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BALLOT FORMAT: MUST CANDIDATES BE TREATED EQUALLY?

RICHARD WINGER¹

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I. INTRODUCTION

This article's purpose is to explore and discuss a major inequality currently plaguing the realm of ballot format—the non-uniformed partisan labeling of election ballots.² This will be accomplished by answering the following question: if a ballot lists partisan labels for some candidates must it list similar labels for all?

This article endorses the idea that an election ballot should be fairly, not unfairly, constructed. Governments preparing a voting ballot so its design does not significantly disadvantage any class of listed candidates seems perfectly reasonable. Despite this seemingly logical approach, some state laws provide that certain classes of candidates are entitled to preferential treatment.³ Moreover, when these laws are challenged, courts have responded

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²In 1996, for instance, a U.S. District Court in Oklahoma struck down a law stating the Democratic Party should always have the top line on the ballot. *Graves v. McElderry*, 946 F. Supp. 1569 (W.D. Okla. 1996). Yet U.S. District Court in Colorado refused to issue an injunction against a law that the two largest political parties, as measured by the last vote for Governor, always get the two top lines on the ballot. *Libertarian Party of Colorado v. Buckley*, 938 F. Supp. 687 (D.Colo. 1996).

³See *Rosen v. Brown*, 970 F.2d 169 (1992).

haphazardly.⁴ In some instances, courts will strike down the discriminatory practice and law, while at other times courts find them valid.⁵

Rosen v. Brown is an example of this unsettledness.⁶ In 1992, the *Rosen* court struck down an Ohio election law that allowed ballots to contain partisan labels for candidates who won a partisan primary, but not for those who qualified for the general election via petitions.⁷ Disregarding the Sixth Circuit Court's ruling, the Ohio legislature re-enacted section 3505.03 of the Ohio Revised Code without adopting the court's modifications.⁸ Adding to the confusion, Ohio's election officials have interpreted *Rosen* narrowly and discouraged any public awareness of the ruling.⁹ To round out this discussion, this article will discuss 1) Ohio's status as one of the few states that has been faced with this issue; 2) the consequences of Ohio's restrictive policy; and 3) the outlook for change.

II. HISTORICAL BACKGROUND

A. *The Period 1892 Through 1946*

Ohio wrote its first ballot access law in 1891.¹⁰ Prior to 1891, Ohioans voted on privately-printed ballots. Most ballots were printed by political parties, but any voter was free to create his own ballot.¹¹ The 1891 law required all statewide independent candidates to have 500 signatures in order to be placed on the general election ballot, although nominees of major and minor political parties did not need any signatures.¹² Other groups, including independent candidates, could appear if they submitted a petition signed by at least one percent of the last vote cast for governor.¹³ Petitioning groups were free to choose any partisan label they wished, as long as the label they chose did not mimic the name of an already-qualified party and its name was not too long.¹⁴ All candidates for partisan office enjoyed the right to have the appropriate

⁴*Id.* The Ohio law being challenged was OHIO REV. CODE § 3503.03 (West 1997).

⁵*Id.*

⁶Telephone interview with Milton Norris, Libertarian Party Activist (Aug. 5, 1995).

⁷*Id.* See also *Kandules v. City of Columbus*, 95 F.3d 1335 (6th Cir. 1996) (declining to extend *Rosen* by holding citizens failed to establish injury-in-fact, causation, and redressability elements of constitutional standing to sue).

⁸OHIO REV. CODE § 3503.03.

⁹Telephone interview with Milton Norris, Libertarian Party activist (Aug. 5, 1995).

¹⁰OHIO REV. CODE ANN. § 2966-32 (Bates 1904).

¹¹*Burson v. Freeman*, 504 U.S. 191, 200 (1992) (describing the use of "private" ballots in all states until the 1890's).

¹²OHIO REV. CODE ANN. § 2966-18 (Bates 1904).

¹³*Id.*

¹⁴*Id.*

partisan label next to their names.¹⁵ Between 1891 and 1947, the Ohio law stated the following:

[The] tickets . . . of the various [political] parties shall be printed in parallel columns . . . and the party names . . . [in the order herein provided], precedence being given to the political party which polled the highest number of votes for in the next proceeding general election, the head of the ticket, and so on.¹⁶

. . . .

The tickets or lists of candidates nominated by nomination papers, *with their party names or designations*, shall be printed at the right of and parallel with the tickets of political parties.¹⁷

. . . .

When candidates have been nominated by petition, and the group of petitioners has failed to indicate a designation, the word "independent" shall be used at the head of the column wherein the names of all such candidates shall appear.¹⁸ Each political party or group of petitioners whose designation contains more than eleven letters shall select an abbreviated form therefor containing not more than eleven letters, which shall be used upon the ballot whenever the board determines that the necessities of space so require.¹⁹

. . . .

If any political party or group of petitioners fails to submit such abbreviated designation, then the secretary of state may determine the abbreviations to be used.²⁰

In 1929, the Ohio legislature created a separate, new procedure by which a group could circulate a petition to qualify itself as a full-fledged party.²¹ This new procedure was distinct from the old one-percent-petition which provided

¹⁵The Prohibition Party failed to poll as much as one percent of the vote in 1896 and was therefore ineligible to participate in the 1898 election unless it completed a petition signed by 10,143 voters. *State ex rel. Plimmer v. Poston*, 51 N.E. 150 (Ohio 1898) (upholding the constitutionality of the one percent vote test and the alternate one percent petition procedure).

¹⁶*See* OHIO ANN. REV. STATS. § 2966-18 (Bates 1904).

¹⁷*Id.*

¹⁸OHIO ANN. REV. STATS. § 2966-32 (Bates 1904).

¹⁹*Id.*

²⁰§ 2966-18.

²¹OHIO REV. CODE ANN. § 4785-61 (Anderson 1929) (*renumbered as* OHIO REV. CODE ANN. § 3517.01 (West 1997)).

for the nomination of a listed slate of candidates.²² The new procedure required a petition signed by fifteen percent of the last gubernatorial vote.²³ Since the old one-percent petition procedure for new or minor party candidates continued to exist and provide for a partisan label, no minor or new party made any attempt to comply with the fifteen percent petition requirement.²⁴ The addition of the fifteen percent petition procedure had no practical impact on Ohio elections because no group took advantage of the procedure.²⁵

B. The Period 1947 Through 1967

In 1947, the Ohio legislature made two significant changes in the ballot access laws.²⁶ First, it deleted the portion of the Ohio Revised Code, section 4785 which allowed petitioning groups to choose a partisan label and substituted a provision which required such groups to be labeled "Independent."²⁷ Second, it provided that the one-percent-petition could not be used to nominate a candidate for president.²⁸

Two forces motivated these changes. The first was the somewhat surprising showing made by the Socialist Labor Party in Ohio's 1946 election.²⁹ The Socialist Labor Party, founded in 1876, was the original socialist party in the United States.³⁰ In 1888, the party ran its first candidates for presidential elector in New York.³¹ The party first appeared on the Ohio ballot in 1894.³² Although the party continued to be on the ballot in most statewide elections for fifty years, it never polled more than 3,025 votes for any office in Ohio.³³ In 1946, however, it polled 13,885 votes for U.S. Senator and 11,203 votes for Governor.³⁴ While this was still a small vote, Ohio legislators were not pleased. More likely than not, a strong showing by any party espousing socialism displeased Republican legislators because a strong showing added prestige to socialist

²²§ 4785.61.

²³*Id.*

²⁴*Id.*

²⁵If any group had successfully qualified as a full-fledged party under this procedure, it would have been provided with its own primary.

²⁶S.B. 3, 97th Leg., 1st Reg. Sess. (Ohio 1947).

²⁷*Id.*

²⁸*Id.*

²⁹MORRIS KILGUILT, *HISTORY OF SOCIALISM IN THE UNITED STATES* 199 (1971) (1910).

³⁰*See generally id.*

³¹*Id.*

³²SAMUEL M. TAYLOR, *OHIO SECRETARY OF STATE, OHIO ELECTION STATISTICS* 165 (1894).

³³*Id.*

³⁴BOB TAFT, *OHIO SECRETARY OF STATE, OHIO ELECTION STATISTICS* 216 (1993-1994).

ideas and helped disseminate socialist views. Naturally, Democrats were just as displeased because they believed they had lost votes to the Socialist Labor Party. Ohio was known for razor-thin statewide races during that time. For example, in 1944, President Franklin Roosevelt lost Ohio to Republican nominee Thomas Dewey by only 11,530 votes and³⁵ Republican U.S. Senator Robert A. Taft was re-elected with a margin of only 17,999 votes. In 1946, only 40,553 votes separated the major party candidates for Governor.³⁶

An even stronger motivation for the legislature to erase party labels for minor parties from the ballot, and to prevent them from running presidential campaigns, was to stop Henry Wallace.³⁷ Wallace was vice-president under President Roosevelt between 1941 and 1945, but was replaced by Harry S. Truman at the 1944 Democratic convention.³⁸ Wallace quarreled with Truman shortly after Truman became president in April 1945.³⁹ On September 12, 1946, Wallace attacked Truman in a speech in New York City.⁴⁰ As a result, Truman asked for his resignation from the Cabinet.⁴¹

Wallace embarked on a tour of Europe during April 1947, spending much of his time denouncing American foreign policy.⁴² On June 1, 1947, the *New York Times* reported that "[a]s Henry Wallace stumps the country, he is leaving in his wake a recrudescence of that familiar form of political rebellion that seeks its ends through the formation of a third party."⁴³ On June 2, 1947, Senate Bill 3 passed the Ohio legislature and was signed into law on June 16, 1947.⁴⁴ Hence, it is likely that proponents of the bill were motivated by their desire to stop Henry Wallace.

In 1948, supporters of the Progressive Party circulated the one-percent candidate petition, naming Henry Wallace for president, U.S. Senator Glen Taylor for vice-president, and the names of twenty-five candidates for presidential elector pledged to Wallace and Taylor.⁴⁵ The Secretary of State rejected the petition on the grounds the new law did not provide for

³⁵SVEND PETERSEN, A STATISTICAL HISTORY OF THE AMERICAN PRESIDENTIAL ELECTIONS 55 (1963).

³⁶TAFT, *supra* note 34, at 189.

³⁷KARL M. SCHMIDT, HENRY A. WALLACE, QUIXOTIC CRUSADE 1 (1948).

³⁸*Id.* See also RICHARD J. WALTON, HENRY WALLACE, HARRY TRUMAN, AND THE COLD WAR (1976).

³⁹See generally SCHMIDT, *supra* note 37. See also DAVID McCULLOUGH, TRUMAN 516-17 (1992).

⁴⁰*Id.*

⁴¹*Id.*

⁴²*Id.*

⁴³See *id.* at 30.

⁴⁴S.B. 3, 97th Leg., 1st Reg. Sess. (Ohio 1947).

⁴⁵SCHMIDT, *supra* note 37, at 145.

independent presidential candidates.⁴⁶ Ruling on the law's validity, the Ohio Supreme Court, sympathetic to Wallace and to Ohioans who wished to vote for him, held that although the law might say no presidential candidate could be printed on the November ballot unless that candidate was nominated by a qualified party, the law did not bar independent candidates for presidential elector.⁴⁷ Thus, in the 1948 general election, the presidential portion of the Ohio ballot included the names of Harry S. Truman and Thomas E. Dewey, and under the label "independent," the names of twenty-five individuals running for presidential elector.⁴⁸ The ballot did not indicate these candidates for elector were pledged to Wallace. Voters who wished to vote for Wallace had to be sophisticated enough to know they should vote for the slate of independent presidential electors.⁴⁹

The 1951 session of the Ohio legislature again amended the ballot access laws⁵⁰ to make it clear independent candidates for presidential elector were also prohibited. The Ohio legislature abolished write-in space on the ballot except for instances in which no candidates had been otherwise nominated, or instances in which a candidate named on the ballot had died after the ballots were printed.⁵¹ In addition, the 1951 legislature raised the independent candidate petition procedure from one percent of the last gubernatorial vote to seven percent of the last gubernatorial vote.⁵² Finally, the 1951 legislature provided that even the label "independent" could no longer be printed on November ballots next to the names of candidates who used the independent petition procedure. The law, now renumbered as Ohio Revised Code section 3513.31 stated:

Except as provided in this section (*i.e.*, except for the nominees of fully-qualified parties), *no words, designations, or emblems descriptive of a candidate or his political affiliation, or indicative of the method by which the candidate was nominated or certified, shall be printed under or after a candidate's name which is printed on the ballot.*⁵³

⁴⁶The Secretary of State also rejected the petitions on the grounds that some of the petitioners had connections with the Communist Party. *See State ex rel. Beck v. Hummel*, 80 N.E.2d 899 (Ohio 1948).

⁴⁷*Id.*

⁴⁸SCHMIDT, *supra* note 37, at 145. TAFT, *supra* note 34, at 218.

⁴⁹TAFT, *supra* note 34, at 218.

⁵⁰S.B. 269, 99th Leg., 1st Reg. Sess. (Ohio 1951).

⁵¹*Id.*

⁵²*Id.*

⁵³*Id.* *See also* OHIO REV. CODE ANN. § 3513.31 (West 1997). This language is still in effect. *Id.*

C. The Period 1968 Through the Present

In 1968, former Alabama Governor George C. Wallace succeeded in getting on the November ballot in every state except Ohio, as the presidential candidate of his new political party, the American Independent Party.⁵⁴ The American Independent Party sued Ohio over its ballot access laws, and the U.S. Supreme Court, by a 6-3 vote, ruled Ohio's ballot access laws were unconstitutional in their entirety.⁵⁵ Subsequently, Ohio printed the name of George Wallace on its November ballot with the party label "American Independent."⁵⁶

In response, the 1969 session of the Ohio legislature allowed presidential candidates to use the candidate petition procedure.⁵⁷ It also lowered the candidate petition procedure from seven percent to four percent of the last gubernatorial vote and provided for write-in space on ballots.⁵⁸ Moreover, it lowered the petition procedure for a full-fledged new political party from fifteen percent of the last gubernatorial vote to seven percent.⁵⁹

In 1970, the Socialist Labor Party filed a lawsuit in federal court opposing the new seven percent procedure for a newly-qualified party.⁶⁰ In addition, candidates of the Socialist Workers Party filed suit opposing the candidate petition procedure of four percent of the last gubernatorial vote.⁶¹ The two cases were consolidated, and a three judge U.S. District Court ruled that both petitions were unconstitutional because they still required too many signatures.⁶²

Ohio appealed to the U.S. Supreme Court, and the Court granted certiorari.⁶³ Before oral arguments were held, however, the legislature succumbed to

⁵⁴George Wallace named his party the American Independent Party in Ohio and eleven other states, the American Party in seventeen states, the George Wallace Party in eight states, the Independent American Party in one state, the Courage Party in one state, and the Conservative Party in one state. In Alabama, he was the nominee of the Democratic Party and in the remaining nine states he was labelled "independent." Richard Winger, Analysis of November 1968 Ballot Returns (July 1, 1969) (unpublished manuscript, on file with author).

⁵⁵*Williams v. Rhodes*, 393 U.S. 23 (1968). The lead plaintiff, Glen Williams, was chairman of the Ohio American Independent Party. *Id.*

⁵⁶TED W. BROWN, OHIO SECRETARY OF STATE, OHIO ELECTION STATISTICS 163 (1967-68).

⁵⁷*See Socialist Labor Party v. Rhodes*, 318 F. Supp. 1262 (S.D. Ohio 1970) (describing the 1969 changes).

⁵⁸*Id.*

⁵⁹*Id.*

⁶⁰*Id.*

⁶¹*Id.*

⁶²318 F. Supp. at 1262.

⁶³*Id.*

political pressure and lowered the full party procedure petition from seven percent of the last gubernatorial vote to one percent of the last gubernatorial vote.⁶⁴ In addition, the legislature lowered the candidate petition procedure from four percent of the last gubernatorial vote to one percent or 5,000 signatures, whichever was less.⁶⁵ This legislative action rendered the appeal to the U. S. Supreme Court moot.⁶⁶

By 1972, all of the anti-third party and independent candidates laws passed by the 1947 and 1951 sessions of the Ohio legislature had been reversed, except for the provision on partisan labels. Third party and independent candidates enjoyed moderate petition requirements starting in 1972, providing they used the independent candidate petition procedure consisting of 5,000 signatures, about one-tenth of one percent of the number of registered voters. But these third party and independent candidates could no longer choose a partisan label which identified their party on their petitions and on the November ballot.

III. WHO USES THE OHIO INDEPENDENT PETITION PROCEDURE?

Starting in 1891, virtually all of the candidates gaining a place on Ohio's general election ballot for statewide office through the independent candidate petition procedure have been the nominees of unqualified political parties. Since the 19th century, the Ohio Secretary of State has published *Ohio Election Statistics* after each statewide election. Various labels for groups which have used the independent candidate procedure between 1892 and 1946 include Prohibition, People's, Socialist Labor, National, National Democratic, Negro Protection, Liberty, Union Reform, Social Democratic, Socialist, Independence, Progressive, Single Tax, Independent Progressive, Commonwealth Land, Workers Communist, Communist, and Union. In 1946, the Socialist Labor Party was the last group to appear on the November ballot *with* the party label, using the independent petition procedure. From 1972 until present, many minor party candidates have used the Ohio Independent Petition Procedure.⁶⁷

⁶⁴*Id.*

⁶⁵S.B. 460, 109th Gen. Assembly, 1971 Ohio Legis. Serv. 392 (Baldwin).

⁶⁶The issue of state loyalty oaths, although not relevant to this article, invites a scrutinizing glance. In *Socialist Labor Party v. Gilligan*, 406 U.S. 583 (1972), the Supreme Court ruled the harm done to the Socialist Labor Party by the oath was speculative. Loyalty oath language for new political parties can still be found in the election code. See OHIO REV. CODE ANN. § 3517.07 (West 1997). *But cf.* *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974) (holding that loyalty oaths for political parties are unconstitutional).

⁶⁷Richard Winger, Summary of Minor Party Activity in Ohio (Dec. 12, 1995) (unpublished manuscript on file with author). The minor party statewide candidates who used the independent procedure after 1947 include: 1948, Henry Wallace electors, Progressives; 1972, Gus Hall for President, Communist; 1974, Nancy Brown Lazar for Governor, Socialist Worker; 1974, Kathleen Harroff for U.S. Senator, Libertarian; 1974, Herman Kirsch for Lieutenant Governor, Socialist Worker; 1974, Richard B. Kay for U.S. Senator, American; 1976, Roger MacBridge for President, Libertarian; 1976 Lyndon LaRouche for President, U.S. Labor; 1976, John O'Neill for U.S. Senator, Socialist Labor;

IV. WHO USES THE NEW PARTY PETITION?

Although a separate, more difficult petition procedure for creating a new, qualified party has existed in the Ohio election code since 1929, it has only been used successfully four times: in 1976 by the American Party, in 1982 by the Libertarian Party, and in 1996 by the Reform and Natural Law Parties.⁶⁸ Completion of the new party petition required 30,721 signatures in 1976, 42,837 signatures in 1982, and 33,463 signatures in 1996.⁶⁹ A group which completes the new party petition is entitled to a party label for its nominees on the November ballot and is also provided a primary election to nominate its candidates. Any registered voter in Ohio is free to vote in the primary of a newly-qualified party.⁷⁰

On forty-one different occasions since 1947, a minor political party petitioned to put its candidates on the ballot for statewide office in Ohio.⁷¹ On thirty-seven of those occasions, the minor party used the independent candidate procedure and on four occasions the minor party used the fully-qualified new party procedure.⁷² During the last fifty years, the normal route to the Ohio ballot for Ohio minor parties has been the independent candidate petition method.

1976, Melissa Singler for U.S. Senator, Socialist Workers; 1978, Patricia Wright for Governor, Socialist Workers; 1978, John O'Neill for Governor, Socialist Labor; 1978, Allan Friedman for Governor, U.S. Labor; 1980, Edward Clark for President, Libertarian; 1980, Barry Commoner for President, Citizens; 1980, Gus Hall for President, Communist; 1980, Rick Congress for President, Socialist Workers; 1980, Deirdre Griswold for President, Workers World; 1980, John E. Powers for U.S. Senator, Socialist Workers; 1980, Rick Nagin for U.S. Senator, Communist; 1982, Kurt Landefeld for Governor, Socialist Workers; 1982, Alicia Merel for U.S. Senator, Socialist Workers; 1984, David Bergland for President, Libertarian; 1984, Gus Hall for President, Communist; 1984, Gavrielle Holmes for President, Workers World; 1984, Mel Mason for President, Socialist Workers; 1984, Ed Winn for President, Workers League; 1988, Lenora Fulani for President, New Alliance; 1988, Ron Paul for President, Libertarian; 1988, Ed Winn for President, Workers League; 1992, Andre Marrou for President, Libertarian; 1992, Lenora Fulani for President, New Alliance; 1992, Bo Gritz for President, Populist; 1992, John Hagelin for President, Natural Law; 1992, Martha Grevatt for U.S. Senator, Workers World; 1994, Joseph Slovenic for U.S. Senator, U.S. Taxpayers; 1996, Harry Browne for President, Libertarian; 1996, Monica Moorehead for President, Workers World; 1996, Howard Phillips for President, U.S. Taxpayers. *Id.*

⁶⁸Taft, *supra* note 34, at 190.

⁶⁹*Id.*

⁷⁰OHIO REV. CODE ANN. § 3513.19 (West 1997).

⁷¹In addition to the forty-one instances at which a minor party petitioned to place its statewide candidates on the ballot, there were also instances in which a minor party was placed on the ballot by court order. Instances include the American Independent Party in 1968, 1970 and 1972, and the Socialist Labor Party in 1970 and 1972. *See Socialist Labor Party*, 318 F. Supp. at 1262.

⁷²Taft, *supra* note 34, at 210-78.

In examining the independent candidate procedure in isolation, it becomes obvious that it is used far more often by minor political parties than by true independent candidates, at least with regard to statewide office. Since 1947, there have been fifty-one instances in which a statewide independent candidate petition has been successfully circulated.⁷³ Of those fifty-one instances, only nine were by true independents. The other forty-two were by minor party nominees.⁷⁴

V. WHAT DIFFERENCE DOES IT MAKE?

The election campaign of a minor party is hampered when the ballot does not list that minor party's ballot label. Minor party candidates, especially for large-scale offices, such as President, U.S. Senator and Governor, raise comparatively small amounts of campaign funds. These parties are not able to advertise extensively; consequently, most voters never become aware of the identity of any minor party candidates. Ross Perot, an independent candidate in the 1992 presidential election and the candidate of the Reform Party in 1996, was one exception.⁷⁵ Perot overcame the advertising obstacle through competitive campaign funding.⁷⁶ A certain percentage of voters may wish to vote for a Marxist Party, Libertarian Party, or Populist Party, but if these voters do not know which candidate on their ballot represents such a party, the voter cannot cast his or her vote for the desired party.

To help answer the question of whether the lack of a party label hurts a minor party candidate, the author has calculated the percentage of the vote received by the Libertarian Party's presidential candidate in both the 1992 and 1996 elections.⁷⁷ Included are all twenty-seven Ohio counties which border other states, and in the thirty-eight counties of other states which border Ohio.⁷⁸ The

⁷³*Id.*

⁷⁴*Id.*

⁷⁵Ed Bark, *GOP Declines to Buy Election Eve TV Time*, DALLAS MORNING NEWS, Oct. 28, 1992, at A14 (latest buys for Perot amounted to \$22.2 million); Ed Bark, *Perot Buys Another Hour on TV; His Spending Nears \$20 Million; Candidates' Total Outpaces Projection*, DALLAS MORNING NEWS, Oct. 23, 1992, at A14 (Perot expenses to date were \$11.3 million at ABC, \$4 million at CBS and \$3.7 million at NBC.).

⁷⁶Harry Berkowitz, *Perot Taps Ad Whiz for TV Blitz*, NEWSDAY, July 2, 1992, at 5 (Perot is competitive in the election because he is able to use his own money.); Sara Fritz, *Perot Candidacy Stirs Up Issue of Wealth in Politics; Campaign: Vast Corporate Holdings by Rich Cloud Claim of Freedom From the Influence of Special Interests*, LOS ANGELES TIMES, May 24, 1992, at A1 (Perot's \$3 billion in assets enables him to finance his campaign with his own money.).

⁷⁷Richard Winger, *Official Election Returns of Ohio and the States that Border It* (Dec. 30, 1996) (unpublished manuscript on file with author) (hereinafter *Official Election Returns of Ohio and the States that Border It*).

⁷⁸*Id.* The percentage of the vote for the Libertarian presidential candidates in 1992 and 1996, in each border county of Ohio, and in each non-Ohio county which borders Ohio is as follows:

Libertarian presidential candidates, Andre Marrou in 1992 and Harry Browne in 1996, were chosen because they were the only minor party presidential candidates in either year who were on the ballot in all states bordering Ohio, although they had no party label on the Ohio ballot.⁷⁹

The data supports the idea that the lack of a party label hurts a minor party candidate. The following graph represents the average percentage of Libertarian votes in border counties of each state.⁸⁰

State	1992	1996
Michigan (3 counties)	.17%	.70%
Indiana (10 counties)	.32%	.69%
Kentucky (8 counties)	.29%	.30%
West Virginia (12 counties)	.26%	.49%
Pennsylvania (5 counties)	.39%	.28%
Ohio (3 on Michigan border)	.13%	.29%
Ohio (9 on Indiana border)	.13%	.28%
Ohio (6 on Kentucky border)	.13%	.29%
Ohio (9 on West Virginia border)	.11%	.34%
Ohio (4 on Pennsylvania border)	.09%	.26%

Ohio counties (1992): Adams .14, Ashtabula .12, Athens .22, Belmont .10, Brown .10, Butler .17, Clermont .15, Columbiana .07, Darke .10, Defiance .15, Fulton .12, Gallia .11, Hamilton .19, Jefferson .09, Lawrence .13, Lucas .14, Mahoning .07, Meigs .13, Mercer .12, Monroe .08, Paulding .06, Preble .12, Scioto .09, Trumbull .11, Van Wert .10, Washington .09, Williams .14. Michigan counties (1992): Hillsdale .22, Lenawee .15, Monroe .14. Indiana counties (1992): Adams .29, Allen .48, Dearborn .49, DeKalb .56, Franklin .23, Randolph .20, Steuben .31, Union .27, Wayne .17. Kentucky counties (1992): Boone .25, Bracken .31, Campbell .24, Greenup .14, Kenton .25, Lewis .43, Mason .22, Pendleton .49. West Virginia counties (1992): Brooke .36, Cabell .27, Hancock .28, Jackson .24, Marshall .37, Mason .14, Ohio .28, Pleasants .30, Tyler .24, Wayne .30, Wetzel .30, Wood .24. Pennsylvania counties (1992): Beaver .14, Crawford .86, Erie .44, Lawrence .12, Mercer .40. Ohio counties (1996): Adams .18, Ashtabula .28, Athens .85, Belmont .20, Brown .26, Butler .34, Clermont .36, Columbiana .26, Darke .16, Defiance .28, Fulton .18, Gallia .27, Hamilton .37, Jefferson .17, Lawrence .36, Lucas .28, Mahoning .25, Meigs .35, Mercer .28, Monroe .27, Paulding .19, Preble .24, Scioto .19, Trumbull .26, Van Wert .23, Washington .31, Williams .42. Indiana counties (1996): Adams .63, Allen .84, Dearborn .66, DeKalb .77, Franklin .63, Randolph .65, Steuben .93, Union .44, Wayne .69. Kentucky counties (1996): Boone .45, Bracken .07, Campbell .37, Greenup .30, Kenton .44, Lewis .25, Mason .23, Pendleton .30. W. Va. counties (1996): Brooke .48, Cabell .42, Hancock .52, Jackson .34, Marshall .57, Mason .34, Ohio .51, Pleasants .38, Tyler .86, Wayne .33, Wetzel .43, Wood .66. Pennsylvania counties (1996): Beaver .27, Crawford .31, Erie .27, Lawrence .26, Mercer .29. *Id.*

⁷⁹In 1996, Ross Perot appeared on the ballot in all states, but because his Reform Party completed the fully-qualified party petition in Ohio, Ohio printed "Reform" next to his name on the ballot. Ohio Ballot, Nov. 1996 (on file with author). Therefore, accuracy dictates that Perot's vote should not be used to test the hypothesis that the lack of a party label results in a lower vote. Andre Marrou had the label "Libertarian" in all fifty states except for Tennessee, Ohio and North Dakota; Harry Browne had the label "Libertarian" in all fifty states except Ohio and Tennessee. Ballots from all Fifty States, Nov. 1996 (on file with author).

⁸⁰Official Election Returns of Ohio and the States that Border It, *supra* note 78.

In every instance, the border counties outside but adjacent to Ohio gave a higher share of their vote to the Libertarian presidential nominee than the adjoining Ohio border counties.⁸¹

One could argue that the Libertarian share of the vote is weaker in the Ohio border counties than in the counties of other states which border Ohio because the Libertarian Party is not as well-organized in Ohio. Even if that argument were true, it would still support the idea that the lack of a party label injures minor parties.

VI. THE ROSEN V. BROWN⁸² DECISION

On July 22, 1992, the Sixth Circuit Court of Appeals ruled that Ohio violated the U.S. Constitution's 14th amendment by permitting candidates nominated by a primary election to have a party label on the November ballot, while denying partisan labels to candidates nominated by petition.⁸³ In *Rosen v. Brown*, the Court of Appeals stated:

[w]ith respect to the political designations of the candidates on nomination papers or on the ballot, a State could wash its hands of such business and leave it to the educational efforts of the candidates themselves, or their sponsors, during the campaigns. Once a State admits a particular subject to the ballot and commences to manipulate the content or to legislate what shall and shall not appear, it must take into account the provisions of the Federal and State Constitutions regarding freedom of speech and association, together with the provisions assuring equal protection of the laws.⁸⁴

The Court held the statute violated the Fourteenth Amendment's Equal Protection Clause because it placed unequal burdens on independent and third-party candidates and gave Democrats and Republicans a decided advantage at the polls during a general election.⁸⁵

The plaintiff, Russell Rosen, ran as an independent candidate for the Ohio House of Representatives in November 1988 and did not request any ballot designation other than the word "Independent."⁸⁶ Consequently, the Court of Appeals did not discuss whether its decision only required that petitioning candidates be able to choose the label "Independent" or whether the decision also gives petitioning candidates the choice of any partisan label which does not mimic the name of a fully-qualified party and is not too long to fit on the ballot.

⁸¹ *Id.*

⁸² 970 F.2d at 169.

⁸³ *Id.*

⁸⁴ *Id.* at 175.

⁸⁵ *Id.* at 177-78.

⁸⁶ *Id.* at 171.

Rosen presented expert testimony of political scientists and a marketing specialist to prove that ballot labels are influential when voters are deciding for whom to vote.⁸⁷ Rosen did not present much information about the laws of other states, except to demonstrate that every state except Ohio permits petitioning candidates to choose some label.⁸⁸ In twenty-five states, including Louisiana and Virginia for presidential elections, petitioning candidates may choose any label which does not mimic the name of a fully-qualified party and is not too long.⁸⁹ In twenty-two states, petitioning candidates may only choose the word "Independent."⁹⁰ Generally, states which confine a petitioning candidate to the label "Independent," the number of signatures to create a new, fully-qualified party is the same number of signatures required for statewide independent candidates. Therefore, minor parties in such states have no motivation to use the independent candidate petition procedure because the two procedures are equally difficult. In those states, minor parties routinely qualify themselves as fully-qualified parties.⁹¹

VII. OHIO'S RESPONSE TO THE ROSEN DECISION

The state of Ohio did not appeal the *Rosen* decision to the U.S. Supreme Court and has acted to minimize the impact of the decision. The legislature has not amended Ohio Revised Code section 3505.03 or section 3505.10 which mandate that petitioning candidates should have no label next to their names on the ballot.⁹² Astonishingly, these two sections were re-enacted, unchanged, in the 1995 session of the legislature.⁹³ The Secretary of State's recommended changes in election laws were introduced and enacted as House Bill 99.⁹⁴ Because other changes were being made in section 3505, the entire section was re-enacted with no change made to the portions which ban labels.

In 1994, the Secretary of State instructed county election boards that petitioning candidates should be informed that they have the right to choose the label "Independent."⁹⁵ Two petitioning candidates for the district office⁹⁶

⁸⁷970 F.2d at 171.

⁸⁸*Id.*

⁸⁹*Id.*

⁹⁰*Id.*

⁹¹*Id.*

⁹²See OHIO REV. CODE ANN. §§ 3505.03, 3505.10 (West 1997).

⁹³*Id.*

⁹⁴H.B. 99, 121st Gen. Assembly, 1995 Ohio Legis. Serv. 1724 (Baldwin).

⁹⁵Telephone interview with Jim Berns, Ohio Legislature Candidate (Aug. 21, 1994).

⁹⁶Jim Berns, candidate for the Ohio House, 31st district, and Joseph J. Jacobs, Jr., candidate for the U.S. House of Representatives, district 10, are two candidates who petitioned for "independent" label. Official Election Returns of Ohio and the States that Border It, *supra* note 78.

exercised their right to have the label "Independent" printed on the November ballot. However, when the Secretary of State published the 1993-1994 *Ohio Election Statistics*,⁹⁷ the label "Independent" was not included in the election returns for these candidates.⁹⁸ Thus, there is no published record whether any petitioning candidates made use of the *Rosen* decision. At the time of this printing, the 1996 edition of *Ohio Election Statistics* has yet to be published; thus, it is unknown if any petitioning candidate in 1996 exercised his or her right to choose "Independent."

The author sent a letter to each legislator in December 1995, advocating for a bill be introduced to permit petitioning candidates to choose any party label that does not mimic the name of a fully-qualified political party and which is not too long. To date, no such bill has been introduced, and no legislator has agreed to introduce such a bill. If the legislature fails to act on this issue, it is fairly likely a lawsuit will be filed before the 1998 election by a minor party candidate for some partisan office, seeking a judicial declaration that the *Rosen* decision extends to partisan labels other than just the term "Independent."

VIII. CONCLUSION

Current Ohio policy, forbids minor party candidates from listing their party label next to their names on the ballot, if they qualify by the method most commonly used by Ohio minor party candidates, thus, injuring those minor parties and their potential voters. Ohio enacted the "no-label" policy for petitioning candidates in 1947 and made it even more restrictive in 1951. Other restrictive ballot access laws passed by Ohio in 1947 and 1951 were declared unconstitutional in 1968 and 1970. In 1992, the Sixth Circuit Court of Appeals struck down the "no-label" policy with regard to the label "Independent" on Equal Protection grounds.⁹⁹ The issue of whether the 1992 decision extends to all labels, or just the label "Independent," is still unresolved.

An election in which some candidates are permitted to have their party label on the ballot, while others are not so permitted, is not a fair election. Voting studies cited in the *Rosen* decision¹⁰⁰ reveal that voters are more influenced by the party affiliation of candidates than by any other factor. Many voters go to the polls, knowing that they wish to vote for the candidates of a particular party, but not knowing the names of those candidates. A ballot which omits party labels for some candidates prevents such voters from voting as they wish. Ohio's policy interferes with the free exercise of the franchise in a discriminatory manner.

⁹⁷ See generally TAFT *supra*, note 34.

⁹⁸ Volumes for years 1952 through 1970 of the *Ohio Election Statistics* include the label "independent" for petitioning candidates.

⁹⁹ *Rosen*, 970 F.2d at 178.

¹⁰⁰ *Id.* at 172.