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Constitutional Law: Legislature May Require Political Party Candidates to Be Listed First on Ballot in Partisan Election

Charles Berg, a state senator, planned to run for reelection in 1976. Under the terms of a Minnesota statute, the names of political party nominees were listed on the ballot before those of independent candidates. Berg, an independent candidate, challenged the ballot position statute on the ground that, by denying independent office seekers benefits allegedly accruing to those listed at the top of the ballot, the statute violated the equal protection provision of the fourteenth amendment. The Minnesota Supreme Court affirmed the trial court's determination that the statute was constitutional, holding that the possibility of "positional bias" in a partisan election was not an infringement of the right to vote sufficient to require strict scru-

2. Id.: "At the general election, and in the case of partisan offices only, the names of candidates nominated by petition shall follow those of candidates nominated at primaries in the order in which the petitions are filed."
3. Originally, the suit included several candidates of the Republican Party (known in Minnesota as the Independent-Republican Party; see Shaw v. Johnson, 247 N.W.2d 921, 922 n.1 (Minn. 1976)) who objected to another statutory provision that required a candidate of the party receiving the largest vote in the preceding general election to be listed first on the ballot. At the time of suit this would have meant that the candidates of the Democratic Party (known in Minnesota as the Democratic-Farmer-Labor Party; see Holmes v. Holm, 217 Minn. 264, 267, 14 N.W.2d 312, 314 (1944)) would be listed first. Before the lower court decision, however, the legislature amended the law to provide that the candidates of the party with the lowest previous vote be listed first. Act of April 9, 1976, ch. 224, § 3, 1976 Minn. Laws 828 (codified at Minn. Stat. 203A.33(4) (1978)). As a result, the Independent-Republican Party as plaintiff-intervenor, and the Independent-Republican candidates, were voluntarily dismissed from the suit. Ulland v. Growe, 262 N.W.2d 412, 413 n.1, 413-14 (Minn.), cert. denied, 436 U.S. 927 (1978).
4. While the "top" of the ballot is reasonably clear for paper ballots, the meaning of that term is less apparent as applied to voting machines. Minnesota Statutes section 203A.33(4) (1978) clarifies this by providing that "[f]or voting machines, 'first name printed for each office' means the position nearest the top or farthest left, whichever applies."
   Generally, the first ballot position is considered to be advantageous, whether "first" means the ballot position at the top when the candidates' names are arranged in vertical columns, the ballot position at the far left when the names are arranged in a horizontal row, or the top left position when they are arranged in two or more rows or columns. See Clough v. Guzzi, 416 F. Supp. 1057, 1065 (D. Mass. 1976); H. Bain & D. Hecock, BALLOT POSITION AND VOTER'S CHOICE 16 (1957). But see Krasnoff v. Hardy, 436 F. Supp. 304, 309 (E.D. La. 1977)(horizontal position is not equivalent to vertical); Board of Supervisors v. Murphy, 247 Md. 337, 341, 230 A.2d 648, 650 (1967) (horizontal arrangement permits all candidates to share preferred top position).
tiny of the legislative classification, and that the legislature's desire to assist partisan voters in locating their party's candidates provided a rational basis for the ballot position scheme. Ulland v. Growe, 262 N.W.2d 412 (Minn.), cert. denied, 436 U.S. 927 (1978). 5

The United States Supreme Court has consistently granted states wide latitude in regulating the mechanics of the electoral process. 6 The Court has also, however, acknowledged the fundamental character of the right to vote and has required that actions regulating this right be "necessary to promote a compelling state interest." 7 Although the Court has not yet held that candidates' rights are "fundamental," 8 it has recognized that the rights of candidates are

5. Following the trial court decision, but before the Minnesota Supreme Court's decision, Berg ran as an independent candidate and was defeated. Ulland v. Growe, 262 N.W.2d at 414. Under accepted doctrines, the case was not mooted by the defeat, however, since the controversy was "capable of repetition, yet evading review." See, e.g., Storer v. Brown, 415 U.S. 724, 737 n.8 (1974); Clough v. Guzzi, 416 F. Supp. 1057, 1060 n.3 (D. Mass. 1976); Gould v. Grubb, 14 Cal. 3d 661, 666 n.5, 536 P.2d 1337, 1340 n.5, 122 Cal. Rptr. 377, 380 n.5 (1975).


Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Id. at 561-62.

The Court usually analyzes voting cases through a standard equal protection format, first determining whether a suspect class or fundamental right is affected by the legislative scheme. If no such class or right is involved, the provision need only be "rational."


Legislation affecting a fundamental right or suspect class, on the other hand, must undergo "strict scrutiny," generally defined as requiring the state to demonstrate that the law is necessary to promote a compelling state interest and that there is no less burdensome method of accomplishing the state purpose. See, e.g., Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972). Examination under the strict scrutiny standard is generally so rigorous, and under the rational basis standard so superficial, that the choice of standard is largely determinative of the result. See note 48 infra and accompanying text.

8. See Bullock v. Carter, 405 U.S. 134, 142-43 (1972) ("[T]he Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous
The Court has, therefore, applied the equal protection clause to invalidate state laws regulating the rights of candidates when such regulations infringed the voting rights of candidates’ supporters.10

The Supreme Court has not yet considered whether discriminatory ballot position laws infringe the right to vote,11 but the question has been faced by several other courts.12 Most courts have found,


12. The diverse nature of the holdings of these other cases makes generalization difficult. Some courts have concluded that the subject statute was unconstitutional. See, e.g., Sangmeister v. Woodard, 585 F.2d 460 (7th Cir. 1977); Weisberg v. Powell, 417 F.2d 388 (7th Cir. 1969) (per curiam); Netsch v. Lewis, 344 F. Supp. 1280 (N.D. Ill. 1972); Kautenburger v. Jackson, 85 Ariz. 128, 333 P.2d 293 (1958); Gould v. Grubb, 14 Cal. 3d 661, 536 P.2d 1337, 122 Cal. Rptr. 377 (1975); Arvan v. Wayne County Clerk, 381 Mich. 761, 160 N.W.2d 345 (1968)(summarized in Wells v. Kent Election Comm’rs, 382 Mich. 120, 372-23, 168 N.W.2d 222, 227 (1969))(rotation of names necessary under constitutional amendment requiring nonpartisan alignment); Holtzman v. Power, 62 Misc. 2d 1020, 313 N.Y.S.2d 904, aff’d, 34 A.D.2d 917, 311 N.Y.S.2d 824, aff’d, 27 N.Y.2d 628, 261 N.E.2d 666, 313 N.Y.S.2d 760 (1970); Walsh v. Boyle, 166 N.Y.S. 678, rev’d, 179 A.D. 582, 166 N.Y.S. 681 (1917). Other courts have concluded that the operative statute was constitutional. See, e.g., Bohus v. Board of Election Comm’rs,
either as a matter of judicial notice or on the basis of expert testimony and statistical studies, that positional bias exists. The major-
ity of these courts have held unconstitutional any scheme that determines ballot position in a discriminatory fashion. Commonly, the courts have permitted the candidates' names to be rotated or allowed ballot position to be determined by lot.

A minority of courts, on the other hand, have determined that the existence of positional bias has not been proven, or that its

to study an election in which more than one format of the ballot has been prepared, rotating the position of candidates' names. By comparing a candidate's percentage of the vote when his name appeared in the top position on ballots with his percentage when his name was in other positions, one may determine if ballot position influenced the election results. See H. BAIN & D. HECK, supra note 4, at 47, 51-53.


Ballot rotation involves the use of more than one ballot format to reduce or eliminate positional bias in an election. See generally H. BAIN & D. HECK, supra note 4, at 16-26. In the case of paper ballots, one common provision is to have the order of names of the candidates for each office change with every ballot, so that each candidate's name will appear in every position a substantially equal number of times. This can be done either by successively moving the top candidate from the head to the foot of the list, or by varying the order of names so that each name is preceded at least once and followed at least once by every other name. The latter approach, known as "scrambling" the ballot, would also eliminate any effect due to relative positions of the candidates' names. See id. at 103-04.

As with paper ballots, rotation on voting machines may be done by office group, often with the requirement that all the machines in a precinct have the same format. If, however, the legislature has provided that all the candidates of a political party be listed in the same row or column (known as a "party block" ballot), normal office-group rotation becomes impossible. Rotation may, however, still be done "in concert" so that all candidates of a party are listed first on one ballot, second on the next, and so forth; but unless all races involve an equal number of candidates, this results in occasional blank spaces appearing in the list of candidates for a particular office. Id.


18. Most courts have made such a determination on the basis of the lack of proof
impact on voting is insignificant, and have upheld state systems that do not determine ballot position by a random method. A few courts have also relied on evidence indicating that several factors influence the magnitude of positional bias in an election—including the “visibility” of the election and whether it is partisan or nonpartisan—in holding positional bias to be too insignificant to require strict scrutiny of the legislature’s purpose.\textsuperscript{19}

In \textit{Ulland}, the trial court heard extensive expert testimony on the existence of positional bias in legislative elections\textsuperscript{20} and concluded

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\textsuperscript{19} A few studies, in addition, have disputed the existence of positional bias. \textit{See, e.g.}, Byrne & Pueschel, \textit{But Who Should I Vote for for County Coroner?}, 36 J. Pol. 778 (1974) (criticized in Sangmeister \textit{v. Woodard}, 565 F.2d 460, 466 n.12 (7th Cir. 1977)).

\textsuperscript{20} Visibility refers to the level of public awareness of an electoral contest. It is generally lower when the office sought is a comparatively insignificant one, or when the candidates do not campaign vigorously. Record at 79-82, 90-96, Ulland \textit{v. Growe}, No. 406759 (Minn. Dist. Ct., Ramsey County, 1976) (testimony of Edward Brandt, Assistant Professor of Political Science, College of St. Thomas, St. Paul, Minnesota). It should be noted that the relevant consideration is not the visibility of an election with respect to the population as a whole, but only among the people who go to the polls. \textit{See note 22 infra.}

\textsuperscript{21} Three witnesses for the plaintiff testified to the existence of positional bias in three Twin City municipal elections that, at the time of trial, were the only partisan Minnesota elections for which the ballots had been rotated. \textit{See Record} at 28-29, Ulland \textit{v. Growe}, No. 406759 (Minn. Dist. Ct., Ramsey County, 1976) (stipulation of counsel); \textit{id.} at 188 (testimony of Charles Backstrom, Professor of Political Science, University of Minnesota). The plaintiff’s position was also supported by William Morris, a University of Minnesota political science professor, who had examined a 1972 state senate race in Oregon. In that contest, which Morris compared favorably to a 1976 state senate race in Minnesota, \textit{id.} at 130-31, 140, Morris found a positional bias effect of 4.5\%. \textit{Id.} at 136. In the 1974 Minnesota House of Representatives elections, that level of positional bias would have reversed the outcome of 22 elections. \textit{Id.} at 154 (testimony of William Morris).

A witness for the defendant claimed that his study of a Twin City municipal
that positional bias exists in all elections, although to a lesser extent in partisan or highly visible contests. The Minnesota Supreme Court gave weight to these findings, but held that positional bias presented less constitutional difficulty than infringements of other kinds of voting rights previously found to be unconstitutional. It reasoned that the magnitude of positional bias present in partisan elections was relatively small and could be reduced, at least in part, by candidates’ efforts to inform the public. The court concluded that the alleged deprivation of voting rights was insufficient to trigger strict scrutiny and found the legislature’s purpose of assisting voters in locating partisan candidates to be a rational justification for the statute.

In failing to apply a standard of strict scrutiny, the Ulland court declined to analogize ballot position cases to those apportionment cases in which strict scrutiny has been required by the United States Supreme Court. Beginning with Gray v. Sanders and Reynolds v. Sims, the Court, in holding that all citizens have a right to equally effective participation in the political process, has insisted that congressional and legislative districts be equally apportioned on the basis of population. The Court has reasoned that voters in disproportionately large legislative districts cast votes that are unfairly

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24. 262 N.W.2d at 414-15 (finding “expert testimony does indicate that an element of positional bias may be operating in some Minnesota elections”).
25. Id. at 416-17 (quoting Clough v. Guzzi, 416 F. Supp. 1057, 1066 (D. Mass. 1976)).
27. Id. at 417-18.
28. Id. at 416.

As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.

Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature.

Id. at 562, 565 (emphasis added).
"diluted" by votes cast in relatively small districts. Thus, voters in relatively large districts are unconstitutionally denied the right to participate on an equal basis with other voters in the same democratic process. Similarly, one may argue, votes cast by supporters of candidates victimized by discriminatory ballot placement statutes are also diluted by the phenomenon of positional bias.

It is significant that the apportionment analogy was relied on in a California case, Gould v. Grubb, in which a ballot position provision providing that incumbents be listed first was held unconstitutional. The California Supreme Court reasoned that placing the names of incumbent candidates in the top ballot position diluted the votes of the other candidates' supporters by allowing an incumbent candidate the possible advantage of extra votes attributable to ballot position. The court concluded that the rationale of the apportionment cases required that ballot position classifications be subjected to strict scrutiny.

The Minnesota Supreme Court, by contrast, reasoned that positional bias can be distinguished from malapportionment on two grounds. First, since voters living in districts that benefited from malapportionment cast a number of "phantom" votes, malapportionment involves voting dilution of a genuinely mathematical nature. In contrast, those voters who choose a candidate on the basis of ballot position are casting real votes that, although irrational, do not cause arithmetical dilution. Second, the victims of malapportion-

32. See, e.g., Gray v. Sanders, 372 U.S. 368, 380-81 (1963) ("The concept of political equality in the voting booth contained in the Fifteenth Amendment extends to all phases of state election . . . . [T]he District Court . . . was right in enjoining the use of [a system in which the effect of a vote decreased as the population of the voter's county increased].").
34. Id. at 672, 536 P.2d at 1344, 122 Cal. Rptr. at 384.
35. Id.
36. The court relied on the additional ground of insufficient proof: "Unlike the findings in Gould, the testimony below, while permitting a finding that positional bias does exist, furnishes no adequate means for measuring its extent." 262 N.W.2d at 416. The California Supreme Court, however, did not mention the exact magnitude of bias present in Gould, electing to rely on the trial court finding that there was a "significant advantage" accruing to the top ballot position. See Gould v. Grubb, 14 Cal. 3d 661, 664, 667-68, 536 P.2d 1337, 1338, 1340-41, 122 Cal. Rptr. 377, 378, 380-81 (1975). The findings in Gould do not appear to differ greatly from the findings in Ulland.
37. 262 N.W.2d at 416. When the vote totals of a small district are compared with those of a large one, the total number of voters in each will differ by a mathematically determinable amount. Hence, the residents of the small district effectively receive the benefit of an equivalent number of "phantom" votes.
38. Id. A recent comment also criticized the California Supreme Court's use of the concept of "diluted" votes from the apportionment cases. Comment, The Supreme Court of California, 1974-75: III(A) Ballot Position Advantages, 64 Calif. L. Rev. 239, 338-39 (1976). The author of the comment observed that even after districts have been
ment are completely precluded from remedying their underrepresentation, while candidates disadvantaged by their ballot position can endeavor to increase the visibility of their candidacy and thus reduce the impact of positional bias.39

The court's emphasis on the mathematical nature of malapportionment can be faulted on two counts. First, by seizing on the measurability of the dilution of voting power as the relevant distinguishing factor,40 the court ignored the critical question of whether all properly apportioned, voters in areas with high turnouts will have less voting power than voters in low-turnout districts. Therefore, "it is apparent that both equality of representation and nondiscrimination against identifiable groups are more important than preserving the equality of the votes actually cast." Id. at 339.

The comment, however, erroneously applied the apportionment cases' voting-power rationale to the high- or low-turnout situation. Voters in high-turnout districts have not been denied an "equally effective" vote. Since districts are apportioned on the basis of population, not size of turnout, each person in high-turnout districts receives the same amount of representation as each person in low-turnout districts. Within the district, all voters have a fair and equal opportunity to influence the choice of representative; voters in high-turnout districts thus have not suffered dilution of their votes in terms that would affect the fairness of the political process.

That cannot be said of either malapportionment or discriminatory ballot position cases. In the former, those in a district with a greater number of inhabitants suffer an interdistrict disadvantage because they receive significantly less representation, per capita, in the legislature. The danger is that a majority of the state's inhabitants will not prevail on a political issue because they are offered the opportunity to select only a minority of the state legislators. In the ballot position cases, voters supporting candidates harmed by positional bias suffer an intradistrict disadvantage in that they must counteract the extra votes gained by the legislatively favored candidates. The danger in these cases is that a plurality of the voters in a legislative district will not be able to elect their choice of representative because the legislature has chosen to give certain political groups an advantage. Multiplied across the state, this could lead to a legislative body just as unrepresentative as those found in the malapportionment cases.

39. 262 N.W.2d at 416 n.12 (quoting Clough v. Guzzi, 416 F. Supp. 1037, 1067 (D. Mass. 1976)). Given that the court perceived positional bias to be minimal, it might well have attempted to buttress its arguments by analogy to those apportionment cases holding that de minimis malapportionment does not merit strict scrutiny. See, e.g., White v. Regester, 412 U.S. 755, 763-64 (1973); Gaffney v. Cummings, 412 U.S. 735, 741-42 (1973). The analogy would be inapt. When drawing legislative boundaries, one must necessarily rely on census information that is already outdated. Some malapportionment, therefore, is virtually inevitable. Nevertheless, the United States Supreme Court has required that the states create districts with as close to equal populations as possible. See, e.g., Chapman v. Meier, 420 U.S. 1, 22 (1975) (quoting Reynolds v. Sims, 377 U.S. 533, 577 (1964)); Kirkpatrick v. Preisler, 394 U.S. 526, 530-31 (1969). While perfect equality cannot be achieved in apportionment, ballot position equality can be assured by rotating the names of the candidates on the ballot. See note 16 supra.

40. The court made reference to the difficulty of ascertaining just how much positional bias could be expected in an election. See Ulland v. Growe, 262 N.W.2d at 416, 416-17 n.12. Given its admission that positional bias would exist in legislative elections, id. at 414-15, the court's apparent concern with the level of bias present implies that it thought that level to be possibly determinative of the statute's constitutionality. It seems clear, however, that any statistically significant level of bias could
voters have a fair and equal opportunity to influence the outcome of the election. Functionally, the rationale of the apportionment cases demands that voting power not be distributed so as to favor voters in certain areas of a state. In a like manner, given the admitted impact of positional bias on vote totals, courts should not allow electoral procedures to systematically favor certain groups by allocating "donkey" votes to partisan candidates. Second, the court may be criticized for relying on the notion that voting dilution caused by positional bias is the result of voter irrationality, and since voters have a right to vote irrationally, any dilution caused by discriminatory ballot placement statutes may not be impugned. The obvious flaw in the court's analysis is its focus on the individual voter, rather than on the action of the state. No one would doubt that an individual has a right to cast a vote on any basis that he wishes. One may, however, question whether the state has the right to systematically direct the irrational vote to partisan candidates. Those voters who cast their vote on the basis of ballot position obviously are unconcerned with which candidate is chosen to represent them. The ultimate effective choice of a candidate is not that of the voters but of the state, which chooses for them when it determines who will be listed at the top of the ballot. The legislature's action, therefore, may determine the representative of the voters.

The Minnesota Supreme Court's assertion that positional bias may be remedied by more vigorous campaigns is also highly questionable. Voters cast "donkey" votes because they do not care enough about an election to inform themselves. While most candidates will presumably try to attract the attention of the public, it is unlikely that they will succeed in communicating with uninterested voters. In addition, a legislative candidate's ability to communicate with voters is limited by the relatively low level of funding generally pre-

affect the outcome of a close election. See note 14 supra. If effect on the election is not the test, one can only speculate as to where the court would draw the line if the level of bias could be determined to a certainty.


42. See notes 13-14 supra and accompanying text.

43. The term "donkey" vote refers to the ballots cast by those voters who select a candidate on the basis of ballot position. See California Ballot Position, supra note 14, at 375 n.19.

44. 262 N.W.2d at 416. See Clough v. Guzzi, 416 F. Supp. 1057, 1067 (D. Mass. 1976)("Voters have no constitutional right to a wholly rational election, based solely on reasoned consideration of the issues and the candidate's positions, and free from other 'irrational' considerations as a candidate's ethnic affiliation, sex, or hometown."). See also Krasnoff v. Hardy, 436 F. Supp. 304, 308 (E.D. La. 1977).

sent in such campaigns. The court may also be faulted more generally for having failed to explicate a standard for determining when a statute regulating the electoral process constitutes a "sufficiently direct infringement on fundamental franchise rights" to call for application of the strict scrutiny test. Since here, as in many equal protection cases, the choice of a standard of review was tantamount to a decision on the merits, the court's failure to develop a principled test for distinguishing between cases involving important or insignificant rights of candidates' supporters can only serve to obscure the "true basis of the court's decision . . . "

It is clear that the traditional two-tiered test may not be appropriate for cases involving the rights of candidates. It is also obvious that regulations affecting candidates cannot be easily divided into those that directly infringe the right to vote, which must pass muster under the strict scrutiny standard, and those that have a minor impact on voting rights, which must satisfy only the minimal scrutiny test. A better approach would be to recognize explicitly that restrictions on the rights of candidates may have a greater or lesser impact.

46. See H. Alexander, Money in Politics 117-21 (1972); G. Thayer, Who Shakes the Money Tree 9 (1973). The figures for state legislative campaign expenditures bear out the low level of funds available. Furthermore, the amount available to candidates varies depending on the office sought. In the 1976 Minnesota election for state legislative offices, for example, contributions from individuals, associations, funds, and political committees averaged $7,149 for each of the 168 senatorial candidates, while the average was only $3,737 for each of the 333 state representative candidates. Compare Minnesota State Ethical Practices Board, 1976 Campaign Finance Summary: II. Candidates for State Senator 1 (1977), with Minnesota State Ethical Practices Board, 1976 Campaign Finance Summary: I. Candidates for State Representative 1 (1977).

47. Ulland v. Growe, 262 N.W.2d at 415.

48. See Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972). Under the traditional formulation of the two-tiered test, there are few cases in which a state classification has survived strict scrutiny. For some of the rare examples see Buckley v. Valeo, 424 U.S. 1, 25, 143 (1976)(upholding federal ceiling on contributions to political campaigns); Marston v. Lewis, 410 U.S. 679, 681 (1973)(upholding fifty-day voter residence requirements); Korematsu v. United States, 323 U.S. 214, 216, 219 (1944)(upholding exclusion of Japanese-Americans from areas of West Coast). Examples of a state law being held unconstitutional under the rational basis standard of review are also rare. See, e.g., Turner v. Fouche, 396 U.S. 346, 363-64 (1970) (striking down requirement that members of school board be property owners); Morey v. Doud, 354 U.S. 457, 467-69 (1957)(irrational to exempt a particular business entity from law), overruled, City of New Orleans v. Dukes, 427 U.S. 297 (1976). As Professor Gunther has noted, strict scrutiny has often been "strict" in theory and fatal in fact, while other situations have received "minimal scrutiny in theory and virtually none in fact." Gunther, supra, at 8.

on the rights of a candidate's supporters to participate on an equal
basis with other voters in elections.50 Similarly, regulations of
the electoral process may promote a variety of state interests, some
of which are certainly more important than others.51 The Minnesota
court should have considered the adoption of an approach that would
have permitted them to weigh explicitly "the interests which the
state claims to be protecting" against the "interests of those who are
disadvantaged" by the regulation.52
The adoption of a more flexible decisional format, in addition,
would have been consistent with recent trends in equal protection
law. The United States Supreme Court appears to have used an
intermediate standard of review in cases involving sex discrimina-
tion.53 It has been urged, further, that the Court adopt a sliding scale
approach54 that would resemble a balanced weighing of the relevant
factors.55 Some courts have explicitly formulated their own equal pro-

50. For instance, denial of access to the ballot box because of inability to pay
high filing fees, see, e.g., Lubin v. Panish, 415 U.S. 709 (1974); Bullock v. Carter, 405
U.S. 134 (1972), is a much greater restriction on the ability of groups of voters to erect
a representative than refusing an independent candidate permission to place a state-
ment of political philosophy or identification on the ballot. See, e.g., Krasnow v.
1361 (E.D. Wis. 1977).

51. For example, states appear to have a strong interest in placing some kind of
limit on the length of the ballot, see note 6 supra, but have less of an interest in
promoting the election of incumbents. See Netsch v. Lewis, 344 F. Supp. 1280 (N.D.


53. See, e.g., Califano v. Goldfarb, 430 U.S. 199, 210-11 (1977); Craig v. Boren,
429 U.S. 190, 204 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); Kahn v. Shevin, 416
U.S. 351, 353 (1974); Reed v. Reed, 404 U.S. 71, 76 (1971). Several Justices have
criticized the two-tiered approach to equal protection cases. See, e.g., Illinois State Bd.
Elections v. Socialist Workers Party, 99 S. Ct. 983 (1979) (Blackmun, J., concurring);
Craig v. Boren, 429 U.S. 190, 210-11, n. * (1976)(Powell, J., concurring); id. at 212
(Stevens, J., concurring); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307,
(1973)(White, J., concurring); San Antonio Independent School Dist. v. Rodriguez, 411
U.S. 1, 62-63 (1973) (Brennan, J., dissenting); id. at 99-99 (Marshall, J., dissenting,
joined by Douglas, J.).

54. See, e.g., Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307
(1976)(Marshall, J., dissenting); San Antonio Independent School Dist. v. Rodriguez,
(Marshall, J., dissenting); Comment, A Case Study in Equal Protection: Voting Rights
and a Plea for Consistency, 70 NW. U.L. REV. 934, 942-43, 945 (1976); cf. Simson, supra
note 51, at 678-81 (proposing multiparameter test).

55. At times, the Court has seemed to approximate a sliding scale or balancing
approach by emphasizing the various factors that must be considered in all equal
protection cases. See, e.g., Storer v. Brown, 415 U.S. 724, 730 (1974); Police Dep't v.
(1972).
tection tests to supplant the two-tiered approach of the United States Supreme Court. 54

The adoption of either an intermediate standard of review or a sliding scale approach would have led to different results in the instant case. On one hand, the court accepted the existence of positional bias. 7 On the other hand, the justification for the ballot position statute under consideration in Ulland—that voters need assistance in locating partisan candidates—is singularly unconvincing. 55

It is clear that the statute involved in Ulland can escape invalidation only under the most minimal level of scrutiny. 9 The court in Ulland misjudged the significance of the voting

54. See, e.g., Boraas v. Village of Belle Terre, 476 F.2d 806, 814 (2d Cir. 1973) ("[T]he test for application of the Equal Protection Clause is whether the legislative classification is in fact substantially related to the object of the statute.") (emphasis in original), rev'd on other grounds, 416 U.S. 1 (1974) (Supreme Court did not apply Second Circuit formulation of test); Demiragh v. DeVos, 476 F.2d 403, 405 (2d Cir. 1973) (following Boraas); Hoover v. Meiklejohn, 430 F. Supp. 164, 168-69 (D. Colo. 1977) (adopting balancing test); Roe v. Ingraham, 357 F. Supp. 1217, 1219 (S.D.N.Y. 1973) (following Boraas); Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 334, 348 N.E.2d 537, 544, 384 N.Y.S.2d 82, 89 (1976) (dictum) ("[W]e ... are ready to adopt middle ground tests in situations where such review is warranted."). The validity of these cases presumably depends on the view that it is the Supreme Court's result and not its method of analysis that is binding on other courts in constitutional litigation.

The Minnesota Supreme Court has acknowledged the trend away from the two-tiered test. See Davis v. Davis, 297 Minn. 187, 189 n.2, 210 N.W.2d 221, 223 n.2 (1973); Schwartz v. Talmo, 295 Minn. 356, 364, 205 N.W.2d 318, 323, appeal dismissed, 414 U.S. 803 (1973). Justice MacLaughlin has been more explicit: "I ... believe the renewed vigor given by the United States Supreme Court to 'traditional' equal-protection review compels a stricter review of nonsuspect classifications and nonfundamental interests than has been granted in the past." Id. at 366, 205 N.W.2d at 324 (MacLaughlin, J., dissenting, joined by Rogosheske & Kelly, JJ).

55. See notes 22-25 supra and accompanying text.

56. In the case of extraordinarily lengthy lists of candidates, further provision arguably might be made for assisting partisan voters in locating their candidates. The state has other, admittedly legitimate, methods of reducing voter confusion by limiting the number of candidates, see cases cited at note 6 supra, but there is no need to extend such a concern to the much more common situation, such as that usually presented by legislative races, of contests involving only a few candidates. A recent case, Board of Election Comm'rs v. Libertarian Party, 591 F.2d 22 (7th Cir. 1979) (strong dissent by Swygert, J.), upheld the placement of major party candidates before minor party candidates primarily on the basis that voter confusion would result from separation of slates of major parties on a party block ballot. The ballot under consideration was quite complicated, containing nearly sixty elective contests, however, the court could have obviated the difficulties involved in using on "in concert" rotation by requiring the county election officials to determine the candidates' ballot position by an office group basis. See note 16 supra.

rights involved and chose the wrong standard of review under the two-tiered test. The court should have utilized a mode of analysis with which it could have better examined the conflicting interests involved in positional bias cases. By neither developing an alternative standard of review nor realistically confronting the "proper analytical framework for dealing with the positional bias phenomenon," the Minnesota Supreme Court failed to provide guidance in the area of voting rights and election procedures, and created uncertainty for the Minnesota Legislature, practitioners, and lower state courts.

candidate was not even considered rational. On the other hand, however, the argument that the voters were entitled to assistance in finding the incumbent was particularly weak because the incumbent was not designated as such and a voter would have had to know, independently of the information on the ballot, that the top name was that of the incumbent.

60. 262 N.W.2d at 416.