

ELECTION BY LOTTERY: BALLOT ORDER, EQUAL PROTECTION, AND THE IRRATIONAL VOTER

*Laura Miller**

Introduction	373
I. Current State of the Law in the Fifty States	376
A. Step One: Ballot Order	378
B. Step Two: Ballot Rotation	379
II. Empirical Evidence of the Ballot Order Effect	381
A. Theoretical Causes of Ballot Order Effects	381
B. Empirical Research on Ballot Order Effects	384
III. Ballot Order Challenges in State and Federal Court ...	389
A. Variation in States	390
1. Local Discretion in Determining Ballot Order	391
2. Incumbent First	391
3. Random Ordering	393
B. Constitutional Equal Protection and Ballot Order Effects	394
1. Level of Review	395
2. The Constitutional Harm	396
3. State Interest	402
Conclusion	405

INTRODUCTION

In January 2008, Hillary Clinton surprised most political commentators by winning the most votes in the New Hampshire primary.¹ Although an early frontrunner, Clinton’s prospects for capturing the nomination were thought to be severely diminished after her defeat to Barack Obama in the Iowa caucuses. The pre-election opinion polls

*J.D. Candidate, New York University School of Law, 2010; Ph.D., Stanford University, 2007.

1. Jacques St. Einberg & Janet Elder, *Analyzing the New Hampshire Surprise*, N.Y. TIMES, Jan. 10, 2008, at A26; Patrick Healy & Michael Cooper, *Clinton is Victor, Turning Back Obama; McCain also Triumphs*, N.Y. TIMES, Jan. 9, 2008, at A1.

coming out of New Hampshire showed her behind by as much as thirteen points.² Various stories were offered to account for this come-from-behind victory,³ but one potential cause, built into the election system itself, was largely ignored.

Prior to 2008, the New Hampshire procedure for ordering candidates on primary ballots involved two steps. The names were first randomized, and then the order was rotated precinct by precinct.⁴ This ensured that each candidate appeared first on the ballot for approximately the same number of voters. For reasons that remain obscure, the New Hampshire Secretary of State decided to end the second step of the process for the 2008 primaries. A letter of the alphabet was selected randomly to determine the starting place for the candidate order, but no rotation across election precincts took place.⁵ The letter selected was Z.⁶ Thus, on a ballot that included twenty-one candidates for the Democratic nomination for president, Joe Biden came first, followed by Hillary Clinton in fourth. Barack Obama ended up in the eighteenth slot. For many decades, social scientists have studied the “primacy effect” phenomenon, whereby individuals are more likely to select an early, rather than later, answer choice from a list of possibilities.⁷ Judging by historical data, this may have given Clinton as much as a three-point bump—the margin of victory—on Election Day.⁸

New Hampshire is by no means unique in its process for determining the order in which candidates appear on the ballot. Several jurisdictions perform similar lotteries to determine ballot order.⁹ Some states and localities take the additional step of rotating candidate names across election districts, but the number is small, and the rotation frequently does not extend to local elections.¹⁰ In still other

2. Susan Page, *Poll: Obama, McCain Leap Ahead in N.H.*, USA TODAY, Jan. 6, 2008, available at http://www.usatoday.com/news/politics/election2008/2008-01-06-poll-newhampshire_N.htm.

3. These included, for example, a high level of undecided voters prior to the election, polling errors, the unpredictable nature of identity politics in the contest, and a high degree of “group think” among reporters on the campaign trail. Einberg & Elder, *supra* note 1, at A26.

4. Jon A. Krosnick, *Ballot Changes Cited in Vote’s Discrepancy With Polls*, ABC NEWS, Jan. 9, 2008, <http://www.abcnews.go.com/print?id=4107883>.

5. *Id.*

6. *Id.*

7. *See infra* Part III.

8. Krosnick, *supra* note 4.

9. *See infra* Table 1.

10. California, for instance, rotates candidates’ names across assembly districts for statewide elections, but no such rotation occurs for local elections. CAL. ELEC. CODE § 13111(b)–(c) (West 2003).

states, far more pernicious practices determine the order. These may include listing the incumbent candidate or party first, or giving discretion to the local election official to design the ballot.¹¹

The effect of ballot ordering is an old problem with an old solution. Since the early twentieth century, many states and localities have recognized a need to randomize or rotate the listing of candidates on the ballot.¹² Still, ballot design, and particularly candidate order, presents an underappreciated problem in election law.¹³ The ballot order effect has been shown to be significant both statistically and in magnitude in a large array of elections. In some cases, the current state procedures for determining the order in which the candidates appear on the ballot have the effect of entrenching incumbents for one or both of the major parties. In other, more difficult cases, the ballot order procedure is not designed to advantage any particular candidate, but can still have a determinative effect on election outcomes. These cases raise considerable questions regarding the legitimacy of the election in that they introduce arbitrary—and entirely avoidable—error into the voting process.

The Supreme Court has repeatedly declared the right to vote as fundamental, and that “severe” infringements on that right are subject to strict scrutiny by courts.¹⁴ In elections with pronounced positional ballot effects, the supporters of candidates listed in disadvantageous

11. In Massachusetts, for example, incumbents for state office are generally listed first. MASS. GEN. LAWS ANN. ch. 54, § 42 (West 2007); see *Tsongas v. Sec’y of Commonwealth*, 291 N.E.2d 149 (Mass. 1972); Jenn Abelson, *Law Placing Incumbents at Top of Ballot Is Challenged*, BOSTON GLOBE, April 17, 2004, at B3.

12. See, e.g., *Elliot v. Sec’y of State*, 294 N.W. 171, 173 (Mich. 1940) (“It is a commonly known and accepted fact that in an election, either primary or general, 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.”); see also *Childs v. Curran*, 52 N.Y.S.2d 911 (Sup. Ct. 1944) (noting that the application of the election law to certain previous situations has been held to be discriminatory and unconstitutional).

13. For a recent comprehensive survey of the issues involved with designing ballots, see LAWRENCE NORDEN, DAVID KIMBALL, WHITNEY QUESENBERY, & MARGARET CHEN, BRENNAN CENTER FOR JUSTICE, *BETTER BALLOTS* (2008), available at http://www.brennancenter.org/content/resource/better_ballots.

14. See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (“[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. . . . [W]hen those rights are subjected to ‘severe’ restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance.” (citation omitted)); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (noting that a court “must first consider the character and magnitude of the asserted injury to the rights protected It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.”).

positions suffer from the dilution of their vote because the surplus, or donkey vote, supplements the votes for another candidate. Particularly in “down-ballot,”¹⁵ non-partisan, and primary elections, courts should demand rotation of ballot order on equal protection grounds. In higher profile elections, such as the general presidential election, the impact of positional bias is likely to be considerably smaller, and so it is less clear that the Constitution requires rotation. However, as a policy matter, rotation is still a better design method for ballots, and state legislatures should adopt rotation schemes for all elections.

Part I of this Note surveys the current ballot order laws and practices in the fifty states. Any attempt to categorize the often expansive and inconsistent election laws of a state is fraught with difficulty, but this section attempts to create a framework to better understand the scope of the problem. The heterogeneity across the states requires some level of generality and simplification, but the basic rules for determining how candidates are listed in statewide primary and general elections are offered. Some discussion is also provided regarding elections for U.S. congressmen and local elections, although this is less comprehensive. Part II discusses both the theoretical and empirical literature in psychology and political science on ballot order effects and primacy effects more generally. Part III summarizes the treatment that ballot order challenges have received in state and federal courts, finding a significant split across jurisdictions. Ballot order effects are then analyzed through the lens of equal protection. In a similar vein as the malapportionment cases of the 1960s, ballot order effects represent constitutionally impermissible vote dilution.

I.

CURRENT STATE OF THE LAW IN THE FIFTY STATES¹⁶

States and their political subdivisions have nearly exclusive control over the administration of elections for offices at both the national and local level.¹⁷ The “hyper-federalized” system of election adminis-

15. “Down-ballot” elections generally refer to elections for state office other than those for high-salience positions, such as governor or attorney general.

16. The primary sources for identifying ballot order rules in each state are state election codes. States vary in how explicitly they detail their ordering process, and so it is possible that the classifications given here depart from the actual practice in the state. Where possible, the procedure is crosschecked with news articles on the ballot ordering.

17. Different scholars lump different election issues within the rubric of “election administration.” Here, I intend it to mean the somewhat narrow “nuts and bolts” of elections, or “election mechanics.” Thus, voting technology, registration criteria, voter identification, the rules governing the handling of provisional balloting and re-counts are included, while issues such as how candidates qualify for the ballot (“ballot

tration in this county includes approximately 13,000 election districts nationwide.¹⁸ As a result, ballot order procedures throughout the nation vary considerably, not just between states, but also within them. The system is not conducive to easy summary, but can generally be separated into a handful of categories.

At the outset, it is important to take note of a few key points that complicate any attempt to survey ballot order laws. First, states frequently employ different rules for different elections. The mandated method for determining the order of candidates in a primary election is generally not the same as that for the general election. Many states organize the general election ballot into columns by party (“party block” ballot), to aid the voter in selecting the party-line vote.¹⁹ Thus, candidates from different parties for the same office are not ordered vertically on the general election ballot. Obviously, in a primary election the party block ballot design is not possible, as only one party appears on any given ballot. An alternative to the party block ballot is to group candidates vertically under each elective office. This “office block” ballot format is frequently employed in primary elections. As will be discussed in more detail below, ballot order effects are likely to be much more significant in primary elections and with the “office block” ballot, and so this analysis focuses on these types of elections.²⁰

A second difficulty in surveying ballot order laws is the fact that the method states use to order candidates and parties is subject to change. This flux in the state of the law makes any general classification difficult. A third difficulty is that ballot order laws vary not only between states, but also within them, resulting in an extraordinary range of ballot orderings. To limit this discussion to manageable pro-

access”) and redistricting are not. The key theoretical distinction is that “election mechanics” tend to directly affect how the individual voter interacts with the electoral system. See Daniel Tokaji, *Judicial Review of Election Administration*, 156 U. PA. L. REV. PENNUMBRA 379, 381–82 (2008).

18. Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 952 (2005).

19. See, e.g., CONN. GEN. STAT. ANN. § 9-249a (West 2009); DEL. CODE ANN. tit. 15, § 4502 (2007); GA. CODE ANN. § 21-2-285(c) (2008); MD. CODE ANN., ELEC. LAW § 9-210(j)(2)(i)–(ii) (LexisNexis 2002); N.J. STAT. ANN. § 19:14-12 (West 1999 & Supp. 2009); N.M. STAT. ANN. § 1-10-8.1 (LexisNexis 2004); OKLA. STAT. ANN. tit. 26, § 6-106 (West 1997 & Supp. 2009); S.C. CODE ANN. § 7-13-330 (1977 & Supp. 2009); S.D. CODIFIED LAWS § 12-16-3.1 (2004 & Supp. 2009); TENN. CODE ANN. § 2-5-206(b)(2) (2003); TEX. ELEC. CODE ANN. § 52.091 (Vernon 2003); UTAH CODE ANN. § 20A-6-301 to -302 (2007); WIS. STAT. ANN. § 5.64(b) (West 2004 & Supp. 2009); WYO. STAT. ANN. § 22-6-121 (2009).

20. See *infra* Part III.

portions, only statewide offices are considered in a comprehensive way. Although ballot order effects are likely to be greater in local elections due to the fact that there is generally less media attention and frequently no party cues, a review of local ballot order is not discussed here.

The ideal determination of ballot order can be seen as a two-step process. The first step is to establish the initial order of candidates on the ballot, while the second step is to rotate that order across the political subdivisions within the jurisdiction. This would allow states to effectively eliminate, collectively, the “primacy effect” from the voting process. Unfortunately, the majority of states skips the critical second step entirely, and have thus failed to adequately account for the consequences that ballot order plays in determining election outcomes.

A. *Step One: Ballot Order*

While a variety of minor variations and peculiarities exist across states, the four general types of ballot order rules are: 1) provide the local election administrator discretion to order the candidates, 2) begin with the incumbent candidate or party, followed by the challengers, 3) rank the candidates in alphabetical order by last name, and 4) create a random order determined by lottery.²¹ In addition to the four dominant types of ordering rules, Illinois and Missouri employ a slight variation to the random order in primary elections.²² In these states, ballot order for primaries is determined by the order in which the candidates filed their candidacy petitions.²³ If candidates file simultaneously, a lottery is conducted among those candidates.²⁴ In reality, most candidates file at the first opportunity—sometimes literally camping out in front of the election office—to ensure their spot in the lottery.²⁵ To the extent that ballot order matters, we should be most concerned with ballot orderings from the first two categories, which would seem to introduce an intentional bias for those already in power.²⁶ The last two categories have the advantage of being facially

21. See *infra* notes 34–40 and accompanying text.

22. 10 ILL. COMP. STAT. ANN. 5/7-12 (West 2003); MO. REV. STAT. § 115.239 (2000).

23. 10 ILL. COMP. STAT. ANN. 5/7-12 (West 2003); MO. REV. STAT. § 115.239 (2000).

24. 10 ILL. COMP. STAT. ANN. 5/7-12 (West 2003); MO. REV. STAT. § 115.239 (2000).

25. Abdon M. Pallasch & Steve Patterson, *Obama, Clinton Try for Top Spot on State Ballot*, CHI. SUN-TIMES, Oct. 30, 2007, at 15.

26. A considerable literature has been developed regarding the problem of election rules structured to entrench incumbent politicians and parties. See generally Samuel

neutral, but still leave open the possibility that the first candidate or party on the ballot will receive an advantage. Commentators tend to endorse the use of a lottery to randomly assign ballot order over listing the candidates alphabetically. The rationale for such a preference is lacking, however, as the first letter of the name you were given at birth can itself be treated as a lottery. The only concern would be if potential candidates were so convinced of a statistical advantage to being listed first on the ballot that they endeavored to improve their electoral chances by actually changing their names.²⁷ While the advantage might be randomly assigned, these processes still introduce an arbitrary element into the election outcome.

B. Step Two: Ballot Rotation

Rotating the order across the political subdivisions of the jurisdiction largely solves both the intentional and random bias problems inherent in any ordering system by ensuring that each candidate gets her turn at the top of the ballot in roughly equal proportion to the other candidates. Rotating the order on the ballot does not reduce primacy effects for any individual voter—presumably just as many voters will be influenced to vote for candidates based on their location on the ballot as when no rotation occurs.²⁸ The goal of rotating the order of the names is to ensure no systematic impact from voters collectively influenced by primacy effects. Rotation across political districts within a given jurisdiction can generally be assumed to achieve randomization of the error associated with positional effects, so long as the number of districts is sufficiently large.²⁹ As the number of units for rotation decreases, the probability that random variation in unit population size will distort election results increases. States that rotate employ a number of different methods. The most common procedure is to first establish a base order, and then sequentially rotate

Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

27. Two politicians in Ireland, where ballot position was determined by alphabetical order, went so far to change their names in the 1980s. Sean Loftus went to Sean Alderman Dublin Day-Rockall Loftus and William Fitzsimon altered his name to William Abbey of the Holy Cross-Fitzsimon. DAVID M. FARRELL, *COMPARING ELECTORAL SYSTEMS* 134 (Prentice Hall 1997).

28. See *infra* Part III.

29. Because rotation procedures do not create a simple randomization of candidate names, the statistical analysis of ballot order effects can be quite complicated. See Daniel E. Ho & Kosuke Imai, *Randomization Inference With Natural Experiments: An Analysis of Ballot Effects in the 2003 California Recall Election*, 101 J. AM. STAT. ASS'N 888, 888–89 (2006).

that order across preexisting political districts, such as state legislative districts or precincts.³⁰

In addition to rotating the names of candidates, another method used to eliminate systematic ballot order effects is to randomly assign the names of candidates on the ballot at the local, rather than state, level. Currently, Arkansas³¹ and New Jersey³² determine candidate order in this way. As to the effectiveness of this method, there should be little difference when compared to a scheme that rotates across the electoral districts. Provided there are a sufficiently large number of randomizing localities, no candidate is likely to gain a ballot order advantage in a disproportionate number of them. The primary issues in deciding between these two systems is likely to concern administrative costs and whether the local election board is better able to handle the order assignment than the state apparatus.³³

A handful of states have moved toward some form of rotation.³⁴ In statewide general elections, such as those for president, governor, or U.S. senator, twelve states currently use some form of rotation, either in practice or by statute.³⁵ In primary elections, where primacy effects are much larger,³⁶ rotation is marginally more common.³⁷ Of the thirty-eight states that do not rotate candidate or party names across districts in general elections, seven use alphabetical order,³⁸ ten

30. See, e.g., CAL. ELEC. CODE § 13111(b)–(c) (West 2003).

31. ARK. CODE ANN. § 7-5-208(f)(4) (2007).

32. N.J. STAT. ANN. § 19:14-12 (West 1999 & Supp. 2009).

33. See *infra* Part IV (discussing the potential costs of ballot order rotation and the competency of election administrators to handle it).

34. However, the change in rotation patterns is not unidirectional. Prior to 1995, Alaska statute required rotation of candidates' names as many times as there were candidates for all elections. A 1995 amendment to the law ended the practice of rotation within a single state house district. See *Sonneman v. Alaska*, 969 P.2d 632, 634 (Alaska 1998).

35. ALASKA STAT. § 15.15.030(6) (2008); ARK. CODE ANN. § 7-5-208(f)(4) (2007); CAL. ELEC. CODE § 13111(b)–(c) (West 2003); IDAHO CODE ANN. § 34-903(4) (2008); KAN. STAT. ANN. § 25-610 (2000); KY. REV. STAT. ANN. § 118.225 (LexisNexis 2004 & Supp. 2009); MONT. CODE ANN. § 13-12-205(2) (2009); NEB. REV. STAT. § 32-815 (2008); *Akins v. Sec'y of State*, 94 A.2d 702, 708 (N.H. 2006); N.J. STAT. ANN. § 19:14-12 (West 1999 & Supp. 2009); N.D. CENT. CODE §§ 16.1-11-27 & 16.1-06-05 (2004 & Supp. 2009); OHIO REV. CODE ANN. § 3505.03 (West 2007).

36. See *infra* Part II.

37. Determining ballot order in primary elections is much more difficult than in general elections. As it stands, I am relatively confident that at least 13 states rotate in primary elections for statewide elections.

38. ALA. CODE § 17-6-25 (LexisNexis 2007); HAW. REV. STAT. § 11-115 (Supp. 2008); LA. REV. STAT. ANN. § 18:551(C)(2) (2004 & Supp. 2009); ME. REV. STAT. ANN. tit. 21-A, § 601 (2008 & Supp. 2009); NEV. REV. STAT. § 293.267 (2007); N.C. GEN. STAT. ANN. § 163-165.6(d) (West 2007); VT. STAT. ANN. tit. 17, § 2472 (2002 & Supp. 2008).

use a lottery procedure,³⁹ and the remaining use some combination of incumbent-first, previous party vote share, or always position one party in the first position.⁴⁰ These results are summarized in Table 1.

II.

EMPIRICAL EVIDENCE OF THE BALLOT ORDER EFFECT

A. *Theoretical Causes of Ballot Order Effects*

Democracy demands a lot of citizens, who have little incentive to engage in the costly search for political information. The significance of voters' informational and cognitive limitations is a common theme within the political behavior research agenda. Since at least the 1950s, political scientists and social psychologists have studied just how much information voters possess and how they translate that knowledge into a vote.⁴¹ From a basic intuitive point of view, it seems uncontroversial that a more informed electorate is an attractive goal. However, from a theoretical standpoint, it is not obvious that increasing the general information level of the electorate is efficient or desirable.⁴² Obtaining political information requires expending scarce resources, and rational citizens will look for ways to significantly reduce those costs. Citizens thus delegate both the procurement and

39. COLO. REV. STAT. § 1-5-404 (2008); 10 ILL. COMP. STAT. ANN. 5/7-12(6) (West 2003); N.M. STAT. § 1-10-8.1 (LexisNexis 2004); OKLA. STAT. ANN. tit. 26, § 6-106 (West 1997 & Supp. 2009); OR. REV. STAT. § 254.155 (2009); S.C. CODE ANN. § 7-13-330 (1977 & Supp. 2009); S.D. CODIFIED LAWS § 12-16-3.1 (2004 & Supp. 2009); R.I. GEN. LAWS § 17-19-9.1 (2003); VA. CODE ANN. § 24.2-613 (2006); W. VA. CODE ANN. § 3-5-13a (LexisNexis 2002 & Supp. 2005).

40. ARIZ. REV. STAT. ANN. § 16-502(E) (2006); CONN. GEN. STAT. § 9-249a (West 2009); DEL. CODE ANN. tit. 15, § 4502 (2007); FLA. STAT. ANN. § 101.151(2)-(3) (West 2008 & Supp. 2010); GA. CODE ANN. § 21-2-285(c) (2008); IND. CODE ANN. § 3-11-2-6 (LexisNexis 2002 & Supp. 2009); IOWA CODE ANN. § 49.31(1)(b) (West 1999 & Supp. 2009); MD. CODE ANN., ELEC. LAW § 9-210(j)(2)(i)-(ii) (LexisNexis 2002); MASS. GEN. LAWS ANN. ch. 54, § 42 (West 2007); MICH. COMP. LAWS ANN. § 168.703 (West 2005); MINN. STAT. ANN. § 204D.13 (West 1992); MISS. CODE ANN. § 23-15-367 (West 2003); MO. REV. STAT. § 115.239 (2000); N.Y. ELEC. LAW § 7-116(1)-(2) (McKinney 2007); 25 PA. CONS. STAT. ANN. § 2963(b) (West 2007); TENN. CODE ANN. § 2-5-206(b)(2) (2003); TEX. ELEC. CODE ANN. § 52.091 (Vernon 2003); UTAH CODE ANN. §§ 20A-6-301 to -302 (2007); WASH. REV. CODE ANN. § 29A.36.161 (West 2005); WIS. STAT. ANN. § 5.64(b) (West 2004 & Supp. 2009); WYO. STAT. ANN. § 22-6-121 (2009).

41. See, e.g., BERNARD R. BERELSON, PAUL F. LAZARSELD, & WILLIAM N. MCPHEE, *VOTING* (1954); ANGUS CAMPBELL, PHILIP E. CONVERSE, WARREN E. MILLER, & DONALD E. STOKES, *THE AMERICAN VOTER* (1960).

42. Anthony Downs, for instance, argued that in a democratic society with rational decision-makers, an electorate that is fully informed, or even equally informed, is not in equilibrium. ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (Harper 1957).

TABLE 1. SUMMARY OF BALLOT ORDER LAW, GENERAL STATEWIDE ELECTIONS

Rotation	No Rotation		
	Alphabetical	Lottery	Other
Alaska	Alabama	Colorado	Arizona
Arkansas ¹	Hawaii	Illinois	Connecticut
California	Louisiana	New Mexico	Delaware
Idaho ²	Maine	Oklahoma	Florida
Kansas	Nevada	Oregon	Georgia
Kentucky	North Carolina	South Carolina ³	Indiana
Montana	Vermont	South Dakota	Iowa
Nebraska		Rhode Island	Maryland
New Hampshire		Virginia	Massachusetts
New Jersey ¹		West Virginia	Michigan
North Dakota			Minnesota
Ohio			Mississippi
			Missouri ²
			New York
			Pennsylvania
			Tennessee ⁴
			Texas
			Utah ⁴
			Washington
			Wisconsin
			Wyoming

¹ Determined randomly by subdivision

² Discretionary

³ Rotated across elections

⁴ Major parties first, unclear how order determined

analysis of political information to specialists, which include political parties, interest groups, and the government itself.

Much of the work in political behavior over the last thirty years focuses on this intuition. In a candidate-campaign, cues such as party, incumbency, and likability significantly reduce the complexity of the vote decision by allowing the voter to easily narrow the choices available.⁴³ Still, some remain skeptical, not about whether voters use cues

43. The early research into political heuristics includes Edward G. Carmines & James H. Kuklinski, *Incentives, Opportunities, and the Logic of Public Opinion in American Political Representation*, in *INFORMATION AND DEMOCRATIC PROCESSES* 240 (John A. Ferejohn & James H. Kuklinski eds., 1990); Richard D. McKelvey & Peter C. Ordeshook, *Information and Elections: Retrospective Voting and Rational Expectations*, in *INFORMATION AND DEMOCRATIC PROCESSES* (John A. Ferejohn & James H. Kuklinski eds., 1990); PAUL M. SNIDERMAN, RICHARD A. BRODY, & PHILIP E. TETLOCK, *REASONING AND CHOICE: EXPLORATIONS IN POLITICAL PSYCHOLOGY* (1991); SAMUEL L. POPKIN, *THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL ELECTIONS* (1991). Voters do not need to know where a candidate stands on every policy issue to choose which candidate best reflects their own views. See generally Richard D. McKelvey & Peter C. Ordeshook, *Information*,

or heuristics, but rather about how well these information and cognitive shortcuts work.⁴⁴ Professors James Kuklinski and Paul Quirk, for instance, are suspicious about citizen competence “in choosing policy preferences, responding to policy rhetoric, and influencing policy making.”⁴⁵ The use of political heuristics can translate into distorted messages offered to political leaders by the electorate.⁴⁶

In this environment of “low information rationality,”⁴⁷ voters are susceptible to other forms of bias as well. Substantial psychological research has established the existence of a “primacy effect,” whereby individuals, when presented with a list of items, are more likely to select the first item on the list than those listed further down.⁴⁸ Professor Jon Krosnick theorizes that primacy effects result from a confirmatory bias:⁴⁹ rather than looking for reasons *not* to select an item, people look for positive reasons to select the item. As a decision-maker moves down a list, she becomes less likely to generate reasons for selecting an item due to increasing fatigue and short-term memory constraints. Thus, people are less likely to select items farther down a list. Another possible cause of primacy effects is “satisficing” behavior, which is most likely to occur when a voter feels compelled to vote for every race on a ballot.⁵⁰ The idea behind satisficing is that rather than selecting the “best” alternative, people select the first option that

Electoral Equilibria, and the Democratic Ideal, 48 J. POL. 909 (1986). Giving simple but very informative signals, such as the candidate’s political party, allows the voter to choose as if she had full information.

44. See, e.g., James H. Kuklinski & Norman Hurley, *On Hearing and Interpreting Political Messages: A Cautionary Tale of Citizen Cue-Taking*, 56 J. POL. 729 (1994); James H. Kuklinski, Paul Quirk, Jennifer Jerit, David Schwieder, & Robert Rich, *Misinformation and the Currency of Democratic Citizenship*, 62 J. POL. 790 (2000); Richard Lau & David Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 AM. J. POL. SCI. 951 (2001); James H. Kuklinski, Paul Quirk, Jennifer Jerit, & Robert Rich, *The Political Environment and Citizen Competence*, 45 AM. J. POL. SCI. 410 (2001).

45. James H. Kuklinski & Paul Quirk, *Reconsidering the Rational Public: Cognition, Heuristics, and Mass Opinion*, in ELEMENTS OF REASON 154 (Arthur Lupia, Mathew McCubbins & Samuel Popkin eds., 2000).

46. For a similar discussion of the political heuristics literature, see Samuel Isacharoff & Laura Miller, *Democracy and Electoral Processes*, in RESEARCH HANDBOOK ON LAW AND PUBLIC CHOICE (Daniel A. Farber & Anne Joseph O’Connell eds., forthcoming 2010).

47. Popkin (1991), *supra* note 43.

48. Joanne M. Miller & Jon A. Krosnick, *The Impact of Candidate Name Order on Election Outcomes*, 62 PUB. OPINION Q. 291, 293–94 (1998).

49. See *id.* at 293–94.

50. See *id.* at 294–95; see also Jon A. Krosnick, *Response Strategies for Coping With the Cognitive Demands of Attitude Measures in Surveys*, 5 APPLIED COGNITIVE PSYCHOL. 213, 216–17 (1991).

meets their “aspiration level,” some satisfactory minimal threshold.⁵¹ Thus, if there is more than one candidate on the ballot that meets a voter’s aspiration level, it is advantageous from the perspective of the candidate to be listed first.

In addition to primacy effects, researchers have also identified a tendency to select the item listed last in a list. Recency effects might occur in the ballot context if, instead of finding positive reasons to vote for a candidate, voters instead generate reasons to vote against them.⁵² As a voter works her way down a ballot, again due to fatigue and short-term memory limitations, she might generate fewer reasons to vote against the later candidates. Additionally, voters might simply be influenced by the last name that they read on the ballot.⁵³

The theoretical literature has also identified settings in which positional effects⁵⁴ are more likely to occur in the election context. A voter is hypothesized to be more susceptible to order when she has no information about a race, or when she is truly ambivalent between the candidates. In other words, when a voter has less substance to base her decision on, she is more likely to select the candidate listed first (or last) in order.⁵⁵ This also means that we should expect larger ballot order effects in “down-ballot” elections that receive far less media attention, as well as in situations when traditional voting heuristics are not present, as in primary and non-partisan elections.⁵⁶

B. Empirical Research on Ballot Order Effects

Researchers have been interested in the existence of ballot order effects for decades, but serious methodological flaws prevented any generalizable inferences until recently.⁵⁷ While the empirical literature on ballot order effects is still growing, a handful of studies have

51. See generally Krosnick, *supra* note 50, at 214–25.

52. Miller & Krosnick, *supra* note 48, at 294.

53. Daniel E. Ho & Kosuke Imai, *Estimating Causal Effects of Ballot Order from a Randomized Natural Experiment: The California Alphabet Lottery, 1978–2002*, 72 PUB. OPINION Q. 216, 219 (2008).

54. I use the term “positional effects” to denote any type of effect that results from the order in which a choice set is offered to a decision-maker. In other words, “positional effects” includes both primacy and recency effects.

55. Miller & Krosnick, *supra* note 48 at 294–95; Jon A. Krosnick, Joanne M. Miller, & Michael P. Tichy, *An Unrecognized Need for Ballot Reform: The Effects of Candidate Name Order on Election Outcomes*, in RETHINKING THE VOTE: THE POLITICS AND PROSPECTS OF AMERICAN ELECTION REFORM 51, 62 (A.N. Crigler, M.R. Just, & E.J. McCaffery eds., Oxford University Press 2004).

56. Miller & Krosnick, *supra* note 48, at 295; Krosnick et al., *supra* note 55, at 62.

57. Miller & Krosnick, *supra* note 48, at 295–97; Krosnick et al., *supra* note 55, at 63. The two major problems with the earlier studies were inadequate statistical significance tests and the failure to randomly assign candidate order to voters. *Id.*

begun to flesh out the boundaries of the phenomenon. The range of elections in the United States is extensive. Not surprisingly, scholars have found significant variation in the impact that ballot order has on the outcome of elections. To summarize the findings described below, elections of lower salience—such as local elections—and elections without the benefit of the party heuristic—such as primary elections—register the biggest effect from ballot order. As the type of election moves along the spectrum toward the more highly publicized general presidential election, the placement of candidate names on the ballot has a smaller effect. In addition, elections for multiple offices, as are common in down-ballot elections for local government commissions, are more susceptible to ballot order.⁵⁸

Modern empirical studies of ballot order take advantage of elections in which the order of the candidates in any given race is randomly assigned across the voting precincts. This “quasi-experimental” situation allows researchers to observe the impact of ballot order without the need to control for the myriad correlative factors that would otherwise obscure the results. The first modern empirical study on the effect of ballot order was an analysis of the 1992 general election in Ohio by Professors Joanne Miller and Jon Krosnick.⁵⁹ Statistically significant ballot order effects were found in almost half of the races analyzed, and, among these races, nearly all of the effects were primacy effects, rather than recency effects.⁶⁰ In two-

58. In addition to the United States, scholars have examined ballot order effects in other countries. The effect of ballot order has been found to be even more pronounced in nations with compulsory voting. See, e.g., Graeme Orr, *Ballot Order: Donkey Voting in Australia*, 1 ELECTION L. J. 573 (2002).

59. Miller & Krosnick, *supra* note 48; see also Krosnick et al., *supra* note 55. The authors examined election results from three of the largest counties in Ohio. In each county, a random order of candidates was generated for each race. That order was then sequentially rotated precinct by precinct. The rotation scheme was somewhat more complicated than this, but is likely to have produced results approximating randomization. Miller & Krosnick, *supra* note 48, at 298–300. This study was expanded to include election results from 2000 in Ohio, North Dakota, and California—all states that employ some rotation scheme. Krosnick et al., *supra* note 55. In contrast with the Ohio rotation method, North Dakota law dictates that each county rotate ballot order independently, N.D. CENT. CODE §§ 16.1-11-27 & 16.1-06-05 (2004 & Supp. 2009), and California rotates ballot order across each assembly district. CAL. ELEC CODE §§ 13111(a)–(c) (West 2003). Again, using the quasi-experimental treatment effect, Krosnick, et al. found significant primacy effects. In the presidential general election—the one election predicted to have the *lowest* primacy effects—George W. Bush did, on average, more than nine percent better in assembly districts in which he was listed first when compared to those in which he was listed last. However, this result was only marginally statistically significant and may be an empirical artifact.

60. Miller & Krosnick, *supra* note 48, at 308.

candidate races, the range of the primacy effect was from one to five percent, with an average just under three percent of the vote.⁶¹ In races with more than two candidates, significant primacy effects were also found.⁶² Looking more closely at the races, Miller and Krosnick found that positional effects were greater in nonpartisan races and races with less media attention.⁶³ Against the hypothesized direction, they found that ballot order effects were on average smaller in down-ballot elections.⁶⁴

While Miller and Krosnick analyzed a general election, the other recent studies of ballot order effects have focused on primary elections, where voters do not have the benefit of a party cue and where ballot order is hypothesized to have a greater impact. Professors Jonathan Koppell and Jennifer Steen analyzed ballot order effects in the 1998 Democratic Primary in New York City, where the names of the candidates are rotated across precincts.⁶⁵ For statewide offices, including Governor, Lieutenant Governor, and Attorney General, Koppell and Steen found that being listed first provided a statistically significant advantage in votes of approximately two percent.⁶⁶ In the primaries for local races the estimated advantage to being listed first was substantially larger, with a median advantage to being first of 3.6 percent.⁶⁷

Professors Daniel Ho and Kosuke Imai have examined ballot order effects through the lens of advanced methodology in two major

61. *Id.*

62. *Id.* at 308–09.

63. *Id.*

64. *Id.* at 312.

65. Jonathan G.S. Koppell & Jennifer A. Steen, *The Effects of Ballot Position on Election Outcomes*, 66 J. POL. 267 (2004). The selection of New York City was not an accident. Koppell's father lost a 1998 Democratic primary to become the New York attorney general, in which he was listed fourth. G. Oliver Koppell subsequently challenged the state's method of determining the order of the ballot. Dustin Block, *Ballot Bias? Exploring the Name-Order Effect in Local Elections*, RACINE J. TIMES, Mar. 23, 2003, available at http://www.journaltimes.com/localweekend/article_61dc2b8d-5eb9-5d7a-9970-d24b3c6ed9e9.html.

66. Koppell & Steen, *supra* note 65, at 271–72. Koppell and Steen analyzed seventy-nine primaries in all, using data from New York City's 5,616 precincts. *Id.* at 270. Rather than test how ballot position impacted the vote totals for each candidate, Koppell and Steen instead looked at how many votes each ballot position received across the precincts. *Id.* at 271. In the absence of any name-order effects, each position on the ballot for a given race should receive equal numbers of votes. The primaries for Governor, U.S. Senator and Attorney General had four candidates, while the Lieutenant Governor primary had three. *Id.* at 271–72.

67. *Id.* at 272.

studies.⁶⁸ In the first study, they analyze the 2003 California recall election, in which 135 candidates competed to succeed then-Governor Gray Davis in the event that he was recalled.⁶⁹ While Ho and Imai found no advantage to being listed on the first page for the two main candidates, more than forty percent of the minor candidates benefitted from that position.⁷⁰ In the second study, Ho and Imai analyzed California statewide elections from 1972 through 2002. In contrast with prior studies,⁷¹ they found little systematic evidence that major party candidates in general elections are favored by being first on the ballot, but did find that minor party and nonpartisan candidates have a statistical advantage by being listed first in general elections.⁷² In primary elections, even major party candidates gained an advantage when they were listed first.⁷³ Major party candidates gain approximately two percentage points of the total vote and minor party candidates can gain as much as fifty percent of their baseline vote.⁷⁴ In a fairly shocking conclusion, the authors found that ballot order might have changed the winner in seven of fifty-nine of the primary races examined.⁷⁵ In addition to primaries, candidates in nonpartisan races gained two percentage points on average.⁷⁶ These results are consistent with the theory that ballot order effects are more predominate in situations in which voters have less substantive knowledge to guide their vote choice.

A number of gaps in our knowledge of the nature of ballot order effects still exist. First, positional effects at a very local level have yet

68. Ho & Imai, *Estimating Causal Effects of Ballot Order from a Randomized Natural Experiment: The California Alphabet Lottery, 1978–2002*, *supra* note 53; Ho & Imai, *Randomization Inference With Natural Experiments: An Analysis of Ballot Effects in the 2003 California Recall Election*, *supra* note 29. In particular, Ho and Imai employ a non-parametric estimation technique that specifically incorporates California's method of randomization and rotation.

69. Gray Davis was indeed recalled from office, and Arnold Schwarzenegger was elected the new governor.

70. Ho & Imai, *Randomization Inference With Natural Experiments: An Analysis of Ballot Effects in the 2003 California Recall Election*, *supra* note 29, at 888, 894.

71. Specifically, Miller & Krosnick, *supra* note 48 and Krosnick et al., *supra* note 55.

72. Ho & Imai critiqued the methodology used in Krosnick, Miller and Tichy and found that the large advantage reported for George W. Bush in districts in which he was listed first is largely attributable to confounding district characteristics. Ho & Imai, *Estimating Causal Effects of Ballot Order from a Randomized Natural Experiment: The California Alphabet Lottery, 1978–2002*, *supra* note 53, at 227.

73. *Id.* at 218.

74. *Id.*

75. *Id.* at 236–38. For instance, if the second place candidate for the Secretary of State in 2002 had been listed first, the race could have easily gone the other way. *Id.*

76. *Id.* at 218.

to be explored because of the difficulty of statistical measurement as the number of possible rotations decreases. Second, all of the studies discussed above analyze elections in states that use the “office block” ballot form for general elections, in which candidates are listed vertically under the heading of the office they seek. Many states instead employ the “party block” ballot for general elections, in which all of the candidates for a party are listed in a single column.⁷⁷ Given the salience of the party label with this type of ballot, one should expect that positional effects would be minimal.⁷⁸ Third, no study has examined ballot order effects in absentee ballots or in other vote-by-mail systems. Absentee voting is becoming increasingly common and one state, Oregon, conducts all of their elections by mail.⁷⁹ Because voters are able to spend more time filling out their ballots in the privacy of their own homes, it seems likely that ballot order effects are lower with this form of voting.⁸⁰ Fourth, we do not know how ballot order interacts with incumbency. It is plausible that when an incumbent is listed first on the ballot, the effect of ballot order and incumbency create a multiplicative effect.

In sum, ballot order matters. The effect is likely relatively small for major party candidates in general elections, but the effect is substantial for minor party candidates in the same races. In primary and non-partisan elections, the effect is larger both in magnitude and statistical significance for all types of candidates. The leading empirical studies estimate the advantage from being listed first in an election without party cues at around two to three percent.⁸¹ To put this number into context, we can compare it with another source of electoral advantage commonly measured in the political science literature, known as the incumbency advantage. Most studies estimate the incumbency advantage at around five to eight percent.⁸² In close elections, whether or not you are listed first as a candidate can be the difference between winning and losing.⁸³ Primacy effects dominate

77. See sources cited *supra* note 19.

78. See Krosnick, et al., *supra* note 55, at 73 n.13. See also Robert Darcy, *Positional Effects with Party Column Ballots*, 39 W. POL. Q. 648 (1986).

79. OR. REV. STAT. § 254.465 (2009).

80. Krosnick, et al., *supra* note 55, at 73–74 n.13. See also David Gold, *A Note on the ‘Rationality’ of Anthropologists in Voting for Officers*, 17 AM. SOC. REV. 99 (1952).

81. See *supra* text accompanying notes 61, 66–67, 74–76.

82. See, e.g., Stephen Ansolabehere & Jim M. Snyder, Jr., *The Incumbency Advantage In U.S. Elections: An Analysis Of State And Federal Offices, 1942–2000*, 1 ELECTION L. J. 315 (2002).

83. Despite the growing empirical literature on ballot order effects, Alvarez, Sinclair and Hasen offer a voice of caution for courts considering using the results de-

recency effects,⁸⁴ and so in the discussion below, it will generally be assumed that when positional effects exist, they tend to favor those candidates that are listed first on the ballot.

III.

BALLOT ORDER CHALLENGES IN STATE AND FEDERAL COURT

With the growing empirical evidence indicating both the statistical significance and sheer magnitude that ballot order effects have in determining the outcome of elections, the question that arises is whether there is any recourse in the courts to address this problem. Even prior to the relatively recent scholarly work on the nature of ballot order effects, the potential advantage from being listed first was widely acknowledged by politicians, courts and social scientists.⁸⁵ As the lower courts have waded into this field, considerable variation has emerged in how they deal with the problem. After offering a descriptive account of how courts have handled ballot order effects, the dis-

scribed above to invalidate election results. R. Michael Alvarez, Betsy Sinclair, and Richard L. Hasen, *How Much is Enough? The "Ballot Order Effect" and the Use of Social Science Research in Election Law Disputes*, 5 ELECTION L. J. 40 (2006). They primarily argue "courts should be cautious before using generalized social science findings to decide election law cases." *Id.* at 41. According to the authors, empirical evidence of ballot order effect is "muddled," and it is unclear if the effect exists at all in general elections. The authors point to a 2001 mayoral election in the city of Compton, California, in which the results of the election were overturned by a court due to the failure of a city clerk to randomize the names on the ballot as required by state law. An appellate court quickly stayed the order that had declared the losing incumbent mayor the winner. The result was overturned by the California District Court of Appeal, which held that "[w]hile many courts and legislatures have recognized the advantage afforded to candidates whose names are listed first on the ballot, no judicial or statutory authority exists to reverse the results of an election where, due to *unintentional* clerical error, the ballot listed the candidates in the wrong alphabetical order." *Bradley v. Perrodin*, 131 Cal. Rptr. 2d 402, 417 (Ct. App. 2003) (original emphasis). There is a considerable consensus that overturning election outcomes *ex post*, as with the Compton mayoral election, should be reserved for only the most extreme cases. *See, e.g.*, Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265, 297-99 (2007). Alvarez, Sinclair, and Hasen also argue that courts should require a high evidentiary standard for claims that state ballot order laws that do not include randomization and rotation violate equal protection rights: "[F]or a plaintiff to prevail, she should have to come forward with significant evidence that the ballot order effect is likely to change election outcomes. If the plaintiff can do so, the state should then have to produce real evidence of significant savings (such as monetary costs or elimination of voter confusion) that outweigh making such a change." Alvarez, Sinclair & Hasen, *supra* at 52-53.

84. *See supra* note 59 and accompanying text.

85. *See cases cited supra* note 12. For a survey of the empirical literature on ballot order effects prior to the 1990s, see Miller & Krosnick, *supra* note 48, at 295-97.

cussion moves to a theoretical argument of how courts should adjudicate challenges to ballot design.

A. *Variation in States*

Beginning in the 1970s, a handful of state and federal courts became increasingly suspicious of various ballot order schemes, going so far as to strike some of them down. The distance that courts are willing to go in setting the standards for listing candidates on a ballot has varied widely across jurisdictions. Part of this variation comes from the fact that the claims are made against both the U.S. Constitution and state constitutions, which inevitably have different doctrines regarding burdens on the electoral process. This only explains a small portion of the divergence, however. Under the equal protection framework, courts have struggled to define the nature of the harm stemming from positional bias, the state interests involved, and the standard of review for determining the constitutionality of state ballot order statutes.

State and federal courts have been dealing with challenges to ballot positioning for several decades, but relatively few courts have invalidated state statutes relating to ballot order.⁸⁶ As discussed above, the variation in how states position candidates on ballots is extreme. As one might imagine, these various methods also range in their susceptibility to constitutional challenge, and so it is useful to examine the court decisions on a spectrum, ranging from the most objectionable ordering methods to the least: 1) allowing local election officials discretion to order the ballot as they see fit, 2) listing the incumbent candidate or party first, and 3) arranging the candidates in alphabetical order or conducting a lottery for ballot position. The trend has been that courts are much more willing to strike down ballot order procedures that clearly favor one party or the incumbent, but a remarkably large number of states still allow these practices. Further, challenges have been levied against procedures that do not rotate candidate names across election districts, but these are generally the least likely to succeed in the courts.

86. Even though a number of these cases are brought by unsuccessful candidates after an election, courts generally sidestep mootness requirements as these cases fall within the category of “capable of repetition, yet evading review.” *See, e.g.*, *Schaefer v. Lamone*, No. L-06-896, 2006 U.S. Dist. LEXIS 96855, at *2 n.3 (D. Md. Nov. 30, 2006); *Graves v. McElderry*, 946 F. Supp. 1569, 1577 (W.D. Okl. 1996); *Strong v. Suffolk County Bd. of Elections*, 872 F. Supp. 1160, 1163 (E.D.N.Y. 1994); *Clough v. Guzzi*, 416 F. Supp. 1057, 1060 n.3 (D. Mass. 1976).

1. *Local Discretion in Determining Ballot Order*

The most questionable ballot order methods are those in which a state election official is given discretionary power to determine ballot order and intentionally lists candidates for the purpose of garnering more votes for her preferred candidate. Currently, only Mississippi allows a local election official to determine the placement of candidates on the ballot in both primary and general elections.⁸⁷ But even in some states with a proscribed method of ordering the ballot, some enterprising election officials have attempted to design the ballot in such a way as to favor their political allies.⁸⁸ The Seventh Circuit is the only federal appellate court to address this practice and held that an Illinois county clerk intentionally placing a candidate of his party first on the ballot is a violation of the Equal Protection Clause.⁸⁹ As all other states carefully specify the manner for determining the order of candidate names, the case law dealing with the discretionary authority of election officials is sparse.

2. *Incumbent First*

The next level of ballot order procedures are those that always place either the incumbent candidate, a specific party, or the party with the greatest vote share in the previous election first. While a few state courts invalidated incumbent-first ballot order provisions in the late 1960s and early 1970s,⁹⁰ California courts took the lead in striking down ballot order statutes found to give an unfair and arbitrary advantage to one candidate over another. In *Gould v. Grubb*,⁹¹ the state supreme court struck down a law requiring incumbents to be listed first or by alphabetical order on the ballot. Basing the decision on equal protection grounds, the court required that name order be randomized, but stopped short of ordering rotation.⁹² The California State Legislature quickly responded and implemented the randomized

87. See *supra* Part II; MISS. CODE ANN. § 23-15-367 (2003).

88. See *Culliton v. Bd. of Election Comm'rs*, 419 F. Supp. 126 (N.D. Ill. 1976); *Sangmeister v. Woodard*, 565 F.2d 460 (7th Cir. 1977).

89. *Sangmeister*, 565 F.2d at 460; *Weisberg v. Powell*, 417 F.2d 388 (7th Cir. 1969) (*but see* *Bohus v. Bd. of Election Comm'rs*, 447 F.2d 821 (7th Cir. 1971)).

90. See, e.g., *Holtzman v. Power*, 313 N.Y.S.2d 904 (N.Y. Sup. Ct. 1970), *aff'd*, 261 N.E.2d 666 (N.Y. 1970); *Arvan v. Branigin*, 160 N.W.2d 345 (Mich. 1968), *aff'd*, 160 N.W.2d 345 (Mich. 1968), *summarized in* *Wells v. Kent Election Comm'rs*, 168 N.W.2d 222, 227 (Mich. 1969). In addition, one federal court found a threat of listing the incumbent first as a tie-breaker unconstitutional. *Mann v. Powell*, 314 F. Supp. 677, 679 (N.D. Ill. 1969).

91. *Gould v. Grubb*, 536 P.2d 1337 (Cal. 1975).

92. *Id.*

alphabet and rotation scheme still in effect today.⁹³ Several other courts have followed the California Supreme Court's lead in striking down incumbent-first statutes.⁹⁴ A few courts, however, have upheld ballot orderings that put incumbents first. The Massachusetts Supreme Court, even after finding that the first position offers an advantage, nonetheless held that always placing the incumbent first in primary elections did not rise to the level of a constitutional violation.⁹⁵ Massachusetts's practice was subsequently upheld in federal court.⁹⁶

Rather than listing incumbent candidates first, some state statutes specify which party should be listed first in general elections.⁹⁷ As was argued above, ballot order effects are likely to be less significant in general elections than they are in primary or non-partisan elections. However, specifying a party to always receive the preferred first slot has the appearance of deliberately entrenching the electoral advantage of that party and so, at least on the surface, raises equal protection concerns. A district court in Oklahoma struck down a law that provided for always listing the Democratic candidate first in the general election.⁹⁸ While the court found this practice unconstitutional, it did not go so far as to require rotation, which Oklahoma already did in primary elections.⁹⁹ In a variation of incumbent-first rules, a large number of states base ballot position on the vote share that the party received in a previous election.¹⁰⁰ At least two federal circuit courts have found constitutional violations in this method.¹⁰¹ The Eighth Circuit requires rotation of party columns in general elections.¹⁰² An-

93. See Ho & Imai, *Estimating Causal Effects of Ballot Order from a Randomized Natural Experiment: The California Alphabet Lottery, 1978–2002*, *supra* note 53, at 220–21; CAL. ELEC. CODE § 13111(c) (West 2003).

94. See, e.g., *McLain v. Meier*, 496 F. Supp. 462, 471 (D.N.D. 1980).

95. *Tsongas v. Sec'y of Commonwealth*, 291 N.E.2d 149, 153 (Mass. 1972) (“Even though we assume that the first ballot position of the incumbents deprived the plaintiffs of an equal chance to benefit from the indifference of careless voters who had no personal choice but marked the first name, that speculative benefit does not override the rights of informed and intelligent voters to have their votes counted as they were cast.”).

96. *Clough v. Guzzi*, 416 F. Supp. 1057 (D. Mass. 1976).

97. This is still the practice in Delaware, where Democrats—the historically dominant party—are always listed in the left-most column. DEL. CODE ANN. tit. 15, § 4502 (2007).

98. *Graves v. McElderry*, 946 F. Supp. 1569 (W.D. Okla. 1996).

99. *Id.* at 1572 n.3, 1582.

100. See *supra* Part II.

101. *Sangmeister v. Woodard*, 565 F.2d 460 (7th Cir. 1977), *cert. denied*, 435 U.S. 939 (1978); *McLain v. Meier*, 637 F.2d 1159 (8th Cir. 1980).

102. *McLain*, 637 F.2d at 1169 (“[W]e do not now undertake on this record to determine which rotation arrangement is financially and administratively feasible, although

other major area of challenge is the procedure of giving the two major parties the first slots on the ballot in random order, followed by minor parties and independent candidates. Courts have universally upheld these “two-tier” schemes.¹⁰³

3. *Random Ordering*

Finally, courts are split on whether allocating ballot order based on an alphabetical or lottery assignment, without rotation, is permissible. Even though alphabetical ordering is essentially as neutral as fully random ordering, courts have been more skeptical of the former.¹⁰⁴ Most recently, the New Hampshire Supreme Court held that alphabetical ordering violates the state constitution by impinging on every citizen’s equal right to be elected into office.¹⁰⁵ Other courts, however, have accepted alphabetical ordering¹⁰⁶ or randomization procedures without requiring rotation.¹⁰⁷

Very few courts have explicitly required candidate name-order to be rotated across election districts, and even in those limited instances where a court did require rotation, unique circumstances narrowed the holding.¹⁰⁸ The Eighth Circuit has gone the farthest in requiring some rotation method in general elections.¹⁰⁹ Much more commonly, courts do not require a rotation scheme, even if they acknowledge that it is likely to be a better election practice.¹¹⁰

we feel obliged to stress the constitutional requirement that position advantage must be eliminated as much as possible.”).

103. *Bd. of Election Comm’rs of Chicago v. Libertarian Party of Illinois*, 591 F.2d 22 (7th Cir. 1979); *Ulland v. Growe*, 262 N.W.2d 412 (Minn. 1978); *New Jersey Conservative Party v. Farmer*, 753 A.2d 192, 198 (N.J. Sup. Ct. 1999); *New Alliance Party v. New York State Bd. of Elections*, 861 F. Supp. 282 (S.D.N.Y. 1994).

104. In *Gould v. Grubb*, 536 P.2d 1337 (Cal. 1975), the California court held that an alphabetical listing was unconstitutional, but called for a randomization. This has led to the California randomized alphabet system still in place today.

105. *Akins v. Sec’y of State*, 904 A.2d 702, 707 (N.H. 2006) (“The ordering of candidates in alphabetical order, either by statutory mandate or by practice, . . . deprives candidates whose surnames do not begin with letters near the beginning of the alphabet the equal right to be elected.”).

106. *Schaefer v. Lamone*, No. L-06-896, 2006 U.S. Dist. LEXIS 96855 (D. Md. Nov. 30, 2006).

107. *E.g.*, *Koppell v. New York State Bd. of Elections*, 382 F. Supp. 2d 382 (S.D.N.Y. 1998).

108. In Arizona, rotation was already used in some parts of the state for the same election. *Kautenburger v. Jackson*, 333 P.2d 293 (Ariz. 1958). In Michigan, there was no statute on point specifying an alternative scheme. *Elliot v. Sec’y of State*, 295 Mich. 245, 294 N.W. 171, 173 (1940).

109. *McLain v. Meier*, 637 F.2d 1159, 1169 (8th Cir. 1980).

110. *Gould v. Grubb*, 536 P.2d 1337, 1347 (Cal. 1975) (“At this juncture, we are not prepared to hold that a rotational method is the only constitutionally permissible ballot procedure.”); *Sonneman v. State*, 969 P.2d 632, 639 (Alaska 1998); *see also*, *Tsongas*

In sum, state and federal courts have varied widely in their response to state ballot order schemes. The range goes from accepting incumbent-first ballot orders¹¹¹ to requiring full rotation in all state elections.¹¹² In reaching these decisions, courts have differed in how they characterize the harm involved, the use and acceptance of empirical data, the standard of review, and proper remedies. In the next section, these issues are analyzed with an attempt to bring some coherence to this area of law.

B. Constitutional Equal Protection and Ballot Order Effects

The Supreme Court has historically been reluctant to find state laws regulating the electoral process unconstitutional. States can establish previous “voteshare” thresholds or other indicia of popular support for ballot access by third parties,¹¹³ set caps on the number of candidates that appear on the ballot to prevent voter confusion,¹¹⁴ prohibit “fusion” candidates,¹¹⁵ prevent voting for “write-in” candidates,¹¹⁶ and require voter identification for in-person voting.¹¹⁷ Because of the Court’s traditional deference to the states in determining and implementing election procedures, identifying a federal constitutional right to be free of ballot order effects has proven difficult. As one court argued, there is “no constitutional right to a wholly rational election, based solely on reasoned consideration of the issues and the candidates’ positions, and free from other ‘irrational considerations.’”¹¹⁸

v. Sec’y of Commonwealth, 291 N.E.2d 149, 153 (Mass. 1972) (“Even though we assume that the first ballot position of the incumbents deprived the plaintiffs of an equal chance to benefit from the indifference of careless voters who had no personal choice but marked the first name, that speculative benefit does not override the rights of informed and intelligent voters to have their votes counted as they were cast.”); *New Alliance Party v. New York State Bd. of Elections*, 861 F. Supp. 282, 295 (S.D.N.Y. 1994) (“[A]ccess to a preferred position on the ballot so that one has an equal chance of attracting the windfall vote is not a constitutional concern. . . . The Constitution does not protect a plaintiff from the inadequacies of the irrationality of the voting public.”).

111. *Tsongas*, 291 N.E.2d 149.

112. *McLain*, 637 F.2d at 1169.

113. *Munro v. Socialist Workers Party*, 479 U.S. 189, 196 (1986); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). For a general discussion of ballot access restrictions, see Bradley A. Smith, Note, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. LEGIS. 167, 173 (1991).

114. *Storer v. Brown*, 415 U.S. 724, 732 (1974).

115. *Timmons v. Twin Cities Area New Part*, 520 U.S. 351 (1997).

116. *Burdick v. Takushi*, 504 U.S. 428 (1992).

117. *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008).

118. *Clough v. Guzzi*, 416 F. Supp. 1057, 1067 (D. Mass. 1976).

This type of sentiment in the courts is misguided. Ballot order effects severely impact the fundamental right to vote, and challenges to schemes that create these effects should be analyzed using strict scrutiny under the Equal Protection Clause.¹¹⁹ Positional bias directly dilutes the vote for those supporting candidates in disadvantageous positions on the ballot by placing a thumb on the scale. Even if the “windfall vote” is randomly assigned, this still infringes on voting rights. Election by lottery is constitutionally impermissible. But, even assuming that ballot order effects do not severely restrict the right to vote, ballot order practices that favor one candidate over another should still be struck down under a rational basis test as they do not favor any legitimate state purpose and the harm caused can be easily remedied with a rotation system.

1. *Level of Review*

Courts have also struggled with the level of judicial scrutiny that should be applied to voting cases. Both the state and federal courts remain divided as to whether to apply strict scrutiny or rational basis review to the issue of ballot order. The Supreme Court has certainly sent mixed signals on this front. In *Anderson v. Celebrezze*,¹²⁰ and then again in *Burdick v. Takushi*,¹²¹ the Court recognized that every voting regulation has some impact on voting rights, and requiring strict scrutiny for all election laws would “tie the hands” of states in their goal of maintaining the integrity of the election system.¹²² The determination of the standard of review in a challenge to a state election law requires weighing “‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule, taking in to consideration the extent to which those

119. In addition to the Equal Protection Clause, various First Amendment rights could plausibly be raised in connection with regard to ballot order. Challengers have asserted that their right to associate for political purposes is implicated when they, as a candidate, are listed below other candidates. Courts have disfavored this line of reasoning, however. See *Schaefer v. Lamone*, No. L-06-896, 2006 U.S. Dist. LEXIS 96855, at *11–12 (D. Md. Nov. 30, 2006). The Court has rejected attempts to defend the right to vote through the First Amendment. See *Burdick*, 504 U.S. at 428. Legal scholars have argued that the First Amendment’s free speech clause does guarantee the right to vote. See, e.g., ALEXANDER BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 59–61 (Yale University Press 1978) (1970).

120. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

121. *Burdick*, 504 U.S. at 428.

122. *Id.* at 433 (“Election laws will invariably impose some burden upon individual voters.”).

interests make it necessary to burden the plaintiff's rights.'"¹²³ The standard of review depends on this assessment of the extent to which the law burdens the right to vote. When the restriction is "severe," strict scrutiny applies, but when the law only imposes "reasonable, nondiscriminatory restrictions" upon voting rights, "the State's important regulatory interests are generally sufficient to justify the restrictions."¹²⁴

This test suffers both from indeterminacy and circular logic. Because it has been so difficult to give some underlying substance to the relatively amorphous "right to vote," any assessment of how that right is burdened is subject to wide variation depending on which court is applying the standard. Proof of this proposition can be found in the range of review lower courts have given to ballot order effects. In the ballot order cases since *Burdick*, courts have variously applied both strict scrutiny¹²⁵ and rational basis review,¹²⁶ all citing the same language. Further, this test upends traditional equal protection doctrine by requiring a balancing test between the nature of the harm and the state interest, in order to determine the level of scrutiny. Despite the ambiguities in court precedent on challenges to voting restrictions, the impact on the right to vote from ballot order effects, at least in primary and nonpartisan elections, is severe and should be treated under a strict scrutiny analysis.

2. *The Constitutional Harm*

The Supreme Court has repeatedly stated that the right to vote is a fundamental right.¹²⁷ Despite the superficial simplicity of this statement, the parameters of this right have been exceedingly difficult to define. As the nation has, for the most part, moved beyond the era where election officials explicitly prevented citizens from voting based on invidious discrimination, challenges have moved to more

123. *Id.* at 434 (quoting *Anderson*, 460 U.S. at 789; *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 213–214 (1986)).

124. *Id.*; see also *Anderson*, 460 U.S. at 787–89. This test was more recently endorsed in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

125. See, e.g., *Akins v. Sec'y of State*, 904 A.2d 702, 707 (N.H. 2006).

126. See, e.g., *Schaefer v. Lamone*, No. L-06-896, 2006 U.S. Dist. LEXIS 96855, at *5–6 (D. Md. Nov. 30, 2006); *Koppell v. New York State Bd. of Elections*, 8 F. Supp. 2d 382, 384–85 (S.D.N.Y. 1998), *aff'd*, 153 F.3d 95 (2d. Cir. 1998); *New Alliance Party v. New York State Bd. of Elections*, 861 F. Supp. 282, 294–297 (S.D.N.Y. 1994); *Graves v. McElderry*, 946 F. Supp. 1569, 1578–79 (W.D. Okla. 1994); *Sonnenman v. State*, 969 P.2d 632, 636–639 (Alaska 1998); *New Jersey Conservative Party v. Farmer*, 753 A.2d 192, 197–98 (N.J. Super. Ct. Ch. Div. 1999).

127. See, e.g., *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966).

difficult claims of vote dilution. Generally speaking, under equal protection doctrine,¹²⁸ the court applies strict scrutiny when a fundamental right is involved,¹²⁹ but the Court has acknowledged that some level of permissibility has to be allowed for states to regulate the electoral process to assure the good functioning of the electoral process.¹³⁰ Following the malapportionment cases, plaintiffs in ballot order cases have argued that when an arbitrary advantage is given to another candidate, the votes of those supporting the challenger are necessarily given less weight. While some courts have been receptive to the vote dilution claim,¹³¹ most have been dismissive.¹³²

For ballot order challenges, the vote dilution claim requires two steps. The first issue is whether unsuccessful candidates may bring claims when it is their supporters that they allege have had their vote diluted.¹³³ This question is relatively well settled. When restrictions are put into place that limit a candidate's ability to get on the ballot in the first place, it is possible for them to rise to the level of creating "constitutionally suspect burdens on voters' rights to associate or to choose among candidates."¹³⁴ The right to be elected, unlike the right

128. A straightforward equal protection claim, without claiming a fundamental right, is unlikely to succeed as there is no suspect classification in these cases, and so the standard of review would be rational basis. Indeed, some courts have—incorrectly, in my view—required some form of intentional discrimination in order to invalidate a ballot order scheme. *See, e.g.,* Bd. of Election Comm'rs v. Libertarian Party, 591 F.2d 22, 24–25 (7th Cir. 1979); Sangmeister v. Woodard, 565 F.2d 460, 465 (7th Cir. 1977); Koppell v. New York State Bd. of Elections, 108 F. Supp. 2d 355, 359–60 (S.D.N.Y. 2000); Libertarian Party v. Buckley, 938 F. Supp. 687, 692 (D. Colo. 1996); Strong v. Suffolk County Bd. of Elections, 872 F. Supp. 1160, 1164 (E.D.N.Y. 1994).

129. *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979).

130. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). The Court held that "[t]o achieve these necessary objectives, States have enacted comprehensive and sometimes complex elections codes. Each provision of these schemes, whether it governs the registration and qualification of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends. Nevertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Id.*

131. *Gould v. Grubb*, 536 P.2d 1337, 1343–1344 (Cal. 1975); *McLain v. Meier*, 637 F.2d 1159, 1167 (8th Cir. 1980).

132. *See, e.g., Koppell*, 108 F. Supp. 2d at 359–60; *New Alliance Party v. New York State Bd. of Elections*, 861 F. Supp. 282, 296–97 (S.D.N.Y. 1994).

133. Similarly, in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 344–45 (1995) the Court stated that "election code provisions governing the voting process itself," or the "mechanics of the electoral process" should be analyzed to determine whether they impermissibly burden the right to vote.

134. *Anderson*, 460 U.S. at 788. The implicated rights in *Anderson* were based on the First Amendment, and so are not directly applicable here. However, the Court in

to vote, is not a fundamental right subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment.¹³⁵ However, in *Bullock v. Carter*, the Court held that the right to run for office is intimately connected with the right to vote and so a candidate injured by a law may assert the franchise rights of her supporters.¹³⁶

Once it has been established that a candidate may bring the voting rights claim, the second issue is whether positional bias creates true vote dilution, in a manner analogous to the way that malapportionment diluted votes. As a first step, it is useful to look at vote dilution as understood in the malapportionment cases of the 1960s. In *Baker v. Carr*, the Supreme Court unleashed a revolution in American electoral politics by holding that a state's legislative apportionment plan was justiciable and subject to challenge under the Equal Protection Clause of the Fourteenth Amendment.¹³⁷ Following this landmark opinion, the Court went on to enunciate a seemingly simple new standard that would remain the rule for vote dilution cases: one person, one vote.¹³⁸ Through the Court's line of 1960s malapportionment cases, the idea that a dilution in the weight of a citizen's vote infringed the basic right to vote, just as much as a wholesale act of disenfranchisement, was repeatedly endorsed.¹³⁹

At a superficial level, it is difficult to argue that the "right to vote" includes the right to have one voter's inattention or ambivalence at the polling booth "cancelled out" by another voter's inattention, in another precinct, with a different ballot ordering. For instance, several courts have pointed out that non-rotational ballot order schemes do not prevent anyone from voting, do not limit which candidates can be on the ballot, or generally keep any voter from choosing their preferred candidate.¹⁴⁰ What these arguments miss is that the claim is not based

that case did specifically reference the parallel with the vindication of rights under the Equal Protection Clause. *Id.* at 786 n.7.

135. See *Bullock v. Carter*, 405 U.S. 134, 143 (1972) ("barriers to [a] candidate[']s access to the ballot '[do] not [themselves] compel strict scrutiny'"); see also *Clements v. Fashing*, 457 U.S. 957, 963 (1982) (plurality). However, at least one state court has interpreted their constitution to include "an equal right to be elected" as a fundamental right. *Akins v. Sec'y of State*, 904 A.2d 702, 705–07 (N.H. 2006).

136. *Bullock*, 405 U.S. at 142–43.

137. *Baker v. Carr*, 369 U.S. 186 (1962).

138. *Gray v. Sanders*, 372 U.S. 368, 381 (1963) ("The conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address to the Fifteenth, Seventeenth, and Nineteenth amendments can only mean one thing—one person, one vote.").

139. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

140. See, e.g., *Schaefer v. Lamone*, No. L-06-896, 2006 U.S. Dist. LEXIS 96855, at *11–12 (D. Md. Nov. 30, 2006).

on the fact that some voters select candidates “irrationally,” or even randomly. The issue is that the state-designed ballot *systematically* steers some proportion of voters to certain candidates over others. The original vote dilution claims were based on the idea that if one representative district had significantly more people than another, then the effective power of a vote in the larger district was proportionally smaller than a vote in the less populous district.¹⁴¹ This implicitly assumes that the value of an individual vote is based on a simple arithmetic relationship between the number of voters and the level of representation. Several alternate theories of representation would not stress this focus on numbers.¹⁴² For all the rhetorical simplicity of “one person, one vote,” the concept actually requires a fairly specific notion of democratic representation that relies on the assumption that the representational “power” of one vote is equal across election districts.

In contrast, disparate allocation of the “phantom votes” created by positional bias is a much more direct instance of vote dilution. When the candidate first on the ballot receives a bump in her voteshare based solely on ballot design, the power of her supporter’s votes is increased, to the detriment of the voting power of other candidates. As a simple illustration, imagine a two-candidate race and a primacy effect of two percent. That two percent of the vote does not “belong” to any candidate, as it is solely based on the ballot design. Ideally, each candidate is apportioned an equal share of that vote. But, if there is no rotation on the ballot, the top-ranked candidate receives the full two percent. Because of this, her supporters collectively gain extra power from these “phantom votes.” Unlike in the malapportionment context, the vote dilution here occurs in the same election, and so the comparison of “voting power” does not require any theory of representation. The direct nature of the harm in ballot ordering cases, when compared to the indirect nature of the harm in malapportionment across election districts, indicates that position bias is a more acute example of vote dilution than the “one-man, one-vote” cases of the 1960s.

141. *E.g.*, *Reynolds*, 377 U.S. at 565 (“Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature.”).

142. For example, a system of representation might endeavor to accommodate group interests, such as enhancing the voice of racial and ethnic minorities. See Grant M. Hayden, *Resolving the Dilemma of Minority Representation*, 92 CAL. L. REV. 1589 (2004).

A few courts have expressly endorsed this view of vote dilution in the ballot order context.¹⁴³ In *Gould v. Grubb*, the California court, citing *Gray* and *Reynolds*, argued that when a candidate with fewer “conscious” supporters managed to win an election based on the fact of her position on the ballot “the fundamental democratic electoral tenet of majority rule” is undermined.¹⁴⁴ As it stands, however, these courts are in the minority. Several courts, in fact, have gone out of their way to ridicule the vote dilution argument, without seriously considering its merit.¹⁴⁵ For example, a New Jersey court stated that plaintiffs arguing for equal allocation of ballot order effects are asking for “an equal chance to obtain the votes of fools, namely those voters who cast a vote without any reason or rationale at all.”¹⁴⁶ Unsurprisingly, the court declined the request.¹⁴⁷ Similarly, in *Koppell*, the Southern District of New York, affirmed by the Second Circuit, explicitly rejected the vote dilution argument:

Contrary to plaintiffs’ arguments, votes cast in support of lottery losers are not “diluted” by the lottery in the same sense that votes cast by voters in larger-than-average election units can be diluted by vote-counting systems. In reapportionment cases, the victims’ votes actually count for less representation. Such is not the case here. Position bias, unlike the dilution of votes caused by drawing of election districts or by vote-counting systems, is not the ineluctable product of the state’s election system. Position bias depends on such factors as the amount of information and encouragement voters receive on how they should vote and voters’ “motivation,” and thus can be ameliorated by voter education about the candidates.¹⁴⁸

The *Koppell* court went on to argue that disadvantages created by ballot order can be remedied by educating the public through campaigning, and that to assume that these effects cannot be remedied by political activity “would be to abandon faith in the ability of indi-

143. *Gould v. Grubb*, 536 P.2d 1337, 1343 (Cal. 1975); *McLain v. Meier*, 637 F.2d 1159, 1167 (8th Cir. 1980); *Graves v. McElderry*, 946 F. Supp. 1569, 1579–80 (W.D. Okla. 1996).

144. *Gould*, 536 P.2d at 1343.

145. *Clough v. Guzzi*, 416 F. Supp. 1057, 1067 (D. Mass. 1976); *Koppell v. New York State Bd. of Elections*, 8 F. Supp. 2d 382, 385 (S.D.N.Y. 1998), *aff’d*, 153 F.3d 95 (2d Cir. 1998); *New Alliance Party v. New York State Bd. of Elections*, 861 F. Supp. 282, 295–97 (S.D.N.Y. 1994); *New Jersey Conservative Party v. Farmer*, 753 A.2d 192, 197 (N.J. Super. Ct. Ch. Div. 1999).

146. *New Jersey Conservative Party*, 753 A.2d at 197. The court further argued that “[w]hat is impacted by the process referred to in [the statute] is not the ability of the voters to cast a *meaningful* vote but whether plaintiffs should have an equal opportunity to obtain *meaningless* votes.” *Id.* at 195–96.

147. *Id.* at 199–200.

148. *Koppell*, 8 F. Supp. 2d at 385 (internal citations omitted).

vidual voters to inform themselves about campaign issues.”¹⁴⁹ Other courts have made this same argument about voter education as a cure for the unequal distribution of ballot order effects.¹⁵⁰

While the court is correct that position bias depends on a variety of factors unrelated to any state action, the allocation of that bias to one group of candidates over another is precisely “the ineluctable product of the state’s election system.” The problem in ballot order cases is not that voters are more likely to vote for candidates at the top of the list, and states are under no constitutional obligation to reduce the propensity of some voters to do so. Instead, the problem is that the electoral system arbitrarily assigns the effect to one candidate.¹⁵¹ Therefore, contrary to the court’s argument, the *effect* of position bias, just like malapportionment, is a direct result of the state’s election system and therefore must meet constitutional muster.

In cases in which the incumbent or a particular party always appears first on the ballot, the argument that candidates not listed first should simply work harder to educate voters rings especially hollow. When election practices that impact the right to vote also act to entrench incumbents or other political elites, courts should be particularly suspicious.¹⁵² However, there is still a cognizable harm to a specific group of voters when the full impact of arbitrarily being listed first is assigned to one candidate.

The relatively simple solution to the unequal distribution of ballot order effects strengthens the case for court intervention.¹⁵³ In *Baker*, Justice Brennan, sounding the death knell of the political question

149. *Id.* at 385–86. In another case from the Southern District of New York, the court held that “[w]hile access to the ballot may, at times, be afforded constitutional protections, access to a preferred position on the ballot so that one has an equal chance of attracting the windfall vote is not a constitutional concern. Indeed, it should not be. The Constitution does not protect a plaintiff from the inadequacies or the irrationality of the voting public; it only affords protection from state deprivation of a constitutional right.” *New Alliance Party*, 861 F. Supp. at 295.

150. *See, e.g., Clough*, 416 F. Supp. at 1067 (“[N]on-incumbents and their supporters have access to those voters and may, in theory and possibly in practice, so educate them as to eliminate the donkey vote and thus eliminate the statistical position bias. . . . The principle of dilution as affecting the fundamental right to vote would seem better reserved for the more clear-cut and certain cases of inequality.”).

151. Further, the actual vote dilution in malapportionment cases is not nearly as straightforward as the court would like to believe. Several factors impact the “power” of the vote in representative districts including voter turnout levels, systematic biases in the Census, and mobility of voters within the district.

152. *See, generally, Issacharoff & Pildes, supra* note 26.

153. As previously discussed, relief in the form of overturning election results or seriously disrupting elections by requiring last-minute changes to ballots should only be undertaken in the most extraordinary circumstances. A more moderate form of remedy is a declaratory judgment requiring a change for future elections. *See, e.g.,*

doctrine, argued that there should be no concern with the Court overstepping its bounds relative to the political branches when straightforward judicially manageable solutions exist.¹⁵⁴ Unlike in the inextricably complicated area of partisan gerrymandering, any number of rotation schemes, such as those already employed in a large number of states, will address the problem. At a minimum, states should not base ballot order on incumbency, previous party vote share, or specify one party or the other to be placed first on the ballot. As repeatedly demonstrated in the empirical literature, this problem is particularly acute in primary and non-partisan elections.

3. *State Interest*

Because so few courts have been willing to analyze ballot order challenges under strict scrutiny, the defendant states have only been required to offer legitimate reasons for their ballot design systems. Courts have recognized a number of legitimate state interests concerning the integrity of the voting process in ballot order schemes that fall short of rotation. These can be generally reduced to two categories: reducing election administration costs and reducing voter confusion.¹⁵⁵ The one proffered state interest that has been resoundingly rejected is the desire to promote one political party at the expense of the others.¹⁵⁶

Reynolds v. Sims, 377 U.S. 533, 585 (1964); Williams v. Rhodes, 393 U.S. 23, 34–35 (1968).

154. *Baker v. Carr*, 369 U.S. 186, 226 (1962) (“Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.”). Professor Pildes has made the argument that “[w]hen manageable judicial remedies are readily at hand, courts have indeed held unconstitutional laws that entrench incumbents with insufficient countervailing justification for doing so. Laws that require ballots to list incumbent candidates first are an example.” Richard H. Pildes, *Foreward: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 76 (2004).

155. In addition, there might be a concern with tabulation error. *Clough v. Guzzi*, 416 F. Supp. 1057, 1068 (D. Mass. 1976).

156. *Graves v. McElderry*, 946 F. Supp. 1569, 1581 (W.D. Okla. 1996) (“Political patronage is not a legitimate state interest which may be served by a state’s decision to classify or discriminate in the manner in which election ballots are configured as to the position of candidates on the ballot.”).

Courts have been receptive to issues of cost in implementing rotational schemes.¹⁵⁷ The increased cost argument only pertains to rotation schemes, as the cost of moving from an incumbent-first or party-first ballot to a random order ballot is negligible. If the names of candidates are rotated, multiple forms of the ballot must be printed, which is presumably more costly. Additionally, if a state or local electoral district distributes sample ballots, then multiple versions would also need to be printed. When all ballots are the same—when there is no rotation—ballot counting is presumably faster because vote-counting machines do not need to be programmed with the ballot format from each electoral district. In *Sonneman*, the court found that the cost of a rotation scheme would amount to 13.7 percent of the ballot budget per election cycle.¹⁵⁸ The court rejected the comparison of costs to the full state budget, but a better comparison would be the cost of rotation to the entire election budget, rather than just the ballot budget. While rotation certainly imposes something more than a *de minimis* cost, and no doubt many states decline to adopt such a system based on cost considerations, this seems a rather minor cost when compared with the nature of the harm involved. Further, a number of states and local governments currently employ rotation schemes without seriously crippling their election budgets.

The state interest in reducing voter confusion is the more important rationale for not rotating names. Indeed, the Supreme Court has held on numerous occasions that avoiding confusion among the electorate is not only a legitimate, but a compelling state interest.¹⁵⁹ Voters potentially do receive some minimal information when a ballot is ordered in a deliberate way. With incumbent-first laws, the voter can presumably distinguish between incumbents and challengers, provided of course that the voter understands that incumbents are always listed first.¹⁶⁰ In an effort to buttress this rationale, election administrators have offered a theory of voting in which, for most elections, the primary decision that a voter makes is whether or not to vote for the

157. *Sonneman v. State*, 969 P.2d 632, 639 (Alaska 1998) (finding that a cost savings of 13.7% of the state ballot budget was a sufficiently important state interest to justify eliminating the rotation).

158. *Id.* at 359.

159. *See, e.g., Storer v. Brown*, 415 U.S. 724, 732 (1974); *American Party v. White*, 415 U.S. 767, 782 n.14 (1974).

160. At least one court has pointed out the weakness of this assumption, as it is unlikely that anyone other than the most sophisticated voter would know that the incumbent was always in the first position. *See Holtzman v. Power*, 313 N.Y.S.2d 904, 908 (N.Y. Sup. Ct. 1970). This same court also pointed out that when there was no incumbent in the race, the rule could actually enhance voter confusion by leading her to mistakenly believe the first ranked candidate was the incumbent. *Id.*

incumbent. Placing the incumbent first facilitates this decision by allowing the voter to quickly identify the incumbent and make their selection.¹⁶¹ Similarly, when candidates are ordered in a manner familiar to voters such as with alphabetical order, it presumably takes the voter less time and energy to locate their favored candidate. This might be particularly useful when there are a large number of candidates.¹⁶² Finally, voter confusion might be reduced through an alphabetical or incumbent first system as it is uniform across the state and allows for consistent sample ballots to be sent to voters.

States frequently make the argument that because they use a single sample ballot for the entire state, voters might mark their sample ballot at home and then become confused in the ballot booth when the sample and actual ballots do not match up. This problem can be solved relatively easily in two ways. The first is to include a disclaimer on the sample ballot informing the voter that the order of candidates will not necessarily be the same on the actual ballot. Alternatively, states can simply send voters different sample ballots based on the randomization within their precinct.

More fundamentally, however, is that in an effort to aid most voters, states are implicitly harming other voters. In *McLain v. Meier*, North Dakota argued that their incumbent-first statute was justified based on the interest in making the ballot “as convenient and intelligible as possible for the great majority of voters.”¹⁶³ The Eighth Circuit dismissed this argument as admitting “that the state [had] chosen to serve the convenience of those voters who support incumbent and major party candidates at the expense of other voters. Such favoritism burdens the fundamental right to vote possessed by supporters of the last-listed candidates, in violation of the Fourteenth Amendment.”¹⁶⁴ The interests that states have put forward for not rotating candidate names on ballots do not justify the severe burden put on the right to vote.

161. *Gould v. Grubb*, 536 P.2d 1337, 1344 (Cal. 1975) (“The city contends that in placing all incumbents on the top of the ballot, the election provision facilitates efficient, unconfused voting; in this regard, the city asserts that in most elections the principal decision for most voters is deciding whether to vote for or against the incumbent and the placement of the incumbent’s name at the head of the ballot permits the voters to isolate this candidate quickly and without confusion.”).

162. The most obvious example of where an alphabetical listing would have been helpful was in the California 2003 Gubernatorial Recall, in which 135 candidates appeared on the ballot, resulting in a multi-paged ballot for a single race. October 7, 2003 Statewide Special Election Certified List of Candidates, http://www.sos.ca.gov/elections/2003_cert_cand_list.htm (last visited March 1, 2010).

163. *McLain v. Meier*, 637 F.2d 1159, 1167 (8th Cir. 1980).

164. *Id.*

CONCLUSION

Substantial empirical evidence points to the conclusion that ballot order effects, particularly in relatively low salience elections, are both statistically significant and large enough in magnitude to alter the outcome of elections. This creates an impermissibly severe restriction on the right to vote. Professor Richard Hasen, borrowing a metaphor from a mathematician, argued that election practices in the United States were akin to an attempt to “measure bacteria with a yardstick.”¹⁶⁵ When elections are close, as they frequently are, “the margin of error is likely to exceed the margin of victory.”¹⁶⁶ Ballot order effects are real and in the absence of legislation, the judiciary is left with the task of determining the constitutionality of the various laws. Strong conceptions of “the will of the people” are generally rejected by democratic theorists, but randomly—or intentionally—giving an advantage to a particular candidate or party in an arbitrary manner certainly violates basic principles of majoritarian voting and equal protection.

165. Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 947 (2005).

166. *Id.*

