OF CHALLENGERS AND CHALLENGES

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The burden on the right to vote is evident. In this case, we anticipate the arrival of hundreds of Republican lawyers to challenge voter registrations at the polls. Behind them will be hundreds of Democrat lawyers to challenge these Challengers’ challenges. This is a recipe for confusion and chaos.

Judge R. Guy Cole, Jr.
U.S. Court of Appeals for the Sixth Circuit

INTRODUCTION: FLORIDA’S IMPRINT

THE 2000 presidential election changed the American electoral experience forever. The administrative problems in Florida and the subsequent scrutiny of the balloting process during litigation over the election, most notably Bush v. Gore,1 exposed deficiencies in election machinery, raised questions about the integrity of registration lists, and divided the nation over the legitimacy of Governor George W. Bush’s election to the presidency.2 The nation learned a great deal about the electoral process through the American experience in Florida after the 2000 Election.3 As Americans went to the polls on Election Day 2004, there was a widespread belief that votes would not be counted accurately, fraud and corruption would be rampant, and a citizen’s vote ultimately may not matter because the election would be decided through litigation.4

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4. Adam Cohen, Where the Action’s at for Poll Watchers: Ohio as the New Florida, N.Y. TIMES, Oct. 31, 2004, at 4-10 (“The legacy of Florida 2000 was public knowledge of a secret that election officials had long kept to themselves: that every year millions of eligible voters are wrongly prevented from voting, and millions of votes are thrown out.”).
As a result of the political parties' posturing and preparation, when voters went to the polls in swing states on November 2, 2004, many had a much different experience than they had just four years earlier. This article examines Election Day 2004's two most regrettable contributions to the American electoral experience—poll challengers and polling site lawyers—and argues that their presence was unlawful and detrimental to the electoral process.  

Moreover, because no state's voters felt the impact of these regrettable contributions more than the citizenry of Ohio, this article focuses extensively on the electoral experiences and political parties' actions in Ohio on Election Day 2004. By all accounts, the Democratic and Republican political parties focused their Election Day political and legal efforts in Ohio, a state which was closely contested throughout the race for the presidency, and was considered the most important "swing state" in the election.  

Although the Ohio experience is scrutinized throughout this article, many of the experiential phenomena and legal shortcomings described in this article were not limited to Ohio and are illustrative of the problems that occurred throughout the country on Election Day where law and politics interacted.

SYLLABUS

Part I of this article explores what went on inside the polling sites. On Election Day 2004, long forgotten poll challenging statutes surfaced and greatly impacted voters' experiences at the polls. Part I.A explores the potential legal and constitutional problems with the poll challenging process. Part I.B looks at the expressive harms that resulted from poll challengers' presence.

Part II analyzes the legal community's reaction to the election debacle in 2000. Fueled by partisan distrust, the two major political parties organized and encouraged large teams of volunteer lawyers from all over the country to deploy to polling sites in swing states. Part II.A argues that this massive deployment of lawyers violated the profession's ethical guidelines and rules of professionalism. Furthermore, part II.B argues that the legal juggernaut on Election Day further tarnished the public's view of the legal profession and its confidence that the law will protect individual voters' rights.

Finally, part III presents some trends in election reform and suggests that the precedent of fixing one state at a time is detrimental to the public's confidence in our democracy. Part III also suggests that the poll challenging process and deployment of lawyers to swing states are simply the political parties' quick and ineffective fixes for larger deficiencies in American election administration.

6. The terms "poll watchers" and "poll challengers" are generally used interchangeably throughout the literature. In this article, the term "poll challengers" has been used for consistency.

7. See Cohen, supra note 4, at 4-10.
I. INSIDE THE POLLS

Most Americans would probably say that the Supreme Court played no direct role in the 2004 Election, but this is not entirely correct. After the 2000 Election, books and articles in the mainstream press and legal scholarship discussed the Supreme Court’s decision to intervene in the election debacle in Florida by handing down its decision in Bush v. Gore. It is widely accepted that this decision sealed George W. Bush’s victory by quelling further challenges to the vote count in Florida. But a lesser known decision by one Supreme Court Justice in 2004 also had a large impact on the present American electoral experience.

Early in the morning on Election Day 2004, Justice John Paul Stevens, who was designated to hear emergency appeals arising from the Sixth Circuit, “refused to suspend a decision issued hours before by the appeals court . . . [which held] that Ohio Republicans could enter polling places to challenge voters there.” In doing so, Justice Stevens paved the way for thousands of Republican poll challengers, and their Democratic counterparts, to flood Ohio polling sites and battle over individuals’ qualifications to vote in the 2004 Election.

Given the immediacy of the situation, Justice Stevens was put in a difficult position. As he stated in his decision, he was presented with the strong possibility that these poll challengers would funnel into “African-American neighborhoods to mount indiscriminate challenges at polling places.” But given that he was reviewing this issue on the morning of Election Day 2004, Justice Stevens, perhaps necessarily, determined that there was not enough time to fully review the issue and thus deferred to state law. In doing so, however,

8. See, e.g., Brian Kates, Bet on Prez to Reshape High Court, DAILY NEWS (N.Y.), Nov. 4, 2004, at 19 (“This time, the Supreme Court did not decide the presidential election.”).


13. Spencer, 125 S. Ct. at 305.


15. Justice Stevens wrote:

Practical considerations, such as the difficulty of digesting all of the relevant filings and cases, and the challenge of properly reviewing all of the parties’ submissions as a full Court in the limited timeframe available, weigh heavily against granting the extraordinary type of relief requested here.
Justice Stevens did not downplay the gravity of the issue before him, as he cautioned that questions about poll watching practices were “undoubtedly serious.”

A. Poll Challengers on Election Day

This section criticizes the decision to allow poll challengers on Election Day 2004. This is not meant as a direct criticism of Justice Stevens’ decision, given that this analysis is made without the menace of immediacy and with the benefit of retrospective perspective. However, from a legal perspective this section contends that poll challengers unduly burden the right to vote in contravention of our fundamental democratic values and constitutional principles. Furthermore, the deliberate and open targeting of precincts occupied by large assemblages of the African-Americans and minorities may amount to an equal protection violation and a violation of the Voting Rights Act.

Although these potential legal violations are extremely troubling, there are also strong public policy ramifications at stake. First, the poll challengers significantly change an individual’s experiences at the polls; voting moves away from a positive opportunity for a citizen to engage in a democratic social experience and civic duty, to an adversarial process during which one must prove her vote’s legitimacy. Second, the poll watching process distracts the attention of officials and judges who impartially monitor the elections process. Finally, the political parties’ (“parties”) preparation for poll watching further divides the nation by unleashing a specter of distrust and feeding off accusations of fraud.

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Spencer, 125 S. Ct. at 305. Ohio Secretary of State Blackwell had also voiced concerns about the time constraints on reviewing the legitimacy of poll challengers in an October 29, 2004 news release. However, unlike Justice Stevens, Secretary Blackwell believed that all of the poll challengers should be banned until that review had taken place:

As Secretary of State, it is my responsibility to conduct Ohio’s elections in a manner as open and accessible as possible, consistent with the absolute requirements of integrity and fairness. While I do not agree there is any discriminatory intent or result from these statutes [allowing parties to place challengers in the polling places], I do believe a full airing of the issues cannot be completed prior to Tuesday’s election. Therefore I have instructed the Attorney General to offer the following recommendation to the federal courts in Hamilton and Summit Counties for resolution of these matters now: All challengers of all parties shall be excluded from polling places throughout the state.


16. Spencer, 125 S. Ct. at 305 (“The allegations of abuse made by the plaintiffs are undoubtedly serious—the threat of voter intimidation is not new to our electoral system—but on the record before me it is impossible to determine with any certainty the ultimate validity of the plaintiffs’ claims.”).

17. See Summit County Democratic Cent. & Executive Comm. v. Blackwell, 388 F.3d 547, 553 (6th Cir. 2004) (Cole Jr., J., dissenting) (“As troubling as the public policy ramifications from this decision are, the legal implications are equally astonishing.”).
B. The Legal Violations

State laws in a number of key electoral states provided for the presence of partisan challengers when voters checked in at polling sites on Election Day 2004. In most cases, these poll challengers were selected by candidates or political parties. However, just because these challengers were provided for by state law does not mean that their presence was constitutional.

1. Undue Burden on the Fundamental Right to Vote

i. The standard of review

The Supreme Court’s voting rights jurisprudence clearly establishes that “[a] citizen’s right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution.” Although state governments have considerable latitude in regulating elections, this power is not unchecked by the courts.

Throughout American history, courts have weighed the “character and magnitude” of the burden the State’s rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State’s concerns make the burden necessary. The Supreme Court requires a “demonstration of a corresponding interest sufficiently weighty to justify the limitation” and where that limitation is justified, it must be “narrowly drawn to advance a state interest of compelling importance.”

The Supreme Court has outlined the approach courts must take while evaluating potentially unconstitutional elections regulations:

[A] court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.

In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests

20. For an example of one such state law in Ohio, see OHIO REV. CODE ANN. § 3505.20 (LexisNexis 2005).
22. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) (“[I]t is also clear that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.”).
23. Id.
make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.25

Much like judicial review in other areas of governmental regulation,26 the scrutiny of elections laws is not formulaic,27 and requires balancing.

ii. "Character and magnitude" of the harm

Prior to the 2004 Election, there was no evidence that poll challengers had actually done anything in Ohio after they were selected. Thus, the courts were left to speculate as to what impact they would have on the election process.28 The Ohio lower courts that heard testimony regarding the impact of poll watching believed that poll challengers' presence could create a significant burden on Ohio voters:

The evidence before the Court shows that in Tuesday's election, the polling places will be crowded with a bewildering array of participants—people attempting to vote, challengers (Republican, Democrat, and issue proponents or opponents), and precinct judges. In the absence of any statutory guidance whatsoever governing the procedures and limitations for challenging voters by challengers, and the questionable enforceability of the State's and County's policies regarding good faith challenges and ejection of disruptive challengers from the polls, there exists an enormous risk of chaos, delay, intimidation, and pandemonium inside the polls and in the lines out the door.29

Plaintiffs argue that the presence of challengers at the polls will infringe on their fundamental right to vote. This Court recognizes that the right to vote is one of our most fundamental rights. Potential voter intimidation would severely burden the right to vote. Therefore, the character and magnitude of Plaintiffs' asserted injury is substantial.30

Even if the potential for longer lines and confusion at the polls may not amount to a "severe burden upon the right to vote" on its own,31 the Supreme Court has found that potential voter intimidation at the polling site can unconstitutionally

28. Spencer v. Blackwell, 347 F. Supp. 2d 528, 535 (S.D. Ohio 2004) ("Further, the testimony reflects that despite the registration of challengers in the past, challengers have never before appeared at the polling place.").
29. Id.
burden the right to vote. However, these burdens do not exist in a vacuum and their showing is necessary, but not sufficient, to establish a constitutional violation. A court must balance these burdens against the interest put forth by the state.

iii. Identifying and balancing the state interest

Once a burden on the right to vote is established, a court must look to see whether the election law strikes an evenhanded constitutional compromise between the burden and the interest. The Supreme Court has "upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." But where the burden is imposed for little gain, strong deference should be given to alleviating the burden on the right to vote; after all, "[o]ther rights, even the most basic, are illusory if the right to vote is undermined."

With regard to poll challengers, identifying the state interest is simple: "[A] State has a compelling interest in ensuring that an individual’s right to vote is not undermined by fraud in the election process." This state interest is often cited in defense of challengers by lawyers and laymen, and it was the interest Ohio sought to establish in the litigation leading up to the 2004 Election. Although it is easy to suggest the state interest, poll watching’s effectiveness in protecting this state interest is not so clear.

After all, inside each polling site there are already experienced bipartisan election judges who look for fraud and ask the same questions that poll challengers do. Further, under Ohio’s statute, other voters who are lawfully present at the polling site may challenge another voter’s legitimacy. Thus, the partisan challengers who arrived on Election Day 2004 were less experienced clones of the election judges who were already present. The infrastructure to root out fraud exists with or without the challengers, and the presence of poll challengers actually threatens to disrupt that proven and tested infrastructure.

34. For example, in Burson v. Freeman, 504 U.S. 191 (1992), the Supreme Court reviewed a challenge to a Tennessee regulation which prohibited candidates from distributing materials and soliciting votes within a 100-foot radius of the entrance to a polling site. In upholding the Tennessee provision, the Supreme Court reaffirmed the state’s interest in regulating elections and explained that these cases usually came down to a constitutional compromise between two competing fundamental interests. Id. at 198.
37. Burson, 504 U.S. at 199.
40. See id.
41. See id. at 537.
In addition to bipartisan poll judges and workers at the polling sites, on Election Day 2004, the Justice Department sent 1090 federal poll watchers from around the country to at least eighty-six targeted locations to “assure compliance with voting laws and prevent discrimination or disenfranchisement.” These federal poll watchers provide an additional level of protection against fraud. Whereas partisan poll challengers purported to focus on potentially fraudulent polling locations, the federal poll watchers purported to focus on sites using a more methodical, and thus legitimate, approach.

Ultimately, the argument that there will be less fraud with poll challengers is unfounded. Throughout our nation’s history, elections have functioned successfully and legitimately without the presence of poll challengers. Indeed, on Election Day 2004, the overwhelming majority of precincts conducted their elections without poll challengers.

Overall, there are more narrowly tailored approaches to rooting out election fraud at the registration stage of the voting process. In fact, many of these approaches are already in place. As one Ohio court noted before the 2004 Election, “[a]s registrations are received, the Board of Elections processes them and works to ensure that they are not fraudulent. The Board of Elections may conduct investigations, summon witnesses, and take testimony under oath regarding the registration of any voter.” Many of the poll challengers reported that they were given only a brief training and a list of potentially fraudulent registrations before dispersing to the polls. Thus, poll challengers could only challenge voters on that list.

But, a lawful process for challenging lists of voters already existed in Ohio, where: “any qualified elector of the county may challenge the right to vote of any registered elector to vote and the challenge will be considered by the Board of Elections at a hearing.” In Ohio, poll challengers only had to submit their lists to the Board of Elections eleven days prior to the election in order to have the registrations reviewed.

Thus, when examined in the context of practices and procedures already in place in Ohio, poll challengers served no strong legitimate purpose. In addition to decreasing efficiency within the polling site, poll challengers’ presence may have distracted poll judges and increased the likelihood of unintended errors.

43. See generally id.
45. See Jo Becker & Dan Eggen, Parties Brace for All Election Eventualities, WASH. POST, Nov. 2, 2004, at A4 (discussing the placement of poll challengers in certain key states and urban areas).
47. See Martin Stolz, Parties Prepare Voter Challengers, PLAIN DEALER (Cleveland, Ohio), Oct. 31, 2004, at B4 (discussing the short training sessions that challengers received in Ohio).
48. Id. (citing OHIO REV. CODE ANN. § 3503.24 (LexisNexis 2005)).
49. OHIO REV. CODE ANN. § 3503.24 (LexisNexis 2005).
At least one court has banned poll challengers from polling sites, because it found they unconstitutionally burden the right to vote. The district court for the Northern District of Ohio found that:

The Court cannot overlook the practical concerns that the presence of appointed challengers at the polls could significantly impede the electoral process, and infringe on the rights of qualified voters. When challenges occur, election judges would be diverted from their duties at the polling places to question voters and rule upon challenges. Random challenges or challenges without cause advanced by members of any political party could result in retaliatory 'tit-for-tat' challenges at the polling places. Election officials would then be faced with the time-consuming task of ruling upon numerous challenges, diverting them from assisting voters. If challenges are made with any frequency, the resultant distraction and delay could give rise to chaos and a level of voter frustration that would turn qualified electors away from the polls.\(^\text{50}\)

If a court determines that the state interest does not outweigh the burden imposed on the voters, as this section has argued that a court could, then the policy must be struck down as an unconstitutional burden on the right to vote.

2. *Race Based Placement, an Equal Protection Violation*

Even more concerning than poll challengers' general burden on the right to vote, is that these burdens from the poll watching process are not felt equally across racial groups.\(^\text{51}\) In addition to being disturbingly discriminatory, the parties' use of state election laws to appoint poll challengers in minority neighborhoods violates the Constitution's equal protection guarantee.\(^\text{52}\)

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51. As one legal scholar wrote:

It's probably true that the Republicans are not targeting heavily black precincts because they're heavily black; they are targeting them because they're heavily Democratic. But let's not be naive: They are also targeting black precincts because they expect to find voters and polling officials who are relatively poor and socially powerless and hence easier to bully and intimidate. This may not be racism in its purest form—animus based on nothing other than race—but it's close enough to make decent people want to take a shower.

Ford, supra note 5. See also Summit County Democratic Cent. & Executive Comm. v. Blackwell, 388 F.3d 547, 550 (6th Cir. 2004) (noting that the amended complaint in the action stated that “African American voters ... will face an imposing array of 'challengers' deployed to their precincts on Election Day. African American voters will be intimidated; racial tension will rise and African American voters will be blocked from exercising their right to vote.”).

52. See SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 21 (2d ed. 2002) (“[L]itigation has focused largely on section 1 of the Fourteenth Amendment, which prohibits states from abridging the privileges or immunities of citizens of the United States and from denying due process or equal protection to any person within their jurisdiction.”).
On Election Day 2004, the poll monitors challenged voters in predominantly African-American precincts, irrationally classifying African-Americans as more likely to commit voter fraud.53 This was a movement that was felt in the nation’s urban centers in closely contested electoral states throughout the country.54 By flocking to African-American neighborhoods, the poll challengers created an extra obstacle that minority voters had to get through in order to vote.55 This intentional and invidious discrimination diluted the voting strength of the African-American community in violation of the Equal Protection Clause.56

The right to vote is protected in more than the initial allocation of the franchise to choose electors for the President of the United States. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the state may not, by later arbitrary and disparate treatment, value one person’s vote over that of another. It must be remembered that the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.57

But unlike an action challenging the statutes authorizing poll challengers under the “fundamental right to vote” jurisprudence,58 an equal protection challenge would confront the parties’ policies of dispersing poll challengers unequally on the basis of race,59 not the actual statute that authorized poll challengers. Thus, the underlying statute authorizing poll challengers would not be at the heart of the challenge, rather the focus of the challenge would be on the parties’ policies. This complicates the legal analysis somewhat, perhaps fatally. To make a successful equal protection claim, once a plaintiff established standing,50 she

54. See, e.g., Patricia Montemurri & Marisol Bello, Aftermath in Michigan: Parties’ Voting-Place Monitors Keep Challenging Each Other, DETROIT FREE PRESS, Nov. 4, 2004, at 10A; Mark Brunswick & Pat Doyle, The Scene: Tension Prompts Disputes at Some Poll Sites, STAR TRIBUNE (Minneapolis, Minn.), Nov. 3, 2004, at 1B.
55. See discussion infra part I.B.2.b. After the White Primary Cases, many elections officials began using "long-unused constitutional provisions regarding literacy and good character tests." See ISSACHAROFF ET AL., supra note 52, at 118. These discretionary tests were used to suppress the African-American vote. There is a strong parallel to be made between the reemergence of discretionary tests after the White Primary Cases and the reemergence of poll challenging in the 2004 Election. In both cases, at least one of the parties was looking for new ways to suppress the minority vote, but used old practices to do it.
58. See discussion supra part I.B.1.
59. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 665-66 (1966) ("warning that the result would be different if a literacy test, fair on its face, were used to discriminate against a class").
60. To bring suit, a plaintiff would have to establish standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). This issue is not dealt with in depth in this paper, as it is well settled that a probabilistic injury is enough to trigger standing in a voting rights case. See Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 61 n.10 (1976) ("Clearly there is no difference for purposes of
would have to demonstrate that there was (a) state action, (b) which used a suspect classification that was wholly irrelevant to the achievement of the regulation’s objectives and infringed on the voting rights of that suspect class.\textsuperscript{61}

The above section explained that the Election Day 2004 poll challengers served almost no legitimate state interest, certainly not a strong enough interest to surpass strict scrutiny. This section demonstrates that, because the parties’ poll challenging policies denied equal protection to a suspect class, they must be struck down under the Court’s strict scrutiny jurisprudence. Specifically, “[t]he interest of a state when it comes to voting is limited to the power to fix qualifications. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored.”\textsuperscript{62}

\textit{i. State action?}

When poll challengers burden the right to vote, state action exists because: the state passed the law that created the poll watching process, which directly burdened the right to vote. But a challenge to the poll watching practice under the Equal Protection Clause based on the discriminatory actions by a political party is slightly different. In that situation, a political party is the actor making the discriminatory policy, not the state. To enjoin the poll challenging process, a court would have to find that the party was a state actor:

Under the state action doctrine developed by the federal courts, the United States constitutional guarantees of free speech, equal protection, and due process impose restrictions or obligations only on state actors. As such, United States constitutional civil rights protect only against governmental action, either actual or constructive, in the shape of laws, customs, or judicial or executive proceedings. The rights and

\textsuperscript{61} See Kramer v. Union Free Sch. Dist., 395 U.S. 621, 636 (1969) (“Although at times variously phrased, the traditional test of a statute’s validity under the Equal Protection Clause is a familiar one: a legislative classification is invalid only ‘if it rest[s] on grounds wholly irrelevant to achievement of the regulation’s objectives.’”); Issacharoff et al., supra note 52, at 320 (“The problem in Gray and Reynolds was not the random, one-time-only differential weighting of individuals’ votes, but the systematic degradation of identifiable blocs of citizens’ voting strength.”).

\textsuperscript{62} Harper, 383 U.S. at 668 (citation omitted).
liberties guaranteed by the United States Constitution therefore erect no shield against merely private conduct.  

According to the Supreme Court in the White Primary Cases, in certain situations where political parties perform the traditional functions of government, the courts should view political parties as state actors. However, "[w]hile state action may exist when political parties exercise the 'traditional government function' of conducting elections, it is not true that every act of a political party is state action."

In examining whether a political party is "a state actor," "[t]he inquiry must begin by determining if there is a sufficiently close nexus between the state and the challenged action of the political party so that the action of the latter may be fairly treated as that of the state itself." Certainly, when the political parties decided to engage in poll challenging in the 2004 Election, they were conducting a traditional state function. Traditionally, the federal government checks voters as they arrive at the polls, and the state protects the polling place. In fact,

63. Republican Party of Tex. v. Dietz, 940 S.W.2d 86, 88-89 (Tex. 1997). As the Supreme Court wrote:

Since the decision of this Court in the Civil Rights Cases, 109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

Shelley v. Kraemer, 334 U.S. 1, 13 (1948); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164 (1978) ("A state is responsible for the . . . act of a private party when the state, by its laws, has compelled the act. . . . This court, however, has never held that a state's mere acquiescence in a private action converts that action into that of the State.").

64. See Terry v. Adams, 345 U.S. 461, 470 (1953) (finding that a party which chooses the eventual county representative in its primary cannot deny African Americans the opportunity to vote in the only election that matters); Smith v. Allwright, 321 U.S. 649, 664-65 (1944) (finding that a party cannot deny African Americans the opportunity to vote in primaries); Nixon v. Condon, 286 U.S. 73, 89 (1932) (striking down a provision that gave the party power to describe voting qualifications after it was shown they denied African Americans the opportunity to vote); Nixon v. Herndon, 273 U.S. 536, 540-41 (1927) (proscribing a statute that barred African Americans from voting).

65. See Ellen D. Katz, Resurrecting the White Primary, 153 U. PA. L. REV. 325, 335 (2004). But see Daniel Hays Lowenstein, Associational Rights of Major Political Parties: A Skeptical Inquiry, 71 TEX. L. REV. 1741 (1993) ("Nearly everyone who has written about the constitutional rights or obligations of parties seems to have assumed that whether parties or their activities are to be classified as 'private' or 'public' is a crucial issue.").

66. Republican Party of Tex., 940 S.W.2d at 92. See also Banchy v. Republican Party of Hamilton County, 898 F.2d 1192, 1195 (6th Cir. 1990) ("merely because the Republican Party has chosen to do something that the state has required them to do does not mean that the voluntary action of the party becomes state action."); Kay v. N.H. Democratic Party, 821 F.2d 31, 33 (1st Cir. 1987).


preserving the integrity of elections is not only a state action; the Supreme Court has found it a compelling state interest. In *Burton v. Freeman*, the Court held that “[a] state indisputably has a compelling interest in preserving the integrity of its election process. . . . The court thus has upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.” 69 Because the purpose of the partisan poll challengers is to regulate an area that is usually left to the states, the Court would likely find the parties’ actions to be “state actions.” 70

Additionally, the poll challengers operating on Election Day 2004 were not involved in “conducting internal affairs of their party,” 71 they were challenging votes in a state-established public location. Furthermore, the voters they challenged may not have been a member of their party and in most cases were not. 72 Thus, the poll challengers involved themselves in a very public procedure.

Finally, where the supposed “state action” involves race, the courts are more likely to find “state action,” and the plaintiff’s burden is lower. In *Jackson v. Metropolitan Edison Co.*, the Court described its state action analysis:

In *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), the Court noted that by its inaction, the State had “elected to place its power, property and prestige behind the admitted discrimination,” although the State did not actually order the discrimination. *See id.*, at 726–727 (Stewart, J., concurring). And in *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967), the Court based its “state action” ruling on the fact that the California constitutional provision “was intended to authorize, and does authorize, racial discrimination in the housing market.” Even in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176-177 (1972), the Court suggested that if the State’s regulation had in any way fostered or encouraged racial discrimination, a state-action finding might have been justified. Certainly this is a less rigid standard than the Court’s requirement in this case that the Public Utility Commission be shown to have ordered the challenged conduct, not merely to have approved it. 73

Although it is not a certainty, the Supreme Court would likely find that the parties’ operatives who served as poll challengers were engaging in “state action.”

**ii. Invidious discrimination against a suspect class**

Assuming that the parties’ actions were “state action,” the equal protection analysis would turn to whether the policies used a suspect classification as a

69. *Id.* at 199.
70. *Federspiel*, 867 F. Supp. at 622 (“[I]n the ‘public function’ area there can be state action if the private group is serving a public function that has been traditionally ‘the exclusive prerogative of the state.’”).
proxy for voter fraud. "No state can pass a law regulating elections that violates the command of the U.S. Const. amend. XIV that no state shall deny to any person the equal protection of the laws."\(^74\)

Poll challengers have a long history of intimidating and discriminating against minority voters.\(^75\) A number of studies cited by the Sixth Circuit demonstrated that the poll watching process has diluted the minority vote in close elections: "Numerous studies have documented the dramatic effect of poll watchers on African-American voters. These studies are strong evidence of both an effect and a burden on the voting rights of all voters."\(^76\) In *Summit County Democratic Central & Executive Committee v. Blackwell*, the Sixth Circuit cited:

A study published in the 1981 Civil Rights Research Review, reported that in almost half the counties in Georgia, pollwatchers intimidated or discriminated against prospective African American voters. A November 11, 1993 report by Associated Press reporter Jim Abrams quoted an anonymous Justice Department Official about post-1988 developments in Los Angeles: "All of these moves are called ballot security moves, moves by plain citizens to keep illegal voters from the polls, but none targeted illegal voters. They all targeted minority voters and specifically threatened them with some dire consequences if there are problems with voter records."

[And in a 1996 study, David Burnham reported that The Republican National Committee and the New Jersey Republican State Committee engaged in a "concerted effort to threaten and harass black and Hispanic voters" via a "ballot security" effort.\(^77\)]

As these studies reveal, any constitutional analysis of the poll challenging process "must not be read without the benefit of a bit of history about race and political parties in this country."\(^78\) There is a long history of minority voter intimidation in the United States and poll challenging has been a significant part of that history.\(^79\)

America's experience with poll watching in 2004 was not an exception. The parties' poll challengers deliberately, and in some cases openly, targeted

\(^74\) Williams v. Rhodes, 393 U.S. 23, 29 (1968).


\(^76\) See Blackwell, 388 F.3d at 554 (Cole, Jr., J., dissenting) (citation omitted).

\(^77\) Blackwell, 388 F.3d at 554 n.1.

\(^78\) Anita F. Hill, Op-Ed, Questionable Tactics by GOP, BOSTON GLOBE, Nov. 6, 2004, at A15.

predominantly African-American neighborhoods. Commentators from various state political bodies and organizations spoke out about this targeting of African American neighborhoods before Election Day 2004. In Ohio, ACLU of Ohio Legal Director Jeff Gamso stated in a press release before the election that:

“In places like Hamilton County, we have seen that there is a conscious effort by the Republican Party to target the African American community. . . . In Hamilton County, 250 out of 251 precincts targeted by Republicans with challengers are African American precincts. All Ohioans should be embarrassed by these tactics and ought to reject the politics of fear, intimidation, and race hatred.”

In fact, in Hamilton County, Ohio, 97% of newly registered African-American voters were expected to see a challenger on Election Day, as opposed to only 14% of new White voters. In Michigan, State Representative John Pappageorge, the chairman of Michigan Veterans for Bush-Cheney was forced to resign his office after he announced, “If we do not suppress the Detroit vote, we’re going to have a tough time in this election cycle.” African-Americans make up over 80 percent of the population in Detroit. In Kentucky, Jefferson County GOP Chairman Jack Richardson was widely criticized after releasing a plan to replace traditional poll workers with white partisan challengers in areas with a large numbers of black voters. His plan openly targeted African-American precincts. Evidence of discriminatory targeting by election and party officials suggests that there was an equal protection violation on Election Day 2004.

iii. An equal protection violation

By all accounts, the political parties deliberately and knowingly sent poll challengers to minority precincts, invidiously classifying African-Americans, a suspect class. As the Supreme Court has stated, this type of policy cannot remain intact, because:

The Equal Protection Clause [of the U.S. Const. amend. XIV] does not make every minor difference in the application of laws to different groups a violation of our

80. See, e.g., Joseph Gerth, Some In GOP Urge Party Chief To Quit; Vote Challenger Plan Is Opposed, COURIER-J., Aug. 3, 2004, at 1B.
82. Spencer v. Blackwell, 347 F. Supp. 2d 528, 530 (S.D. Ohio 2004). See also Montemurri & Bello, supra note 54, at 10A (noting that poll challengers were present at every one of the 254 polling sites in Detroit).
83. See Kathleen Gray, Remark Sets Off Election Fervor, DETROIT FREE PRESS, Oct. 13, 2004 at 1B.
84. See Alejandro Bodipo, Hispanics Seek Bolder Voice; Growing Numbers Aren’t Resulting in Increased Influence, DETROIT FREE PRESS, Oct. 14, 2003, at 1A.
85. Gerth, supra note 80.
Constitution. But "invidious" distinctions cannot be enacted without a violation of the Equal Protection Clause. In determining whether or not a state law violates the Equal Protection Clause, [an appellate] court must consider the facts and circumstances behind the law, the interests which the state claims to be protecting, and the interests of those who are disadvantaged by the classification. 86

Classifications based on race are subject to strict scrutiny. 87 The classifying policy must be narrowly tailored to advance a compelling state interest. 88 If they are not, such classifications are unconstitutional. 89 As described above in part I.B.1.c., the partisan poll challengers served no legitimate state interest, and their focus on African-American precincts certainly did not. The political parties certainly could have developed a better plan for dispersing their operatives than only sending them to minority districts. Saddled with accusations of racism, 90 the political parties never presented any evidence that voter fraud was more likely in minority precincts, or that they had developed their deployment strategy in a way that attempted to avoid using race as a proxy for voter fraud. Therefore, no compelling interest merited the parties' classification of minorities as proliferators of voter fraud. 91 As one Sixth Circuit Judge found:

In this case, we need not go so far as to balance these interests in a vacuum, however, because here, the rights of those seeking to prevent voter fraud are already well protected by the election protocols established by the state: at each polling place, there are election officials, election judges, and ordinary voters who can challenge potential voter fraud. 92

Because dispersing party operatives based on race did not further a compelling state interest and doing so was not narrowly tailored based on evidence of voter fraud in minority district, there is no way that the policies could survive strict scrutiny by the courts. 93

89. See id.
90. See discussion supra part I.B.2.b.
91. Indeed, the Sixth Circuit wondered why the district courts in the Ohio cases before the 2004 Election did not examine the poll challengers under the courts' equal protection jurisprudence. Summit County Democratic Cent. & Executive Comm. v. Blackwell, 388 F.3d 547, 554 (6th Cir. 2004) ("district courts did not render their decisions on Equal Protection grounds") (Cole, Jr., J., dissenting).
92. Id. at 552 (Cole, Jr., J., dissenting).
93. See discussion supra part I.B.2.b. See also Grutter, 539 U.S. at 326 (describing strict scrutiny review).
3. Voting Rights Act Violation

An equal protection claim is complicated, and does not necessarily lead to the abolition of the statutes authorizing poll challenging; it may only lead to an injunction against the parties' policies of racial deployment.94 However, a challenge under the Voting Rights Act could use the evidence of racial discrimination and disparate impact to attack the underlying statutes authorizing poll challengers.95 In fact, under the Voting Rights Act, a plaintiff does not need to show that there was discriminatory intent.96

Section 2 of the Voting Rights Act provides:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the

94. See supra pt. 1 sec. B. Indeed, the parties might just change their deployment policies, or not speak openly about them, thus undermining an equal protection challenge. This article argues that the harm of poll challengers extends beyond their impact on race.

95. This article does not seek to review the ongoing legal debate regarding the scope of Congress's enforcement powers. For that discussion, see Conn, supra note 3. As the Supreme Court has stated:

Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]." While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment.

City of Boerne v. Flores, 521 U.S. 507, 519-20 (1997). Today, it certainly appears that a "state practice could survive Equal Protection Clause scrutiny but fail Section 2 Voting Rights Act scrutiny." Johnson v. Governor of Fla., 405 F.3d 1214, 1234 (11th Cir. 2005) (finding that whether Section 2 of the Voting Rights Act applies to felon disenfranchisement provisions has divided the Circuits).

96. As the Third Circuit found:

In 1982, Congress amended § 2 of the Voting Rights Act to make clear that certain practices and procedures that result in the denial or abridgment of the right to vote are forbidden even though the absence of proof of discriminatory intent protects them from constitutional challenge.

guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b).\(^{97}\)

Accordingly, “[i]n determining whether a challenged voting practice violates § 2 [of the Voting Rights Act], the district court must . . . ‘determine, based upon a searching practical evaluation of the past and present reality,’ . . . whether the political process is equally open to minority voters.”\(^{98}\) In examining the totality of the circumstances, a finding of discriminatory results alone is enough to establish a claim under the Voting Rights Act.\(^{99}\)

i. Discriminatory impact and burden on minorities

Even if the political parties were successful in arguing that minority neighborhoods were not intentionally targeted, in a § 2 challenge, a court could also consider the disparate impact the poll challengers had on minority communities on Election Day 2004.\(^{100}\) After all, the targeting of minority neighborhoods had its intended effect. Indeed, in one survey of Ohio voters, 16% of African-American respondents reported feelings of intimidation on Election Day 2004;\(^{101}\) only 5% of White respondents reported similar feelings.\(^{102}\) In addition, African-Americans were much more likely to have their identity questioned.\(^{103}\) Despite laws stating that voters only needed to present identification if they had not done so when they registered, 47% of African-American voters in Ohio reported having their identification checked.\(^{104}\) Only 35% of White voters in Ohio reported having their identification checked.\(^{105}\) These results were not accidental or unexpected; they were, and are, a national disgrace and a direct result of the poll challenging laws. Combined with the other evidence regarding the impact of poll challenging on minority communities, and the overall burden of disproportionate poll challenging in minority districts, a court would likely find a Voting Rights Act violation.

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99. Chisom, 501 U.S. at 404 (“Congress made clear that a violation of § 2 could be established by proof of discriminatory results alone.”).
100. Disparate impact, although not a sufficient factor, would weigh on any court’s decision. See Washington v. Davis, 426 U.S. 229, 242 (1976) (“Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.”) (citing McLaughlin v. Florida, 379 U.S. 184 (1964)).
102. Id.
103. Id. at 4.
104. Id.
105. Id.
ii. A violation of the Voting Rights Act

In *Thornburg v. Gingles*, the Supreme Court noted that “[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” The poll challenging statutes are a “practice” with “social and historical conditions” that can be traced to poll taxes and discretionary tests. These statutes also create inequality by providing an extra hurdle that African-Americans must go over in order to vote. They change the experiences of African-American voters by creating longer lines and an avenue for intimidation at the polling place. Although not explicitly written to discriminate, the poll challenging statutes have been used, and continue to be used, in a discriminatory manner, with proven disparate impacts. They defy the very mission of the Voting Rights Act: “[T]o rid the country of racial discrimination in voting.” Therefore, the Voting Rights Act should be used to provide permanent injunctive relief against poll challenging.

C. The Expressive Harms

This article suggests three potential angles plaintiffs could take to contest the poll challengers in the courts: Fundamental Right to Vote, Equal Protection Clause, and Voting Rights Act. Reasonable legal minds could differ as to the strength of these constitutional challenges. However, one thing is clear from voters’ experiences on Election Day 2004: The presence of poll challengers detrimentally changed the American democratic experience, perhaps, forever.

1. Altering Voters’ Experiences at the Polls

Economists have wondered why voters go to the polls on Election Day. After all, the act of voting does not make much sense given the low likelihood that one’s vote will ultimately change the outcome of an election. However,

107. See *Hill, supra* note 78.
111. As one recent study explains:

The fact that people vote is a longstanding puzzle to economists. Since instrumental benefits are close to zero, but not so the costs from going to the polls, a rational individual should abstain from voting. The “Voting Paradox” describes the fact that in spite of the economic prediction of a very low voter turnout, a fairly large amount of people goes to the polls.

there is evidence to suggest that voters go to the polls for the social experience, and for the social esteem of being viewed as a citizen who fulfills her civic duty. But in 2004, poll challenging changed this positive social experience into an adversarial process, thus impacting one of the greatest incentives to voting: the enjoyment of voting.

Rather than walking into a polling site filled with familiar faces and neighbors, voters in 2004 entered polling sites to find booths guarded by partisan protectors. Surveys taken just after the 2004 Election found that only 65% of Ohio voters were satisfied with their voting experience (70% of Whites and 26% of African-Americans). Poll challengers contributed to longer lines, more scrutinizing identification checks, and a more impersonal experience at the polls.

As one commentator wrote on Election Day:

Besieged by partisan hacks, polling places will be transformed from peaceful and orderly to contentious and tense. Queues—already expected in this tight election—will grow as officials stop to consider challenges motivated by partisan politics. Although voters standing in the queue when the polls close are entitled to cast a ballot, no doubt many will give up, irritated by needless delay and intimidated by an atmosphere of hostility.

Poll challengers negatively altered Americans’ experiences at the polls in 2004 and were largely unchecked by any supervising power.

2. **Who was Challenging the Poll Challengers?**

Beyond a few empty threats from the political parties prior to the 2004 Election that they would prosecute any poll challengers who brought challenges in a discriminatory manner, there was little discussion about the regulation of the poll challengers. This is astounding. After all, there was very little guidance for how poll challengers should operate and after the election there was extensive documentation of problems at the polls. Thus, the American public is left to wonder: Was anyone watching the poll challengers? Most likely, the answer is no.

Indeed, in 2004 there were no conspicuous reports of poll challengers being sanctioned or prosecuted. With regard to the tradition of poll watching, one editorial before the 2004 Election suggested that “[a] few high-profile

112. *Id.* See also Dubner & Levitt, *supra* note 110.
114. Thompson, *supra* note 5.
115. DEMOCRATIC NATIONAL COMMITTEE, “IMPORTANT LEGAL NOTICE” (on file with author); Joni James & Adam Smith, *Will Florida Replay 2000 Drama?*, ST. PETERSBURG TIMES (Fla.), Nov. 2, 2004, at 1A.
prosecutions of political operatives, and even elections officials, would go a long way toward ending a disgraceful American tradition." But with elections officials already stretched to the limit of their resources in most states, poll challengers went largely unmonitored beyond local supervision by the judges at polling sites. Thus, many stories of wrongdoing and intimidation may never come to light.

3. *Dividing the Nation Through Partisan Distrust*

The poll watching phenomenon in 2004 was predicated by a belief on both sides of the political aisle that the other side was planning on cheating. Thus, at a time when the nation was already divided on so many important issues, both parties fueled the rallying rift in American society through unfounded and saddening accusations of electoral fraud. Suddenly, the neighbors with the opposing candidate’s sign on their lawn not only wanted the other candidate to win, they were willing to engage in orchestrated illegal schemes in order to win the election. Poll watching brought these sentiments to a boiling point by pitting groups of dedicated partisans against one another at each polling place. Poll challengers detrimentally impacted many voters’ experiences at the polls on Election Day 2004, and when many poll challengers left the polls that night, few had found any registration violations, but many had a stronger dislike for the opposing political party. The poll watching process further entrenched the partisan political divide in America by encouraging partisanship and cynicism.

For example, the Kerry-Edwards/DNC “Colorado Election Day Manual: A Detailed Guide To Voting In Colorado” released before the election suggested: “If no signs of intimidation techniques have emerged yet, launch a ‘pre-emptive strike’ (particularly well-suited to states in which these techniques have been tried in the past).” The manual suggests that a “pre-emptive strike” might include issuing a press release, priming minority leadership to discuss the issue in the media, and placing stories in which minority leadership express concern about potential intimidation.

120. See, e.g., Nelson, *supra* note 44, at 4 (noting that “tempers flared” at some precincts in Ohio).
122. *Id*.
A number of poll challengers reported being the targets of violence.123 Some poll challengers reported organized efforts by political operatives to intimidate them with brute force.124 There were also reports that pro-life groups who supported President Bush screamed “baby killers” at Kerry supporters and voters.125 In Lima, Ohio, police reportedly towed cars outside of polling places with Kerry signs or stickers on them, and a vocal Kerry supporter’s car was vandalized.126

Poll challengers from both political parties were threatened and discouraged with law suits and legal action. For example, in Florida, and a number of other states, the DNC sent an “Important Legal Notice” to Republican poll challengers warning them that the DNC and state Democratic Party “will insist on strict enforcement of the law.”127 Rather than work together on the supposed common goal of, “protecting the election,” Democrat and Republican poll challengers simply found a new medium through which to engage in partisan bickering.

In the days leading up to the election, a poll found that 51% of Americans felt that the 2004 campaign was the most negative presidential campaign in their memory.128 Most Americans believed that there would be problems at the polling sites and that fraud would contribute to these problems.129 In a perfect world, the two major political parties would have released a statement asking their supporters to refrain from fraudulent activities and assuring the American public that neither party was engaging in misconduct. Instead, both parties chose to exploit this distrustful outlook by suggesting that the other party was going to try to cheat.130 When voters arrived at the polls and were confronted by the unusual site of party operatives in the polling place, the most sacred sanctuary of our democracy, voting became a venal action in an adversarial process. Poll watching was a manifestation and propagation of the partisan hatred and distrust which threatens the very electoral process poll challengers professed to want to protect.

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124. Id.
125. See Jensen, supra note 116, at 6.
126. Id.
127. DEMOCRATIC NATIONAL COMMITTEE, “IMPORTANT LEGAL NOTICE” (on file with author).
129. See DNC, supra note 101, at 8.
130. As the New York Times reported:

Much of the tone has been set by a propaganda war of sorts between the parties, with the Democrats charging that efforts are being made to suppress the vote and Republicans warning against voter fraud or double voting. In part, the charges are designed by each party to get out their core supporters to the polls.

II. OUTSIDE THE POLLS

While poll challengers sat inside polling sites in Ohio, and in other key electoral states around the country, another group of partisan imports braved stormy weather outside the polls in a crusade to "protect the election."\footnote{131} On Election Day 2004, armies of self-proclaimed "Voting Rights Attorneys" descended on swing states at the request of the two major parties.\footnote{132}

Whereas, under Ohio and Florida state law, poll challengers had to be from the state in which they wanted to challenge votes, the lawyers that flooded into swing states in the days leading up to the elections came from all over the country.\footnote{133} For the most part, these lawyers were armed with their respective party’s handbook filled with "strategies to challenge new voters at the polls, to keep polling stations open late if lines are long and to demand recounts if victory margins are razor-thin."\footnote{134} Certain that the courts would, once again, become involved in the presidential election, the legal community arrived in a self-fulfilling prophecy to ensure its presence, should litigation become necessary.

A. Why were the Polling Site Lawyers There?

On Election Day 2004, there were partisan lawyers and non-partisan lawyers. The partisan lawyers who went to swing states in 2004 traveled for the paradoxical purposes of preventing another Bush v. Gore scenario and looking for litigable issues on behalf of their candidate.\footnote{135} The so-called non-partisan lawyers who went to swing states were there to keep people informed of their rights and to help any voter who was turned away from the polls.\footnote{136} Thus, many key polling sites had three groups of "legal experts": Democrats, Republicans, and non-partisans.\footnote{137}

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\footnote{133} As the \textit{New York Times} reported in the days leading up to the election:

But the legal preparations are very real—and very large. With more than two weeks to go before polls open, law-yers recruited by the two parties and independent groups have begun flooding into Ohio, Florida, Pennsylvania and other swing states.

\footnote{134} \textit{Id.}


\footnote{136} Birg, supra note 132, at 307.

\footnote{137} It is also worth noting that many of these "legal experts" were not licensed lawyers at all. Law students, college students, and political activists were all recruited to work as voting rights counselors at the polls.
More importantly, the partisan lawyers who went to swing states were there because neither party wanted the other to out-lawyer them in any state. 138 Robert F. Bauer, the Democratic National Committee’s national counsel for voter protection, bragged about the Democrats’ recruitment efforts: “It is the largest law firm in the United States . . . If we paid everyone at the prevailing market rate, it would rank among the more robust economies in the world.” 139 Not to be outdone, Mindy Tucker Fletcher, a senior adviser to the Republican party in Florida, shot back: “Why is that something to be proud of? . . . [W]e have lawyers in every county, and at the state level.”140

But neither party’s legal response was something to be proud of. While both parties’ legal leadership jostled for the domineering position, they neglected some of the basic ethics and guidelines of the legal profession; 141 damaging America’s view of the electoral process and further tarnishing the public’s view of the legal profession.

B. The Legal/Ethical Violation

Election Day 2004 was arguably the largest and most organized “ambulance chase” in legal history. The Democratic and Republican parties encouraged and subsidized lawyers and law students’ deployment in swing states to provide unsolicited legal advice, look for potential law suits, and create a record for future litigation. 142 The lawyers who went across state lines were not licensed to practice law in the states in which they arrived, the law students certainly were not, and for the most part neither the lawyers nor the law students had knowledge of that state’s laws or election law in general. In many cases, these lawyers and students represented themselves as voting rights experts and advised voters on a wide array of legal issues and then reported back to media outlets and party leadership about the conversations they had with these “clients.” These lawyers had an agenda and were not looking out for the best interests of the person they were advising in all cases. All of these actions are questionable, and potentially punishable, under the Model Rules of Professional Conduct (“Model Rules”).

140. Id.
141. Id., supra note 132, at 308.
142. See Jonathan Groner, Girding For Another Bush v. Gore, LEGAL TIMES, Mar. 1, 2004, at 1 (“In a program they call Protect and Promote the Vote, or P2TV, the Democrats are tapping thousands of volunteer lawyers in hotly contested states. They will watch polling places and be prepared to go to court. Even before Election Day, these lawyers will look out for attempts by voting officials to purge voter rolls or make it more difficult to register.”).
1. Unauthorized Practice of Law

The lawyers who worked to protect the election arguably engaged in the unauthorized practice of law. The Model Rules proscribe the unauthorized practice of law in Rule 5.5 and each state has a parallel rule that’s purpose is to protect “the public against rendition of legal services by unqualified persons.” In essence, a lawyer cannot practice law outside of a state in which she is licensed except under some very limited exceptions. Also, a lawyer cannot represent, even tacitly, that they are licensed in a state in which they are not. The lawyers who flooded Ohio, Florida, and other swing states were not allowed to practice law in those states.

Were these lawyers actually practicing law? This is debatable. Each state defines what constitutes the “practice of law.” The Supreme Court of Ohio recently stated:

Section 2(B)(1)(g), Article IV of the Ohio Constitution, confers on [the Supreme Court of Ohio] original jurisdiction over all matters related to the practice of law. A person who is not admitted to practice law in Ohio under Gov. ’Bar R. I and is not granted active status under Gov. ’Bar R VI or certified under Gov. Bar R. II, IX, or XI engages in the unauthorized practice of law when he or she provides legal services to another. Gov. Bar R. VII(2)(A). The practice of law is not limited to appearances in court, but also includes giving legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are preserved.

When lawyers stood outside of Ohio polling places and offered advice to voters on their rights and the remedies for violations of those rights, including giving advice on provisional ballots, many of the voters probably believed they were getting legal advice. Armed with copies of the “Voters Bill of Rights,” legal manuals, and “You Have the Right to Vote T-shirts,” many of the lawyers probably thought they were giving legal advice as well. Additionally, many of these lawyers were documenting potential legal violations in preparation for litigation. If voting is a protected legal right and lawyers gave advice on how

143. Birg, supra note 132, at 308.
144. See Model Rules of Prof’l Conduct R. 5.5 (2004); Model Rules of Prof’l Conduct R. 5.5 cmt. 2 (2004).
145. Id. There is an exception for the temporary practice of law outside of one’s licensing state. However, this exception requires that a lawyer associate with a licensed lawyer or practice law that is reasonably related to their in-state practice. The exception would not apply in the case of the election volunteer lawyers.
146. Id.
147. Birg, supra note 132, at 310-14.
149. See Birg, supra note 132, at 307.
150. Dao, supra note 133 (reporting before the election that the lawyers were “prepared to file complaints or to ask judges to keep the polls open late” and that “[b]oth parties will also be
to exercise this right, one could make a convincing argument that the polling site lawyers were practicing law.

The Model Rules were designed in part to stop non-lawyers from holding themselves out as lawyers to the public and to stop lawyers from giving advice when they are not licensed to do so.151 When there is the possibility that a layperson might misconstrue a lawyer's advice as a part of an attorney-client relationship, lawyers have an obligation to explain the nature of their relationship.152 On Election Day 2004, the lawyers did not. Law students are also prohibited from practicing law, but on Election Day 2004 many law students were inexplicably grouped with attorneys for the purposes of election protection efforts.153 For this reason, the lawyers in Ohio and around the country on Election Day 2004 violated the rules proscribing the unauthorized and unlicensed practice of law.

2. Election Law Experts?

Most of the lawyers who fanned out on Election Day 2004 received some sort of pre-election training.154 A number of such training sessions were held at law schools and legal offices throughout the country.155 These sessions were often run by a party representative or a staff attorney from one of the many organizations that subsidized the election protection efforts.156 After a few hours of training, lawyers and students were given packets of information, and in most cases received a sticker, sign, or t-shirt that declared that they were part of the "Bush Legal Team" or "Kerry Legal Team," a "Voting Rights Attorney," "Election Protection Volunteer," or some variation of these messages.157 In many cases, these identifiers also proudly listed, or displayed the logos of, a number of legal or law-related organizations that had sponsored the items.158 In other words, with no expertise and little legal training in voting rights or election law, lawyers presented themselves to the voting public as experts in these areas of law and as associates of certain legitimate and well-respected legal organizations, and even held themselves out as state officials or state-sanctioned representatives.

However, the Model Rules explicitly state in Rule 7.4, "Communication of Fields of Practice and Specialization," that a lawyer cannot represent herself as a specialist in an area of law unless "such certification is granted by an

154. See id.
155. See id.
156. See Dao, supra note 133.
157. See Birg, supra note 132, at 308.
158. See id.
organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists.”\textsuperscript{159} Rule 7.1, “Communications Concerning A Lawyer’s Services,” states that “[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”\textsuperscript{160} The lawyers who represented themselves as voting rights or election law experts violated these provisions.\textsuperscript{161} Likely, none of the lawyers were accredited by state-approved organizations and none of them had the requisite level of expertise to be considered an expert in election law. By informing voters that they were attorneys and wearing shirts that designated themselves as such, the lawyers misled the voting public.

3. \textit{The Great “Ambulance Chase”: Client Solicitation}

The election protection lawyers and partisan legal teams resembled organized “ambulance chasers” on Election Day 2004. The legal profession has consistently shunned the solicitation of potential clients through in-person contact because the practice makes the profession look gluttonous and contributes to the view that lawyers are litigious.\textsuperscript{162} Generally, lawyers wait for clients to come to them with a potential cause of action. Lawyers are not supposed to “create” or encourage law suits and an in-person solicitation may never involve “coercion, duress or harassment.”\textsuperscript{163} The Supreme Court addressed the issue in \textit{Ohralik v. Ohio State Bar Association}, and stated:

The solicitation of business by a lawyer through direct, in-person communication with the prospective client has long been viewed as inconsistent with the profession’s ideal of the attorney-client relationship and as posing a significant potential for harm to the prospective client. It has been proscribed by the organized Bar for many years.\textsuperscript{164}

\textsuperscript{159} \textit{Model Rules of Prof’l Conduct} R. 7.4 (2004); \textit{Model Rules of Prof’l Conduct} R. 7.4 cmt. 3 (2004).
\textsuperscript{160} \textit{Model Rules of Prof’l Conduct} R. 7.1 (2004).
\textsuperscript{161} In the State of Ohio:

In some instances, a lawyer confines his or her practice to a particular field of law. Except as provided in the Rules for the Government of the Bar of Ohio, a lawyer should not be permitted to hold himself or herself out as a specialist or as having special training or ability, other than in the historically excepted fields of admiralty, trademark, and patent law.

\textsuperscript{162} See \textit{Model Rules of Prof’l Conduct} R. 7.3(b) (2004).
\textsuperscript{163} \textit{Id}.
The profession's policies and standards are backed up by important policy justifications. As the comments to Model Rule 7.3 explain:

There is a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.  

Generally, the profession's proscriptions of in-person solicitation have focused on solicitation for the purpose of obtaining remunerated business.  

Whether a lawyer acts properly in volunteering in-person advice to a layperson to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laypersons in recognizing legal problems. The advice is proper only if motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. It is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause legal action to be taken merely to harass or injure another. A lawyer should not initiate an in-person contact with a non-client, personally or through a representative, for the purpose of being retained to represent him for compensation.  

Indeed, where an attorney is not seeking "pecuniary gain," the profession has allowed in-person solicitation.  As Rule 7.3 states:

A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted has a family, close personal, or prior professional relationship with the lawyer.  

Where the actions of lawyers on Election Day 2004 fit into these ethical guidelines is not clear cut. However, the action of many lawyers was certainly questionable under the Model Rules. On Election Day 2004, lawyers approached

169.  Id.
voters to provide unsolicited legal advice.\textsuperscript{170} In some instances, this solicitation may have amounted to harassment.\textsuperscript{171} Although most lawyers were not seeking monetary gain, some hoped to find positions in the new administration, and many attorneys received some sort of compensation or received credit from their employers.\textsuperscript{172} Certainly, lawyers did not shy away from the limelight on Election Day 2004; lawyers fed stories and gave interviews to any news outlet they could find before and after the election in a pageant of self-congratulation and legal marketing.\textsuperscript{173} Furthermore, many lawyers were motivated by partisan interests and by a desire to find actionable suits that could impact the outcome of the election, not a desire to provide impartial advice to their "clients."\textsuperscript{174}

4. \textit{Impartial Partisans?}

Lawyers are advocates. They are expected to represent their clients diligently and without outside influence.\textsuperscript{175} But were the lawyers on Election Day 2004 representing the voters or the political parties that sent them there? The answer is not so clear. In some cases, the lawyers helped individual voters, but in other situations the lawyers prepared their party's potential legal challenges.\textsuperscript{176} Indeed, most of the time they represented a number of interests by being present, not just their client's or the voters'.\textsuperscript{177}

Model Rule 2.1, "Advisor," states: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."\textsuperscript{178} But the advisors who helped voters outside of the polls on Election Day 2004 were anything but independent or impartial. Certainly, if a Bush supporter approached a member of the "Kerry Legal Team" for advice on asserting her right to vote,

\textsuperscript{170} Deborah Barfield Berry, \textit{Florida Polls; Volunteers Swarm to Protect Rights}, NEWSDAY, Nov. 3, 2004, at W17 ("With cars and cell phones, roving lawyers went from site to site taking complaints and offering legal advice.").

\textsuperscript{171} John Wildermuth, \textit{Parties Anticipate Chaotic Election: Observers Mobilize for Big Day, Lawyers Prepare for Fallout}, S.F. CHRON., Sept. 18, 2004, at A1 ("We are very prepared, very aggressive," Terry McAuliffe, head of the Democratic National Committee, said after the party convention in Boston.").


\textsuperscript{173} See, e.g., Cohen, supra note 4, at 4-10 ("In a sleek law firm conference room 19 stories above Park Avenue last Thursday night, the subject was where people wanted to go to monitor elections this week."); Dao & Liptak, supra note 139, at A1.

\textsuperscript{174} Derrick Nunnally, \textit{McCann Strives to Ensure a Fair Election}, MILWAUKEE J. SENTINEL (Wisc.), Nov. 1, 2004, at A2 (discussing the Milwaukee County District Attorney's decision to send prosecutors to the polls to counter "partisan attorneys from both political parties pledging to monitor—and possibly challenge—voting practices").

\textsuperscript{175} \textit{See MODEL RULES OF PROF'L CONDUCT R. 1.7}(2004).

\textsuperscript{176} \textit{See Berry, supra note 170, at W17; Fund, supra note 135, at A28.}

\textsuperscript{177} As one law student stated when asked what law students were doing at the legal call center: "I tell people to vote provisionally, and I look up their polling center to make sure they're in the right place . . . I was just feeling like I wanted to contribute something to getting Bush out of office." Alexandra Berzon, \textit{Local Lawyers Turn Election Watchdogs} (Nov. 2, 2004), http://journalism.berkeley.edu/projects/election2004/archives/2004/11/local_lawyers_t.html.

\textsuperscript{178} \textit{See MODEL RULES OF PROF'L CONDUCT R. 2.1}(2004).
there was a troubling conflict of interest for the attorney in handing out advice. These conflicts should worry the profession. After all, "[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client."^179

Not every attorney who went to the swing states violated every rule, and some probably did not violate any of the Model Rules cited above. Additionally, the Model Rules provide some room for interpretation. But, even if one could parse the rules' language to exclude the Election Day 2004 activities of the various election protection groups, the public policies behind the Model Rules suggest that something went seriously wrong that day. For some reason, lawyers and law firms, who are generally so meticulous and careful about the profession's ethical guidelines, seemed to abandon some of the most basic principles of the legal profession.^180

C. The Expressive Harm

The lawyers who volunteered on Election Day 2004 contributed to the already chaotic and intimidating atmosphere at polling sites across the country. Whether or not the actions described above are sanctionable under the Model Rules, the legal profession certainly has an interest in examining its role in the electoral process. After all, on Election Day 2004 the voting public was confronted with many of the attributes—uninformed advice, conflicting interests, misrepresentations of expertise, and ambulance chasing—that the general public dislikes and fears most from the legal profession.^181

Lawyers are generally viewed negatively in the United States. ^182 The legal profession's interaction with the electoral process did not quell many of the common stereotypes about lawyers.

^180. Certainly, one might wonder why lawyers believed that after consulting with a client they had the right to report on their advice.
^182. See generally John C. Buchanan, The Demise of Legal Professionalism: Accepting Responsibility and Implementing Change, 28 VAL. U.L. REV. 563, 563 (1994) ("Few people, lawyers or laymen, can deny that the legal profession is now largely viewed negatively. Some may blithely dismiss this negativity as the price lawyers pay for their role in society—a role which often requires them to take on grossly unattractive causes. Duty has always demanded and always will demand that lawyers risk being misunderstood. But the public perception problems lawyers face today are deeper and more widespread than any the profession has ever faced before. Worse yet, the problems are growing.").
1. Politicization of the Legal Process

The public largely views the judicial process as politicized. Indeed, articles discussing the pre-election cases in Ohio made a point of noting which President had appointed each judge involved. In essence, the press implied that the court decisions impacting the election would largely be decided by the political leanings of the judges. This implication is not unwarranted and is now firmly ingrained in legal scholarship as well. After Bush v. Gore, the public expects that politics will play a large role in courts' decisions, and the lawyers who deployed on Election Day 2004 polling sites further demonstrated the extent to which politics has infiltrated the law.

In his dissent in Bush v. Gore, Justice Stevens warned:

What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's

183. See Steven M. Pyser, Recess Appointments to the Federal Judiciary: An Unconstitutional Transformation of Senate Advice and Consent, 8 U. Pa. J. Const. L. 61, 97 (“Throughout the last twenty-five years, judicial appointments have become increasingly politicized.”).
184. See, e.g., Murray Whyte, Ohio Becomes a Polling Battleground, Toronto Star, Nov. 3, 2004, at A12 (“But a Republican appeal [in Ohio] overturned that ruling in the early-morning hours of election day. U.S. Circuit Judge John M. Rogers, appointed by Bush in 2002, ruled that the challengers could be present—just 5½ hours before polls opened statewide.”); Yvonne Abraham & Charlie Savage, Challengers Barred from Polling Places, Boston Globe, Nov. 2, 2004, at A14 (“In separate cases [in Ohio], the two judges—one appointed by President Bill Clinton, and the other appointed by President George W. Bush—ruled that the thousands of challengers the GOP hoped to place at polling places to guard against voter fraud today, and the thousands of monitors Democrats had recruited to watch them, would intimidate voters and create confusion.”).
185. See, e.g., id.
Presidential election, the identity of the loser is perfectly clear. It is the Nation’s confidence in the judge as an impartial guardian of the rule of law.\textsuperscript{188}

On Election Day 2004, the same lawyers who had spent four years arguing over whether or not the Supreme Court had been compromised by politics in Bush, allowed the legal process to become a tool of the political process, rather than a check on the process’s malevolence. Perhaps, on Election Day 2004, the loser was the nation’s confidence in the legal profession as the impartial protector of a fair political process.

2. \textit{Winning Elections through Litigation & Devaluing Votes}

The increased focus on winning elections after the polls close through litigation has devalued the act of voting. Whereas a vote in a close election might seem more important, Americans now expect a close election to be decided through litigation:

But there is a more important point: the closer an election is, the more likely that its outcome will be taken out of the voters’ hands - most vividly exemplified, of course, by the 2000 presidential race. It is true that the outcome of that election came down to a handful of voters; but their names were Kennedy, O’Connor, Rehnquist, Scalia and Thomas. And it was only the votes they cast while wearing their robes that mattered, not the ones they may have cast in their home precincts.\textsuperscript{189}

In fact, had the presidential election in 2004 been closer in Ohio, the election likely would have been decided in the courts.\textsuperscript{190}

Thus, rather than spend campaign funds on spreading their message and vision for the country, candidates now must spend a great deal of time and money preparing for the post-election legal battle.\textsuperscript{191} Instead of standing outside the polls handing out literature and discussing substantive issues with voters, America’s lawyers spoke with voters after they had voted in an attempt to establish a record for future litigation. By perpetuating the belief, and reality, that close elections will be decided by the courts, the legal profession has devalued the power of the vote and created the perception that democratic process is in the hands of judges, not the people.

\textsuperscript{188} Bush, 531 U.S. at 128-29 (Stevens, J., dissenting).
\textsuperscript{189} Dubner & Levitt, supra note 110, at 30-31.
\textsuperscript{190} Senator Kerry said, “In America, it is vital that every vote count . . . . But the outcome should be decided by voters, not a protracted legal fight.” Charles Hurt, As Night Wore On, Glee Became Gloom, WASH. TIMES, Nov. 4, 2004, at A11. See also Charles Babington & Brian Faler, Congress Makes Reelection Official; Two Lawmakers Raise Objection to Ohio Balloting, WASH. POST, Jan. 7, 2005, at A4.
\textsuperscript{191} See Groner, supra note 142, at 1.
3. No Justice or Remedy for Election Day Problems

But the 2004 Election was never placed in the hands of judges. In fact, very few law suits were ever filed in Ohio or other contested states on Election Day 2004 or in the days immediately after. Certainly, the number of law suits pales in comparison to the number of legitimate complaints that were made to election protection and partisan attorneys, and the number of calls made to hotlines across the country. Thus, perhaps, the most distressing lesson that the American public learned about the legal system in 2004, was that the legal profession is powerless and incapable of actually correcting Election Day problems or bringing justice to the disenfranchised.

In a report in The Columbus Free Press, a group of reporters wrote:

The Kerry campaign, which raised millions of dollars to guarantee “every vote will be counted” in the 2004 election, has challenged the results in just one county, where a technician dismantled at least one voting machine prior to the recount. Daniel J. Hoffheimer, an attorney hired by the Kerry campaign has emphasized his belief that despite that challenge, “this presidential election is over. The Bush-Cheney ticket has won.”

Hoffheimer is affiliated with Taft, Stettinus and Hollister, a Cincinnati firm with deep Republican ties to Ohio’s current GOP governor, Bob Taft. Hoffheimer said “the Kerry-Edwards campaign has found no conspiracy and no fraud in Ohio,” but more serious researchers continue to uncover plenty. While struggling to find the financial resources necessary for the legal challenge, the Election Protection team has continued to uncover deeply disturbing evidence of manipulation, theft and fraud that went unaudited by the official recount.

As this passage and the news reports coming out of Ohio after the 2004 Election demonstrate, the lawyers who flooded Ohio left just as quickly as they arrived. As soon as the winner of the presidential election was accepted by the general population, the legal community abandoned Ohioans, leaving thousands of voting complaints that would never receive any follow-up. Even though these voting problems and irregularities impacted local, state, and federal elections, once the presidential election was decided, the legal juggernaut no longer had an interest in rectifying voting problems from Election Day 2004.

The aftermath, or lack thereof, of Election Day 2004 revealed the election protection effort for what it truly was: a partisan effort aimed at winning the presidential election. The American voters brought their problems to the legal

192. Deborah Hastings, No Major Problems, Just Long Voter Lines, THE ADVOCATE (Baton Rouge, La.), Nov. 3, 2004, at 12A (“Common Cause reported more than 175,000 calls to its national voting hot line.”).
194. Id.
195. See ISSACHAROFF ET AL., supra note 52, at 306-07 (discussing the use of “surrogate
community, seeking justice for the inequities that have infiltrated the electoral system. But had they pulled the curtain aside, they would have realized that the whole legal interest in voting was brilliantly orchestrated by the Democratic and Republican parties. The lawyers wanted to protect the presidency, not the American electorate’s “right to vote.”

III. 2 DOWN, 48 TO GO

In the 2000 Election, the country focused on Florida. In the 2004 Election, the country focused on Ohio. Thus, legal scholars and the political parties now know a lot about politics and elections laws in Florida and Ohio. But what about the other states? Until they matter, apparently no one cares.

More accurately, until a state becomes key to winning the Electoral College, the national political parties do not care about actionable deficiencies in a state’s elections administration. By leaving election reform to the partisan political process, law suits will only be brought in certain key states prior to close elections. However, discriminatory and unconstitutional burdens on the right to vote are equally troubling whether they occur in Florida or Oklahoma, Ohio, or Massachusetts, and the legal community, and the thousands of lawyers who screamed about these burdens on Election Day 2004, need to bring suit to guarantee equality in election administration and serve as the catalyst for election reform. This is the positive impact that lawyers can have on the electoral process.

A. Precedent of One State at a Time Rather Than Real Reform

After the 2000 Election in Florida, the general public learned what poll workers, pollsters, and politicians have known for years: The voting system is deeply flawed. But rather than change the system as a whole, legal scholars and politicians focused their attention on Florida. Even though Congress passed Help America Vote Act of 2002 (HAVA) and a number of states passed minor reforms; for the most part, the litigation and legislative focus was on Florida and the types of problems that occurred there. Furthermore, most of the scholarship and election studies focused on Florida. Thus, when Floridians went to the

remedies” in election litigation).

196. See generally TOOBIN, supra note 9.
198. See Groner, supra note 142, at 1 (For the Democrats, in 2004, “[s]wing states such as Pennsylvania, Ohio, Missouri, West Virginia, and of course Florida are on the list, as are large states like California and New York that the Democrats carried handily in 2000.”)
polls in 2004 their electoral system, although far from perfect, was much improved. In the four years between presidential elections, the state had an opportunity to review its laws and prepare for the next election. But as the haze around the Electoral College map lifted in October 2004, and the parties realized that Ohio could decide the 2004 presidential election, the academic and political communities were back to scratch.\footnote{201}

The legal and legislative responses to the widespread problems with election administration have focused on fixing one state at a time. Politically, this seems strange since different candidates and rapid population movements mean that the state that “decided” an election is not necessarily a great indicator of the state that will decide the next election. Legally, this is troubling since the law guarantees equality to voters no matter what state they live in or how close an election is. In the two weeks leading up to the 2004 Election, a number of Ohio election provisions that had been on the books for years were challenged for the first time. Where was the legal community in Ohio prior to 2004? The answer is that no one cared until these laws impacted who won. But the legal community should care about state electoral systems before the 2008 Election. Rather than cross state lines to stand outside the polls in a swing state on Election Day 2008, each state’s legal community should capitalize on the current interest in elections issues by working to reform a system that is universally broken and untrustworthy.

B. Tree Falling in a Forest Phenomenon

The old riddle goes: If a tree falls in a forest and no one is there to hear it, does it make a sound? Similarly, one might ask: If elections violations occur and no partisan lawyer is present to catch them, do they matter?

When an elections statute does not impact the ultimate winner of the presidential election it still has an effect on individuals’ voting rights and on the outcome in smaller races around the country. When pre-election law suits are brought against a state, like the suits leading up to the 2004 Election, they usually cite the burden and harm on individuals’ voting rights. Thus, the focus of the harm is on the individual voter, not the harm to a political candidate who will ultimately lose if the policy remains intact. Thus, the law should be concerned about these burdens whether they occur in swing or safe states.

A policy like poll challenging may not dilute the vote in minority communities in certain states enough to impact the presidential race’s outcome in that state. But, the minority community’s voting power is still diluted for the races for Governor, congressional seats, state legislative representatives, judges, and even city council positions. Indeed, the legal problems that the scholarship has found with elections laws in Ohio since 2004 and Florida since 2000 have a profound

\footnote{201. Dan Tokaji, What Voting Equipment Will Ohio’s 10 Largest Counties Be Using?, http://moritzlaw.osu.edu/electionlaw/ebook/part4/equipment_machines03.html (last visited Nov. 8, 2005) (“When the polls open on November 2, 2004, most Ohio voters will find the same voting equipment that they used four years ago.”).}
impact on a state’s representative makeup at every political level.\textsuperscript{202} If elections violations occur and no partisan lawyer is present to bring suit, they still impact the election and the legal community should work to ensure that all voters’ rights are protected, not just those that happen to live in key electoral states.

C. Fraud Challengers & Legal Challenges As Band-Aids on Wounds

Additionally, that the major political parties felt there was a need to deploy poll challengers and partisan lawyers throughout Ohio was emblematic of a larger problem with election reform in America today: The election laws around the country are unclear, confusing, inconsistent in codification and application, and enforced under insufficient legal inspection. The poll watching process put a Band-Aid infected with the disease of partisan politics over an open wound in our most fundamental democratic process.

Although this article does not address all the areas in need of election reform,\textsuperscript{203} it is clear that poll challengers and polling site lawyers are simply a temporary solution to larger problems with election administration. If the registration process was more trustworthy and there were standard procedures to guarantee that voters did not vote twice, then the political parties would not see a legitimate need for poll challengers.\textsuperscript{204} If the minority vote was not plagued by constructive and intentional disenfranchisement then perhaps the parties would not feel as if there was a need to preserve a close legal record in minority districts. Although it may be enough to satisfy the major political parties, Americans should not be satisfied with a system that relies on the unpredictable protections of partisan poll watching. Therefore, systematic election reform is necessary in the United States.

D. Confidence in Elections

During the 2004 Election, the American public believed it needed poll watching in order for the democratic process to succeed. In the final New York Times/CBS News Poll of the 2004 campaign, “\textit{[a] majority of voters—and an overwhelming number of African-Americans—said they were concerned that their own votes would not be counted properly, and one-third said they expected to encounter problems when they went to vote.}\textsuperscript{205} Indeed, prior to the 2004 Election there was a severe distrust of the authenticity of the electoral process and a belief that the election would be “stolen.”\textsuperscript{206}

\begin{itemize}
  \item \textsuperscript{202} See generally Conn, supra note 3.
  \item \textsuperscript{203} For a discussion of different areas in need of reform, see Coney, supra note 75; Jason Belmont Conn, Felon Disenfranchisement Laws: Partisan Politics in the Legislatures, 10 Mich. J. Race & L. 495 (2005); Conn, supra note 3.
  \item \textsuperscript{204} See Coney, supra note 75, at 187.
  \item \textsuperscript{205} Adam & Elder, supra note 3, at A16.
  \item \textsuperscript{206} Wildermuth, supra note 171 (“There’s a growing concern that the 2004 election will be close enough to be stolen, and neither side has been shy about pointing fingers.”).
\end{itemize}
But this lack of confidence in our electoral process was reinforced, and exacerbated, by voters’ experiences at the polls in 2004. A survey of Ohio voters after the 2004 Election found that less than one-third (30%) said their 2004 voting experience had made them much more confident in the reliability of elections in the state of Ohio.\(^{207}\) Almost one quarter (23%) of the voters said that there experience made them less confident in the reliability of elections.\(^{208}\) Less than three-fourths (71%) of all voters in that state said they were very confident that their vote was counted correctly.\(^{209}\) Additionally, only two-thirds of voters in Ohio were very satisfied with their overall voting experience.\(^{210}\) These data demonstrate that the greatest failure of the poll watching phenomena was that it did not make voters feel better about the electoral process.\(^{211}\) Indeed, “[t]he 2000 election—combined with pre-Election Day [2004] accusations of voter disenfranchisement in Ohio and Florida—has poisoned the view of many Americans about the election system.”\(^{212}\)

CONCLUSION

A. The Legal Community’s Role in the Solution

This article has outlined an admittedly cynical view of the election protection efforts on Election Day 2004. Although this article has focused on the negative interactions between the legal community and the electoral process, there are some positives that can be found in the 2004 Election.

A lawyer is asked to be “a public citizen having special responsibility for the quality of justice,”\(^{213}\) and throughout the 2004 election cycle, lawyers heard that call. The legal community engaged in unprecedented involvement in the political process, and although this article has argued that this energy was misdirected and misused, if this interest in voting rights was channeled towards efforts at reform, perhaps there would not be such a need for poll challengers.

The legal community can use the legislative process, and law suits challenging the discriminatory placement of poll monitors under the Fourteenth Amendment and Voting Rights Act, to reform the poll challenging process. The legal community can curtail the presence of polling site lawyers on Election Day by enforcing ethics rules that are already in place. In addition, state bar associations can use the Model Rules to shape lawyers’ actions on Election Day. By taking away or regulating the parties’ self-interested use of the legal community on

\(^{207}\) DNC, supra note 101, at 8.

\(^{208}\) Id.

\(^{209}\) Id.

\(^{210}\) Id.

\(^{211}\) See Ford, supra note 5 (“It’s commonplace, especially in the case of presidential elections involving millions of voters and decided by the arcane mechanisms of the Electoral College, for people to feel that their vote won’t count. But no one should feel that her vote won’t be counted.”).

\(^{212}\) Nagourney & Elder, supra note 3, at A16.

\(^{213}\) See MODEL RULES OF PROF’L CONDUCT Preamble (2004).
Election Day, the profession can force the parties to push for real reform to the electoral process.

B. Elections in America

Today, the American public’s view of the electoral process is disheartening. As a citizenry that is divided on so many issues, it is disappointing that Americans are skeptical of the process of choosing leaders, not just the policies they make once elected.\textsuperscript{214} The poll challengers who flocked to the polls on Election Day 2004 and the lawyers who waited outside of the polls to document voting problems cannot be exclusively blamed for the current lack of confidence in the system or the system’s actual shortcomings. After all, the motivation for these movements was many Americans’ altruistic desire to protect our most fundamental democratic principles. But the other motivator of these election volunteers was distrust, of both the system and their fellow Americans.\textsuperscript{215}

Rather than battling at the polling sites of contested states on Election Day 2008, Americans, and specifically the legal community, should focus that energy on forcing real reform at the state and federal level. The debate on Election Day 2008 should center on issues and policy differences, not on the number of feet volunteers must stand from the entrance to a polling site. Partisan law suits and political bickering after the election rarely bring systemic reform or justice to the disenfranchised; they perpetuate cynicism and distrust.

As this article has argued, the law and legal profession can, and must, pave the way for these reforms. Otherwise, the legal profession will remain part of the problem.

\textsuperscript{214} Nagourney & Elder, supra note 3, at A16 (noting that only 45% of Americans in November 2004 believed that President Bush had legitimately won the 2000 Election).

\textsuperscript{215} See Shawn Windsor, Civility Surprises Poll Challengers for Rival Parties, DETROIT FREE PRESS, Nov. 3, 2004, at 8A.