

CONSISTENTLY UNCONSTITUTIONAL: EXAMINING OHIO'S BALLOT ACCESS LAWS

NICHOLAS WALSTRA *

I. INTRODUCTION

Minor political parties often have a difficult time competing against the Republicans and Democrats for votes, but many times the battle begins even earlier because minor parties must fight to get their names on the ballot. The dominating parties in charge of the state government often establish strict requirements that minor parties must meet to gain access to the ballot. Many times, these requirements border unconstitutionality, and Ohio is no exception. On several occasions, Ohio's election laws regarding minor party ballot access were found unconstitutional, including in the 2004 and 2008 presidential elections.¹ In the 2008 election, not only did the Southern District of Ohio find Ohio's election laws unconstitutionally burdensome to minor parties, but also it found them to be unconstitutionally created by the Secretary of State.²

The immediate effect of the ruling was a large number of minor candidates on the Ohio presidential ballot.³ It also left Ohio without constitutional ballot access laws.⁴ The ruling opened up numerous questions, both constitutionally and politically. For example, if the Constitution's Elections Clause only allows a state's legislature to create presidential election laws, as the court in *Libertarian Party of Ohio v.*

Copyright © 2009, Nicholas Walstra

* I would like to thank Professor Mark Brown for his assistance in developing and researching this article.

¹ See *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 582–83 (6th Cir. 2006); *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006, 1008, 1013 n.3 (S.D. Ohio 2008).

² *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d at 1009.

³ There were four minor party candidates on the ballot for the 2008 Presidential election in Ohio, OHIO SECRETARY OF STATE, PRESIDENT/VICE-PRESIDENT: NOVEMBER 4, 2008, (2008), <http://www.sos.state.oh.us/SOS/Text.aspx?page=10417&AspxAutoDetectCookieSupport=1>, which was higher than in the previous elections because Ohio averaged one minor party per ballot in each election since 1992. *Libertarian Party of Ohio v. Blackwell*, 462 F.3d at 589.

⁴ *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d at 1015.

*Brunner*⁵ found, then what kind of effects will this have in other states? And will this help minor parties? Politically, how will Ohio's legislature respond, and will their response benefit minor political parties?

This comment will answer these questions, as well as examine how the judiciary has treated ballot access cases in the past. The first section examines the important role of minor political parties and how candidates get their names on the ballot. Next, the comment looks at some of the major Supreme Court cases that have dealt with ballot access issues and the tests that courts use to determine if ballot access regulations are constitutional. In the third section, the comment discusses the recent cases in Ohio where the state's election laws were found invalid. This section also analyzes the Constitution's Election Clause. In the analysis, the comment examines the effects that the ruling could have in Ohio and other states.

II. HOW CANDIDATES GAIN BALLOT ACCESS

Although the parties have changed throughout America's history, presidential elections have been primarily two party affairs.⁶ This is not to say, however, that minor parties and independents have not had an impact on elections.

On several occasions, the minor party candidates threatened to win the presidency. Theodore Roosevelt ran for President with the Progressive Party and was at one point polling ahead of the Republicans, but ultimately lost to Woodrow Wilson.⁷ Ross Perot, running as a Reform Party candidate in 1992,⁸ was also leading early in the election polls before bowing out and then re-entering the race, eventually losing to Bill Clinton.⁹

Other times, the minor party candidate can simply play the role of spoiler. In 2000, the election came down to which major party candidate won the State of Florida.¹⁰ When the Democratic candidate lost by just a

⁵ 567 F. Supp. 2d 1006 (S.D. Ohio 2008).

⁶ Bradley A. Smith, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. ON LEGIS. 167, 168 (1991).

⁷ *Id.* at 170.

⁸ *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 589 n.9 (6th Cir. 2006).

⁹ Victor Williams & Alison M. MacDonald, *Rethinking Article II, Section 1 and Its Twelfth Amendment Restatement: Challenging Our Nation's Malapportioned, Undemocratic Presidential Election Systems*, 77 MARQ. L. REV. 201, 222-25 (1994).

¹⁰ See Steve Bousquet, *Challenge to Nader Left Dems Weakened*, ST. PETERSBURG TIMES, Sept. 18, 2004, at 5B.

few hundred votes, many blamed Ralph Nader, the Green Party candidate, for “stealing” their votes and costing the Democrats the election.¹¹

More than just providing an impact, however, minor party candidates give voters a broader choice. The Court has treated the right to vote as one of the “most precious freedoms” provided by the United States Constitution.¹² Voting gives citizens an opportunity to express their support or displeasure, which is a right given to them in the First Amendment.¹³

Since the major parties dominate the government, it is obviously in their best interest to keep it that way. One way to ensure that minor parties do not take votes away from major party candidates is to keep them off the ballot.

A. Ballot Access

The United States Constitution gives the states the responsibility of setting up election regulations for congressional representatives and presidential electors.¹⁴ Found in both Articles I and II, this is known as the Elections Clause.¹⁵ The Clause gives each state’s legislature, specifically, the power to decide how the federal elections are run in each state.¹⁶

Part of the states’ power is determining how votes are cast,¹⁷ and the way people cast their votes has changed over the years. The current form is called an “Australian Ballot,” where the candidates are all listed on the ballot, and the voter makes his or her decision.¹⁸ This form has been used in the United States since the early twentieth century, with the exception of Massachusetts, which began using it in 1888.¹⁹ With the introduction of the Australian Ballot, access to the ballot first became an issue. At this point, it becomes an issue of who is or is not listed on the ballot.

Many states provide three ways for candidates to gain access to the ballot: as major party candidates, as minor party candidates, and as independents.²⁰ Major party candidates often automatically qualify for a

¹¹ *Id.*

¹² *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

¹³ U.S. CONST. amend. I.

¹⁴ U.S. CONST. art. I, § 4, cl. 1; U.S. CONST. art. II, § 1, cl. 3.

¹⁵ *Foster v. Love*, 522 U.S. 67, 69 (1997).

¹⁶ U.S. CONST. art. I, § 4, cl. 1; U.S. CONST. art. II, § 1, cl. 3.

¹⁷ *Smith*, *supra* note 6, at 172.

¹⁸ *See id.* at 172–73.

¹⁹ *Id.* at 172.

²⁰ *Id.* at 174–75.

spot on the ballot.²¹ The state's election laws determine whether a party is a major party, specifically by looking to the amount of votes that a given party received in a previous election.²² The parties must reach a certain percentage of the votes to qualify as a major party.²³

Parties that do not reach the chosen percentage are considered minor parties.²⁴ Minor parties must prove that they have sufficient support to merit a place on the ballot.²⁵ To prove their support, parties must collect signatures from a percentage of the voting population.²⁶ The required percentage varies by state.²⁷ Ohio, for example, currently requires signatures from 1% of the number of people who voted in previous gubernatorial or presidential election.²⁸ The signatures and a petition must be filed with the state by a specific deadline.²⁹ Some states, such as Ohio, require that all parties hold primaries to determine their presidential candidate.³⁰

Candidates without a party affiliation—independents—must meet similar qualifications as minor party candidates.³¹ Like minor party candidates, independent candidates must prove that they have some support, and they must collect a certain number of signatures.³² Again, the signatures must be filed with the state, along with a petition, by a specific filing date.³³

III. JUDICIAL REVIEW OF BALLOT ACCESS LEGISLATION

Once ballots were standardized and states began creating laws defining how a person or party could gain a spot on the ballot, it was only a matter of time before those laws were questioned. The U.S. Supreme Court heard one of its first cases regarding presidential ballot access in 1968,³⁴ and it

²¹ *See id.* at 175–76.

²² *See id.* at 175.

²³ *Id.*

²⁴ *Id.* at 168 n.5, 175.

²⁵ *Id.* at 175–76.

²⁶ *Id.* at 175.

²⁷ *Id.* at 175–76.

²⁸ *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 583 (6th Cir. 2006).

²⁹ *See Smith*, *supra* note 6, at 174–75.

³⁰ *See Libertarian Party of Ohio v. Blackwell*, 462 F.3d 589; OHIO CONST. art. V, § 7.

³¹ *Smith*, *supra* note 6, at 168 n.5.

³² *Id.* at 175.

³³ *Id.* at 174–75.

³⁴ *Williams v. Rhodes*, 393 U.S. 23 (1968).

returned to the subject several times over the next fifteen years.³⁵ As noted earlier, most states delineate between major party candidates, minor party candidates, and independent candidates, and each type of candidate has requirements that they must meet in order to obtain ballot access.³⁶ The requirements that plaintiffs often argue to the court are the signature requirements³⁷ and the filing deadline.³⁸ The Supreme Court has developed different tests over the years to decide when these requirements are violating the candidates' or the voters' rights.³⁹ However, the Court has never developed an easy, bright-line test to determine when these election laws are unconstitutional.⁴⁰

A. *Williams v. Rhodes: Setting the Standard*

In the first case, *Williams v. Rhodes*,⁴¹ the Court found that Ohio's ballot access laws for minor parties were too burdensome and thus unconstitutional.⁴² The case recognized the rights of candidates and voters and set up an analysis to determine when these rights were being violated.⁴³ The American Independent Party and the Socialist Party brought the suit because they were denied access on Ohio's presidential ballot for the 1968 election.⁴⁴ Both political parties contended that the State of Ohio violated their constitutional rights under the Fourteenth Amendment.⁴⁵ Known as the Equal Protection Clause, the Fourteenth Amendment states, "No State shall . . . deny to any person . . . the equal

³⁵ See *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Storer v. Brown*, 415 U.S. 724 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971).

³⁶ See *supra* text accompanying notes 20–33.

³⁷ Smith, *supra* note 6, at 177.

³⁸ See, e.g., *Anderson*, 460 U.S. at 782; *Williams*, 393 U.S. at 27.

³⁹ See, e.g., *Anderson*, 460 U.S. at 789 (applying a balancing test of state interests and asserted injuries, rather than applying strict scrutiny); *Jenness*, 403 U.S. at 442 (declining to apply strict scrutiny and require a compelling state interest to overcome rights protected by the Equal Protection Clause, and rather, only requiring an "important" interest); *Williams*, 393 U.S. at 30–31 (applying strict scrutiny and requiring a compelling state interest to overcome rights protected by the Equal Protection Clause).

⁴⁰ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) (citing *Storer*, 415 U.S. at 730).

⁴¹ 393 U.S. 23 (1968).

⁴² *Id.* at 24, 34.

⁴³ *Id.* at 30.

⁴⁴ *Id.* at 24–28.

⁴⁵ *Id.* at 26.

protection of the laws.”⁴⁶ The Court held “that no State can pass a law regulating elections that violates the Fourteenth Amendment’s command”⁴⁷ The State of Ohio argued that the Constitution gives the state the right to choose the electors as it sees fit, and therefore, the process can be as burdensome as it wants.⁴⁸ The state derives its power from the Second Article of the Constitution, which states that, to choose a President, “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors”⁴⁹ Although the Court acknowledged that the states do have such a right, it found that this right is limited by other parts of the Constitution, in this case the Fourteenth Amendment.⁵⁰

What made ballot accessibility so difficult for minor parties in 1968 was Ohio’s signature requirement and its filing deadline.⁵¹ To obtain a listing on the presidential ballot, each minor party needed to obtain signatures from 15% of Ohio’s qualified electors⁵² by February 7th of 1968.⁵³ If found to be too burdensome of a requirement, the Court stated this would violate two protected rights: “the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.”⁵⁴ The first right, the freedom of association, is derived from the First Amendment.⁵⁵ Regarding the other freedom, the right to vote, the Court said, “No right is more precious”⁵⁶

For Ohio to restrict these rights, it would need a compelling interest.⁵⁷ Ohio said its primary interest was to maintain a two-party system.⁵⁸ Ohio believed a two-party system was the best way to ensure that the election winner was the choice of the majority of the voters.⁵⁹ However, the Court did not follow this rationale. It stated that Ohio’s current laws favored two

⁴⁶ U.S. CONST. amend. XIV, § 1.

⁴⁷ *Williams*, 393 U.S. at 29.

⁴⁸ *Id.*

⁴⁹ U.S. CONST. art. II, § 1, cl. 2.

⁵⁰ *Williams*, 393 U.S. at 29.

⁵¹ *Id.* at 26–27.

⁵² “Qualified electors” are commonly referred to as “registered voters.”

⁵³ *Id.* at 24–26.

⁵⁴ *Id.* at 31.

⁵⁵ *Id.*

⁵⁶ *Id.* at 31 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)).

⁵⁷ *Id.* (citing *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

⁵⁸ *Id.* at 31–32.

⁵⁹ *Id.* at 32.

specific parties, and the only way a new party could enter the ballot was to have enough votes to actually win.⁶⁰ This hinders the competitiveness that the First Amendment attempts to uphold.⁶¹

Ohio also claimed that it has an interest in limiting the number of names on the ballot in order to prevent the ballot from being confusing to voters.⁶² The Court noted that other states, which had a signature requirement of just 1%, did not have a large amount of names on the ballot that would make voting confusing.⁶³ The Court recognized avoiding voter confusion was a legitimate interest, but Ohio had not proven that their burdensome requirements affected that interest.⁶⁴

The Court ultimately forced Ohio to place the Independent Party's candidates on the ballot and would have done the same for the Socialist Party, but it was too late in the election process.⁶⁵ Prior to the hearing before the Supreme Court, the Independent Party was granted an injunction by Justice Stewart of the Sixth Circuit Court of Appeals.⁶⁶ Several days later, the Socialist Party moved for the same remedy, but the injunction was denied because it was too late in the election process, specifically noting that Ohio would have to reprint the ballots again.⁶⁷ The Court determined that the State did not meet the test to justify having such stringent ballot requirements.⁶⁸ The case set the standard that states must have a compelling interest to justify restricting candidates' and voters' constitutional rights.⁶⁹

B. *Anderson v. Celebrezze: The Balancing Test*

The Court expanded upon the test in 1983 in another case that also originated in Ohio.⁷⁰ In *Anderson v. Celebrezze*,⁷¹ the Court, in a 5-4 decision,⁷² once again found Ohio's filing deadlines to be

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 33.

⁶³ *Id.* at 33 n.9.

⁶⁴ *Id.* at 33.

⁶⁵ *Id.* at 35.

⁶⁶ *Id.* at 27.

⁶⁷ *Id.* at 28.

⁶⁸ *Id.* at 34.

⁶⁹ *Id.* at 31.

⁷⁰ *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

⁷¹ 460 U.S. 780 (1983).

⁷² *See id.* at 806.

unconstitutional.⁷³ John Anderson, an independent candidate⁷⁴ who broke off from the Republican Party,⁷⁵ as well as three voters, filed the suit.⁷⁶ In this case, the plaintiffs believed the filing deadline for independent candidates was unconstitutional.⁷⁷

The Court said that in determining whether a state's election laws are constitutional, there is no easy test.⁷⁸ In his majority opinion, Justice Stevens stated how the constitutionality of ballot access laws should be approached:

It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.⁷⁹

The Court continued by noting that determining the extent of the injury is not always easy, as there are often multiple injured parties.⁸⁰ Though it is easy to see how the candidate can be injured, the Court stated that the possible injury to the voters is the one that most needs to be prevented.⁸¹ The Court concluded the opinion by stating, “[O]ur primary concern is . . . the interests of the voters who chose to associate together to express

⁷³ *Id.* at 805–06.

⁷⁴ *Id.* at 782.

⁷⁵ *Id.* at 784 n.2.

⁷⁶ *Id.* at 783.

⁷⁷ *Id.*

⁷⁸ *See id.* at 789 (citing *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

⁷⁹ *Id.*

⁸⁰ *Id.* at 795. For example, the Court stated “the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.” *Id.* at 786 (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)).

⁸¹ *See id.* at 786, 806.

their support for Anderson's candidacy”⁸² The movement of ideas, the freedom to associate, and the ability to compete cannot be restricted by complex election laws that favor the two dominant parties.⁸³ This injury to the voters prevented the Court from needing to use an Equal Protection argument, as the First and Fourteenth Amendments were able to effectively show how the plaintiffs were injured.⁸⁴

Ohio's main reason for restricting access to the ballot was to maintain political stability.⁸⁵ The State wanted to prevent infighting among the major parties, which it believed would result in arguments over both resources and votes.⁸⁶ Although this could be a legitimate interest,⁸⁷ the Court found that Ohio had no way to discern between independent candidates that were splintering away from major parties and legitimate independent candidates.⁸⁸

The State also brought up two other interests: voter education and equal treatment between partisan and independent candidates.⁸⁹ The Court quickly rejected each argument.⁹⁰ Regarding voter education, the Court found that this may have been a legitimate interest several decades ago, but in an age where information can be relayed immediately and literacy rates are high, a voter education argument does not make sense.⁹¹ The equal treatment argument also did not make sense to the Court. A shared filing date was not equal because the consequences of a missed deadline were very different for partisan and independent candidates.⁹² If a political party candidate missed a deadline, the party was still likely to get a candidate on the ballot; for independent candidates, if they missed the deadline, they would not get on the ballot.⁹³

The Court then applied its balancing test and concluded that the State's interests do not outweigh the injuries that the voters would suffer.⁹⁴ The

⁸² *Id.* at 806.

⁸³ *Id.* at 794, 802 (quoting *Williams v. Rhodes*, 393 U.S. 23, 31–32 (1968)), 806.

⁸⁴ *Id.* at 786 n.7.

⁸⁵ *Id.* at 801.

⁸⁶ *Id.*

⁸⁷ *See, e.g., Storer v. Brown*, 415 U.S. 724, 736 (1974).

⁸⁸ *Anderson*, 460 U.S. at 803–04.

⁸⁹ *Id.* at 796.

⁹⁰ *Id.* at 796, 799.

⁹¹ *Id.* at 796–97.

⁹² *Id.* at 799.

⁹³ *Id.*

⁹⁴ *Id.* at 806.

fact that the ballot was a presidential ballot was of particular importance to the Court.⁹⁵ The election of the President and the Vice President incorporate the collective vote of all the states.⁹⁶ Thus, a presidential election has *less* importance to the states because their votes are compiled with other states.⁹⁷ Therefore, in a presidential election, it is more difficult for a state to show that its interests outweigh the resulting injuries.

The Court further defined its test in 1992 in two cases: *Burdick v. Takushi*⁹⁸ and *Norman v. Reed*.⁹⁹ In *Burdick*, a Hawaiian voter argued for the inclusion of a write-in spot on the ballot during a congressional race where a candidate was running unopposed.¹⁰⁰ The Court held that strict scrutiny does not automatically apply whenever election legislation restricts a voter's rights.¹⁰¹ The Court described its reasoning while citing *Norman* and *Anderson*:

[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.¹⁰²

The Court takes the balancing approach found in *Anderson* and separates voters' injuries into two categories: severe and reasonable.¹⁰³ Accordingly, the key decision a court must make is whether the election law reasonably restricts the rights of voters or candidates. If the restriction is reasonable,

⁹⁵ *Id.* at 798.

⁹⁶ *Id.* at 794–95.

⁹⁷ *See id.* at 795.

⁹⁸ 504 U.S. 428 (1992).

⁹⁹ 502 U.S. 279 (1992).

¹⁰⁰ *Burdick*, 504 U.S. at 430.

¹⁰¹ *Id.* at 432.

¹⁰² *Id.* at 434 (citations omitted).

¹⁰³ *Id.*

then the law is likely valid.¹⁰⁴ If the restriction is unreasonable and considered severe, then the law is subject to strict scrutiny, and the court will likely find it unconstitutional.¹⁰⁵

IV. RECENT DECISIONS

As one will clearly see from the noted cases, Ohio has a long history of minor parties and independents battling to gain access to presidential ballots. Two of the biggest Supreme Court cases regarding ballot access originated in the State of Ohio.¹⁰⁶ In each of those cases, the Court found Ohio's election laws unconstitutional.¹⁰⁷ The trend did not end there, however, as courts found the State's laws unconstitutional again in each of the past two presidential elections.¹⁰⁸

The Sixth Circuit has acknowledged "evidence showing that Ohio is among the most restrictive, if not the most restrictive, state in granting minor parties access to the ballot."¹⁰⁹ The court cited evidence showing that "[o]f the eight most populous states, Ohio has had by far the fewest minor political parties on its general election ballot."¹¹⁰ Since 1992, in each major election (in all races), Ohio has averaged only one minor party on the ballot.¹¹¹

A. Recent Ohio Cases

The Libertarian Party's suit against Ohio regarding the 2004 presidential election set the stage for their next suit, pertaining to the 2008 election. Their 2004 suit was not decided until 2006,¹¹² which was

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Williams v. Rhodes*, 393 U.S. 23 (1968).

¹⁰⁷ *Anderson*, 460 U.S. at 806; *Williams*, 393 U.S. at 34.

¹⁰⁸ *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 595 (6th Cir. 2006); *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006, 1015 (S.D. Ohio 2008).

¹⁰⁹ *Libertarian Party of Ohio v. Blackwell*, 462 F.3d at 589.

¹¹⁰ *Id.* "From 1992–2002, the other states in this group averaged four minor political parties on the ballot each year. In contrast, Ohio averaged one per year, and no minor political parties qualified for the ballot, in any race, in 1992, 1994, 2002 and 2004." *Id.* (citation omitted).

¹¹¹ *Id.*

¹¹² *Id.* at 579, 583.

obviously too late for the 2004 election. However, their suit was successful,¹¹³ and it should have helped them gain easier access in 2008.

The Libertarian Party of Ohio (“LPO”) argued one of the typical issues many minor parties dispute in regards to a state’s election laws:¹¹⁴ the filing deadline was unconstitutional.¹¹⁵ Ohio’s election laws required minor parties¹¹⁶ to file their petitions 120 days before the primaries.¹¹⁷ As the major parties gradually moved their primary dates earlier and earlier in the year, the Ohio legislature moved up the filing date with them.¹¹⁸ The result was that minor parties had to file their petitions almost a full year before the election.¹¹⁹

The LPO’s other argument was that Ohio made it too difficult for parties to automatically qualify for the ballot.¹²⁰ Ohio requires all political parties to hold primaries¹²¹ and requires all parties that did not receive at least 5% of the vote in the previous election to collect signatures from 1% of the voting population in the previous election.¹²²

The Sixth Circuit followed the precedent set forth in *Anderson and Burdick*.¹²³ Under this analysis, the first step is looking at the injury to the plaintiff, and determining if it was severe or reasonable.¹²⁴ The nature of the injury determines what kind of scrutiny a court must apply.¹²⁵ The court describes how it determines the severity of the injury this way:

The key factor in determining the level of scrutiny to apply is the importance of the associational right burdened. Restrictions that do not affect a political party's ability to perform its primary functions—organizing and developing, recruiting supporters, choosing a candidate,

¹¹³ *Id.* at 582.

¹¹⁴ *See, e.g.*, cases cited *supra* note 38.

¹¹⁵ *Libertarian Party of Ohio v. Blackwell*, 462 F.3d at 582.

¹¹⁶ In *Libertarian Party of Ohio v. Blackwell*, the court noted that the Ohio Revised Code did not define minor parties, and thus, it referred to minor parties as those parties other than the Republican and Democratic parties. *Id.* at 582 n.1.

¹¹⁷ *Id.* at 583, 589.

¹¹⁸ *Id.* at 582.

¹¹⁹ *Id.* at 591 (stating the deadline is 364 days before the election).

¹²⁰ *Id.* at 582–83.

¹²¹ OHIO CONST. art. V, § 7.

¹²² *Libertarian Party of Ohio v. Blackwell*, 462 F.3d at 582–83.

¹²³ *Id.* at 586.

¹²⁴ *Id.*; *see supra* text accompanying notes 101–05.

¹²⁵ *Id.* at 587.

and voting for that candidate in a general election—have not been held to impose a severe burden.¹²⁶

In determining the burden of the plaintiff, the court does not look at each law individually, but rather looks at the combined effects of the regulations and how they hinder the plaintiff's constitutional rights.¹²⁷

In its analysis, the court found that Ohio placed a severe burden on minor parties.¹²⁸ The court stated, “[T]he restrictions . . . serve to prevent a minor political party from engaging in the most fundamental of political activities—recruiting supporters, selecting a candidate, and placing that candidate on the general election ballot in hopes of winning votes and ultimately, the right to govern.”¹²⁹ The court cited numerous cases where other states’ filing deadlines were found too burdensome to minor parties¹³⁰ and noted that Ohio’s deadline was earlier than those states.¹³¹ The court also noted that only one other state (California) had a similar filing date, but its qualifications for automatic entry were much easier to meet.¹³²

Once the Court established that the burden was “severe,” it applied strict scrutiny to Ohio’s election laws.¹³³ The State needed to demonstrate that its interests were compelling to justify its regulations.¹³⁴ Ohio’s stated interests were fairness in the electoral process and political stability.¹³⁵ Although the court recognized that these are viable interests, it did not feel that Ohio provided enough evidence to show the State was accomplishing those goals with their regulations.¹³⁶

The decision took place after the 2004 election, so the LPO was unable to make it on the ballot,¹³⁷ and it left Ohio’s election laws unconstitutional.¹³⁸ The LPO’s next suit against Ohio dealt with the repercussions of that 2006 decision.

¹²⁶ *Id.*

¹²⁷ *Id.* at 586.

¹²⁸ *Id.* at 590.

¹²⁹ *Id.*

¹³⁰ *Id.* at 586.

¹³¹ *Id.* at 591.

¹³² *Id.* at 589.

¹³³ *Id.* at 593.

¹³⁴ *Id.*

¹³⁵ *Id.* at 593–94.

¹³⁶ *Id.*

¹³⁷ *Id.* at 579, 583.

¹³⁸ *Id.* at 595.

Before the 2008 election, the LPO once again was unable to meet Ohio's election regulations in order to get on the ballot.¹³⁹ The LPO again filed suit, claiming the election laws were still violating its constitutional rights.¹⁴⁰ Ohio's General Assembly failed to correct Ohio's previous election law, and Ohio's Secretary of State, Jennifer Brunner, attempted to resolve the situation by updating the provisions.¹⁴¹ The court, in its decision, found multiple constitutional problems—in both the laws themselves and in how they were created.¹⁴²

Ohio's new laws shortened the filing deadline by twenty days and cut the signature requirement in half, but still required parties to hold primaries.¹⁴³ The court put this updated law under the same analysis that it did in *Libertarian Party of Ohio v. Blackwell*,¹⁴⁴ and once again, the State was found to have severely injured the plaintiffs.¹⁴⁵ Even with relaxed standards, the court found Ohio still had some of the most stringent requirements in the United States.¹⁴⁶ Ohio claimed that the laws were set up the way they were to ensure that minor parties had sufficient support before placement on the ballot.¹⁴⁷

Analyzing this under strict scrutiny, the court did not find the State's interest to be sufficient.¹⁴⁸ First, by having the deadline so early, the State forced minor parties to gather supporters and signatures¹⁴⁹ before the election season had really begun,¹⁵⁰ and it is significantly more difficult to gather volunteers and signatures so early before the primaries.¹⁵¹ Second, the court believed it was too difficult for parties to qualify automatically for ballot access.¹⁵² The Libertarian Party's national following and its inclusion on other state ballots, as well as previous Ohio ballots, gave

¹³⁹ *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006, 1010 (S.D. Ohio 2008).

¹⁴⁰ *Id.* at 1010–11.

¹⁴¹ *Id.* at 1010.

¹⁴² *Id.* at 1012–13.

¹⁴³ *Id.* at 1013.

¹⁴⁴ 462 F.3d 579 (6th Cir. 2006).

¹⁴⁵ *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d at 1013.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1014.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1010.

¹⁵⁰ *Id.* at 1014 (quoting *Williams v. Rhodes*, 393 U.S. 23, 33 (1968)).

¹⁵¹ *Id.*

¹⁵² *Id.* at 1015; *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 589 (6th Cir. 2006).

proof to the court that the party had significant support, in both Ohio and the country.¹⁵³ Based on this, the court found that, once again, Ohio's election laws were unconstitutional.¹⁵⁴

1. *A New Perspective*

The court in *Libertarian Party of Ohio v. Brunner* found Ohio's election laws to be invalid, not just because the requirements were unconstitutional, but for other reasons as well.¹⁵⁵ Because Article II of the Constitution specifically states that the legislature must determine a state's presidential election procedures,¹⁵⁶ Ohio's Secretary of State does not have any authority to change the laws.¹⁵⁷ The court found that this alone would be enough to find the laws unconstitutional.¹⁵⁸ The court looked at a concurring opinion from *Bush v. Gore*,¹⁵⁹ which discussed the exclusive role that the legislative branch has in creating election law.¹⁶⁰ Even though it acknowledged the Secretary of State has the power to oversee the State's election process, the court in *Libertarian Party of Ohio v. Brunner* found the Secretary of State does not have the authority to create laws.¹⁶¹ From the opinion of the court: "The general, statutory authority to direct the conduct of electors cannot, as to Articles I and II of the Constitution, serve as a substitute for state legislative action regarding the election of federal officials. Accordingly, the Directive has no effect and cannot be enforced"¹⁶²

2. *The Elections Clause*

Not only did the court find that Ohio's election laws were still in violation of the First Amendment, and implicitly the Fourteenth Amendment, but also the creation of the laws was in violation of the

¹⁵³ *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d at 1014.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1011–15.

¹⁵⁶ U.S. CONST. art. II, § 1, cl. 2.

¹⁵⁷ *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d at 1011.

¹⁵⁸ *Id.*

¹⁵⁹ 531 U.S. 98 (2000); *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d at 1011. The *Bush* Court actually adopted the opinion into its *per curiam* opinion. *Bush*, 531 U.S. at 104.

¹⁶⁰ *Bush*, 531 U.S. at 113 (Rehnquist, J., concurring).

¹⁶¹ See *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d at 1012.

¹⁶² *Id.* at 1013.

Elections Clause.¹⁶³ The Elections Clause is found in Article I, section IV of the Constitution (pertaining to senatorial and congressional elections)¹⁶⁴ and in Article II of the Constitution (pertaining to presidential elections).¹⁶⁵ Both parts of the clause specifically state that it is up to the legislature to determine a state's election laws.¹⁶⁶ The key question is if, when the Constitution says "legislature," it means specifically the state's appointed legislature or the state itself as a governing body.

In the past decade, members of the Supreme Court have opined on the issue, and demonstrated that the Constitution is likely referring specifically to the state legislatures.¹⁶⁷ As noted above and in *Libertarian Party of Ohio v. Brunner*, the Supreme Court examined the Elections Clause in *Bush* in 2000.¹⁶⁸ In *Bush*, the Court analyzed how the votes should be counted in Florida's presidential election.¹⁶⁹ Although it was just a *per curiam* decision,¹⁷⁰ Chief Justice Rehnquist wrote a separate opinion (in which Justices Scalia and Thomas joined) where he discussed the Elections Clause.¹⁷¹ In his opinion, Rehnquist declined to take into account how the Florida Supreme Court analyzed Florida election laws because, under Article II, he felt the Court should only look at the state legislature's intent.¹⁷² He stated he would normally defer to a state court's interpretation of state law, but being a presidential election law, which is discussed specifically in Article II, the Constitution "confers a power on a

¹⁶³ *Id.*; see also U.S. CONST. amend. XIV (applying the First Amendment to the states via the Equal Protection Clause).

¹⁶⁴ U.S. CONST. art I, § 4, cl. 1.

¹⁶⁵ U.S. CONST. art II, § 1.

¹⁶⁶ 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 [*sic*] Senators." (emphasis added));

U.S. CONST. art II, § 1, cl. 2 ("Each State shall appoint, in such Manner as *the Legislature* thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." (emphasis added)).

¹⁶⁷ See *infra* text accompanying notes 171–74, 178–82.

¹⁶⁸ *Bush v. Gore*, 531 U.S. 98, 104 (2000).

¹⁶⁹ *Id.* at 100.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 111–13 (Rehnquist, J., concurring).

¹⁷² *Id.* at 112–13.

particular branch of a State's government.”¹⁷³ Because of this, Rehnquist’s analysis only looked at what Florida’s legislature intended when it wrote the laws.¹⁷⁴ The Florida judiciary could not be the ones to decide the interpretation.¹⁷⁵ In reaching his decision, Rehnquist referenced a case from 1892, *McPherson v. Blacker*,¹⁷⁶ which came to a similar conclusion about the interpretation of Article II.¹⁷⁷ In *McPherson*, the Court stated that the Constitution “leaves it to the legislature exclusively to define the method” by which electors are appointed.¹⁷⁸

In another Supreme Court case, *California Democratic Party v. Jones*,¹⁷⁹ Justice Stevens came to a similar conclusion in his dissent.¹⁸⁰ Stevens stated that “it is unclear whether a state election system not adopted by the legislature is constitutional insofar as it applies to the manner of electing United States Senators and Representatives.”¹⁸¹ Stevens reserved judgment on the issue, because neither party brought it up on their path to the Court. However, he noted that the United States House of Representatives has determined that “the Elections Clause's specific reference to ‘the Legislature’ is not so broad as to encompass the general ‘legislative power of this State.’”¹⁸²

The Justices demonstrated that it is entirely up to a state’s legislature to determine the state’s election laws. It cannot be left up to other branches of the government to determine either what the laws are or how they should be properly interpreted, as the Constitution clearly designates that responsibility to the legislatures of the states.¹⁸³ The court in *Libertarian Party of Ohio v. Brunner* followed this lead and determined Ohio’s Secretary of State, based in the executive branch, does not have the power to create new presidential election laws for Ohio.¹⁸⁴

¹⁷³ *Id.* at 112.

¹⁷⁴ *Id.* at 113.

¹⁷⁵ *Id.*

¹⁷⁶ 146 U.S. 1 (1892).

¹⁷⁷ *Id.* at 36.

¹⁷⁸ *Id.* at 27.

¹⁷⁹ 530 U.S. 567 (2000).

¹⁸⁰ *Id.* at 602 (Stevens, J., dissenting).

¹⁸¹ *Id.*

¹⁸² *Id.* at 603 (citing *Baldwin v. Trowbridge*, 2 Bartlett Contested Election Cases, H.R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46, 47 (1866)).

¹⁸³ See *supra* Part IV.A.2.

¹⁸⁴ *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d at 1012.

3. *The Court's Answer*

Though the Secretary of State cannot create presidential election laws, the court, in attempting to correct the problem, is not in a position where it can decide what the regulations should look like.¹⁸⁵ Until the legislature decides to act, however, the court still must decide what to do with the LPO's accessibility to the ballot.¹⁸⁶ Although it attempted to prevent "laundry list" ballots, the court decided there was enough state and national support for the Libertarian Party and placed the LPO on the ballot.¹⁸⁷

The court's ruling had immediate effects. Within a few months of the ruling, plaintiffs representing the Socialist Party filed suit seeking to get its candidates on the ballot.¹⁸⁸ The candidates were previously seeking ballot access as independents, but sought to take advantage of the ruling in *Libertarian Party of Ohio v. Brunner*.¹⁸⁹ Because the LPO already made a case of injury, it was not difficult for the Socialist Party to prove that they were injured. In deciding whether to place the Socialists on the ballot, the court, as it did in *Libertarian Party of Ohio v. Brunner*, looked to the Sixth Circuit's ruling in *Goldman-Frankie v. Austin*.¹⁹⁰

Goldman-Frankie, like both *Libertarian Party of Ohio v. Brunner* and *Libertarian Party of Ohio v. Blackwell*, dealt with a situation where the Sixth Circuit found election laws unconstitutional¹⁹¹ and courts were forced to find a solution.¹⁹² The court decided that, in order for the candidate to have a place on the ballot, he needed to have enough support.¹⁹³ The support only needed to be "sufficient," as opposed to "compelling."¹⁹⁴

In both *Libertarian Party of Ohio v. Brunner* and *Moore v. Brunner*,¹⁹⁵ the courts found that the parties had sufficient support, based on their

¹⁸⁵ *Id.* at 1015.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 1014–15.

¹⁸⁸ *Moore v. Brunner*, No. 2:08-CV-224, 2008 WL 3887639, at *1 (S.D. Ohio Aug. 21, 2008).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at *4 (citing *Goldman-Frankie v. Austin*, 727 F.2d 603, 607 (6th Cir. 1984)).

¹⁹¹ *Goldman-Frankie*, 727 F.2d at 607.

¹⁹² *Id.* at 608 n.4.

¹⁹³ *See id.* at 607–08.

¹⁹⁴ *Id.*

¹⁹⁵ No. 2:08-CV-224, 2008 WL 3887639 (S.D. Ohio Aug. 21, 2008).

ballot access in other states and their long established histories as political parties.¹⁹⁶

B. Immediate Effects

As noted earlier, Ohio has had some of the most stringent guidelines regarding how minor parties and independents can gain access to the ballot.¹⁹⁷ Over the past sixteen years, Ohio has averaged just one minor party per ballot, in any race, in all major elections.¹⁹⁸ When the Sixth Circuit found Ohio's laws unconstitutional in *Libertarian Party of Ohio v. Blackwell*, the door opened for many minor parties to gain rare access to the Ohio presidential ballot. The State of Ohio had four minor parties on the 2008 presidential ballot (in addition to the two major party candidates and eight independents).¹⁹⁹ Unofficial State results had minor parties accounting for nearly 44,000 votes.²⁰⁰

As it stands now, Ohio's General Assembly has not made any changes to the State's ballot access laws, which means the laws are still unconstitutional.²⁰¹ The legislature had hearings regarding new election laws, but did not have any serious talks about replacing the unconstitutional laws that are currently on the books.²⁰²

V. WHAT THE FUTURE HOLDS FOR MINOR PARTIES

Minor party candidates in Ohio, since the recent judgments, are certainly better off than they were previously. The 2008 election is evidence of that, with four minor parties and six independents gaining a spot on the presidential ballot in Ohio.²⁰³ And with courts continually finding Ohio's laws unconstitutional, Ohio's legislature will eventually be forced to relax their strict standards and make it easier for minor parties to

¹⁹⁶ *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006, 1014 (S.D. Ohio 2008); *Moore v. Brunner*, 2008 WL 3887639, at *5.

¹⁹⁷ See cases cited *supra* notes 68, 146 and accompanying text.

¹⁹⁸ See *supra* notes 110–11 and accompanying text.

¹⁹⁹ OHIO SECRETARY OF STATE, *supra* note 3.

²⁰⁰ *Id.* Bob Barr, the Libertarian candidate led all minor parties in votes, accumulating nearly 20,000 votes. *Id.*

²⁰¹ *Ohio Legislature Passes Other Election Law Bills but Still Doesn't Pass New Ballot Access Bill*, Ballot Access News, (December 17, 2008), <http://www.ballot-access.org/2008/12/17/ohio-legislature-passes-other-election-law-bills-but-still-doesnt-pass-new-ballot-access-bill/>.

²⁰² *Id.*

²⁰³ OHIO SECRETARY OF STATE, *supra* note 3.

gain access to the ballot.²⁰⁴ Although the standards may become easier, it also may be difficult for the parties as a conglomerate to see the widespread success they saw this past election.

A. The Future of Ohio's Election Laws

As it stands right now, the State is without constitutional election laws.²⁰⁵ This can go in three directions, two of which are temporary.

1. If the Legislature Fails to Act

The first direction would occur if Ohio's General Assembly fails to do anything. This is what happened in the previous election, which resulted in a high number of minor party candidates on the ballot.²⁰⁶ After the court's decision in *Libertarian Party of Ohio v. Blackwell*, Ohio's General Assembly failed to do anything.²⁰⁷ As a result, Ohio's Secretary of State acted outside of her authority in an attempt to remedy the situation.²⁰⁸ Because of this, the minor party candidates were forced to file suits to gain access to the ballot.²⁰⁹ If the General Assembly continues not to act, this situation is sure to arise again.

For minor party candidates, this has both positive and negative effects. A positive effect is that without a change, it will be easy for parties to prove a severe injury, and the State will likely once again fail to prove a compelling interest for laws that were already determined to be unconstitutional. The negative effect is that it would be difficult for parties to prove that they have the requisite support to require placement on the ballot.²¹⁰

The Sixth Circuit has determined that parties and candidates need to prove they have a "sufficient" following to gain access through an

²⁰⁴ See *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 595 (6th Cir. 2006) (stating that Ohio Laws are too strict, and they need to modify them to conform to the parameters set forth by the Constitution).

²⁰⁵ *Ohio Legislature Passes Other Election Law Bills but Still Doesn't Pass New Ballot Access Bill*, *supra* note 201; *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006, 1014 (S.D. Ohio 2008).

²⁰⁶ See OHIO SECRETARY OF STATE, *supra* note 3.

²⁰⁷ *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d at 1009.

²⁰⁸ *Id.*

²⁰⁹ See, e.g., *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006; *Moore v. Brunner*, No. 2:08-CV-224, 2008 WL 3887639, at *1 (S.D. Ohio Aug. 21, 2008).

²¹⁰ See *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d at 1015.

injunction.²¹¹ While “sufficient” support is more lenient than “compelling” support, it is still a very subjective test. Courts in the past have looked at a party’s history on the Ohio ballot, the party’s ballot status in other states, the party’s national history, and other evidence of regional or national following.²¹² The Socialist and Libertarian parties seemed to meet that test rather easily in the past election.

Before courts place candidates on the ballot, however, they should consider other factors than the candidates’ support. The courts have an interest in preventing “laundry list” ballots that have too many candidates that would ultimately confuse voters.²¹³ The Supreme Court has determined that this is a legitimate interest,²¹⁴ but they have not defined at what point a ballot is too cluttered. Up to this point, the “laundry list” ballot is simply something that the courts use as a balancing tool in determining who does or does not merit placement on the ballot. Part of the difficulty for courts is that each suit is handled on a case-by-case basis. Would placement on the ballot be on a first-come first-serve basis, where the spots on the ballot could be filled up first? The court has not yet addressed this question.

The biggest problems with this method of ballot access are that it is slow, temporary, and expensive. As the Libertarians found in the 2004 election, a court’s decision may not come until after the election.²¹⁵ Although they won the suit,²¹⁶ it obviously did not do them any good in that particular election. With more parties seeking injunctive relief, the easiest ploy for the State would be to drag out the case past the election.

Another issue for minor parties is money. They do not have the bankrolls that the major parties have, and they must make every dollar count.²¹⁷ Spending time and money on a lawsuit is money that can certainly be better spent campaigning.

²¹¹ *Goldman-Frankie*, 727 F.2d at 607–08.

²¹² *McCarthy v. Briscoe*, 429 U.S. 1317, 1319–23 (1976); *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d at 1014.

²¹³ *Lubin v. Panish*, 415 U.S. 709, 715 (1974).

²¹⁴ *Id.* at 715–16.

²¹⁵ See *supra* text accompanying note 112.

²¹⁶ *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 595 (6th Cir. 2006).

²¹⁷ See Keith Darren Eisner, *Non-Major Party Candidates and Televised Presidential Debates: The Merits of Legislative Inclusion*, 141 U. PA. L. REV. 973, 991 (1993). The federal government also provides substantially more money to Democratic and Republican presidential candidates than minor party candidates. Benjamin D. Black, *Developments in*
(continued)

The question now is whether the General Assembly will be compelled to finally act. It went through one election cycle already without acting, which forced the Secretary of State to make last minute changes.²¹⁸ The courts made it very clear that only Ohio's legislature can make the changes.²¹⁹ For the General Assembly, it comes down to motivation. Being completely dominated by Democrats and Republicans, what motivation do the major parties have to help out minor parties? In terms of minor party interference, this past election went smoothly for both parties in Ohio. The minor parties did not play the role of spoiler, as their combined support accounted for less than 1% of the vote.²²⁰

On the other hand, with four minor parties on the ballot (compared to the usual one), this could be setting a dangerous precedent for the major parties. Because the courts let onto the ballot any party with "sufficient" support,²²¹ this may lead Ohio's legislature to make the official determination of who can get on the ballot. If they know there will continually be a large ballot, the major parties may figure that, at some point, it will come back to hurt them. Also, the previous elections were not cheap affairs for the Ohio government either. The Secretary of State was involved in twenty-two lawsuits that cost the State over a million dollars.²²²

2. *If the Legislature Acts*

So when the legislature eventually does act, what are the likely consequences? Again, because the legislature is dominated by the major parties, its main motivation is to keep minor parties off the ballot.²²³ The courts have acknowledged that this is likely their biggest interest.²²⁴ The

the State Regulation of Major and Minor Political Parties, 82 CORNELL L. REV 109, 177 (1997).

²¹⁸ *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006, 1009 (S.D. Ohio 2008).

²¹⁹ *Bush v. Gore*, 531 U.S. 98, 104 (2000); *Libertarian Party of Ohio v. Blackwell*, 462 F.3d at 587; *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d at 1015; *Moore v. Brunner*, No. 2:08-CV-224, 2008 WL 3887639, at *3 (S.D. Ohio Aug. 21, 2008).

²²⁰ See OHIO SECRETARY OF STATE, *supra* note 3.

²²¹ *Goldman-Frankie v. Austin*, 727 F.2d 603, 607-08 (6th Cir. 1984).

²²² Mark Niquette, *Ohio Has Paid \$1 Million to Settle Election Lawsuits*, COLUMBUS DISPATCH, Dec. 16, 2008, at B8, available at http://www.dispatchpolitics.com/live/content/local_news/stories/2008/12/16/electbill.html?sid=101.

²²³ See *Libertarian Party of Ohio v. Blackwell*, 462 F.3d at 587.

²²⁴ See *id.* (quoting *Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring); *Williams v. Rhodes*, 393 U.S. 23, 31-32 (1968)).

courts have also stated that this is not a legitimate interest.²²⁵ Either way, when the General Assembly makes changes, it is likely to make the least amount of changes possible. It is highly unlikely that Ohio will go from being one of the most difficult states for minor parties to obtain ballot access to one of the easiest.

Ohio's status as a "swing state" makes it one of the most important states in a presidential election.²²⁶ If a candidate wins Ohio, he or she is likely to win the whole election.²²⁷ Neither party in Ohio wants to be responsible for "losing" the election because of a minor party spoiler. In Florida, another swing state,²²⁸ after the 2000 election, Ralph Nader, an independent candidate, was seen as a spoiler who stole votes away from Al Gore, the Democratic candidate.²²⁹ When Nader made another attempt in 2004, it was expected to be another highly contested race between the major parties,²³⁰ and Florida Democrats fought hard to keep him off the ballot.²³¹

So when the Ohio legislature creates its new election laws, minor parties should not expect the door to be left wide open. The General Assembly is likely to look to other states to determine the minimum standards. For the courts, this seemed to be a key factor.²³² When deciding whether Ohio's laws were constitutional, the *Libertarian Party of Ohio v. Blackwell* court made numerous comparisons to other states.²³³

Once the new laws are on the books, the minor parties will once again attempt to comply. This means gathering the new requisite number of signatures and meeting the new filing deadline—if the parties do not

²²⁵ Anderson v. Celebrezze, 460 U.S. 780, 803 (1983); *Libertarian Party of Ohio v. Blackwell*, 462 F.3d at 594.

²²⁶ Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1220 (2005).

²²⁷ See Roger K. Lowe, *Campaign Visits Show Ohio's Electoral Importance*, COLUMBUS DISPATCH, Mar. 17, 1996, at 4D.

²²⁸ Porter v. Bowen, 496 F.3d 1009, 1012 (9th Cir. 2007).

²²⁹ Bousquet, *supra* note 10, at 5B.

²³⁰ Jodi Wilgoren, *The 2004 Kerry Is Expected to Meet with Nader*, N.Y. TIMES, May 19, 2004, at A20.

²³¹ Bousquet, *supra* note 10, at 5B.

²³² Storer v. Brown, 415 U.S. 724, 742 (1974); *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 589 (6th Cir. 2006).

²³³ *Libertarian Party of Ohio v. Blackwell*, 462 F.3d at 589.

automatically qualify under the new regulations.²³⁴ This would lead the minor parties down the optimal path: favorable election laws that give them access to the ballot.

Preferably, minor parties that have shown consistent support would like to be able to meet the standards to qualify automatically for a spot on the ballot. The problem with Ohio's old laws was the significant amount of time and money parties spent campaigning and gathering signatures almost a full year before the election.²³⁵ Ideally, minor parties would like to focus their time and resources closer to the actual election—when supporters are more active and voters are making decisions.

3. *If the Legislature Acts, Will It Be Constitutional?*

If Ohio, as can be expected, makes the minimal amount of changes, minor parties are still likely to have problems gaining ballot access. Future lawsuits are certainly not out of the question. The next question becomes, will Ohio's new election laws finally be constitutional? The State is likely to push the boundaries, and minor parties that get burned are likely once again to take it to the judiciary.

In order for the legislature to avoid the situation that it found itself in this past election, they should carefully craft the new regulations. The three aspects of election law the courts considered in the previous cases were the filing deadline,²³⁶ the signature requirement,²³⁷ and the qualifications for automatic ballot access.²³⁸ If Ohio aims for just above the minimum standards in all three aspects, the new regulations might still be found unconstitutional. The previous courts did not look at each regulation individually.²³⁹ Instead, they looked at the regulations as a collective whole and examined the burden they created.²⁴⁰ If the court examines the laws the way they have been in the past, then minimum standards on all fronts might not be sufficient.

²³⁴ See *id.* at 582–83.

²³⁵ *Id.* at 590–91.

²³⁶ *Anderson v. Celebrezze*, 460 U.S. 780, 782 (1983); *Williams v. Rhodes*, 393 U.S. 23, 27 (1968); *Libertarian Party of Ohio v. Blackwell*, 462 F.3d at 589–90; *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006, 1013–14 (S.D. Ohio 2008).

²³⁷ *Williams*, 393 U.S. at 33–35; *Libertarian Party of Ohio v. Blackwell*, 462 F.3d at 583; *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d at 1013–14.

²³⁸ *Libertarian Party of Ohio v. Blackwell*, 462 F.3d at 589–90; *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d at 1015.

²³⁹ *Libertarian Party of Ohio v. Blackwell*, 462 F.3d at 586; *Williams*, 393 U.S. at 34.

²⁴⁰ *Libertarian Party of Ohio v. Blackwell*, 462 F.3d at 586–87.

If the laws are found unconstitutional once again, it would leave Ohio in the same conundrum that it was in before the 2008 election. Minor parties would again have to file a lawsuit seeking an injunction, and the courts would have to apply the standards from *Goldman-Frankie* to determine if the minor parties deserved to be on the ballot.

B. Nationwide Effects

Outside of Ohio, the ruling in *Libertarian Party of Ohio v. Brunner* has already played an immediate role in other cases. In Louisiana, in *Libertarian Party v. Dardenne*,²⁴¹ the court heard the same argument as in *Libertarian Party of Ohio v. Brunner* when Louisiana's Secretary of State extended the filing deadline to account for Hurricane Gustav.²⁴² The extension of the filing deadline, even under such extraordinary circumstances as a hurricane, was still an election regulation that the state's legislature needed to change.²⁴³ The court, like the one in *Libertarian Party of Ohio v. Brunner*, examined Article II under the guidance of *Bush v. Gore*, and found that the powers given to the legislature cannot be circumscribed.²⁴⁴ Both the Libertarian Party and the Socialist Party filed the lawsuit, and both sought injunctions for placement on the presidential ballot.²⁴⁵ The political parties were not placed on the ballot because the court found the issues moot after the election had passed.²⁴⁶

Another suit, in Mississippi, where the plaintiffs also cited *Libertarian Party of Ohio v. Brunner*, was less successful. In *Moore v. Hoseman*,²⁴⁷ the Socialist Party was unable to get its paperwork in by the 5 p.m.

²⁴¹ 294 Fed. Appx. 142 (5th Cir. 2008), *vacated*, 308 Fed. Appx. 861 (5th Cir. 2009).

²⁴² *Id.* at 143. The plaintiffs in both cases had the same attorney, and after his success in Ohio, he employed the same argument in Louisiana. See *id.*; *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006.

²⁴³ *Dardenne*, 294 Fed. Appx. at 144.

²⁴⁴ See *id.* at 144; *Bush v. Gore*, 531 U.S. 98, 103–05 (2000); *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d at 1011–13.

²⁴⁵ Brief of Appellees at 4, *Dardenne v. Libertarian Party*, No. 08-30922 (5th Cir. Dec. 12, 2008). The Libertarian Party was given a spot on the ballot, as it had all of their paperwork in by a reasonable time, but because the Socialist Party turned in incomplete paperwork, it was denied relief. *Id.* at 5 n.2.

²⁴⁶ *Libertarian Party v. Dardenne*, No. 08-582-JJB, 2009 WL 790149, at *2 (M.D. La. Mar. 24, 2009).

²⁴⁷ *Moore v. Hosemann*, No. 3:08CV573TSL-JCS, 2009 WL 649700 (S.D. Miss. Mar. 10, 2009).

deadline.²⁴⁸ The party alleged that the Secretary of State's decision to close the offices at 5 p.m. was an alteration of the legislation's deadline, which has simply stated a deadline date, and not a specific time.²⁴⁹ The court found that closing the office at 5 p.m. was a reasonable interpretation of the State's election laws and was not a violation of Article II.²⁵⁰

The ruling from *Libertarian Party of Ohio v. Brunner*, along with Chief Justice Rehnquist's opinion in *Bush* and Justice Stevens' opinion in *California Democratic Party v. Jones*, indicate that state governments should be very careful that the legislatures are the ones creating the election laws; otherwise, they might be found invalid. Regarding ballot access laws, it appears that this will be most pertinent in emergencies. *Bush* was a rare presidential recount, *Libertarian Party of Ohio v. Brunner* was a quick effort to replace already unconstitutional laws, and *Libertarian Party v. Dardenne* was after a hurricane. All of them provided rather unique situations where either the judicial or the executive branch attempted to remedy the situation.

Although these situations, so far, appear to arise mainly from "emergencies," minor parties struggling to gain access to the ballot should still be keenly aware of the Elections Clause. As noted above, three states dealt with such cases just in the last election.²⁵¹ Also, as shown in *Bush* and *Moore v. Hosemann*, it is not just the creation of laws, but also the interpretation of the laws that is left up to the legislature.²⁵² Even though it was an unsuccessful attempt in *Moore v. Hosemann*, examining who has interpreted the laws could be a beneficial avenue for minor parties to explore. Other states could have laws that the executive branch has interpreted for its own benefit, which would be invalid.

In the end, the Elections Clause provides minor parties with another weapon to use in their battle to gain consistent and easier access to the ballot. Because it seems to arise only in unique situations, it is not likely to change the system completely. However, in some situations, such as *Libertarian Party of Ohio v. Brunner*, it may force legislatures to create laws that are more beneficial towards minor parties.

²⁴⁸ *Id.* at *1.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at *4.

²⁵¹ See *Moore v. Hosemann*, 2009 WL 649700; *Libertarian Party v. Dardenne*, 294 Fed. Appx. 142 (5th Cir. 2008), *vacated*, 308 Fed. Appx. 861 (5th Cir. 2009); *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006 (S.D. Ohio 2008).

²⁵² *Bush*, 531 U.S. at 112–13; see also *Moore v. Hosemann*, 2009 WL 649700 at *1.

VI. CONCLUSION

As Ohio's 123rd General Assembly exited office in 2008, Ohio was still without constitutional ballot access laws.²⁵³ The lame-duck assembly, which was switching from a Republican majority to a Democratic majority, was encouraged by Governor Ted Strickland not to make any drastic changes to the election laws.²⁵⁴ As the 124th General Assembly takes office in Columbus, it will be interesting to see if they make correcting the unconstitutional laws a priority. The next presidential election is still three years away, but the State could be in a rush to ensure it does not encounter the legal problems (and legal bills) it was subjected to in 2008.

When the legislature does create the new laws, minor parties will likely be awaiting anxiously to see how willing the Democrats and Republicans are to share a spot on the ballot. Will Ohio continue to be one of the most difficult states to gain ballot access, or will Ohio relax their standards more than is constitutionally necessary?

²⁵³ *Ohio Legislature Passes Other Election Law Bills but Still Doesn't Pass New Ballot Access Bill*, *supra* note 201; *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d at 1014.

²⁵⁴ See Jim Siegel, *Strickland to Veto Vet-Bonus, Election Bills*, COLUMBUS DISPATCH, Dec. 19, 2008, at B1, B3, available at http://www.dispatchpolitics.com/live/content/local_news/stories/2008/12/19/copy/leg19.ART_ART_12-19-08_B1_IBC9FN9.html?sid=101.

