William Mitchell Law Review

Volume 5 | Issue 1 Article 8

1979

Election Law—Minnesota Ballot Position Statute Does Not Violate Equal Protection—Ulland v. Growe, 262 N.W.2d 412 (Minn.), cert. denied, 436 U.S. 927 (1978)

to avoid this problem by obtaining a knowledgeable waiver at the outset so that review of the record for conflict does not become necessary. Lastly, the *Olsen* approach avoids the problem of knowledgeable waiver of rights respecting separate counsel that can arise if a defendant waives these rights without fully appreciating the significance of potential conflicts.[50] By providing the supreme court with a trial record replete with all waiver discussion, review of the waiver is possible.

The adoption of the affirmative-inquiry standard by the Minnesota court in *Olsen* properly transfers from the defense counsel to the trial court the responsibility of protecting the untrained and oftentimes uninformed defendant's right to effective counsel. By adopting this standard, the Minnesota court has stepped into the forefront of this important area. The Minnesota criminal defendant's sixth amendment right to effective counsel is now better protected from the perils of joint representation.

Election Law—MINNESOTA BALLOT POSITION STATUTE DOES NOT VIOLATE EQUAL PROTECTION—*Ulland v. Growe*, 262 N.W.2d 412 (Minn.), *cert. denied*, 436 U.S. 927 (1978).

The arrangement of candidates' names on election ballots has traditionally been the prerogative of state legislatures.[1] In recent years, how-

references to one defendant may be made in order to promote the image of the other defendant before the jury, or counsel may decide to allow only one defendant to testify, leaving a question in the mind of the jury as to why the nontestifying codefendant did not take the stand. Moreover, counsel may fail to object to certain damaging evidence because it is favorable to one defendant, or he may unknowingly emphasize one defendant's case to the detriment of the other's defense. Furthermore, different mitigating or aggravating circumstances and varying degrees of involvement in the crime may lead counsel to play one defendant against the other.

50. *See* Campbell v. United States, 352 F.2d 359, 360 (D.C. Cir. 1965) ("An individual defendant is rarely sophisticated enough to evaluate the potential conflicts . . . ."); United States v. Garafola, 428 F. Supp. 620, 623 (D.N.J. 1977) (average defendant unable to understand fully the effect joint representation may have on trial strategy). *See generally* Geer, *supra* note 3, at 140-42. The jointly represented defendant is not in a position to evaluate whether his rights will be protected adequately by a single counsel. For example, a "strong" defendant may thrust his own attorney upon a "weak" codefendant who will accept the joint representation without realizing that he is entitled to the undivided loyalty of counsel to his own cause. Furthermore, it is virtually impossible for a defendant to envision, before trial, the myriad circumstances under which a conflict may arise, because conflicts are at times unforeseeable and often develop during the course of trial. In addition, defendants usually consent to a waiver in reliance on advice received from counsel who has represented that no conflicts exist.

1. *E.g.*, Mann v. Powell, 333 F. Supp. 1261, 1266 (N.D. Ill. 1971); *see, e.g.*, Voltaggio v. Caputo, 210 F. Supp. 337, 338-39 (D.N.J. 1962), *appeal dismissed*, 371 U.S. 232 (1963). The methods of determining ballot position include:

ever, ballot placement has been a matter of controversy involving constitutional issues.[2] The controversy surrounding ballot placement derives from a phenomenon called "positional bias."[3] Political scientists have asserted that in any election[4] the first position on the ballot is advantageous to the candidate whose name appears there.[5] The candi-

---

(1) alphabetical arrangement according to surname, *see, e.g.*, FLA. STAT. ANN. § 101.141(4) (West Supp. 1978) (primary elections); UTAH CODE ANN. §§ 20-3-20, 20-7-5 (1969); *id.* § 20-12-1 (Supp. 1977);

(2) lottery, *see, e.g.*, N.J. STAT. ANN. § 19:14-12 (West Supp. 1978); PA. STAT. ANN. tit. 25, § 2875 (Purdon 1978) (primary elections); *id.* § 2962(b) (Purdon Supp. 1978) (same); TEX. ELEC. CODE ANN. art. 13.17 (Vernon Supp. 1978) (same); WIS. STAT. ANN. § 5.60(1)(b) (West Supp. 1978), *as amended by* Act of July 8, 1978, ch. 449, § 5, 1977-1978 Wis. Legis. Serv. 2562 (West); WIS. STAT. ANN. § 5.60(1)(c), (5)(a), (6), (8) (West Supp. 1978); *id.* § 5.62(4)(b) (West Supp. 1978), *as amended by* Act of June 5, 1978, ch. 427, § 36, 1977-1978 Wis. Legis. Serv. 2458 (West) (spring elections and primaries);

(3) party receiving highest number of votes in last election, *see, e.g.*, FLA. STAT. ANN. § 101.151(4) (West Supp. 1978) (last gubernatorial contest determines order in general elections); WIS. STAT. ANN. § 5.64(1)(b) (1967) (same);

(4) incumbents first, *see, e.g.*, MASS. GEN. LAWS ANN. ch. 53, § 34 (West 1975 & Supp. 1978), *as amended by* Act of July 12, 1978, ch. 393, § 27, 1978 Mass. Legis. Serv. 375 (West); MASS. GEN. LAWS ANN. ch. 54, § 42 (West 1975 & Supp. 1978), *as amended by* Act of May 5, 1978, ch. 136, 1978 Mass. Legis. Serv. 111 (West);

(5) discretion of the board of elections, *see, e.g.*, ILL. ANN. STAT. ch. 46, § 16-3 (Smith-Hurd Supp. 1978);

(6) rotation of names, *see, e.g.*, IOWA CODE ANN. §§ 43.28, 49.31 (West Supp. 1978) (rotation of names among but not within precincts); MINN. STAT. §§ 203A.23(5), .35(1) (1976) (primary and nonpartisan general elections); and

(7) party receiving smallest number of votes in last election, *see, e.g.*, MINN. STAT. § 203A.33(4) (1976).

2. *See, e.g.*, Sangmeister v. Woodard, 565 F.2d 460 (7th Cir. 1977) (intentional discrimination in name placement constituted violation of equal protection), *cert. denied*, 435 U.S. 939 (1978); Clough v. Guzzi, 416 F. Supp. 1057 (D. Mass. 1976) (statute providing that incumbents be listed first on ballot found to have rational basis and therefore not violative of equal protection); Kautenburger v. Jackson, 85 Ariz. 128, 333 P.2d 293 (1958) (equal protection requires rotation of names in voting machines when rotation on paper ballot is required by statute); Gould v. Grubb, 14 Cal. 3d 661, 536 P.2d 1337, 122 Cal. Rptr. 377 (1975) (practice of listing incumbents first on ballot is not warranted by any compelling government interest and therefore violative of equal protection).

3. *See* H. BAIN & D. HECOCK, BALLOT POSITION AND VOTER'S CHOICE (1957); Masterman, *The Effect of the "Donkey Vote" on the House of Representatives*, 10 AUSTL. J. OF POL. & HIST. 221 (1964); Upton & Brook, *The Importance of Positional Voting Bias in British Elections*, 22 POLITICAL STUD. 178 (1974); Note, *California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents*, 45 S. CAL. L. REV. 365 (1972); Comment, *Equal Protection in Ballot Positioning*, 28 U. FLA. L. REV. 816 (1976).

4. In Ulland v. Growe, 262 N.W.2d 412, 416 (Minn.), *cert. denied*, 436 U.S. 927 (1978), the court recognized the opinion of experts at trial that positional bias has a greater effect in nonpartisan elections than in partisan elections.

5. *See* Mueller, *Choosing Among 133 Candidates*, 34 PUB. OPINION Q. 395, 399 (1970); Upton & Brook, *supra* note 3, at 189. *But cf.* Mueller, *Voting on the Propositions: Ballot Patterns and Historical Trends in California*, 63 AM. POLITICAL SCI. REV. 1197, 1208 (1969)

date whose name appears in the first position is expected to receive a number of "extra" votes merely because of the position of his or her name on the ballot.[6] These extra votes[7] confer an advantage not available to candidates whose names are listed after the first position.[8] To counteract the advantage created by positional bias, some statutes provide for rotation of names on the ballot so that each candidate's name appears in the first position on an equal number of ballots in an election.[9]

(the tendency to vote for the candidate in the first position reverses itself towards the end of a lengthy ballot). *See generally* H. BAIN & D. HECOCK, *supra* note 3; Comment, *supra* note 3, at 819-32.

The location of the first position may vary according to how the ballot is arranged; it may be either the top row or the far left column. *See, e.g.*, Clough v. Guzzi, 416 F. Supp. 1057, 1065 (D. Mass. 1976); MINN. STAT. § 203A.33(4) (1976).

6. The advantage, a number of extra votes, conferred by the first ballot position changes depending on other variables of a particular election. Among the variables are the publicity given the election, the level of office, the total number of candidates for the office, and the placement of the race among other races on the ballot. *See, e.g.*, Tsongas v. Secretary of the Commonwealth, 362 Mass. 708, 710-11, 291 N.E.2d 149, 151 (1972).

7. Courts have used the terms "extra" votes, Ulland v. Growe, 262 N.W.2d 412, 416 (Minn.), *cert. denied*, 436 U.S. 927 (1978), "donkey" votes, Clough v. Guzzi, 416 F. Supp. 1057, 1063 (D. Mass. 1976), and "windfall" votes. *Id.*

8. The number of extra votes has been estimated to be a minimum of five percent of the candidate's total votes. *See* Note, *supra* note 3, at 376. *But see* J. Tomlinson & K. Broady, The Effect of Ballot Position in Partisan Elections (Jan. 10, 1977 release) (unpublished study of three city elections in Minnesota in 1973, 1974, and 1975) (on file at William Mitchell Law Review office).

Arguably, positional bias could influence the outcome of a close election. Numerous other factors, however, affect voter behavior and they cannot be isolated in an election study. Party affiliation is the most important factor influencing voter behavior in a partisan election. *See, e.g.*, Ulland v. Growe, 262 N.W.2d 412, 414-15 (Minn.), *cert. denied*, 436 U.S. 927 (1978). But election visibility, sex, ethnic background, and age are also important factors. Thus, the impact of positional bias is difficult to measure accurately. *See generally* W. FLANIGAN & N. ZINGALE, POLITICAL BEHAVIOR OF THE AMERICAN ELECTORATE 69-90 (3d ed. 1975).

9. *See, e.g.*, ARIZ. REV. STAT. ANN. § 16-533 (1975) (primary elections); *id.* § 16-796 (primary elections and voting machines); IOWA CODE ANN. § 43.28 (West Supp. 1978) (primary elections); *id.* § 49.31(2)-(3) (rotation in elections where two or more persons are to be elected at large and in city, school, and special elections); *id.* § 52.10 (West 1973) (voting machines); KAN. STAT. ANN. § 25-610 (Supp. 1977) (rotation on ballots); *id.* § 25-1318 (1973) (rotation on voting machines, positions determined by lot when insufficient number of machines prohibits rotation); NEB. REV. STAT. § 32-426 (1974) (general election); *id.* § 32-528 (Supp. 1976) (primary election); OHIO CONST. art. V, § 2a (general election); OHIO REV. CODE ANN. §§ 3505.04, .10 (Page Supp. 1977) (presidential and nonpartisan general elections); Act of Mar. 10, 1978, file 216, § 1, 1978 Ohio Legis. Bull. 71 (Anderson) (to be codified as OHIO REV. CODE ANN. § 3505.03) (other general elections).

In State v. Board of Comm'rs, 39 Ohio St. 2d 130, 314 N.E.2d 172 (1974) the court reviewed the problem that, with the introduction of voting machines, rotation of names could not be provided in the same way as with paper ballots. Sustaining a challenge to the failure of voting machines to rotate names within a precinct, the Ohio Supreme Court declared that a system of "[p]erfect rotation" would require that "every name will be

Minnesota law requires the rotation of names in nonpartisan elections.[10] However, in partisan elections where the candidate's party designation appears on the ballot a different method of name placement is required.[11] The first position on the ballot is allocated to the political

---

seen by an equal number of voters at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs." *Id.* at 134 n.2, 314 N.E.2d at 176 n.2. Recognizing that voting machines currently marketed do not have the capacity to rotate names, *id.* at 136 n.4, 314 N.E.2d at 177 n.4, the court held that each precinct must have at least two voting machines and always an even number of machines, that names of candidates be rotated alternately within a precinct, that voters be directed to use the machines in serial sequence, and that names of candidates for office in which three or more candidates are running be rotated not only within a precinct from machine to machine but also continuously from one precinct to the next. *Id.* at 143, 314 N.E.2d at 181. The court also held that the Ohio Constitution did not demand perfect rotation to meet the constitutional requirement. *Id.* The constitution states in part:

> The names of all candidates for an office at any general election shall be arranged in a group under the title of that office, and shall be so alternated that each name shall appear (in so far as may be reasonably possible) substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs.

OHIO CONST. art. V, § 2a.

Prior to 1972, Wisconsin required the rotation of candidates' names on ballots for spring elections and primary elections. *See* Act of Sept. 24, 1966, ch. 666, §§ 1, 2, 1965-1966 Wis. Laws 1217 (codified at WIS. STAT. ANN. § 5.60(1)(b)(2) (1967)) (spring election ballots); Act of Sept. 24, 1966, ch. 666, §§ 1, 2, 1965-1966 Wis. Laws 1217 (codified at WIS. STAT. ANN. § 5.60(1)(b)(2) (1967)) (spring election ballots); Act of Sept. 24, 1966, ch. 666, §§ 1, 2, 1965-1966 Wis. Laws 1217 (codified at WIS. STAT. ANN. § 5.62(4)(b) (1967)) (September primary ballots). In 1972 this requirement was repealed by the Legislature and replaced by the requirement that ballot position be determined by drawing lots. *See* Act of May 8, 1972, ch. 304, §§ 9-10, 1971 Wis. Laws 1217 (current version at WIS. STAT. ANN. § 5.60(1)(b) (West Supp. 1978)) (spring election ballots); Act of May 8, 1972, ch. 304, § 12, 1971 Wis. Laws 1218 (current version at WIS. STAT. ANN. § 5.62(4)(b) (West Supp. 1978)) (September primary ballots).

10. *See* MINN. STAT. § 203A.35(1) (1976). Since 1959 Minnesota has provided for ballot rotation in primary elections and nonpartisan general elections. *See* Act of Apr. 24, 1959, ch. 675, art. 4, §§ 34(1), 35(5), 1959 Minn. Laws 1158.

11. *See* MINN. STAT. § 203A.33(2), (4) (1976). Subdivision 2 provides:

> At the general election, and in the case of partisan offices only, the names of candidates nominated by petition shall follow those of candidates nominated at primaries in the order in which the petitions are filed.

Id. § 203A.33(2). Subdivision 4 provides:

> At the general election, and in the case of partisan offices only, the first name printed for each office, or group of names if more than one is to be voted for, for the same office, shall be that of the candidate of the political party which at the last preceding general election polled the smallest number of votes, the same to be determined by the average vote cast for that party's candidates for partisan offices except representatives in congress. In like manner the second and succeeding lines shall be filled with the names of the candidates of the other political parties receiving succeedingly higher numbers of votes respectively. For the purposes of this subdivision, the average vote of the party shall be computed by determining the total number of votes counted in the state for all of the party's candidates on the general election ballot except representatives in congress, and dividing that sum by the number of the party's candidates, except representatives in congress, appearing on the general election ballot.

party that received the smallest number of votes in the last general election[12] provided that the party meets certain requirements. First, a political party's candidates must be nominated by primary, and second, at least one of its candidates must receive a threshold percentage of votes in the last general election.[13] Therefore, along with independent candidates, candidates from minor political parties failing to receive the requisite number of votes in prior elections cannot possibly attain the first position on the ballot in any political contest.

In *Ulland v. Growe*[14] the Minnesota Supreme Court confronted the

---

> On voting machines, "first name printed for each office" means the position nearest the top or farthest left, whichever applies.

Id. § 203A.33(4).

12. *Id.*

13. *See id.* §§ 202A.41(3), 203A.33(2). Eligibility for placement in the first position on the ballot involves two qualifications. One is affiliation with a political organization that qualifies as a "political party" within the meaning of the election statute. *Id.* § 203A.33(4). MINN. STAT. § 200.02(7) (1976) sets forth the requirements for qualifying as a political party:

> The words "political party" mean an organization which shall have maintained in the state, governmental subdivision thereof or precinct therein in question, a party organization and presented candidates for election at the last preceding general election one or more of which candidates shall have been voted for in each county within the state at such election and shall have received in the state not less than five percent of the total vote cast for all candidates at such election or whose members to a number equal to at least five percent of the total number of votes cast at the preceding general election in the county where the application is made shall present to the county auditor a petition for a place on the primary election ballot.

The other qualification is that the candidate be nominated in the primary election. *Id.* § 203A.33(2).

Another statute, however, contains criteria that, theoretically, can disqualify candidates from being eligible for first place on the ballot in the general election even though they received the majority of votes cast for their political parties in the primary. MINN. STAT. § 202A.41(3) (1976) provides:

> If at the primary election any person seeking a party's nomination for an office receives a number of votes equal to ten percent of the average votes cast at the last general election for state officers of that political party within the district for which the office is voted, then all candidates of that political party who receive the highest vote for an office are the nominees of that political party. If none of the candidates of a political party receive the required ten percent, then no candidates are nominated, and all the candidates of that political party may be nominated, by nominating petitions as provided in sections 202A.27 to 202A.31. The term "state officers," as used in this section for the purpose of computing the average vote to determine the ten percent as provided in this section, means the governor, lieutenant governor, secretary of state, state auditor, state treasurer, and attorney general.

The relationship of this statute to ballot placement requirements is unclear as presently applied. Strictly read, the statute suggests that under some circumstances a candidate nominated by primary and belonging to a "political party" might nevertheless fail to qualify for first ballot position.

14. 262 N.W.2d 412 (Minn.), *cert. denied*, 436 U.S. 927 (1978).

issue of whether the failure to provide equal access to the first position on a ballot and, as a result, equal access to the benefits of positional bias was a violation of the equal protection clause.[15] The plaintiff, an independent candidate for the state legislature,[16] asserted that the statute created two classes of candidates for partisan elections: those qualified to appear on the ballot because of winning a primary election[17] and those qualified to appear by filing a nominating petition.[18] In so doing, he claimed that the law had created an unreasonable classification denying him equal protection. As an independent candidate qualifying by petition,[19] the plaintiff would never be eligible to have his name appear in the first position on the ballot.[20]

The threshold inquiry in *Ulland* was whether the rational basis standard or the strict scrutiny standard of review should be applied in determining the constitutionality of the challenged election statute.[21] Courts have recognized that states have broad power over the mechanics of the electoral process.[22] Therefore, only when the statute in question infringes upon a fundamental right is the strict scrutiny standard of review applied.[23] Under this standard, the state must establish the existence of a

15. *See* U.S. CONST. amend. XIV, § 1. The names of candidates nominated by petition are placed after the names of candidates nominated in primaries. MINN. STAT. § 203A.33(2) (1976). Candidates nominated by petition are listed in the order in which their petitions are filed. *Id.*

16. Originally, the Independent-Republican Party and several of its candidates joined with the independent candidate to assert a denial of equal protection because the statute gave first ballot position to the party polling the largest number of votes in the last election. *See* Ulland v. Growe, 262 N.W.2d 412, 413 n.1 (Minn.), *cert. denied*, 436 U.S. 927 (1978). The number of votes excluded votes for congressional partisan offices. *See* Act of Apr. 24, 1959, ch. 675, art. 4, § 33(3), 1959 Minn. Laws 1158. During the litigation a statutory amendment satisfied the Independent-Republican Party candidates' claim that the statute would systematically grant first position to the Democratic-Farmer-Labor Party candidates in every partisan election. Ulland v. Growe, 262 N.W.2d at 413 n.1, 414 n.4. The amendment designated the first ballot position to the candidate whose party polled the smallest number of votes among recognized political parties. *See* Act of Apr. 9, 1976, ch. 224, § 3, 1976 Minn. Laws 828 (amending MINN. STAT. § 203A.33(4) (Supp. 1975)).

17. *See* MINN. STAT. § 203A.33(3) (1976). Candidates who are affiliated with a political party and are unopposed will still be listed on the primary election ballot and, therefore, be nominated by primary election. *See id.* § 203A.22.

18. *See id.* § 203A.33(2).

19. *See id.*

20. *See id.* § 203A.33(2), (4).

21. 262 N.W.2d at 415; *see* Williams v. Rhodes, 393 U.S. 23, 30-31 (1968). For a discussion of the equal protection clause, see Note, *Notice of Claim Requirement Under the Minnesota Municipal Tort Liability Act*, 4 WM. MITCHELL L. REV. 93, 109-16 (1978). For an analysis of evolving equal protection standards, see Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

22. *See, e.g.*, Bullock v. Carter, 405 U.S. 134, 140-41 (1972); McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969).

23. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 & n.3 (1976)

compelling government interest to infringe upon the fundamental right.[24] If a fundamental right is not involved, a less rigorous standard of review—the rational basis standard—is applied.[25] In applying the rational basis standard, the court presumes a statute to be valid so long as the statute is reasonably related[26] to a legitimate object of the legislation.[27]

(per curiam). Activities recognized as fundamental rights include rights of a uniquely private nature, the right to vote, the right to interstate travel, rights guaranteed by the first amendment, and the right to procreate. *Id.*

Another factor can trigger strict scrutiny of a statute when it operates to the disadvantage of a recognized "suspect" class. *See, e.g., id.* at 312-13 (mandatory retirement involves neither fundamental rights nor suspect classes); San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973) (school financing system not discriminatory against a suspect class). A suspect class is one encumbered with disabilities, historically subject to unequal treatment, or handicapped by political powerlessness. *Id.* at 28; Graham v. Richardson, 403 U.S. 365 (1971) (alienage); McLaughlin v. Florida, 379 U.S. 184 (1964) (race).

24. *See, e.g., In re* Griffiths, 413 U.S. 717, 721 (1973) (statute denying aliens permission to practice law subjected to strict scrutiny held unconstitutional). The governmental interest must be "overriding." Loving v. Virginia, 388 U.S. 1, 11 (1967) (Stewart, J., concurring). Not only must the government have a substantial interest, but the use of the classification must be "necessary . . . to the accomplishment" of the interest. McLaughlin v. Florida, 379 U.S. 184, 195-96 (1964).

25. *See, e.g.,* Ohio Bureau of Employment Serv. v. Hodory, 431 U.S. 471, 489 (1977) (unemployment compensation statute); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976) (per curiam) (mandatory retirement); O'Brien v. Skinner, 414 U.S. 524 (1974) (voting rights of convicted misdemeanants and pretrail detainees); Reed v. Reed, 404 U.S. 71, 76 (1971) (no rational basis for law giving preference to men over women in appointment as administrator of a decedent's estate); Dandridge v. Williams, 397 U.S. 471, 485-86 (1970); McDonald v. Board of Election Comm'rs, 394 U.S. 802, 808-10 (1969) (regulations that prevent inmates awaiting sentencing from qualifying for absentee ballots are rationally related to legitimate state purpose of maintaining prison discipline); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488-90 (1955) (statute prohibiting opticians from replacing eyeglasses without prescription rationally related to public health and welfare). For a description of the rational basis standard, see Comment, *Equal Protection in Transition: An Analysis and a Proposal,* 41 FORDHAM L. REV. 605, 606-07, 609-10 (1973).

26. *See, e.g.,* Estelle v. Dorrough, 420 U.S. 534, 538-40 (1975) (per curiam) (automatic dismissal of pending appeals for felons who escape reasonably related to objective of deterring escapes). In Rinaldi v. Yeager, 384 U.S. 305 (1966), the Court stated: "[L]egislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.'" *Id.* at 309; *accord,* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); State v. Reps, 302 Minn. 38, 49, 223 N.W.2d 780, 787 (1974); Schwartz v. Talmo, 295 Minn. 356, 362, 205 N.W.2d 318, 322, *appeal dismissed,* 414 U.S. 803 (1973).

27. *See, e.g.,* Williams v. Rhodes, 393 U.S. 23, 30-31 (1968) (election law denying political party access to ballot adversely affected voting rights); Loving v. Virginia, 388 U.S. 1, 10-11 (1967) (antimiscegenation statute violated equal protection); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666-67 (1966) (poll tax discriminated against less affluent voters); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (mandatory

In determining the standard to be applied, courts have distinguished between election statutes that interfere with the exercise of the political franchise, that is, with the right to vote,[28] and statutes regulating the right to appear on the ballot as a candidate for political office.[29] The latter is usually subject to the rational basis standard of review,[30] whereas the former is subject to the strict scrutiny standard.[31] On this basis, statutes affecting the right to run for political office are subject to the strict scrutiny standard to the extent that the restrictions on the candidates are found to infringe upon the right to vote.[32] For example, the United States Supreme Court has declared the following to be an unconstitutional infringement on voting rights: statutes imposing an unreasonable filing fee system for candidates in a primary election[33] and

---

sterilization of certain felons held discriminatory); *cf.* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359-60 (1973) (ad valorem personal property tax assessed against corporations and not individuals held valid); State v. Friswold, 263 Minn. 130, 134, 116 N.W.2d 270, 274 (1973) (temporary procedural preference afforded to violators of traffic ordinances, but not violators of traffic statutes, held not unreasonably discriminatory).

28. The political franchise is a fundamental right which, if infringed, will subject the infringing regulation to the strict scrutiny standard of review. *See* Bullock v. Carter, 405 U.S. 134, 142-44 (1972); Williams v. Rhodes, 393 U.S. 23, 30-31 (1968); Ulland v. Growe, 262 N.W.2d 412, 415 (Minn.), *cert. denied*, 436 U.S. 927 (1978); Meyers v. Roberts, 310 Minn. 358, 360-61, 246 N.W.2d 186, 187-88 (1976), *appeal dismissed*, 429 U.S. 1083 (1977).

Implicit in the right to vote is the right of voters to "cast their votes effectively." Williams v. Rhodes, 393 U.S. at 30. *See* note 43 *infra* and accompanying text.

29. *See, e.g.*, Lubin v. Panish, 415 U.S. 709, 715-16 (1974) (reasonable standards can be imposed to limit access to the ballot); Bullock v. Carter, 405 U.S. 134, 142-43 (1972) (candidate status not sufficiently fundamental to require strict review); Williams v. Rhodes, 393 U.S. 23, 30-31 (1968) (restricted access to placement on ballot cannot be permitted to interfere with the right to vote); Snowden v. Hughes, 321 U.S. 1, 7 (1944) (right to run for office is not a constitutionally protected right of liberty or property); Beller v. Kirk, 328 F. Supp. 485, 486 (S.D. Fla. 1970) (per curiam) (signatures of three percent of voters in state can be required to have name of candidate placed on ballot), *aff'd sub nom.* Beller v. Askew, 403 U.S. 925 (1971); Fowler v. Adams, 315 F. Supp. 592, 595 (M.D. Fla. 1970) (candidate filing fees are not invidiously discriminatory), *appeal dismissed*, 400 U.S. 986 (1971).

30. *But cf.* Williams v. Rhodes, 393 U.S. 23, 30-31, 34 (1968) (strict scrutiny standard of review applied to ballot laws which were so restrictive as to impair the right to vote).

31. *See, e.g.*, Bullock v. Carter, 405 U.S. 134, 143-44 (1972); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964).

32. Bullock v. Carter, 405 U.S. 134, 144 (1972); Williams v. Rhodes, 393 U.S. 23, 31 (1968); *see* Lubin v. Panish, 415 U.S. 709, 716 (1974). Outside the area of voting rights, the Court has indicated that the rational basis standard may apply to a regulation involving a fundamental right if the regulation does not significantly interfere with the right. *See* Zablocki v. Redhail, 434 U.S. 374, 386 (1978) (state regulation of marriage is not subject to strict scrutiny unless the regulation interferes with the decision to marry); Maher v. Roe, 432 U.S. 464, 473-74 (1977) (refusal to finance indigent women's abortions does not unduly interfere with freedom to decide to terminate pregnancy).

33. *See* Lubin v. Panish, 415 U.S. 709, 718-19 (1974); Bullock v. Carter, 405 U.S. 134, 149 (1972). The statutes in *Bullock* effectively eliminated all candidates not privately wealthy or affiliated with a well-financed, organized party. *Id.* at 143.

statutes imposing burdensome procedures for filing nominating petitions.[34] Although courts have recognized the phenomenon of positional bias in cases involving nonpartisan or primary elections,[35] they have split on the question of whether positional bias infringes on the right to vote.[36]

Holding that no fundamental right had been infringed, the Minnesota court in *Ulland* applied the rational basis standard of review to the statute. The court found a reasonable basis in the Legislature's intent to assist party-affiliated voters in quickly and easily locating their candidates' names on the ballot.[37] Evidence introduced at trial established that two-thirds of Minnesota voters identify with one of the major political parties. Therefore, assisting the majority of voters supplied a rational basis for the classification of party-affiliated and unaffiliated candidates.[38] The court concluded that even if ballot rotation were marginally fairer, it would not overturn the statute.[39]

In rejecting the strict scrutiny standard, the court found no significant impact on voting rights.[40] Proponents of ballot rotation analogize positional bias to improper apportionment. They have argued that because the candidate in the first position on the ballot receives a number of extra votes, the votes for candidates on other ballot positions are, in effect, unconstitutionally "diluted."[41] The Minnesota court rejected this argument, finding that the dilution which occurs because of positional bias is not the same as the dilution caused by improper apportionment.[42]

---

34. *See* Williams v. Rhodes, 393 U.S. 23, 33-34 (1968).

35. *See, e.g.*, Weisberg v. Powell, 417 F.2d 388 (7th Cir. 1969) (per curiam) (primary election); Gould v. Grubb, 14 Cal. 3d 661, 536 P.2d 1337, 122 Cal. Rptr. 377 (1975) (nonpartisan); Elliott v. Secretary of State, 295 Mich. 245, 294 N.W. 171 (1940) (per curiam) (nonpartisan); Holtzman v. Power, 62 Misc. 2d 1020, 313 N.Y.S.2d 904 (Sup. Ct.), *aff'd*, 27 N.Y.2d 628, 261 N.E.2d 666, 313 N.Y.S.2d 760 (1970) (primary election).

36. *Compare* Gould v. Grubb, 14 Cal. 3d 661, 536 P.2d 1337, 122 Cal. Rptr. 377 (1975) *with* Clough v. Guzzi, 416 F. Supp. 1057 (D. Mass. 1976). In *Gould*, the court held that the ballot position provision of the statute imposed a significant impact on the "equality, fairness and integrity of the electoral process." 14 Cal. 3d at 670, 536 P.2d at 1343, 122 Cal. Rptr. at 383.

37. *See* 262 N.W.2d at 418; *cf.* Bullock v. Carter, 405 U.S. 134, 144-45 (1972) (state has a legitimate interest in keeping ballots within manageable, understandable limits). The Illinois Supreme Court has recognized the interest of the voter in being able to identify readily the candidates for whom he wishes to vote. *See* Bradley v. Lunding, 63 Ill. 2d 91, 98, 344 N.E.2d 472, 476, *stay denied*, 424 U.S. 1309 (Stevens, Circuit Justice), *appeal dismissed*, 425 U.S. 956 (1976).

38. 262 N.W.2d at 418.

39. *Id.* The Massachusetts Supreme Judicial Court has stated that the propriety of the Legislature's failure to counteract the positional bias factor in favor of a uniform system of assigning ballot position "turn[s] on matters of degree." Tsongas v. Secretary of the Commonwealth, 362 Mass. 708, 720, 291 N.E.2d 149, 156 (1972).

40. 262 N.W.2d at 416; *accord*, Clough v. Guzzi, 416 F. Supp. 1057, 1067 (D. Mass. 1976).

41. *See, e.g.*, Gould v. Grubb, 14 Cal. 3d 661, 536 P.2d 1337, 122 Cal. Rptr. 377 (1975).

42. Ulland v. Growe, 262 N.W.2d 412, 416 (Minn.), *cert. denied*, 436 U.S. 927 (1978).

Improper apportionment occurs when districts with unequal populations nevertheless have the same number of legislators elected from each district. Consequently, the improper apportionment dilutes the impact of votes cast in the underrepresented districts.[43] Positional bias, on the other hand, occurs because some voters, having no reason to vote for any particular candidate, automatically cast their votes for the candidate listed first on the ballot. This uninformed choice makes the first position on the ballot superior to all others.

The court did not recognize a constitutional right to be free from the effects of positional bias. Treating uninformed voters differently would be equivalent to recognizing a constitutional right to a wholly rational election based only on reasoned considerations of issues and candidates' opinions.[44] At least one court, prior to the Minnesota decision, had rejected an attack on an election statute for this reason, stating: "Voters have no constitutional right to a wholly rational election, based solely on reasoned consideration of the issues and the candidates' positions, and free from [such] other 'irrational' considerations as a candidate's ethnic affiliation, sex, or home town."[45]

Whether the court will continue to apply a rational basis standard to the issue of positional bias depends on the evidence that can be presented to support the existence and impact of positional bias.[46] Research

---

The Minnesota Supreme Court did not make reference to dictum in Clough v. Guzzi, 416 F. Supp. 1057, 1067 (D. Mass. 1976), that suggested one other distinction from the reapportionment cases. The federal district court had noted that candidates and their supporters can minimize the number of uninformed voters through their campaign efforts to make the election visible and thus inform the electorate. What that discussion seems to infer is the unprecedented requirement that when the effects of the disadvantage caused by a statute can be overcome the strict scrutiny standard need not be applied. The court's language could be interpreted, however, as an emphasis on the lack of evidence that the election statute directly caused dilution to the extent that it infringed the fundamental right to vote.

43. Ulland v. Growe, 262 N.W.2d 412, 416 (Minn.), *cert. denied*, 436 U.S. 927 (1978); *see* Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Baker v. Carr, 369 U.S. 186 (1962). In reapportionment cases the United States Supreme Court has held that a maximum total deviation of up to 10% from mathematically perfect representation is insufficient, absent other factors, to constitute an equal protection violation. *See* White v. Regester, 412 U.S. 755, 776-77 (1973) (Brennan, J., dissenting in part, concurring in part) (total deviation was 9.9%); *cf.* Gaffney v. Cummings, 412 U.S. 735, 737 (1973) (total deviation was 7.83%). In order to find an equal protection violation it is necessary to establish that either the deviation is such as to amount to invidious discrimination or that there is, in fact, invidious discrimination. *See id.* at 740-41.

44. *See* Clough v. Guzzi, 416 F. Supp. 1057, 1067 (D. Mass. 1976); Ulland v. Growe, 262 N.W.2d 412, 416 (Minn.) ("[S]ome citizens may choose to vote irrationally, as is their right . . . ."), *cert. denied*, 436 U.S. 927 (1978).

45. Clough v. Guzzi, 416 F. Supp. 1057, 1067 (D. Mass. 1976). *But cf.* Comment, *supra* note 3, at 841-42 (illegality of a government statutorily conferring preferential treatment on a discriminatory basis is distinguishable from the voter's right to express whatever personal biases that person holds).

46. *See, e.g.*, Diamond v. Allison, 8 Cal. 3d 736, 737, 505 P.2d 205, 206, 106 Cal. Rptr.

of voter behavior is often inconclusive and not always applicable to a particular type of election.[47] Presented with concrete evidence of a substantial impact on elections caused by positional bias, the court might extend the greater protection of the strict scrutiny standard in reviewing the statute.

Although the Minnesota Supreme Court did not apply the constitutional standards incorrectly, the current law affecting candidate name placement on ballots is less than satisfactory. Election laws should eliminate as many uncertainties as possible that could cloud the intentions of the voters.[48] In close elections particularly, a win or loss can be attributed to various intangible factors. Positional bias is but one of these intangibles. A rule of name rotation for all types of elections could eliminate positional bias as a factor in the election process. Furthermore, more than other methods, name rotation would affect at least the appearance of fairness[49] no matter what the statistical evidence might establish about the relative impact of positional bias on election results. What ballot rotation does that no other method of name placement even attempts to accomplish is to spread among all the candidates whatever bias might occur; every method except name rotation allocates the benefits of whatever bias exists to a particular candidate.

In the past, Minnesota law has required ballot rotation in state legislative contests;[50] presently, rotation is required in all nonpartisan elec-

13, 14 (1973) (per curiam); Tsongas v. Secretary of the Commonwealth, 362 Mass. 708, 720-21, 291 N.E.2d 149, 156-57 (1972); Ulland v. Growe, 262 N.W.2d 412, 416 (Minn.), *cert. denied*, 436 U.S. 927 (1978); *cf.* Gould v. Grubb, 14 Cal. 3d 661, 664, 536 P.2d 1337, 1338-39, 122 Cal. Rptr. 377, 378-79 (1975) (compelling governmental interest must be shown to sustain validity of ballot placement statute where substantial advantage is proven to inure to candidate occupying the top ballot position).

47. Ulland v. Growe, 262 N.W.2d 412, 414 & n.5 (Minn.), *cert. denied*, 436 U.S. 927 (1978); *cf.* Sangmeister v. Woodard, 565 F.2d 460, 465-66 (7th Cir. 1977) (fact that advantage accrues to first position on ballot was supported by substantial evidence, even though the conclusiveness and applicability of the data was disputed), *cert. denied*, 435 U.S. 989 (1978).

48. Minnesota law already seeks to establish as readable a ballot format as possible to promote easy and accurate candidate selection by voters. *See* MINN. STAT. § 203A.12(1) (1976).

49. *See also* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973). In discussing limitations on federal employees' rights of political association, the United States Supreme Court not only expressed the strong concern that public employees in the executive branch of government administer the law without bias for or against any political party or group, *id.* at 564-65, but that the suggestion of prejudice warrants prohibiting participation in certain political activities. The Court said: "[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Id.* at 565. An appearance of corruption in the election process is "[o]f almost equal concern" as the danger of actual corrupt activities. Buckley v. Valeo, 424 U.S. 1, 27 (1976).

50. Prior to 1973, candidates for the state legislature were nominated on nonpartisan

tions. Therefore, the tradition and the capability exist for the use of name rotation.[51] But, absent stronger evidence of the impact of positional bias, such a return to name rotation is not the responsibility of the courts; it is the responsibility of the Minnesota Legislature. Surely the Legislature will recognize that voters can identify their party's candidate through party labels, regardless of the position of the candidate's name on the ballot. In an era when cynicism toward our political system is widespread and has the potential to impair severely public participation in elections, the Legislature would do well to return to procedures designed to enhance the integrity of the ballot election process.

Environmental Law—A BALANCING TEST ADOPTED UNDER MERA—*MPIRG v. White Bear Rod & Gun Club*, 257 N.W.2d 762 (Minn. 1977).

An effort by the Minnesota Legislature in 1971 to protect, conserve, and promote the best use of the state's natural resources resulted in the passage of the Minnesota Environmental Rights Act (MERA).[1] MERA

ballots without designation of party affiliation beside the candidates' names. *See* Act of Apr. 24, 1959, ch. 675, art. III, § 3(1), 1959 Minn. Laws 1133 (current version at MINN. STAT. § 203A.21(1) (1976)). First ballot position was, and continues to be, rotated in the nonpartisan general election contests. *See* Act of Apr. 24, 1959, ch. 675, art. IV, § 34(1), 1959 Minn. Laws 1158 (codified at MINN. STAT. § 203A.35(1) (1976)). In contrast to ballot positioning of candidates in nonpartisan general elections, candidates in partisan general elections were arranged in the order of number of votes polled by their party in the last general election. In first position was the party polling the largest number of votes. *See* Act of Apr. 24, 1959, ch. 675, art. IV, § 33(3) (current verson at MINN. STAT. § 203A.33(4) (1976)). In 1973, ballot placement methods for state legislative contests changed when the Legislature changed the status of elections for members of the state legislature from nonpartisan to partisan. *See* Act of Feb. 20, 1973, ch. 3, § 1, 1973 Minn. Laws 2 (codified at MINN. STAT. § 203A.21(1) (1976)).

51. Despite the expanded use of voting machines, which in some respects impairs the ability to attain perfect name rotation, the use of the machines can be adapted to effect rotation. *See* State v. Board of Comm'rs, 39 Ohio St. 2d 130, 135, 136-37 & n.4, 314 N.E.2d 172, 176-78 & n.4 (1974). For a discussion of Ohio's method of achieving ballot rotation while using voting machines, see the discussion of State v. Board of Comm'rs, *supra* note 9.

1. Act of June 7, 1971, ch. 952, 1971 Minn. Laws 2011 (codified at MINN. STAT. §§ 116B.01-.13 (1976)). For a comprehensive discussion of the origin and legislative history of the Act, see Note, *The Minnesota Environmental Rights Act*, 56 MINN. L. REV. 575 (1972). Discussion of actions brought under MERA in the first five years following its enactment may be found in Bryden, *Environmental Rights in Theory and Practice*, 62 MINN. L. REV. 163 (1978).

The Legislature's policy under MERA is:

> [T]o create and maintain within the state conditions under which man and nature can exist in productive harmony in order that present and future genera-