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Constitutional Problems with Statutes Regulating Ballot Position

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CONSTITUTIONAL PROBLEMS WITH STATUTES REGULATING BALLOT POSITION

I. INTRODUCTION

Ronald Reagan's landslide presidential election victory in 1984 shows how short term forces[1] can influence vote choice. Election decisions are also influenced by other traditional forces such as party identification.[2] However, when party identification does not determine vote choice, as in nonpartisan or in primary elections, the appearance of the election ballot can play a role in the vote choice.[3] Political scientists theorize that a candidate who is listed first on the ballot will receive an electoral advantage simply by being listed first.[4] As a result, a top-listed candidate, who is not favored among those voters with a preference, can actually win an election due to the votes of uninformed voters favoring the first position.

Statutes which confer a position benefit on certain candidates[5] in

1. Short term forces are issues which are unique to a particular election and therefore, affect voters in some way only in that election. In Reagan's case, his popularity among the electorate was a major factor in his victory. *See* H. ASHER, PRESIDENTIAL ELECTIONS AND AMERICAN POLITICS 31 (3d ed. 1984).

2. *Id.* Vote choice is a function of several factors, some of which affect the magnitude of position bias. For instance, a voter's party identification is a major, if not *the primary*, component of vote choice. *Id.* at 31-32. Thus, in a general election, a voter is more inclined to vote for the candidate of his or her own party. Even if a voter goes to the polls in a particular election with no preference among the candidates, he or she can cast a vote based on party identification with reasonable certainty that the vote somehow reflects his or her desires. However, when cues provided by party identification are missing, as in a party primary or a nonpartisan contest, the uninformed voter has no way of casting a vote which reflects his or her views. No traditional cues help the voter to make a decision.

3. *See* H. BAIN & D. HECOCK, BALLOT POSITION AND VOTER'S CHOICE 4 (1957). A candidate's position on the ballot is a voting cue in primary and nonpartisan elections. However, unlike party identification, which provides a somewhat meaningful guide to voting, position bias is a completely capricious factor in elections. Bias is unrelated in any way to the voters' preferences between Republican and Democrat, incumbent or challenger.

4. *See* Kautenburger v. Jackson, 85 Ariz. 128, __, 333 P.2d 293, 295 (1958) (stating that "it is a commonly known and accepted fact" that being listed first confers an advantage on the candidate so listed); Gould v. Grubb, 14 Cal. 3d 661, 668, 536 P.2d 1337, 1341, 122 Cal. Rptr. 377, 381 (1975) (finding that ballot position preference is a factor in municipal elections); *see also* Note, *Position of Candidates' Names and Special Designations on Ballots: Equal Protection Problems with the Massachusetts Election Law*, 9 SUFFOLK U.L. REV. 694 (1975) (arguing that a state law giving position preference to certain candidates is unconstitutional). "Position bias" is the phrase often used to describe the advantage a top-listed candidate receives from being listed first.

5. For an example of beneficial statutes, see ALA. CODE § 17-8-4 (1975) (reserving left-hand

primary and nonpartisan general elections may be subject to constitutional attack because of the burden that position bias places on individual rights protected by the Equal Protection Clause.[6] These statutes impair the right to candidacy by handicapping lower-listed candidates, infringe the right to vote by requiring a larger number of voters with a preference to support a lower-listed candidate, and burden the freedom of association of voters who support lower-listed candidates by making it less likely that their candidate will prevail. Courts are currently split on the appropriate standard of review to apply in ballot position cases.[7] The present conflict among the courts in determining the applicable standard of review under the Equal Protection Clause should be resolved by first recog-

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column for party which comes first alphabetically — always the Democrats among the major parties); DEL. CODE ANN. tit. 15, § 4502 (1974) (left-hand column reserved for Democrats); ILL. ANN. STAT. ch. 46, para. 7-19 (Smith-Hurd 1965 & Supp. 1987) (names in primaries arranged in order in which candidates filed for office); ME. REV. STAT. ANN. tit. 21, § 701 (1964) (names listed alphabetically in primaries); OKLA. STAT. tit. 26, § 6-106 (1981) (reserving left-hand column of ballot for Democrats).

6. McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980); Sangmeister v. Woodard, 565 F.2d 460 (7th Cir. 1977), *appeal dismissed*, 435 U.S. 939 (1978); Ulland v. Growe, 262 N.W.2d 412 (Minn.) (en banc), *cert. denied*, 436 U.S. 927 (1978).

7. *See infra* notes 94-151 and accompanying text.

Analysis under the Equal Protection Clause generally falls into three categories. These strands of analysis differ from each other in that the Court gives more deference to legislative judgments which fall into the minimum rationality mode rather than the middle tier or strict scrutiny strands. The reasoning behind using different standards of review in equal protection cases is found in the often-quoted footnote four of United States v. Carolene Products Co., 304 U.S. 144 (1938) where Justice Stone stated:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

Id. at 152 n.4 (citations omitted).

Based on Justice Stone's note, the Court has applied strict scrutiny whenever fundamental rights guaranteed by the first ten amendments are affected by state action or when legislation distinguishes between people on a "suspect" basis. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 531 (3d ed. 1986). When applying strict scrutiny, the Court requires that the state choose means which are necessary to achieve a compelling state interest. *Id.*

Middle-tier analysis is invoked when the state's legislation is drawn on lines based on gender or legitimacy. This standard requires that the legislation be substantially related to an important state interest. *See* Craig v. Boren, 429 U.S. 190, 197 (1976). Middle-tier analysis gives more deference to legislatures because it does not require the state to choose means which are necessary to achieve some goal, and the test does not require that the goal be compelling. *Id.*

The strand of analysis which affords the most deference to a legislature is the minimum rationality test. This level of review is normally applied to economic legislation and requires only that there be some rational relation between the asserted state interest and the means chosen to achieve it. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra*, at 530. Legislation which falls into this category is presumed constitutional. *Id.*

nizing that position bias burdens fundamental rights protected by the Constitution. Therefore, a strict standard of review should be applied when examining statutes regulating ballot position.

Although the issue of position bias raises constitutional questions, little legal material addresses this problem.[8] Some courts have dealt with the issue, but for the most part, studies of position bias have been largely confined to political science journals.[9] Nevertheless, the effects of position bias cannot be underestimated. When one considers news accounts of races being recounted or won by the narrowest of margins,[10] the importance of possible position bias is vividly highlighted. In a country where only a few votes can decide winners, losers, and policy directions of the government, position bias should be eliminated.

II. POSITION BIAS

The methods of favoring one candidate over another in terms of ballot placement are as numerous as the states. The Australian Ballot[11] used in the United States has contributed to this problem by allowing states to choose different ballot formats, each of which favors a predetermined class of candidate. For example, some states' formats for general elections require that ballots be printed in party columns,[12] where each party occupies a column on the ballot with candidates from each party listed vertically in the party column. Most instances of favorable treatment, however, are found in nonpartisan and primary elections. Statutes

8. For some of the only scholarly works on this issue, see Comment, *Elections -- Right of Suffrage and Regulation Thereof -- Official Ballots: Validity of Ballot Access and Ballot Position Restrictions*, 57 N.D.L. REV. 495 (1981); Comment, *Equal Protection in Ballot Positioning*, 28 U. FLA. L. REV. 816 (1976); Note, *California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents*, 45 S. CAL. L. REV. 365 (1972); Note, *supra* note 4. For other works, see *infra* note 9.

9. The most recent work dealing with position bias is Darcy, *Position Effects With Party Column Ballots.* 39 W. POL. SCI. Q. 648 (1986). Other works include: Masterman, *The Effect of the "Donkey Vote" on the House of Representatives*, 10 AUSTL. J. POL. & HIST. 221 (1964); White, *Voters Plump for First on List*, 39 NAT. CIVIC REV. 110 (1950).

10. Some election results from Oklahoma within the past twenty years put this in some perspective. In 1970, the governor's race was won by a margin of 2,181 votes out of 698,790 cast (.3% of the vote); in 1982, the District 16 race for state senator was won by only .4% of the vote; and the 1984 Tulsa mayoral race was won by only 1% of the vote.

11. The Australian Ballot is a ballot which lists all the candidates who are running for office on a single ballot, rather than separate ballots for each candidate. Rusk, *The Effect of the Australian Ballot Reform on Split Ticket Voting: 1876-1908*, 64 AM. POL. SCI. REV. 1220, 1221 (1970).

12. OKLA. STAT. tit. 26 § 6-106 (1981) (reserving left-hand column for Democrats); ALA. CODE § 17-8-4 (1975) (reserving left-hand column for party which comes first alphabetically). The theory of position bias predicts that the *party* listed first will fare better than all other parties.

commonly arrange names in alphabetical order,[13] in filing order,[14] by random drawing,[15] or with the incumbent listed first.[16] Each of these placement methods favors certain classes of candidates at the expense of others.

A. *Detecting Position Bias*

Although position bias may seem logical,[17] detecting it is difficult. Political scientists who have studied the effects of position bias generally examine election contests which use a rotated ballot.[18] Analyses of elections which use a rotated ballot compare the actual vote totals in each of the differing positions with the vote total that each position would be expected to receive. These analyses show not only whether position bias is present in any election, but also determines how much of an advantage or disadvantage each position received as a result of the bias.[19]

Several studies have found evidence of position bias in elections. Each study concentrates on a particular type of election. The analyses fall into three categories: whether the election is a high or low visibility

13. DEL. CODE ANN. tit. 15, § 3124(b) (1974); ME. REV. STAT. ANN. tit. 21, § 701(2)(B) (1964); UTAH CODE ANN. § 20-7-5 (1984 & Supp. 1987); VT. STAT. ANN. tit. 17, § 2472 (1982).

14. ILL. ANN. STAT. ch. 46, § 7-19(2) (Smith-Hurd 1965 & Supp. 1987). Alphabetic voting is discussed in Masterman, *supra* note 9, where the author notes that an unexpectedly large number of representatives in the Australian House have surnames which begin at the front of the alphabet.

15. ARK. STAT. ANN. § 3-114(b) (1976); N.J. STAT. ANN. § 19:14-12 (West 1964 & Supp. 1987); PA. STAT. ANN. tit. 25, § 2875 (Purdon 1963 & Supp. 1987); WIS. STAT. ANN. § 5.60(1)(b), 5(a), 6, 8 (West 1986 & Supp. 1986).

16. MASS. GEN. LAWS ANN. ch. 53, § 34 (West 1975 & Supp. 1987).

17. Conventional political science theories of voting also explain position bias. Riker and Ordeshook theorize that a person's decision of whether or not to vote is largely the result of a person's somehow weighing the advantages and disadvantages of doing so. Riker & Ordeshook, *A Theory of the Calculus of Voting*, 62 AM. POL. SCI. REV. 25, 25-40 (1968). Thus, voters who are only marginally inclined to vote would likely put little effort into making intelligent decisions regarding races he or she knows little about. As a result, such a voter would vote for the top listed candidate — the first candidate he or she sees on the ballot.

President Woodrow Wilson has this to say about how a lengthy ballot can tax a voter:

> I have seen a ballot . . . which contained seven hundred names. It was bigger than the page of a newspaper and was printed in close columns as a newspaper would be. Of course no voter who is not a trained politician, who has not watched the whole process of nomination carefully, who does not know a great deal about the derivation and character and association of every nominee it contains, can vote a ticket like that with intelligence. In nine cases out of ten, as it has turned out, he will simply mark the first name under each office, and the candidates whose names come highest in alphabetical order will be elected.

H. BAIN AND D. HECOCK, *supra* note 3, at 99.

18. Several states have provisions for ballot rotation in primary elections, *e.g.*, OKLA. STAT. tit. 26 § 6-109 (1981); ARIZ. REV. STAT. ANN. § 16-464(A), 465(A), 466(E) (1984 & Supp. 1986); CAL. ELEC. CODE § 10216 (West 1977); KAN. STAT. ANN. § 25-212 (1986).

19. See Appendix I for a description of the method.

contest, whether the election is conducted with voting machines or paper ballots, and whether the election is partisan or nonpartisan.

Examples of position bias affecting low visibility races are found in a published analysis of the California election returns from 1968 and 1970 elections.[20] In elections for judges of the Superior Court, the candidate in the first position received anywhere from 12% to 61% more votes than expected.[21] The same analysis, applied to the 1970 Democratic gubernatorial primary, showed that the candidate in the first position actually received fewer votes than expected.[22] These results illustrate the different impacts that position bias has on low and high visibility races. Position bias has a greater effect in low visibility races because less voters have a real preference as to who wins the election. Consequently, position bias effectively distributes a higher percentage of the disinterested vote to the first position as shown by the analysis of the California elections.

Many instances of position bias have been detected when voting machines were used in an election.[23] In fact, some studies have shown a greater bias effect when voting machines were used than when paper ballots were used because the voting machine is more complicated for the voter to operate.[24] In one Ohio primary election in which voting machines were used, the first position gathered 60% of all votes cast, even though the position of the candidates on the ballots were rotated by precinct.[25]

Finally, position bias is more pronounced in nonpartisan general elections and partisan primaries than in partisan general elections. When candidates listed on the ballot are not visibly associated with a political party, an important control of voting behavior is absent.[26] Thus, votes are cast which do not reflect true preferences and are distributed unevenly to favor the first listed candidate.[27]

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20. These studies are found in Note, *California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents*, 45 S. CAL. L. REV. 365 (1972).

21. *Id.* at 375.

22. *Id.*

23. White, *supra* note 9. Statistics quoted are from the White article.

24. H. BAIN & D. HECOCK, *supra* note 3, at 45.

25. White, *supra* note 9.

26. H. Asher, *supra* note 1, at 31-33.

27. Mueller, *Choosing Among 133 Candidates*, 34 PUB. OPINION Q. 395 (1970). Mueller pointed out that one nonpartisan school board election demonstrated a strong link between a candidate's top placement and the amount of votes received. He also found that it is possible that statutes which regulate ballot position by listing candidates alphabetically influence who decides to run for elections. He noted that of the election he studied, 11% of the 133 candidates' surnames began with

Not all studies claim to have found evidence of position bias. In fact, the most recent scholarly work on bias, conducted by Robert Darcy, concluded that bias was not a factor in general elections.[28] However, critical analysis of Darcy's work reveals that the results of his study actually supports the theory of position bias. Darcy examined the vote returns of twenty-two 1984 elections. After calculating the percentage of the vote each position received, Darcy concluded that position bias was not a *statistically* significant factor in the outcome of any of the elections.[29] Although there may have been no *statistical* significance in his findings, Darcy fails to recognize that all but one of the elections studied *did* show evidence of position bias. In twenty-one of the returns, the percentage of the vote each candidate received while occupying the first or second position varied as the position of their names were rotated.[30] Although this variation was not statistically significant, it still affected the election returns. Darcy's failure to distinguish between statistical tests of significance and *actual presence* of position bias is the fatal flaw in his work. Instead of disproving the theory of position bias, Darcy's study actually supports its existence.

B. *Judicial Recognition of Position Bias*

In addition to certain political science studies, various courts have recognized the effects of position bias.[31] In particular, Illinois courts have become very receptive to the constitutional issues raised by statutes which regulate ballot position.[32] Nevertheless, courts disagree on what type of impact bias can have on an election. For example, in *Ulland v. Growe*,[33] the Minnesota Supreme Court reluctantly recognized that, in a few elections, some advantage accrues to the top listed candidate. However, the court listed several reasons why it was not persuaded that position bias had a meaningful effect in some elections. First, no method

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the letter A, while only 5% of Los Angeles residents, where the eligible candidates were drawn, had similar surnames. *Id.* at 397.

28. Darcy, *supra* note 9.

29. *Id.* at 661. Appendix II summarizes and correctly explains Darcy's study.

30. Appendix II.

31. McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980); Ulland v. Growe, 262 N.W.2d 412 (Minn.) (en banc), *cert. denied*, 436 U.S. 927 (1978); Gould v. Grubb, 14 Cal. 3d 661, 536 P.2d 1337, 122 Cal. Rptr. 377 (1975); Kautenburger v. Jackson, 85 Ariz. 128, 333 P.2d 293 (1958).

32. *See, e.g.*, Sangmeister v. Woodard, 565 F.2d 460 (7th Cir. 1977), *appeal dismissed*, 435 U.S. 939 (1978); Bohus v. Board of Election Comm'rs, 447 F.2d 821 (7th Cir. 1971); Shakman v. Democratic Org. of Cook County, 481 F. Supp. 1315 (N.D. Ill. 1979).

33. 262 N.W.2d 412 (Minn.) (en banc), *cert. denied*, 436 U.S. 927 (1978).

existed to correctly measure the "extent" of position bias in an election.[34] Second, the court observed that neither party disputed the finding that position bias is more pronounced in nonpartisan elections than in partisan elections.[35] Because the election at issue in *Ulland* was partisan, the court rejected any argument that position bias played a meaningful role in its outcome. Had the election been nonpartisan, the court may have been more willing to recognize position bias as a factor. Nevertheless, the *Ulland* court did recognize that position bias may exist in varying degrees in some elections.[36]

Other courts have not been as reluctant as the *Ulland* court to recognize position bias in partisan elections. At one extreme, the court in *Kautenburger v. Jackson*[37] stated that "[i]t is a commonly known and accepted fact that . . . where a number of candidates or nominees for the same office are before the electorate, those whose names appear at the head of the list have a distinct advantage."[38] *Kautenburger* involved a partisan primary result which was contested by a losing candidate. In *McLain v. Meier*,[39] the court recognized position bias in partisan elections even though the evidence presented at trial was not perfectly applicable to the case being decided.[40] Although some courts have unequivocally recognized position bias, particularly in nonpartisan elections,[41] others have not. In *Schell v. Studebaker*[42] a defeated candidate filed suit to void an election in which the ballots had not been rotated as required by the state constitution. The court found no evidence that the election results would have been different had a rotation system been used. Thus, the court found that there was not a showing that position bias was a determinative factor in the election.[43]

III. CONSTITUTIONAL CHALLENGES

Position bias dilutes the votes of informed voters who support an

34. *Id.* at 416.

35. *Id.* However, in *McLain*, 637 F.2d at 1166, the court suggested that there is not an appreciable difference between partisan and nonpartisan elections.

36. *Ulland*, 262 N.W.2d at 415-16.

37. 85 Ariz. 128, 333 P.2d 293 (1958).

38. *Id.* at __, 333 P.2d at 295 (*quoting* Elliot v. Secretary of State, 295 Mich. 245, __, 294 N.W. 171, 193 (1940) (per curiam).

39. 637 F.2d 1159 (8th Cir. 1980).

40. *Id.* at 1166.

41. *See* Darcy, *supra* note 9, at 650 (the author concludes there is no position bias in general elections).

42. 174 N.E.2d 637 (Ohio C.P. 1960), *appeal dismissed*, 173 N.E.2d 107 (1961).

43. *Id.* at 640. The court did not hold that position bias does not exist, only that there was no showing that it would have a meaningful effect in the election.

unfavorably placed candidate. This dilution occurs as a result of a higher percentage of any uninformed or disinterested vote being cast for the candidate listed first. Dilution of votes infringes upon a citizen's right to be a candidate, burdens the fundamental right to vote, and impairs the voters' first amendment freedom of association. Analysis of these rights illustrates a relationship among them.[44]

A. *The Right to Be a Candidate*

While it may be true that a right to be a candidate exists, clearly the right is not a fundamental right. No express language in the Constitution confers a right to candidacy; hence, the Supreme Court has stated that any restrictions which a state may place on a citizen's ability to run for office must be consistent with the demands of the Equal Protection Clause.[45]

1. Whose Rights are Affected?

The close relationship between the right to vote and the right to be a candidate necessarily means that burdening one right has some effect on the other. By limiting the possible number of candidates, a state both prevents a citizen from voting for a potentially effective leader, and denies that citizen an opportunity to run for office.

Courts which have identified the link between the right to vote and the right to candidacy, do so by recognizing "that *voters*' rights are abridged by the impairment of a candidate's ability to gain access to the

44. *See, e.g.*, Lubin v. Panish, 415 U.S. 709 (1974) (denying indigent a ballot position infringes interests of potential candidate (his rights of expression and association) as well as interest of the voters who may vote); Bullock v. Carter, 405 U.S. 134, 143 (1972) ("the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."); Shakman v. Democratic Org. of Cook County, 435 F.2d 267, 270 (7th Cir. 1970) (interests of candidate to be free from intentional discrimination and voters' interests in an effective vote are constitutionally protected), *cert. denied*, 402 U.S. 909 (1971).

45. *Bullock*. 405 U.S. at 143. In *Bullock*, the Court stated that any system which creates barriers to the ballot is not automatically subjected to the type of strict scrutiny normally reserved for instances when suspect classes or fundametal rights are affected by state action. Thus, ballot access statutes have to be rationally related to legitimate state interests unless they also burden other fundamental rights or discriminate against suspect classes. *Id. See also* Ulland v. Growe, 262 N.W.2d 412, 415 (Minn.) (en banc) (electoral regulations receive a "rational basis" scrutiny), *cert. denied*, 436 U.S. 927 (1978); Blassman v. Markworth, 359 F. Supp. 1 (N.D. Ill. 1973) (holding a ten year residency requirement before running for office did not violate the Equal Protection Clause). *Contra* Mancuso v. Taft, 476 F.2d 187, 195 (1st Cir. 1973) (any law which infringes the interests of an individual in running for office must be given strict review).

ballot."[46] In *Mancuso* v. *Taft*,[47] the court found a strong relationship between the two rights. A Rhode Island statute prohibited any candidate from keeping his or her job as a civil servant.[48] The court prefaced its analysis of the case by noting that "whenever a state or city regulates the right to become a candidate for public office, it also regulates the citizen's right to vote; the person or persons whose candidacy is affected may be the voters' choice for public official."[49] Thus, the court found that the statute was subject to strict scrutiny because of its infringement on the fundamental right to vote, and that the statute was unconstitutional because it contravened the Equal Protection Clause.

The link between voters' rights and candidates' rights was strengthened in *Antonio* v. *Kirkpatrick*,[50] a case which held that a ten year residency requirement for potential candidates was unconstitutional. The court found that the residency requirement burdened no less than three rights guaranteed by the Constitution: the right to associate, the right to be a candidate, and the right to travel.[51] Furthermore, although the right to run for office may not be as valued as the right to vote, a statute burdening the right to run for office which also has a substantial impact on voting rights will be subjected to strict scrutiny.[52] Thus, the court in *Antonio* both identified the link between the two rights as well as limited the effect of the connection. Only if the candidacy restriction has a *substantial* impact on voting rights will strict scrutiny be invoked. Otherwise, the state is free to use any reasonable means to achieve its legitimate objectives. However, *Antonio* involved a state law which denied voters the opportunity to support a person who was as qualified as any other candidate, except for the residency requirement. The court found that this restriction on voting rights was both substantial and too broad to be constitutionally permissible; therefore, the statute was struck down.[53]

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46. Gordon, *The Constitutional Right to Candidacy*, 25 U. KAN. L. REV. 545, 558 (1977).

47. 476 F.2d 187 (1st Cir. 1973).

48. *Id.* at 189. A similar law was upheld by the Supreme Court in Clements v. Fashing, 457 U.S. 957 (1982) (plurality opinion). In *Clements*, the plurality asserted there was no fundamental right of candidacy. *Id.* at 963. The dissent would have applied a strict review due to the infringement of the First Amendment Rights. *Id.* at 976-90.

49. *Mancuso*, 476 F.2d at 193.

50. 453 F. Supp. 1161 (W.D. Mo.), *aff'd.*, 579 F.2d 1147 (1978).

51. "Indisputably, the State of Missouri has intruded into a constitutionally sensitive area, laced with the penumbrae of protected associational conduct such as travel, voting, and the heart of government, candidacy." *Id.* at 1165.

52. *Id.* at 1164.

53. For other cases applying a strict scrutiny standard, see Wellford v. Battaglia, 485 F.2d 1151 (3d Cir. 1973); Green v. McKeon, 468 F.2d 883 (6th Cir. 1972); Fleak v. Allman, 420 F. Supp. 822

2. State Restrictions On Candidacy

State restrictions on candidacy have traditionally taken many forms. In *Bullock* v. *Carter*,[54] the Court examined a Texas Election Code provision which imposed a candidate filing fee as a prerequisite for candidacy. The amount of the fee was dependent upon such factors as the race to be contested and the size of the population in the county or counties in which the contest was to take place. The statutory system imposed fees ranging from $1000 to $8900 per candidate.[55] The state maintained that the purpose of the fee was to require the candidates to generate funds for the election. However, the Court found that the state's interest was not rationally related to a fee system and thus held that the statute was unconstitutional. Requiring the payment of a fee before allowing a candidate to appear on a ballot did not further a legitimate state goal.[56]

Another type of restriction on candidacy is a residency requirement. Generally, this restriction requires a person to live in the state or county for a certain period of time to be eligible for candidacy. The constitutionality of this restriction was most recently tested in *Hankins* v. *State of Hawaii*.[57] Article V, section 1 of the Hawaiian Constitution requires that a person be a resident of Hawaii for five years before becoming eligible to run for governor.[58] A gubernatorial candidate who had only resided in the state three years prior to the election wanted his name included on the list of candidates seeking nomination in the party primary. When he was not allowed to do so because of the statutory requirement, he sought declaratory and injunctive relief from the court.

After noting that the Supreme Court has not ruled on the constitutionality of residency requirements, and that most courts analyze such statutes under a strict scrutiny standard, the Federal District Court of Hawaii opted instead to apply a minimum rationality test, but found that the statute would also meet a strict scrutiny test if applied.[59] The court

(W.D. Okla. 1976); Sununu v. Stark, 383 F. Supp. 1287 (D. N.H. 1974), *aff'd*, 420 U.S. 958 (1975); Alexander v. Kammer, 363 F. Supp. 324 (E.D. Mich. 1973); Chimento v. Stark, 353 F. Supp. 1211 (D. N.H.), *aff'd*, 414 U.S. 802 (1973); Headlee v. Franklin County Board of Elections, 368 F. Supp. 999 (S.D. Ohio 1973); McKinney v. Kaminsky, 340 F. Supp. 289 (M.D. Ala. 1972); Draper v. Phelps, 351 F. Supp. 677 (W.D. Okla. 1972); Bolanowski v. Raich, 330 F. Supp. 724 (E.D. Mich. 1971); Hadnott v. Amos, 320 F. Supp. 107 (M.D. Ala. 1970), *aff'd*, 401 U.S. 968 (1971); Stapleton v. Clerk of Inkster, 311 F. Supp. 1187 (E.D. Mich. 1970).

54. 405 U.S. 134 (1972).
55. *Id.* at 138 & n.11.
56. *Id.* at 147.
57. 639 F. Supp. 1552 (D. Haw. 1986).
58. *Id.* at 1553.
59. *Id.* at 1554-56.

reasoned that the right to hold office has not yet been accorded the status of a fundamental right. Also, the court observed that a durational residency requirement does not penalize the exercise of other constitutional rights when the requirement is imposed on candidates.[60] In fact, the court found approval for its decision to apply minimum rationality in recent Supreme Court *dictum*.[61] The court, therefore, upheld the durational requirement of the state constitution.

Although restrictions based on property ownership of a potential candidate are few,[62] requirements that a candidate demonstrate a certain level of voter support are not. However, if the requirement onerously burdens a potential candidate's ability to appear on a ballot, it is subject to strict scrutiny because of the effect that the statute has on voters' rights. For example, in *Williams* v. *Rhodes*,[63] the Supreme Court found unconstitutional an Ohio statute requiring a new political party to demonstrate support from 15% of the total number of ballots cast in the previous gubernatorial race before being allowed on a ballot. Under this Ohio scheme, Republicans and Democrats could retain positions merely by polling 10% of the vote in the previous election. By treating the two classes of parties differently, the state heavily burdened the voters' right to associate with a new political party, as well as impinged upon the voters' right to cast their vote effectively.[64] The statute abridged the right to associate because voters who supported a party that was unable to secure a ballot position were denied the opportunity to vote their true preferences. Similarly, their votes could not be cast effectively because the electors' first choice was not on the ballot. The state's justifications for the law were its interests in promoting political stability through a

60. *Id.* at 1555. In the context of residency requirements for voters, see Dunn v. Blumstein, 405 U.S. 330 (1972) and Carrington v. Rash, 380 U.S. 89 (1965).

61. *Hankins*, 639 F. Supp. at 1555. The court quoted Clements v. Fashing, 457 U.S. 957 (1982) (plurality opinion). In *Clements* the court identified two strands of ballot-access cases: those involving classifications based on wealth, and those cases which burden "small political parties or independent candidates." *Id.* at 964. Finding that a waiting period is not a significant barrier to such candidates, the Court held that "this sort of insignificant interference with access to the ballot need only rest on a rational predicate in order to survive a challenge under the Equal Protection Clause." *Id.* at 968. Waiting periods of up to seven years have been upheld. *See* Chimento v. Stark, 353 F. Supp. 1211 (D. N.H.), *aff'd*, 414 U.S. 802 (1973).

62. The only Supreme Court case to deal with such a requirement is Turner v. Fouche, 396 U.S. 346 (1970), where the Court declared unconstitutional a state law requiring school board members to own real property. Such a requirement amounted to discrimination. *Id.* at 364. In Chappelle v. Greater Baton Rouge Airport Dist., 431 U.S. 159 (1977), the court summarily reversed a lower court decision upholding a property ownership requirement. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 7, at 780-81.

63. 393 U.S. 23 (1968).

64. *Id.* at 30.

two-party system, insuring that a winner had the support of a majority of the voters, and preventing unduly long and complicated ballots.[65] Although the court recognized some merit in the latter two arguments, it flatly rejected the first argument because of the monopoly that would result if a state were permitted to favor existing parties over new parties.[66]

B. *The Right To Vote*

1. The Nature of the Right

Although there is no constitutional right to vote *per se*,[67] the Supreme Court has recognized that statutes which directly burden this right are subject to strict scrutiny. Therefore, requirements which restrict the right to vote must further a compelling state interest. With few exceptions,[68] the Court has struck down laws which burden the right to vote. Thus, in *Kramer v. Union Free School District*,[69] the Court invalidated a New York law[70] which prohibited registered voters from participating in a school district election unless the voter was a parent, had custody of a child enrolled in school, or owned or leased property in the school district.[71] New York argued that these requirements were intended to limit the electorate to those with an appreciable interest in the election outcome. However, in a rigorous application of the strict scru-

65. *Id.* at 31-33.
66. *Id.* at 32.
67. "There is no constitutional right to vote, as such." Shakman v. Democratic Org. of Cook County, 481 F. Supp. 1315, 1334 (N.D. Ill. 1979). Yet the Supreme Court has found that the cumulative effect of amendments has fashioned a fundamental right to vote. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 7, at 720.
68. *E.g.*, Pope v. Williams, 193 U.S. 621 (1904) (allowing a state to require a person be a bona fide resident before voting).
69. 395 U.S. 621 (1969).
70. The Court quoted section 2012 of the New York Educational Law which read:

> A person shall be entitled to vote at any school meeting for the election of school district officers . . . who is:
> 1. A citizen of the United States
> 2. Twenty-one years of age.
> 3. A resident within the district for a period of thirty days next preceding the meeting at which he offers to vote; and who in addition thereto possesses one of the following three qualifications:
> a. Owns or is the spouse of an owner, leases, hires, or is in the possession under a contract of purchase [real property] . . . or
> b. Is the parent of a child of school age, provided such a child shall have attended the district school . . . or
> c. Not being a parent, has permanently residing with him a child of school age who shall have attended the district school . . . .

Id. at 633-34.
71. *Id.* at 622.

tiny test, the Court found that the means New York had chosen were not *necessary* to serve its interests. For example, the statute was underinclusive in that it assumed that voters without children or property did not have the same interest in schools as voters with children or property. The statute also granted the franchise to people who may not have had any interest in public education.[72] The Court, therefore, invalidated the law because it was both under- and overinclusive.[73]

The right to vote was broadened dramatically in the 1960's. Supreme Court cases established that the right to vote in state elections is implicitly guaranteed by the federal Constitution,[74] that the Equal Protection Clause requires that one person's vote be substantially equal to another's,[75] and that a dilution of votes is tantamount to a denial of the vote.[76]

2. The Right to Vote Equals the Right to Vote Effectively

As a result of the right to vote emphasis of the 1960's, and particularly because of the *Reynolds v. Sims*[77] and *Wesberry v. Sanders*[78] decisions, the right to vote was equated with the right to vote effectively. This equation is a logical extension of the "one man, one vote" requirement of *Reynolds* and *Westberry*. If inequitable apportionment is depriving district voters of equal representation, and therefore an effective vote in the legislature, then the Equal Protection Clause provides a remedy.

Nevertheless, courts which have addressed the issue of whether the right to vote means the right to vote effectively have made interesting observations of how that maxim conflicts with real voting behavior. For

72. *Id.* at 632.

73. *Id.* at 633.

74. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966). *Harper* represents a challenge to a poll tax which had been imposed as a condition to vote. The Court held that the Virginia law imposed a condition on voting which was totally unrelated to the state's interest in fixing qualifications.

75. An often quoted passage from Reynolds v. Sims, 377 U.S. 533 (1964) explains why:

> Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. 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.

Id. at 562.

76. Wesberry v. Sanders, 376 U.S. 1 (1964). This case held that article 1, § 2 of the federal Constitution requires that "as nearly as practicable one man's vote in a congressional election is to be worth as much as another's." *Id.* at 7-8. The Court based its holding on the theory that of the two houses, one would represent the people, and the other the states. *Id.* at 13.

77. 377 U.S. 533 (1964).

78. 376 U.S. 1 (1964).

example, in *Ulland v. Growe*,[79] the court stated:

> We know of no authority which would allow us to treat the votes of any voters, however ill-informed, as if they were somehow inferior, thereby "diluting" the effect of the more thoughtfully cast ballots. In short, *the fact that some citizens may choose to vote irrationally, as is their right, does not mean that the votes of better-informed voters are arithmetically "diluted" within the language of the reapportionment decisions.*[80]

Thus, the court seems to be admitting that the right to cast an effective vote can be infringed so long as the infringement is the result of uninformed votes being cast. Further, courts will continue to tacitly admit that there is no constitutional right to an election free of position bias until they recognize that bias does have an effect in nearly all elections.[81]

C. *The Right of Association*

The freedom of association is implicated in ballot position cases for one reason. Position bias in effect penalizes those voters who support an unfavorably positioned candidate. Their right to associate with that candidate is infringed by the state consciously favoring a higher positioned candidate. Although the right to associate is an issue in position bias, its boundaries are defined by looking to its application in other cases.

1. What is the Right to Associate?

The Supreme Court recognizes the right of association as a fundamental right protected by the Constitution.[82] Thus, state action which burdens the ability to associate is subjected to strict scrutiny. While this heightened scrutiny may be "strict in theory, fatal in fact," there are still instances where compelling state interests have overcome the presump-

79. 262 N.W.2d 412 (Minn.) (en banc), *cert. denied*, 436 U.S. 927 (1978).

80. *Id.* at 416 (emphasis added). The court distinguished the effect of an irrationally cast vote from the effect of an inequitably apportioned vote because the latter involves a practice which creates an "immutable or absolute advantage or preclusion," while an irrationally cast vote does not. *Id.* at 416 n.12.

81. See Note, *Minnesota Ballot Position Statute Does Not Violate Equal Protection*, 5 WM. MITCHELL L. REV. 259, 268 (1979).

82. In NAACP v. Alabama, 357 U.S. 449 (1958), the Supreme Court laid down what was to become the standard definition of the right to associate.

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association .... It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause ....

Id. at 460. The Court required that a state's demand for the NAACP to reveal its membership list withstand the "closest scrutiny." *Id.* at 461. The state order would have had the effect of discouraging membership in the NAACP, so the state could not compel disclosure. *Id.* at 462-63.

tion of unconstitutionality which is raised when fundamental rights are adversely affected by state action. One area upon which the right to associate has been infringed is in limiting the political activity of government employees. Certain types of political expression may validly be restrained by the state. In this context, the government asserts that regulation is necessary because government employment could be abused if it were allowed to be a means of achieving some politcal advantage.[83] Furthermore, the government also has an interest in limiting the political activity of employees because of the possibility that party loyalty may impair a worker's productivity.[84] If these, or similar state interests are not served by narrowly drawn restrictions on association, the private interest will prevail over the state's interest.

2. Modern Analysis of the Right of Association

In *Roberts v. United States Jaycees*,[85] the Court enunciated the modern bounds of the right of association. The Jaycees' bylaws allowed only men to be regular voting members of that private association. Women could be members, but only in a limited, nonvoting capacty.[86] As a result, when one chapter began admitting women as regular members, the national office threatened to revoke its charter, and the chapter filed suit under a Minnesota anti-discrimination law.[87]

The *Roberts* Court identified two strands which compose the right of association. One extends to private types of relationships which are fundamental to society. This strand of association is a fundamental element of the liberty protected by the Constitution.[88] However, the second type of association is not always entitled to the same level of scrutiny. This second strand includes the "right to associate for the purpose of

83. In United States Civil Service Comm'n v. National Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548 (1973), the Court upheld a federal statute which limited political involvement of federal employees. The Hatch Act, 5 U.S.C § 7324 (1981) reads in part:

(a) An employee in an Executive agency or an individual employed by the government of the District of Columbia may not —

(1) use his official authority or influence for the purpose of interfering with or affecting the result of an elction; or

(2) take an active part in political management or in political campaigns.

84. *United States Civil Service Comm'n.*, 413 U.S. at 564-66.

85. 468 U.S. 609 (1984).

86. *Id.* at 613.

87. "It is an unfair discriminatory practice: To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex. " MINN. STAT. ANN. § 63.03(3) (West 1982) (repealed 1983).

88. *Roberts*, 468 U.S. at 617-18.

engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[89] Between the two types of freedom lies a spectrum in which every case must fall.[90] As the personal attachment to the association in question increases, the case is given a higher standard of review. The Court in *Roberts* determined that any challenge to the right of association should focus on the context in which the challenge takes place. The level of scrutiny is determined by the extent to which the right sought to be protected resembles one or the other strand of freedom of association.

Roberts, however, involved a case where the interests of the Jaycees in excluding women was not constitutionally protected.[91] Further, the regular members' right of association was subordinate to the compelling state interest of eliminating discrimination against women.[92] The Court, therefore, recognized that the right to associate for the purpose of expressing views is a fundamental right which can be abridged only if the state is addressing a compelling state interest. In *Roberts*, the state had demonstrated a compelling interest and therefore, could require the Jaycees to admit women.[93]

IV. Challenges to Ballot Position Statutes: The Applicable Standard

When the preceding rights are infringed, deciding which standard of review[94] to apply may be relatively simple. However, as cases which have dealt with position bias show, the same determination is more difficult to make when reviewing statutes regulating ballot position. Case law runs the gamut, from those courts which apply a strict level of review,[95] to some requiring only minimum rationality,[96] and still others that seem to apply their own test.[97]

89. *Roberts*, 468 U.S. at 618.

90. *Id.* at 620. The Court identified some of the factors which are examined in this inquiry; the size, purpose, policies, selectivity, and congeniality of the association are a few of them. *Id.*

91. *Id.* at 621.

92. *Id.* at 623.

93. *Id.*

94. See *supra* note 7 for a discussion of the levels of review under the Equal Protection Clause.

95. Gould v. Grubb, 14 Cal. 3d 661, 536 P.2d 1337, 122 Cal. Rptr. 377 (1975); Kautenburger v. Jackson, 85 Ariz. 128, 333 P.2d 293 (1958).

96. Krasnoff v. Hardy, 436 F. Supp. 304 (E.D. La. 1977); Clough v. Guzzi, 416 F. Supp. 1057 (D. Mass. 1976); Ulland v. Growe, 262 N.W.2d 412 (Minn.) (en banc), *cert. denied*, 436 U.S. 927 (1978).

97. Bohus v. Board of Election Comm'rs, 447 F.2d 821 (7th Cir. 1971) (plaintiff must prove first position is an advantage and that the state intentionally discriminates in its placement); Groesbeck v. Board of State Canvassers, 251 Mich. 286, 232 N.W. 387 (1930) (practice of placing certain

A. *Strict Scrutiny*

Cases which apply a strict standard of review to position bias also establish a close link between the ballot position, voters' rights, and candidates' rights. In *Gould v. Grubb*,[98] the court tied position bias together with burdens on fundamental rights. The court first accepted the lower court's evidentiary findings which concluded that position bias is a factor in elections.[99] This factor favors candidates who are listed first for the office which they seek. Thus, a statutory requirement which places a certain candidate first on the ballot "discriminates against voters supporting all other candidates, and accordingly can only be sustained if necessary to further a compelling governmental interest."[100] A statute such as the one reviewed in *Gould* discriminates against the fundamental right of voters to vote. The bias distributes a larger number of any uninformed votes to the first listed candidate.[101]

The court in *Gould* rejected the governmental interest asserted in support of the statute. The court found that the interest asserted was not the compelling interest required to pass the test of strict scrutiny. The city had contended that since most voting decisions consist of either voting for or against the incumbent, merely placing the incumbent on the top of the ballot helped the voters by making their choice "efficient" and "unconfused."[102] Not only was the interest not "compelling," but there were also less restrictive means available to the state to assist voters in identifying incumbents.[103] By not choosing to use any of these methods, the city had consciously favored the incumbent over all other candidates.[104]

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candidates first is permissible as long as the practice does not prevent the voter from freely expressing himself or herself).

98. 14 Cal. 3d 661, 536 P.2d 1337, 122 Cal. Rptr. 377 (Cal. 1975).

99. *Id.* at 664, 536 P.2d at 1338, 122 Cal. Rptr. at 378.

100. *Id.* at 664, 536 P.2d at 1338-39, 122 Cal. Rptr. at 378-79.

101. "Indeed, in a close race it is quite possible that a candidate with fewer 'conscious' supporters than an opponent will actually win an election simply because his high position on the ballot affords him the advantage of receiving the vote of unconcerned or uninformed voters." *Id.* at 670, 536 P.2d at 1343, 122 Cal. Rptr. at 383. *See also* Schell v. Studebaker, 174 N.E.2d 637 (Ohio C.P. 1960), *appeal dismissed*, 173 N.E.2d 107 (1961). In *Schell* the court commented on a rotational scheme: "People being what they are, there is 'something in a name,' and the people, believing that a psychological advantage accrues to a name by its position on a ballot, provided that this believed advantage should be shared among the candidates . . . ." *Id.* at 639 (quoting Bees v. Gilronon, 116 N.E.2d 317, 319-20 (Ohio C.P.), *appeal dismissed*, 159 Ohio St. 186, 111 N.E.2d 395 (1953)).

102. *Gould*, 14 Cal.3d at 672, 536 P.2d at 1344, 122 Cal. Rptr. at 384.

103. "Less restrictive means" in this context refers to alternate methods which do not have such a great effect on the voters' right to associate with a particular candidate. The right to asociate is expressed by voting.

104. *Id.* at 673, 536 P.2d at 1345, 122 Cal. Rptr. at 385. For other cases striking down incum-

Kautenburger v. Jackson[105] is similar to *Gould* in that *Kautenburger* found that fundamental rights were infringed when a rotated ballot was not used. However, unlike *Gould*, this court found that the *candidate's* right to not be discriminated against is paramount. Thus, the right to candidacy is a consideration in position bias cases. The court decided that ballot rotation is required because the right to be a candidate is fundamental,[106] and it is a commonly known and accepted fact that "where a number of candidates or nominees for the same office are before the electorate, those whose names appear at the head of the list have a distinct advantage."[107] Consequently, placing one candidate on top of the ballot unfairly discriminates against other candidates and impairs their right to candidacy.

B. *Minimum Rationality*

At the other end of the equal protection spectrum from *Gould* and *Kautenburger* is *Ulland v. Growe*.[108] The court in *Ulland* applied a minimum rationality test to a Minnesota statute which placed partisan over nonpartisan candidates. Although agreeing in theory that strict scrutiny applies when fundamental rights are abridged,[109] the court determined that the effect of the statute on voting rights was only marginal;[110] and therefore, a minimum rationality standard was applicable.[111]

The *Ulland* court distinguished *Gould* on two grounds.[112] First, the holding in *Gould* was based on a nonpartisan election, while the statute

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bent first statutes, see Netsch v. Lewis, 344 F. Supp. 1280 (N.D. Ill. 1972); Holtzman v. Power, 62 Misc. 2d 1020, 313 N.Y.S.2d 904 (N.Y. Sup. Ct.), *aff'd*, 311 N.Y.S.2d 824 (1970).

Some support for heightened scrutiny of incumbent first statutes is found in Buckley v. Valeo, 519 F.2d 821 (D.C. 1975), *modified*, 424 U.S. 1 (1976). In discussing the appropriate level of review of a statute regulating campaign expenditures and contributions, the court stated:

> The need for exacting judicial scrutiny is underscored by the plaintiffs' contention that the legislation is a composite of measures that serve the interests of the "ins" — members of Congress already elected — in resisting the incursions of the "outs."... In any event, *we are aware that serious constitutional questions are raised by measures that may inhibit potential candidates.*

Id. at 843 (emphasis added). Obviously, legislators who are in office are the ones benefitted by incumbent first statutes.

105. 85 Ariz. 128, 333 P.2d 293 (1958).

106. *Contra*, Bullock v. Carter, 405 U.S. 134, 142-43 (1972); Ulland v. Growe, 262 N.W.2d 412, 415 n.7 (Minn.) (en banc), *cert. denied*, 436 U.S. 927 (1978).

107. *Kautenburger*, 85 Ariz. at __, 333 P.2d at 295 (quoting Elliot v. Secretary of State, 295 Mich. 245, __, 294 N.W. 171, 173 (1940)).

108. 262 N.W.2d 412 (Minn.) (en banc), *cert. denied*, 436 U.S. 927 (1978).

109. *Id.* at 415.

110. *Id.* at 418.

111. *Id.*

112. *Id.* at 416.

challenged in *Ulland* applied only to partisan elections.[113] Second, the court in *Ulland* disagreed with *Gould's* analogy between position bias and vote dilution.[114] Vote dilution, in the sense of an unconstitutional infringement of equal protection, implies the creation of "phantom" votes.[115] Position bias, on the other hand, "does not create the same kind of immutable or absolute advantage or preclusion."[116] The *Ulland* court implicitly held that it is possible for every voter to have a true preference in a race.

Clough v. Guzzi[117] also applied a minimum rationality test to a statute which required that the incumbent be listed first on the voting ballot. *Clough* was distinguished from *Gould* on the same grounds as in *Ulland*, but the court made several other observations that warrant comment. First, *Clough* held that there is no constitutional right to have a rational election.[118] Thus, a ballot may constitutionally inject an irrational influence on vote choice. Position bias may be one such irrational influence. Presumably, position bias is permissible because the court in *Clough* did not find that any rights of candidates or voters were abridged.[119] The absence of those rights puts no limit on how significant of a role position bias can play in an election. Since statutes governing elections do not have to be rationally related to a legitimate state interest, position bias is not an issue.

Secondly, and not surprisingly, the court's analysis in *Clough* of the state interest involved was similar to *Ulland's* and opposed to *Gould's*. In *Clough*, the court found that listing the incumbent first is a legitimate state interest because incumbency is a primary consideration in vote choice;[120] therefore, the state had a legitimate interest in listing incumbents first because it allowed the *state* to decide who would receive a majority of any uninformed votes.[121] *Gould*, on the other hand, found

113. The court stated that although the expert testimony of each party in *Ulland* was conflicting, one point of agreement was that the magnitude of position bias in nonpartisan elections is greater than in partisan contests. *Id.* at 415.

114. *Id.* at 416.

115. *Id.*; *see also* Reynolds v. Sims, 377 U.S. 533 (1964) (Court found that malaportionment created unequal representation).

116. *Ulland*, 262 N.W.2d at 416 n.12 (quoting Clough v. Guzzi, 416 F. Supp. 1057, 1067 (D. Mass. 1976)).

117. 416 F. Supp. 1057 (D. Mass. 1976).

118. *Id.* at 1067. Elections, said the court, could be decided on irrational factors such as "ethnic affiliation, sex, or home town." *Id.*

119. *Id.*

120. *Id.* at 1068.

121. *Id.*

The Commonwealth also asserts that, if there is an uninformed segment of the voters, those

that the city has no legitimate right to favor incumbents over other candidates, even if incumbency is a primary factor in the vote decision.[122]

Even though a minimum rationality test gives the greatest amount of deference to legislative judgments, courts which apply the test have not always validated all statutes placing the incumbent first on the ballot. In *McLain v. Meier*,[123] the court applied what could be a stricter form of minimum rationality. The state of North Dakota had argued that its statute requiring incumbents to be listed first was justified by its interest in making voting as easy as possible.[124] However, the court found that the method that North Dakota had chosen to achieve this goal essentially favored the incumbent who was listed first.[125] In doing so, the state had infringed upon the right to vote of those voters who supported lower listed candidates. The court in *McLain* looked beyond whatever interest was asserted by the state and examined the effect its means would have on voters. Although a statute placing the incumbent first on the ballot may be convenient, it also impairs the right to vote; therefore, the court held that the "incumbent first" statute was unconstitutional.

C. *The Two Part* Bohus *Test*

The test developed in the Seventh Circuit for evaluating position bias cases is distinct from traditional equal protection cases. First introduced in *Bohus v. Board of Election Commissioners*,[126] the test was later applied and explained in *Sangmeister v. Woodard*[127] and *Shakman v. Democratic Organization of Cook County*.[128]

Bohus involved the validity of an Illinois statute[129] which gave election officials discretion in placing candidates' names on ballots. The plaintiff was a Republican candidate who claimed that he was deprived of equal protection because the election officials consistently placed Dem-

votes should go to the incumbent candidate who at least has some experience in the business of government.

We cannot say that these are illegitimate considerations beyond the authority of the Commonwealth properly and lawfully to advance.

Id.

122. *Gould*, 14 Cal. 3d at 672-74, 536 P.2d at 1344-45, 122 Cal. Rptr. at 384-85.

123. 637 F.2d 1159 (8th Cir. 1980). For a complete discussion of this case, see Comment, *Elections -- Right of Suffrage and Regulation Thereof -- Official Ballots: Validity of Ballot Access and Ballot Position Restrictions*, 57 N.D.L. REV. 495 (1981).

124. *McLain*, 637 F.2d at 1167.

125. *Id.*

126. 447 F.2d 821 (7th Cir. 1971).

127. 565 F.2d 460 (7th Cir. 1977), *cert. denied*, 435 U.S. 939 (1978).

128. 481 F. Supp. 1315 (N.D. Ill. 1979).

129. ILL. REV. STAT. ch. 46, § 16-3 (1969).

ocratic candidates on the ballot first.[130] The court ruled that for the plaintiff to prevail, he would have to show that (1) top placement on the ballot is an electoral advantage; and (2) he was intentionally denied the first position.[131] After reviewing the evidence adduced at trial, the Court of Appeals found that the plaintiff had failed to sustain his burden of proof on the first element. Since the trial court's finding of an advantage in being listed first was not clearly erroneous, the appellate court affirmed the lower court's verdict for the defendant.[132]

The court in *Sangmeister* concentrated its analysis on the second prong of the *Bohus* test.[133] The court noted that an earlier Seventh Circuit case[134] had found proof of intentional discrimination in extrinsic evidence which indicated that subjective considerations of the Secretary of State were the determining factors in the assignment of ballot positions.[135] Similarly, that element of intentional discrimination was also present in *Sangmeister*. The court found sufficient evidence of intent by noting that the practice of placing Democrats first had occurred for a period of thirty to one hundred years, depending on the county. This "systematic and widespread" behavior satisfied the constitutional requirement of intent.[136]

In reaching this conclusion, the *Sangmeister* court relied on the legal precedent of *Washington v. Davis*.[137] *Davis* involved a challenge to the testing in the District of Columbia of all applicants for police officer positions, alleging that the test was a tool to purposefully discriminate against all black applicants.[138] The *Davis* Court held that a facially neutral law is not unconstitutional simply because it affects separate classes unequally.[139] Although disproportionate impact is some indication of in-

130. Bohus v. Board of Election Commissioners, 447 F.2d 821, 822 (7th Cir. 1971). Thus, the plaintiff never claimed that the statute itself was unconstitutional, but that the manner in which it was applied was unconstitutional.

131. *Id.* at 822.

132. *Id.* at 823. "Findings of fact shall not be set aside unless clearly erroneous . . . ." FED. R. CIV. P. 52(a).

133. *Sangmeister*, 565 F.2d 460.

134. Weisberg v. Powell, 417 F.2d 388 (7th Cir. 1969).

135. *Id.*

> The Secretary of State may well have been sincere in his belief that persons with experience in government and with standing in one of the parties are best qualified to write a constitution, but the sincerity of his reason for tipping the scales in their favor does not undermine, but rather supports, the proposition that the discrimination was purposeful and intentional.

Id. at 392.

136. *Sangmeister*, 565 F.2d at 467.

137. 426 U.S. 229 (1976).

138. *Id.* at 234.

139. *Id.* at 239.

vidious discrimination, the *Davis* Court stated that other indicators of purposefulness are required, such as a "systematic exclusion"[140] of one class of persons from serving on a jury.[141] The Court in *Davis* found that the systematic exclusion satisfied constitutional standards which require a purposeful discrimination.

The *Sangmeister* court relied heavily on systematic exclusion as an illustration of purposefulness. The court analogized that if a systematic exclusion of blacks from a jury amounted to intentional discrimination, then so does systematic exclusion of certain classes of candidates from the top position of the ballot.[142] Thus, the purposeful discrimination prong of the *Bohus* test was satisfied in *Sangmeister*.[143]

One year after deciding *Sangmeister*, the Seventh Circuit Court of Appeals heard yet another position bias case. In *Board of Election Commissioners v. Libertarian Party of Illinois*,[144] the court again applied the *Bohus* test to uphold the constitutionality of a statutory scheme which placed new political parties beneath established parties on the ballot. This time, unlike *Sangmeister*, the court upheld the placement method. *Sangmeister* was distinguished because, in that case, evidence of intentional favoritism toward certain candidates demonstrated an unconstitutional infingement of fundamental rights. A statute which is neutral with respect to ballot position is a requirement of the Equal Protection Clause.[145] The court in *Libertarian Party* found that the statute in question satisfied the neutrality requirement.[146] The method chosen by the state simply eliminated voter confusion without reducing the chance of minor parties being elected.[147]

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140. *Id.*

141. *Id.* (citing Akins v. Texas, 325 U.S. 398, 403-04 (1945)).

142. *Sangmeister*, 565 F.2d at 467.

143. *Id.* at 467.

144. 591 F.2d 22 (7th Cir. 1979), *cert. denied*, 442 U.S. 918 (1979).

145. *Sangmeister*, 565 F.2d at 468.

146. *Libertarian Party*, 591 F.2d at 25.

> Different treatment of minority parties that does not exclude them from the ballot, prevent them from attaining major party status if they achieve widespread support, or prevent any voter from voting for the candidate of his choice, and that is reasonably determined to be necessary to further an important state interest does not result in a denial of equal protection. . . .
>
> In conclusion, we find that the two-tier system of ballot placement by the District Court is a reasonable solution to the problems faced by the election officials and has not been shown to be the product of invidious discrimination.

Id. at 25, 27.

The major problem with the court's reasoning is that it assumes that every voter actually has a preference. Position bias, on the other hand, is apparent only when voters do not have a preference. Thus, the court's reasoning is particularly ill-suited to application in position bias cases.

147. *Id.* at 25-26. The court explicitly noted that the purpose of the Illinois scheme was to

The decision in *Shakman v. Democratic Organization of Cook County*[148] sheds light on the first prong of the *Bohus* test. *Shakman* attempted to define the meaning of "advantage" under the *Bohus* test. The court ruled that a showing of massive electoral advantage in top placement on the ballot is not required.[149] However, the plaintiff in ballot placement cases is required to show that first place position confers an actual, "significant" advantage.[150] This test amounts to something more than a showing of a *de minimus* effect and can be satisfied if the plaintiff shows that top position is "one of a number of factors which tend to affect the outcome of an election, and which may have a substantial effect although the degree varies with the circumstances."[151] Thus, plaintiff's burden of proof does not appear to be heavy, given the volume of political science studies which have detected position bias.[152]

V. CONCLUSION

Case law reveals that position statutes may be analyzed in three ways. The majority approach is to apply a minimum rationality test in which the state interest is usually found to be sufficiently strong to warrant upholding the statute. At the other end of the spectrum, some courts apply a form of strict scrutiny. In these cases, the interests of the state are given primary consideration. As a result, courts invoking strict scrutiny usually strike down laws reserving the top position for a particular type of candidate. Finally, courts in the Seventh Circuit have developed their own two-part test to apply in ballot position cases. Currently, little agreement exists among the courts regarding just what rights are infringed by position statutes and how important those rights are. This disagreement is evidenced by the three tests which are currently applied in position cases.

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prevent voter confusion. Arguably, the result may have been different had there been evidence of another purpose which was to benefit certain candidates.

148. 481 F. Supp. 1315 (N.D. Ill. 1979).

149. *Id.* at 1336.

150. *Id.* at 1337.

151. *Id.* (quoting Weisberg v. Powell, 417 F.2d 388, 392 (7th Cir. 1969)).

152. *See supra* notes 20-24 and accompanying text.

APPENDIX I

In order to compare the vote total of each candidate while occupying a different position on the ballot, Bain and Hecock (see note 3) compensate for the difference in vote totals between ballot formats as follows:

	Format		
	Candidate 1	Candidate 2	Candidate 3
Ballot	Candidate 2	Candidate 3	Candidate 1
Position	Candidate 3	Candidate 1	Candidate 2
1	A_1	B_1	C_1
2	B_2	C_2	A_2
3	C_3	A_3	B_3
Format total	T_I	T_{II}	T_{III}

Total vote = N; m = number of candidates

A_1 = the number of votes Candidate 1 received while in first position, A_2 = the number of votes Candidate 1 received while in second position, etc. T_I = the total number of votes cast on the ballot listing Candidates 1, 2, and 3, in that order. Bain and Hecock equalize the Format totals in order to see if one candidate received more votes than expected while occupying a certain position. The formula

$$C_1' = C_1(N/m)/T_I \; ; \; C_2' = C_2(N/m)/T_{II}$$

gives the vote each candidate would have gotten if each ballot format had been used an equal number of times. Using this formula, the first table is transformed into

	Format			
	Candidate 1	Candidate 2	Candidate 3	
Ballot	Candidate 2	Candidate 3	Candidate 1	
Position	Candidate 3	Candidate 1	Candidate 2	
1	A_1'	B_1'	C_1'	T_1'
2	B_2'	C_2'	A_2'	T_2'
3	C_3'	A_3'	B_3'	T_3'
Format total	T_I'	T_{II}'	T_{III}'	

Then, absent any position bias, the first position on the ballots should have received the expected adjusted vote (T_1 should equal T_1'). For example, using election returns from a race between two candidates and a rotated ballot, the raw vote results are:

Ballot Position	Format: Candidate 1 Candidate 2	Candidate 2 Candidate 1
1	$A_1=13523$	$B_1=15609$
2	$B_2=16308$	$A_2=11670$
Adjusted Format Total	$T_I=29831$	$T_{II}=27279$

$N=57110$, $m=2$

Equalized format totals using the formulas above give:

Ballot Position	Format: Candidate 1 Candidate 2	Candidate 2 Candidate 1	
1	$A'_1=12945$	$B'_1=16339$	$T'_1=29284$
2	$B'_2=15610$	$A'_2=12216$	$T'_2=27826$
	$T'_I=28555$	$T'_{II}=28555$	

If there were no position bias, then total vote the first position received, T'_1, should equal the expected vote total, T'_I. In this example, the total vote for the first position exceeds the expected vote total by 2.5%, which indicates position bias.

See Note, *California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents*, 45 S. CAL. L. REV. 365, 392 (1972).

APPENDIX II

Some of Darcy's (see note 9) returns are as follows:

First Position	Republican	Democrat	n=votes cast
President			
Republican	48.10%	51.89%	101,712
Democrat	48.29%	51.70%	102,470
U.S. Senate			
Republican	49.23%	50.72%	98,813
Democrat	49.67%	50.33%	99.015
U.S. Congress			
Republican	35.96%	64.04%	93,437
Democrat	37.31%	62.69%	94,316
District Attorney			
Republican	30.26%	69.74%	90,517
Democrat	30.26%	69.74%	90.194
Represent. Dist. 36			
Republican	50.41%	49.59%	7,282
Democrat	49.44%	50.56%	7,184

In the race for President, the Republican received 48.10% of the votes cast on the ballots on which he was listed first. When the positions were switched, the Democrat received 51.70% of the vote. The Presidential race shows evidence of position bias because the percentage of the vote each candidate received varied as their position on the ballot changed.

With the exception of the District Attorney's race, this sampling of elections show position bias in each race. However, the percentages of the votes received by each candidate also shows that bias was not the determinative factor in the elections, with the exception of the District 36 Representative race, which was won by the Democrat. When the Democrat was listed first, he outpolled his challenger; yet when the Democrat was listed second, the Republican prevailed. The slight variations in the percentage of the vote each candidate received shows that the race was very close. Therefore, *any* position bias, even a statistically insignificant effect, could change the outcome of the election.

Applying Bain and Hecock's transformation to the District 36 race bears this out. Their method shows that the first position received 1.0096% of the expected adjusted vote, which is much less than other races Darcy studied. Nevertheless, because the Democrat won this race by only twenty votes, *any* position effect could have determined the outcome of the election.