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

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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,[1] the names of political party nominees were listed on the ballot before those of independent candidates.[2] Berg, an independent candidate, challenged the ballot position statute[3] on the ground that, by denying independent office seekers benefits allegedly accruing to those listed at the top of the ballot,[4] 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-

1. MINN. STAT. § 203A.33(2) (1978).

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 "[for] 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

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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).

6. *See, e.g.,* Storer v. Brown, 415 U.S. 724, 730 (1974) ("Decision in this context . . . is very much a 'matter of degree' . . . .") (citing Dunn v. Blumstein, 405 U.S. 330, 348 (1972)); Bullock v. Carter, 405 U.S. 134, 145 (1972) (state may reasonably limit the total number of candidates on the ballot) (dictum).

7. Kramer v. Union School Dist., 395 U.S. 621, 627 (1969). In Reynolds v. Sims, 377 U.S. 533 (1964), the Court said:

> 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."

The traditional "rational basis".test represents a judicial posture of extreme deference to the legislature, requiring that the challenged state action be upheld if any justification could be imagined for it. *See, e.g.,* McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-2 to -5 (1978); Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949).

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

"intertwined with the rights of voters."[9] 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,

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standard of review.").

Although most courts have analyzed restrictions on candidates in terms of the impact such restrictions have on the voting rights of the candidates' supporters, some courts, apparently interpreting the Supreme Court's ambiguous language to mean that the fundamental or nonfundamental nature of candidacy is still an open question, have considered candidacy itself to be a fundamental right. *See* Mancuso v. Taft, 476 F.2d 187, 195 n.11, 196 (1st Cir. 1973)(rejecting a narrow reading of Supreme Court cases that would restrict inquiry to situations in which voters were affected by candidate restrictions, and finding the right to run for office to be protected by the first amendment); Zeilenga v. Nelson, 4 Cal. 3d 716, 720-21, 484 P.2d 578, 581-82, 94 Cal. Rptr. 602, 604-05 (1971)(compelling state interest must be shown to justify impinging the fundamental right of candidacy); Johnson v. State Civil Serv. Dep't, 280 Minn. 61, 65, 157 N.W.2d 747, 750 (1968)(right of candidacy is protected by first amendment); Sorenson v. City of Bellingham, 80 Wash. 2d 547, 552, 496 P.2d 512, 515 (1972) (dictum). *See also* Gordon, *The Constitutional Right to Candidacy*, 25 U. KAN. L. REV. 545, 562-65, 571 (1977) (arguing that the Supreme Court should consider candidacy to be a fundamental right and that support for such a position can be found in United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938)).

9. Lubin v. Panish, 415 U.S. 709, 716 (1974); *see* Bullock v. Carter, 405 U.S. 134, 142-43 (1972).

10. *See, e.g.*, Lubin v. Panish, 415 U.S. 709 (1974)(filing fee); Communist Party v. Whitcomb, 414 U.S. 441, 449 (1974)(loyalty oaths); Bullock v. Carter, 405 U.S. 134 (1972)(filing fee); Williams v. Rhodes, 393 U.S. 23 (1968)(ballot access). Some circuit courts have also used this indirect approach. *See, e.g.*, Plante v. Gonzalez, 575 F.2d 1119, 1126 (5th Cir. 1978) (Wisdom, J.) (chilling effect of requirement of financial disclosure by elected officials); Manson v. Edwards, 482 F.2d 1076, 1077-78 (6th Cir. 1973)(age restrictions).

11. The Court has twice refused to consider claims of denial of equal protection in ballot position cases, Voltaggio v. Caputo, 371 U.S. 232 (1963), *dismissing appeal as moot to* 210 F. Supp. 337 (D.N.J. 1962); Ulland v. Growe, 436 U.S. 927, *denying cert. to* 262 N.W.2d 412 (Minn. 1978), although it did affirm an injunction concerning ballot placement in Mann v. Powell, 314 F. Supp. 677 (N.D. Ill. 1969), *aff'd mem.* 398 U.S. 955 (1970).

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, 565 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. 112, 122-23, 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[13] or on the basis of expert testimony and statistical studies,[14] that positional bias exists. The major-

447 F.2d 821 (7th Cir. 1971); Krasnoff v. Hardy, 436 F. Supp. 304 (E.D. La. 1977); Clough v. Guzzi, 416 F. Supp. 1057 (D. Mass. 1976); Voltaggio v. Caputo, 210 F. Supp. 337 (D.N.J. 1962), *appeal dismissed as moot*, 371 U.S. 232 (1963); Levy v. Power, 43 Misc. 2d 158, 250 N.Y.S.2d 511, *aff'd*, 21 A.D.2d 751, 252 N.Y.S.2d 51 (1964). In still other cases, the courts' view respecting constitutionality is unclear. *See, e.g.*, Mann v. Powell, 333 F. Supp. 1261 (N.D. Ill. 1969)(statute constitutional on face, but election officials must break ties in balloting positions by nondiscriminatory method like drawing lots); Diamond v. Allison, 8 Cal. 3d 736, 505 P.2d 205, 106 Cal. Rptr. 13 (1973); Mexican-American Political Ass'n v. Brown, 8 Cal. 3d 733, 505 P.2d 204, 106 Cal. Rptr. 12 (1973)(per curiam); Tsongas v. Secretary of Commonwealth, 362 Mass. 708, 291 N.E.2d 149 (1972); Groesbeck v. Board of State Canvassers, 251 Mich. 286, 297, 232 N.W. 387, 391 (1930)(failure of election officials to alternate names of candidates in one county as required by law held not to deceive voters on facts shown).

13. *See, e.g.*, Sangmeister v. Woodard, 565 F.2d 460, 465-66 (7th Cir. 1977); Weisberg v. Powell, 417 F.2d 388, 392 (7th Cir. 1969)(per curiam); Kautenburger v. Jackson, 85 Ariz. 128, 130-31, 333 P.2d 293, 295 (1958); Gould v. Grubb, 14 Cal. 3d 661, 667-68, 536 P.2d 1337, 1340-41, 122 Cal. Rptr. 377, 380-81 (1975); Board of Supervisors v. Murphy, 247 Md. 337, 341, 230 A.2d 648, 650 (1967); Elliott v. Secretary of State, 295 Mich. 245, 249, 294 N.W. 171, 173 (1940)(per curiam); Groesbeck v. Board of State Canvassers, 251 Mich. 286, 297, 232 N.W. 387, 391 (1930); Holtzman v. Power, 62 Misc. 2d 1020, 1023, 313 N.Y.S.2d 904, 907, *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); Note, *Position of Candidates' Names and Special Designations on Ballots: Equal Protection Problems with the Massachusetts Election Law*, 9 SUFFOLK U.L. REV. 694, 706-08 (1975).

One authority avers that the Minnesota Supreme Court impliedly recognized the effect of positional bias as long ago as 1913, by referring to the top position as the "preferential" one in Heilman v. Olsen, 121 Minn. 463, 465, 141 N.W. 791, 791 (1913). *See* Note, *supra*, at 710 n.101. *See also* Brief for Appellant at 8, Ulland v. Growe, 262 N.W.2d 412 (Minn.), *cert. denied*, 436 U.S. 927 (1978). Justice Stevens made the assumption that positional bias existed when, writing in his capacity as Circuit Justice in Bradley v. Lunding, 424 U.S. 1309 (1976), he referred to a high ballot position as "especially favorable." *Id.* at 1311.

14. *See, e.g.*, Sangmeister v. Woodard, 565 F.2d 460, 463 n.3 (7th Cir. 1977) (listing authorities). *See also* H. BAIN & D. HECOCK, *supra* note 4; J. MUELLER, REASON AND CAPRICE: BALLOT PATTERNS IN CALIFORNIA (1965); Mackerass, *The Donkey Vote*, 40 AUSTL. Q. No. 4, at 89 (1968); Masterman, *The Effect of the "Donkey Vote" on the House of Representatives*, 10 AUSTL. J. POL. & HIST. 221 (1964); Robson & Walsh, *The Importance of Positional Voting Bias in the Irish General Election of 1973*, 22 POL. STUD. 191 (1974); Upton & Brook, *The Importance of Positional Voting Bias in British Elections*, 22 POL. STUD. 178 (1974); White, *Voters Plump for First on List*, 39 NAT'L MUNICIPAL REV. 110 (1950); Note, *California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents*, 45 S. CAL. L. REV. 365 (1972) [hereinafter cited as *California Ballot Position*]. *See generally* MASS. LEGISLATIVE RESEARCH COUNCIL, REPORT RELATIVE TO ORDER OF NAMES ON THE BALLOT, MASS. H.R. DOC. No. 5312 (Jan. 9, 1974); Note, *supra* note 13; Note, *Equal Protection in Ballot Positioning*, 28 U. FLA. L. REV. 816 (1976); *see also* Bagley, *Does Candidates' Position on the Ballot Paper Influence Voters' Choice? A Study of the 1959 and 1964 British General Elections*, 19 PARLIAMENTARY AFFAIRS 162 (1966) (cited as erroneously concluding there was no first position effect in Sangmeister v. Woodard, 565 F.2d 460, 466 n.12 (7th Cir. 1977)).

The most common method used to demonstrate the existence of positional bias is

ity of these courts have held unconstitutional any scheme that determines ballot position in a discriminatory fashion.[15] Commonly, the courts have permitted the candidates' names to be rotated[16] or allowed ballot position to be determined by lot.[17]

A minority of courts, on the other hand, have determined that the existence of positional bias has not been proven,[18] or that its

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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. HECOCK, *supra* note 4, at 47, 51-53.

15. *See, e.g.*, Sangmeister v. Woodard, 565 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); 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); *cf.* Mann v. Powell, 333 F. Supp. 1261 (N.D. Ill. 1969) (Secretary of State enjoined from discriminatorily exercising his authority to determine ballot position); Arvan v. Wayne County Clerk, 381 Mich. 761, 160 N.W.2d 345 (1968) (summarized in Wells v. Kent Election Comm'rs, 382 Mich. 112, 122-23, 168 N.W.2d 222, 227 (1969)) (based on Michigan Constitution); Elliott v. Secretary of State, 295 Mich. 245, 294 N.W. 171 (1940)(based on Michigan Constitution).

16. *See, e.g.*, Sangmeister v. Woodard, 565 F.2d 460 (7th Cir. 1977)(permissible methods of selection not limited to rotation); Kautenburger v. Jackson, 85 Ariz. 128, 333 P.2d 293 (1958)(rotation required rather than listing in alphabetical order); Gould v. Grubb, 14 Cal. 3d 661, 676, 536 P.2d 1337, 1347, 122 Cal. Rptr. 377, 387 (1975)(permissible solutions include rotation, lottery, and possibly other nondiscriminatory methods); Elliott v. Secretary of State, 295 Mich. 245, 294 N.W. 171 (1940)(mandated rotation).

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. HECOCK, *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.*

17. *See* Holtzman v. Power, 62 Misc. 2d 1020, 313 N.Y.S.2d 904, 909, *aff'd*, 34 A.D.2d 917, 311 N.Y.S.2d 824, *aff'd*, 27 N.Y.S.2d 628, 261 N.E.2d 666, 313 N.Y.S.2d 760 (1970)(determination by lot required).

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.[19] 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[20] and whether it is partisan or nonpartisan—in holding positional bias to be too insignificant to require strict scrutiny of the legislature's purpose.[21]

In *Ulland,* the trial court heard extensive expert testimony on the existence of positional bias in legislative elections[22] and concluded

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at trial. *See, e.g.,* Bohus v. Board of Election Comm'rs, 447 F.2d 821 (7th Cir. 1971); Krasnoff v. Hardy, 436 F. Supp. 304 (E.D. La. 1977); Clough v. Guzzi, 416 F. Supp. 1057 (D. Mass. 1976). *See also* Diamond v. Allison, 8 Cal. 3d 736, 505 P.2d 205, 106 Cal. Rptr. 13 (1973); Mexican-American Political Ass'n v. Brown, 8 Cal. 3d 733, 505 P.2d 204, 106 Cal. Rptr. 12 (1973); Tsongas v. Secretary of Commonwealth, 362 Mass. 708, 291 N.E.2d 149 (1972).

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

19. *See, e.g.,* Bohus v. Board of Election Comm'rs, 447 F.2d 821 (7th Cir. 1971); Krasnoff v. Hardy, 436 F. Supp. 304 (E.D. La. 1977); Clough v. Guzzi, 416 F. Supp. 1057 (D. Mass. 1976). *See also* Voltaggio v. Caputo, 210 F. Supp. 337 (D.N.J. 1962), *appeal dismissed as moot,* 371 U.S. 232 (1963); Levy v. Power, 43 Misc. 2d 158, 250 N.Y.S.2d 511, *aff'd,* 21 A.D.2d 751, 252 N.Y.S.2d 51 (1964); Walsh v. Boyle, 179 A.D. 582, 166 N.Y.S. 681, *rev'g* 166 N.Y.S. 678 (1917).

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 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. *See* note 22 *infra.*

Other possible factors include the size of the district, the number of candidates to be elected, and the relative income and educational levels of voters within a district. Brief for Respondent at 5 n.19, Ulland v. Growe, 262 N.W. 2d 412 (Minn.), *cert. denied,* 436 U.S. 927 (1978)(citing to expert testimony in the Record).

21. *See, e.g.,* Krasnoff v. Hardy, 436 F. Supp. 304, 308 (E.D. La. 1977); Clough v. Guzzi, 416 F. Supp. 1057, 1065-66 (D. Mass. 1976).

22. 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. *See* Record at 28-29, Ulland v. Growe, No. 406759 (Minn. Dist. Ct., Ramsey County, 1976) (stipulation of counsel); *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, *id.* at 130-31, 140, Morris found a positional bias effect of 4.5%. *Id.* at 136. In the 1974 Minnesota House of Representatives elections, that level of positional bias would have reversed the outcome of 22 elections. *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.[23] The Minnesota Supreme Court gave weight to these findings,[24] but held that positional bias presented less constitutional difficulty than infringements of other kinds of voting rights previously found to be unconstitutional.[25] 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.[26] 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.[27]

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.[28] Beginning with *Gray v. Sanders*[29] and *Reynolds v. Sims*,[30] the Court, in holding that all citizens have a right to equally effective participation in the political process,[31] 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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election had produced no evidence of a positional bias effect. *Id.* at 220 (testimony of Charles Backstrom). The plaintiff responded to this argument by noting that municipal elections, unlike state senate contests, were highly visible elections where the amount of positional bias would probably be less than that in relatively less visible state legislative races held concurrently with a presidential general election. *See id.* at 81-83, 91-92 (testimony of Edward Brandt); *id.* at 130-31 (testimony of William Morris).

23. Ulland v. Growe, No. 406759, at 1 (Minn. Dist. Ct., Ramsey County, July 1, 1976) (memorandum accompanying findings of fact, conclusions of law, and order for judgment), *aff'd*, 262 N.W.2d 412 (Minn.), *cert. denied*, 436 U.S. 927 (1978).

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)).

26. *Id.* at 416 n.12 (quoting Clough v. Guzzi, 416 F. Supp. 1057, 1066 (D. Mass. 1976)).

27. *Id.* at 417-18.

28. *Id.* at 416.

29. 372 U.S. 368 (1963).

30. 377 U.S. 533 (1964).

31. *See* Reynolds v. Sims, 377 U.S. 533 (1964).

> 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. . . .
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> 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.[32] 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*,[33] 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.[34] The court concluded that the rationale of the apportionment cases required that ballot position classifications be subjected to strict scrutiny.[35]

The Minnesota Supreme Court, by contrast, reasoned that positional bias can be distinguished from malapportionment on two grounds.[36] First, since voters living in districts that benefited from malapportionment cast a number of "phantom" votes,[37] 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.[38] 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].").

33. 14 Cal. 3d 661, 536 P.2d 1337, 122 Cal. Rptr. 377 (1975).

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. 1057, 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.[41] In a like manner, given the admitted impact of positional bias on vote totals,[42] courts should not allow electoral procedures to systematically favor certain groups by allocating "donkey" votes[43] 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,[44] 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.[45] 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.

41. *See* Reynolds v. Sims, 377 U.S. 533, 560, 562-63, 567-68 (1964); Gray v. Sanders, 372 U.S. 368, 379 (1963).

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 home town."). *See also* Krasnoff v. Hardy, 436 F. Supp. 304, 308 (E.D. La. 1977).

45. *See* W. FLANIGAN & N. ZINGALE, POLITICAL BEHAVIOR OF AMERICAN ELECTORATE 19-24 (3d ed. 1975).

sent in such campaigns.[46]

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"[47] 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,[48] 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 [c]ourt's decision . . . ."[49]

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.

49. San Antonio School District v. Rodriguez, 411 U.S. 1, 110 (1973)(Marshall, J., dissenting).

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 discrimination.[53] It has been urged, further, that the Court adopt a sliding scale approach[54] 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 elect a representative than refusing an independent candidate permission to place a statement of political philosophy or identification on the ballot. *See, e.g.*, Krasnoff v. Hardy, 436 F. Supp. 304 (E.D. La. 1977); Ihlenfeldt v. State Election Bd., 425 F. Supp. 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. Ill. 1972)(per curiam). *See generally* Simson, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 STAN. L. REV. 663, 668, 710 (1977).

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

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, 318-21 (1976) (Marshall, J., dissenting); Vlandis v. Kline, 412 U.S. 441, 458-59 (1973)(White, J., concurring); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 62-63 (1973) (Brennan, J., dissenting); *id.* at 98-99 (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, 411 U.S. 1 (1973)(Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471 (1970) (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. Mosley, 408 U.S. 92, 95 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173 (1972).

tection tests to supplant the two-tiered approach of the United States Supreme Court.[56]

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.[57] 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.[58] It is clear that the statute involved in *Ulland* can escape invalidation only under the most minimal level of scrutiny.[59]

The court in *Ulland* misjudged the significance of the voting

56. *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.).

57. *See* notes 22-25 *supra* and accompanying text.

58. 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*.

59. Indeed, in Holtzman v. Power, 62 Misc. 2d 1020, 1024, 313 N.Y.S.2d 904, 908-09, *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), a provision that gave the first ballot position to the incumbent

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,"[60] 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.