers in the United States. West Virginia effectively outlaws the practice, requiring anyone “other than ... election officers and voters going to the election room to vote and returning therefrom” to remain at least three-hundred feet from the entrance of any polling place.⁵⁸ The state goes so far as to empower its election commissions to limit the number of voters within a polling place to preserve order.⁵⁹ California, likewise, allows only active voters and those “authorized by the precinct board to keep order and enforce the law” in the voting area.⁶⁰ Oral challenges to a voter’s qualifications may only be made by a member of the precinct board, who are, in turn, appointed by an election official.⁶¹

The majority of states, however, allow poll watchers to observe the operations of their precincts. Most, though, restrict who may appoint these poll watchers and the number of poll watchers that may be appointed. Political parties are generally the entities which wield the most power to appoint and deploy poll watchers on Election Day. Arizona, Delaware, Arkansas, New Hampshire, Florida, Colorado, Minnesota, Ohio, Missouri, and New Mexico all allow each political party with a candidate on the ballot to appoint one poll watcher to each precinct or polling location.⁶² Similarly, political parties in New Jersey, Vermont, Tennessee, Michigan, and Kentucky may appoint two challengers per polling place.⁶³ Iowa allows each political party with a nominee on the ballot to maintain three poll watchers at each polling place to serve as a “challenging committee.”⁶⁴ Pennsylvania allows political parties to appoint three watchers per

⁵⁸ W. Va. Code § 3-1-37(a).

⁵⁹ *Id.* at § 3-1-37(b).

⁶⁰ Cal. Elec. Code § 14221 (West).

⁶¹ Cal. Elec. Code § 14240(a) (West); Cal. Elec. Code § 12286(a)(4) (West).

⁶² Ariz. Rev. Stat. Ann. § 16-590(b); Del. Code Ann. tit. 15, § 4933 (West); Ark. Code Ann. § 7-5-312(a)(West); N.H. Rev. Stat. Ann. § 666:4; Fla. Stat. Ann. § 101.131(1) (West); Colo. Rev. Stat. Ann. § 1-7-106 (West); Minn. Stat. Ann. § 204C.07(1) (West); Ohio Rev. Code Ann. § 3505.21(B) (West); Mo. Ann. Stat. § 115.105(1) (West); N.M. Stat. Ann. § 1-2-21 (West).

⁶³ N.J. Stat. Ann. § 19:7-1 to §19:7-2 (West); Vt. Stat. Ann. tit. 17, § 2564(a) (West); Tenn. Code Ann. § 2-7-104(a) (West); Mich. Comp. Laws Ann. § 168.730(1) (West); Ky. Rev. Stat. Ann. § 117.315 (West).

⁶⁴ Iowa Code Ann. § 49.104(2) (West).

district.⁶⁵ Some states allow each nominating political party to appoint poll watchers to each precinct and, additionally, to maintain some number of statewide at-large poll watchers. For example, Georgia permits each political party participating in an election to appoint two poll watchers per precinct plus twenty-five additional state-wide poll watchers.⁶⁶ North Carolina law also allows for each political party to appoint two watchers per precinct, plus an additional ten at-large poll watchers who may be present at any precinct.⁶⁷

Many jurisdictions also empower individual candidates to appoint poll watchers to their states' polling places. Usually these appointments exist in addition to, rather than instead of, appointments made by political parties. Some states restrict candidate poll watcher appointments to independent candidates. Arkansas, Tennessee, Iowa, and Colorado allow independent candidates, and only independent candidates, to appoint one poll watcher per precinct.⁶⁸ North Carolina and Vermont allow unaffiliated candidates to appoint two watchers per polling place.⁶⁹ Other states allow any candidate, independent or not, to appoint poll watchers. For example, Florida allows all candidates to appoint one challenger per polling place.⁷⁰ New Jersey and Pennsylvania permit two poll watcher appointments by any candidate.⁷¹

Some jurisdictions allow only a group of candidates to retain poll watchers. Ohio requires a group of five candidates to appoint one poll watcher per precinct.⁷² New Mexico requires a group of any three candidates.⁷³ Like some of the provisions governing appointments by political parties, some state regulations allow for candidates to retain at-large poll watchers. In Georgia,

⁶⁵ 25 Pa. Cons. Stat. Ann. § 2687 (West).

⁶⁶ Ga. Code Ann. § 21-2-408(b)(1)-(2)(West).

⁶⁷ N.C. Gen. Stat. Ann. § 163-45(a) (West).

⁶⁸ Ark. Code Ann. § 7-5-312(a)-(b) (West); Tenn. Code Ann. § 2-7-104(a) (West); Iowa Code Ann. § 49.104(5) (West); Colo. Rev. Stat. Ann. § 1-7-106 (West).

⁶⁹ N.C. Gen. Stat. Ann. § 163-45(a) (West); Vt. Stat. Ann. tit. 17, § 2564(a) (West).

⁷⁰ Fla. Stat. Ann. § 101.131(1) (West).

⁷¹ N.J. Stat. Ann. § 19:7-1 to §19:7-2 (West); 25 Pa. Cons. Stat. Ann. § 2687 (West).

⁷² Ohio Rev. Code Ann. § 3505.21(B) (West).

⁷³ N.M. Stat. Ann. § 1-2-27 (West).

each independent candidate may appoint one poll watcher per precinct as well as twenty-five additional statewide watchers.⁷⁴ In Louisiana (unique in allowing appointments by candidates but not political parties), each candidate has the power to appoint one watcher to each precinct in the state and one “super watcher” who must be permitted into each precinct in which his appointing candidate is on the ballot.⁷⁵

In addition to political parties and candidates, many states allow for some organizations (and occasionally some ad hoc political collectives) which are not registered political parties to appoint poll watchers. These regulations vary in the specificity with which the groups are defined and the process, if any, they must go through to become certified. Arkansas allows “group[s] seeking the passage or defeat of a measure on the ballot” to appoint one poll watcher to each polling site.⁷⁶ Tennessee and Michigan each allow citizen organizations either interested in the adoption or defeat of a measure on the ballot or generally “interested in preserving the purity of elections and in guarding against abuse of the elective franchise” to appoint poll watchers to each polling place in general elections.⁷⁷ Michigan also expressly allows “incorporated organizations” who espouse these concerns to likewise appoint poll watchers.⁷⁸ Vermont allows committees “supporting or opposing any public question on the ballot” to appoint two representatives per precinct.⁷⁹ In Florida, each “political committee formed for the specific purpose of expressly advocating the passage or defeat of an issue on the ballot” and “political committees and other groups and organizations that have properly identified their

⁷⁴ Ga. Code Ann. § 21-2-408(b)(2) (West).

⁷⁵ La. Rev. Stat. Ann. 18:435(A).

⁷⁶ Ark. Code Ann. § 7-5-312(a)-(b) (West).

⁷⁷ Tenn. Code Ann. § 2-7-104(a) (West); Mich. Comp. Laws Ann. § 168.730(1) (West). It is not clear from the statute or citing case law how many poll watchers each group of concern citizens may appoint as poll watchers.

⁷⁸ Mich. Comp. Laws Ann. § 168.730(1) (West).

⁷⁹ Vt. Stat. Ann. tit. 17, § 2564(a) (West).

scope of interest to include a specific issue” on the ballot may each appoint one poll watcher.⁸⁰ In Colorado, “issue committee[s] whose candidate or issue is on the ballot” may appoint one watcher to each polling center.⁸¹ Ohio and Kentucky allow “any committee that in good faith advocates or opposes a measure [on the ballot to] file a petition with” the county election authority asking for permission to appoint Election Day observers.⁸² Only one committee per election may be designated as the committee representing either side of a ballot issue and, in Ohio, no more than six total observers are allowed any one precinct.⁸³ New Mexico allows any “election-related organization” to appoint watchers to its polling places.⁸⁴ Finally, if a “public question” appears on the ballot, New Jersey empowers the local county board the discretionary right to appoint two poll watchers each to represent the proponents of and opposition to the measure in question.⁸⁵

Along with controlling who may appoint them, some states regulate the qualifications of poll watchers themselves. The lion’s share of these regulations specify where the poll watcher must reside or where they must be registered to vote. Poll watchers in Colorado, Louisiana, Michigan, and Ohio must be qualified electors in the state.⁸⁶ Minnesota requires that their challengers be residents of, but not qualified voters in, the state.⁸⁷ More narrowly, Kentucky, North Carolina, and Pennsylvania require their poll watchers to be registered voters in the county in which the election is being held.⁸⁸ In Missouri, each challenger must be “a registered voter in

⁸⁰ Fla. Stat. Ann. § 101.131(2) (West); Op.Div.Elect., DE 86-05, April 20, 1986.

⁸¹ Colo. Rev. Stat. Ann. § 1-7-106 (West).

⁸² Ohio Rev. Code Ann. § 3505.21(B) (West); Ky. Rev. Stat. Ann. § 117.315 (West).

⁸³ Id.

⁸⁴ N.M. Stat. Ann. § 1-2-27 (West).

⁸⁵ N.J. Stat. Ann. § 19:7-1 to §19:7-2 (West).

⁸⁶ Colo. Rev. Stat. Ann. § 1-7-108(1) (West); La. Rev. Stat. Ann. 18:427(A); Mich. Comp. Laws Ann. § 168.730(2) (West); Ohio Rev. Code Ann. § 3505.21(B) (West).

⁸⁷ Minn. Stat. Ann. § 204C.07(3a) (West).

⁸⁸ Ky. Rev. Stat. Ann. § 117.315 (West); N.C. Gen. Stat. Ann. § 163-45(a) (West); 25 Pa. Cons. Stat. Ann. § 2687 (West).

the jurisdiction of the election authority for which the challenger is designated.”⁸⁹ Most restrictively, challengers in New Mexico must be qualified voters in the precinct in which they perform their duties.⁹⁰ Examples of other poll watcher qualifications include the requirement that challengers must have a “good moral character” (North Carolina) and that they can read and write in English (Missouri).⁹¹

Sitting outside, or at least at the very edge of, of these regulatory spectra are the statutory schemes of Nevada and Wisconsin. These states have promulgated some of the most permissive poll watcher statutes in the country. Nevada allows any member of the public who is not a member of the media and who is not acting in their professional capacity to “observe the conduct of voting at a polling place.”⁹² Similarly, Wisconsin law provides that “[a]ny member of the public may be present at any polling place,” only limited by the chief inspector or municipal clerk’s authority to “reasonably limit the number of persons representing the same organization who are permitted to observe” at one time.⁹³

B. What are the powers vested in and restrictions imposed upon poll watchers?

Once poll watchers are appointed and qualified, they are generally given some power to challenge electors who they suspect are violating state election laws. While the question of who may appoint or become a poll watcher is one of great impact, perhaps more integral to a statute’s effect on voting rights and election integrity is the question of precisely what powers are vested in a state’s poll watchers. It should also be kept in mind that these two axes of poll watcher regulations interact with one another; their relationship within a given statutory scheme often creates unique burdens on a jurisdiction’s election system. A scheme with tight limits on poll

⁸⁹ Mo. Ann. Stat. § 115.105(1) (West).

⁹⁰ N.M. Stat. Ann. § 1-2-21 (West).

⁹¹ N.C. Gen. Stat. Ann. § 163-45(a) (West); Mo. Ann. Stat. § 115.105(5) and § 115.085 (West).

⁹² Nev. Rev. Stat. Ann. § 293.274 (West).

⁹³ Wis. Stat. Ann. § 7.41 (West).

watcher qualifications but liberal grants of poll watcher powers has far different consequences than a scheme with permissive poll watcher qualifications and limited grants of poll watcher powers.

Generally, state regulations over the powers wielded by their poll watchers are less organized and well-defined than equivalent regulations regarding who may become and appoint poll watchers. Nevertheless, this Note attempts to delineate and organize many of them below. Again, although powers vested in poll watchers generally encompass several stages of the election process, this Note will concentrate on those powers vested in poll watchers which can be exercised at the polls while voters are present.

Common among poll watchers in nearly every state is the power to be present at the polls and to observe its operations.⁹⁴ States generally do not permit ordinary voters to remain or loiter in the voting area, but they do permit poll watchers to do so. As the name implies, the quintessential power possessed by poll watchers is the power to remain within some area of a polling place in order to observe its proceedings. Without that power, exercising many of the other powers consigned to poll watchers would be, at best, very challenging.

Some jurisdictions regulate where poll watchers may linger within a precinct. Arizona stipulates that no challenger is permitted in voting booths.⁹⁵ Arkansas allows poll watchers to “[s]tand close enough to the place where voters check in to vote so as to hear the voter's name” but does not allow them “within six feet (6’) of any voting machine or booth.”⁹⁶ In Virginia, poll watchers may remain “close enough to the voter check-in table to be able to hear and see what is

⁹⁴ See, e.g., Ark. Code Ann. § 7-5-312 (West), Colo. Rev. Stat. Ann. § 1-7-108 (West), Ga. Code Ann. § 21-2-408 (West).

⁹⁵ Ariz. Rev. Stat. Ann. § 16-590(B).

⁹⁶ Ark. Code Ann. § 7-5-312 (West).

occurring.”⁹⁷ Louisiana, on the other hand, allows poll watchers “within all parts of the polling place.”⁹⁸

In many states, the power of a poll watcher to remain in the polling place is concomitant with their right to challenge an elector’s eligibility because of a right vested in all qualified electors in the state to challenge another voter’s eligibility. Arizona, Florida, Iowa, and Wisconsin, among others, allow any qualified voter properly present in the precinct to challenge any other voter as unqualified.⁹⁹ Poll watchers, who are often qualified electors, are in a unique position to exercise these universal challenger rights because they have the power to remain in the precinct and observe a large number of voters over a long period of time.

Other statutes expressly grant to poll watchers in particular the right to challenge voters in some manner. Some statutes, like those promulgated by Colorado and Michigan, simply permit their challengers to “challenge ineligible electors” without addressing the manner in which a challenge must take place.¹⁰⁰ Other jurisdictions require that challenges be made in a specific manner. Arkansas requires that a ballot may be challenged only upon notification of an election official and requires the completion of a “Challenged Ballot Form”.¹⁰¹ Arizona expressly permits challenges to a voter’s eligibility be made orally.¹⁰² Oppositely, Florida and New Hampshire require challenges, either by poll watchers or ordinary qualified electors, to be made in writing.¹⁰³ Florida further requires that the writing contain an oath to the properness of

⁹⁷ Va. Code Ann. § 24.2-604(C) (West).

⁹⁸ La. Rev. Stat. Ann. 18:427(B).

⁹⁹ Ariz. Rev. Stat. Ann. § 16-591; Fla. Stat. Ann. § 101.111 (West); Iowa Code Ann. § 49.79 (West); Wis. Stat. Ann. § 6.925 (West).

¹⁰⁰ Colo. Rev. Stat. Ann. § 1-7-108 (West); Mich. Comp. Laws Ann. § 168.733(1)(c) (West). See also Minn. Stat. Ann. § 204C.12 (West), N.J. Stat. Ann. § 19:7-5 (West), and Vt. Stat. Ann. tit. 17, § 2564 (West).

¹⁰¹ Ark. Code Ann. § 7-5-312(a)(4) (West).

¹⁰² Ariz. Rev. Stat. Ann. § 16-591.

¹⁰³ Fla. Stat. Ann. § 101.131 (West); N.H. Rev. Stat. § 659:27-a.

the challenge.¹⁰⁴ New Hampshire further requires an affidavit signed under oath by the challenger.¹⁰⁵ Finally, some states do not allow their poll watchers to challenge voters on Election Day at all. Ohio’s current statutory scheme, for example, allows only “precinct officials” to challenge a voters at the polls.¹⁰⁶ Ohio’s private election “observers” may watch their precinct’s operations and inspect some election documentation, but they are not authorized to challenge voters.¹⁰⁷

Many state statutes specify the grounds under which a challenge must be made. Some of these limitations are broad, such as that of Missouri, which allows challenges to violations of election law generally.¹⁰⁸ Other states, such as Colorado, Kentucky, Iowa, Minnesota, and Wisconsin dictate that voters may be challenged as “ineligible” or “unqualified.”¹⁰⁹ In Arizona and Arkansas, a challenge must be grounded on the poll watcher’s belief that the voter is not properly registered or that he “has voted before in that election.”¹¹⁰ North Carolina has set forth a long lists of grounds on which a challenge may be based, including that the voter is a non-resident, is under eighteen, is a felon, or is a member of the opposite party in a closed primary election.¹¹¹ Vermont, however, likely has the most restrictive acceptable grounds for issuing a challenge. The state requires that challenges be based on the watcher’s belief that either (a) the voter is not the person that appears on the voter checklist or (b) that she has voted already in that election.¹¹²

Beyond the right to challenge voter eligibility, many poll watcher statutes grant watchers

¹⁰⁴ Fla. Stat. Ann. § 101.131 (West).

¹⁰⁵ N.H. Rev. Stat. § 659:27-a.

¹⁰⁶ Ohio Rev. Code Ann. § 3505.20 (West).

¹⁰⁷ *Id.* at §3505.21(B).

¹⁰⁸ Mo. Ann. Stat. § 115.107 (West).

¹⁰⁹ Colo. Rev. Stat. Ann. § 1-7-108 (West); Ky. Rev. Stat. Ann. § 117.316 (West); Iowa Code Ann. § 49.79 (West); Minn. Stat. Ann. § 204C.12 (West); Wis. Stat. Ann. § 6.925 (West).

¹¹⁰ Ariz. Rev. Stat. Ann. § 16-591 and § 16-121.01; Ark. Code Ann. § 7-5-312 (West).

¹¹¹ N.C. Gen. Stat. Ann. § 163-87 (West).

¹¹² Vt. Stat. Ann. tit. 17, § 2564 (West).

additional rights. Arkansas, Colorado, Pennsylvania, and Michigan allow poll watchers to compile themselves a list of those who can vote or who have voted.¹¹³ Georgia and Minnesota, on the other hand, prohibit poll watchers from “checking elector lists.”¹¹⁴ Louisiana and New Mexico expressly allow their watchers to take written notes of their observations.¹¹⁵ Other states grant watchers additional powers of observation or review. Michigan, Tennessee, and New Mexico allow inspection of the official poll books or lists.¹¹⁶ Minnesota, oppositely, prohibits watchers from handling or inspecting “registration cards, files, or lists.”¹¹⁷ Two particularly powerful and perhaps intrusive powers are those granted to poll watchers in Pennsylvania and New Jersey, both allowing direct interaction between watchers and the states’ electors. Pennsylvania law entitles its poll watchers to “require proof” of a challenged voter’s qualifications.¹¹⁸ New Jersey grants poll watchers the “power to ask all necessary questions to determine” a challenged voter’s eligibility.¹¹⁹

Statutory powers granted to poll watchers, however, are often accompanied by statutory restrictions. These restrictions by and large seem aimed at keeping order at the polls and preventing voter interference and intimidation. Arkansas, Georgia, and Minnesota prohibit poll watchers from speaking with electors in or around polling places except under very limited circumstances, if at all.¹²⁰ Delaware, Georgia, Kentucky, Louisiana, New Mexico, Arkansas, and Vermont prohibit their watchers from creating a disturbance, obstructing the functioning of the

¹¹³ Ark. Code Ann. § 7-5-312 (West); Colo. Rev. Stat. Ann. § 1-7-108 (West); 25 Pa. Cons. Stat. Ann. § 2687 (West); Mich. Comp. Laws Ann. § 168.733(1)(h) (West).

¹¹⁴ Ga. Code Ann. § 21-2-408 (West); Minn. Stat. Ann. § 204C.07 (West).

¹¹⁵ La. Rev. Stat. Ann. 18:427; N.M. Stat. Ann. § 1-2-23(B)(5) (West).

¹¹⁶ Mich. Comp. Laws Ann. § 168.733(1)(a) (West); Tenn. Code Ann. § 2-7-104 (West); N.M. Stat. Ann. § 1-2-23(B) (West).

¹¹⁷ Minn. Stat. Ann. § 204C.07 (West).

¹¹⁸ 25 Pa. Cons. Stat. Ann. § 2687 (West).

¹¹⁹ N.J. Stat. Ann. § 19:7-5 (West); *Vargas v. Calabrese*, 634 F. Supp. 910, 923 (D.N.J. 1986).

¹²⁰ Ark. Code Ann. § 7-5-312 (West); Ga. Code Ann. § 21-2-408 (West); Minn. Stat. Ann. § 204C.07 (West).

polls, or from creating an unreasonable delay in poll operations.¹²¹ Express prohibitions on poll watcher campaigning and electioneering are common in many statutory schemes.¹²² Many states, such as Georgia, also prohibit the use of audiovisual and recording equipment by poll watchers.¹²³ Kentucky and Michigan directly and expressly prohibit their poll watchers from intimidating or harassing voters.¹²⁴

Some states require that their poll watchers attend training session regarding their duties. Kentucky, for example, requires their challengers to attend training sessions provided by their local county board of elections before every primary and general election.¹²⁵ These sessions include, *inter alia*, information on who is an eligible voter and proper challenge procedure.¹²⁶ Challengers who do not attend these sessions may not participate as challengers in any election for the following five years.¹²⁷

CONSTRUCTING A MODEL STATUTE

As the above survey illustrates, rules governing Election Day poll watchers are diverse. Regulations in some states are often directly at odds with the regulations of others. Thus, in constructing a model statute, value judgments must be made in selecting the rules that should govern poll watcher appointments, qualifications, powers, requirements, and restrictions. This Note will tread the middle road. The model statute described *infra* attempts to balance evenly the goals of election integrity and unrestricted voting rights. The model statute will furthermore attempt to maximize voter fraud protection while minimizing the burden or potential burden on

¹²¹ Del. Code Ann. tit. 15, § 3164 (West); Ga. Code Ann. § 21-2-408 (West); Ky. Rev. Stat. Ann. § 117.317 (West); La. Rev. Stat. Ann. 18:427; N.M. Stat. Ann. § 1-2-23 (West); Ark. Code Ann. § 7-5-312 (West); Vt. Stat. Ann. tit. 17, § 2564 (West).

¹²² See, e.g., Ga. Code Ann. § 21-2-408 (West); La. Rev. Stat. Ann. 18:427; Minn. Stat. Ann. § 204C.07 (West).

¹²³ Ga. Code Ann. § 21-2-408 (West).

¹²⁴ Ky. Rev. Stat. Ann. § 117.3167 (West); See also Mich. Comp. Laws Ann. § 168.733 (West).

¹²⁵ Ky. Rev. Stat. Ann. § 117.187(2) (West).

¹²⁶ *Id.* at § 117.187(2)(e)-(f).

¹²⁷ *Id.*

the voting rights of the electorate. That is, rules with a high probability of increasing election integrity and a low probability of intimidating qualified voters or creating polling place confusion will be included. Oppositely, rules with a high probability of inviting voter intimidation and confusion but with only a marginal benefit to election integrity will be left out. Rules that invite abuse or manipulation by political actors are minimized as are rules that can be taken advantage of by those wishing to organize voter fraud. The model statute will also attempt to address the concerns expressed by federal judges in analyzing the constitutionality of “day of” poll watcher statutes.¹²⁸

The model statute described below is not intended to be exhaustive or a final draft. It is instead intended to be a starting point, containing rules addressing what this Note considers to be the chief issues lawmakers may face in constructing a poll watching statute. However, in order to address one of the concerns of the *Spencer*¹²⁹ court, the model statute is also intended to provide sufficient “statutory guidance” to poll watchers with the goal of preventing chaos and disorder at the polls.¹³⁰

First, unlike the schemes of West Virginia and California, this Note’s model statute will permit officially appointed poll watchers.¹³¹ This Note contends that it is possible to mold a statute, as described below, which permits the appointment of poll watchers while simultaneously imposing a minimal burden on the voting rights of the electorate. Who may appoint poll watchers, and how many poll watchers they may appoint, however, should be limited. Channeling most poll watcher appointments through political parties will likely create an assembly of more moderate watchers within a state. Political parties tend to have a moderating

¹²⁸ See *supra*, notes 32-55.

¹²⁹ Recall, this is the case brought in the Southern District of Ohio by African American voters challenging the constitutionality of Ohio’s permissive poll watcher statute.

¹³⁰ *Supra*, note 37.

¹³¹ *Supra*, notes 58-61.

effect on political expression, as they must appeal to a broad spectrum of citizens and must consider their actions' effects on future elections.¹³² Therefore, political parties are incentivized to appoint poll watchers who will conduct themselves professionally and in a way that will not reflect poorly on the party. No political party wants to be perceived by the electorate as having sent out an army of partisans to the polls to intimidate and influence voters.

Like most state statutes, however, the ideal model statute would limit the amount of poll watchers each party may appoint to a precinct. Allowing too many or an unlimited number of appointments to each precinct may allow an opportunistic party leader to flood a hotly contested precinct with a large number of watchers. Having a large number of partisan poll watchers within a polling place will likely intimidate many voters from the opposite party. It, moreover, may create the “bewildering array” of polling place participants described in *Spencer*.¹³³ Limiting the number of watchers that may be appointed by political parties to two, like do New Jersey, Tennessee, and others, will create sufficient voter fraud protections while limiting the crowding or partisan packing of polling locations.¹³⁴

The model statute advocated by this Note also allows for the appointment of poll watchers by candidates. Although the motivation is less potent, candidates, like political parties, have incentives to moderate in order to balance competing constituent interests.¹³⁵ However, a rule limiting candidate appointments to independent candidates would best achieve the goals of this Note's model statute as described above. A rule allowing all candidates to appoint poll watchers, like the ones promulgated by Florida, New Jersey, and Pennsylvania, gives partisan candidates an advantage over independent ones because, under that scheme, both partisan

¹³² See Samuel Issacharoff & Pamela S. Karlan, The Hydraulics of Campaign Finance Reform, 77 Tex. L. Rev. 1705, 1714 (1999); See also Bruce C. Cain, Democracy More or Less 16 (2004).

¹³³ Supra, note 37.

¹³⁴ Supra, note 63.

¹³⁵ Supra, note 132.

candidates and the parties they represent will both be permitted to appoint poll watchers.¹³⁶

Partisan candidates may be tempted to seize on this advantage by retaining the maximum number of poll watchers they and their party may appoint. This advantage may be used to create a show of force at the polls which may intimidate the supporters of independent candidates.

Additionally, such a scheme may create a duopoly risk, in which the two major political parties will collude within voting precincts to disadvantage independent candidates and preserve their shared power. Finally, allowing partisan candidates to appoint poll watchers will increase the total number of poll watchers at polling locations, exacerbating the risk of chaos and confusion on Election Day. Fairness is achieved by equal representation of each interest at the polls rather than equal representation of each political actor with a stake in the election. A partisan candidate's interest in fair and accurate elections is adequately represented by the poll watchers appointed by the party she represents. An independent candidate's interests are not similarly represented by an umbrella political party and, thus, they should be entitled to appoint poll watchers to represent these interests. A rule, like that of North Carolina or Vermont, allowing unaffiliated candidates to appoint two watchers per district puts independent candidates on equal footing with their partisan counterparts.¹³⁷

The model statute advocated for in this Note does not permit the appointment of multiple “at large” candidates, like the schemes of Georgia and North Carolina do.¹³⁸ Such a rule allows an appointing party to pack contentious precincts with a large number of poll watchers. In Georgia, for example, a political party may, if they are so inclined, assign twenty-seven poll watchers to a single precinct.¹³⁹ The high potential for intimidation, chaos, and confusion under

¹³⁶ Supra, note 70-71.

¹³⁷ Supra, note 67.

¹³⁸ Supra, note 66-67, 74.

¹³⁹ See supra, note 74.

this scenario is self-evident. However, the appointment of a single “super watcher” per state, like those provided for under Louisiana law, is permitted under this Note’s suggested statute.¹⁴⁰ A single roaming watcher cannot be effectively used to pack any one precinct. However, the retention of a capable and experienced “super watcher” by a party or independent candidate can help to organize and inform that party or candidate’s state-wide troupe of watchers. Thus, while Louisiana’s “super watcher” rule poses little risk of voter intimidation, it may contribute greatly to the maintenance of orderly polling places and the creation of groups of organized poll watchers with the ability to spot voter fraud effectively.

In addressing appointments by political groups which are not registered political parties, this Note suggests a rule that has not been promulgated by any state. States should be wary of allowing these organizations to appoint poll watchers to their precincts. Non-party organizations (especially single-issue organizations) tend to be more extreme than political parties and are less sensitive to the demands of a wide constituency.¹⁴¹ Politically polarizing groups like True the Vote and the New Black Panther Party have attempted to sway elections in the past by appearing at polling places.¹⁴² This Note suggests a rule that will minimize such conduct while allowing groups with a legitimate interest in a ballot measure to be represented by poll watchers. This rule dictates that established or ad hoc political groups seeking the defeat or passage of a ballot measure may appoint one poll watcher to each precinct upon a showing that their interest is not adequately represented by a political party, candidate, or another non-party organization which has appointed poll watchers to the precincts being applied to. This showing, similar to the

¹⁴⁰ Supra, note 75.

¹⁴¹ Supra, note 132.

¹⁴² Stephanie Saul, Looking, Very Closely, for Voter Fraud, The New York Times, Sept. 16, 2012, available at <http://www.nytimes.com/2012/09/17/us/politics/groups-like-true-the-vote-are-looking-very-closely-for-voter-fraud.html>; Dave Boyer & Jim McElhatton, Problems, Panthers Surface at Pa. Polls, The Washington Times, Nov. 6, 2012, available at <http://www.washingtontimes.com/news/2012/nov/6/problems-black-panthers-surface-pa-polling-places/?page=all>.

showings that must be made under Kentucky law, should be made to the county election authority, which will have the ultimate say on whether the applicant's interests are already adequately represented by other poll watchers.¹⁴³ Again, this rule maintains an equitable representation of interests by poll watchers rather than an equal distribution of poll watchers to each political entity which asks for it. On most contentious issues, the parties and candidates within an election will likely have already staked out a position. Thus, allowing a potentially extreme political group to appoint additional poll watchers to polling places who also seek protection of that position would be redundant. More specifically, it will open the door to intimidation, confusion, and chaos, while not significantly advancing the integrity of the vote.

Regarding poll watcher qualifications, this Note advocates the approach taken by New Mexico, which requires their poll watchers to be qualified voters in the precinct in which they serve.¹⁴⁴ At the very least, this requirement will improve voter perceptions of poll watchers and their influence on the polling place environment. Voters are less likely to be intimidated by poll watchers when those poll watchers are the voters' neighbors, rather than imported political mercenaries. Voters in certain precincts during the 2014 Mississippi Republican Senate primary probably sensed that they were being watched with suspicious eyes by strangers with political motives inapposite to their own. A home-precinct requirement would reduce this perception. The requirement may also combat perceived racial incongruities that may discourage citizens from voting. Under this rule, precincts in majority black districts are more likely to have black poll watchers assigned to them and vice versa. Finally, a poll watcher who is watching his neighbors at their polling place has further incentive to behave respectfully and reasonably. Presumably, such a poll watcher would have to interact with his precinct's voters on a daily basis after

¹⁴³ Supra, note 82.

¹⁴⁴ Supra, note 90.

Election Day. This poll watcher would suffer reputational harm if they were to act unfairly or unprofessionally and, thus, is more likely to exercise restraint and professionalism in the exercise of his duties. This, naturally, would further insure against voter intimidation by overzealous watchers. While a home-precinct requirement may make finding poll watchers more difficult by reducing the pool that they may be chosen from, it will likely significantly reduce the burden on voting rights presented by a poll watcher scheme.

In addressing the powers vested in poll watchers, this Note's model statute attempts to preserve a right to challenge voters, but in a measured and undisruptive manner. Poll watchers who may invade a voter's private space, interrogate them, or loudly challenge their qualifications represent a significant threat to voting rights and polling place order. On the other hand, poll watchers without any ability to challenge voters could do little to prevent voter fraud.

A rule like Arkansas's, allowing poll watchers to remain anywhere in the precinct except for within six feet of voting booths, gives adequate room for poll watchers to exercise their duties while retaining voter privacy.¹⁴⁵ The voting booth is generally considered a private place in which voters may make decisions anonymously. Voters who feel as if they may be being watched in the voting booth may be unduly influenced into altering their vote or not voting altogether. A rule requiring poll watchers to keep a clear distance from those in the act of voting will decrease the perceived threat against voter privacy. Moreover, such a rule will not hinder poll watchers in the exercise of their duties. There is nothing obvious that can be done in or near a voting booth that would indicate to an observer that a voter is ineligible. Under this rule, poll watchers are still permitted to closely observe voter check-in – likely the most fertile area for observing potential voter fraud.

As far as challenge procedure, this Note's model statute suggests a system of silent,

¹⁴⁵ Supra, note 96.

written challenges made through election officials, similar to the procedures promulgated in Florida and New Hampshire.¹⁴⁶ An oral challenge procedure, like the one promulgated by Arizona, presents a high risk of voter intimidation and polling place chaos with no marginal benefit to election integrity.¹⁴⁷ A voter challenged orally at a precinct may feel embarrassed and attacked. A precinct in which multiple voters are challenged out loud may, in some situations, become a raucous, intimidating, and confusing environment. What's more, oral challenges present only minor obvious marginal benefits to election integrity over written challenges (the possible benefits being slightly faster and more efficient challenges). A written challenge, delivered discreetly to an election official is equally as effective as an oral challenge, if a little slower. In fact, a system of written challenges may advance the goal of election integrity by generating a written record of official challenges. Consequently, this Note advocates a rule requiring challengers who maintain a good faith suspicion of a voter's eligibility to fill out an official form which describes the reason for the challenge, and to deliver it silently to an election official. That official may then decide if the challenge is well-grounded and whether a further inquiry is necessary. This rule minimizes the level of intrusion, embarrassment, and intimidation visited upon a challenged voter. In fact, under this scheme, a voter may never know they have been challenged at all. It also limits interaction between the voters and poll watchers, shrinking the opportunity for poll watchers to burden an elector's voting rights. Finally, because under this rule a poll watcher may only "initiate" an inquiry into a voter's eligibility, it is likely to be subject to intermediate scrutiny under the Sixth Circuits analysis above.¹⁴⁸

This Note's model statute also specifies the grounds on which a challenge must be based. Adopting the rule promulgated by Vermont, the model statute advocates a regulation which

¹⁴⁶ *Supra*, notes 103-105.

¹⁴⁷ *Supra*, note 102.

¹⁴⁸ *Supra*, note 49.

allows a challenge to be based only upon the poll watcher's belief that either (a) the voter is not the person that appears on the voter checklist or (b) that she has voted already in that election.¹⁴⁹ The reasoning behind this rule is that these two violations of election law can be most readily diagnosed by sight or sound at the polling location. Any poll watcher, simply by observing a precinct on Election Day, can determine that an elector has already voted by recognizing them from earlier in the day. Likewise, a watcher can maintain a reasonable suspicion that an attempted voter is not who they claim to be, perhaps because they witnessed a voter by that name voting earlier in the day. This rule allows little room for a watcher's prejudice to fuel their challenges. Compare this rule to the rules promulgated by states like Arkansas, Colorado, and Iowa, which allow challenges to be based on a watcher's suspicion that a voter is simply "ineligible" or not properly registered.¹⁵⁰ How can a poll watcher know, without additional information, whether a challenger has lived in the state for the requisite period of time? Is a felon? Is a U.S. citizen? Accusations of these and other similar registration violations must necessarily be based on specific extrinsic information or assumptions made by the poll watcher based on their own experiences and preconceived notions. One need not look far for evidence of this phenomenon. For example, during the 2012 general election, two Somalian U.S. citizens had their votes challenged by a poll watcher in Maine because they couldn't speak English.¹⁵¹ A rule like the one promulgated by Vermont will reduce the opportunity for similar ill-founded challenges. Because the rule restricts the basis for challenges to those that can be fully observed at a polling place on Election Day, it reduces the chances that a voter will be challenged based on their skin color, appearance, accent or the sound of their name. It thus, decreases the probability

¹⁴⁹ Supra, note 112.

¹⁵⁰ Supra, 109-110.

¹⁵¹ Somali Immigrants Challenged at Auburn Polling Place, ABC WMTW, Nov. 6, 2012, available at <http://www.wmtw.com/politics/Somali-immigrants-challenged-at-Auburn-polling-place/17289442>.

of an unequal burdening of voting rights and voter intrusion or intimidation.

Some additional rights that are often granted to poll watchers usually implicate issues of voter privacy. A poll watcher who has access to lists of which electors are registered to vote in her precinct or which voters have voted in a particular election has access to, at some level, certain private voter information. Nevertheless, this Note advocates a rule which allows poll watchers to keep lists of those who have voted, to view registration lists, and to keep notes of their observations, provided that all the material they have compiled be turned into election officials upon the closing of the polls. While much of the information that may be contained in these lists and notes may be non-public, the information they contain is not particularly invasive of voter privacy. They simply indicate whether and where an elector is registered to vote or has voted and does not reveal for whom or what that elector has voted. The information does not appreciably violate the sanctity of the voting booth. Consequently, the revelation of such information to a select few individuals will probably not have a significant chilling effect on the exercise of voters' franchise. Requiring the surrender of the voter lists and notes after the polls close will protect voter privacy by ensuring that the material does not become public. Meanwhile, access to these lists makes the exercise of poll watching duties considerably easier. Spotting an elector who has voted twice, for example, is much less difficult if one may utilize a list of those who have already voted rather than relying on one's own memory. Thus, permitting poll watchers to compile voter lists, take notes, and have access to registration lists advances the state's interest of election integrity by making poll watchers more effective, while not meaningfully burdening the electorate's voting rights.

This Note's model statute also advocates for several restrictions on poll watchers. For obvious reason, the statute follows Kentucky and Michigan in expressly prohibiting voter

harassment and intimidation and follows Arkansas and Georgia in prohibiting the delay or disruption of polling place operations.¹⁵² The model statute also follows states like Georgia and Minnesota in prohibiting poll watchers from speaking with electors at the polls.¹⁵³ No doubt that absent this rule the overwhelming majority of conversations between poll watchers and voters would be constructive or at least cordial. However, allowing poll watchers to speak with electors at the polls creates a small but unnecessary risk of voter influence and intimidation. Under the written challenge system advocated for in this Note, challenges must be made in writing without speaking with the challenged voter. The questioning of challenged voters under the model statute is conducted entirely by the election official and only at their discretion, rather than by poll watchers as is permitted in New Jersey and Pennsylvania.¹⁵⁴ The election official, under the model statute, is not required to pursue a challenge presented by a poll watcher if he finds the grounds for the challenge to be insufficient. Full discretion is given to the election official in determining the statutory sufficiency of the grounds on which the challenge is based. Therefore, under this scheme, speaking with a voter does not advance the challenge process but will create a medium for intended or unintended voter influence and intimidation by poll watchers.

In terms of enforcement, this Note's model statute advocates the path taken by Georgia, which allows the presiding precinct official (in the case of Georgia, the "poll manager" or "superintendent") to remove any poll watcher from the precinct who violates any of the restrictions listed above.¹⁵⁵ This simple enforcement system allows for the rapid redress of poll watcher infractions, thereby limiting any potential burden on voting rights arising from sustained poll watcher malfeasance.

¹⁵² Supra, note 124.

¹⁵³ Supra, note 121.

¹⁵⁴ Supra, notes 18-119.

¹⁵⁵ Supra, note 120.

Finally, this Note's model statute follows Kentucky in requiring poll watchers to undergo training delivered by their local election board before each election in which they will serve.¹⁵⁶ This rule directly addresses the concerns of the majority in *Spencer*, which contended that the fact that Ohio poll watchers were largely unfamiliar with the electoral process would contribute to delay and chaos at the polls.¹⁵⁷ This Note agrees that training poll watchers on the law and election process will create an army of well-informed watchers who are more likely to conduct themselves professionally and contribute to the efficient operation of their polling places. Granted, requiring pre-election training also increases the barrier to entry for prospective poll watchers, making the appointment of qualified watchers more difficult. However, training may also attract or create more astute poll watchers, better at identifying and reporting potential voting fraud. This rule, thus, has an indeterminate effect on the government's interest in preventing voter fraud, but has a clear positive influence on protecting its citizens' voting rights. Consequently, a rule requiring training is included in the model statute based on the value maximizing proposition set out in the beginning of this section.

¹⁵⁶ *Supra*, note 125.

¹⁵⁷ *Supra*, note 39.

THE MODEL STATUTE

§ X-X-XXXX. Poll Watchers.

(A) The following parties may assign two (2) poll watchers to each of the state's precincts to be present during statewide elections for the purposes of observing precinct operations and challenging ineligible voters under the procedures set forth in this section:

(1) Registered political parties

(2) Independent candidates

(B) In addition to the poll watchers provided for in Paragraph (A), each registered political party and independent candidate may designate one watcher per state as a "super watcher" who shall have the qualifications, powers, and duties of watchers provided under this section and who shall be admitted as a watcher in every precinct in the state.¹⁵⁸

(C) Any organization seeking the passage or defeat of a measure on the ballot may appoint one (1) poll watcher to each precinct in which that measure is to be voted on upon a showing to the county election authority that the applicant group's interest is not adequately represented by a political party, candidate, or another non-party organization which has appointed poll watchers in the precincts being applied to. It is in the county election authority's sole discretion to determine if the applicant group has made the requisite showing and, therefore, may be certified to appoint poll watchers to the precincts in question.

(D) All poll watchers, aside from "super watchers" appointed under Paragraph (B), must be qualified electors in the precinct in which they serve. A "super watcher" appointed under Paragraph (B) must be a qualified elector in the state.

(E) In the exercise of their duties, poll watchers may:

(1) observe poll workers and voters;

(2) be present during voting hours in any part of the precinct except for within six feet (6') of any voting machine or booth used by voters to cast their ballot;¹⁵⁹

(3) challenge voters according the procedure described in Paragraph (F);

(4) view precinct registration lists;

¹⁵⁸ The language of this section is based, almost verbatim on La. Rev. Stat. Ann. 18:435(A)(2).

¹⁵⁹ The language of this section is based, almost verbatim on Ark. Code Ann. § 7-5-312 (West).

(5) compile a list of those who have voted, which much be turned over to an election official upon the closing of the polls; and

(6) compile notes of their observations, all of which much be turned over to an election official upon the closing of the polls.

(F) If a poll watcher in good faith believes that a voter is ineligible under any of the basis set forth in Paragraph (G), they may challenge that voter's eligibility by silently completing the "Voter Challenge Form" provided at the end of this section. Once the poll watcher completes the form, detailing the grounds for the challenge, they must deliver the form to a presiding election official serving in the precinct. The election official, in their discretion, may determine if the challenge is well-grounded under this section and therefor whether or not to question the voter. At no point may a poll watcher question the voter or indicate to the voter that their eligibility is being challenged.

(G) The grounds for a challenge to a voter's eligibility under Paragraph (F) may only be:

(1) that he or she is not, in fact, the person whose name appears on the checklist, or

(2) that he or she has previously voted in the same election¹⁶⁰.

(H) Poll watchers may not:

(1) harass or intimidate voters;

(2) unduly delay or obstruct precinct operations; or

(3) speak with any elector within the precinct.

(I) A precinct's poll manager shall have the power to order the removal of any poll watcher who violates or is in violation of Paragraphs (D) through (H) within the precinct over which that poll manager has authority.

(J) The county board of elections shall provide special training before each primary and regular election to all certified poll watchers regarding their duties and the penalties for failure to perform. Poll watchers shall attend the training session, unless excused by the county board of elections. Any person who fails to attend a training session without being excused shall be prohibited from serving as an election officer or challenger for a period of five (5) years.¹⁶¹

¹⁶⁰ Text copied almost verbatim from Vt. Stat. Ann. tit. 17, § 2564(a) (West).

¹⁶¹ Text copied almost verbatim from Ky. Rev. Stat. Ann. § 117.187(2) (West).