Florida Law Review

Volume 28 | Issue 3 Article 10

March 1967

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tives authorizing a nonconforming activity in a particular area.[110] Thus, subject to application of the balancing-of-interests test by zoning authorities and the courts, a county or municipality is bound by its own zoning regulations;[111] one governmental body owning property within the jurisdiction of another governmental body is subject to the zoning regulations of the host government;[112] and the state's immunity from regulation in the use of its property within other governmental bodies is no longer absolute.[113]

The balancing-of-interests test should not be applied by administrative agencies or by the courts as the legislative intent test has been in other jurisdictions[114] — a hollow formality that gives lip-service to the rights of the local community but that in effect continues to effectuate the superior sovereign concept.[115] The ever increasing growth of state government and its agencies and a corresponding increase in land acquisition by purchase or lease by state agencies have made total governmental immunity to zoning an increasing threat to local community interests. The Florida supreme court's adoption of the balancing-of-interests test and rejection of the antiquated superior sovereign approach will hopefully protect valid local and state interests, which inevitably will conflict in the future to an even greater extent than in the past.

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EQUAL PROTECTION IN BALLOT POSITIONING

An electorate's unfettered exercise of its franchise is crucial to the continued viability of a democratic society.[1] The United States Supreme Court in

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State Has Power to Overrule Restrictive Local Ordinances and Provide for Low and Moderate Income Housing, 52 J. URB. L. 811 (1975).

110. Hillsborough Ass'n for Retarded Citizens, Inc. v. City of Temple Terrace, 332 So. 2d 610 (Fla. 1976).

111. Parkway Towers Condominium Ass'n v. Metropolitan Dade County, 295 So. 2d 295 (Fla. 1974). *See also* OP. ATT'Y GEN. FLA. 075-170 (1975).

112. Orange County v. City of Apopka, 299 So. 2d 652 (4th D.C.A. Fla. 1974).

113. City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens, Inc., 322 So. 2d 571 (2d D.C.A. Fla. 1975), *aff'd*, 332 So. 2d 610 (Fla. 1976).

114. See note 45 *supra*.

115. *See* Long Branch Div. of United Civic & Taxpayers Organization v. Cowan, 119 N.J. Super. 306, 291 A.2d 381, *cert. denied*, 62 N.J. 86, 299 A.2d 84 (1972). *See also* City of Newark v. University of Del., 304 A.2d 347 (Ch. Del. 1973). The courts in these cases espoused examination of legislative intent but summarily concluded that such intent existed without stating how this conclusion had been reached.

1. *See* Gould v. Grubb, 14 Cal. 3d 661, 677, 536 P.2d 1337, 1348, 122 Cal. Rptr. 377, 388 (1975) (Tobriner, J.): "A fundamental goal of a democratic society is to attain the free and pure expression of the voters' choice of candidates. To that end, our state and federal Constitutions mandate that the government must, if possible, avoid any feature that might adulterate or, indeed, frustrate, that free and pure choice; the state must eschew arbitrary preferment of one candidate over another . . . . [T]he voters' selection must remain untainted by extraneous artificial advantages imposed by weighted procedures of the election process."

Harper v. Virginia Board of Elections[2] forcefully ruled that the exaction of a fee, however small, as a prerequisite to voting was unconstitutional.[3] Though the citizenry is free to vote, governmental interference can still permeate the electoral decision-making process. This commentary will explore the possibility that the outcomes of many closely contested elections are determined by a factor totally unrelated to campaign issues, candidates' personalities, or voters' personal biases. That factor is the order in which candidates' names appear on the electoral ballot.[4]

Access to the Ballot: The Guarantee of Equal Protection

The law presently dictates that all bona fide candidates are entitled as a matter of right to a position on the ballot, inasmuch as voters are constitutionally guaranteed the right to discriminatorily select their leaders from the citizenry's rank and file.[5] To limit the number of names on the ballot would restrict the exercise of the voters' selection process. The Supreme Court has

2. 383 U.S. 663 (1966).

3. The Supreme Court has held consistently that any state activity limiting the individual's exercise of his fundamental right to vote would be subjected to a test of strict judicial scrutiny and that unless the state could prove a compelling governmental justification for such a limitation, the state activity would be rejected as a violation of the equal protection clause of the fourteenth amendment. *See* Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 627 (1969) (states may not exclude otherwise qualified voters from limited purpose elections unless "the exclusions are necessary to promote a compelling state interest"). When the Court reviews statutes that infringe on the right to vote, "the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable." *Id.* at 627-28 (footnote omitted). *See* McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969) (the Court held that "because of the overriding importance of voting rights, classifications 'which might invade or restrain them must be closely scrutinized and carefully confined' where those rights are asserted under the Equal Protection Clause."); Reynolds v. Sims, 377 U.S. 533, 562 (1964) ("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."). *See also* O'Brien v. Skinner, 414 U.S. 524, 533 (1974) (Marshall, Douglas, and Brennan, JJ., concurring) (the Court invalidated a New York practice in which pre-trial detainees and convicted misdemeanants confined in the county of their residence were not afforded a means to vote); Kusper v. Pontikes, 414 U.S. 51 (1973) (the Court employed the strict scrutiny test to invalidate an Illinois statute that prohibited a person from voting in the primary election of a political party if he had voted in the primary of any other party within the preceding 23 months); Goosby v. Osser, 409 U.S. 512 (1973) (a Pennsylvania statute was invalidated that prohibited pre-trial detainees from voting).

4. This is commonly referred to as "position effect" or "order effect." See note 24 *infra*.

5. Williams v. Rhodes, 393 U.S. 23 (1968). "[B]urdensome [ballot access] procedures . . . operate to prevent . . . [vocal political minorities] from ever getting on the ballot and . . . thus den[y] the 'disaffected' not only a choice of leadership but a choice on the issues as well." *Id.* at 33. "[B]y denying the appellants any [effective] opportunity to participate in the [electoral] procedure . . . the State . . . [is] thereby depriving appellants of much of the substance, if not the form, of their protected rights. The right to have one's voice heard and one's views considered by the appropriate governmental authority is at the core of the right of political association." *Id.* at 41 (Harlan, J., concurring). See text accompanying note 8 *infra*.

recognized that substantial equal protection rights of voters can be violated by state action affording preferential treatment to specified classes of candidates. In *Williams v. Rhodes*,[6] the Court examined an Ohio statute that provided that a new political party seeking a place on the ballot must present to state officials by February of the election year petitions signed by qualified electors totaling 15 percent of the number of ballots cast in the last gubernatorial election.[7] The opinion gave the following interpretation of the Ohio statute:

> In the present situation the state laws place burdens on two different, although overlapping, kinds of rights — the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters . . . *to cast their votes effectively* . . . . [Both the freedom of association and the right to vote are] entitled under the Fourteenth [Amendment's Equal Protection Clause] to . . . protection from infringement by the States.[8]

The State of Ohio was required to show "a compelling state interest" in order to justify the imposition of any limitations on the constitutionally protected rights of association and on the effective exercise of the franchise.[9] Thus, the Court applied the strict scrutiny test of judicial review, which is mandated whenever the Court perceives fundamental rights being threatened by state action.[10]

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6. 393 U.S. 23 (1968).

7. OHIO REV. CODE ANN. §3517.01 (1960). "[T]hese various restrictive provisions make it virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties. These two Parties face substantially smaller burdens because they are allowed to retain their positions on the ballot simply by obtaining 10% of the votes in the last gubernatorial election and need not obtain any signature petitions." 393 U.S. at 25-26. *See also* Socialist Labor Party v. Rhodes, 290 F. Supp. 983, 995 (S.D. Ohio 1968) (Kinneary, J., dissenting).

8. 393 U.S. at 30-31 (emphasis added).

9. *Id.* at 31. Ohio failed to show any compelling state interest.

10. Justice Marshall has advocated a rejection of the Court's self-imposed and rigidly observed, two-tiered approach to equal protection challenges. Instead of subjecting state activity that affects fundamental interests to a test of whether a compelling state interest is involved and subjecting all other challenges against state action to the test of whether a mere legitimate governmental purpose is involved, Justice Marshall would apply a sliding scale approach involving varying degrees of judicial scrutiny "depending . . . on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting). Thus, the strict scrutiny test would not necessarily be limited to established fundamental rights under the Constitution. Instead, the proper test would be as follows: "As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly." *Id.* at 102-03. Justice White has voiced his agreement with this approach: "I am uncomfortable with the dichotomy [between the two equal protection standards of review], for it must now be obvious, or has been all along, that, as the Court's assessment of the weight and value of the individual interest escalates, the less likely it is that mere administrative convenience and avoidance of hearings or investigations will be sufficient to justify what otherwise would appear to be irrational discrimination." Vlandis v. Kline, 412 U.S. 441, 458-59 (1973) (White, J., concurring).

In the subsequent case of *American Party v. White*,[11] the Supreme Court again applied the strict scrutiny test to state action in the area of elections, holding that it was an "arbitrary discrimination violative of the Equal Protection Clause"[12] for the State of Texas to limit access to its absentee ballots to candidates who represented the two major parties.[13] Such limitation of ballot access to candidates was interpreted by the Court as "denying the privilege [to vote] to . . . classes of otherwise qualified *voters* in similar circumstances, without affording a comparable alternative means to vote . . . ."[14] Thus, the Supreme Court has viewed state action that is not necessitated by a compelling governmental interest and that restricts the right of voters to cast their votes effectively[15] as violative of the equal protection clause. Moreover, the Court has determined that denial of ballot access to a candidate is violative of a voter's constitutional right to exercise his franchise.[16] If the listing of candidates in a specified order necessarily engenders disadvantageous ballot positions that lead to a demonstrable loss of votes, then state action mandating candidate order on the ballot violates voters' constitutionally protected right to an effective exercise of the franchise. The factual issue in this argument is whether order or position on the ballot can favor one candidate over another and consequently determine the outcome of a closely contested election.

Psychological Order Preference: A Response to Forced Decision-Making

Although one cannot predict how an individual will act in a given instance, studies have shown that people exhibit psychological preferences for certain arguments or points of view keyed to the order in which they are presented. A complicated series of experiments on this subject is outlined in a 1957 Institute of Human Relations study.[17] One set of experiments conducted by Abraham S. Luchins concentrated on "Primacy-Recency in Impression Formation":[18] whether persons who receive diverse sensory impressions are influenced to a greater extent by those impressions perceived first or last. In one controlled experiment, high school and college students were presented with printed descriptions of the activities of a hypothetical character

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11. 415 U.S. 767 (1974).

12. *Id.* at 795.

13. In support of such a practice, the State of Texas cited the additional expense that would result from printing the names of minority and independent candidates on its absentee ballots. The Court summarily rejected the argument. *Id.* at 794-95.

14. *Id.* at 795 (emphasis added). The Court refused to rely "on the presumption of constitutionality of state laws." *Id.* at 794. *See also* Storer v. Brown, 415 U.S. 724, 738-46 (1974) (case remanded to the district court to determine whether an unconstitutional burden was placed on plaintiff's access to the ballot, in view of the fact that within a 24-hour period a candidate was required to gather signatures from the pool of electors who had *not* voted in the preceding primaries of the established parties).

15. See text accompanying note 8 *supra*.

16. See text accompanying note 14 *supra*.

17. C. Hovland, The Order of Presentation in Persuasion (Yale Studies in Attitude and Communication No. 1, 1957) [hereinafter cited as C. Hovland].

18. A. Luchins, *Primacy-Recency in Impression Formation*, in C. Hovland 33.

named Jim. Each student read two short paragraphs about Jim. While one paragraph described a friendly, extroverted Jim, the other depicted a withdrawn, introverted character. Approximately half the students read the description of Jim's extroverted activities first and then read of his introverted activities. The other half read the paragraphs in reverse order. The students were then asked to describe Jim as either a friendly or an unfriendly person. According to Mr. Luchins:

> For all . . . groups studied, each of the two indices pointed to primacy, to the greater influence of the lead block. Each of the differences is statistically significant. While there were some subjects who showed recency effects, on the whole primacy prevailed over recency, regardless of whether the [extroversive] or the [introversive] block came first. An extremely large primacy effect is clearly shown.[19]

The quantitative results of this experiment point rather dramatically to the primacy effect: 78 percent of those students who read the extroversive paragraph first described Jim as friendly, but only 18 percent of those who read the introversive description first felt that Jim was a friendly person. Similarly, while 63 percent of the subjects who first perceived Jim as unfriendly stayed with that opinion, only 11 percent of the students who were first introduced to the friendly character conceived of him as unfriendly after reading both paragraphs.[20]

Studies have also been made to test whether the positions of alternative responses to a questionnaire bear any relationship to the answer one might select. One study recorded the following result: in printed lists containing a variety of ideas or statements, respondents are "disposed to select the statements at the extreme positions . . . favor[ing] the top of the list more than the bottom."[21] The more difficulty an individual encounters in answering a question, the higher the probability that the order of alternate responses will determine his final selection. For example, in one opinion poll the answers to seven difficult questions varied significantly in relation to the order in which the alternatives were presented; in contrast, answers to nine simple questions showed little relation to the order in which presented.[22] In another instance the order in which possible "yes" — "no" responses were presented

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19. *Id.* at 39-40.

20. *Id.* at 40, Table 6. Those students comprising the remainder of the 100% in each category were unable to formulate an opinion as to Jim's personality.

21. S. PAYNE, THE ART OF ASKING QUESTIONS 84 (1951).

22. Payne, *Case Study in Question Complexity*, 13 PUB. OPINION Q. 653-58 (1949). The substantive result of the experiment was that alternatives offered as answers to the difficult questions were more frequently chosen when they were listed last. *Id.* at 656. In another experiment concerned with the significance of position effect in relation to how one answers a multiple choice test, the following conclusion was reached: "In items where the answers are pure guesses the position of the misleads [intentionally incorrect answers] is a distinct factor in the ones which are selected. In such a selection a definite pattern is found, positions 1, 5, 3, 4, 2 being chosen with decreasing frequency in that order." Atwell & Wells, *Wide Range Multiple Choice Vocabulary Tests*, 21 J. APPLIED PSY. 550, 553 (1937).

to children had a bearing on their choice. The more difficult the question, the more likely each child would be to prefer the first alternative presented.[23]

EXPERIMENTAL PROOF OF ORDER PREFERENCE IN VOTING

If the difficulties certain voters perceive when choosing among unfamiliar candidates corresponds to the difficulties in survey questions, then position on the ballot may have the same determinative effect that the order of alternate responses did in the experiments outlined above. The authoritative study on the effect that the ordering of candidates' names on the ballot had on their subsequent success in an election was conducted in 1957 by Henry M. Bain and Donald S. Hecock.[24] This report analyzed specific elections that took place in cities and counties in Michigan from 1951 to 1952. The authors began with the hypothesis: "Under the same conditions, the number of votes cast for . . . a . . . candidate when appearing in first position will be greater than N/m."[25] (*N* equals the total of votes cast for a candidate in an election for which there are *m* number of positions or candidates on the ballot.) This ratio, corresponding to the "percentage of the vote to be expected in the absence of position effect,"[26] is the tool that the authors utilized to simplify the reporting of their results. If the position or order effect for two candidates in a single ballot position is identical, this is not evidence that they each

23. Mathews, *The Effect of Position of Printed Response Words Upon Children's Answers to Questions in Two-Response Types of Tests*, 18 J. ED. PSY. 445 (1927). As to all questions, both difficult and simple, the average preference for the first alternative was 3.2 percent greater than would be expected in the absence of position effect. *Id.* at 453. Mathews notes that the "probable error of this [3.2 percent] difference shows that it could not occur by chance. Furthermore, the difference in every group of questions, except one, favors the response printed to the left." *Id.* at 453-54. He speculated as to the reason for the preference for the first printed alternative. "Children are taught to read from left to right and from the top to the bottom of a page or column. The word which appears at the top or left, in this sense, is the first word. In dealing with facts among which we cannot discriminate, such as a preference for beauty, interest or correctness, perhaps these reading habits cause us to be satisfied more often with the first response suggested." *Id.* at 455. A similar degree of preference has been noted in Australian elections. "[It has been] convincingly demonstrated that a donkey vote [the vote attributable to a candidate's position on the ballot] does exist in elections for the [Australian] House [of Representatives] . . . . [T]he vote for minor parties and independents [has been analyzed in the following circumstances]: on the one hand when they headed the ballot paper and thus derived benefit from the donkey vote, on the other when they did not . . . . [T]here was roughly a 3% advantage to be gained from holding the top position on the paper . . . . The donkey vote is by no means a trivial problem. In 1961, an alteration of the order of the names on the ballot paper would have changed the result in seven seats . . . ." Masterman, *The Effect of the "Donkey Vote" on the House of Representatives*, 10 AUST. J. POL. & HIST. 221, 225 (1964), *citing* DEP'T OF GOV'T, AUST. POL. STUDIES ASSOC. MONOGRAPH NO. 6 (1963).

24. H. BAIN & D. HECOCK, BALLOT POSITION AND VOTER'S CHOICE: THE ARRANGEMENT OF NAMES ON THE BALLOT AND ITS EFFECT ON THE VOTER (1957) [hereinafter cited as H. BAIN & D. HECOCK]. *See* Note, *California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents*, 45 S. CAL. L. REV. 365 (1972) (a subsequent study of the determinative effect ballot position had on certain California elections).

25. H. BAIN & D. HECOCK 57.

26. *Id.* at 55.

received the same number of votes when located in that position. Instead, it establishes that each candidate received the same percentage of *his* total voter support when listed in that position. For example, it might be discovered that each of two candidates received 50 percent of *his* total votes when listed in the first of four ballot positions and only 12.5 percent of *his* total when listed in the fourth position. Inasmuch as in the absence of position effect one would expect each candidate to receive 25 percent of *his* total vote in each of the four ballot positions (N/m), the position effect would be 200 percent for each candidate when listed in the first position (since each received twice as many votes as would naturally be expected when so listed) and 50 percent for each candidate when listed in the fourth position (since each received half as many votes when listed in this position as would be the case were ballot position to exert no influence on voters).

Two elections were initially analyzed. In one, a nonpartisan election for the city commission of Kalamazoo,[27] the results showed a nonconclusive voter preference for the first 3 of 15 ballot positions. It is significant, however, that the city commission race was the only one on the ballot in this specific election.[28] For those who made the effort to vote, it should not have been

27. *Id.* at 56, Table 11, reprinted below.

TABLE 11

Non-partisan election for City Commission, Kalamazoo, November 6, 1951

Ballot format: Paper ballot, for this office alone, listing 15 names in a single column, without other identification of the candidates, seven to be elected.
Sample: 15 precincts; 22,345 votes (3603 ballots), representing approximately one-half of the vote cast.

Position	Votes	Percentage of expected
1	1,564	104.99
2	1,555	104.39
3	1,540	103.38
4	1,488	99.89
5	1,493	100.22
6	1,491	100.09
7	1,415	94.99
8	1,449	97.27
9	1,461	98.08
10	1,467	98.48
11	1,451	97.40
12	1,486	99.75
13	1,494	100.29
14	1,476	99.08
15	1,515	101.70
Total	22,345	

The expected vote would equal the total number of votes (22,345) divided by the number of positions (15).

28. *Id.* at 59.

a difficult decision. Thus, position effect was negligible. The second election for probate judge in Detroit[29] was part of a ballot on which voters were asked to select their party's nominees for governor and senator, among other offices.[30] The results were much more conclusive. There was a decided voter preference for the first position of the ballot. A logical conclusion would be that, while many voters were drawn to the polls by the gubernatorial and senatorial races, it might have been more difficult for them to choose among the relatively obscure candidates for probate judge. Perhaps at this point, they fulfilled their civic duty by quickly selecting the first name presented, an action that would display the nature of position effect.

After these studies the authors presented an impressive array of minutely detailed and carefully analyzed election results. Their methodology entailed four additional hypotheses. The first hypothesis[31] was the following: "Under the same conditions, as the number of candidates is increased, the number of positions for which the total vote is greater than N/m [the total vote in the absence of position effect] will increase, but not more than half as fast."[32] To test this hypothesis, the authors analyzed the results of Wayne County Republican and Democratic Primaries for August 5, 1952.[33] The authors concluded that:

> [T]he positions immediately following the first may be favored as the list grows longer . . . [and] it appears that position effect may cause the

29. *Id.* at 58, Table 12, reprinted below.

TABLE 12

Non-partisan election (combined with party primary) for Judge of Probate, Detroit, August 5, 1952

Ballot format: Paper ballot, for this office alone, listing 9 candidates in a single column, three to be elected.

Sample: 41 precincts chosen at random from 1334 precincts using paper ballots (1480 precincts in the city); 32,956 votes (13,505 ballots) out of 1,159,907 votes cast.

Position	Votes	Percentage of expected
1	4,472	122.13
2	3,913	106.86
3	3,742	102.19
4	3,588	97.99
5	3,488	95.25
6	3,360	91.76
7	3,317	90.58
8	3,428	93.62
9	3,648	99.62
Total	32,956	

30. *Id.* at 59.
31. Hypotheses are renumbered for convenience of presentation in the instant format.
32. H. BAIN & D. HECOCK 60.
33. *Id.* at 63, 65, Tables 13 and 14, reprinted below.

TABLE 13

Republican primary for U.S. Representative, Detroit, August 5, 1952

Election: Republican primary for 15 national, state, and local offices.
Office: U.S. Representative, from the 5 Detroit Congressional districts.
Ballot format: Candidates were listed in the left-hand column of a four-column paper ballot.
Sample: Varying numbers of ballots and precincts, as shown below.

Position	15th Cong. Dist. Vote	15th Cong. Dist. Percentage of expected	13th Cong. Dist. Vote	13th Cong. Dist. Percentage of expected	16th Cong. Dist. Vote	16th Cong. Dist. Percentage of expected	14th Cong. Dist. Vote	14th Cong. Dist. Percentage of expected	17th Cong. Dist. Vote	17th Cong. Dist. Percentage of expected
1	445	132.84	189	126.00	250	130.89	318	130.18	290	132.76
2	307	91.64	161	107.33	213	111.52	255	104.39	246	112.61
3	299	89.25	142	94.67	172	90.05	267	109.30	218	99.80
4	289	86.27	132	88.00	174	91.10	224	91.70	237	108.49
5			126	84.00	165	86.39	226	92.51	204	93.39
6					172	90.05	227	92.92	196	89.72
7							193	79.00	193	88.35
8									191	87.44
9									191	87.44
Blank	357		114		214		160		158	
Total	1697		864		1360		1870		2124	

TABLE 14

Democratic primary for state Senator, Detroit, August 5, 1952

Election: Democratic primary for 15 national, state, and local offices.
Office: State Senator, from 3 Detroit districts.
Ballot format: Candidates were listed in the left-hand column of a four-column paper ballot.
Sample: Varying numbers of ballots and precincts, as shown below.

Position	1st State Senatorial District Vote	1st State Senatorial District Percentage of expected	4th State Senatorial District Vote	4th State Senatorial District Percentage of expected	2nd State Senatorial District Vote	2nd State Senatorial District Percentage of expected
1	1030	111.91	253	162.88	363	129.85
2	894	97.14	146	93.99	315	112.68
3	837	90.95	154	99.14	300	107.31
4			123	79.18	273	97.66
5			111	71.46	266	95.15
6			145	93.35	235	84.06
7					250	89.43
8					248	88.71
9					266	95.15
Blank	610		367		644	
Total	3371		1299		3160	

> curve representing the distribution of votes [versus position] to take the form of a reversed J when the list of candidates is long, and that shortening the list has the effect of removing successive segments of the curve, beginning at the right-hand end.
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> . . . In the nine-man contest the second and third positions also receive a larger vote than that to be expected in the absence of position effect. In both the six- and the nine-man contests the last position receives a markedly greater vote than the positions immediately preceding it . . . .[34]

The second hypothesis was that "[i]n non-partisan elections the magnitude of position effect will vary inversely with the educational level of the voting population."[35] The results of the 1952 Detroit election for probate judge were again reviewed to test the foregoing hypothesis. The percentage of the expected vote in the absence of position effect for the first position in this nine-man race was found to range from 130.89 percent among those voters with the least formal education to 118.02 percent for the most educated voters. Positions two, three, four, and nine also substantially benefited from position effect.[36] These results clearly support the hypotheses previously submitted—

34. *Id.* at 64.

35. *Id.* at 66. Compare this hypothesis with studies on order preference in relation to difficulty of question. See text accompanying note 22 *supra.*

36. *Id.* at 67, Table 15, reprinted below.

TABLE 15

Vote by educational level, non-partisan election for Judge of Probate, Detroit, August 5, 1952
Source: Same as Table 13, except for the omission of three precincts for which data on educational level were inadequate.

Group of precincts	I		II		III		IV	
Median school years completed in 1950, in corresponding census tracts (range for precincts in group)	7.5 to 8.7		9.0 to 9.4		9.6 to 10.7		11.1 to 12.8	
Number of precincts	10		9		9		10	
Number of ballots cast	3123		2987		3118		3373	
Position	Vote	Percentage of expected	Vote	Percentage of expected	Vote	Percentage of expected	Vote	Percentage of expected
1	1015	130.89	977	119.50	1067	121.34	1109	118.02
2	805	103.81	905	110.70	927	105.42	1009	107.38
3	794	102.39	829	101.40	908	103.26	945	100.57
4	741	95.56	821	100.42	864	98.26	927	98.65
5	714	92.08	782	95.65	826	93.93	923	98.23
6	725	93.49	720	88.07	827	94.05	869	92.48
7	683	88.08	765	93.57	773	87.91	867	92.27
8	714	92.08	778	95.16	828	94.16	882	93.86
9	788	101.62	781	95.53	894	101.67	926	98.54
Total	6979		7358		7914		8457	

that the number of votes cast for all candidates when appearing in first position will be greater than that to be expected in the absence of position effect and that certain positions other than the first will be preferred by the voter but to a lesser degree. With voters of all levels of education achievement, the curve representing voter preference versus position on the ballot seems to take the form of a reversed J.[37]

Third, the researchers tested the hypothesis that "[t]he magnitude of position effect will vary among different offices inversely with the extent to which the incumbents of those offices are brought to the attention of the public in their performance of their official duties."[38] This hypothesis is directly related to the results noted earlier[39] that showed a direct correlation between difficulty of question and preference for either the first or the last offered alternative. To test this hypothesis Bain and Hecock undertook to analyze the results of the August 5, 1952, Detroit Republican primaries for Lieutenant Governor, United States Senator, county clerk, and drain commissioner.[40] The authors' hypothesis appears supported by the fact that the least position effect occurred in the race for the well-recognized office of United States Senator. The other offices in order of decreasing position effect were Lieutenant Governor followed by drain commissioner and county clerk. Although it is reasonable to believe that the clerk's duties are quickly perceived by the voters because his signature and seal are required to be

37. See text accompanying note 34 *supra*.
38. H. BAIN & D. HECOCK 68.
39. See note 22 *supra* and accompanying text.
40. H. BAIN & D. HECOCK 70, Table 16, reprinted below.

TABLE 16

Republican primary for Lieutenant Governor, U.S. Senator, County Clerk, and Drain Commissioner, Detroit, August 5, 1952, paper ballot

Election: Republican primary for 15 national, state, and local offices.
Ballot format: Candidates for Lieutenant Governor and U.S. Senator were listed in the left-hand column and for the other two offices in the right-hand column, of a 4-column paper ballot.
Sample: 54 precincts, chosen at random from 1480 precincts in the city. 6697 ballots, containing 6307 votes for U.S. Senator, out of 186,369 votes cast for U.S. Senator throughout the city.

	Lieutenant Governor		U.S. Senator		County Clerk		Drain Commissioner	
Position	Vote	Percentage of expected	Vote	Percentage of expected	Vote	Percentage of expected	Vote	Percentage of expected
1	1809	125.40	1699	107.76	1626	117.80	1634	123.98
2	1441	99.90	1541	97.73	1333	96.58	1268	96.21
3	1286	89.15	1576	99.95	1230	89.11	1145	86.87
4	1234	85.55	1491	94.56	1332	96.51	1225	92.94
Blank	927		390		1176		1425	
Total	6697		6697		6697		6697	

affixed to all public documents, it is less believable that the office of county drain commissioner has a higher rate of voter perception than that of Lieutenant Governor. Bain and Hecock attempt to account for this result by adducing that the low visibility ballot position occupied by the candidates for county drain commissioner meant that fewer undecided individuals actually voted for this office as compared with those who voted for Lieutenant Governor.[41]

The last hypothesis is that "[t]he magnitude of position effect for any one candidate will be less in his home town than elsewhere in the state."[42] This hypothesis is based on the belief that the more information one has at his disposal concerning a specific question, the less difficult his choice will be, and the least likelihood exists that he will be affected by such random variables as the ballot position of alternative choices. Results from the 1952 Republican primary for Lieutenant Governor in both Grand Rapids and Lansing, Michigan, yield strong support for this hypothesis.[43] Candidate Welsh, a resident of Grand Rapids, was subject to a significantly smaller degree of position effect in Grand Rapids than was candidate Reid. The result of their contest in Lansing, where neither was well known, showed a similar position effect for both. Each candidate received an equal percentage of *his* total votes when placed in each position. When one considers the results of voter preference both in Grand Rapids and Lansing, the evidence of position effect is too significant to be disregarded.

In the course of their study, Bain and Hecock also attempted to ascertain whether the grid or format of a voting machine would affect the degree of position effect that resulted from its use. They contrasted results derived from the Shoup voting machine used in Dearborn, Michigan, with the two automatic voting machines that were employed in Grand Rapids and Lansing. On the Shoup Machine,[44] (Figure 1) position effect favored Candidates 1 and 3, in that order, with Candidates 2 and 4 trailing the field.[45]

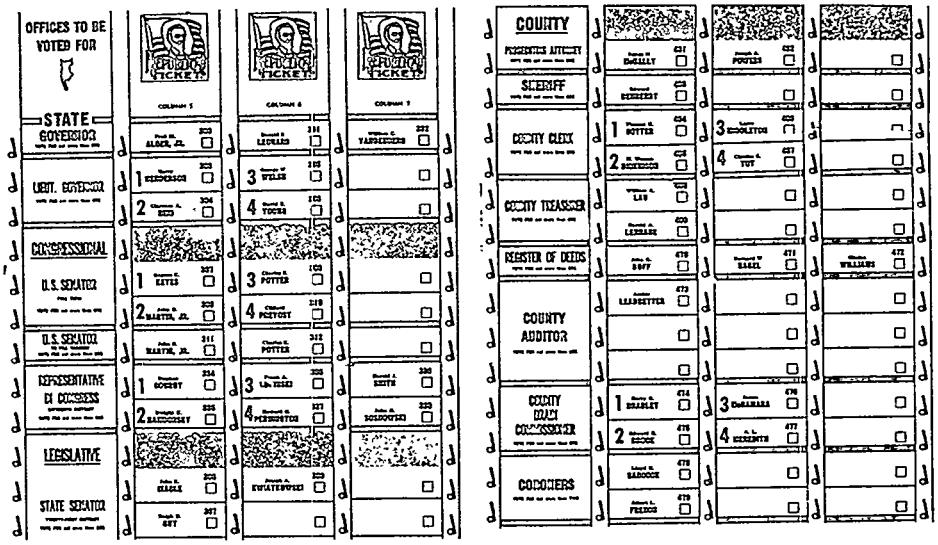
41. *Id.* at 71.
42. *Id.* at 84.
43. See H. BAIN & D. HECOCK 86, Table 26, reprinted below.

TABLE 26
Republican primary for Lieutenant Governor,
Grand Rapids and Lansing, August 5, 1952, voting machine

	Grand Rapids				Lansing			
	Reid		Welsh		Reid		Welsh	
Position	Vote	Percentage of expected	Vote	Percentage of expected	Vote	Percentage of expected	Vote	Percentage of expected
1	2806	123.98	2630	109.23	1813	153.27	1550	153.64
2	2740	121.07	2524	104.83	1728	142.11	1437	146.44
3	1709	75.51	2140	88.88	623	53.20	538	52.80
4	1798	79.44	2337	97.06	556	51.42	520	47.12
Total	9053		9631		4720		4045	

44. *Id.* at 77, Figure 4.
45. *Id.* at 76, Table 19, reprinted below.

FIGURE 1



Position effect was found to exist to a much larger degree in Lansing and Grand Rapids where the automatic voting machine was in use.[46] In Lansing the position effect from this machine format was staggering.[47]

In the Lansing contests for Lieutenant Governor, United States Senator, and State Representative the candidates listed in the first horizontal row were significantly preferred over their opponents listed in the second horizontal row. Though the same results obtain from the Grand Rapids machine, the

TABLE 19

Republican primary for Lieutenant Governor, U.S. Senator, County Clerk, and Drain Commissioner, Dearborn, August 5, 1952. voting machine

Election: Republican primary for 15 national, state, and county offices.
Ballot format: Shoup voting machine. Two columns of two names each.
Sample: At least 11,288 ballots, out of an undetermined total number of ballots, in all 22 precincts of the city.

Position	Lieutenant Governor Vote	Lieutenant Governor Percentage of expected	U.S. Senator Vote	U.S. Senator Percentage of expected	County Clerk Vote	County Clerk Percentage of expected	Drain Commissioner Vote	Drain Commissioner Percentage of expected
1	2093	118.42	3176	112.55	2742	114.79	3053	130.00
2	1653	93.52	2673	94.72	2417	101.14	2182	92.91
3	1807	102.23	2900	102.76	2345	98.17	2227	94.83
4	1517	85.83	2539	89.97	2051	85.90	1932	82.26
Total	7070		11,288		9555		9394	

46. *Id.* at 80, 82, Tables 21, 22, 23 reprinted below.
47. *Id.* Figure 6, following 80.

preference is of a smaller magnitude. Visual contemplation of the differences between the Lansing machine format (Figure 2) and the Grand Rapids machine format[48] (Figure 3) yields the reason.

A Republican voter in Grand Rapids easily perceived that his party was running four candidates for the Lieutenant Governorship, four candidates for the United States Senate, and five for State Representative. His counterpart in Lansing might reasonably but erroneously have concluded that the number of Republican candidates running for each of the above-mentioned offices was two, two, and three, respectively, if he did not bother to read

TABLE 21

Republican primary for Lieutenant Governor and U.S. Senator, Grand Rapids and Lansing, August 5, 1952, voting machine

Position	Grand Rapids Votes	Grand Rapids Percentage of expected	Lansing Votes	Lansing Percentage of expected
		Lieutenant Governor		
1	7893	122.34	6079	155.71
2	7715	119.58	5975	153.05
3	5021	77.82	1806	46.26
4	5178	80.26	1756	44.98
Total	25,807		15,616	
		U.S. Senator		
1	8002	119.79	5736	143.16
2	7980	119.47	5632	140.56
3	5256	78.69	2352	58.70
4	5481	82.05	2307	57.58
Total	26,719		16,027	

TABLE 22

Republican primary for state Representative, Grand Rapids and Lansing, August 5, 1952, voting machine

Position	Grand Rapids (3 to be elected) Vote	Grand Rapids Percentage of expected	Lansing (2 to be elected) Vote	Lansing Percentage of expected
1	12,843	120.55	6629	144.61
2	12,580	118.08	6502	141.84
3	12,257	115.05	6394	139.49
4	7,578	71.13	2593	56.57
5	8,011	75.19	2576	56.19
6			2810	61.30
Total	53,269		27,504	

48. *Id.* Figure 5, following 80.

FIGURE 2

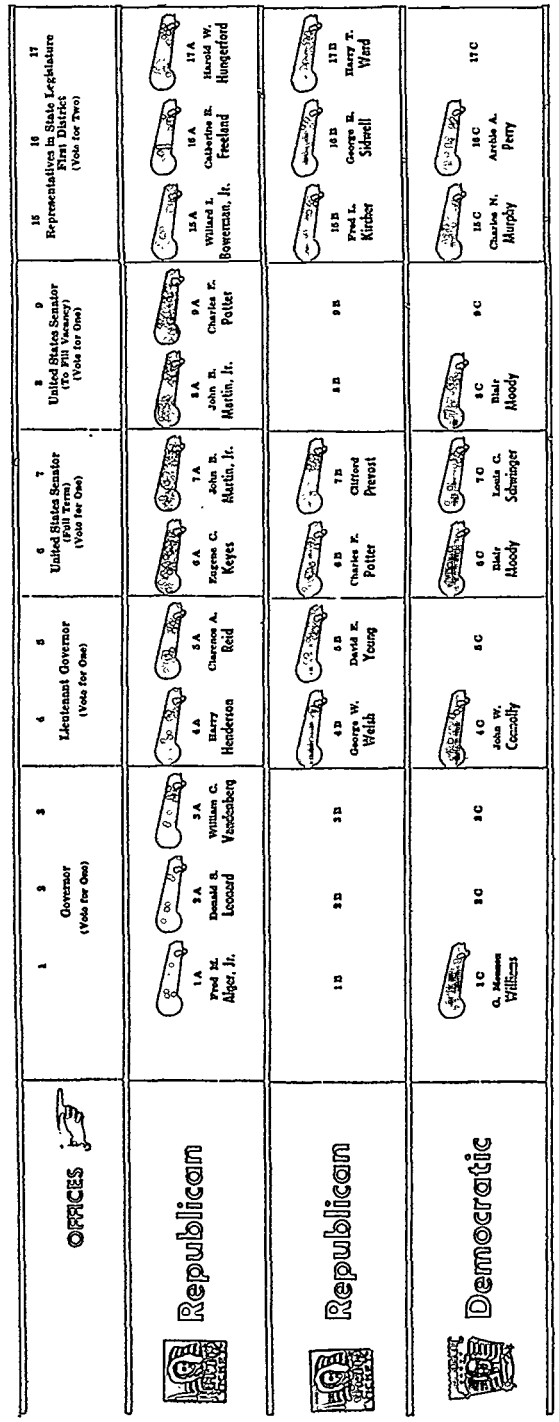

OFFICES
1 Governor (Vote for One)
4 Lieutenant Governor (Vote for One)
6 United States Senator (Full Term) (Vote for One)
8 United States Senator (To Fill Vacancy) (Vote for One)
15 16 17 Representatives in State Legislature First District (Vote for Two)
Republican
1A Fred M. Alger, Jr.
2A Donald S. Leonard
3A William C. Vandenberg
4A Harry Henderson
5A Clarence A. Reid
6A Eugene C. Keyes
7A John B. Martin, Jr.
8A John B. Martin, Jr.
9A Charles E. Potter
15A William L. Bowerman, Jr.
16A Catherine D. Freeland
17A Harold W. Hungerford
Republican
1B
2B
3B
4B George W. Walsh
5B David K. Young
6B Charles E. Potter
7B Clifford Pierpont
8B
9B
15B Fred L. Kircher
16B George E. Sidwell
17B Harry T. Ward
Democratic
1C C. Monroe Williams
2C
3C
4C John W. Cocnolly
5C
6C Blair Moody
7C Louis C. Schwinger
8C Blair Moody
9C
15C Charles N. Murphy
16C Archie A. Perry
17C

FIGURE 3

Name of Office Voted For ☞	GOVERNOR (Vote For Not More Than One)	LIEUTENANT GOVERNOR (Vote For Not More Than One)	UNITED STATES SENATOR (FULL TERM) (Vote for Not More Than One)	UNITED STATES SENATOR (TO FILL VACANCY) (Vote for Not More Than One)	REPRESENTATIVE IN CONGRESS FIFTH DISTRICT (Vote for Not More Than One)	Representative in State Legislature 1st DISTRICT (Vote For Not More Than Three)
REPUBLICAN TICKET REPUBLICAN PARTY	1 A Fred M. Alger, Jr.	2 A Donald S. Leonard	3 A Harry Henderson	4 A Clarence A. Reid	5 A Eugene C. Keyes	6 A John B. Martin, Jr.
	7 A John B. Martin, Jr.	8 A Charles E. Potter	9 A Gerald R. Ford, Jr.			
	13 A Andrew Bolt	14 A Edward A. Borgman	15 A Joseph A. Renihan			
	1 B William C. Vandenberg		3 B George W. Welsh	4 B David E. Young	5 B Charles E. Potter	6 B Clifford Prevost
	13 B Thomas J. Whinery	14 B Jon D. Witters				

Name of Office Voted For ☞	GOVERNOR (Vote for Not More Than One)	LIEUTENANT GOVERNOR (Vote for Not More Than One)	UNITED STATES SENATOR (FULL TERM) (Vote For Not More Than One)	UNITED STATES SENATOR (TO FILL VACANCY) (Vote for Not More Than One)	REPRESENTATIVE IN CONGRESS FIFTH DISTRICT (Vote For Not More Than One)	Representative in State Legislature 1st DISTRICT (Vote for Not More Than Three)
DEMOCRATIC PARTY DEMOCRATIC PARTY	1 E G. Mennen Williams	3 E John W. Connolly	5 E Blair Moody	6 E Louis C. Schwinger	7 E Blair Moody	9 E Vincent E. O'Neill
	13 E Hillary R. Bissell	14 E G. Don Stevens	15 E Berend Zevalkink			

through the entire ballot but merely noted that his party's candidates were listed on the top line and proceeded to vote accordingly. The Grand Rapids contest for Governor reflected a larger degree of position effect because candidate three was listed in the second horizontal row, whereas his visibility was greater in the third position of the first horizontal row of the Lansing machine.

EQUAL PROTECTION CHALLENGES TO PREFERENTIAL BALLOT POSITIONING

Challenges to incumbents' preferential treatment in the ordering of candidates' names on the ballot were presented to the California supreme court in 1973. In two per curiam decisions[49] the court discounted the argument that the preferential effect of an incumbent candidate's lead position on the ballot "is subject to such accurate determination by resort to sources of reasonably indisputable accuracy that it is not reasonably subject to dispute."[50] Thirty months later, the same court[51] reversed its earlier position. Justice Tobriner, architect of a fiery dissent in the two 1973 opinions,[52] wrote the unanimous turnabout decision in *Gould v. Grubb*.[53] The court noted in *Gould* that substantial and uncontroverted evidence had been introduced in the trial court to sustain the contention that "the top positions on an election ballot 'are advantageous vis-à-vis the other positions' . . . ."[54]

TABLE 23

Republican primary for Governor,
Grand Rapids and Lansing, August 5, 1952, voting machine

Position	Grand Rapids Vote	Grand Rapids Percentage of expected	Lansing Vote	Lansing Percentage of expected
1	10,510	111.50	5,879	104.52
2	9,436	100.11	5,693	101.21
3	8,332	88.39	5,303	94.27
Total	28,278		16,875	

49. Mexican-American Political Ass'n v. Brown, 8 Cal. 3d 733, 505 P.2d 204, 106 Cal. Rptr. 12 (1973) (Tobriner, J., dissenting); Diamond v. Allison, 8 Cal. 3d 736, 505 P.2d 205, 106 Cal. Rptr. 13 (1973) (Tobriner, J., dissenting).

50. Mexican-American Political Ass'n v. Brown, 8 Cal. 3d 733, 744, 505 P.2d 204, 205, 106 Cal. Rptr. 12, 13 (1973) (Tobriner, J., dissenting); Diamond v. Allison, 8 Cal. 3d 736, 737, 505 P.2d 205, 206, 106 Cal. Rptr. 13, 14 (1973) (Tobriner, J., dissenting).

51. In 1975 the only change from the 1973 court was that Justice Richardson replaced Justice Burke.

52. Justice Tobriner, in dissent, admonished his colleagues who had "dismiss[ed] the instant case[s] at this stage of the proceedings only by blinding themselves to the obvious, universally-recognized truth that a candidate is advantaged by having his name placed first on the ballot." Mexican-American Political Ass'n v. Brown, 8 Cal. 3d 733, 735, 505 P.2d 204, 205, 106 Cal. Rptr. 13, 13 (1973) (dissent applicable to both cases).

53. 14 Cal. 3d 661, 536 P.2d 1337, 122 Cal. Rptr. 377 (1975).

54. *Id.* at 667, 536 P.2d at 1340-41, 122 Cal. Rptr. at 380-81.

While recognizing that a municipality enjoys considerable discretion in administering elections[55] and that not all classifications established by election laws infringe on the fundamental right to vote,[56] the California supreme court determined that statutorily mandated preferential treatment in the listing of candidates on the ballot was inherently violative of equal protection. The challenged statutory scheme[57] automatically afforded the incumbent the top ballot position and thus "impose[d] a very 'real and appreciable impact' on the equality, fairness and integrity of the electoral process."[58] Such a procedure violated the equal protection of the law guaranteed to all voters who cast their ballots for non-incumbents since the effectiveness of their right to vote was diminished by the statute's unequal distribution of the votes determined purely on the basis of position effect.[59] The court subjected the challenged ballot positioning scheme to "strict judicial scrutiny"[60] and rejected the scheme on constitutional grounds[61] since the city could not demonstrate that placing the incumbent in the first ballot position was necessitated by a compelling governmental interest.[62]

The city first contended that it was necessary to place the incumbent at the top of the ballot to eliminate voter confusion[63] and assure efficient balloting,[64] inasmuch as many voters view an election as a vote of confidence for or against an incumbent. The court responded with the argument that an alternate, nondiscriminatory means was available by which the incumbent

55. *Id.* at 669, 536 P.2d at 1342, 122 Cal. Rptr. at 382.

56. *Id.* at 670, 536 P.2d at 1342-43, 122 Cal. Rptr. at 382-83.

57. Art. XIV, §1403 of the Charter of the City of Santa Monica incorporated CAL. ELEC. CODE §22870 (West 1961), reading in pertinent part: "The name of the incumbent shall appear first upon the list of all candidates for any office, and if two or more positions are to be filled at the same time and more than one incumbent is running, the name of each of the incumbents shall appear in alphabetical order followed by the names of all other candidates printed on the ballot in alphabetical order." 14 Cal. 3d at 665 n.3, 536 P.2d at 1339 n.3, 122 Cal. Rptr. at 379 n.3.

58. *Id.* at 670, 536 P.2d at 1343, 122 Cal. Rptr. at 383.

59. *Id.*

60. *Id.* at 672, 536 P.2d at 1344, 122 Cal. Rptr. at 384.

61. The court held that the statutory scheme infringed the voters' effective exercise of the franchise. *Id.*

62. *See* Dunn v. Blumstein, 405 U.S. 330 (1972) (invalidating Tennessee's durational residence requirement for voters). The Court held that three criteria must be analyzed in an equal protection challenge to voting laws: (1) the character of the classification in question; (2) the individual interests affected by the classification; and (3) the governmental interests asserted in support of the classification. *Id.* at 335. The Court concluded that the state must show a substantial and compelling reason for imposing durational residence requirements. "[A] heavy burden of justification is on the State, and . . . the statute will be closely scrutinized in light of its asserted purposes . . . . [I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference." *Id.* at 342-43.

63. 14 Cal. 3d at 672, 536 P.2d at 1344, 122 Cal. Rptr. at 834. In Holtzman v. Power, 62 Misc. 2d 1020, 1024, 313 N.Y.S.2d 904, 909 (Sup. Ct. 1970), *aff'd*, 27 N.Y.2d 628, 261 N.E.2d 666, 313 N.Y.S.2d 760 (1970), the court stated that "it would take an ultra-sophisticated electorate extremely knowledgeable in election procedures to ascertain that the top position is that of the present incumbent."

64. 14 Cal. 3d at 672, 536 P.2d at 1344, 122 Cal. Rptr. at 384.

could be identified, namely the statutory practice in California elections of allowing all candidates to list their present occupation or other similar identifying designation opposite their names on the ballot.[65] Second, it was argued that someone had to be placed in the top ballot position and that the city could therefore reasonably exercise its judgment in this regard.[66] The court pointed out, however, that ballot rotation, a system by which all candidates are placed in the top ballot position on an equal number of ballots, has long afforded election officials a way to eliminate the unfair advantage that arises when one candidate is given a preferential ballot position.

Though this recent California decision is the most comprehensive treatment of preferential ballot position and the most far-reaching rejection of alternate preferential positioning schemes,[67] it does not stand alone as a judicial recognition of the equal protection violations inherent in preferential positioning policies.[68] In 1958 the Arizona supreme court was faced with a challenge to that state's statutory provision[69] that required voting machines used in primary elections to list candidates in alphabetical order.[70] Since the state legislature had required rotation on the paper (hand-marked) ballots[71] for the primary elections because of position effect,[72] the court ruled it a violation of the Arizona constitutional "privileges and immunities" clause[73] not to rotate the position of candidates' names on the voting machines used for the same elections.[74]

Cook County, Illinois, has been another site of litigation over the statutory method by which candidates are to be certified for positions on the ballots. The ultimate result was that the order of receipt of nominating petitions would determine the subsequent position of candidates on the ballot.[75] A long uphill battle was required before this seemingly harmless solution would

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65. CAL. ELEC. CODE §10219 (West 1961).

66. 14 Cal. 3d at 673, 536 P.2d at 1345, 122 Cal. Rptr. at 385.

67. The court in *Gould* declared unconstitutional a ballot positioning procedure based on alphabetical ordering of candidates. *Id.* at 674-75, 536 P.2d at 1446, 122 Cal. Rptr. at 386. "[T]he substantial advantage which accrues to a candidate in a top ballot position may significantly distort the equality and integrity of the electoral process, [therefore] the simple rationality of an alphabetical order procedure is not sufficient to sustain such a position in this context." *Id.*

68. As early as 1940 the Michigan supreme court took judicial notice of the 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." Elliott v. Secretary of State, 295 Mich. 245, 249, 294 N.W. 171, 173 (1940).

69. ARIZ. REV. STAT. ANN. §16-796 (1956).

70. Kautenburger v. Jackson, 85 Ariz. 128, 333 P.2d 293 (1958).

71. ARIZ. REV. STAT. ANN. §16-53(C) (1956) provided that "[t]he provisions of this section shall not apply where voting machines are used."

72. 85 Ariz. at 131, 333 P.2d at 295.

73. ARIZ. CONST. art. 2, §13 provides: "No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

74. 85 Ariz. at 131, 333 P.2d at 295.

75. Huff v. State Bd. of Elections, 57 Ill. 2d 74, 309 N.E.2d 585 (1974). *See also* note 102 *infra.*

be applied in a fair and impartial manner. In *Weisberg v. Powell*,[76] a challenge was brought to the Illinois Secretary of State's practice of discriminatorily applying a state statute setting up the means by which ballot order was to be determined. The statute in question provided that the "name of the person first filing his nomination petition with the Secretary of State shall be certified first on the ballot, and the names of the other candidates shall be listed in the order that their nominating petitions were filed with the Secretary of State."[77] Many candidates waited in line for periods of time exceeding 14 hours in order that they might receive the first spot on the ballot.[78] The Secretary settled this deadlock by informing only certain candidates that, if their petitions were received by the Springfield, Illinois, post office on the day before the first official day for receiving such petitions, he would accord them preferential priority.[79] In the event of ties, either within the group of petitions received before the official filing period commenced or between any others, the Secretary of State would confer preferential treatment on candidates he personally knew and whose views he approved.[80] The court, recognizing the significance of position effect,[81] held that these acts intentionally and purposefully perpetuated an unlawful, discriminatory classification scheme that violated the equal protection guarantee.[82] The *Weisberg* court did not recognize the applicability of the standard of strict judicial scrutiny since it found that the activities of Secretary Powell in no way promoted any legitimate governmental interest.[83]

The Illinois Secretary of State, however, once again injected his personal preferences into the ballot ordering method. In an affidavit he had assured the court that he intended to continue to employ his own personal method of tie-breaking when it came to ballots received simultaneously.[84] These attempts led to *Mann v. Powell (I)*.[85] A newly enacted statute,[86] in pertinent part, provided that:

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76. 417 F.2d 388 (7th Cir. 1969). The district court's dismissal of the plaintiff's action is unreported.

77. Pub. Act. 76-40(5), [1969] Ill. Laws.

78. 417 F.2d at 390. The New York Times reported on January 15, 1971, that "[t]wo years ago, reformers running for the state's constitutional convention waited in the hallway outside his (Secretary Powell's) office all night in hopes of gaining the first line on the ballot—an asset sometimes estimated to be worth 10 to 15 per cent more votes. The reformers were enraged to discover Powell aides carrying cartons of petitions from organization candidates in a side door." N.Y. Times, Jan. 15, 1971, §1, at 14, col. 2.

79. 417 F.2d at 390-91.

80. *Id.* at 391 n.4.

81. *Id.* at 392. The court noted that the very activities of the Secretary under challenge and the already mentioned practice of candidates spending a sleepless night on the capitol steps in an effort to gain preferred ballot positions were evidence of the importance of ballot position to those connected with the electoral process. *Id.* at 393.

82. *Id.* at 392.

83. *Id.* at 393.

84. Mann v. Powell (I), 314 F. Supp. 677, 678-79 (N.D. Ill. 1969), *aff'd*, 398 U.S. 955 (1970).

85. 314 F. Supp. 677 (N.D. Ill. 1969), *aff'd*, 398 U.S. 955 (1970).

86. ILL. ANN. STAT. ch. 46, §7-12(7) (Smith-Hurd 1975).

> Where 2 or more petitions are received simultaneously, the Secretary of State or the various clerks with whom such petitions are filed shall break ties and determine the order of filing, and such determination shall be conclusive.[87]

Because the time for filing was close at hand,[88] the court did not rule on the constitutionality of the Illinois statute in question but temporarily enjoined Secretary Powell from applying his interpretation of the statute to the election.[89] Citing *Weisberg*, the *Mann (I)* court held that Powell's tie-breaking system effectuated "a purposeful and unlawful invasion of plaintiffs' Fourteenth Amendment right to fair and evenhanded treatment."[90]

Secretary Powell still favored his system of giving preference to names he recognized.[91] He developed a scheme, which he claimed was nondiscriminatory,[92] by which candidates who had past legislative experience or who were running for the office that they then held were automatically given preferential ballot positions over opponents who filed at the same time.[93] In *Mann v. Powell (II)*,[94] the court was forced to determine the constitutionality of the newly enacted Illinois statute.[95] In determining that the statute was constitutional because it effectuated a legitimate governmental purpose of establishing a positioning system,[96] the court refused to strictly scrutinize the statute and its effect on the fundamental rights of voters. The *Mann (II)* tribunal justified its decision by noting that it could "adequately protect the plaintiffs' right to equal protection in the allocation of ballot positions by the issuance of an injunction similar to that employed by the Court of Appeals in the *Weisberg* case."[97]

The subsequent issuance of a permanent injunction by the *Mann II* court[98] effectively restrained Secretary Powell but not the Illinois Legislature. In

87. *Id.*

88. Petitions for the election under consideration could be filed beginning December 8, 1969. The decision of the court was handed down on December 5, 1969. 314 F. Supp. at 678.

89. *Id.* at 679.

90. *Id.*

91. In reference to the *Weisberg* and *Mann* litigation, The New York Times reported: "Testifying in a Federal Court suit challenging his makeup of the ballot, Mr. Powell conceded he had put the names of the regulars in the favored positions. 'After 30 years in government, I can recognize a name,' he told the court. 'I know men in government and I gave preference to men I knew something about.' He denounced the suit as a 'move to destroy the two-party system' and 'an effort by long-haired hippie Communists to get on the ballot.'" N.Y. Times, Jan. 15, 1971, §1, at 14, col. 2.

92. The court's injunction in *Mann v. Powell* (I) read in part: "[D]efendants . . . are enjoined from breaking ties . . . by any means other than a drawing of candidates' names by lot *or other nondiscriminatory means* by which each of such candidates shall have an equal opportunity to be placed first on the ballot." 314 F. Supp. at 679 (emphasis added).

93. Mann v. Powell (II), 333 F. Supp. 1261, 1264 (N.D. Ill. 1969).

94. 333 F. Supp. 1261 (N.D. Ill. 1969).

95. ILL. ANN. STAT. ch. 46, §7-12(7) (Smith-Hurd 1975).

96. 333 F. Supp. at 1266.

97. *Id.* at 1266-67.

98. *Id.* at 1267.

1972 Illinois House Bill 2485 was enacted over the Governor's veto.[99] It granted preferential ballot position as between two otherwise similarly situated candidates to incumbents or former legislators.[100] The United States District Court in *Netsch v. Lewis*[101] declared the Act to be an unconstitutional violation of the plaintiffs' rights to equal protection under the fourteenth amendment and enjoined Secretary of State Lewis from enforcing its provisions.[102]

In 1970 the State of New York amended its election laws[103] to provide for incumbents to be placed first on the ballot in voting machines used in the 1970 New York City primary elections. Candidate Elizabeth Holtzman[104] challenged the constitutionality of this amendment on fourteenth amendment equal protection grounds.[105] The Supreme Court of New York County dismissed plaintiff's petition in *Holtzman v. Power*,[106] holding, alternatively, that plaintiff had no standing to bring suit because she had as yet suffered no wrong[107] or that assuming proper jurisdiction, the state law under challenge represented a reasonable legislative determination as to the manner in which order on the ballot would be determined.[108] In so

99. For a discussion of Illinois House Bill 2485, see Netsch v. Lewis, 344 F. Supp. 1280 (N.D. Ill. 1972).

100. *Id.* at 1280. This should be contrasted with present Illinois statutory allocation of ballot position. ILL. ANN. STAT. ch. 46, §§8-10—8-12 (Smith-Hurd 1975).

101. 344 F. Supp. 1280 (N.D. Ill. 1972).

102. *Id.* at 1281. A final sequel to the litigation in this controversy transpired in the Illinois supreme court case of Huff v. State Bd. of Elections, 57 Ill. 2d 74, 309 N.E.2d 585 (1974). Suit was initiated in the Circuit Court of Cook County, Illinois, on January 2, 1974, two days before the lottery to determine ballot position between candidates whose petitions were received simultaneously. The lottery was to have been held pursuant to ILL. ANN. STAT. ch. 46, 17-12(6) (Smith-Hurd 1973). 57 Ill. 2d at 78, 309 N.E.2d at 588. The court was confronted with a challenge to an administrative interpretation of the state statute that predicated ballot position on the basis of the order in which candidates' nominating petitions were received by the office of the Secretary of State. The Secretary had determined that those petitions personally delivered to his office at 8:00 a.m. of the initial day set aside for their filing would be deemed received simultaneously with petitions his office received in the mail prior to that time. The court affirmed the constitutionality of this procedure, noting that it "provide[d] a fair and impartial means of determining the order in which nominating petitions were to be considered filed so that ballot placement could be settled on a nondiscriminatory basis." *Id.* at 80, 309 N.E.2d at 588.

103. N.Y. Laws 1970, ch. 196, *amending* N.Y. ELECTION LAW §242-a(7), *repealed by* N.Y. Laws 1972, ch. 146. For the present law as amended in 1973 (N.Y. Laws 1973, ch. 391, §1) and 1975 (N.Y. Laws 1975, ch. 602, §1), *see* N.Y. ELECTION LAW §§242-a(7), (7a) (McKinney 1975).

104. She is presently a Congresswoman from the 16th District, New York.

105. Holtzman v. Power, 64 Misc. 2d 221, 314 N.Y.S.2d 777, *rev'd and remanded*, 34 App. Div. 2d 779, 311 N.Y.S.2d 37, *opinion on remand*, 62 Misc. 2d 1020, 313 N.Y.S.2d 904 (Sup. Ct.), *aff'd*, 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).

106. 64 Misc. 2d 221, 314 N.Y.S.2d 777 (Sup. Ct. 1970).

107. *Id.* at 222-23, 314 N.Y.S.2d at 780.

108. *Id.* at 224-26, 314 N.Y.S.2d at 782-84. The court also noted that petitioners had failed to join indispensable parties, namely "[t]he opposing candidates, whose rights would be affected by a determination of petitioners' application . . . ," *id.* at 780, and that

ruling, the court subjected the statutory amendment to a mere surface-level scrutiny – the constitutionality of the statute would be upheld if it was predicated on a legitimate legislative purpose.[109] No consideration was given to the strict scrutiny test usually applied by courts when fundamental voting rights are at stake.[110] In a per curiam decision the Appellate Division of the supreme court reversed and remanded for a decision on the merits.[111] The appellate court concluded that: (1) petitioners had standing to pursue the instant action since "each had actually filed a petition at the Board of Elections, and that undisputed fact was made known to the [trial] court";[112] (2) the incumbents whose positions were sought by the petitioners would be added to the litigation as party defendants;[113] and (3) "[t]he proceeding being, in substance, an action for declaratory judgment of unconstitutionality, [it] is so regarded regardless of form . . . ."[114] After a de novo hearing on the merits, the court,[115] on advice of a special referee,[116] made a factual finding that "there is a distinct advantage to the candidate whose name appears first on the ballot."[117] Although by its language[118] the court seemed to be subjecting the statutory amendment to the mere legitimate purpose test, its emphatic declaration of the amendment's unconstitutionality because it "unlawfully impinge[d] upon basic and inviolable rights"[119] supports the conclusion that the court was applying a stricter standard of review.[120] This ruling of unconstitutionality was summarily affirmed by both the Appellate Division[121] and the Court of Appeals.[122]

Ballot Position in Florida: One Court's Ill-Advised Decision

Florida Statutes section 101.141(4) provides that the names of candidates running for office in primary elections shall be printed on the ballot in

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the court lacked jurisdiction over the subject matter, *id.* at 781, since "[t]he relief petitioner seeks may not be granted in *a proceeding* of this nature but must be sought in a *plenary action* for a judgment declaring the amendment to be unconstitutional and void . . . ." *Id.* at 780 (emphasis original).

109. See notes 3, 10 *supra.*

110. See notes 3, 10, 62 *supra.*

111. 34 App. Div. 2d 779, 311 N.Y.S.2d 37 (1970).

112. *Id.* at 779, 311 N.Y.S.2d at 38. Thus the petitioners were alleging a concrete harm if the state's grant of preferential ballot position was found to be beneficial to incumbents.

113. *Id.*

114. *Id.*

115. 62 Misc. 2d 1020, 313 N.Y.S.2d 904 (Sup. Ct. 1970) (proceeding in trial court on remand).

116. *Id.* at 1021, 313 N.Y.S.2d at 906.

117. *Id.* at 1023, 313 N.Y.S.2d at 907.

118. "The Court finds *no rational basis* for affording . . . favoritism to a candidate merely on the basis of his having been successful at a prior election." *Id.* at 1024, 313 N.Y.S.2d at 908 (emphasis added).

119. *Id.*

120. See note 10 *supra.*

121. 34 App. Div. 2d 917, 311 N.Y.S.2d 824 (1970) (McGivern, J., dissenting).

122. 27 N.Y.2d 628, 261 N.E.2d 666, 313 N.Y.S.2d 760 (1970) (Burke and Scileppi, JJ., dissenting).

alphabetical order.[123] Thus, those candidates fortunate enough to have been born with a surname beginning with one of the first letters of the alphabet will benefit from position effect.[124] As the California supreme court recognized in *Gould*, it is not necessary to survey the results of elections in any specific community in order to note the existence of position effect in those elections.[125] One can assume, absent evidence to the contrary, that the findings of a scientifically conducted and well documented study of voter habits in one section of the country will apply with equal validity to other locations.[126] No equal protection challenge has yet been brought against this statute, and the recent decision of *Nelson v. Robinson*[127] portends little success for such a challenge if the oblique reasoning of that court is followed.

In *Nelson* a challenge was brought to the Pinellas County election officials' interpretation of Florida Statutes section 101.27(6).[128] The usual configuration for Pinellas County voting machines was a listing of candidates in a single horizantal row.[129] Election officials, however, determined that it was impossible to follow this standard procedure because of the large number of candidates running for certain offices in the September 10, 1974, primary election.[130] They prepared a format for the voting machines whereby the names of certain candidates were placed in a second horizontal row directly beneath the row containing the names of their opponents. This configuration is similar in design to the automatic voting machines employed by the Lansing and Grand Rapids election officials.[131] As the Bain and Hecock study noted, it is significantly disadvantageous for a candidate to be situated within the second horizontal row of his party's nominees because of the lower

123. The pertinent part of FLA. STAT. §101.141(4) (1975) reads as follows: "The ballot shall have the headings, under which appear the names of the offices and the candidates for the respective offices alphabetically arranged as to surnames . . . ." FLA. STAT. §101.141 (1975) is limited in application to paper ballots. FLA. STAT. §101.27(4) (1975) provides: "The order in which the voting machine ballot is arranged shall as nearly as practicable conform to the requirements of the form of the paper ballot for that election."

124. As previously mentioned, factors such as the number of candidates running for a specific office, the educational level of the voting population, the extent to which incumbents' performance is brought to the attention of the public, and whether a candidate is running in his home town will reflect on the extent of and effect such position will have on the result of a specific election. See text accompanying notes 32, 35, 38, 42 *supra*.

125. 14 Cal. 3d at 667-68, 536 P.2d at 1341, 122 Cal. Rptr. at 381.

126. *Id.*

127. 301 So. 2d 508 (2d D.C.A. Fla.), *cert. denied*, 303 So. 2d 21 (1974).

128. FLA. STAT. §101.27(6) (1975) provides: "In all primary elections and nonpartisan judges' elections, county supervisors of elections may, with the approval of their boards of county commissioners, when combinations of horizontal and vertical ballots are used, or when large or irregular numbers of candidates make the ballot confusing, print voting machine ballots in shaded colors to group and identify the number of candidates in any or all given races. Colors shall be light or pastel with candidates' names overprinted in plain black type, and in no case shall any particular color or pattern of colors be used to identify any political party."

129. 301 So. 2d at 510.

130. *Id.* at 509.

131. See text accompanying notes 46-48 *supra*.

visibility of that position.[132] Paying little attention to the position effect, the court in *Nelson*[133] held that "an unfavorable position of the ballot (from the candidate's standpoint) which does not also prevent the exercise of the peoples' right to a full, free and open choice, cannot operate as a predicate for an equal protection claim by the candidate."[134] In so ruling, the court failed to perceive the fundamental basis of the candidates' claims: that voters' rights were involved. Failure to allow candidates access to the ballot has been determined by the United States Supreme Court to be violative of the voters' constitutionally guaranteed right to exercise an effective franchise.[135] Additionally, the California supreme court has recognized that the votes of those who conscientiously selected a candidate listed low on the ballot were diluted to the extent by which votes attributable to position effect increased the value of the votes of those who in a similarly studious manner selected the candidate listed first.[136]

The result that any court reaches on the equal protection challenge depends to a significant extent on the level of scrutiny to which the challenged state action is subjected. A superficial level of analysis looks merely at the names listed on the ballot. If all the candidates properly nominated for an office are listed, then the state's duty is met — it has afforded all candidates access to the ballot. A more probing inquiry, however, scrutinizes the question of whether each voter has been guaranteed an equal voice in the electoral process. The members of the *Nelson* court looked at the Pinellas County voting machines and observed that it would not take an inordinate amount of time for a voter to find the candidate of his choice if he was willing to put forth the necessary effort.[137] The court also concluded that:

> [T]he constitution intended that a voter search for the name of the candidate of his choice and to express his choice for that candidate without regard to others on the ballot. Furthermore, it assumes his ability to read and his intelligence to indicate his choice with the degree of care commensurate with the solemnity of the occasion.[138]

This noble approach is blind to reality: many voters select a candidate on the basis of his position on the ballot.[139] Thus, the court is willing to permit these voters the power to swing elections and to vitiate the well-considered votes for the non-preferred position.

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132. See Tables 21, 22, 23, note 46 *supra.*

133. In reversing the Circuit Court of Pinellas County, the Second District Court of Appeal took notice of the "twenty-seven page final judgment in which he [the Circuit Judge] painstakingly detailed his findings of fact and conclusions of law." 301 So. 2d at 512. It is therefore surprising that the District Court made no mention of the relevant and substantial evidence available in September 1974 concerning the protracted litigations arising out of Illinois and New York. See text accompanying notes 75, 102, 103, 122 *supra.*

134. 301 So. 2d at 512 (footnote omitted).

135. See text accompanying notes 8, 14 *supra.*

136. See text accompanying note 59 *supra.*

137. 301 So. 2d at 511.

138. *Id.* at 512 (footnote omitted).

139. See text accompanying notes 24-48 *supra* for results of H. BAIN & D. HECOCK.

The plaintiffs in *Nelson* were requesting an invalidation of the elections in which they had participated.[140] The court refused to grant such relief and rightly so. It would have been improper to invalidate election ballots that were valid on their face but discriminatory in their application. The court set out, in its own words, "to meet head-on the question of equal protection"[141] but nevertheless managed to side-step the true issues involved in a challenge to preferential ballot positioning. One case relied on by the court in support of its basic position that "the candidate himself has no constitutional right to a particular spot on the ballot . . ."[142] was *Gilhool v. Chairman & Commissioners, Philadelphia County Board of Elections.*[143] This case dealt with minority party candidates' equal protection challenges to the use of Philadelphia machines that afforded the opportunity to vote a "straight party ticket" only for the Republican or Democratic party.[144] By the time the case actually came before the court, the city of Philadelphia had modified its voting machines to allow "straight party" voting for all parties listed on the ballot.[145] Unfortunately, the cases directly on point,[146] though obviously not binding on the Florida court, are never even considered in *Nelson* for their persuasive value.

CONCLUSION

Discrimination is inherent in our political system. Some voters prefer the taller of two candidates; others vote automatically for the one whose ethnic background is similar to their own. Certainly neither of these preferments gives rise to an equal protection challenge by the short candidate or the Anglican in an Irish neighborhood. This is because it is the voters who are discriminating as they select their elected representatives. Would not the cry of foul play be loud and emphatic, however, if the state were to give preferential treatment to the taller candidate or to the Irishman during the

140. 301 So. 2d at 509.
141. *Id.* at 512.
142. *Id.*
143. 306 F. Supp. 1202 (E.D. Pa. 1969), *aff'd*, 397 U.S. 147 (1970).
144. *Id.* at 1205-06.
145. The plaintiffs' only remaining justiciable challenges involved (1) the existence of the "straight party" levers as a promotion of party politics, though equally afforded to all parties, *id.* at 1206-07; (2) the "spatial gaps" between the listings of the Republican and Democratic party nominees and their own, *id.* at 1207, such gaps being due to the Constitutional and American Independent Parties' choice not to run any candidates in the particular election, *id.* at 1210; and (3) the instructions for voting listed on the ballot, since they informed voters first of their option to vote a "straight party" ticket and second that they could "split" their ticket, *id.* at 1207. The court in *Gilhool* refused relief on all three grounds, *id.* at 1210-11, but it can be seen that only plaintiffs' challenge relating to spatial discrimination even tangentially relates to the issues of ballot positioning and voter preference before the court in *Nelson.*
146. Weisberg v. Powell, 417 F.2d 388 (7th Cir. 1969); Netsch v. Lewis, 344 F. Supp. 1280 (N.D. Ill. 1972); Mann v. Powell (II), 333 F. Supp. 1261 (N.D. Ill. 1969); Mann v. Powell (I), 314 F. Supp. 677 (N.D. Ill. 1969); Kautenburger v. Jackson, 85 Ariz. 128, 333 P.2d 293 (1958); Elliott v. Secretary, 295 Mich. 245, 294 N.W. 171 (1940); Holtzman v. Power, 62 Misc. 2d 1020, 313 N.Y.S.2d 904 (Sup. Ct. 1970).

course of an electoral campaign? This is precisely what transpires when the state determines position on the ballot on the basis of such factors as incumbency or alphabetical ordering of surnames. If a voter desires to elect an Ackerman over a Zelman that is his choice. But when the state gives preferential ballot position to Ackerman, claiming mere economic strain as its justification, Zelman should be able to challenge such an arbitrary and invidiously discriminatory classification scheme. The most important indicator of a court's propensity to honor such a challenge is the level of scrutiny to which it is willing to subject such state activity. On a superficial level most state schemes serve a legitimate governmental purpose. They provide a simple and ordered method by which ballot position is determined. Yet, a court is remiss in its duty if it does not remove the veil that symbolizes "legitimate purpose" and perceive the violations of fundamental rights. A state should have to prove the existence of a *compelling governmental interest* before it can justify an unequal application of its election laws. The right to cast one's vote effectively[147] may not be lightly disregarded. An economic burden of minor magnitude should not be given more weight than the right of the electorate to have its representatives chosen in a manner that does not reflect biased governmental activity. Presently, at least nineteen states use a ballot rotation scheme in some elections.[148] It would behoove the Florida legislature to amend Florida Statutes section 101.141(4) to provide for the listing of each candidate in the top ballot position an equal number of times. Should the legislature fail to enact a progressive positioning scheme, the Florida courts may still eliminate this infusion of governmental bias into the results of our state's elections by an enlightened interpretation of the equal protection clause.

STEVEN L. SOMMERS

APPENDIX

Coding: Roman type indicates no changes; under-lined type indicates deletions; italicized type indicates additions.

PROPOSED AMENDMENT TO FLORIDA STATUTES SECTION 101.141(4)

The ballot shall have the headings, under which appear the names of the offices and the candidates for the respective offices alphabetically arranged as to surnames *by a method of rotation, such that each candidate for a respective office shall be placed in the top ballot position on an equal number of ballots in each election precinct that lists his name . . . .*

147. Williams v. Rhodes, 393 U.S. 23, 30-31 (1968). See text accompanying note 8 *supra*.

148. Note, *supra* note 24, at 379 n.37 (listing 18 of the states). California joined their ranks because of the 1975 decision of Gould v. Grubb, 14 Cal. 3d 661, 536 P.2d 1337, 122 Cal. Rptr. 377 (1975).