

## OUTSOURCING DEMOCRACY: REDEFINING PUBLIC-PRIVATE PARTNERSHIPS IN ELECTION ADMINISTRATION

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### INTRODUCTION

*“We are left with a system in which almost every state still out-sources its elections to what are actually private organizations.”*<sup>1</sup>

In 2008, during a hotly contested presidential campaign, legions of private individuals, nonprofit organizations, political parties, and candidates embarked upon canvassing, registering and assisting citizens, and monitoring voting problems in a historic presidential election.<sup>2</sup> Certainly, the 2000 election debacle—in which the world watched as our election process seemed to implode with butterfly ballots, hanging chads, and disproportionate disenfranchisement in the minority community—prompted extreme criticism of how the United States handles elections.<sup>3</sup>

Since the 2000 election, we have witnessed an increase in private participation in elections. The level of private involvement spanned from registering voters, to getting citizens to the ballot box through get out the vote campaigns (“GOTV”), assisting limited English proficient (“LEP”) citizens, and monitoring Election Day activities.<sup>4</sup> This increased in-

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1. Phil Keisling, *To Reduce Partisanship, Get Rid of Partisans*, N.Y. TIMES, March 22, 2010, at A27, available at [http://www.nytimes.com/2010/03/22/opinion/22keisling.html?\\_r=1](http://www.nytimes.com/2010/03/22/opinion/22keisling.html?_r=1) (former Oregon Secretary of State arguing for the elimination of primaries and stating that “[w]ith the approval of the Supreme Court, the parties have the authority to exclude independent voters or other non-members who might seriously challenge their partisan shibboleths or taboos”).

2. During the 2008 election, nonpartisan organizations chronicled numerous voting irregularities in voter registration, felon disenfranchisement, long lines at the polls, poll watcher challenges, and unwarranted challenges to student voters and deceptive practices. See, e.g., *Hearing on Lessons Learned from the 2008 Election Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 1 (2009) (statement of Tova Andrea Wang, Vice President, Research, Common Cause); *Id.* (statement of Hillary O. Shelton, Washington Bureau Chief, NAACP); see also *Protecting the Right to Vote: Oversight of the Department of Justice’s Preparations for the 2008 General Election: Hearing before the S. Comm. on the Judiciary*, 110th Cong. 1 (2008) (statement of Gilda R. Daniels, Assistant Professor, University of Baltimore School of Law).

3. See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000); *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70 (2000); *Gore v. Harris*, 773 So. 2d 524 (Fla. 2000); Edward B. Foley, *Refining the Bush v. Gore Taxonomy*, 68 OHIO ST. L.J. 1035 (2007); Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1 (2007).

4. For example, nonpartisan organizations, such as Election Protection, self-described as “the nation’s largest non-partisan voter protection coalition,” used more than 10,000 volunteers and received over 200,000 calls to its hotline during the election season and more than 80,000 calls on

volvement has been criticized on many fronts; critiques range from the involvement of the media<sup>5</sup> to voting machine manufacture<sup>6</sup> to voter registration.<sup>7</sup> In some instances, government has outsourced its obligations to private entities.<sup>8</sup>

Private partisan involvement in elections has hit troubling levels—from partisan election administrators at the highest rank to federal government officials tasked with enforcing and protecting voting rights laws.<sup>9</sup> The government has outsourced its authority to private groups, particularly private partisans, who use public authority for private political gain. Governments outsource in a wide variety of areas, such as education, prisons, and the military.<sup>10</sup> The increase in private partisan

Election Day. Election Protection, *Election Protection 2008: Helping Voters Today, Modernizing the System for Tomorrow: Preliminary Analysis of Voting Irregularities 1* (2008), available at <http://www.866ourvote.org/tools/documents/files/0077.pdf>; *About Us*, ELECTION PROTECTION, <http://www.866ourvote.org/about> (last visited Oct. 10, 2010).

5. James Brown & Paul L. Hain, *Private Administration of a Public Function: The News Election Service*, 2 INT'L J. PUB. ADMIN. 389, 389 (1980) ("In the case of election administration, however, the public officials have abdicated responsibility for election night aggregation of the national Vote totals to a private organization, News Election Service, which is owned by five major news organizations. This private organization performs without a contract, without public compensation, and without supervision by public officials. It makes decisions concerning its duties according to its own criteria. The questions of responsibility and accountability have not arisen in part because of the private organization's performance record and in part because the responsibility was assumed gradually over a lengthy period without ever being evaluated as an item on the public agenda.").

6. John C. Bonifaz, *Our Voting Re-Public*, in REBOOTING AMERICA: IDEAS FOR REDESIGNING AMERICAN DEMOCRACY FOR THE INTERNET AGE 133, 134 (Allison Fine, Micah L. Sifry, Andrew Rasiej & Josh Levy, eds., 2008), available at <http://rebooting.personaldemocracy.com/files/JohnBonifaz.pdf> ("[A] small handful of private companies (including, but not limited to, The Election Systems & Software Company, Diebold Election Systems, now known as Premier Election Solutions, and Sequoia Voting Systems) have gained enormous profit and influence marketing their electronic voting systems to states and municipalities as the answer to the 'hanging chad' fiasco in Florida.").

7. In recent years, state governments have placed limits on private entities, particularly in the area of third party voter registration and assistance at the polls. A 2008 Brennan Center report noted that:

Americans have run voter registration drives to register their fellow citizens to vote for decades, but until very recently often had to be deputized by the state to do so. This "deputy registrar" system left drives at the mercy of county or state officials who could deny that deputization to disfavored groups, or restrict the number of people who could take part.

*Restrictions on Community-Based Voter Registration Drives*, Brennan Center for Justice 1 (Aug. 4, 2008), [http://brennan.3cdn.net/ca85dbcf2d2ac045ff\\_awm6iviui.pdf](http://brennan.3cdn.net/ca85dbcf2d2ac045ff_awm6iviui.pdf). For suggestions on modernizing the voter registration process, see, e.g., Wendy Weiser, Michael Waldman & Renée Paradis, *Voter Registration Modernization: Policy Summary*, in VOTER REGISTRATION MODERNIZATION: COLLECTED BRENNAN CENTER REPORTS AND PAPERS 9, 9–15 (Wendy Weiser ed., 2008), available at [http://brennan.3cdn.net/329ceaa2878946ba17\\_kwm6btu6r.pdf](http://brennan.3cdn.net/329ceaa2878946ba17_kwm6btu6r.pdf).

8. See *Developments in the Law—State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1250–51 (2010) [hereinafter *Public/Private Distinction*]; see also Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 547 (2000).

9. See generally Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL'Y REV. 125 (2009) (suggesting ways to address partisan election administrators in the next wave of election reform); Pamela S. Karlan, *Lessons Learned: Voting Rights and the Bush Administration*, 4 DUKE J. CONST. L. & PUB. POL'Y 17 (2009) (arguing that the Bush administration's Department of Justice Civil Rights Division displayed partisan objectives in the enforcement of voting rights).

10. See *infra* Part I.

groups' participation in unique government roles follows the recent trend toward outsourcing and privatization in all aspects of government operations.<sup>11</sup> While private involvement often garners support for government ideals, such as promoting and encouraging voter participation, the use of private partisan voter challenges have different objectives: promoting one's candidate,<sup>12</sup> voter suppression,<sup>13</sup> or the less sinister but just as effective voter frustration and confusion.<sup>14</sup>

Private partisan activity, primarily voter caging<sup>15</sup> and voter challenges,<sup>16</sup> tends to undermine the very right it was designed to protect—namely, free and equal voter participation.<sup>17</sup> Since the states determine

11. See *Developments in the Law—State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1250–51 (2010) [hereinafter *Public/Private Distinction*]; see also Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 547 (2000).

12. See *Tiryak v. Jordan*, 472 F. Supp. 822, 824 (E.D. Pa. 1979) (“The poll-watcher performs a dual function on Election Day. On the one hand, because he is designated and paid by a political party, his job is to guard the interests of that party’s candidates. On the other hand, because exercise of his authority promotes an honest election, the poll-watcher’s function is to guard the integrity of the vote. Protecting the purity of the electoral process is a state responsibility and the poll-watcher’s statutory role in providing that protection involves him in a public activity, regardless of his private political motive.”).

13. See *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, 671 F. Supp. 2d 575, 578–79 (D. N.J. 2009). After the 2008 election, the Democratic National Committee (“DNC”) and the Republican National Committee (“RNC”) sought to modify a consent decree limiting the RNC’s “ballot security measures.” *Id.* at 579. The court noted that, “The RNC produced thousands of pages of newspaper articles and other sources documenting alleged incidents of voter fraud over the past 27 years, while the DNC did the same with respect to voter intimidation.” *Id.* at 578.

14. See, e.g., WENDY WEISER & VISHAL AGRAHARKAR, BRENNAN CENTER FOR JUSTICE, *BALLOT SECURITY AND VOTER SUPPRESSION: INFORMATION CITIZENS SHOULD KNOW 1* (2010), available at [http://brennan.3cdn.net/e2d20ecc819018aa49\\_xpm6iixd.pdf](http://brennan.3cdn.net/e2d20ecc819018aa49_xpm6iixd.pdf).

15. See Chandler Davidson et al., *Vote Caging as a Republican Ballot Security Technique*, 34 WM. MITCHELL L. REV. 533, 537–38 (2008) (“[V]ote caging is defined as a three-stage process designed to identify persons in another political party or faction whose names are on a voter registration list, but whose legal qualification to vote is dubious, and then to challenge their qualification either before or on Election Day. Ostensibly, caging is an attempt to prevent voter fraud. In practice, it may have the effect of disenfranchising voters . . .”). There are a few theories on the origin of the term, one being that caging lists seem to have originated in the direct-mail fund-raising business. Because the term is so new, a formal definition cannot be found in a traditional print dictionary but can be found on websites such as Wikipedia or the Double-Tongued Dictionary. *Id.* at 537. However, according to Wikipedia, fundraisers will hire third-parties to handle the processing of responses to direct mail, which may include “processing payments, compiling product orders, correcting recipient addresses, processing returned mail, providing lockbox services and depositing funds received into the hiring organization’s bank account, and all of the associated data entry for each of these services.” *Caging (Direct Mail)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Caging\\_\(direct\\_mail\)](http://en.wikipedia.org/wiki/Caging_(direct_mail)) (last modified July 17, 2010). The term “caging” itself may be a derivative of the financial teller cage, since a number of operations related to lockbox services involve the control and protection of funds. Another explanation involves the “old postal ‘cages,’ the hundreds of cubby holes that fronted postal desks for sorting.” Ed Brayton, *GOP Has a History of Voter ‘Caging,’ According to Democrats’ Lawsuit*, THE MICH. MESSENGER (Sept. 17, 2008, 8:10 PM), <http://michiganmessenger.com/4479/gop-has-a-history-of-voter-caging-according-to-democrats-lawsuit>.

16. See *infra* Parts I–IV.

17. See *Mont. Democratic Party v. Eaton*, 581 F. Supp. 2d 1077, 1082 (D. Mont. 2008) (“Eaton and the Montana Republican Party are abusing the process the State of Montana has provided to ensure the accuracy of voter rolls (indeed, they are using the process designed to protect the integrity of the political process to undermine it) . . .”).

the time, places, and manner for elections,<sup>18</sup> they also develop the rules for allowing voter challenges. No federal law governs voter challenges;<sup>19</sup> as such, laws explaining who can challenge and what authority they are given vary from state to state. Most states call the individuals who conduct voter challenges “poll watchers,”<sup>20</sup> “challengers,”<sup>21</sup> and/or “observers”<sup>22</sup> and allow them to observe the casting of ballots, the counting of absentee ballots, and in some instances, challenge the poll workers handling of the process.<sup>23</sup>

The often related voter caging or vote caging occurs when a political party sends registered mail to addresses of registered voters.<sup>24</sup> If the mail is returned as undeliverable—because, for example, the voter refuses to sign for it, the voter isn’t present for delivery, or the voter is homeless—the party uses that fact to challenge the registration, arguing that because the voter could not be reached at the address, the registration is fraudulent.<sup>25</sup> The private group then prepares a caging list, which “is a list or database of addresses, updated after a mailing program is completed, with notations on responses received from recipients with corrections for addresses that mail has been returned as” undelivered or

18. U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of chusing Senators.”).

19. See Frank Emmert, Christopher Page & Antony Page, *Trouble Counting Votes? Comparing Voting Mechanisms in the United States and Other Selected Countries*, 41 CREIGHTON L. REV. 3, 30–34 (2007). The authors argue that some of the problems in past U.S. elections occurred because of lack of uniform and transparent laws guiding elections at the national level and that the United States needs to make improvements in its election procedures and laws. *Id.*

20. See, e.g., ARK. CODE ANN. § 7-5-312(a)(2) (2009) (“poll watcher” or “representative”); CAL. ELEC. CODE § 19362 (West 2003) (“poll watchers”).

21. See, e.g., LA. REV. STAT. ANN. § 18:427 (2004) (“watchers”); MICH. COMP. LAWS ANN. §§ 168.730–734 (West 2005) (“challenger”); MO. REV. STAT. §§ 115.105–107 (1997) (“challenger” and “watcher”); N.H. REV. STAT. ANN. §§ 666:4–:5 (2010) (“challenger”); N.J. STAT. ANN. § 19:7-5 (West 1999) (“challengers”); N.C. GEN. STAT. § 163-45 (2010) (“observers”); OHIO REV. CODE ANN. § 3505.21 (West 2010) (“observers”).

22. See, e.g., VA. CODE ANN. §§ 24.2-604(I) (2010) (“observers”); WASH. REV. CODE ANN. §§ 29A.04.630 (West 2005) (“political parties” and “elections observers”).

23. A few states explicitly allow challengers to question an election official’s performance. See, e.g., LA. REV. STAT. ANN. § 18:427 (2004) (allowing a watcher to contest “any infraction of the law”); MICH. COMP. LAWS ANN. § 168.730 (West 2005) (allowing challengers to question election workers and procedures).

24. See Davidson et al., *supra* note 15, at 538.

25. See Jo Becker, *GOP Challenging Voter Registrations: Civil Rights Groups Accuse Republicans of Trying to Disenfranchise Minorities*, WASH. POST, Oct. 29, 2004, at A5. Jo Becker, a reporter for the Washington Post, stated that in 1981 “the [RNC] sent letters to predominantly” African-American neighborhoods in New Jersey. *Id.* When 45,000 of these letters were returned as undelivered, the RNC attempted to challenge the voters whose mail was returned and have his or her name removed from voter rolls. *Id.* In 1986, the RNC attempted to do the same to 31,000 people in Louisiana. *Id.* Similarly in 2004, the RNC challenged voters in Ohio for undeliverable mail. *Id.* In that same year, Republicans also sent mail to 130,000 voters in Philadelphia neighborhoods, whose residents are predominantly black and Democratic. *Id.* In reference to attempted voter purges and influencing voter rolls, Republicans said their actions had nothing to do with partisanship and had “nothing to do with race.” *Id.*

forwarded.<sup>26</sup> A political party then uses the “caging list” to challenge the validity of a voter’s registration.<sup>27</sup> In order for the voter’s provisional ballot to be counted, the voter may have to defend and prove his or her eligibility.<sup>28</sup>

Voter caging and voter challenges have been used to target racial minorities and to otherwise disrupt the voting process. The use of abusive voter challenges was evident after the 2008 Presidential election when voters in New York suffered suppression of the right to vote.<sup>29</sup> Attorneys present at the polls “documented efforts to suppress minority voters.”<sup>30</sup> The attorneys reported:

Some of the suppressive actions . . . included an armed man with police shield escorting around alleged poll watchers throughout various polling sites during voting hours; repeated blanket challenges to minority voters at a particular polling location . . . and a widespread challenge to nearly 6,000 Democratic voters who allegedly did not live where their voter registration information claimed they did.<sup>31</sup>

A *New York Times* reporter characterized the suppression activities as “chaotic.”<sup>32</sup> The New York legislature subsequently introduced legislation to outlaw these practices.<sup>33</sup> In another example, while the Republican National Committee (RNC) was defending a lawsuit in Louisiana, it

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26. *Caging (Direct Mail)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Caging\\_\(direct\\_mail\)](http://en.wikipedia.org/wiki/Caging_(direct_mail)) (last modified July 17, 2010). Caging lists seem to have originated in the direct-mail fund-raising business. *See id.* Fundraisers will hire third-parties to handle the processing of responses to direct mail, “which may include processing payments, compiling product orders, correcting recipient addresses, processing returned mail, providing lockbox services and depositing funds received into the hiring organization’s bank account, and all of the associated data entry for each of these services.” *Id.* The term caging “may be a derivative of the financial teller cage, since a number of operations related to lockbox services involve the control and protection of funds.” *Id.*

27. *See* Becker, *supra* note 25. During the 2008 presidential election, the Republican Party in Macomb County, Michigan proposed using foreclosure lists to challenge voters at the polls. Eartha Jane Melzer, *Lose Your House, Lose Your Vote*, MICH. MESSENGER (Sept. 10, 2008, 6:42 AM), <http://michiganmessenger.com/4076/lose-your-house-lose-your-vote>. The party quickly backtracked from its proposed strategy, but even the mere proposition that foreclosures would be used to intimidate and potentially disenfranchise voters is reprehensible and problematic. Eartha Jane Melzer, *Republicans Recant Plans to Foreclose Voters but Admit Other Strategies*, MICH. MESSENGER (Sept. 11, 2008, 3:41 PM), <http://michiganmessenger.com/4231/republicans-recant-plans-to-foreclose-voters-but-admit-other-strategies>.

28. *See, e.g.*, Act of June 20, 2005, ch. 277, § 24, 2005 Fla. Laws 2614, 2643 (allowing a voter to provide evidence of eligibility to the county canvassing board and providing that “a provisional ballot shall be counted unless the canvassing board determines by a preponderance of the evidence that the person was not entitled to vote”). State laws provide the opportunity for private actors to “challenge” a voter’s eligibility to participate in the election process. *See, e.g.*, Act of June 20, 2005, ch. 277, § 27, 2005 Fla. Laws 2614, 2646. In order to exert a challenge, most states do not require any threshold finding of ineligibility. *See, e.g., id.* (requiring only a “good faith” belief).

29. *See* S. 2554, 232d Ann. Legis. Sess., Reg. Sess. (N.Y. 2009), *available at* <http://www.open.nysenate.gov/legislation/bill/S2554B> (giving the justification of the original bill).

30. *Id.*

31. *Id.*

32. *Id.*

33. *See id.*

released a memo from one of its party officials indicating its intentions to suppress the minority vote.<sup>34</sup> The pertinent part of the memo read: “I would guess that this program will eliminate at least 60–80,000 folks from the rolls . . . . If it’s a close race . . . which I’m assuming it is, this could keep the black vote down considerably.”<sup>35</sup>

Additionally, in a hotly contested 2003 mayoral election in Philadelphia, involving an African American incumbent, voters in predominantly African American areas of the city were systematically challenged by men carrying clipboards and driving a fleet of approximately 300 sedans with decals designed to look like law enforcement insignia.<sup>36</sup> During that election, local judges heard numerous allegations of voter intimidation and harassment and ultimately issued orders in two city polling places prohibiting Republican poll watchers from requesting registration and identification materials from voters.<sup>37</sup>

Voter challenges and vote caging serve as yet another new millennium mechanism to disenfranchise minority voters.<sup>38</sup> Historically, the disenfranchisement devices were clearly race based.<sup>39</sup> More contemporaneously, however, partisan actors have proclaimed that the challenges were meant to prevent voter fraud and target party affiliation, more so than race. Indeed, recent assertions merely use “partisan” as a proxy for race.<sup>40</sup> In spite of these assertions, whether the actions are motivated by

34. See Thomas B. Edsall, ‘Ballot Security’ Effects Calculated: GOP Aide Said Louisiana Effort ‘Could Keep the Black Vote Down’, WASH. POST, Oct. 25, 1986, at A1.

35. *Id.* (omissions in original).

36. PEOPLE FOR THE AM. WAY & NAACP, THE LONG SHADOW OF JIM CROW: VOTER INTIMIDATION AND SUPPRESSION IN AMERICA TODAY 4–6 (2004), available at <http://www.pfaw.org/sites/default/files/thelongshadowofjimcrow.pdf>.

37. Clea Benson, Cynthia Burton & Jacqueline Soteropoulos, *Chaotic Day Marks End of Tense Campaign*, PHILA. INQUIRER, Nov. 5, 2003, at A1.

38. This Article is the third that examines various new millennium mechanisms that are used to disenfranchise minority voters. See also Gilda R. Daniels, *Voter Deception*, 43 IND. L. REV. 343 (2010) (discussing the need for enforcement and penalties for voter deception); Gilda R. Daniels, *A Vote Delayed Is a Vote Denied: A Preemptive Approach to Eliminating Election Administration Legislation that Disenfranchises Unwanted Voters*, 47 U. LOUISVILLE L. REV. 57 (2008) (calling for a proactive approach to potentially disenfranchising election administration measures).

39. See *infra* note 107–09 and accompanying text.

40. The use of partisanship as a proxy for race is seen most often in the redistricting process. In *Bartlett v. Strickland*, Justice Souter wrote in his dissent:

If districts with minority populations under 50% can never count as minority-opportunity districts to remedy a violation of the States’ obligation to provide equal electoral opportunity under § 2, States will be required under the plurality’s rule to pack black voters into additional majority-minority districts, contracting the number of districts where racial minorities are having success in transcending racial divisions in securing their preferred representation. The object of the Voting Rights Act will now be promoting racial blocs, and the role of *race* in districting decisions as a *proxy* for political identification will be heightened by any measure.

129 S. Ct. 1231, 1250 (2009) (Souter, J., dissenting) (emphasis added); see also *Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality opinion) (“Strict scrutiny does not apply merely because *redistricting* is performed with consciousness of race. . . . Electoral district lines are ‘facially race neutral,’ so a more searching inquiry is necessary before strict scrutiny can be found applicable in *redistricting* cases than in cases of ‘classifications based explicitly on race.’” (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213 (1995) (Thomas, J., concurring in judgment) (emphasis added)).

racial animus or partisanship, the result is the same. Racial minorities are targeted for vote challenges and those private actions constitute unconstitutional state action.

When private partisans are allowed to challenge voters in the polling site, they are engaged in determining voter eligibility, which is a governmental function.<sup>41</sup> Moreover, when private partisan organizations are involved in the electoral process, their allegiance to a certain candidate or outcome is different than the governmental goal of ensuring access and applying the laws impartially, regardless of who the voter is perceived to support. Allowing private partisans to participate in voter eligibility decisions—which occur with the use of voter challenges—can confuse voters and blur the lines between appropriate public and private behavior.<sup>42</sup> In the election administration context, little has been written to assess whether the government has given too much of its authority to private actors at the expense of the exercise of the fundamental right to vote.<sup>43</sup> The abusive and intimidating use of voter challenges, however, has prompted legislation prohibiting or altering the practice.<sup>44</sup> Accordingly, the state statutes governing voter challenges and the private actor's access to Election Day voters require a closer look to ensure that they properly protect against discriminatory actions. A void currently exists in an analysis of this type of election administration activity. This Article attempts to fill that void with clear and thorough analysis of how voter challengers act as adjuncts of the state when issuing voter challenges and how courts should treat their actions as “state action.”<sup>45</sup>

This Article explores the level of public-private “partnership” in election administration and takes a particular look at private partisan's manipulation of state voter challenge laws. This Article argues that the private partisans use of government authority in determining voter eligibility constitutes state action and could subject not only the private partisan—but also the state—to liability under the Fourteenth Amendment's Equal Protection Clause. In Part I, this Article explores the use of outsourcing government functions to private organizations and discusses how the public-private divide has a different dynamic than other outsourced areas, such as education or welfare reform, when juxtaposed against

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41. See *Tiryak v. Jordan*, 472 F. Supp. 822, 824 (E.D. Pa. 1979) (“No activity is more indelibly a public function than the holding of a political election . . .”).

42. See Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369 (2003); *Public/Private Distinction*, *supra* note 12, at 1250–51.

43. See, e.g., Barry H. Weinberg & Lyn Utrecht, *Problems in America's Polling Places: How They Can Be Stopped*, 11 TEMP. POL. & CIV. RTS. L. REV. 401, 434–36 (2002) (“[T]he states have delegated to the counties the responsibility for conducting the election and maintaining order in the polls, and by doing so, the states have abdicated their responsibility for preventing bad things from happening to voters in the polls on election day.”).

44. See, e.g., S. 6134, 59th Leg., Reg. Sess. (Wash. 2006) (authorizing canvassing boards to impose civil penalties for improper voter challenges).

45. See *supra* note 38 and accompanying text.

the fundamental right to vote. Part II examines the level of race-based targeting in voter challenges and vote caging. Part III discusses legal concerns and applies the state action framework to these new millennium mechanisms and cautions that states can be held liable for private partisan voter challenges. Scholars have argued both sides of the issue regarding whether poll watchers engage in state action.<sup>46</sup> This Article provides clarity to this discussion. Part IV recommends the elimination of voter challenges, or in the alternative, suggests a means to ensure that the private partisan's role does not cede government authority.

#### I. THE CEDING OF AUTHORITY: PRIVATE INVOLVEMENT IN PUBLIC FUNCTIONS

*“Privatization is now virtually a national obsession. Hardly any domestic policy issue remains untouched by disputes over the scope of private participation in government . . . .”*<sup>47</sup>

The public-private divide has become a blur in many areas. Private actors perform government functions in, *inter alia*, the military, education, welfare reform, and public safety.<sup>48</sup> Arguably, privatization is fueled by two primary arguments: efficiency and lower costs and a “democratizing” effect that returns the power to local communities.<sup>49</sup> One can readily make an argument that the government can cut its costs if it outsources the welfare benefits program to a private company, creates a charter school, or allows a private company to build and run a prison. For example, an argument for privatizing education centers on providing a choice for students from low-income families to apply public school funds to private school tuition.<sup>50</sup> Further, it is argued that the competition

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46. Compare Jason Belmont Conn, *Of Challengers and Challenges*, 37 U. TOL. L. REV. 1021, 1032–33 (2006) (exploring the role of and the decisions of poll watchers in Ohio during the 2004 presidential election, and maintaining that the poll watchers were indeed state actors by virtue of their engaging in poll challenging, which is traditionally a state action), with Heather S. Heidelbaugh, Logan S. Fisher & James D. Miller, *Protecting the Integrity of the Polling Place: A Constitutional Defense of Poll Watcher Statutes*, 46 HARV. J. ON LEGIS. 217, 233–34 (2009) (arguing that placing poll watchers in polling sites is not state action but rather a licensing process).

47. Metzger, *supra* note 42, at 1369.

48. See, e.g., Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CALIF. L. REV. 569, 571–73 (2001); Kenneth J. Saltman, *Putting the Public Back in Public Schooling: Public Schools Beyond the Corporate Model*, 3 DEPAUL J. FOR SOC. JUST. 9, 9–10 (2009) (“I consider how the corporatization of public schools redistributes economic control and cultural control from the public to private interests. I argue that these intertwined redistributions of power undermine public democracy (the possibilities for the development of a more participatory and deeper democracy), just social transformation, and critical citizenship while exacerbating material and symbolic inequality.”); Ian Traynor, *The Privatisation of War*, THE GUARDIAN (Dec. 10, 2003, 2:28 AM), <http://www.guardian.co.uk/world/2003/dec/10/politics.iraq/print>.

49. See Gilman, *supra* note 48, at 596 (“Privatization advocates . . . contend that private companies can deliver services with greater efficiency and innovation than government at a lower cost. . . . Yet another strand of the privatization movement sees privatization as a democratizing force that returns power from the government to local communities and their mediating institutions, such as churches, neighborhoods, and voluntary organizations, which are better situated to address a community’s needs.”).

50. See Julie Huston Vallarelli, Note, *State Constitutional Restraints on the Privatization of Education*, 72 B.U. L. REV. 381, 395–96 (1992).

between private and public schools will create better schools for all students regardless of income.<sup>51</sup> Additionally, the private school's ability to provide a quality education is governed by its capacity to provide a competitive product.<sup>52</sup> Arguably, "privatization of welfare converges 'the free market ideology of the right and the citizen participation/empowerment objectives of the left.'"<sup>53</sup> While each of these examples are subject to strong criticism,<sup>54</sup> including whether the law can hold private companies accountable in the same manner as the government,<sup>55</sup> they tend to fit neatly into the costs-democratizing paradigm.

Most scholarship has focused on private contracts for public functions, such as Medicare and Medicaid services or building prisons and education.<sup>56</sup> In these service contracts, the debate has raged over whether the government has granted too much power to private parties and whether the public benefits from the agreement.<sup>57</sup> Nonetheless, private contractors, particularly not-for-profit entities, presumably have a similar goal as the government, i.e., to improve services or outcomes, such as improving the educational system.

Conversely, when private partisans are involved in the public function of election administration, it is somewhat of a misnomer to describe the relationship between the public governmental agencies and the private group as a partnership. Partnership is the wrong characterization, since it would normally connote two or more groups working towards the same goal.<sup>58</sup> In the election administration context, the government

51. See Saltman, *supra* note 48, at 27–28.

52. Vallarelli, *supra* note 50, at 384–85 ("To remain open, schools must attract student-consumers by providing equal or better services than competitors. Costs are reduced as each school responds to economic pressures and maximizes the services it can offer.")

53. Gilman, *supra* note 48, at 596.

54. See, e.g., Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1058–60 (2007) (arguing that allowing private companies to collect and disburse child support payments is in conflict with the best interests of the child); Saltman, *supra* note 48, at 9 (arguing that the privatization of schools is detrimental to education and democracy).

55. See Gilman, *supra* note 48, at 603 (analyzing the detrimental effects of privatizing welfare benefits on the recipient's due process rights).

56. See *id.* at 578–79 (examining private contracts for providing welfare).

57. See, e.g., Daniel L. Hatcher, *Collateral Children: Consequence and Illegality at the Intersection of Foster Care and Child Support*, 74 BROOK. L. REV. 1333, 1377–79 (2009) (arguing for the elimination of foster care recovery programs, which are often administered by private entities, because they serve no benefit to the children in foster care).

58. The U.S. Election Assistance Commission's *Guidebook on Successful Practices for Poll Worker Recruitment, Training, and Retention* [hereinafter *Successful Practices*] lists the "Pitfalls and Challenges" of partnering with political parties to recruit poll workers as follows:

- Some political parties use Election Day poll service as a patronage job for the party faithful, not necessarily appointing those most qualified and willing to serve.
- Party representatives may be tempted to work for the success of a particular candidate.
- Political party lists may be submitted too late to be of use.
- Political parties often want members and others to serve as observers.
- Political party poll workers may want to work only in high-stakes elections and may not be reliable components of a long-term election team.

has a uniquely constitutional function to ensure that elections are held in a fair and impartial manner.<sup>59</sup>

Voting, however, is different from other outsourced functions—such as education and welfare.<sup>60</sup> Voting is a fundamental right,<sup>61</sup> and the United States Constitution mandates that the federal and state governments administer all aspects of elections. The democratic process is at its best when all three levels of government—federal, state, and local—work together to protect access and integrity.<sup>62</sup> No contractual relationship exists between the private groups and the governmental agencies, and in most instances, the private organizations are working to improve the democratic process by increasing the number of eligible voters through voter registration drives or delivering eligible voters to the polls.<sup>63</sup>

The political partisan, however, has a different goal in mind through his or her participation in the electoral process; to get a particular candidate elected or ballot measure passed.<sup>64</sup> Once the private partisans use statutory authority to achieve the goal of political gamesmanship and influence governmental decisions on voter eligibility, the government has ceded its authority to private partisans at the expense of the eligible voter.

In order to understand how private partisans are assuming governmental power, one must first understand what authority the government has under the Constitution and other federal statutes in regards to elections—as well as how the authority is divided amongst the federal, state, and local governments.

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U.S. ELECTION ASSISTANCE COMM'N, *GUIDEBOOK ON SUCCESSFUL PRACTICES FOR POLL WORKER RECRUITMENT, TRAINING, AND RETENTION* 49–50 (2007) [hereinafter *SUCCESSFUL PRACTICES*], available at <http://www.eac.gov/assets/1/AssetManager/Successful%20Practices%20for%20Poll%20Worker%20Recruitment%20Section%201%20Recruitment.pdf>.

59. See *Burson v. Freeman*, 504 U.S. 191, 208–09 (1992) (“[A] government has . . . a compelling interest in securing the right to vote freely and effectively . . .”).

60. See *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (“It is beyond cavil that ‘voting is of the most fundamental significance under our constitutional structure.’” (quoting *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979))).

61. See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (proclaiming that voting is regarded as a fundamental political right).

62. See generally Jocelyn Friedrichs Benson, *One Person, One Vote: Protecting Access to the Franchise Through the Effective Administration of Election Procedures and Protections*, 40 *URB. LAW.* 269 (2008) (discussing ways that public and private entities can work together to ensure fair elections, focusing on advancing participation in the language minority community and Section 203 of the Voting Rights Act).

63. *Id.* at 278.

64. See *Tiryak v. Jordan*, 472 F. Supp. 822, 824 (1979) (“The poll-watcher performs a dual function on Election Day. On the one hand, because he is designated and paid by a political party, his job is to guard the interests of that party’s candidates. On the other hand, because exercise of his authority promotes an honest election, the poll-watcher’s function is to guard the integrity of the vote.”).

### A. The Federal Government

The federal, state, and local governments share in the administration of elections.<sup>65</sup> On the federal level, government agencies enforce various voting rights statutes<sup>66</sup> and Constitutional amendments.<sup>67</sup> Notwithstanding state authority to develop election administration laws governing “The Time[], Place[] and Manner of elections,” Congress—under the Elections Clause—maintains authority to “make or alter” state regulation of federal elections.<sup>68</sup>

It is widely understood that the Constitution contemplated that federal and state governments would coordinate election administration issues, with any federal decisions reigning supreme.<sup>69</sup> Recent cases interpreting the Elections Clause reinforce Congress’s broad authority to regulate all aspects of elections.<sup>70</sup> Accordingly, Congress has the power to develop and supersede state election regulations. Additionally, in *Smiley v. Holm*,<sup>71</sup> the Court noted that Congress’s Elections Clause power allows it to “supplement . . . state regulations or . . . substitute its own.”<sup>72</sup>

65. However, elections are primarily a local government function. See Note, *Toward A Greater State Role In Election Administration*, 118 HARV. L. REV. 2314, 2323 (2005) [hereinafter *Greater State Role*]; see also Weinberg & Utrecht, *supra* note 41, at 434–36 (“If the states do not assume the responsibility for conducting effective elections when the counties fail to do so, then the United States Congress should consider whether federal civil rights voting laws should be expanded to include the deprivations of voting rights at the polls . . . and should consider similarly expanding the unquestionably successful federal observer program.”).

66. Federal agencies enforce various statutes that pertain to voting, such as the Voting Rights Act of 1965, the National Voter Registration Act, and the Help America Vote Act. 42 U.S.C. § 1973 *et seq.* (2006); 42 U.S.C. § 15511 (2006); 42 U.S.C. § 1973gg-9 (2006). Additionally, the Help America Vote Act spawned the Election Assistance Commission, which provides guidance and best practices for state and local election administrations and provides funds for improving the election process. 42 U.S.C. § 15381 (2006).

67. U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”); U.S. CONST. amend. XV, §§ 1–2 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation.”).

68. U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”). Congress can regulate the elections of Representatives and Senators. *United States v. Gradwell*, 243 U.S. 476, 482 (1917); *Ex parte Siebold*, 100 U.S. 371, 383–84 (1879); *United States v. Manning*, 215 F. Supp. 272, 287 (W.D. La. 1963); *Commonwealth ex rel. Dummit v. O’Connell*, 181 S.W.2d 691, 694 (Ky. 1944).

69. *Siebold*, 100 U.S. at 384 (“[T]he power . . . may be exercised as and when Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them. This is implied in the power to ‘make or alter.’”).

70. *Cook v. Gralike*, 531 U.S. 510, 523–24 (2001) (“[The Elections Clause] encompasses matters like ‘notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.’” (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932))).

71. 285 U.S. 355 (1932).

72. *Id.* at 366–67. In *Smiley v. Holm*, Chief Justice Hughes wrote:

Together, the federal and state governments have the constitutional authority to regulate the election process, which includes voter eligibility. While Congress has used its constitutional power to implement laws that govern aspects of election administration,<sup>73</sup> it is the states' responsibility to implement those laws in a nondiscriminatory and fair manner.<sup>74</sup>

### B. The State Government

In election administration matters, state and local governments bear the lion's share of the responsibility. Article I, Section IV of the United States Constitution grants the ability to administer elections to the states,<sup>75</sup> which provides extensive obligations to ensure that elections are conducted impartially and accurately.<sup>76</sup>

Perhaps one of the most powerful and important responsibilities of state administrators is to make an accurate and almost instantaneous determination of the eligibility of a citizen to cast a ballot. In most instances, a voter ID, signature, or other form of verification is all that is needed.<sup>77</sup> When a voter is challenged, the process changes tremendously, shifting the power from the state to the challenger and placing the voter on the defensive. The local administrator is tasked with the on the spot determination and the responsibility of communicating any problems to the county and state administrators, who, if needed, will also communicate with federal government agencies for assistance. Accordingly, federal offices also communicate any problems with the state, and local election administrators; in some instances, correcting for clear discriminatory practices, and in others, leaving the voter stranded on the road to full political participation.<sup>78</sup>

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It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

*Id.* at 366.

73. Congress utilized its Elections Clause authority when it enacted the NVRA and HAVA. See U.S. CONST. art. I, § 4, cl. 1.

74. The National Voter Registration Act demands that its measures are implemented in a nondiscriminatory manner. 42 U.S.C. § 1973gg-6(b)(1) (2006).

75. U.S. CONST. art. I, § 4, cl. 1; *Storer v. Brown*, 415 U.S. 724, 730 (1974); *Greater State Role*, *supra* note 65, at 2323.

76. See *Storer*, 415 U.S. at 730. See generally J. Kenneth Blackwell & Kenneth A. Klukowski, *The Other Voting Right: Protecting Every Citizen's Vote by Safeguarding the Integrity of the Ballot Box*, 28 YALE L. & POL'Y REV. 107 (2009); Jocelyn Friedrichs Benson, *Democracy and the Secretary: The Crucial Role of State Election Administrators in Promoting Accuracy and Access to Democracy*, 27 ST. LOUIS U. PUB. L. REV. 343, 355-61 (2008); Raquel A. Rodriguez, *Reflections of Another Bush v. Gore Lawyer*, 64 U. MIAMI L. REV. 631, 636 (2010).

77. See, e.g., *Voter Identification Requirements*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/LegislaturesElections/ElectionsCampaigns/StateRequirementsforVoterID/tabid/16602/Default.aspx#in> (last updated Sept. 30, 2010).

78. *Voting Rights Act: Sections 6 and 8 – The Federal Examiner and Observer Program*:

Most states refer to the persons primarily responsible for the Election Day experience as poll workers.<sup>79</sup> The poll workers, *inter alia*, open the polling sites, welcome voters, and provide the necessary voting materials—such as actual ballots or access to the electronic system employed in the jurisdiction.<sup>80</sup> Once the polls close, the poll workers must secure the actual ballots and/or the voting machines and deliver the machines and ballots to the central facility for the official Election Day count.<sup>81</sup> For all their hard work, poll workers are only paid approximately \$100 for a more than 12-hour day in some cases.<sup>82</sup>

On the local level, poll workers protect the overall integrity of the voting process. A well-trained poll worker is aware of state and federal election regulations, as well as how to fairly administer and handle any potential disputes. Poll workers must consistently apply fair and egalitarian principles in a nondiscriminatory way and avoid the appearance of impropriety. They must also know clearly how to administer the ballot and provisional ballots, determine voter eligibility, and have a superior familiarity with voting procedures and voting technology.<sup>83</sup> In this new millennium, particularly with the advent of the electronic voting machine, computer literacy is crucial to a smooth voting process.

The public and private entities must work together in order to facilitate a smooth election process. It has become evident, however, that not all entities are working toward the same goal.<sup>84</sup> The unique placement of private partisans inside the polling place with the authority to challenge voters—and as such, determine whether a person is eligible to vote—aligns the private actions with government authority.<sup>85</sup>

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*Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 17–19 (2005) (statement of Barry H. Weinberg, Former Deputy Chief and Acting Chief, Voting Section, Civil Rights Division, U.S. Dep't. of Justice) (stating that federal observers are the “eyes and ears of the Justice Department”). For a discussion of the relationship between federal observers and the election process, see *infra* Part IV.C.

79. See, e.g., CAL. ELEC. CODE § 12302 (West 2010) (allowing the state to recruit student poll workers). In New York, they are referred to as “inspectors” and “poll clerks.” N.Y. ELEC. LAW § 3-420 (McKinney 2007). In Alabama, poll workers are referred to as “inspectors” and “clerks.” ALA. CODE § 17-8-5 (2007).

80. See SUCCESSFUL PRACTICES, *supra* note 58, at 7.

81. See *generally id.*

82. In Alabama, clerks and inspectors are paid at least \$75 and \$100 per day respectively for statewide elections. ALA. CODE § 17-8-12 (2007); *cf.* N.Y. ELEC. LAW § 3-420 (McKinney 2007) (poll workers are paid \$200 for working on election day and an additional amount for attending poll worker training); WIS. STAT. § 7.03(1)(a) (2004) (election officials are paid “a reasonable daily compensation”). In Madison, Wisconsin, “a reasonable daily compensation” is presently \$11.66 per hour. MADISON CITY CLERK’S OFFICE, SERVING AS AN ELECTION OFFICIAL IN THE CITY OF MADISON, available at <http://www.cityofmadison.com/election/pollWorkers/documents/ElectionOfficialBrochure.pdf> (last visited Oct. 15, 2010).

83. See SUCCESSFUL PRACTICES, *supra* note 58, at 7.

84. See Emmert et al., *supra* note 19, at 8 (detailing the ineffective administration of elections in the United States).

85. See *id.* at 24–25.

*C. Voter Challenge/Poll Watcher Statutes*

State statutes determine who may remain inside a polling site to observe the electoral process.<sup>86</sup> Poll watcher eligibility is determined by state laws that allow persons of various positions, i.e., political party, political candidate, or concerned citizen, to view the actual voting process.<sup>87</sup> Some statutes are extremely liberal, allowing “[a]ny member of the public,” except a candidate, to observe the election,<sup>88</sup> while others limit the observers to voters and election officials.<sup>89</sup>

Like most states, Florida law allows one poll watcher from each party and one poll watcher representing each candidate to view the voting process.<sup>90</sup> Further, a Florida poll watcher may challenge any voter’s right to vote if done “in good faith,”<sup>91</sup> provided the challenger signs an oath that details the challenger’s name, address, political affiliation, and reason for the challenge.<sup>92</sup> Once offered, the challenged voter is allowed to cast a provisional ballot.<sup>93</sup> Although filing a frivolous challenge is a first-degree misdemeanor in Florida, an exception is given for electors or poll workers making the challenge “in good faith.”<sup>94</sup>

The process of issuing a challenge is rather involved. If a challenge is offered, the poll workers then engage in a time-consuming process, which takes them away from the business of processing eligible voters.<sup>95</sup> In some states, the challenger has to make his challenge in writing on a form that is provided for the purpose of challenging, and the challenged voter must respond with an affidavit.<sup>96</sup> In most instances, the challenged

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86. See, e.g., ALA. CODE § 17-8-7 (2007); FLA. STAT. § 102.031(3) (2008). Scholars have argued that states have failed to undertake their responsibilities in this arena by delegating the duty to maintain order at elections to counties. See Weinberg & Utrecht, *supra* note 41, at 434 (arguing that the states need to use their authority to regulate the activity of elections today to stop future problems).

87. See, e.g., ALA. CODE § 17-8-7 (2007); FLA. STAT. § 102.031(3) (2008).

88. See, e.g., WIS. STAT. § 7.41(1) (2004) (“Any member of the public may be present at any polling place . . . except a candidate whose name appears on the ballot at the polling place . . .”).

89. See, e.g., W. VA. CODE § 3-31-37(a) (2010) (“[N]o person, other than the election officers and voters going to the election room to vote and returning therefrom, may be or remain within three hundred feet of the outside entrance to the building housing the polling place while the polls are open.”).

90. FLA. STAT. § 101.131(1) (2008).

91. FLA. STAT. § 101.111(2) (2008).

92. FLA. STAT. § 101.111(1)(a) (2008).

93. FLA. STAT. § 101.111(1)(b)(1) (2008).

94. FLA. STAT. § 101.111(2) (2008) (“[E]lectors and poll watchers shall not be subject to liability for any action taken in good faith and in furtherance of any activity or duty permitted of such electors and poll watchers by law.”). This exception essentially allows questionable challenges to stand without criminal repercussions. *Id.* For other examples of disenfranchising methods that avoid criminal prosecution, see generally Daniels, *supra* note 38.

95. See, e.g., Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 223 (2008) (Souter, J., dissenting) (arguing that a voter ID law increases the likelihood of delay at the polls since any minor discrepancy between a voter’s photo identification card and the registration may lead to a challenge).

96. See, e.g., N.J. STAT. ANN. § 19:15-18.1 (West 1999) (permitting a challenged voter to establish a right to vote by a signed affidavit detailing voter qualifications or a presentation of a suitable identifying document); N.C. GEN. STAT. § 163-85(b) (2008) (requiring a challenge made in

voter may vote if it is determined by a majority vote of the poll workers that the voter is eligible.<sup>97</sup> Once a challenge is issued, a poll worker must resolve the challenge before the person can vote.<sup>98</sup> Thus, the poll workers decision regarding voter eligibility is reliant upon the private declaration of ineligibility. It then forces the voter to prove her identity. The inability to do so, could disenfranchise an eligible voter not because she is ineligible but for a myriad of reasons unassociated with eligibility, such as lack of an ID when the jurisdiction does not require identification.

#### D. Private Actors

Private partisan involvement in the exercise of the franchise is not new. Prior to the Civil War, most states did not require voters to prove their eligibility prior to Election Day.<sup>99</sup> One scholar has noted:

Until 1888, political parties printed and distributed the ballots in each of the United States. Besides discouraging split-ticket voting and encouraging strong party organizations . . . the party ballot insured illiterates the right to vote. Nevertheless, reformers, who were more concerned with eliminating fraud than safeguarding the rights of illiterates, instituted the secret ballot . . . .<sup>100</sup>

Voters arrived at the polls with required documentation, including witnesses that could attest to their eligibility.<sup>101</sup> During this period, Republicans feared voter fraud promoted voter registration, while Democrats argued for extending voting hours.<sup>102</sup> During the Jim Crow era, the federal government had to step in to protect the right to vote as a result of the Black Codes, Jim Crow laws, and death threats.

As chronicled in *Burson v. Freeman*,<sup>103</sup> once the country moved from oral vote to paper ballots, private partisan involvement began to

writing, under oath, and on prescribed forms); N.C. GEN. STAT. § 163-86(d) (2008) (permitting a challenged voter to appear at a hearing in person or through affidavit).

97. See, e.g., OHIO REV. CODE ANN. § 3505.20 (West 2006) (providing that the election judges shall provide a provisional ballot to a person whom a majority of the judges believe is not entitled to vote), held unconstitutional by *Boustani v. Blackwell*, 460 F. Supp. 2d 822 (N.D. Ohio 2006) (holding that provisions requiring that naturalized citizens present a certificate of naturalization upon challenge or otherwise cast a provisional ballot violates the Fourteenth Amendment).

98. See, e.g., OHIO REV. CODE ANN. § 3505.19 (West 2006) (providing that if a challenged person shows up to vote and establishes to the satisfaction of the judges that he or she is entitled to vote, he or she shall be permitted to vote).

99. ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 151 (2000). During the colonial era, the vote was reserved for white men and in some states only those men who owned property. See *id.* at 5. The later requirement of voter registration was due in part to the increase in urban areas where “voters were less likely to be known personally to election officials.” See *id.* at 152.

100. J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910*, at 51 (1974).

101. See KEYSAR, *supra* note 99, at 151.

102. See *id.* at 152. In post Civil War Chicago, Republicans hired individuals to “check polling places” and offered a \$300 reward to those who would assist in convicting persons who voted illegally. But, all those who were accused were acquitted. *Id.* at 153–54.

103. 504 U.S. 191 (1992).

overly influence and destroy the free exercise of the right to vote.<sup>104</sup> The Court wrote:

Within 20 years of the formation of the Union, most States had incorporated the paper ballot into their electoral system. . . . Wishing to gain influence, political parties began to produce their own ballots for voters. These ballots were often printed with flamboyant colors, distinctive designs, and emblems so that they could be recognized at a distance. State attempts to standardize the ballots were easily thwarted—the vote buyer could simply place a ballot in the hands of the bribed voter and watch until he placed it in the polling box. Thus, the evils associated with the earlier *viva voce* system reinfected the election process; the failure of the law to secure secrecy opened the door to bribery and intimidation.<sup>105</sup>

While the practice of vote caging dates back to the 1950s, the use of race-based voter challenges can be traced to the post-Civil War era. Beginning in the 1860s, Republicans enacted vote challenging mechanisms with the mission of addressing fraud, while the Democrats responded with arguments that the Republican passed laws were “an act of hostility to the Democratic party.”<sup>106</sup>

Still, the race-based voter targeting was both blatant and widespread. As an example, in 1865, the Florida legislature instituted measures designed for the sole purpose of denying the franchise to freed Blacks.<sup>107</sup> Likewise, after record black enfranchisement in 1867, white legislators adopted a statute that granted poll watchers the ability to challenge voter eligibility, stating:

If any person offering to vote shall be challenged, as not qualified, by an inspector or by any other elector, one of the board shall declare to the person challenged the qualifications of an elector. If such person shall claim that he is qualified, and the challenge be not withdrawn, one of the inspectors shall administer to him an oath prescribed by law.<sup>108</sup>

In *Tiryak v. Jordan*,<sup>109</sup> the court found that, although the state is responsible for the administration of elections, “[t]he statutory scheme in certain instances delegates aspects of that responsibility to the political

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104. *See id.* at 200–01.

105. *Id.*

106. KEYSSAR, *supra* note 99, at 155. Beginning in 1866, the Republican and Democratic parties set the stage for partisan battles over access and integrity for centuries to come. *See id.* at 152–53.

107. *See* ADVANCEMENT PROJECT, REPORT TO STATE AND LOCAL ELECTION OFFICIALS ON THE URGENT NEED FOR INSTRUCTIONS FOR PARTISAN POLL WATCHERS (2004), available at <http://www.advancementproject.org/sites/default/files/AP-VSchallenge.pdf>. Racial voting restrictions are as old as the Confederacy. *See id.* (citing FLA. CONST. of 1865, art. VI, § 1 (limiting the right to vote to white males)).

108. *Id.* at 108.

109. 472 F. Supp. 822 (1979).

parties. This delegation is a legislative recognition of ‘the critical role played by political parties in the process of selecting and electing candidates for state and national office.’”<sup>110</sup> The “critical role” begins to impede upon government authority in the area of partisan poll watchers.

## II. RACE BASED CHALLENGES AND VOTER CAGING

As discussed, *supra*, voter challenges have been used to target racial minorities. The practice of partisan voter challenges rests upon the discriminatory selection of voters based on geography, i.e., racially segregated neighborhoods and racial identification. As a first step, political operatives utilize voter caging to capture the voters and ultimately question their eligibility.

Although gaining recent prominence, caging is not new. The political tactic was used as a so-called “ballot security” measure as early as the 1950s.<sup>111</sup> Voter caging often goes hand in hand with voter intimidation<sup>112</sup> and deception tactics.<sup>113</sup> For instance, as discussed, *supra*, while the Republican National Committee was defending a lawsuit in Louisiana, a memo released from a party official indicated its intentions to suppress the minority vote. The relevant part of the memo read: “I would guess that this program will eliminate at least 60-80,000 folks from the rolls . . . . If it’s a close race . . . which I’m assuming it is, this could keep the

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110. *Id.* at 823–24 (quoting *Marchioro v. Chaney*, 442 U.S. 191, 195 (1979)).

111. See Davidson et al., *supra* note 15, at 559. Voter caging was recognized in Arizona in the 1950s and 1960s as a Republican political tool to exclude African Americans and Mexican Americans. *Id.* at 543. The Arizona example also implicated former Chief Justice William Rehnquist during his confirmation hearings. See JOHN W. DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT* 271 (2001). In 1962, the Republican National Committee expanded this approach and engaged in a national voter caging campaign named “Operation Eagle Eye,” which targeted minority voters in urban areas in battleground states. See CHANDLER DAVIDSON ET AL., *REPUBLICAN BALLOT SECURITY PROGRAMS: VOTE PROTECTION OR MINORITY VOTE SUPPRESSION—OR BOTH?: A REPORT TO THE CENTER FOR VOTING RIGHTS & PROTECTION* 25 (2004). For example, in the 1960s in Chicago the RNC planned to have more than 10,000 poll-watchers for the 3,552 voting precincts. *Id.* at 26 n.5 (citing *250,000 Accredited to Watch City Polls*, CHICAGO DAILY NEWS, Nov. 2, 1964, at 1, 14).

112. *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, 671 F. Supp. 2d 575, 578–79 (D.N.J. 2009) (“Voter intimidation presents an ongoing threat to the participation of minority individuals in the political process, and continues to pose a far greater danger to the integrity of that process than the type of voter fraud the RNC is prevented from addressing by the Decree.”); Jo Becker, *GOP Challenging Voter Registrations: Civil Rights Groups Accuse Republicans of Trying to Disenfranchise Minorities*, WASH. POST, Oct. 29, 2004, at A5 (introducing evidence that Republicans have “used tactics that were aimed at intimidating minority voters and suppressing their votes.”).

113. See DAVIDSON ET AL., *supra* note 111 (“There are several noteworthy characteristics of these [vote caging] programs. They focus on minority precincts almost exclusively. There is often only the flimsiest evidence that vote fraud is likely to be perpetrated in such precincts. In addition to encouraging the presence of sometimes intimidating Republican poll watchers or challengers who may slow down voting lines and embarrass potential voters by asking those humiliating questions, these programs have sometimes posted people in official-looking uniforms with badges and side arms who question voters about their citizenship or their registration. In addition, warning signs may be posted near the polls, or radio ads may be targeted to minority listeners containing dire threats of prison terms for people who are not properly registered—messages that seem designed to put minority voters on the defensive.”). See generally Daniels, *supra* note 38.

black vote down considerably.”<sup>114</sup> Similarly, in 1981, “the Republican National Committee sent letters to predominantly black neighborhoods in New Jersey, and when 45,000 letters were returned as undeliverable, the [RNC] compiled a challenge list to remove those voters from the rolls.”<sup>115</sup> More recently, prior to the 2004 presidential election the Republican National Committee used vote caging methods to compile a list of approximately 35,000 persons.<sup>116</sup> The RNC gathered its voter challenge list of 35,000 persons “by sending letters to registered voters in precincts with a high concentration of minorities, in this case inner-city areas in Cleveland, and recording the names of those voters for whom the letter was returned as undeliverable.”<sup>117</sup>

In *Spencer v. Blackwell*,<sup>118</sup> a recent voter challenge case, African American voters sought and obtained a preliminary injunction against Ohio Secretary of State Kenneth Blackwell, seeking a court order prohibiting voter challenges inside the polling place.<sup>119</sup> The plaintiffs alleged that voter challenges would be used to discriminate against African American voters in Hamilton County, Ohio.<sup>120</sup> They asserted that the Hamilton County Board of Elections and the Hamilton County Republican Party were working together to discriminate against African American voters on Election Day.<sup>121</sup> The Hamilton County Republican Party had petitioned to have hundreds of poll challengers present during the 2004 presidential election to challenge voter eligibility and prevent fraud.<sup>122</sup> Tim Burke, Chair of the Hamilton County Board of Elections, testified that two-thirds of the poll challengers were designated for predominately African-American precincts.<sup>123</sup> The court found that the Ohio statutes governing voter challenges and the Secretary of State’s guidance

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114. See Edsall, *supra* note 34 (omissions in original).

115. Becker, *supra* note 112. The Democratic National Committee and Republican National Committee entered into a Consent Decree in 1982 in which the RNC agreed to:

[R]efrain from undertaking any ballot security activities in polling places or election districts where the racial or ethnic composition of such districts is a factor in the decision to conduct, or the actual conduct of, such activities there and where a purpose or significant effect of such activities is to deter qualified voters from voting; and the conduct of such activities disproportionately in or directed toward districts that have a substantial proportion of racial or ethnic populations shall be considered relevant evidence of the existence of such a factor and purpose.

Consent Order at ¶ 2(e), *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, 671 F. Supp. 2d 575 (D.N.J. Nov. 1, 1982) (No. 81-3876).

116. *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, 671 F. Supp. 2d 575, 582 (D.N.J. 2009).

117. *Id.*

118. 347 F. Supp. 2d 528 (S.D. Ohio 2004).

119. *Id.* at 529. In Ohio, poll watchers must take an oath, be a resident of the state and a “qualified elector.” OHIO REV. CODE ANN. § 3505.21 (LexisNexis 2010). See *Spencer*, 347 F. Supp. 2d at 529–30.

120. *Id.* at 529.

121. *Id.*

122. See *id.* at 530.

123. *Id.* The court heard evidence that “14% of new voters in a majority white location will face a challenger . . . , but 97% of new voters in a majority African-American voting location will see such a challenger.” *Id.*

imposed a severe burden on Ohio voters and was not narrowly tailored to serve a compelling state interest.<sup>124</sup> The court opined that “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.”<sup>125</sup>

In the 2010 midterm elections, reports of voter intimidation, voter suppression and increased challenges were numerous.<sup>126</sup> The outcome of these types of measures are a decrease in voter participation. The threat of voter challenges and voter caging can deter eligible voters from going to the polls.<sup>127</sup> Additionally, the heightened scrutiny associated with voter challenges also has a deterrent and intimidating effect.<sup>128</sup>

When election officials accept voter challenges that exhibit a pattern of race, ethnic, or national origin discrimination, the practice could be found violative of the Equal Protection Clause and other statutes.<sup>129</sup> Much like discriminatory peremptory challenges in jury selection,<sup>130</sup> the current voter challenge system has created a sort of peremptory voter challenges. In this regard, voter challenges are similar to peremptory challenges used in criminal and civil trials and should be considered peremptory voter challenges because of their use to eliminate voters based solely on race and the ability to utilize the challenges without proffering a basis for the strike.

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124. *Spencer*, 347 F. Supp. 2d at 536.

125. *Id.* at 535. The Court has repeatedly recognized that “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.” *Id.* at 534 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)).

126. *See, e.g.*, Krissah Thompson, *Some Complaints Surface Amid Stepped-Up Efforts to Monitor Voting Fraud*, WASH. POST, Nov. 3, 2010 (“In Minnesota, where conservative groups had run radio ads and offered \$500 rewards to those willing to turn in anyone prosecuted for voter fraud, a few poll watchers aggressively challenged voters until they were confronted by election protection volunteers, lawyers monitoring the election reported.”); *see also* Ian Urbina, *Reports of Intimidation and Electronic Problems Surface at Polls Across the U.S.*, N.Y. TIMES, Nov. 2, 2010, (““One of the most worrisome things we’re seeing is an uptick in voter intimidation and misinformation compared to prior elections,” said Wendy Weiser, director of the voting rights and elections project at the Brennan Center for Justice at New York University.”)

127. *Voter Registration and List Maintenance: Hearing Before the Subcomm. on Elections of the H. Administration Committee*, 110th Cong. (2007) (statement of Joseph D. Rich, Director, Fair Housing Project) (“Targeted at traditionally disenfranchised voters, this practice relies on voter ‘challenge’ laws to blindly question the ability of eligible voters to cast a ballot. While dressed in the garb of protecting against the ‘voter fraud,’ caging is really a cynical way to undermine the most fundamental right of all Americans – the right to participate freely in our democracy – for partisan gain. It is especially pernicious because it has almost invariably been used to suppress the vote of minority voters.”)

128. *See Democratic Nat’l Comm. v. Republican Nat’l Comm.*, 671 F. Supp. 2d 575, 590 (D.N.J. 2009) (discussing partisan intimidation tactics including those associated with voter challenges).

129. *See generally id.*

130. *Batson v. Kentucky*, 476 U.S. 79, 82 (1986).

In *Batson v. Kentucky*,<sup>131</sup> the Supreme Court found that a prosecutor's use of peremptory challenges to exclude racial minorities from serving on a jury violated the Equal Protection Clause.<sup>132</sup> In a subsequent case, the Court focused its attention on whether the defendant, when exercising peremptory challenges, should be considered a state actor under the Fourteenth Amendment.<sup>133</sup> The court held that the defendant should be considered a state actor because the defendant used the peremptory challenge procedures with "the overt, significant assistance of state officials."<sup>134</sup> The dissenters in the case argued that the use of peremptory challenges equaled private action because the decision to use the peremptory challenge is left to the defendant's discretion.<sup>135</sup>

In many ways, voter challenges are similar to peremptory challenges due to the lack of an evidentiary standard before denying a fundamental right.<sup>136</sup> Once the government allows private actors to make an assertion regarding whether a citizen lives at a certain address or has a "belief" that the person is otherwise ineligible, it has outsourced its authority and granted the private actors governmental power.

### III. PRIVATE PARTISAN ACTIONS AS STATE ACTION

*"The timing of the challenges is so transparent that it defies common sense to believe the purpose is anything but political chicanery."*<sup>137</sup>

In elections, private partisans participate to the extent that the law allows, i.e., laws governing electioneering, private access to the polls, and what voters can wear to the polls.<sup>138</sup> States should become wary of allowing voter challengers. In the exercise of race based or racially targeted voter challenges, where partisanship is used as a proxy for race, courts have implied liability for both public and private entities.<sup>139</sup> Private partisan racially targeted voter challenges could leave public authorities liable for their involvement in denying citizens the right to vote.

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131. 476 U.S. 79 (1986).

132. *Id.* at 83–84.

133. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991).

134. *Id.* at 622 (quoting *Tulsa Prof'l Collection Servs. v. Pope*, 485 U.S. 478, 485 (1988)).

135. *Id.* at 631–32 (O'Connor, J., dissenting). Justice O'Connor, Chief Justice Burger and Justice Scalia dissented arguing that the challenge allows private parties to exclude potential jurors and is left wholly within the discretion of the litigant, and considered it "an enclave of private action in a government-managed proceeding." *Id.* at 632–34.

136. See *supra* notes 134–35.

137. *Mont. Democratic Party v. Eaton*, 581 F. Supp. 2d 1077, 1081 (D. Mont. 2008).

138. Kimberly J. Tucker, "You Can't Wear That to Vote": *The Constitutionality of State Laws Prohibiting the Wearing of Political Message Buttons at Polling Places*, 32 T. MARSHALL L. REV. 61, 61–62 (2006) (arguing that the state statute that bans private partisans access to political buttons at polling places is unconstitutional because it violates free speech).

139. See *Mont. Democratic Party*, 581 F. Supp. 2d at 1078. The Montana Democratic Party sought a temporary restraining order to stop the Montana Republican Party from challenging 6,000 registered voters who were predominately young and registered Democrats. *Id.*

The Supreme Court has applied the notion that a private actor performing a governmental function can be deemed a state action in the area of election law—most notably in areas of race discrimination. In the first of the white primary cases,<sup>140</sup> the Supreme Court found that a Texas statute that excluded blacks from participating in the state primary that was run by the state Democratic Party constituted a state action in violation of the Equal Protection Clause.<sup>141</sup> In the landmark case *Smith v. Allwright*,<sup>142</sup> the Supreme Court stated, “[t]he [political] party takes the character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party.”<sup>143</sup>

#### A. Nexus between the State and the Private Action

The state’s ceding of authority to private parties in the area of voter eligibility places governmental power in the private partisan and strips the challenged voter of her rights and the expectation of participating in the electoral practice free from discrimination. In determining whether state action has occurred, the Supreme Court looks at two distinct issues: whether “the deprivation . . . [was] caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible,” and whether “the party charged with the deprivation . . . [is] a person who may fairly be said to be a state actor.”<sup>144</sup>

Under this test, the function of voter challenges can be deemed state action: It is the state statutes that provide for voter challenges, and, the action itself is derived from an inherently public-private relationship. In *Edmonson v. Leesville Concrete Co.*,<sup>145</sup> the Court found that “[a]lthough private use of state-sanctioned private remedies or procedures does not rise, by itself, to the level of state action, our cases have found state action when private parties make extensive use of state procedures with ‘the overt, significant assistance of state officials.’”<sup>146</sup> In *Tiryak*, a § 1983 case involving voter challenges, the court found that “[n]o activity is more indelibly a public function than the holding of a political elec-

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140. See *Terry v. Adams*, 345 U.S. 461, 467–70 (1953) (holding that excluding blacks from “pre-primary elections” constituted unconstitutional state action under the Civil War Amendments); *Smith v. Allwright*, 321 U.S. 649, 660 (1944) (the Court found that “delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party’s action the action of the state”); *Nixon v. Herndon*, 273 U.S. 536, 540–41 (1927) (striking down the Texas statute that denied blacks an opportunity to participate in a state primary).

141. *Nixon*, 273 U.S. at 540–41.

142. 321 U.S. 649 (1944).

143. *Id.* at 663.

144. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

145. 500 U.S. 614 (1991).

146. *Id.* at 622 (citation omitted).

tion . . . cases make it clear that the conduct of the elections themselves is an [e]xclusively public function.”<sup>147</sup>

The crucial question is whether enough governmental involvement exists to convert private discrimination into state action. The Supreme Court has held that an activity constitutes state action when the State exercised “coercive power”<sup>148</sup> or when a private actor operates as a “willful participant in joint activity with the State or its agents.”<sup>149</sup> Once the government allows private actors to make an assertion regarding whether a citizen lives in a certain address or “believes” that the person is otherwise ineligible, it has outsourced its authority and granted the private actors governmental power. It is the government’s responsibility to determine whether a voter is eligible to vote, not a private party’s.

Notwithstanding the use of preemptory electoral challenges, the state action doctrine should serve as a deterrent to those who wish to use public power in a discriminatory manner.<sup>150</sup> The Supreme Court has found that even peripheral involvement could equate to an Equal Protection violation.<sup>151</sup> The state’s bestowal of authority, here, allows persons other than the state to determine the eligibility of voters. In the landmark case *Smith v. Allwright*, the Supreme Court found that “the [political] party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party.”<sup>152</sup> More contemporaneously, in *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*,<sup>153</sup> the Court found state action where the private actor received its power from the state.<sup>154</sup> Here, it is the state that allows private actors to serve as voter challengers and challenge voters—thus, granting power to the private actors.

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147. *Tiryak v. Jordan*, 472 F. Supp 822, 824 (E.D. Pa. 1979) (internal quotation marks omitted).

148. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

149. *United States v. Price*, 383 U.S. 787, 794 (1966).

150. The Supreme Court has held that “the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate.” *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966) (outlawing the poll tax).

151. *United States v. Guest*, 383 U.S. 745, 755–56 (1966) (“This is not to say, however, that the involvement of the State need be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several cooperative forces leading to the constitutional violation.”).

152. *Smith v. Allwright*, 321 U.S. 649, 663 (1944).

153. 531 U.S. 288 (2001).

154. *Id.* at 290–91, 296 (“We have treated a nominally private entity as a state actor when it is controlled by an ‘agency of the State,’ when it has been delegated a public function by the State, when it is ‘entwined with governmental policies,’ or when government is ‘entwined in [its] management or control.’”) (alteration in original) (citations omitted).

In cases where the court has not found state action, it acknowledged the difficulty in making the designation.<sup>155</sup> The courts have neglected to find a state action violation primarily in the area of inner affairs of political parties.<sup>156</sup> The Supreme Court and lower courts have found that the political party's decision on the seating and selection of delegates does not constitute state action.<sup>157</sup> Here the discrepancy does not lie between the political party and its internal rules governing delegate selection or primary dates, but the party's manipulation of state laws to discriminate against voters on the basis of race. The use of the state statute to provide access to the voters and to allow the parties to challenge voters based on a list that was developed on a discriminatory premise, and the State's approval of the individual challenges such that voters eligibility is questioned and in some cases disallowed, clearly places the political party in the position of acting on behalf of the State and its actions can be attributed to the State.

### *B. Private Partisans Performing Governmental Functions*

The Supreme Court has repeatedly determined that the act of regulating voting is a governmental responsibility.<sup>158</sup> The Federal Constitution grants the authority to administer elections to the federal and state government, which convenes the responsibility to register, monitor, and count ballots pursuant to the rules, regulations and statutes those governmental entities prescribe.<sup>159</sup> Clearly, administering the vote and access to the voting process is an exclusive governmental function.

Determining whether a particular voter is eligible, therefore, is likewise a governmental duty. The use of voter challenges outsources

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155. See, e.g., *Evans v. Newton*, 382 U.S. 296, 299 (1966) (“What is ‘private’ action and what is ‘state’ action is not always easy to determine. Conduct that is formally ‘private’ may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action.”) (citation omitted); see also *Gilmore v. City of Montgomery*, 417 U.S. 556, 571–74 (1974) (failing to find state action because the record was not conclusive on whether the nonexclusive use of recreational facilities by all-white private schools, private school-affiliated groups, and all-white non-school organizations was enough state action to warrant judicial intervention on constitutional grounds).

156. See *Max v. Republican Comm. of Lancaster Cnty.*, 587 F.3d 198, 202 (3d Cir. 2009) (holding that a political party's involvement in a primary election did not constitute state action but instead constituted internal party affairs which are not subject to § 1983 enforcement).

157. *Cousins v. Wigoda*, 419 U.S. 477, 491 (1975) (holding that the First Amendment protects a national political party's delegate selection rules); *Bachur v. Democratic Nat'l Party*, 836 F.2d 837, 843 (4th Cir. 1987) (holding that a challenge to the gender allocation rule was not permitted for delegate selection); *Ripon Soc'y, Inc. v. Nat'l Republican Party*, 525 F.2d 567, 586 (D.C. Cir. 1975) (holding that the Equal Protection Clause was not violated when a national party did not make presidential nominations based on a defined constituency of one person-one vote).

158. *United States v. Manning*, 215 F. Supp. 272, 283, 285–86 (W.D. La. 1963) (holding that the “manner of holding elections” has been understood as covering the entire election process, from voter registration to the counting of ballots); see also *Foster v. Love*, 522 U.S. 67, 69 (1997) (finding Congress's Elections Clause authority “well settled . . . to override state regulations” involving federal election administration matters); *Ex parte Coy*, 127 U.S. 731, 755 (1888).

159. The Supreme Court described the state's abdication of responsibility as an “evil.” *Terry v. Adams*, 345 U.S. 461, 477 (1953).

this responsibility to private actors. The voter challenger's use of discriminatory means to develop the list of voters to oppose promotes race discrimination and can make the state responsible for the private party's actions; thus, the private partisans are involved in a governmental function.

### *C. Scrutinizing Voter Challengers: Addressing the Vote Fraud Claim*

While this Article fervently argues that the use of racially targeted voter challenges violates the Equal Protection Clause, it also recognizes that the level of scrutiny applied and the case-by-case analysis that the courts employ will determine whether a violation has occurred.<sup>160</sup> A governmental or private agency would argue that it narrowly tailored its voter challenge statutes and had a compelling state interest in allowing voter challengers in the polling place and that state and federal authorities would require adherence to the law.<sup>161</sup> Moreover, it would assert that the private party's actions did not constitute state action under the Equal Protection Clause. In this instance, even under the most forgiving standard, it is difficult to ascertain how the state could meet its burden.<sup>162</sup>

Additionally, proponents of voter challenges will argue that the challenges serve as a voter integrity measure that helps prevent fraud.<sup>163</sup>

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160. In *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 179–81, 195 (1988), a state university imposed disciplinary sanctions against its basketball coach in compliance with National Collegiate Athletic Association rules and recommendations. The Court found that this action did not turn Association's otherwise private conduct into "state action," and thus Association could not be held liable for violation of coach's civil rights. In *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 526–27, 547 (1987), the United States Olympic Committee (USOC) and the International Olympic Committee brought suit under the Amateur Sports Act against a California corporation and various individuals to restrain their use of the term "Olympics" to describe an athletic competition they sponsored. The Court said that the USOC was not a government actor.

161. See *Burson v. Freeman*, 504 U.S. 191, 199 (1992). "The Court also has recognized that a State 'indisputably has a compelling interest in preserving the integrity of its election process.'" *Id.* (quoting *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)). "The Court has thus 'upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.'" *Burson*, 504 U.S. at 199 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)). "In other words, it has recognized that a State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process." *Id.* The Court further held that "[t]o survive strict scrutiny, however, a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest." *Id.*

162. See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (holding that during a challenge to a state election law a court "must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'").

163. While voter fraud once was a distinct problem in this country, it has certainly become less of a threat to democracy. See KEYSSAR *supra* note 99, at 123. As early as 1934, noted election administration expert Joseph Harris found that voter fraud was disappearing and "[h]onest elections have become the established rule in most sections of the country." See JOSEPH P. HARRIS, ELECTION ADMINISTRATION IN THE UNITED STATES 317 (1934). In one instance, the Court held that voter fraud in Indiana has never been a problem. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 194 (2008).

To these arguments, courts have already spoken. For example, in *Democratic Nat'l Committee v. Republican Nat'l Committee*,<sup>164</sup> the court found that the effect of the alleged incidents of fraud “pale[d] in comparison to the damage that would likely result from allowing the types of ballot security initiatives that are currently prohibited by the Consent Decree.”<sup>165</sup>

The strongest response to such arguments is that although permitting statutory voter challenges helps prevent voter fraud, the elimination of this ill is not the responsibility of private actors or partisan organizations. Instead, it is the government’s sole responsibility to prescribe the manner of elections and to protect the process. Moreover, in the recent Supreme Court case *Crawford v. Marion Cnty. Election Board*,<sup>166</sup> the Court noted that the State of Indiana had not encountered any documented reports of voter fraud.<sup>167</sup> In fact, once implemented, the voter ID law that had the stated compelling reason of preventing fraud—much like the voter challenges—was more effective at eliminating eligible voters. Likewise, as other litigation has brought to light, so-called ballot security measures tend to interfere with the balloting process and do not promote voter participation and confidence.<sup>168</sup>

The precision that is used to eliminate, frustrate and intimidate eligible voters and, in most cases minority voters, should serve as a credible reason to consider curtailing, if not eliminating, the position of voter challengers. Or, at a minimum, to alter their authority and presence in the polling site. Their presence clutters the polling site, and distracts poll workers and election officials from the process of allowing citizens to vote by requiring that they comply with verification procedures that are based on a flawed discriminatory premise. Additionally, the means that private partisans have utilized to arguably prevent fraud is tainted with racial targeting and discrimination.

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164. 671 F. Supp.2d 575 (D.N.J. 2009).

165. *Id.* at 610 (“Even if the Court were to assume that all 300 of the alleged incidents of fraud involved in-person misconduct at the polls, the effects of such fraud pales in comparison to the damage that would likely result from allowing the types of ballot security initiatives that are currently prohibited . . . . [Another] matter involved a voter challenge list that included 35,000 predominantly-minority individuals. If only one tenth of those individuals were deterred from voting by harassment at the polls, the effect would have been the disenfranchisement of 3,500 individuals—a number far greater than the 300 alleged incidents of voter fraud which the [Republican National Committee] points to in support of its claim.”).

166. 553 U.S. 181 (2008).

167. *Id.* at 194.

168. *Democratic Nat'l Comm.*, 671 F. Supp. 2d at 610 (“The effects of ballot security initiatives . . . pose a far greater threat to the integrity of modern elections than in-person voter fraud. In fact, even a cursory investigation of the prevalence of voter intimidation demonstrates that ballot security initiatives have the potential to unfairly skew election results by disenfranchising qualified voters in far greater numbers of than [sic] the instances of in-person fraud that may occur during any given race.”).

While the Supreme Court has found the State's interest in preventing voter fraud to be a constitutionally acceptable goal,<sup>169</sup> the levels of voter fraud are miniscule when compared to the imposition placed on voters to succumb to private inquisition.<sup>170</sup> When you compare the level of voter fraud, vote caging, and baseless voter challenges the voter is the victim.<sup>171</sup> The government's interest is to provide a fair and free process for citizens to access the ballot. It has become clear, however, that the goal of some private entities is to stop as many votes as possible under the guise of voter fraud prevention, ballot security or voter integrity.

#### IV. STATE ACTION SOLUTIONS

*“As against the unfettered right, however, lies the [c]ommon sense, as well as constitutional law . . . that government must play an active role in structuring elections; as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”*<sup>172</sup>

In *Crawford*, Justice Souter recognized that voting legislation has “two competing interests,” the fundamental right to vote and the need for governmental structure in elections.<sup>173</sup> In a democracy, political participation serves as a fundamental component of its legitimacy.<sup>174</sup> Partisan voter challenges do not further these laudable principles. This allowance, however, is often used to “game” the system. Ballot security initiatives often use party as a proxy for race.<sup>175</sup> The presumption against the voter

169. See, e.g., *Crawford*, 553 U.S. at 196 (stating that there is “no question” that prevention of voter fraud constitutes a legitimate and important state interest).

170. See David Schultz, *Less Than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 486 (2008) (“[V]oter fraud is used as a pretext for a broader agenda to disenfranchise Americans and rig elections.”).

171. In a 1986 election, the RNC used vote caging to compile a list of voters, mostly black, that it attempted to have removed from the voter rolls. At the time, Kris Wolfe, the Republican National Committee Midwest political director, wrote Lanny Griffith, the committee's Southern political director, “I know this is really important to you. I would guess this program would eliminate at least 60-80,000 folks from the rolls . . . If it's a close race . . . which I'm assuming it is . . . this could keep the black vote down considerably.” See Martin Tolchin, *The Political Campaign: Committees Prepare Negative Attacks in House Races*, N.Y. TIMES, Oct. 26, 1988, at B19 (discussing similar tactics in a 1984 election); TERESA JAMES, CAGING DEMOCRACY: A 50 YEAR HISTORY OF PARTISAN CHALLENGES TO MINORITY VOTERS 12 (2007), available at [http://www.projectvote.org/images/publications/Voter%20Caging/Caging\\_Democracy\\_Report.pdf](http://www.projectvote.org/images/publications/Voter%20Caging/Caging_Democracy_Report.pdf) (discussing the vote caging activities of the 1986 Louisiana election). Following this caging scandal, both parties agreed to amend the original 1982 consent decree to require that the RNC would submit to the court any future ballot security plan for approval.

172. *Crawford*, 553 U.S. at 210 (Souter, J., dissenting) (alterations in original) (internal quotation marks omitted).

173. *Id.* at 210.

174. See *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”).

175. In his expert testimony in *Democratic National Committee*, Professor Chandler Davidson opined:

creates a barrier to participation.<sup>176</sup> Accordingly, voter challenges should be abolished, or at a minimum, altered to a more uniform and silent mechanism in the polling place.

In many instances, voter challenges are used for partisan gain, not election integrity or ballot security, and derive from race based caging schemes.<sup>177</sup> In all these situations, the law should provide some protections to ensure that only those ineligible are burdened with the responsibility of proving or disproving private allegations. In current practices, the presumption of eligibility has been removed from the voter and placed squarely in the hands of the private actor.<sup>178</sup> The following measures would provide a presumption of legitimacy to the voter and require the state to determine eligibility, not the private actors. Moreover, private actors would be more consistent with federal observers in their duties and Election Day characteristics, i.e., they would be allowed to enter and remain in the polls but not interject in the voting process.<sup>179</sup>

#### A. Eliminating Voter Challenges

The voter challenge process in its present form allows private parties the opportunity to disrupt the electoral process for partisan gain.<sup>180</sup> Because states, in large part, determine who has access to the polls, it would take a major effort to legislate the voter challenger's presence out of the voting precinct. However, the disruption that is caused and the discriminatory basis for the challenges—whether race, national origin or

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[T]he reason such programs are usually carried out by Republicans rather than Democrats may simply be a matter of statistics: minority voters—who are far more likely to be added to a challenge list because of irregularities in registration attributable to language barriers, lack of photo identification cards (“ID”), or changes of address—have historically tended to vote for Democratic candidates.

Democratic Nat’l Comm. v. Republican Nat’l Comm., 671 F. Supp. 2d 575, 590 (D.N.J. 2009).

176. See Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 71–79, 123 (2009) (arguing for expanding the use of the “Democracy Canon,” which generally construes election statutes in the voter’s favor).

177. See JAMES, *supra* note 171, at 5–6.

178. See Benson, *supra* note 62, at 271 (arguing for uniform election administration measures on basis that “the presumption that the voter is sovereign on Election Day, and that every policy and practice implemented on that day must consider the voter and his or her experience as paramount”).

179. See *infra* Part IV.B–C.

180. In *Spencer v. Pugh*, 543 U.S. 1301, 1301–03 (2004), the State of Ohio allowed challengers to be stationed in polls. The Hamilton County Republican Party requested to have additional challengers beyond the typical filed list of precinct challengers present at polling places, assigned to predominantly African American precincts. *Id.* at 1301. The district court overruled the State’s decision to allow the use of challengers on Election Day because it could create an extraordinary risk of intimidation and delay. *Id.* at 1301–02. However, the Sixth Circuit reversed the decision and the Supreme Court affirmed. See *id.* at 1302–03. Justice Stevens reviewed the case without referring the matter to the full Supreme Court. *Id.* at 1303. He noted in his brief opinion that although “the threat of voter intimidation is not new to our electoral system,” there was simply no evidence that voter-targeted fraud would occur if challengers were permitted in the polling place. *Id.* at 1302. Emphasizing his “faith” that voter-targeted deception and intimidation would not occur and that “the elected officials and numerous election volunteers on the ground will carry out their responsibilities in a way that will enable qualified voters to cast their ballots,” Justice Stevens upheld the Sixth Circuit’s decision to allow challengers in the polling place. *Id.* at 1302–03.

language ability—as a proxy for party must be recognized and dealt with in either litigation, via the Fourteenth Amendment, or a legislative manner, via state statute. Some scholars would argue that the presence of voter challengers assist the electoral process as a deterrence factor. Such an argument, however, has little basis in fact,<sup>181</sup> and pales in comparison to the mammoth accounts of disruption and chaos.<sup>182</sup>

As discussed, partisans use voter challenges like illegal peremptory challenges. Armed with nothing more than an address, partisans make presumptions based on race, primarily that the voter will not vote for them thus they issue a challenge to frustrate the voter and the democratic process. Challenges make lines longer and cause substantial confusion. They can also intimidate voters and disrupt polling place procedures.<sup>183</sup> The primary detraction for voter challenges is that the practice casts dispersions on a wide swath of voters. The government could not disqualify a voter because of returned mail, yet, private partisans are given the ability to infringe upon a fundamental right.

While it is tempting to suggest that states eliminate the position of voter challengers in the polls to avoid the instances of partisan manipulation at the expense of the voter's fundamental right, a more balanced approach is warranted. The state rationale for massive voter challenges is to deter voter fraud. However, the basis for this assertion rests upon race discrimination.<sup>184</sup> The partisan is not seeking to eliminate voter fraud, but to eliminate voters whom it believes are predisposed to vote against its candidate and/or its ideals.

Granting the challenger the authority to question a voter's eligibility and requiring the voter to rebut the assertions of nongovernmental entities shifts the power from the voter to the partisan. This shifting is burdensome to the voter and requires the state to weigh the evidence and make a decision against the voter. The eligibility is questioned based on the challenge. If the voter cannot address the nature of the challenge, the State will, in some instances, not allow the citizen to vote or require them

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181. See *supra* Part III.B–C.

182. See *Summit Cnty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 554 (6th Cir. 2004) (“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.”).

183. See Schultz, *supra* note 170, at 485 (“A second great disenfranchisement is afoot across the United States as, yet again, voter fraud is raised as a way to intimidate immigrants, people of color, the poor, and the powerless, and prevent them from voting.”); see also Sherry A. Swirsky, *Minority Voter Intimidation: The Problem That Won’t Go Away*, 11 TEMP. POL. & CIV. RTS. L. REV. 359, 361–65 (2002) (arguing that voter intimidation is a common campaign tactic and providing examples of “ballot security measures” and other measures used to deceive and intimidate).

184. See *supra* Part II.

to vote a provisional ballot.<sup>185</sup> The shifting of power and the presumption that the voter is in fact ineligible unduly burdens the voter.

As held in *Tiryak*, elections are public functions.<sup>186</sup> Allowing private parties to begin a process that could lead to racial targeting and racial discrimination manipulates a state's authority to stage elections. When this occurs, the private partisans "are abusing the process the State . . . has provided to ensure the accuracy of voter rolls (indeed, they are using the process designed to protect the integrity of the political process to undermine it)."<sup>187</sup>

If the poll worker allows the voter challenge to question a voter's eligibility in a racially targeted manner, that worker could subject himself to liability for allowing racially based discrimination.<sup>188</sup> In *Tiryak*, the court recognized the duality of poll watchers and the potential for state liability. The court opined that:

The poll-watcher performs a dual function on Election Day. On the one hand, because he is designated and paid by a political party, his job is to guard the interests of that party's candidates. On the other hand, because exercise of his authority promotes an honest election, the poll-watcher's function is to guard the integrity of the vote. Protecting the purity of the electoral process is a state responsibility and the poll-watcher's statutory role in providing that protection involves him in a public activity, regardless of his private political motive.<sup>189</sup>

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185. Additionally, an unfortunate consequence of the voter challenges has been the misuse of provisional ballots, which are mandated in the Help America Vote Act to ensure that eligible citizens are not turned away from the polls. See 42 U.S.C. § 15482 (2006). The administration of provisional ballots has been called into question for the myriad of ways that election administrators determine whether to issue and count the ballot. In 2004, nearly 1.9 million provisional ballots were cast and 1.2 million were counted, which left more than half a million people disenfranchised. U.S. ELECTION ASSISTANCE COMM'N, FINAL REPORT OF THE 2004 ELECTION DAY SURVEY, 6–5 (2005). Moreover, implementing the provisional ballot requirement left poll workers confused and many ballots unaccounted for, creating even more disparities. See PEOPLE FOR THE AM. WAY ET AL., SHATTERING THE MYTH: AN INITIAL SNAPSHOT OF VOTER DISENFRANCHISEMENT IN THE 2004 ELECTIONS, 8 (2004), available at [http://www.866ourvote.org/tools/publications\\_testimony/files/0002.pdf](http://www.866ourvote.org/tools/publications_testimony/files/0002.pdf) ("There was widespread confusion over the proper use of provisional ballots, and widely differing regulations from state to state—even from one polling place to the next—as to the use and ultimate recording of these ballots."); see also R. Bradley Griffin, Note, *Gambling with Democracy: The Help America Vote Act and the Failure of the States to Administer Federal Elections*, 82 WASH. U. L. REV. 509, 525–28 (2004) (arguing that HAVA provides states too much control over federal election procedures); Tokaji, *supra* note 9, at 129–33 (assessing the 2004 election and the failure of election reform to remedy election administration problems).

186. *Tiryak v. Jordan*, 472 F. Supp. 822, 824 (E.D. Pa. 1979) ("Protecting the purity of the electoral process is a state responsibility and the poll-watcher's statutory role in providing that protection involves him in a public activity, regardless of his private political motive.")

187. *Mont. Democratic Party v. Eaton*, 581 F. Supp. 2d 1077, 1082 (D. Mont. 2008) (discussing the Montana Democratic Party's pursuit of a temporary restraining order to stop the Montana Republican Party from challenging 6,000 registered voters who were predominately young and registered Democrats).

188. See *supra* Part II.

189. *Tiryak*, 472 F. Supp. at 824.

In many instances, it is not the voter's ineligibility that is determined but his inability to produce supporting documents at the polling place that are not required. For example, a poll worker, in response to a voter challenge, could require a challenged voter to present valid photo identification. If the voter is unable to present the requested identification, his inability to do so does not prove that a citizen was attempting to commit fraud, but that he came to the polling place unprepared and for this, his right to vote in this election has been negated. In many instances, challenged voters receive a provisional ballot. The provisional ballots, however, are not counted unless the voter returns to a central registrar's office within a prescribed period of time to provide additional documentation to verify his identity. Without this additional step, the provisional ballot is not counted. In this situation, the voter challenge merely caused a frustrating delay at the polls and possibly the disenfranchisement of the voter if she does not ultimately provide the necessary documentation. Accordingly, the private partisan has effectively denied, with the state's endorsement and assistance, an eligible voter the opportunity to vote.

### B. Need for Uniform Guidelines

The federal government does not administer elections. It can, as discussed *infra*, regulate elections through the passage of legislation. In fact, Congress has passed legislation to curb discriminatory practices in elections. Under the Voting Rights Act of 1965,<sup>190</sup> the federal government is tasked to ensure that the method of electing federal offices is not tainted with race, ethnic, national origin or language minority discrimination.<sup>191</sup> Other statutes, such as the National Voter Registration Act (NVRA)<sup>192</sup> and the Help America Vote Act (HAVA)<sup>193</sup> address the actual administration of elections, *inter alia*, providing funds for new voting machines, requiring the development of voter databases, and increas-

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190. See Fannie Lou Hamer, Rosa Parks, & Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified as amended at 42 U.S.C. § 1973). The Voting Rights Act's most prominent temporary provisions include Sections five and 203, which govern which jurisdictions must report all voting changes to the Attorney General and designates those jurisdictions required to provide election materials in certain minority languages. 42 U.S.C. § 1973c (2006) (Section 5); *id.* § 1973aa-1a (Section 203).

191. See discussion *supra* Parts I.A, II, III.A, IV.A (discussing the Fourteenth Amendment and Equal Protection Clause).

192. In enacting NVRA, Congress sought to increase voter registration and participation. 42 U.S.C. §§ 1973gg(b)(1)-(2) (2006). The NVRA requires states to register voters for federal elections through mail registration and when citizens apply for a driver's license or seek services from certain state agencies that receive federal funds, such as public assistance offices providing welfare and Medicaid, veteran's affairs offices, and libraries. *Id.* §§ 1973gg-2, 1973gg-5. See *supra* notes 73-74 and accompanying text.

193. In 2002, Congress passed the Help America Vote Act to provide funding to replace outdated voting machines and created the Election Assistance Commission to serve as a "clearing-house" for election administration matters. Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended at 42 U.S.C. §§ 15301-15545). For a detailed description of HAVA's legislative history, see Leonard Shambon & Keith Abouchar, *Trapped by Precincts? The Help America Vote Act's Provisional Ballots and the Problem of Precincts*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 133, 160-65 (2006).

ing voter registration opportunities. Although both the NVRA and the HAVA are federal creations, the legislation was left almost exclusively to the states to implement.<sup>194</sup> In order to thwart the racially discriminatory practice of racially targeted voter challenges, federal agencies, such as the Election Assistance Commission should issue a Best Practices guide for states and encourage the use of uniform guidelines.<sup>195</sup> Congress could pass these guidelines, however, the lack of funding and the political response may seem too costly to implement. States should provide clear guidelines on the grounds for issuing challenges and limit those grounds to those that a challenger would have personal knowledge of—such as voting more than once, similar to the Vermont challenge statute.<sup>196</sup> States should not allow challenges based on residence, age or other voter qualification. It is the state that is in the best position to determine voter eligibility on these grounds. While state legislators provide the opportunity for partisans to challenge voters, it is the voter's fundamental right to participate in the electoral process. State laws should not allow challengers to jeopardize that right based on vote caging or intimidation schemes built to favor partisan outcomes instead of full participation in the electoral process or on other administrative grounds, such as a valid registration.

Likewise, because local election workers are primarily responsible for implementing federal and state election laws, it is crucial that poll workers receive proper and comprehensive training.<sup>197</sup> The federal government has made an effort to provide states with best practices recommendations for poll worker recruitment and training. Many nonprofit or-

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194. Some states, like Tennessee, performed well, albeit only after federal intervention. *See* *United States v. Tennessee*, No. 3-02-0938 (M.D. Tenn. Sept. 27, 2002), [http://www.justice.gov/crt/voting/nvra/tm\\_cd.pdf](http://www.justice.gov/crt/voting/nvra/tm_cd.pdf) (consent decree); *see also* Jason Marisam, *Voter Turnout: From Cost to Cooperation*, 21 ST. THOMAS L. REV. 190, 202–04 (2009) (criticizing the NVRA for not dramatically improving voter turnout).

195. The EAC issued a Best Practices Guide for Poll Worker Training, but has not issued guidelines on poll watchers or voter challenges. EAC guidelines, however, are not met with the honor and reverence regularly afforded a federal government agency because of its lack of enforcement power. *See* Heather K. Gerken, *Shortcuts to Reform*, 93 MINN. L. REV. 1582, 1608 (2009) (criticizing the EAC's attempts to suggest Best Practices); Hasen, *supra* note 3, at 4 (noting that the EAC “has so far proven ineffective and now appears in danger of becoming a new site for partisan stalemate over election reform.”); Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 ELECTION L.J. 424, 428 (2004) (“The EAC was designed to have as little regulatory power as possible. . . . [A]nd for the most part it cannot ‘issue any rule, promulgate any regulation, or take any other action’ imposing a requirement on any state or unit of local government . . . .”) (quoting HAVA, Pub. L. No. 107-252, § 209, 116 Stat. 1666, 1678 (2002)).

196. Karlan, *supra* note 9, at 19–24, 25–29 (arguing that the Bush administration treated vote fraud as a much larger problem than political exclusion). Karlan argues that “we need legislation that recognizes an official obligation to make sure all citizens who are eligible to vote are placed on the voting rolls and that elections run smoothly and accurately.” *Id.* at 29. Also, Karlan believes “it is critical [in the area of election law] to make sure the rules are clear and clearly established before the election begins.” *Id.* The Bush administration also politicized the Civil Rights Division (and the voting rights section in particular), and Karlan believes this department needs to be remade. *Id.* at 28–29.

197. Many states call those persons who administer elections on Election Day at the polling sites across the country election judges or poll workers.

ganizations also seek to assist county and state governments with poll worker training. Proper poll worker training can serve as the difference between a smooth election and a troubled one. It is difficult to overstate the importance of proper poll worker training and knowledge regarding how the machines operate, what items are needed to operate the machines, what question are appropriately asked, who can assist the voter, and how to avoid racial or ethnic discrimination during the exercise of the political process.<sup>198</sup>

### C. From Poll Watchers to Silent Observers

On Election Day, certain jurisdictions are required either under the Voting Rights Act or a court order to allow federal observers inside the polling place to observe and document the election process.<sup>199</sup> The Voting Rights Act of 1965 instituted the advent of the federal observer, whose primary responsibility is to monitor the electoral process.<sup>200</sup> Federal observers are prohibited from interfering in the voting process or

198. See *United States v. City of Hamtramck*, No. 0073541 (E.D. Mich. Jan. 29, 2004), [http://www.justice.gov/crt/voting/sec\\_2/hamtramck\\_cd04.pdf](http://www.justice.gov/crt/voting/sec_2/hamtramck_cd04.pdf) (second amended consent order and decree requiring that the City appoint bilingual translators to protect against voter discrimination targeting Arab-Americans); *United States v. Berks Cnty.*, 277 F. Supp. 2d 570, 575, 583 (E.D. Pa. 2003) (preventing race-based voter discrimination by ordering that, *inter alia*, all election-related materials to be printed in English and Spanish).

199. Various provisions in the Voting Rights Act authorize the Attorney General or a court to order or appoint federal observers. 42 U.S.C. §1973a (2006). For example, subsection (a) provides: Whenever the Attorney General or an aggrieved person institutes a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court shall authorize the appointment of Federal observers by the Director of the Office of Personnel Management in accordance with section 1973d of this title to serve for such period of time for such political subdivisions as the court shall determine is appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment . . . .

*Id.* The Attorney General may also assign Federal observers to a jurisdiction certified under 42 U.S.C. §1973f. The Attorney General has certified approximately 148 jurisdictions in Alabama, Arizona, Georgia, Louisiana, Mississippi, New York, North Carolina, South Carolina and Texas. *About Federal Observers and Election Monitoring*, DEPARTMENT OF JUSTICE: CIVIL RIGHTS DIVISION, [http://www.justice.gov/crt/voting/examine/activ\\_exam.php](http://www.justice.gov/crt/voting/examine/activ_exam.php) (last updated Sept. 7, 2010). When determining where to send federal observers, the Attorney General assesses the following information:

- Any incidents of discrimination or interference with the right to vote in connection with upcoming or recent elections;
- Any complaints to local or state officials about the incidents and what, if anything, was done in response;
- Names and contact information for victims of discrimination or other violations of federal voting rights law;
- Names and contact information for any persons who have first-hand knowledge of the incidents;
- Names and contact information, if possible, for persons alleged to have engaged in discrimination or other violations of federal voting rights law;
- Locations where incidents have occurred.

*See id.* Thirteen jurisdictions in nine states have been ordered to allow federal observers to monitor elections. *Id.*

200. See §1973f(d)(1)–(2) (charging Federal observers with the duties of attending places where elections are being held or votes are being tabulated to “observe[] whether persons entitled to vote are being permitted to vote,” and “whether votes cast votes cast by persons entitled to vote are being properly tabulated”).

attempting to correct what may seem to constitute voting irregularities or illegalities. A federal observer documents what she observes from the beginning of the Election Day to the counting of the ballots.<sup>201</sup> Federal observers are merely eye witnesses, and are not allowed to interfere with the voting process. Unlike voter challenges they do not interfere with the voting process. They do not speak to nor direct poll workers or voters. At the end of the Election Day, federal observers draft a report that can be used, if need be, in any litigation if it is found that systematic discrimination in the operation of the polling place occurred. Likewise, voter challengers could serve as eyewitnesses and document what they observe throughout the Election Day experience. Federal observers help thwart potential voter intimidation. Their presence promotes the exercise of voter integrity and the elimination of voter fraud.

Instead of the voter losing her ability to vote or having that right called into question, if the voter challenger has credible documentation of voting irregularities, especially voter fraud, the voter challenger's Election Day report can serve as evidence in the litigation proceeding. Instead of forcing the voter to possibly lose her right to vote, the voter challenger preserves the right to challenge the election in future litigation. In this way, the presumption of eligibility is restored to the voter. More so, the burden to prove voter fraud or other irregularity is squarely placed on the partisan but does not disrupt the voting process nor strip the citizen's right to vote.<sup>202</sup>

This Article is not advocating that state governments treat voter challengers as government federal observers. Voter challenger statutes should include a crucial and vital characteristic that federal observers have, which is that they are neutral and impartial.<sup>203</sup> Just as the history of partisan involvement has caused the scaling back of partisan involvement in the election process, so here, an adjustment is needed to ensure the impartiality of the electoral system. When private partisan concerns are paramount to individual voters the process is skewed towards the partisan and questions the integrity of the system.

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201. See James Thomas Tucker, *The Power of Observation: The Role of Federal Observers Under The Voting Rights Act*, 13 MICH. J. RACE & L. 227, 248 (2007) ("Federal observers are able to monitor [and document] every aspect of an election, from the time the voter enters the polling place to the moment that he or she casts her ballot, and even thereafter when the ballots are tabulated.").

202. See Steve Barber et al., Comment, *The Purging of Empowerment: Voter Purge Laws and the Voting Rights Act*, 23 HARV. C.R.-C.L. L. REV. 483, 483-84 (1988), for a discussion of the burdens on mistakenly purged voters. The authors assert that the voter purge laws place the burden of reregistering on the purged voters, which may "thwart political participation and place a disproportionate burden on minority voters." *Id.* at 483. The history of mechanisms such as voter purge laws have created the disillusionment of minority voters and has resulted in low political participation from such groups. *Id.* at 483-84.

203. Federal observers are Office of Personnel Management employees. They are nonpartisan and merely observe the election process without comment or interruption. Tucker, *supra* note 208, at 230, 241, 254.

## CONCLUSION

While our democratic form of government thrives on political participation, the level of authority that government has given to private partisan organizations through the use of voter challenges may well threaten the heart and integrity of the democratic process. If private individuals are allowed to determine who is allowed to vote and in what manner, the damage to the integrity of the electoral process is deeply wounded, particularly when those challenges are based solely on geographical designation, physical hue or language ability. In actuality, these measures determined the eligibility of the voter and in many cases, prevent them from casting a ballot. A strong public-private alliance allows organizations, groups and individuals to express their collective political opinion. It is the ability, however, to silence those voices through the lack of confidence<sup>204</sup> in the system and particularly allowing partisans to determine voter eligibility that harms the system.

The State, which is given the authority to prescribe the requirements for voting, has surrendered that authority to private and often partisan individuals. More poll watchers, more litigation or stringent statutes are not the only answer to this perplexing problem. The solution lies in our willingness to prescribe measures that presume the validity and eligibility of voters and scale back the Jim Crow era disenfranchising methods that are becoming prevalent in this new millennium.

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204. See *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 671 F. Supp. 2d 575, 611 (D.N.J. 2009).