2001 UCLA J.L. & Tech. 6

Breaking Duverger's Law is not Illegal: Strategic Voting, the Internet and the 2000 Presidential Election

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"No body politic worthy of being called a democracy entrusts the selection of leaders to a process of auction or barter." [2]

"Censorship is the bastard child of technology." [3]

I. Introduction

As the 2000 campaign reached its climax, renegade supporters of Green Party candidate Ralph Nader countered critics' charges that they were going to "hand Bush a victory"[4] by creating websites encouraging a form of strategic voting known as "online vote-swapping."[5] In short, a Nader supporter in a hotly contested state would agree to vote for Al Gore if a Gore supporter in an uncontested state would vote for Ralph Nader. The object was to help deliver five percent of the popular vote to the Green Party so that the Greens would receive federal matching funds for the 2004 presidential election, while simultaneously working to prevent a George W. Bush presidency.

With the election less than a week away, and the poll margins closer than any election in recent history, the Secretaries of State of Oregon and California acted to snuff out the online vote-swapping movement. The California Secretary of State sent an e-mail to Jim Cody, co-creator of VoteSwap2000,[6] a site promoting this voting behavior, threatening him with prosecution under California's election code sections 18521[7] and 18522[8] as well as criminal conspiracy under Penal Code section 182.[9] Oregon Secretary of State Bill Bradbury said online vote-swapping, even without the exchange

of money, violated his state's election laws.[10] Bradbury sent desist letters to six vote-trading sites all based outside Oregon, informing them that they would be subject to civil penalties in Oregon if they facilitated the trading of votes.[11]

If the First Amendment means anything, it means that Americans have the right to speak freely in a public forum on matters of political importance.[12] With the rise of the Internet as a powerful medium of mass communication, this core value does not change.[13] Now, anyone with a dial-up account "can become a town crier with a voice that resonates farther than it could from any soapbox."[14] With the almost instantaneous democratization of mass communication through this new medium, social and political institutions and leaders are understandably confused about how to cope with questions about freedom of speech, association, and assembly in the context of cyberspace. This fact became starkly apparent, with great repercussions, in the waning days of the 2000 presidential race when the Secretaries of State of Oregon and California may have tipped the scales in the closest U.S. election in recent history.[15]

Were vote-swapping sites truly corrupting the electoral process? Is this conduct that falls within the boundaries of political speech and freedom of assembly, subject to the highest level of First Amendment protection? Or is it the same as buying a vote and contravening the one-citizen one-vote ideal? Did the Secretaries of State of California and Oregon step on the most precious of American rights and alter history in the process?

This article will introduce the reader to the concept and practice of vote-swapping. It will then examine the chilling effect of the threats of prosecution and its possible consequences. The actions of the Oregon and California secretaries of state

will be analyzed under their respective state laws and constitutions, and finally vote-swapping will be examined under federal election law and the U.S. Constitution.

II. Strategic voting and Democracy in the Internet Age

A. Political Action in Cyberspace

Online networks have created a rapid global communication system.[16] As the grandfather of all computer networks, the Internet provides citizens with "the opportunity to engage in an unprecedented communal process of sharing information and creating new knowledge."[17]

In recent years, political candidates, parties, and political action committees have recognized the Internet's potential as "a powerful campaign tool with the potential to significantly influence the outcome of [elections]."[18] The massive communicative power of the net makes it a super-broadcasting tool that allows anyone to jump into the political fray, regardless of their economic means.[19]

In July of 1989, an organization of Chinese students living in the U.S. organized a lobbying campaign to persuade Congress to protect them from Communist Chinese threats of reprisal for their support of the Tiananmen Square demonstrators.[20] The lobbying committee used e-mail and Internet newsgroups to organize 20,000 students at 160 colleges and universities and gain widespread media attention with only four days notice.[21] The bill passed, "but the students would never have been able to mount this effort without the use of telecommunications to coordinate the disparate chapters within their coalition."[22]

Also in 1989, a group of 20 activists in Santa Monica, California, organized the SHWASHLOCK (showers, washers, and lockers) movement online.[23] “They eventually overcame neighborhood and City Council resistance, obtaining a $150,000 line item in the budget and approval for converting an old bath house to a facility for the homeless.”[24] The group also created a job bank co-op for the homeless and a campaign to include Santa Monica schools in an international program to educate school children about electronic communication.[25] A follow-up survey of the activists revealed that “it was the online process that enabled the group to plan and execute these various efforts.”[26]

The Christian Coalition used its website on July 7, 1994 to urge its allies to contact Congress and demand an end to federal support for the National Endowment for the Arts.[27] Three days later a group of freshman Republican Congressmen called for an end to federal support for the NEA.[28] Analysts credit the online coalition building power of the Internet for this victory.[29]

These actions could have been accomplished without the Internet, despite Bonchek and Schwartz’s claims. Had the Chinese students or the Christian Coalition owned a TV network, or possessed enough funds to buy sufficient airtime to make their cause heard nationwide, the result may have been the same. In these examples, the Internet brought power to people who otherwise might not have had such a powerful voice, but their actions were not unique to cyberspace. The Internet acted as a tool of democratization, but the conduct was not entirely Internet-dependent.

The next level of using the Internet for a political action tool is the actual use of the “space” of cyberspace as a “place” for the creation of online coalitions.[30] Bart-Jan

Flos of the Politeia Network for Citizenship and Democracy in Europe suggested the use of the Internet to form coalitions led by already-elected politicians.[31] Bonchek and Schwartz demonstrated the strength of the Internet as a replacement for capital in the organization of grassroots political movements.

The idea of the Internet as political organization tool really evolved into a new creature in November of 2000. Instead of being used as an alternative to phone banks and expensive advertising, Internet vote-swapping was a coalition building movement unique to cyberspace and with the potential for massive political repercussions.

B. Strategic Voting

The purpose of an election is to gauge the preferences of the electorate. However, in simple-majority single-ballot systems as we have in the United States, some voters who would prefer the leadership of a third-party do not vote for their preferred candidate.[32] Strategic voting[33] occurs when a voter abandons his preferred candidate in favor of another because of the specific election context.[34] Usually this occurs when the voter's most preferred candidate is a less viable candidate than the two front-runners in an election, and to reduce the chances of their least-preferred candidate winning, the voter will select a lesser choice among the front-runners.[35] Traditional political science and logic tells us that the net effect of this will be to diminish the number of viable political parties.[36] The electorate will reach an equilibrium under which only the two dominant candidates survive, and third parties are marginalized to the point of non-importance – the Duvergerian equilibrium. [37] This occurs in American presidential races. Alternatively, a non-Duvergerian equilibrium may

be reached when there is a clear front-runner, but the two candidates fighting for second place are of sufficient parity that neither candidate's backers are willing to forego their support.[38] However, in the 2000 presidential election online vote swapping actually acted to increase support for a minor party, the Greens, instead of following Duverger's law. Furthermore, some supporters of the Democratic candidate strategically cast their vote for a minor party candidate.

C. Strategic Voting Meets the Internet - Online Vote Swapping

As shown above, online vote-swapping transcends traditional voting behavior.[39] Vote-swapping is common among our legislators as well. In the Senate and House of Representatives, members of Congress routinely support their colleagues' bills in exchange for their promises to support their own[SK1] .[40] Coalition-building was never a practical issue in presidential electoral politics because of the logistical impossibility of creating a citizen vote-swap on a scale that could have any significant impact. However, the power of the Internet made it possible.

Building an online vote-swapping coalition is simple and entirely Internet-dependent. In the 2000 election, a voter who wished, for example, to support Ralph Nader might have lived in a hotly-contested "swing state" such as Florida. Assuming that the Nader supporter would have rather seen Al Gore elected than George Bush,[41] this put him in a quandary. Was he to vote his conscience, and actually contribute to his third choice, at the expense of his second choice?[42] An alternative was to contact a Gore supporter in an uncontested state, such as Massachusetts. The Nader supporter in Florida and the Gore supporter in Massachusetts both recognized

that Gore could easily carry Massachusetts and they would agree that taking a few votes from Gore in a Democratic stronghold would have no impact on Massachusetts' electoral votes. The Gore supporter in Massachusetts could agree to cast her vote for Ralph Nader, giving the Green Party one more vote toward their magic five percent.[43] In turn, the Nader supporter in Florida cast his vote for Gore, giving Gore that much more support in a hotly-contested and ultimately pivotal state.[44]

James Ridgeway explained the concept of online vote-swapping in a Village Voice in September, 2000.[45] Ridgeway reported that since the election promised to be so close, Nader supporters were concerned that their efforts could bring about a conservative victory.[46] Many believed that if Nader were not running, Gore would have been more securely in the lead in the late days of the campaign.[47] Concerned with spoiling Gore's chances in what was never more than a two-way race, Nader supporters got to work. On October 1, 2000 Steve Yoder, a Washington, D.C. technical writer, launched Voteexchange.org.

By October 2, 2000 conservative voters were in the act as well. On that day a message board for the FreeRepublic.com[48] began encouraging Libertarians, Constitutional Party Supporters, and Reform Party voters to vote-swap with Bush voters in Massachusetts, New York, and Washington, D.C.[49] However, the conservative vote-swappers did not gain the same momentum and media attention as the "Nader-traders."

The idea didn't truly catch fire until an American University constitutional law professor, Jamin Raskin, promoted the idea in the MSN online magazine Slate on October 24, 2000.[50] In his article, Raskin explained that the presidential race had narrowed by that date so that "a strong showing by Ralph Nader in 10 swing states

could give George W. Bush the 270 Electoral College votes he needs to win."[51] Raskin believed that this reality presented hundreds of thousands of progressive Nader supporters in swing states with a dilemma. Upon the publication of Raskin's article, hits to the vote-swapping sites increased exponentially. VoteExchange.org arranged 500 swaps in one week. After the Raskin article, VoteSwap2000 arranged 500 trades in 24 hours, and in its short life exchanged more than 5,000 votes.[52] Votetrader.org claimed that it arranged 15,000 vote exchanges in several battleground states.[53]

What irked the Secretaries of State of both Oregon and California, however, was not the mere advocacy of trading votes. Although both offices acknowledged the illegality of citizens contracting to trade votes, neither sought (after November 3) to restrain the mere suggestion of doing such a thing. The websites that both states targeted were the sites that facilitated the process itself by the use of computerized databases. These website users identified their states of residence, their preferred candidates, and their preferred major-party candidates.[54] The program then indicated to the user whether their state was a contested or a non-contested state. Then users could enter their e-mail addresses, and the computerized database would find a matching voter in another state and send an e-mail to each voter. At that point it became the voters' responsibility to agree to swap votes.[55]

Both Secretaries of State regarded this online automated networking as the application of undue influence in the voting process, in direct violation of their respective states' laws.[56] However, the Secretaries of State posited that sites espousing the same political message were permissible under California[57] and Oregon[58] law; it was the

conduct of “brokering” votes that was explicitly prohibited under California law,[59] and the application of “undue influence”[60] that ran afoul of Oregon law.[61]

When vote-swap participants agreed to exchange their votes, they engaged in speech and association related to a campaign for political office. Each voter convinced the other to change his or her vote in order to achieve a common political goal. There was no exchange of money or goods and there was no enforceable binding arrangement.[62]

The Secretaries of State certainly achieved their goals to end the practice when they moved against the vote-swapping sites. Although nobody was certain whether prohibiting vote-swapping was constitutional, the chilling effect brought about by the letters from Oregon and California was immediate.

III. The Chilling Effect

A. What is the Chilling Effect?

The Supreme Court defines “chilling effect” as the “collateral effect of inhibiting freedom of expression, by making the individual the more reluctant to exercise it.”[63] This effect is recognized as impacting free association rights,[64] as well as free speech rights.[65] A chilling effect exists when citizens are apprehensive to exercise their rights to free expression or free association due to the threat of the expense and inconvenience of criminal prosecution.[66]

Of course, any threat of criminal or civil prosecution will by necessity “chill” the activity it threatens. Dicta in Near v. Minnesota[67] instructs us that “publication of the sailing dates of [military] transports or the number and location of troops” may be

lawfully restrained.[68] Therefore, a chilling effect is not necessarily unconstitutional, but its existence can stifle "the flow of democratic expression and controversy at one of its chief sources. "[69]

B. Was there a Chilling Effect?

The California and Oregon Secretaries of State's demands to shut-down the vote-swapping sites sent shivers through cyberspace, affecting website operators nationwide.[70] The day after California contacted VoteSwap2000, the website contained the following:

> We are not lawyers . . . Our advice is to err on the side of caution, and if you can't determine for sure that you are not in violation of any laws, you should not participate in vote-swapping.[71]

Despite their support of Ralph Nader, and the questionable constitutionality of the Secretaries' actions, none of the site operators were willing to risk prison or fines. At least three vote-swapping sites closed down immediately after Jones's letter to VoteSwap2000 became public, citing threats of litigation as their reason for ceasing operations.[72] One Florida-based site, PresidentGore.com[73] was designed to specifically exclude Californians because its operator was uncertain of California's jurisdiction over it.[74] Without determining whether the Secretaries of State's actions were permissible or unconstitutional, it is not far-fetched to theorize that Secretaries of State may have had a profound effect on the outcome of the 2000 presidential election by creating a nationwide "chilling effect" on the publication and use of vote-swapping websites.[75]

C. What were the electoral consequences of the chilling effect?

Had the 2000 election been decided by a large margin, this debate would still be of constitutional importance due to the fact that the idea of online vote-swapping was crushed by the mere threat of prosecution.[76] However, because the entire election was resolved by a razor-thin margin in the State of Florida, it is easy to speculate that the vote-swapping movement could have had a profound effect upon the outcome of the election. In fact, as late as November 17, 2000, pundits claimed 'Nader Traders' could have tipped Florida toward Al Gore.[77]

Voteexchange2000.org arranged 257 exchanges for Florida voters between October 26 and October 30, 2000 when it shut down due to fear of prosecution.[78] Given the fact that the buzz surrounding the vote-swapping phenomenon had just begun, it is likely that the rate of votes being swapped would have increased up until election day.[79] However, had the rate not changed, 2056 votes would have been exchanged, by this one site, in Florida alone. That many more votes for Al Gore in Florida would have given 25 more electoral votes to Al Gore nationally, and thus would have changed the outcome of the 2000 presidential race. In fact, had the sites continued to run, the circus following the election may never have occurred. Alternatively, had the sites been shut down immediately, the race may not have been decided by such a close margin, and George W. Bush may have been able to claim victory on Tuesday, November 7 instead of waiting until December.

The effect upon the election is not mere hindsight. With the 2000 presidential campaign entering its waning days, it was a cliffhanger between Al Gore and George W. Bush. With less than a week to go, no pundits could definitively predict who was actually

in the lead. With a total of 538 electoral votes up for grabs and 270 needed to win the presidency, as of November 1, 2000, ABCNEWS.COM reported that Bush held 213 electoral votes securely to Gore's 182 and 143 were too close to call. By November 3, CNN.com reported 171 for Gore, 225 for Bush, and 142 up for grabs.[80] Meanwhile Reuters reported that Bush had 217 electoral votes solid or leaning toward him, while Gore had 200, and 121 electoral votes were too close to call.[81]

Making this all more interesting was the candidacy of Ralph Nader, the Green Party's nominee for President. The Greens, previously not much of a force to be reckoned with in American politics, promised to have a resounding influence over who would be elected president in the year 2000. The Florida polls as of November 3 showed Gore with 46% of the vote, Bush with 42% of the vote, and Nader with 6%.[82] With a margin of error of +/- 4%, Florida's all-important 25 electoral votes remained unclaimed. Pennsylvania's 23 electoral votes were similarly precarious with 45% supporting Gore, 41% supporting Bush, and 8% supporting Nader.[83] Washington, formerly narrowly in the Gore column[84] went to a dead toss up on Nov. 3 with 44% supporting both Gore and Bush and 6% supporting Nader.[85] Nationally speaking, as of October 27, 2000, 56 percent of Nader supporters said that if Nader was not running, they would have voted for Gore, while 23 percent favored Bush, and 21 percent would not have voted at all.[86] Given these numbers, had Nader not been in the race, Gore would have appeared to have a firm lead in Florida, Pennsylvania, and Oregon a week before the election.

As the wind blew out of California and chilled vote-swapping operations nationwide, the national race for electoral votes was tight, with Bush holding 217 likely

votes, Gore holding 200, and 121 too close to call.[87] With the race as close as it was, even New Hampshire's four electoral votes, traditionally forgotten about the day after its primary race[88] were still important enough that neither campaign had abandoned the state (Bush 45%, Gore 40%, Nader 5%).[89]

Given the closeness of the election at this point, the Secretaries of State should have foreseen the potential effect upon the election. Did they act correctly? Had they not acted, could it have changed the outcome of the election? Were the other 48 Secretaries of State delinquent in not acting similarly? Although any effect upon the results of the election is mere speculation, at the time that the Secretaries of State acted (or didn't act), such an effect was certainly foreseeable. The resolution of the debate over the propriety of their conduct could have great implications for future elections and the concept of democracy in a new media society.

IV. State Concerns

In the end, Federal Constitutional law will have the final word over whether vote-swapping is protected activity. However, it is important to examine both Oregon and California's election laws and constitutions before beginning the federal analysis.[90] Both California and Oregon's Secretaries of State appear to have relied upon their respective state election laws incorrectly. This analysis of each state's law reveals how the statutes might be misinterpreted to prohibit vote-swapping. If vote-swapping is examined in light of the respective state statutes, it is unlikely that prosecution would result in conviction.

Even if the plain language of the Oregon and California election laws was held to encompass the vote-swap websites, it is extremely unlikely that the convictions would be upheld in light of each state's constitution. Both Oregon[91] and California's[92] constitutions have been held to give greater protection to First Amendment concerns than the Federal Constitution, discussed in section VI of this article.

A. California

The threat of prosecution sent out by Bill Jones, Secretary of State of California was doubly flawed. Under California constitutional law, his actions are void. However, his application of the statute was flawed by the plain text of the law.

1. California Constitutional Law

The California Constitution affords greater protection to free speech and association than the Federal Constitution.[93] As long as federal rights are protected, California legal principles will prevail in California State courts.[94] For a complete federal analysis of vote-swapping see part VI infra.

As of Monday, November 6, 2000, VoteSwap2000's Federal Court motion for a temporary restraining order languished as the rights of Californians and Americans nationwide were constrained due to the threatened prosecutions and the creation of "an ominous, chilling effect on the free exercise of political speech"[95] and freedom of association.

Upon the receipt of prosecution threats, counsel for VoteSwap2000 should have immediately sought injunctive relief against the Secretary of State in California State

Court in the form of a writ of mandate.[96] This remedy is appropriate where denial of relief causes an immediate infringement on First Amendment rights.[97] California courts have held that when prosecution threats create an "ominous, chilling effect on the free exercise of political speech. . .[a] petition for writ of mandate [is] appropriate."[98]

Had such an action been sought, it would have been appropriate under California law to grant it. [99] However, it is not necessary to discuss the constitutional concerns under California law, since the application of the statute was not in accord with the plain meaning of the elections law.

2. The Plain Language of the Election Law

The California Secretary of State threatened to prosecute the operators of VoteSwap2000[100] for violations of California Elections Code sections 18521[101] and 18522.[102] These provisions prohibit citizens from giving or receiving payment or other "valuable consideration" to induce any voter to vote for a particular person or measure. Jones believed that the exchange of promises to vote for certain candidates fit the definition of "valuable consideration." California law defines "valuable consideration as follows:

Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise.[103]

Valuable consideration is not necessarily money or a material benefit.[104] Consideration exists if the person to whom the promise is made loses any right he could have otherwise exercised or the person making the promise receives any benefit he would otherwise have not had.[105] Both need not exist in order for there to be consideration, but if neither condition is met, there is no consideration.[106]

If the promise leaves a party able to perform or withdraw at will without detriment, there is no consideration and the contract is void.[107] If even one of the promises given in an agreement leaves a party with the option to perform or withdraw at will, then the promise is illusory and provides no consideration.[108]

In comparison to "valuable consideration," "gratuitous consideration" is defined as consideration "which is not founded upon any such loss, injury, or inconvenience to the party to whom it moves as to make it valid in law."[109] Therefore, absent the elements of valuable consideration that make it truly valuable, the consideration is merely gratuitous.

The right to vote is a right that both parties might otherwise exercise, as was the right to refrain from voting, or the right to vote for whomever they pleased. The promises made did not change this condition. When a voter agreed to swap her vote with another person, she retained all of these rights. Her pledge was unenforceable, and she was free to withdraw at any time without detriment. Therefore, at best, the agreements could be considered to be gratuitous consideration "which is not founded upon any such loss, injury, or inconvenience to the party to whom it moves as to make it valid in law."[110] The acts of vote-swappers were no more than exchanges of mere gratuitous consideration, and the website operators were working outside the scope of the statute.

B. Oregon

Oregon Secretary of State Bill Bradbury, a Democrat, took steps far greater than the Republican Secretary of State of California by targeting sites outside of Oregon. [111] However, under Oregon law, he equally overstepped the boundaries of his state election statute and his state constitution.

1. Oregon Elections Law

On November 2, 2000, Bradbury said online vote-swapping, even without the exchange of money violated his state's election laws.[112] Bradbury acted swiftly, and sent desist letters to six vote-trading sites that were based outside Oregon.[113] Although Oregon initially also targeted sites that merely advocated vote-swapping, by November 3 the Oregon Elections Board softened its position to only prohibit entering into a contract to trade votes or facilitate such activity.[114] Sites that merely advocated vote-swapping were no longer targeted.

Oregon's voting corruption law states that "No person, acting either alone or with or through any other person, shall directly or indirectly subject any person to undue influence with the intent to induce any person to register or vote in any particular manner." [115] The statute defines "undue influence" as including the "giving or promising to give money, employment or other thing of value."[116]

Oregon's Secretary of State interpreted "thing of value" to include the exchange of a co-equal vote. Therefore, according to the State Election Division, any individual

pair of voters engaging in an arrangement to swap votes are in violation of Oregon law,[117] as is any website operator who facilitates such an arrangement.

Analysis of this concept under Oregon law hinges on the question: Is a vote a "thing of value that would be used to induce a person to vote?" There is only one reported case in Oregon that has interpreted ORS § 260.665. Although it offers a nearly perfect roadmap for analysis of this issue under Oregon law, due to a procedural technicality it offers little in the way of precedent upon which a court, the Secretary of State, or citizens can rely.

Oregon Republican Party v. State of Oregon ("Oregon Republican I")[118] dealt with a plan by the Oregon Republican Party to mail applications for absentee ballots with the voter's name pre-printed on them. The application was to include a letter urging the voter to apply for an absentee ballot if the voter was unsure of being able to vote on election day, and a postage-paid envelope in which the voter could send the application to Republican party headquarters.[119] The party would then have forwarded the applications to the county clerk, who would have sent the ballots to the individual voters.[120] The Republican Party sought a declaration that the mailing would not violate the election statute and the Circuit Court of Marion County, Oregon held that it would violate the statute due to the fact that the stamped envelope was a "thing of value."[121]

The Republican Party appealed to the Court of Appeals of Oregon, which reversed the finding of the Circuit Court, and agreed that such a mailing would not violate ORS § 260.665.[122] The court opined that when considering whether "a postage paid envelope is a thing of value that would be used to induce a person to vote," the parties had incorrectly focused on the first part of the question.[123] The decisive factor

was not whether the stamped envelope was valuable consideration, but rather whether there existed intent to induce persons to register or vote.[124] Since inducement requires a "promise of an advantage as a result of performing the desired act; it is persuasion coupled with a benefit or the absence of a threatened detriment."[125] Therefore, in order for inducement to exist, there must be a benefit greater than what is involved in the act of voting, something with independent value to the voter.[126] The court held that the envelope was a "thing of value," but that it did not reward the act of voting.[127]

This would appear to quell the vote-swap controversy, at least in the State of Oregon. However, Oregon Republican Party v. Oregon was rendered moot upon appeal to the Supreme Court of Oregon (Oregon Republican II).[128] The Supreme Court of Oregon reasoned that the issue was mooted because the election was over.[129] While not accepting that the doctrine of "capable of repetition, yet evading review" existed in Oregon, the Supreme Court of Oregon stated that if it did exist, the doctrine would not apply to this case.[130] Because the Republican Party did not allege that it intended to utilize the same plan in the future, the issue evaded review.[131] Therefore, the decision of the Court of Appeals in Oregon Republican I was reversed and remanded with instructions to dismiss the appeal as moot.[132]

The Court of Appeals obediently wrote, in a per curiam opinion "Dismissed as moot. Oregon Republican Party v. State of Oregon, 301 Or. 437, 722 P.2d 1237 (1986)."[133] (Oregon Republican III). However, in a scathing concurrence, Judge Van Hoomissen foresaw the vote-swap controversy when he wrote:

The Supreme Court could have decided the issue on its merits and should have done so. Meanwhile, political parties, campaign committees, candidates and public

officials responsible for enforcement of the election laws are left guessing about the legality of the conduct proposed here. More litigation, more expense and more delay are the only results of the Supreme Court's directive to this court.[134]

2. Oregon Constitutional Analysis.

Judge Van Hoomissen not only foresaw the issue before Oregon today, but offered in his concurrence in Oregon Republican I, guidance to the resolution of this issue on free speech grounds. In examining the legislative intent behind ORS 260.665, he wrote: "an election offense does not exist unless the act tends to produce the types of evils that the statute was designed to avoid."[135] Judge Van Hoomissen's concurrence states that it is consistent with his interpretation of the statute to say that the giving of a thing of value does not include the giving of an item or service that does no more than facilitate the act of deliberative voting.[136]

Judge Van Hoomissen noted that the court did not address the Constitutional aspects of the case that he believed were present, but suggested that the application of ORS § 260.665 in this manner was violative of Article I § 8 (freedom of speech) [137] and Article I § 26 (freedom of assembly)[138] of the Oregon Constitution. He also opined that it could have violated the First and Fourteenth Amendments of the U.S. Constitution, but if either the freedom of speech or freedom of assembly articles of the State Constitution are violated, it is not necessary to analyze the effect under the Federal Constitution.[139] In some circumstances, the Oregon Constitution provides greater protection than the First Amendment to the U.S. Constitution,[140] but the Oregon and Federal constitutions are considered to be similar enough that Oregon courts will

usually rely on federal cases that interpret the First Amendment, even when they are interpreting the Oregon Constitution.[141] For a complete analysis of vote-swapping under the Federal Constitution see section VI of this paper.

Bradbury's application of ORS § 260.665 impacts First Amendment rights to freedom of speech and assembly. The websites expressed political opinion, and facilitated the assembly of citizens to achieve a common political goal. Accordingly, the application of the statute must be subjected to strict scrutiny under the state constitution.[142]

Initially, Bradbury's actions implicated both Article I § 8 and Article I § 26 of the Oregon Constitution. However, given his re-statement of his position on November 3, only § 26, the Oregon Constitution's guarantee of freedom of association, was implicated.[143] This provision states in pertinent part: "No law shall be passed restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good . . ."[144]

Therefore, the constitutional question becomes one of whether or not under Oregon law an unqualified constitutional prohibition against laws suppressing freedom of association can be overridden by the actions of a Secretary of State that directly restrain freedom of association.[145] This is a logical proposition that the Supreme Court of Oregon has already rejected.[146] If the Secretary of State threatened citizens with prosecution, and if such threats result in a restraint of Oregonians from assembling together to consult for their own common good, a balancing test is neither necessary nor proper.[147]

Had suit been brought in Oregon court, it would have been proper to enjoin the state from further threats or prosecution. At this point, any citizen who can allege that they intend to engage in this type of conduct in an upcoming election would have standing to file suit in Oregon and would, based on the logic in the Oregon Republican Party trilogy of cases, stand an excellent chance of prevailing.

V. Federal Election Law -- 42 U.S.C. § 1973i(c)

The federal law that parallels the state laws invoked by Oregon and California is the federal vote-buying statute, 42 U.S.C. § 1973i(c). This law prohibits conspiring "with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pay or offers to pay or accepts payment either for registration to vote or voting . . ."[148] Amidst a backdrop of action by state officials, the U.S. Justice Department failed to move against any of the vote-swapping website operators. A spokesperson at the Department was quoted as saying that because the sites "serve as a clearing house, there is no pecuniary exchange, and it is an agreement amongst private parties," there is no violation in terms of voter fraud.[149]

The case law interpreting 42 U.S.C. § 1973i(c) suggests that this analysis was correct. It is clearly a violation of the statute to pay for a vote or even registration to vote, whether the voter is paid $50,[150] $3,[151] or $1.[152] Furthermore, it is not necessary for the government to prove that vote-buying schemes actually had an effect upon a federal election.[153] All that is necessary to establish a violation of § 1973i(c) is evidence that a defendant bought or offered to buy a vote and that such activity exposed the federal elements of the election to the mere possibility of corruption.[154] For "corruption"

to exist, there must be at least an offer of pecuniary gain to the voter. [155]Whether the actual corruption takes place or whether the participants in the scheme intended that it take place is irrelevant.[156]

The definition of "payment" in §1973i(c) is not necessarily limited to the transfer of money or a monetary equivalent.[157] The legislative history of the Act makes it clear that Congress contemplated an exchange of a benefit beyond actual cash.[158] The Congressional Record shows that non-monetary payments would qualify as "payment."[159] However, the Fifth Circuit held that this definition is limited to benefits of a truly pecuniary nature.[160] Benefits such as the assistance of a civic group to prospective voters or even a continuance of employee's fringe benefits are not prohibited by the statute.[161]

Although most of the limited case law interpreting the statute indicates that vote-swapping would not be illegal under § 1973i(c), it is not overwhelmingly so. Arguably, agreeing to exchange a vote for a vote is tantamount to exchanging a vote for a governmental benefit (a vote) to which the voter is already entitled. In United States v. Garcia,[162] voters received welfare vouchers in exchange for their votes. The Fifth Circuit found that although the recipients were already eligible for this government benefit, and thus were not receiving anything they were not otherwise entitled to, the receipt of the vouchers still amounted to a pecuniary benefit since the vouchers came in specific dollar denominations and could be directly exchanged for goods as if they were cash.[163] The court further recognized that the voters stated that they believed that receipt of the vouchers depended upon how they agreed to vote, and not upon their eligibility.[164]

Although the Garcia analysis would be a stretch, a zealous prosecutor could take action against a vote-swapping site by relying upon this logic. If this issue arises again, and the party in power does not stand to benefit, as it did in 2000, federal conduct may be entirely different.

VI. Federal Constitutional Concerns

The acts of the Secretaries of State of Oregon and California touch upon the core of constitutionally protected necessities for democracy – the trinity of speech, assembly, and association.

Freedom of speech is necessary in a self-governing society.[165] The Constitution seeks to protect speech from government intervention to guarantee the free exchange of ideas for the promotion of political and social change.[166] When speech involves political issues the Courts have consistently recognized that protecting such speech is fundamental to First Amendment values.[167] Even jurists who would protect only a narrow sliver of what is now untouchable agree that explicitly political speech must be protected.[168]

The rights to freedom of speech and freedom of assembly are deeply entwined[169] for, like the right to free speech, the right to assemble to further a common political goal is fundamental to our system of government and law.[170] Advocacy of a political point of view protected by the First Amendment, "is undeniably enhanced by group association."[171] The Constitution not only protects the freedom of citizens to join together to discuss and further their common political beliefs,[172] but affirmatively demands it.[173] Therefore, the right to associate for the advancement of political beliefs is

“an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”[174]

One could argue that the Framers of the Constitution intended to extend freedom of expression and association only to technologies existing in the 1700s.[175] However, even strict textualists argue that courts must apply constitutional values to new circumstances, especially when those circumstances arise due to changes in technology.[176] Cyberspace is entitled to the same degree of protection as other more traditional public forums and media.[177] Online assembly, association, and speech intended to further public political goals are therefore at the core of First Amendment values.[178]

A. Regulation of Vote-swap Sites Requires Strict Scrutiny.

Political speech is most zealously-guarded as the core value protected by the First Amendment,[179] “[f]or speech concerning public affairs is more than self-expression; it is the essence of self-government.”[180] At the very pinnacle of this core value is the notion that speech related to a campaign for political office is worthy of the “fullest and most urgent application” of First Amendment protection.[181]

Even the most fundamental of constitutional rights may be curtailed, however, if the infringement passes the test of strict scrutiny.[182] Rights of speech, assembly, and association may be infringed only by regulations designed to serve a compelling governmental interest. The interest must be unrelated to the suppression of ideas and the means used must be by the narrowly tailored to that interest; they must be the least restrictive and least drastic means available to achieve the stated purpose.[183]

Application of strict scrutiny hinges on whether the restriction severely burdens rights of speech[184] or association.[185] If a restriction severely burdens these rights, then strict scrutiny applies.[186] However, most cases eliminate this step; without examining the degree of burden a restriction creates, they simply state that if political speech or association is at issue, then strict scrutiny applies.[187] In NAACP v. Alabama ex rel Patterson,[188] the Supreme Court held that it is of no consequence whether the goals sought to be furthered by the association are political, economic, religious or cultural – any government action to curtail them is subject to the most exacting level of constitutional scrutiny.[189]

Strict scrutiny has been applied to situations involving solicitation of voters and distribution of literature within 100 feet of a polling place entrance,[190] regulation of campaign promises,[191] and a law prohibiting businesses from making expenditures to influence the outcome of referenda.[192] If a political group's associational rights are implicated, strict scrutiny must apply.[193] Given that the users of vote-swapping sites were communicating and associating for purely political reasons, strict scrutiny must apply.

Oregon's and California's actions restricting the vote-swap website operators' rights to disseminate information of a political nature taken on the eve of a pending election implicate core First Amendment values to such an extent that strict scrutiny must apply. The impact upon the rights of association of these sites' users and potential users should independently trigger strict scrutiny. Given the fact that both groups' rights are implicated, only strict scrutiny would be logical.

B. Were the restrictions by the Secretaries of State content-neutral?

The Oregon and California Secretaries of States regulated protected political speech and association in a public forum. In many cases, these actions are enough to trigger strict scrutiny.[194] However, to apply the appropriate level of scrutiny for examining their actions, it is necessary to first determine whether the Secretaries of State's actions were based on content.[195]

Regulations are content-based when they distinguish permissible speech from impermissible speech on the basis of the ideas or views expressed.[196] Courts presume that government actions are invalid when they speech due to its message, ideas, subject matter, or content.[197] In fact, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible."[198] This is because the government attacks the very heart of the First Amendment when it restricts speech due to the message it conveys.[199] Restrictions based on the message conveyed impede society's search for truth,[200] impair the individual's right to meaningful self-fulfillment,[201] and, most applicable to the vote-swapping controversy, obstruct the ability of citizens to fully participate in a system of deliberative self-government.[202]

Laws that impair speech with a blind eye toward the ideas and views expressed are usually content-neutral.[203] The Court has held that government may restrict all speech emanating from a sound-amplification truck regardless of the message broadcast. Billboards have been prohibited so as to minimize visual clutter and enhance aesthetics. [204] Also, the court upheld a National Park service anti-camping rule prohibiting people from sleeping on the national mall as part of a coordinated political statement because it was equally applicable to traditional campers.[205] Each of these

regulations impacted speech, potentially even political speech, but none was created for the purpose of impairing speech based on its message.[206]

According to one website operators' counsel, the threat of prosecution turned on the particular message the sites carried: the "user's willingness to participate in an exchange of unenforceable pledges as a methodology for communicating a political viewpoint."[207] Websites containing any other content were not subject to threats of reprisal by the government.[208]

The Republican National Committee had a website which permitted users to enter their names, addresses, e-mail addresses, and other personal information so that they could "Get involved with the Republican Party!"[209] The Democratic National Committee had a similar website inviting visitors to sign up and "Take Action!"[210] The Libertarians,[211] Natural Law Party,[212] and the Yahoo! personals[213] each had web forms permitting users to enter their names in a database in order to communicate with other individuals with common political or social goals. The goal that the Secretaries of State considered illegitimate was the common goal of simultaneously electing Al Gore as president and helping the Green Party acquire five percent of the popular vote. As such, this does not appear to be a content-neutral regulation, but one that specifically targets the political goals of the so-called "Nader traders." Inasmuch as they restricted websites that urged people to vote in a particular manner in a publicly-held election, the actions of the Secretaries of State are unconstitutional.[214]

C. Did the regulations seek to achieve a compelling governmental interest?

Under strict scrutiny, a regulation must be narrowly tailored to achieve a compelling governmental interest.[215] Although the First Amendment may be to some the most sacrosanct of rights, there are competing government interests to which the First Amendment must occasionally yield.[216] For example, fair trial rights have been held to trump the First Amendment in specific circumstances.[217] The need for the government to keep order outside an abortion clinic may stand above the rights of abortion protesters to spread their political message.[218] And in circumstances most analogous to the issue at hand, in order to assure the public a right to "fair and honest" elections, First Amendment rights are frequently trumped[219] because the right to cast a ballot in an uncorrupt election is just as important as the right to discuss that election.[220]

There would be little value in open debate prior to an election in which the democratic process itself was subverted by intimidation and fraud. "States have a legitimate interest in preserving the integrity of their electoral process."[221] The prevention of corruption or even the appearance of corruption, in government has been held to be a compelling governmental interest validating the restriction of constitutionally protected speech and associational rights.[222] The prohibition of the giving of gifts or money to a voter in exchange for his support is permissible.[223]

The interest alleged by both Secretaries of State is the elimination of "undue influence"[224] or "corruption"[225] from the voting process in their respective states. These interests are certainly compelling state interests.[226] Given this fact, Oregon and California would have little difficulty arguing that they were at least motivated to act by a desire to further a compelling state interest when they restricted the speech and

associational rights of the website operators and users. However, it does not appear that their actions bore a reasonable relationship to the compelling governmental interest.

If a vote-swap is an actual situation of "bartering" of votes, it could be construed as conduct that the state can legitimately prohibit.[227] However, as demonstrated above, nothing in this arrangement was truly bartered. Voters entered into a discussion and convinced one another to vote a certain way based on common political goals. The Court has drawn a distinction between entering into an exchange of this type and an illegal exchange by making the distinction between voting based on a promise of public political action and voting based on an illegal exchange for "private profit."[228]

There can be no determination, or even serious assertion, that anyone entered into a vote-swap arrangement for private profit or any other form of enrichment. Perhaps if the vote-swap sites been more correctly named "vote consensus" sites, or "vote strategically" sites, they would have passed by unnoticed. 'Barter' only exists in this situation as a matter of semantic misfortune. The trades are unenforceable, confer no benefit upon either voter, and do not truly transfer anyone's voting authority.[229] It appears that these websites and their users engaged in political speech and association, which is activity protected by the First Amendment.[230]

D. Were the regulations the least restrictive method of serving the governmental interest?

If the compelling governmental interest is the integrity of the polling process, the state may suppress fundamental rights to achieve this interest.[231] However, even the

most compelling governmental interest may not be promoted by broad means that suppress otherwise protected freedoms.[232] Because of the danger of governmental excess and censorship of politically disfavored ideas, content-based restrictions can only be employed when absolutely necessary to achieve the interest asserted.[233]

Prohibiting vote-swapping websites in order to prevent corruption in the political process is misguided. Both Secretaries of State relied upon statutory provisions against the exertion of undue influence upon a voter. Were these agreements in some manner enforceable, then the voters who entered into them would enter the polls subject to the external influence of an enforceable contract preventing them from voting according to their own political beliefs. Even content-based restrictions on political speech in a public forum would be permissible if this were the case.[234]

However, the agreements were in no manner binding or enforceable. Upon entry into the voting booth all citizens were bound by their consciences, the desire to further their own interests, or even random chance. There can be no valid determination that any vote-swapper entered the voting booth compelled to vote by any motivation other than the desire to achieve their own personal political goals.

While the threats of prosecution placed a great burden on providers of protected content, they did not effectively address the harm they sought to prevent. The government bears the burden of demonstrating that the regulation will in fact address the problem of corruption of the electoral process.[235] Since all the sites were only putting individuals in contact with one another by e-mail, an allegation of coercion is fanciful at best.[236] Given the lack of proximity to the polls and voluntary nature of

participation in the program, this governmental regulation of vote solicitation was an impermissible burden on speech.[237]

VII. Conclusion

The online vote-swapping phenomenon was thousands of people nationwide gathering in the new town square to associate for the furtherance of a common political goal. Had this happened in a traditional meeting room, few would question its legality. However, the Secretaries of State of California and Oregon reacted to new technology by imperiling the most fundamental of constitutional rights. The Constitution demands that any government actor wishing to restrict speech and assembly bears a heavy burden, one that the Secretaries of State did not carry.

The actions of the Secretaries of State were invalid under the very laws they sought to apply. As demonstrated above, California law would not characterize a swapped vote as "valuable consideration." In Oregon, the element of "undue influence" in that state's voting corruption law would not be satisfied.

A citizen pledging to swap votes followed her conscience, un-policed and unobserved in the voting booth.[238] Even Oregon officials admitted that there was no way to ascertain how another person voted.[239] A citizen using a website to pledge a vote could have changed her mind, or may not even have been a citizen or a registered voter.[240] Website users could have used fictitious or multiple e-mail addresses or identities because information on the website and information concerning the entire arrangement is not verifiable.[241]

Even if the agreement could be verified, the end result is a vote cast to achieve a preferred political goal, albeit in a non-traditional manner. Before threatened with prosecution, these websites facilitated political association and speech.[242] They asked a user a series of questions about her political goals and geographic location and then used that information to match her with another user who had complimentary political goals. Once so matched, the two voters could arrange coordinated political action.[243]

Ultimately, what controls this issue is that vote-swapping is protected by the Federal Constitution. Voting to achieve a political goal is the essence of democracy.[244] The vote-swapping websites took the consensus-building aspect of the political meeting and political speech from the town hall and transferred it into cyberspace. That the political meeting and discussion took place in the digital world as opposed to a meeting room does not change the level of constitutional protection that should be afforded.[245] While this phenomenon may have broken Duverger's law and inverted his theories of strategic voting, no American law was broken. Online vote-swapping is legal and subject to the highest level of constitutional protection.

Footnotes

1. Juris Doctor, Georgetown University Law Center, 2000. The author wishes to thank Michelle Prettie and Professor Bill Chamberlin for their guidance and assistance.

2. Brown v. Hartlage, 456 U.S. 45, 54 (1982).

3. Robert Corn-Revere, New Technology and the First Amendment: Breaking The Cycle of Repression, 17 Hastings Comm. & Ent. L.J. 247, 264 (1994).

4. Rebecca Cook, Nader Urges Washington Supporters to Ignore Pressure from Democrats, Associated Press Newswire, Nov.5, 2000 < http://www.oregonlive.com/newsflash/index.ssf?/cgi-free/getstory_ssf.cgi?o1325_BC_WA--Nader&&news&newsflash-oregon>; Jeff Mapes, Nader-Gore Choice Disrupts Unity Among Leftist Activists, Portland Oregonian, Nov. 2, 2000, at A13.

5. See, e.g., <http://www.voteswap2000.com>, <http://www.winwincampaign.org/>; <http://www.voteexchange.com/>; <http://www.nadertrader.org/>.

6. <http://www.voteswap2000.com>.

7. Cal. Elec. Code § 18521(a) (2000) (“A person shall not directly or through any other person receive, agree, or contract for, before, during or after an election, any money, gift, loan, or other valuable consideration . . . because he or any other person voted, agreed to vote, refrained from voting, or agreed to refrain from voting for any particular person or measure.”).

8. Cal.Elec.Code § 18522(a)(2) (2000) (“Neither a person nor a controlled committee shall directly or through any other person or controlled committee pay, lend, or

contribute, or offer or promise to pay, lend, or contribute, any money or other valuable consideration to or for any voter to or for any other person to induce any voter to vote or refrain from voting at an election for any particular person or measure.").

9. Cal. Penal Code § 182 (2000) (Conspiracy).

10. Oregon Warns Websites that Promote Vote Trading, Record of Bergen County, Nov. 3, 2000, at A26.

11. See Scott Harris, ACLU Takes Up Vote-Swapping Fight, The Standard, Nov. 2, 2000<http://www.thestandard.com/article/display/0,1151,19890,00.html>

12. See Alexander Meiklejohn, Free Speech and its Relation to Self-Government (1948); see also Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L. J. 1, 23 (1971) ("[E]ven without a first amendment . . . representative democracy . . . would be meaningless without freedom to discuss government and its policies. Freedom for political speech could and should be inferred even if there were no first amendment.").

13. See Reno v. ACLU, 521 U.S. 844, 870 (1997) (restrictions on website content are afforded the same protection as traditional print).

14. Id. at 870 (1997).

15. Rutherford B. Hayes actually won the 1876 presidential race by a single electoral vote. See Paul Abramson et al., Third-Party and Independent Candidates in American Politics: Wallace, Anderson, and Perot, 110 Pol. Sci. Q. 349, 351 (1995); see also Bronislaus B. Kush, Every Vote Counts in Fight for the White House, Worcester Telegram and Gazette, Nov. 3, 2000, at 2 (The Kennedy/Nixon race of 1960 had a 118,574 popular vote margin, but was a clear electoral college victory for Kennedy. In

1880, James Garfield prevailed over Winfield S. Hancock by a mere 7,018 votes.).

16. Vincent Casaregola and Robert A. Cropf, Virtual Town Halls: Using Computer Networks to Improve Public Discourse and Facilitate Service Delivery, Research and Reflection, Vol. 4, No. 1, (Oct. 1998) <http://www.gonzaga.edu/rr/v4n1/cropf.htm>.

17. Id.

18. Use of the Internet for Campaign Activity, 64 Fed. Reg. 214, 60,360 (Nov. 5, 1999); see also Mark S. Bonchek, Grassroots in Cyberspace: Using Computer Networks to Facilitate Political Participation, Working Paper 95-2.2. Midwest Political Science Association, April 6, 1995, Sections 5.1-5.3.

19. Mark S. Bonchek, “Grassroots in Cyberspace: Using Computer Networks to Facilitate Political Participation” Working Paper 95-2.2: Midwest Political Science Association, April 6, 1995, Sections 5.1-5.3.

20. Id.

21. Id.

22. Id.

23. Id.

24. Id.

25. Id.

26. Ed Schwartz, NetActivism: How Citizens Use the Internet <http://www.oreilly.com/catalog/netactivism/excerpt/>.

27. Id.

28. Bonchek, supra note 19.

29. Id; Schwartz, supra note 26.

30. See Philip Giordano, Invoking Law as a Basis for Identity in Cyberspace, 1 Stan. Tech. L. Rev. 1, 4 (1998) (Suggesting that the Internet is not just a means of communication, but a “place.”); Linda M. Harasim, Networks as Social Space, in Global Networks 15-34 (Linda M. Harasim ed., 1993) (same).

31. Bart-Jan Flos, Teledemocracy VIII: The Formation of On-line Coalitions, Politeia Online Newsletter, No. 11, (Sept. 1998) at <http://www.dds.nl/~scene/newsletter/archive/okt_98/nl_11198.html#tel>.

32. See generally MAURICE DUVERGER, Political Parties: Their Organization and Activity in the Modern State, 217 (Barbara & Robert North trans., Wiley 1954). ; GARY COX, Making Votes Count: Strategic Coordination in the World’s Electoral Systems, 13 (Cambridge Univ. Press, 1997) .

33. Cain and others refer to this practice as “tactical voting.” See Bruce Cain, Strategic Voting in Britain, 22 Am. J. Pol. Sci. 639 (1978). Abramson prefers the term “‘sophisticated’ voting.” See Abramson et al., “Sophisticated” Voting in the 1988 Presidential Primaries, 86 Am. Pol. Sci. Rev. 55 (1992).

34. See Gary W. Cox, Strategic Voting Equilibria Under the Single Nontransferable Vote, 88 Am. Pol. Sci. Rev. 608, 611 (1994); Thomas Gschwend, Remarks entitled “Ticket Splitting and Strategic Voting: Evidence from the 1998 Election in Germany,” delivered at the Annual Meeting of the American Political Science Association (Aug. 30 - Sept. 3, 2000) (unpublished manuscript on file with the author).

35. This is what Duverger referred to as the “psychological effect” of the simple plurality system. See Duverger at 207-235 (discussing the coalescence of two main parties); Cox, supra note 32 (discussing Duverger’s propositions); Gary W. Cox, Strategic Voting

Equilibria Under the Single Nontransferable Vote, 88 Am. Pol. Sci. Rev. 608, 611 -616 (1994); John Fuh-Sheng Hsieh et al.,, Strategic Voting in the 1994 Taipei City Mayoral Election, 16 Electoral Stud. 153, 154 (1997) (discussing the meaning of “strategic voting”).

36. This is commonly referred to as "Duverger's Law." See Duverger at 217; see also Gary Cox, Strategic Voting Equilibria Under the Single Nontransferable Vote, in 88 Am. Pol. Sci. Rev., supra note 35 at 608; William Riker, The Two Party System and Duverger's Law: An Essay on the History of Political Science, 76 Am. Pol. Sci. Rev. 753, 757 (1982) (showing support for Duverger's law while demonstrating that writing on the law predates Duverger); A.N. Holcombe, Direct Primaries and the Second Ballot, 5 Am. Pol. Sci. Rev. 535, 540 (1911) (“The tendency under the system of plurality elections toward the establishment of the two party system is, therefore, almost irresistible.”).

37. See William Riker, Models of strategic choice in Politics (Peter C. Ordeshook ed., University of Michigan Press 1989).

38. Gary Cox, Strategic Voting Equilibria Under the Single Nontransferable Vote, in 88 Am. Pol. Sci. Rev., supra note 35; Arturo Valenzuela, The Breakdown of Democratic Regimes, Chile (1978) (discussing the 1958 Chilean presidential election in which the right wing candidate won the election with 31.2% of the vote, the leftist candidate gathered 28.5%, and the centrist received 20.5%. Although the left and center were more likely to ally against the right and could have easily changed the results had there been strategic voting, the relative strength of both non-right candidates dampened any incentive to enter into compromise strategy voting); John Fuh-Sheng Hsieh et al.,

Strategic Voting in the 1994 Taipei City Mayoral Election, 16 Electoral Stud. 153, 160 (1997) (demonstrating the non-Duvergerian equilibrium in the 1994 Taipei City election).

39. Some authors cite examples as far back as Ancient Rome. See Gary W. Cox, Strategic Voting Equilibria Under the Single Nontransferable Vote, in 88 Am. Pol. Sci. Rev. supra note 35, at 608; David P. Myatt, Strategic Voting Under the Qualified Majority Rule, (1969) (unpublished manuscript on file with the author), citing Robin Farquharson, Theory of Voting (New Haven, 1969). See Abramson et al., supra note 15, at 354 (discussing more recent examples are the 1932 German election that led to the rise of Adolf Hitler and the U.S. presidential race in the same year that Franklin D. Roosevelt was elected).

40. See William H. Riker and Steven J. Brams, The Paradox of Vote Trading, 67 Am. Pol. Sci. Rev. 1235 (1973).

41. The assumption that all Nader voters would have voted for Bush was false. Twenty-three percent of Nader supporters said that they would have voted for Bush had Nader not been running. See Peter Dizikes and David Ruppe, Will Nader Fare Well? How Strong Will Green Party Candidate's Support be on Election Day?, ABCNEWS.COM, (Oct. 26, 2000) <http://abcnews.go.com/sections/politics/DailyNews/naderthreat_001026.html>.

42. The notion that a vote for Nader was a vote for Bush was not 100% accurate. A vote for Nader would have kept a left-leaning vote from Gore, but did not actually place a vote in Bush's totals. Therefore it was a half vote at best.

43. See, e.g., Charles Pope, Take a Stand, Nader Urges Seattle Crowd, Seattle Post-

Intelligencer, Nov. 3, 2000, at A1 (“Nader’s aim is to collect 5 percent of the vote nationally to establish the Green Party as a major political organization. ‘It’s time to take a stand’ he said ‘We want to build a permanent new party of citizens who have been closed out by their own government.”).

44. See Scott Harris, 'Nader Traders' May Have Affected Outcome in Florida, (Nov. 17, 2000) <http://www.cnn.com/2000/TECH/computing/11/17/nader.traders.help.gore.idg/index.html>.

45. James Ridgeway, Beatification of Ralph, Village Voice, (Sept. 27-Oct. 3, 2000) <http://www.villagevoice.com/issues/0039/ridgeway3.php>.

46. Id.

47. See, e.g., Dizikes and Ruppe, supra note 41.

48. <http://www.freerepublic.com>.

49. <http://www.freerepublic.com/forum/a39d85fb603a8.htm>.

50. Jamin Raskin, Nader’s Traders: How to Save Al Gore’s Bacon by Swapping Votes on the Internet, Slate, (Oct. 24, 2000) <http://slate.msn.com/Concept/00-10-24/Concept.asp>.

51. Id.

52. Lisa Napoli, Trading Nader, Gore Votes, MSNBC.COM, (Oct. 31, 2000) <http://www.msnbc.com/news/482104.asp>.

53. Harris, supra note 44.

54. Brief for Plaintiffs at 5, Porter v. Jones, (D. Cal. 2000) (No. 00-11700) (on file with author).

55. Id.

56. OR. REV. STAT. § 260.665 (1999); Cal. Elec. Code § 18521(a) (2000); Cal. Elec Code § 18522(a) (2000).

57. The California Secretary of State said that <http://www.winwincampaign.org> was permissible under California law. Burden of Proof, CNN television broadcast (Nov. 2, 2000).

58. Letter from Paddy McGuire, Chief of Staff, Oregon Elections Division to Jeffrey Cardille, operator of www.nadertrader.com and www.nadertrader.org, (Nov. 3, 2000) (on file with author).

59. For a discussion of the Secretary of State's actions under California law see Section IV(A) infra.

60. OR. REV. STAT § 260.665(1) (1999) "As used in this section, "undue influence" means force, violence, restraint or the threat of it, inflicting injury, damage, harm, loss of employment or other loss or the threat of it, fraud or giving or promising to give money, employment or other thing of value. " For elaboration see also Oregon Republican Party v. State of Oregon, 78 Or. App. 601, 604; 717 P.2d 1206, 1207 (1986) ("[T]he promise of an advantage as a result of performing the desired act; it is persuasion coupled with a benefit or the absence of a threatened detriment.") For a full discussion of this concept under Oregon law, see Section IV(B)infra.

61. For a discussion of the Secretary of State's actions under Oregon law see Section IV(A)infra.

62. Brief for Plaintiffs at 2.

63. See Smith v. California, 361 U.S. 147 (1959) (ordinance prohibiting the possession of "obscene" or "indecent" material in a bookstore was determined to be unconstitutional

due to its tendency to inhibit not only unprotected, but protected expression).

64. See, e.g., Dombrowski v. Pfister, 380 U.S. 479, 482 (1965) (statute defining "subversive organization" was unconstitutional due to potential "chilling effect" on defendant's associational rights).

65. See Near v. Minnestota, 283 U.S. 697 (1931) (Minnesota statute authorizing prior restraints on publication of any defamatory materials held unconstitutional).

66. See Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940).

67. 283 U.S. 697 (1931).

68. Id. at 716; see also New York Times Co. v. United States, 403 U.S. 713, 726-27 (1971) (Brennan, J., concurring) (even when national security information is implicated, the government has the burden of proving that disclosure would have severe consequences for national security).

69. See Weiman v. Updegraff, 344 U.S. 183, 191 (1952) (loyalty oath that ignored the element of scienter invalid).

70. Websites Shut Selves Down, Ariz. Republic, Nov. 2, 2000, at A8; Margie Wylie, Nader Backers Elect to Trade Their Vote, Plain Dealer, Nov. 1, 2000, at 2A.

71. <http://www.voteswap2000.com> (visited Nov. 3, 2000).

72. Oregon Warns Websites that Promote Vote Trading, Rec. Bergen County, Nov. 3, 2000, at A26.

73. <http://www.presidentgore.com> (visited Nov. 5, 2000).

74. When the user filled out the vote swap form, if the user entered “California” in the “state” field, he received the following message: “As at least one other site has had issues with CALIFORNIA law not permitting the swap of their votes, we have disallowed

submissions from California. I'm sorry for this, but I don't want to get in trouble over this." <http://www.presidentgore.com> (visited Nov. 5, 2000).

75. See Harris, supra note 53.

76. See Dombrowski v. Pfister, 380 U.S. 479, 482 (1965) (statute defining "subversive organization" was unconstitutional due to potential "chilling effect" on defendant's associational rights).

77. Harris, supra note 53.

78. See, e.g., James Rosen, Backers of Gore, Nader Make Deal; e-trades: Green Voters in Close States 'Swap' Votes for Gore in pro-Bush States, News Trib. of Tacoma, Nov. 2, 2000, at A1.

79. See Dave D'Alessio, Use of the World Wide Web in the 1996 US Election, 16 Electoral Stud. 489, 494-95 (1997) (demonstrating that hits to election oriented websites increased rapidly as election day approached, with rates the day before the 1996 election attracting twice as many hits as the week before, and on election day attracting more than seven times the hits of the prior week).

80. <http://www.cnn.com/interactive/allpolitics/0010/electoral.map/map1.html> (Nov. 4, 2000).

81. Yahoo! Daily News, (Nov. 3, 2000)<http://dailynews.yahoo.com/h/nm/20001103/pl/campaign_ electoral_dc.html>.

82. Zogby tracking poll, conducted 10/31-11/2/00 for Reuters/MSNBC, surveyed 659 likely Florida voters; margin of error +/- 4% (release, 11/2/00). This tracking poll is a rolling sample of 200 likely voters each 24-hour period, with the three most recent 24-hour surveys added together for an approx. 600 likely voter sample.

83. Zogby tracking poll, conducted 10/31-11/2/00 for the Toledo Blade and Pitt. Post-Gazette, surveyed 603 likely Pennsylvania voters; margin of error +/- 4% (release, 11/2/00). This tracking poll is a rolling sample of 200 likely voters each 24-hour period, with the three most recent 24-hour surveys added together for an approx. 600 likely voter sample.

84. See Ronald Brownstein, Campaign 2000; Liberals Beat Drum For Gore, Hope Nader Backers Listen, Los Angeles Times, Nov. 1, 2000 at A16.

85. Zogby tracking poll, conducted 10/31-11/2/00 for Reuters/MSNBC, surveyed 508 likely Washington voters; margin of error +/- 4.5% (release, 11/2/00). This tracking poll is a rolling sample of 200 likely voters each 24-hour period, with the three most recent 24-hour surveys added together for an approx. 600 likely voter sample.

86. Dizikes and Ruppe, supra note 41. <http://abcnews.go.com/sections/politics/DailyNews/naderthreat_001026.html>.

87. Bush with Slight Edge in Electoral College Count, Reuters (Nov. 3, 2000) <http://dailynews.yahoo.com/h/nm/20001103/pl/campaign_electoral_dc_9.html>.

88. Mike Recht, Close Presidential Race Pulls Small States out of Obscurity, AP Wire, Oct. 31, 2000.

89. An American Research Group poll, conducted 10/31-11/1/00, surveyed 600 likely New Hampshire voters; margin of error +/- 4% (release, 11/2/00).

90. California and Oregon were not the only states to weigh in on this issue. Two states acknowledged vote-swapping as legal activity. See David Connerty-Marin, Nader-Gore Vote Swapping is DeemedLegal in Maine, Portland Press Herald, Nov. 1, 2000, at 1A (statement of Maine secretary of state, Dan Gwadosky that vote-swapping was not only

legal, but was a "'…provocative way to use a new medium' [that] will probably get more people involved in voting"); see also Nader Traders Shut Down Their Web Site Under Pressure, Washington Times, Nov. 1, 2000, at A12 (quoting Nebraska Secretary of State Scott Moore as saying that he did not believe that vote swapping was illegal). Other states issued statements that vote-swapping was illegal and undermined the electoral process. See Minnesota Secretary of State, Secretary of State, Mary Kiffmeyer, Asks Vote-Swap Web Sites to "Cease and Desist" in MN (Nov. 1, 2000) <http://www.sos.state.mn.us/office/voteswap.htm> (discussing that Minnesota Secretary of State Mary Kiffmeyer emailed www.voteswap2000.com and demanded an end to vote- swapping in Minnesota). See Margie Wylie, Vote Trading Sites Prove Popular, Despite Brewing Ethical and Legal Concerns, Newhouse News Service(Oct. 31, 2000) <http://www.newhouse.com/archive/story1b110100.html> (discussing that Wisconsin and Arizona officials stated that vote swapping was illegal in their respective states, but planned no legal action).

91. See Deras v. Myers, 535 P.2d 541, 544 (Or.1975).

92. See Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 343-46 (Cal. 1979), aff'd. 447 U.S. 81 (1980) ("past decisions on speech and private property testify to the strength of 'liberty of speech' in this state.").

93. Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 343-46 (Cal. 1979), aff'd. 447 U.S. 81 (1980) ("[P]ast decisions on speech and private property testify to the strength of 'liberty of speech' in this state.").

94. Id. at 907-910.

95. See Gonzalez v. City of Santa Paula, 226 Cal. Rptr. 164, 167 (Cal.Ct.App. 1986).

96. Id.

97. See Readers-Digest Ass'n. v. Superior Court, 690 P.2d 610 (Cal. 1984).

98. Gonzalez v. City of Santa Paula, 226 Cal. Rptr. 164, 166 (Cal. Ct. App. 1986) (citing Wilson v. Superior Court, 13 Cal. 3d 652, 656 (Cal. 1975)).

99. See Gonzalez v. City of Santa Paula, 226 Cal. Rptr. 164, 166 (Cal. Ct. App. 1986) (citing Wilson v. Superior Court, 13 Cal. 3d 652, 656 (Cal. 1975)); Duran v. Cassidy, 104 Cal. Rptr. 793, 797(Cal. Ct. App. 1972).

100. Jones stated that VoteSwap2000 ". . . specifically offers to broker the exchange of votes throughout the United States of America. This activity is corruption of the voting process in violation of Elections Code sections 18521 and 18522 as well as Penal Code section 182, criminal conspiracy . . . any person or entity that tries to exchange votes or broker the exchange of votes will be pursued with utmost vigor." (E-mail from California Secretary of State to operator of Vote Swap 2000, forwarded on Nov. 1, 2000).

101. Cal. Elec. Code § 18521(a) ("A person shall not directly or through any other person receive, agree, or contract for, before during or after an election, any money, gift, loan, or other valuable consideration . . . because he or any other person voted, agreed to vote, refrained from voting, or agreed to refrain from voting for any particular person or measure.").

102. Cal Elec. Code § 18522(a)(2) ("Neither a person nor a controlled committee shall directly or through any other person or controlled committee pay, lend, or contribute, or offer or promise to pay, lend, or contribute, any money or other valuable consideration to or for any voter to or for any other person to induce any voter to vote or refrain from voting at an election for any particular person or measure.").

103. Cal. Civ. Code § 1605 (2000).

104. See Estate of Bishop, 25 Cal. Rptr. 763 (Cal. Ct. App.1962).

105. See Southern Cal. Enterprises, Inc. v. Walter & Co., 178 P.2d 785, (Cal. Ct. App.1947); Chrisman v. Southern California Edison Co., 256 P. 618, 621 (Cal. Ct. App. 1927) (If the promisor is not otherwise lawfully entitled to the benefit, the benefit is sufficient to claim valuable consideration); Parsons v Cashman, 137 P. 1109 (Cal. Ct. App.1913).

106. See Jordan v. Scott, 177 P.2d 504, 505 (Cal. Ct. App. 1918).

107. See Mattei v. Hopper, 330 P.2d 625 (Cal. 1958); Cox v. Hollywood Film Enterprises, Inc., 240 P.2d 713 (Cal. Ct. App.1952).

108. See Pease v. Brown, 8 Cal. Rptr. 917 (Cal. Ct. App.1960).

109. Black's Law Dictionary (4th ed. 1968).

110. Id.

111. This raises interesting questions as to whether he would even have been able to assert jurisdiction over the operators. This issue is beyond the scope of this article, but there have been many excellent studies of this question. See, e.g., Brian E. Daughdrill, Comment: Personal Jurisdiction And The Internet: Waiting For The Other Shoe To Drop On First Amendment Concerns, 51 Mercer L. Rev. 919 (2000); Kevin R. Lyn, Personal Jurisdiction And The Internet: Is A Home Page Enough To Satisfy Minimum Contacts?, 22 Campbell L. Rev. 341 (2000); Todd D. Leitstein, Comment: A Solution For Personal Jurisdiction On The Internet, 59 La. L. Rev. 565 (1999).

112. Oregon Warns Websites the Promote Vote Trading, supra note 72,at A26; see OR. Rev. Stat. § 260.665.

113. Harris, supra note 11.

114. Press release, Oregon Secretary of State, Nov. 3, 2000.

115. OR. Rev. Stat. § 260.665(2)(c) (1999).

116. OR. Rev. Stat. § 260.665(1) (1999).

117. Telephone interview with Jennifer Hertel, Program Representative, Oregon State Election Division (Nov. 6, 2000) (Hertel stated that the individual voters would be in violation of Or. Rev. Stat. §260.665, but acknowledged that there would be no practical way to prosecute individual voters due to the impossibility of verifying exactly how each voter cast his or her ballot).

118. 717 P.2d 1206 (Or. Ct. App. 1986).

119. .Id. at 1207.

120. Id.

121. Id. (trial court opinion unpublished, but trial court reasoning derived from published court of appeals decision).

122. Id. at 1208.

123. Id.

124. Id.

125. Id.

126. Id.

127. Id.

128. See Oregon Republican Party v. State of Oregon, 722 P.2d 1237 (Or. 1986); see also Brumnett v. PSRB, 848 P.2d 1194, 1196 (Or. 1993) (“cases that are otherwise justiciable but in which a court's decision no longer will have a practical effect on or

concerning the rights of the parties are moot. ”).

129. Oregon Republican I, 722 P.2d at 1238.

130. Id.; see also Barcik v. Kubiaczyk, 895 P.2d 765, 774-775 (Or. 1995) (“capable of repetition, yet evading review” has been rejected by Oregon courts); Pham v. Thompson, 965 P.2d 482, 485 (Or. Ct. App. 1998) (Oregon does not recognize the doctrine of “capable of repetition, yet evading review.”); accord Safeway v. Oregon Public Employees Union, 954 P.2d 196, 198 (Or. Ct. App.1998).

131. Oregon Republican I, 722 P.2d at 1238. But see Responsible Contracting Council, Inc. v. Oregon, 956 P.2d 993, 994 (Or. Ct. App.1998) (“Matters of public interest … should be resolved … even in the face of mootness of the particular case at hand.”).

132. Oregon Republican I, 722 P.2d at 1239.

133. Oregon Republican Party v. State, 726 P.2d 412 (Or. Ct. App. 1986).

134. Id. (Van Hoomissen, J., concurring).

135. Oregon Republican I, 717 P.2d 1206, 1209-10 (Van Hoomisen, J., concurring).

136. Id. at 1210.

137. Or. Const. art. I, § 8 (“No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.”).

138. Or. Const. art. I, § 26 (“No law shall be passed restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good; nor from instructing their Representatives; nor from applying to the Legislature for redress of grievances.”).

139. See, e.g., Deras v. Myers, 535 P.2d 541, 544 (Or. 1975).

140. Id. at 541.

141. See State v. Crane, 612 P.2d 735 (Or. Ct. App. 1980).

142. See State v. Tusek, 630 P.2d 892, 894 (Or. Ct. App. 1981); State v. Crane, 612 P.2d at 741; State v. Hodges, 457 P.2d 491, 493 (Or. 1969).

143. Press Release, Oregon Secretary of State, Secretary of State Moves to Close Vote Swapping Sites, Nov. 2, 2000, <http://www.sos.state.or.us/executive/pressrel/110200swap.html> (on file with author).

144. Or. Const. art. I, § 26.

145. See Deras v. Myers, 535 P.2d 541, 544 (Or. 1975).

146. Id.

147. Id. at 545 n.6.

148. 42 U.S.C. § 1973i(c) (2001).

149. Napoli, supra note 52, at ¶ 15.

150. See United States v. Campbell, 845 F.2d 782, 787 (8th Cir. 1988).

151. See United States v. Daugherty, 952 F.2d 969, 971 (8th Cir. 1991).

152. See United States v. Lewin, 467 F.2d 1132, 1135 (7th Cir. 1972).

153. United States v. Carmichael, 685 F.2d 903, 908 (4th Cir. 1982).

154. Id.

155. United States v. Garcia, 719 F.2d 99, 102 (5th Cir. 1983) (explaining that Congress' intent was to prohibit the offering or giving of items of pecuniary value to an individual voter in exchange for his vote).

156. See United States v. Bowman, 636 F.2d 1003, 1011 (5th Cir. 1981).

157. Garcia, 719 F.2d at 101.

158. See 111 Cong. Rec. S8423 (daily ed. April 26, 1965) (statement of Sen. Williams) ("Third, the amendment would provide a penalty for anyone offering or accepting money or something of value in exchange for registering or voting.") (emphasis added).

159. See 111 Cong. Rec. S8986 (daily ed. April 29, 1965) (statement of Sen. Jarvits) ("I wish to make it as clear as it is possible to make it that it is intended solely to prohibit the practice of offering or accepting money or a fifth of liquor, or something – some payment of some kind – for voting or registering.").

160. See, e.g., United States v. Lewin, 467 F.2d 1132, 1136 (7th Cir. 1972).

161. Id.

162. 719 F.2d 99 (5th Cir. 1983).

163. United States v. Garcia, 719 F.2d 99, 100 (5th Cir. 1983).

164. Id.

165. See generally Meiklejohn, supra note 12.

166. Buckley v. Valeo, 424 U.S. 1, 14 (1976).

167. See, e.g., Boos v. Barry, 485 U.S. 312, 318 (1988) (protecting political speech outside foreign embassies); cf. Connick v. Myers, 461 U. S. 138, 147 (1983) (explaining that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, federal courts will not normally protect his speech).

168. Bork, supra note 12, at 23 ("[E]ven without a first amendment . . . representative democracy . . . would be meaningless without freedom to discuss government and its policies. Freedom for political speech could and should be inferred even if there were no first amendment.").

169. Patterson, 357 U.S. at 460-61; De Jonge v. Oregon, 299 U.S. 353, 364 (1937); Thomas v. Collins, 323 U.S. 516, 530 (1945) (explaining that the right to associate in order to express one's views is “inseparable” from the right to speak freely).

170. See, e.g., California Democratic Party v. Jones, 530 U.S. 567 577 (2000) (holding that members of a political party have the right to select their nominees for higher office); McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 336 n.1 (1995) (quoting Brandeis, J., in his concurring opinion in Whitney v. California, 274 U.S. 357 (1927), that the right of assembly is a fundamental right).

171. Patterson, 357 U.S. at 460.

172. California Democratic Party v. Jones, 120 S.Ct. 2402, 2408 (2000); (State law mandating that only party members, and not independents, may vote in party primaries placed “an unconstitutional burden on the fundamental freedom of political association guaranteed by the First and Fourteenth Amendments to the United States Constitution.”); see also Tashjian v. Republican Party, 479 U.S. 208, 214-215 (1986).

173. Meiklejohn, supra note 12.

174. Patterson, 357 U.S. at 460 (citing Gitlow v. New York, 268 U.S. 652, 666 (1923)); Palko, 302 U.S. at 324.

175. Corn-Revere, supra note 3.

176. Ollman v. Evans, 750 F.2d 970, 996 (D.C. Cir. 1984), cert denied, 471 U.S. 1127 (1985) (Bork, J., concurring) (The First Amendment must be interpreted “to encompass the electronic media.”).

177. Reno v. ACLU, 521 U.S. 844, 885 (1997) (“As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of

the content of speech is more likely to interfere with the free exchange of ideas than to encourage it."); cf. Brief for Plaintiffs at 7, Porter v. Jones, (D. Cal. 2000) (No. 00-11700) (arguing that the Supreme Court has explicitly rejected the argument that cyberspace is subject to less protection than newspapers).

178. See, e. g., Boos v. Barry, 485 U.S. 312, 318 (1988) (protecting political speech outside foreign embassies); NAACP v. Claiborne Hardware Co., 458 U. S. 886, 913 (1982) (members of an organization organized for lawful political motives may not be punished for association with other members who may act unlawfully); cf. Connick v. Myers, 461 U.S. 138, 145 (1983) (when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, federal courts will not normally protect the employee's speech).

179. See Mills v. Alabama, 384 U.S. 214, 218-19 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes."); New York Times v. Sullivan, 376 U.S. 354 (1964) (the First Amendment demands unfettered and uninhibited robust political debate); Bork, supra note 12, at23 ("Even without a first amendment . . . representative democracy . . . would be meaningless without freedom to discuss government and its policies. Freedom for political speech could and should be inferred even if there were no first amendment"); Cass R. Sunstein, Free Speech Now, 59 U. Chi. L. Rev. 255, 305-6 (1992) ("[A]n insistence that government's burden is

greatest when political speech is at issue responds well to the fact that here government is most likely to be biased. The presumption of distrust of government is strongest when politics are at issue.").

180. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[The Founding Fathers] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.").

181. Burson v. Freeman, 504 U.S. 191 (1992) (citing Eu v. San Francisco County. Democratic Cent. Comm., 489 U.S. 214, 223 (1989)) (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

182. Burson, 504 U.S. 191 (prohibition of the solicitation of votes and distribution of campaign materials within 100 feet of the polls is permissible); United States v. O'Brien, 391 U.S. 367, 376 (1968) (The compelling governmental interest in maintaining an armed forces in time of war justifies the suppression of the speech element of the expressive political conduct of burning a draft card); cf., Mills v. Alabama, 384 U.S. 214, 219 (1966) (law prohibiting the publication of political editorials on an election day is an "obvious and flagrant" violation of the principles of the First Amendment).

183. United States v. Playboy Entertainment Group, Inc.,528 U.S. 803 (2000) (articulating strict scrutiny test); Sable Communications Inc. v. FCC, 492 U.S. 115, 126

(1989) (same); Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) (freedom of association is a fundamental element of personal liberty which may be curtailed if the restriction passes strict scrutiny); Perry Educ. Ass'n. v. Perry Local Educators Ass'n., 460 U.S. 37, 45 (1983); Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 572-573 (1987); Cornelius v. NAACP Legal Defense and Educ. Fund., 473 U.S. 788, 800 (1985); United States v. Grace, 461 U.S. 171, 177 (1983); Sanitation Recycling Indus. v. City of New York, 107 F.3d 985, 997 (2d Cir. 1997) ("Even regulations that substantially infringe upon [the right of expressive association] will pass constitutional muster if they serve compelling government interests unrelated to the suppression of ideas and those interests cannot be achieved through less restrictive means.").

184. Buckley v. American Constitutional Law Found., 525 U.S. 182, 208 (1999) ("restrictions on core political speech plainly impose a 'severe burden'"); Eu v. San Francisco County. Democratic Cent. Comm'n., 489 U.S. 214, 222-23 (1989); see also R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) citing Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991) (Kennedy, J., concurring in judgment); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536, (1980); Police Dep't. of Chicago v. Mosley, 408 U.S. 92, 95(1972)).

185. See Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) (the right to speak can not be protected from government interference without a correlative freedom to associate); see also NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460-61 (1958).

186. See Eu, 489 U.S. at 222-23.

187. Buckley, 525 U.S. at 207 (“When core political speech is at issue, we have ordinarily applied strict scrutiny without first determining that the State’s law severely burdens speech.”); McIntyre v. Ohio Elections Comm’n, 514 U.S. 334 (1995) (same).

188. 357 U.S. 449 (1958).

189. Id. at 460 (“State action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny”).

190. Burson v. Freeman, 504 U.S. 191 (1992).

191. Brown v. Hartlage, 456 U.S. 45, 52 (1982) (the state has a legitimate interest in protecting the integrity of the electoral process, but when it seeks to do so by restricting speech, strict scrutiny is triggered).

192. First Nat’l. Bank v. Bellotti, 435 U.S. 765, 786 (1978).

193. See Tashjian v. Republican Party479 U.S. 208 (1986) (burdens on the associational rights of a political party must be subjected to strict scrutiny); see also Buckley v. American Constitutional Law Found., 525 U.S. 182, 207-8 (1999); Norman v. Reed, 502 U.S. 279 (1992) (burdening association by limiting new parties’ access to the ballot subject to strict scrutiny); Eu v. San Francisco County. Democratic Cent.Comm’n., 489 U.S. 214, 223 (1989); Storer v. Brown, 415 U.S. 724 (1974).

194. Buckley, 525 U.S. at 207 (“When core political speech is at issue, we have ordinarily applied strict scrutiny without first determining that the State’s law severely burdens speech.”); McIntyre v. Ohio Elections Comm’n, 514 U.S. 334 (1995) (same); Eu, 489 U.S. at 222-23 (same).

195. See Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

196. See, e.g., Burson, 504 U.S. at 197 (“Whether individuals may exercise their free-

speech rights near polling places depends entirely on whether their speech is related to a political campaign.").

197. See R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); see also Cohen v. California, 403 U.S. 15, 24 (1971); Street v. New York, 394 U.S. 576 (1969); New York Times Co. v. Sullivan, 376 U.S. 254, 269-270 (1964), and cases cited; Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."); NAACP v. Button, 371 U.S. 415, 445 (1963); Wood v. Georgia, 370 U.S. 375, 388-389 (1962); Terminiello v. Chicago, 337 U.S. 1, 4 (1949); De Jonge v. Oregon, 299 U.S. 353, 365 (1937).

198. United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000).

199. For a complete discussion of content-neutral analysis, see Geoffrey R. Stone, Content Neutral Restrictions, 54 U. Chi. L. Rev 46 (1987).

200. Id. at 56 (citing Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is 'the power of the thought to get itself accepted in the competition of the market'")).

201. Id. (citing Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

202. Id. ("in a self-governing nation, the people, not the government, 'are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments'") (citing First National Bank v. Bellotti, 435 U.S. 765, 791 (1978)).

203. See, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (city requirement that concerts use city sound equipment and technician valid under First Amendment is a time, place, and manner regulation); Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (prohibition on the posting of signs on lampposts did not address the content of the signs); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981) (regulation requiring that organizations may sell and solicit funds only from designated kiosks was an even-handed rule applying to all potential participants).

204. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-508 (1981).

205. Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

206. Facially even-handed regulations on speech are not always content-neutral. See, e.g., NAACP v. Button, 371 U.S. 415, 423 (1963) (Virginia law prohibited attorneys from accepting business from anyone who was not a party to a suit or that had no pecuniary interest in the case – held to impermissibly prevent NAACP's political action).

207. Brief for Plaintiffs at 12, Porter v. Jones, (D. Cal. 2000) (No. 00-11700).

208. Id.

209. <http://www.rnc.org/RNCWeb/action.asp>.

210. <http://www.democrats.org/action/takeaction.html>.

211. <http://www.lp.org/action/email.html>.

212. <http://www.natural-law.org/get_involved.html>.

213. <http://personals.yahoo.com/>.

214. Mills v. Alabama, 384 U.S. 214, 219 (1966).

215. See, e.g., United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 813

(2000); Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983).

216. See, e.g., Dennis v. United States, 341 U.S. 494 (1951); Gitlow v. New York, 268 U.S. 652 (1925); Schenck v. United States, 249 U.S. 47 (1919).

217. See, e.g., Sheppard v. Maxwell, 384 U.S. 333 (1966) (First Amendment yields to fair trial rights).

218. Schenck, 519 U.S. at 382.

219. See, e.g., Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000) (campaign contributions - although protected - yield to the maintenance of the appearance of uncorrupt elections); Burson v. Freeman, 504 U.S. 191 (1992) (maintaining a polling environment free from intimidation trumps free speech); Brown v. Hartlage, 456 U.S. 45 (1982) (integrity of electoral process trumps free speech); Buckley v. Valeo, 424 U.S. 1, 58 (1976) (campaign contribution limits are justified to prevent appearance of corruption).

220. Burson, 504 U.S. at 206; Hartlage, 456 U.S. at 52 (the state has a legitimate interest in protecting the integrity of the electoral process, but when it seeks to do so by restricting speech, strict scrutiny is triggered).

221. Hartlage, 456 U.S. at 52 (the state has a legitimate interest in protecting the integrity of the electoral process, but when it seeks to do so by restricting speech, strict scrutiny is triggered).

222. Buckley, 424 U.S. at 58 (restriction of campaign contributions is justified by the need to prevent actual or apparent quid pro quo corruption in the electoral process).

223. Hartlage, 456 U.S. at 54 ("No body politic worthy of being called a democracy entrusts the selection of leaders to a process of auction or barter.").

224. Letter from Bill Bradbury to website operators (Nov. 2, 2000) (on file with author).

225. E-mail from California Secretary of State to operator of Vote Swap 2000 (forwarded Nov. 1, 2000) (on file with author).

226. Buckley, 424 U.S. at 58 (restriction of campaign contributions is justified by the need to prevent actual or apparent quid pro quo corruption in the electoral process).

227. Id.

228. Hartlage, 456 U.S. at 55 (a solicitation to enter into an agreement to vote for pecuniary gain is an illegal exchange due to its relationship to private profit).

229. Brief for Plaintiffs at 5, Porter v. Jones, (D. Cal. 2000) (No. 00-11700)(quoting Hasen, Vote Buying, 88 Cal. L. Rev. 1323, 1338-48 (2000)).

230. Boy Scouts of America v. Dale, 530 U.S. 640, 660-661 (2000) ("[The Founding Fathers] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth"); see also Whitney v. California, 274 U.S. 357, 375 (1927)) (Brandeis, J., concurring) ("without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.").

231. See, e.g., Hartlage, 456 U.S. at 54.

232. R.A.V. v. City of St. Paul, 505 U.S. 377, 395-396 (1992); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

233. Burson v. Freeman, 504 U.S. 191, 199 (1992); R.A.V., 505 U.S. at 395-396 (1992); Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983); NAACP v.

Alabama ex rel. Patterson, 357 U.S. 449 (1958).

234. Burson v. Freeman, 504 U.S. 191 (1992).

235. See Turner Broad. Sys. Inc. v. FCC, 512 U.S. 622, 664 (1994) (government bears the burden of demonstrating that its restrictions will prevent the alleged harms in a direct and material way).

236. Brief for Plaintiffs at 14, Porter v. Jones, (D. Cal. 2000) (No. 00-11700) (on file with author).

237. Id.; Burson, 504 U.S. at 210; Mills v. Alabama, 384 U.S. 214 (1966).

238. Brief for Plaintiffs at 2, Porter v. Jones, (D. Cal. 2000) (No. 00-11700) (on file with author).

239. Telephone interview with Jennifer Hertel, Program Representative, Oregon State Election Division (Nov. 6, 2000) Hertel stated that the individual voters would be in violation of ORS §260.665, but acknowledged that there would be no practical way to prosecute individual voters due to the impossibility of verifying exactly how each voter cast his or her ballot.

240. Id.

241. Id.

242. Brief for Plaintiffs at 11, Porter v. Jones, (D. Cal. 2000) (No. 00-11700).

243. Id. at 7.

244. See Meyer v. Grant, 486 U.S. 414, 421 (1988) (the expression of a desire for political change and a discussion of the merits of the proposed change is afforded the highest level of First Amendment protection).

245. See Reno v. ACLU, 521 U.S. 844, 870 (1997) (website content is afforded the same First Amendment protection as traditional print).