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Marc J. Randazza

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# THE CONSTITUTIONALITY OF ONLINE VOTE SWAPPING

*Marc J. Randazza\**

*No body politic worthy of being called a democracy entrusts the selection of leaders to a process of auction or barter.<sup>1</sup>*

*Censorship is the bastard child of technology.<sup>2</sup>*

## I. INTRODUCTION

The boondoggles of the 2000 presidential election were not limited to dimpled chads, standards of review, or Supreme Court Justices making a mockery of federalism. The forgotten issue of the 2000 election, and the issue that stands to impact presidential politics in 2004, took place in cyberspace. While an election close enough for hanging chads to decide the outcome is not likely to recur, online vote swapping will be back in 2004.

As the 2000 campaign reached its climax, some renegade supporters of Green Party candidate, Ralph Nader, countered critics' charges that they were handing the election to Bush<sup>3</sup> by creating

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

2. Robert Corn-Revere, *New Technology and the First Amendment: Breaking the Cycle of Repression*, 17 HASTINGS COMM. & ENT. L.J. 247, 264 (1994).

3. See Rebecca Cook, *Nader Urges Washington Supporters to Ignore Pressure from Democrats*, NEWSFLASH, at [http://www.oregonlive.com/newsflash/index.ssf?/cgifree/getstory\\_ssf.cgi?o1325\\_BC\\_WA—Nader&news](http://www.oregonlive.com/newsflash/index.ssf?/cgifree/getstory_ssf.cgi?o1325_BC_WA—Nader&news)

Web sites encouraging vote swapping.<sup>4</sup> In short, vote swapping was where a Nader supporter in a hotly contested state agreed to vote for Al Gore if a Gore supporter in an uncontested state voted for Ralph Nader. The objects of this exercise were to help deliver five percent of the popular vote to the Green Party so that they could receive matching federal funds for the 2004 presidential election, while simultaneously working to prevent a George W. Bush presidency.<sup>5</sup>

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. California Secretary of State Bill Jones sent an e-mail to Jim Cody,<sup>6</sup> co-creator of VoteSwap2000.org<sup>7</sup>—a site promoting this voting behavior—threatening prosecution under California Election Code sections 18521<sup>8</sup> and 18522<sup>9</sup> and Penal Code section 182.<sup>10</sup> Similarly, Oregon Secretary of State Bill Bradbury claimed that online vote swapping, even without the exchange of money, violated Oregon's election laws.<sup>11</sup> Further, Bradbury sent desist letters to six

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&newsflash-oregon (last visited Nov. 3, 2000); see also Jeff Mapes, *Nader-Gore Choice Disrupts Unity Among Leftist Activists*, THE OREGONIAN, Nov. 2, 2000, at A13 (discussing the infighting among Green Party members).

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

5. See Lisa Napoli, *Trading Nader, Gore Votes*, MSNBC, Oct. 31, 2000, at <http://www.msnbc.com/news/482104.asp?cp1=1>.

6. See *id.*

7. See *ACLU Defends Voters Against California, Oregon Backs Away from Allegations of Vote Trading*, at <http://www.voteswap2000.org> (last visited Nov. 3, 2000).

8. CAL. ELEC. CODE § 18521(a) (West 1996) ("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 . . . [v]oted, agreed to vote, refrained from voting, or agreed to refrain from voting for any particular person or measure.").

9. *Id.* § 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 or to or for any other person to . . . [i]nduce any voter to . . . [v]ote or refrain from voting at an election for any particular person or measure.").

10. CAL. PENAL CODE § 182 (West 1999 & Supp. 2001) (criminal conspiracy).

11. See *Oregon Warns Web Sites that Promote Vote Trading*, THE RECORD (Bergen County, N.J.), Nov. 3, 2000, at A26.

vote-swapping sites informing them that sanctions would be imposed if the sites facilitated vote trading.<sup>12</sup>

If the First Amendment means anything, it means that Americans have the right to the core value of free speech in a public forum on matters of political importance.<sup>13</sup> With the rise of the Internet as a powerful medium of mass communication, this core value does not change.<sup>14</sup> Now, anyone with a dial-up account "can become a town crier with a voice that resonates farther than it could from any soap-box."<sup>15</sup> With this almost instantaneous democratization of mass communication through this new medium, social and political institutions and leaders are consistently confused about how to cope with questions of freedom of speech, association, and assembly in the context of cyberspace.<sup>16</sup> 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 history.

Were vote-swapping sites truly corrupting the electoral process? Does this conduct fall 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?

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12. See Scott Harris, *ACLU Takes Up Vote-Swapping Fight*, THE STANDARD, Nov. 2, 2000, at <http://www.thestandard.com/article/display/0,1151,19890,00.html> [hereinafter Harris, *ACLU Takes Up Vote*].

13. See ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 22-27, 94 (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 . . . a 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.")

14. See *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (stating that restrictions on Web site content are afforded the same protection as traditional print).

15. *Id.*

16. See, e.g., *Reno*, 521 U.S. at 870 (stating that the "indecent transmission" and "patently offensive display" of the Communications Decency Act abridge the First Amendment's freedom of speech guarantee).

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. Finally, vote swapping will be examined under both federal election law and the U.S. Constitution.

## II. DEMOCRACY IN THE INTERNET AGE, VOTE SWAPPING, AND ONLINE COALITIONS

### A. Political Action in Cyberspace

Online networks have created an unprecedented means of rapid global communication.<sup>17</sup> 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."<sup>18</sup>

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 federal elections."<sup>19</sup> The massive communicative power of the Internet makes it a super-broadcasting tool that allows anyone to jump into the political fray, regardless of economic means.<sup>20</sup>

For example, in July of 1989, a group of Chinese students living in the U.S. organized a lobbying campaign to persuade Congress to pass a bill that would protect them from Communist Chinese threats

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17. See Vincent Casaregola & Robert A. Cropf, *Virtual Town Halls: Using Computer Networks to Improve Public Discourse and Facilitate Service Delivery*, RESEARCH AND REFLECTION, Oct. 1998, at <http://www.gonzaga.edu/rr/v4n1/cropf.htm> (last updated Nov. 2, 1998).

18. Use of the Internet for Campaign Activity, 64 Fed. Reg. 60,360, 60,360 (Nov. 5, 1999) (to be codified at 11 C.F.R. pts. 100, 102, 103, 104, 106, 107, 109, 110, 114, and 116).

19. *Id.*; see also Mark S. Bonchek, *Grassroots in Cyberspace: Recruiting Members on the Internet or Do Computer Networks Facilitate Collective Action? A Transactional Approach* (Apr. 1995) at [http://www.entry.tn/virtuelle\\_gemeinschaft/text/bonch95a.htm](http://www.entry.tn/virtuelle_gemeinschaft/text/bonch95a.htm) (discussing how computer-mediated communication facilitates political action).

20. See Bonchek, *supra* note 19.

of reprisal for their support of the Tiananmen Square demonstrators.<sup>21</sup> The lobbying committee used e-mail and Internet newsgroups to organize 20,000 students at 160 colleges and universities and to gain widespread media attention with only four day's notice.<sup>22</sup> 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.<sup>23</sup>

Also in 1989, a group of twenty activists in Santa Monica, California, organized the SHWASHLOCK—showers, washers, and lockers—movement online.<sup>24</sup> "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."<sup>25</sup> The group later created a job bank cooperative for the homeless and campaigned to include Santa Monica schools in an international program to educate school children about electronic communication.<sup>26</sup> 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."<sup>27</sup>

Similarly, the Christian Coalition used its Web site 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 ("NEA").<sup>28</sup> Three days later, a group of freshman Republican members of Congress called for an end to federal support for the NEA.<sup>29</sup> Analysts credit the online coalition-building power of the Internet for this victory.<sup>30</sup>

Despite Bonchek's and Schwartz's claims that the above examples could not have been accomplished without the Internet, they truly *could* have been. Had the Chinese students or the Christian

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21. *See id.*

22. *See id.*

23. *See id.*

24. *See id.*

25. *Id.*

26. *See id.*

27. Ed Schwartz, *NetActivism: How Citizens Use the Internet*, at <http://www.oreilly.com/catalog/netactivism/excerpt/> (last visited Feb. 21, 2001).

28. *See id.*

29. *See id.*

30. *See id.*

Coalition owned a television network, or possessed enough funds to buy sufficient airtime to make their cause heard nationwide, the same thing could have been accomplished. In these examples, the Internet brought power to people who otherwise might not have had such a powerful voice, but these actions were not unique to cyberspace. In other words, the Internet acted as a tool of democratization, but these actions were not entirely Internet dependent.

The next level of Internet usage as a political action tool is the use of the "space" of cyberspace as a "place" for the creation of on-line coalitions.<sup>31</sup> 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.<sup>32</sup> Bonchek and Schwartz also demonstrated the strength of the Internet as a democratizing surrogate for capital in the organization of grassroots political movements.<sup>33</sup>

However, the idea of the Internet as a tool for political organization evolved into a new creature in November of 2000. Rather than an alternative to phone banks and expensive advertising, Internet vote swapping became a unique, online, coalition-building movement with the potential for massive political repercussions.

### B. Online Vote Swapping

Vote swapping is a variation on a common legislative practice. In the United States Senate and House of Representatives, members of Congress routinely support their colleagues' bills in exchange for support for their own. This coalition building was never before a practical issue in presidential electoral politics, because of the logistical impossibility of creating a citizen vote swap on a scale that

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31. See Philip Giordano, *Invoking Law as a Basis for Identity in Cyberspace*, 1998 STAN. TECH. L. REV. 1, ¶ 4 (1998) (suggesting that the Internet is not just a means of communication, but a "place"), available at [http://stlr.stanford.edu/STLR/Articles/98\\_STLR\\_1/](http://stlr.stanford.edu/STLR/Articles/98_STLR_1/); see also Linda M. Harasim, *Networks: Networks as Social Space*, in GLOBAL NETWORKS: COMPUTERS AND INTERNATIONAL COMMUNICATION 15, 16-17 (Linda M. Harasim ed., 1993).

32. See Bart-Jan Flos, *Teledemocracy VIII: The Formation of On-line Coalitions*, at <http://www.politeia.net/newsletter/> (Oct. 1998).

33. See Bonchek, *supra* note 19.

could have any significant impact. Enter the Internet, and enter the freak circumstances of the 2000 presidential race.

Building an online vote-swapping coalition is simple and entirely Internet dependent. In the 2000 presidential election, for example, if a voter wished to support Ralph Nader and 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<sup>34</sup>—the voter faced a quandary. Should Nader supporters vote their conscience, and contribute to their third choice, at the expense of their second choice?<sup>35</sup> The alternative was to contact a Gore supporter in a state that was uncontested, such as Massachusetts. Recognizing that Gore would have easily carried Massachusetts, the Nader supporter in Florida and the Gore supporter in Massachusetts could agree that taking a few votes from Gore in a Democratic stronghold would have no impact on the apportionment of Massachusetts' electoral votes. Therefore, the Gore supporter in Massachusetts could agree to vote for Ralph Nader, thus, giving the Green Party one more vote toward the magic five percent they sought.<sup>36</sup> In turn, the Nader supporter in Florida could cast their vote for Gore, thus, giving Gore that much more support in a hotly contested and ultimately pivotal state.

The concept of online vote swapping first appeared in a *Village Voice* article by James Ridgeway in September, 2000.<sup>37</sup> Ridgeway

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34. The assumption that all Nader voters would have voted for Gore was false. Twenty-three percent of Nader supporters said that they would have voted for Bush had Nader not been running. See David Ruppe & Peter Dizikes, *Will Nader Fare Well? How Strong Will Green Party Candidate's Support Be on Election Day?*, at [http://abcnews.go.com/sections/politics/DailyNews/naderthreat\\_001026.html](http://abcnews.go.com/sections/politics/DailyNews/naderthreat_001026.html) (Oct. 26, 2000).

35. 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.

36. See, e.g., Charles Pope, *'Take a Stand,' Nader Urges; Seattle Crowd Told That Gore Is Unworthy of Vote Switch and a Captive of Corporations*, 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.'").

37. See James Ridgeway, *Beatification of Ralph*, VILLAGE VOICE, (Sept. 27 Oct. 3, 2000) at <http://www.villagevoice.com/issues/0039/ridgeway3.shtml>.



reported that, since the election promised to be so close, Nader supporters were concerned that their efforts could bring about a conservative victory.<sup>38</sup> Many believed that if Nader were not running, Gore would have been more securely in the lead in the late days of the campaign.<sup>39</sup> Concerned with being branded as spoilers of 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](http://Voteexchange.org),<sup>40</sup> an Internet vote-swapping site.

By October 2, 2000, conservative voters got into the act as well. On that day a message board for [FreeRepublic.com](http://FreeRepublic.com) encouraged Libertarians, Constitutional Party Supporters, and Reform Party voters to swap their votes with Bush voters in Massachusetts, New York, and Washington, D.C.<sup>41</sup> Despite these efforts, the conservative vote swappers did not gain the same momentum and media attention that the "Nader traders" managed to garner.

The idea did not 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.<sup>42</sup> In his article, Professor Raskin explained that the presidential race had narrowed by that date so that "a strong showing by Ralph Nader in ten swing states could help give George W. Bush the 270 Electoral College votes he need[ed] to win."<sup>43</sup> He believed that this presented hundreds of thousands of progressive Nader supporters in swing states with a dilemma.<sup>44</sup> After the publication of his article, hits to the various vote-swapping sites increased exponentially. [VoteExchange.org](http://VoteExchange.org) arranged 500 swaps in one week;<sup>45</sup> [VoteSwap2000.org](http://VoteSwap2000.org)

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38. *See id.*

39. *See, e.g.,* Ruppe & Dizikes, *supra* note 34.

40. *See Greens and Democrats: Vote Smart! Join the Vote Exchange Program!*, at <http://www.votexchange.org/vote001.htm> (last visited Feb. 21, 2001).

41. *See Vote Swapping! Attn: Bush, Buchanan, Browne, Phillips Voters!*, at <http://www.freerepublic.com/forum/a39d85fb603a8.htm> (last visited Oct. 2, 2000).

42. *See* Jamin Raskin, *Nader's Traders* (Oct. 24, 2000), at <http://slate.msn.com/Concept/00-10-24/Concept.asp>.

43. *Id.*

44. *See id.*

45. *See Greens and Democrats, supra* note 40.

arranged 500 trades in twenty-four hours, and in its short life exchanged more than 5000 votes.<sup>46</sup> Similarly, Votetrader.org claimed that it arranged 15,000 vote exchanges in several battleground states.<sup>47</sup>

What raised the ire of the secretaries of state of 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.<sup>48</sup> The Web sites that both states targeted were the sites that facilitated the process by the use of computerized databases.<sup>49</sup> Users of these Web sites gave their state of residence, their preferred candidates, and their preferred major-party candidates.<sup>50</sup> The program then indicated to the user whether the state was a contested or a noncontested state.<sup>51</sup> Users then entered their e-mail addresses and the computerized database would find a matching voter in another state and send e-mail to each matched voter.<sup>52</sup> At that point, it became the voter's responsibility to agree to swap votes.<sup>53</sup>

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 state's laws.<sup>54</sup> However, it was the position of the secretaries of state that sites espousing the same political message were permissible under California<sup>55</sup> and Oregon<sup>56</sup>

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46. See Napoli, *supra* note 5.

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

48. See Brief for Plaintiffs at 5, Porter v. Jones (D. Cal. 2000) (No. 00-11700).

49. See *id.*

50. See *id.*

51. See *id.*

52. See *id.*

53. See *id.*

54. See OR. REV. STAT. § 260.665 (1999); CAL. ELEC. CODE §§ 18521(a), 18522(a) (West 1996).

55. The California Secretary of State said that [www.winwincampaign.org](http://www.winwincampaign.org) was permissible under California law. See *Burden of Proof* (CNN television broadcast, Nov. 2, 2000).

56. Letter from Paddy McGuire, Chief of Staff, Oregon Elections Division to Jeffrey Cardille, operator of [www.nadertrader.com](http://www.nadertrader.com) and [www.nadertrader](http://www.nadertrader)

law. It was the conduct of "brokering" votes that was explicitly prohibited under California law,<sup>57</sup> and the application of "undue influence"<sup>58</sup> that ran afoul of Oregon law.<sup>59</sup>

When vote-swap participants agreed to exchange their votes, they exercised their rights of free 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.<sup>60</sup>

The secretaries of state certainly achieved their goal to end the practice when they moved against the vote-swapping sites. Although nobody was certain whether vote swapping was constitutionally protected or not, the chilling effect, brought about by the desist letters sent by the secretaries of state of Oregon and California to vote-swapping Web sites, was immediate and possibly of great consequence.

### III. THE CHILLING EFFECT

#### A. *What Is the Chilling Effect?*

The Supreme Court defines "chilling effect" as the "collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it."<sup>61</sup> This effect impacts free

.org, (Nov. 3, 2000) (on file with the author).

57. For a discussion of the California Secretary of State's actions under California law, see *infra* Part IV.A.

58. 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."); see also *Oregon Republican Party v. State*, 717 P.2d 1206, 1208 (Or. Ct. App. 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 *infra* Part IV.B.

59. For a discussion of the secretary of state's actions under Oregon law, see *infra* Part IV.B.

60. See Brief for Plaintiffs at 5, *Porter v. Jones* (D. Cal. 2000) (No. 00-11700).

61. *Smith v. California*, 361 U.S. 147, 151-54 (1959) (holding that an ordinance prohibiting the possession of "obscene" or "indecent" material in a

association rights,<sup>62</sup> as well as free speech rights.<sup>63</sup> A chilling effect arises 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.<sup>64</sup>

Of course, any threat of criminal or civil prosecution will necessarily "chill" the activity it threatens. For example, dicta in *Near v. Minnesota* instructed us that "publication of the sailing dates of transports or the number and location of troops" may be lawfully restrained.<sup>65</sup> Therefore, it is not to say that a chilling effect is by definition unconstitutional, but its existence creates a question as to whether the effect was legitimate due to the fact that it stifled "the flow of democratic expression and controversy at one of its chief sources."<sup>66</sup>

### B. Was There a Chilling Effect?

The California and Oregon secretaries of state's letters demanding the shutdown of vote-swapping sites sent shivers through cyberspace that affected Web site operators nationwide.<sup>67</sup> The day after California contacted VoteSwap2000.org, the Web site contained the following message: "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

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

62. See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479, 482-83, 493-94 (1965) (holding that a statute defining "subversive organization" was unconstitutional due to the potential "chilling effect" on defendant's associational rights).

63. See *Near v. Minnesota*, 283 U.S. 697, 720-23 (1931) (holding that a Minnesota statute authorizing prior restraints on publication of any defamatory materials was unconstitutional).

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

65. 283 U.S. at 716; see also *N.Y. Times Co. v. United States*, 403 U.S. 713, 726-27 (1971) (Brennan, J., concurring) (stating that even when national security information is implicated, the government has the burden of proving that disclosure would have severe consequences for national security).

66. See *Weiman v. Updegraff*, 344 U.S. 183, 191 (1952) (stating that a loyalty oath that ignored the element of scienter was invalid).

67. See *Websites Shut Selves Down*, ARIZ. REPUBLIC, Nov. 2, 2000, at A8, available at 2000 WL 8074750; Margie Wylie, *Nader Backers Elect to Trade Their Vote*, THE PLAIN DEALER, Nov. 1, 2000, at 2A, available at 2000 WL 5173523.

not in violation of any laws, you should not participate in vote-swapping."<sup>68</sup>

Despite their support of Ralph Nader, and the questionable constitutionality of the secretaries' actions, no vote-swapping Web site operator was willing to risk prison or fines. At least three vote-swapping sites closed down immediately after Jones's letter to VoteSwap2000.org became public, citing the threatened litigation as their reason for ceasing operations.<sup>69</sup> One Florida-based site, PresidentGore.com, had been designed to specifically exclude Californians because its operator was uncertain of California's jurisdiction over him.<sup>70</sup> Without determining whether the actions of the secretaries of state were constitutional or not, it is not far-fetched to theorize that their actions 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 Web sites.<sup>71</sup>

### C. *What Were the Electoral Consequences of the Chilling Effect?*

Had the 2000 election been decided by a greater margin, this debate would still be of constitutional importance since the idea of online vote swapping was crushed by the mere threat of prosecution.<sup>72</sup> 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 2000 election. In fact, as late as November 17, 2000, pundits claimed "Nader Traders" could have tipped Florida toward Al Gore.<sup>73</sup>

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68. *ACLU Defends Voters*, *supra* note 7.

69. *See Oregon Warns Websites*, *supra* note 11.

70. When the user filled out the vote-swap form, if "California" was entered in the "state" field, the user 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> (last visited Nov. 5, 2000).

71. *See Harris, 'Nader Traders'*, *supra* note 47.

72. *See Dombrowski v. Pfister*, 380 U.S. 479, 482 (1965) (holding that a statute defining "subversive activities" was unconstitutional due to the potential "chilling effect" on defendant's associational rights).

73. *See Harris, 'Nader Traders'*, *supra* note 47.

One vote-swapping site, Voteexchange2000.org, arranged 257 exchanges for Florida voters between October 26 and October 30, 2000, when it shut down due to fear of prosecution.<sup>74</sup> Since the buzz surrounding the vote-swapping phenomenon had just begun, it is likely that the rate of votes being swapped would have increased until election day. However, had the rate not changed, 2056 votes probably would have been exchanged, by this one site, in Florida alone.<sup>75</sup> More votes for Al Gore in Florida would have given twenty-five more electoral votes to Al Gore nationwide, and would have changed the outcome of the 2000 presidential race. In fact, had the sites continued to run, the entire boondoggle the country endured for a month after 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, 2000, instead of waiting until December.

The effect on the election is not based on hindsight alone. When the 2000 presidential campaign entered 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 truly in the lead. With a total of 538 electoral votes up for grabs and 270 needed to win the presidency, as of October 30, 2000, Bush securely held 202 electoral votes to Gore's 190, and 146 electoral votes were too close to call.<sup>76</sup> By November 3, CNN.com reported 224 electoral votes for Bush, 181 for Gore, and 133 were too close to call.<sup>77</sup> Meanwhile, Reuters reported that Bush had 217 electoral votes, either solid or leaning toward him, while Gore had 200, and 121 electoral votes were too close to call.<sup>78</sup>

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74. 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*, THE NEWS TRIBUNE OF TACOMA, Nov. 2, 2000, at A1.

75. See *id.*

76. See Michael Griffin, *An Electoral Elite Will Have Last Word; In a Close Race, Florida and 12 Other States Likely Will Choose the Next President, According to an Orlando Sentinel Analysis*, ORLANDO SENTINEL, Oct. 30, 2000, at A1.

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

78. See Reuters, *Bush With Slight Edge in Electoral College Count* (Nov. 3,

Furthermore, the candidacy of Ralph Nader, the Green Party nominee for president, made all of this more interesting. The Greens have never been much of a force in American politics, but they promised to have a resounding influence over who would be elected president in the year 2000. In Florida, the polls, as of November 3, 2000, showed Gore with 46% of the vote, Bush with 42% of the vote, and Nader with 6% of the vote.<sup>79</sup> With a margin of error of plus or minus four percent, this made the race for Florida's all-important twenty-five electoral votes quite uncertain.<sup>80</sup> Pennsylvania's twenty-three electoral votes were similarly precarious with 45% of the population supporting Gore, 41% supporting Bush, and 8% supporting Nader.<sup>81</sup> Washington, formerly in the Gore column,<sup>82</sup> was in a dead toss-up on November 3, 2000, with Gore and Bush each with 44% of the vote and Nader with 6% of the vote.<sup>83</sup> Nationally speaking, as of October 27, 2000, if Nader had not been running, 56% of his supporters said they would have voted for Gore, while 23% would have voted for Bush, and 21% would not have voted at all.<sup>84</sup> Given these numbers, had Nader not been in the race, Gore would have had a firm lead in Florida, Pennsylvania, and Oregon, one 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

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2000), at [http://dailynews.yahoo.com/h/nm/20001103/pl/campaign\\_electoral\\_dc\\_9.html](http://dailynews.yahoo.com/h/nm/20001103/pl/campaign_electoral_dc_9.html).

<sup>79</sup> These percentages are from a Zogby tracking poll, conducted October 31 to November 2, 2000 for REUTERS/MSNBC, surveying 659 likely Florida voters with a margin of error of plus or minus 4%. A copy of this poll is on file with the author.

<sup>80</sup> See *id.*

<sup>81</sup> These percentages are from a Zogby tracking poll, conducted October 31 to November 2, 2000 for the TOLEDO BLADE and the PITTSBURGH POST-GAZETTE, surveying 603 likely Pennsylvania voters with a margin of error of plus or minus 4%. A copy of this poll is on file with the author.

<sup>82</sup> See Ronald Brownstein, *Campaign 2000: Liberals Beat Drum For Gore, Hope Nader Backers Listen*, L.A. TIMES, Nov. 1, 2000, at A16.

<sup>83</sup> These percentages are from a Zogby tracking poll, conducted October 31 to November 2, 2000 for REUTERS/MSNBC, that surveyed 508 likely Washington voters with a margin of error of plus or minus 4.5%. A copy of this poll is on file with the author.

<sup>84</sup> See Ruppe & Dizikes, *supra* note 34.

close to call.<sup>85</sup> With the race as close as it was, even New Hampshire's four electoral votes, traditionally forgotten the day after the primary election,<sup>86</sup> were still important enough that neither campaign abandoned the state.<sup>87</sup> On November 1, 2000, Bush held 45% of the votes in New Hampshire, Gore held 40%, and Nader 5%.<sup>88</sup>

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, would it have changed the outcome of the election? Were the other forty-eight secretaries of state delinquent in not acting similarly? Although any effect upon the result of the election is mere speculation, at the time the secretaries of state acted—or did not 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 a protected activity. However, it is important to examine both Oregon's and California's election laws and constitutions before beginning the federal constitutional analysis.

Both California's and Oregon's secretaries of state relied upon their respective state election laws in a misguided manner. The analysis of each state's law reveals how the statutes might be misinterpreted to prohibit the vote-swapping sites' operation. If the actions of the vote-swap Web site operators are examined in light of the respective state statutes, it can be shown that prosecution resulting in conviction was unlikely.

Even if the plain language of the Oregon and California election laws was held to encompass the vote-swap Web sites, it is extremely

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85. See Reuters, *supra* note 78.

86. See Mike Recht, *Close Presidential Race Pulls Small States Out of Obscurity* (Oct. 31, 2000), THE TELEGRAPH ONLINE, at <http://www.nashuatelegraph.com>.

87. See *id.*

88. These percentages are from an American Research Group poll conducted October 31 to November 1, 2000, surveying 600 likely New Hampshire voters with a margin of error of plus or minus 4%. A copy of this poll is on file with the author.



unlikely that the convictions would be upheld in light of each state's constitution. Both Oregon's<sup>89</sup> and California's<sup>90</sup> constitutions have been held to give greater protection to First Amendment concerns than the Federal Constitution.<sup>91</sup>

### A. California

The letter threatening prosecution sent by Bill Jones, secretary of state of California, to the vote-swapping Web sites, was doubly flawed. First, under California constitutional law, his actions were void. Second, his application of the statute was flawed under its plain text.

#### 1. California constitutional law

The California Constitution affords greater protection to free speech and association than the Federal Constitution.<sup>92</sup> As long as federal rights are protected, California legal principles will prevail in California state courts.<sup>93</sup>

As of Monday, November 6, 2000, VoteSwap2000.org's federal court motion for a temporary restraining order languished as the rights of Californians and Americans nationwide suffered irreparable harm due to the threatened prosecutions' creation of an "ominous, chilling effect on the free exercise of political speech" and freedom of association.<sup>94</sup>

Upon receipt of the prosecution threats, counsel for VoteSwap2000.org should have immediately sought injunctive relief against the secretary of state in a California state court through a writ of mandate.<sup>95</sup> This remedy is appropriate where denial of relief

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

90. See *Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899, 908, 592 P.2d 341, 346, 153 Cal. Rptr. 854, 859 (1979), *aff'd* 447 U.S. 74 (1980) ("Past decisions on speech and private property testify to the strength of 'liberty of speech' in this state.").

91. See *infra* Part VI.

92. See *Robins*, 23 Cal. 3d at 908, 592 P.2d at 346, 153 Cal. Rptr. at 859.

93. See *id.* at 907-10, 592 P.2d at 345-47, 153 Cal. Rptr. at 858-60. For a complete federal analysis of vote swapping, see *infra* Part VI.

94. *Gonzales v. City of Santa Paula*, 180 Cal. App. 3d 1116, 1121, 226 Cal. Rptr. 164, 167 (1986).

95. See *id.* at 1121, 226 Cal. Rptr. at 166.

permits an immediate infringement on First Amendment rights.<sup>96</sup> California courts have held that when prosecution creates an "ominous, chilling effect on the free exercise of political speech . . . [a] petition for writ of mandate [is] appropriate."<sup>97</sup>

Had such a writ petition been filed, it would have been appropriate under California law to grant it.<sup>98</sup> However, it is not necessary to reach the constitutional concerns under California law, since the application of the statute was not in accord with the plain meaning of the election law.

## 2. The plain language of the election law

The California secretary of state threatened to prosecute the operators of VoteSwap2000.org<sup>99</sup> for violations of California Elections Code sections 18521(a)<sup>100</sup> and 18522(a)(2).<sup>101</sup> These provisions prohibit citizens from giving or receiving payment or other "valuable consideration" in order to induce any voter to vote for a particular

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96. *See* Reader's Digest Ass'n v. Superior Court, 37 Cal. 3d 244, 251, 690 P.2d 610, 613, 208 Cal. Rptr. 137, 140 (1984).

97. *Gonzales*, 180 Cal. App. 3d at 1121, 226 Cal. Rptr. at 167 (citing *Wilson v. Superior Court*, 13 Cal. 3d 652, 656, 532 P.2d 116, 119, 119 Cal. Rptr. 468, 471 (1975); *Duran v. Cassidy*, 28 Cal. App. 3d 574, 578-79, 104 Cal. Rptr. 793, 796-97 (1972)).

98. *See id.* (citing *Wilson*, 13 Cal. 3d at 656, 532 P.2d at 119, 119 Cal. Rptr. at 471; *Duran*, 28 Cal. App. 3d at 578-79, 104 Cal. Rptr. at 796-97).

99. Jones stated that VoteSwap2000.org "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 Bill Jones, California secretary of state, to operator of VoteSwap2000.org (Nov. 1, 2000) (on file with author).

100. CAL. ELEC. CODE § 18521 (West 1996) ("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 . . . [v]oted, agreed to vote, refrained from voting, or agreed to refrain from voting for any particular person or measure.").

101. *Id.* § 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 or to or for any other person to . . . [i]nduce any voter to . . . [v]ote or refrain from voting at an election for any particular person or measure.").

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.<sup>102</sup>

Valuable consideration is not necessarily money or a material benefit.<sup>103</sup> 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 not have had.<sup>104</sup> Both need not exist in order for there to be consideration, but if neither condition is met, there is no consideration.<sup>105</sup>

If the promise leaves a party able to perform or withdraw at will without detriment, there is no consideration and the contract is void.<sup>106</sup> 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.<sup>107</sup>

In comparison to "valuable consideration," "gratuitous consideration" is defined as consideration that "is not founded upon any such loss, injury, or inconvenience to the party to whom it moves as to make it valid in law."<sup>108</sup> Therefore, absent the elements of

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102. CAL. CIV. CODE § 1605 (West 1982).

103. *See* Estate of Bishop, 209 Cal. App. 2d 48, 55, 25 Cal. Rptr. 763, 767 (1962).

104. *See* S. Cal. Enters. v. Walter & Co., 78 Cal. App. 2d 750, 758-60, 178 P.2d 785, 790-91 (1947); *Chrisman v. S. Cal. Edison Co.*, 83 Cal. App. 249, 256, 256 P.2d 618, 621 (1927) (stating that if the promisor is not otherwise lawfully entitled to the benefit, the benefit is sufficient to claim valuable consideration); *Parsons v. Cashman*, 23 Cal. App. 298, 302, 137 P. 1109, 1110 (1913).

105. *See* Jordan v. Scott, 38 Cal. App. 739, 742, 177 P. 504, 505 (1918).

106. *See* Mattei v. Hopper, 51 Cal. 2d 119, 122, 124, 330 P.2d 625, 626-27 (1958); *Cox v. Hollywood Film Enters.*, 109 Cal. App. 2d 320, 325, 240 P.2d 713, 716 (1952).

107. *See* Pease v. Brown, 186 Cal. App. 2d 425, 431, 8 Cal. Rptr. 917, 921 (1960).

108. BLACK'S LAW DICTIONARY 307 (6th ed. 1990).

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 voter's agreed to swap their votes, they retained all of these rights. Their pledge was unenforceable, and they were free to withdraw at any time without detriment. Therefore, at best the agreements could be deemed gratuitous consideration, that is consideration that "is not founded upon any such loss, injury, or inconvenience to the party to whom it moves as to make it valid in law."<sup>109</sup> As such, the acts of vote swappers were no more than exchanges of mere gratuitous consideration, and the Web site operators were working outside the scope of the statute.

### B. Oregon

It is important to note that 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.<sup>110</sup> However, under Oregon law, Bradbury equally overstepped the boundaries of his state election statute and his state constitution.

#### 1. Oregon election law

On November 2, 2000, Bradbury said online vote swapping, even without the exchange of money, violated Oregon's election laws.<sup>111</sup> Bradbury acted swiftly, and sent desist letters to six

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109. *Id.*

110. 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., Kevin R. Lyn, *Personal Jurisdiction and the Internet: Is a Home Page Enough to Satisfy Minimum Contacts?*, 22 CAMPBELL L. REV. 341 (2000); 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); Todd D. Leitstein, Comment, *A Solution For Personal Jurisdiction on the Internet*, 59 LA. L. REV. 565 (1999).

111. See *Oregon Warns Websites that Promote Vote Trading*, *supra* note 11; see also OR. REV. STAT. § 260.665 (2)(h) (1999) (listing illegal acts that constitute undue influence on registering and voting).

vote-trading sites, all based outside Oregon.<sup>112</sup> Although Oregon initially targeted sites that merely advocated vote swapping, by November 3, 2000, the Oregon Elections Board softened its position to prohibit only the entering into a contract to trade votes or facilitate such activity.<sup>113</sup> Sites that merely advocated vote swapping were no longer targeted.

Oregon's voting corruption law states that "[n]o 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 [r]egister or vote in any particular manner."<sup>114</sup> The statute defines "undue influence" as including the "giving or promising to give money, employment or other thing of value."<sup>115</sup>

The Oregon secretary of state interpreted "thing of value" to include the exchange of a co-equal vote from another voter. Therefore, according to the State Election Division, any individual pair of voters engaging in an arrangement to swap votes is in violation of Oregon law,<sup>116</sup> as is any Web site operator who facilitates such an arrangement.

Analysis of this concept under Oregon law hinges on this 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 interpreting Oregon Revised Statute section 260.665 ("section 260.665"). Although it almost offers a perfect roadmap to 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.

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112. See Harris, *ACLU Takes Up Vote*, *supra* note 12.

113. See Press Release, Oregon Secretary of State (Nov. 3, 2000) (on file with author).

114. OR. REV. STAT. § 260.665(2)(c) (1999).

115. *Id.* § 260.665(1).

116. See Interview with Jennifer Hertel, Program Representative, Oregon State Election Division (Nov. 6, 2000) (confirmed by e-mail from Norma Buckno, Oregon State Election Division, to Marc J. Randazza (Mar. 28, 2001) (on file with author)). Hertel stated that the individual voters would be in violation of Oregon Revised Statute section 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. See *id.*

*Oregon Republican Party v. State*<sup>117</sup> dealt with a plan by the Oregon Republican Party to mail absentee ballot applications with the voter's name preprinted on them; 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.<sup>118</sup> The party would have then forwarded the applications to the county clerk, who would send the ballots to the individual voters.<sup>119</sup> The Republican Party sought a declaration that the mailing would not violate the election statute.<sup>120</sup> The Circuit Court of Marion County, Oregon, held that the plan would violate the statute because the stamped envelope was a "thing of value."<sup>121</sup>

The Republican Party appealed, and the Oregon Court of Appeals reversed the circuit court's finding and agreed that such a mailing would not violate section 260.665.<sup>122</sup> The court opined that by asking "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.<sup>123</sup> 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.<sup>124</sup> 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."<sup>125</sup> 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."<sup>126</sup> The court held that the envelope was indeed a "thing of value" but that it did not reward the act of voting.<sup>127</sup>

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117. 717 P.2d 1206 (Or. Ct. App. 1986) [hereinafter *Oregon Republican I*].

118. *See id.* at 1207.

119. *See id.*

120. *See id.* at 1208.

121. *Id.*

122. *See id.* at 1209.

123. *Id.* at 1208.

124. *See id.*

125. *Id.*

126. *Id.*

127. *Id.*

This decision would appear to quell the vote-swap controversy, at least in the state of Oregon. However, the Oregon Supreme Court rendered *Oregon Republican I* moot on appeal, because the election was over.<sup>128</sup> 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, it would not be applicable to this case.<sup>129</sup> Since the Republican Party did not allege that it intended to utilize the same plan in the future, the issue evaded review.<sup>130</sup> Therefore, the decision of the court of appeals in *Oregon Republican I* was reversed and remanded with instructions to dismiss the appeal as moot.<sup>131</sup>

On remand, the court of appeals once again dismissed the decision as moot.<sup>132</sup> However, Justice Van Hoomissen did not go so quietly. In a scathing concurrence, Van Hoomissen foresaw the vote-swap controversy and 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 the 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.<sup>133</sup>

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128. See *Or. Republican Party v. State*, 722 P.2d 1237, 1237 (Or. 1986) [hereinafter *Oregon Republican II*]; see also *Brumnett v. Psychiatric Sec. Review Bd.*, 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. *Id.*; see also *Barcik v. Kubiacyk*, 895 P.2d 765, 774-75 (Or. 1995) ("[C]apable 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."); *Safeway Inc. v. Or. Pub. Employees Union*, 954 P.2d 196, 198 (Or. Ct. App. 1998).

130. See *Oregon Republican II*, 722 P.2d at 1238. But see, e.g., *Responsible Pub. Contracting Council, Inc. v. Oregon*, 956 P.2d 993, 994-95 (Or. Ct. App. 1998) ("[M]atters of public interest should be resolved by this court, even in the face of apparent mootness of the particular case at hand.").

131. See *Oregon Republican II*, 722 P.2d at 1238-39.

132. *Or. Republican Party v. Oregon*, 726 P.2d 412, 412 (Or. Ct. App. 1986) [hereinafter *Oregon Republican III*].

133. *Id.* (Van Hoomissen, J., concurring).

## 2. Oregon constitutional analysis

Van Hoomissen not only foresaw the issue before Oregon courts 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 section 260.665, Van Hoomissen wrote: "an election offense does not exist unless the act tends to produce the types of evils that the statute was designed to avoid."<sup>134</sup> Van Hoomissen's concurrence states 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.<sup>135</sup>

Van Hoomissen noted that the court did not address the constitutional aspects of the case that he believed were present, and suggested that the application of section 260.665, in this manner, was violative of Article I, Section 8<sup>136</sup> and Article I, Section 26<sup>137</sup> of the Oregon Constitution.<sup>138</sup> He also opined that the statute might violate 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, analysis under the Federal Constitution is not necessary.<sup>139</sup> In some circumstances, the Oregon Constitution provides greater protection than the First Amendment to the U.S. Constitution.<sup>140</sup> The state and federal constitutions are considered equivalent enough so that Oregon courts will usually rely on federal cases interpreting the First Amendment, even while interpreting the state constitution.<sup>141</sup>

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134. *Oregon Republican I*, 717 P.2d at 1209-10.

135. *See id.* at 1210.

136. 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 abuse of this right.").

137. 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.").

138. *See Oregon Republican I*, 717 P.2d at 1209.

139. *See Deras v. Myers*, 535 P.2d 541, 549 (Or. 1975).

140. *See id.* at 541.

141. *See, e.g., State v. Crane*, 612 P.2d 735 (Or. Ct. App. 1980). For a complete analysis of vote swapping under the Federal Constitution, see *infra* Part VI.



Bradbury's application of section 260.665 impacted First Amendment rights to freedom of speech and assembly. The Web sites expressed political opinion and facilitated the assembly of citizens to achieve a common political goal. As such, the application of the statute must be subjected to strict scrutiny under the state constitution.<sup>142</sup>

Initially, Bradbury's actions implicated both Article I, Section 8 and Article I, Section 26 of the Oregon Constitution. However, given his re-statement of position on November 3, 2000, only Section 26, the Oregon Constitution's guarantee of freedom of association, was implicated.<sup>143</sup> 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. . . ." <sup>144</sup>

Therefore, the constitutional question becomes whether, under Oregon law, an unqualified constitutional prohibition against laws suppressing freedom of association can be overridden by the actions of a secretary of state, which directly restrain freedom of association.<sup>145</sup> This is a logical proposition that the Supreme Court of Oregon has already rejected.<sup>146</sup> If the secretary of state threatened citizens with prosecution that results in a restraint of Oregonians from assembling together to consult for their own common good, no balancing test is necessary or proper.<sup>147</sup>

Had a lawsuit been brought in Oregon court, it would have been proper for the court to enjoin the secretary of state from further threats or prosecution. At this point, any citizen who intends to engage in this type of conduct in an upcoming election, may 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.

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142. See *State v. Hodges*, 457 P.2d 491, 492-93 (Or. 1969); *State v. Tusek*, 630 P.2d 892, 894 (Or. Ct. App. 1981); *Crane*, 612 P.2d at 737-38.

143. See Press Release, *supra* note 113.

144. OR. CONST. art. I, § 26.

145. See *Deras*, 535 P.2d at 544.

146. See *id.*

147. See *id.* at 545-46 n.6.

## 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. . . ." <sup>148</sup> Amidst a backdrop of action by state officials, the U.S. Justice Department failed to move against any of the vote-swapping Web site operators. A spokesperson at the Department was quoted as saying that since the sites "serve[d] as a clearing house . . . [t]here [was] no pecuniary exchange, and it [was] an agreement amongst private parties," thus, there was no violation in terms of voter fraud. <sup>149</sup>

An examination of 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 to register to vote, whether the voter is paid \$50, <sup>150</sup> \$3, <sup>151</sup> or \$1. <sup>152</sup> Furthermore, it is not necessary for the government to prove that vote-buying schemes actually had an effect upon a federal election. <sup>153</sup> 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. <sup>154</sup> For "corruption" to exist, there must be at least an offer of pecuniary gain to the voter. <sup>155</sup> Whether the actual corruption takes place or whether the participants in the scheme intended that it take place is irrelevant. <sup>156</sup>

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148. 42 U.S.C. § 1973i(c) (1994).

149. Napoli, *supra* note 5.

150. *See* United States v. Campbell, 845 F.2d 782, 789 (8th Cir. 1988).

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

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

153. *See* United States v. Carmichael, 685 F.2d 903, 908-09 (4th Cir. 1982).

154. *See id.* at 908.

155. *See* United States v. Garcia, 719 F.2d 99, 102 (5th Cir. 1983) (stating that the intent of Congress was to prohibit the exchange of items of pecuniary value for individual votes).

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

The definition of "payment" in § 1973i(c) is not necessarily limited to the transfer of money or a monetary equivalent.<sup>157</sup> The legislative history of the Act makes it clear that it contemplated an exchange of a benefit beyond that of actual cash.<sup>158</sup> The Congressional Record shows that nonmonetary payments fell within the definition of "payment."<sup>159</sup> However, one court held that this definition does not extend beyond the receipt of benefits of a pecuniary nature.<sup>160</sup> Benefits, such as the assistance of a civic group to prospective voters or a continuance of employee's fringe benefits, are not prohibited by the statute.<sup>161</sup>

Although most of the limited case law interpreting the Act indicates that vote swapping would not be illegal under § 1973i(c), its approval is not unquestionable. It could be argued that 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*, voters received welfare vouchers in exchange for their votes.<sup>162</sup> In that case, 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.<sup>163</sup> 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.<sup>164</sup>

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

158. See 111 CONG. REC. S8423 (daily ed. Apr. 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. Apr. 29, 1965) (statement of Sen. Williams) ("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 *Garcia*, 719 F.2d at 102.

161. See *Lewin*, 467 F.2d at 1136.

162. See *Garcia*, 719 F.2d at 100.

163. See *id.* at 100-01.

164. See *id.* at 100.

Although applying the *Garcia* analysis would be difficult, 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 the 2000 presidential election, federal response to the vote-swapping Web sites could be entirely different.

## VI. FEDERAL CONSTITUTIONAL CONCERNS

The acts of the secretaries of state of Oregon and California touched upon the core of constitutionally protected necessities for democracy—the trinity of speech, assembly, and association.

Freedom of speech is a necessary element in a self-governing society.<sup>165</sup> The constitutional guarantee that speech shall remain unencumbered by governmental intervention exists to ensure the free exchange of ideas for the promotion of political and social change.<sup>166</sup> When speech involves political issues, the U. S. Supreme Court has consistently recognized it as at the core of First Amendment values.<sup>167</sup> Even jurists who would protect only a narrow sliver of what is now untouchable agree that political speech must be protected.<sup>168</sup>

Freedom of association does not have the explicit textual protection of the First Amendment, but the Supreme Court has long recognized it as a member of the First Amendment family of freedoms.<sup>169</sup> The rights to freedom of speech and freedom of association

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165. See generally MEIKLEJOHN, *supra* note 13.

166. See *Buckley v. Valeo*, 424 U.S. 1, 13, 14 (1976).

167. See, e.g., *Boos v. Barry*, 485 U.S. 312, 318-19 (1988) (stating that the First Amendment protects political speech outside foreign embassies); *cf. Connick v. Myers*, 461 U.S. 138, 145-46 (1983) (stating that when a public employee speaks, not as a citizen upon matters of public concern, but instead as an employee on matters only of personal interest, federal courts will not normally protect the employee's speech).

168. See *Bork*, *supra* note 13, 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. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect

are deeply intertwined,<sup>170</sup> for, like the right to free speech, the right to assemble in furtherance of a common political goal is fundamental to our system of government and law.<sup>171</sup> Advocacy of a political point of view, protected by the First Amendment, "is undeniably enhanced by group association."<sup>172</sup> The Constitution not only protects the freedom of citizens to join together to discuss and further their common political beliefs,<sup>173</sup> but affirmatively demands it.<sup>174</sup> 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."<sup>175</sup>

The argument could be made that the Framers intended to extend freedom of expression and association only to technologies

of 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.") (citing *Staub v. City of Baxley*, 355 U.S. 313, 321 (1958); *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Palko v. Connecticut*, 302 U.S. 319, 324 (1937); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937); *Gitlow v. New York*, 268 U.S. 652, 666 (1925)).

170. See *Patterson*, 357 U.S. at 460-61; *Thomas*, 323 U.S. at 530 (holding that the right to associate in order to express one's views is "inseparable" from the right to speak freely); *De Jonge*, 299 U.S. at 364 ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.").

171. See, e.g., *Cal. Democratic Party v. Jones*, 120 S. Ct. 2402, 2408 (2000) (stating that members of a political party have the right to select their nominees for higher office, thus California's blanket primary did not hold up under strict scrutiny); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 336 n.1 (1995) (stating that the right of assembly is a fundamental right); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 779-80 (1978) (finding that freedom of assembly is a fundamental right embedded in our law).

172. *Patterson*, 357 U.S. at 460; *Thomas*, 323 U.S. at 530; *De Jonge*, 299 U.S. at 364.

173. See *Cal. Democratic Party*, 120 S. Ct. at 2408; *Tashjian v. Republican Party*, 479 U.S. 208, 214-15 (1986) (holding that 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).

174. See MEIKLEJOHN, *supra* note 13, at 17-19.

175. *Patterson*, 357 U.S. at 460 (citing *Staub*, 355 U.S. at 321; *Thomas*, 323 U.S. at 530; *Cantwell*, 310 U.S. at 303; *Palko*, 302 U.S. at 324; *De Jonge*, 299 U.S. at 364; *Gitlow*, 268 U.S. at 666).

existing in the 1700s,<sup>176</sup> but even strict textualists urge that courts must apply constitutional values to new circumstances, especially when those circumstances arise due to changes in technology.<sup>177</sup> Cyberspace is entitled to no less protection than other traditional public forums and media.<sup>178</sup> Therefore, online assembly, association, and speech for the furtherance of a public political goal are at the core of First Amendment values.<sup>179</sup>

#### *A. Regulation of Vote-Swap Sites Requires Strict Scrutiny*

Political speech is most jealously guarded as the core value protected by the First Amendment,<sup>180</sup> "[f]or speech concerning

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176. See Corn-Revere, *supra* note 2, at 265.

177. See Ollman v. Evans, 750 F.2d 970, 996 (D.C. Cir. 1984) (Bork, J., concurring) (stating that the First Amendment must be interpreted "to encompass the electronic media").

178. See 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).

179. See, e.g., Boos v. Barry, 485 U.S. 312, 318 (1988) (stating that the First Amendment protects political speech outside foreign embassies); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 920 (1982) (finding that 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) (stating 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 the employee's speech).

180. 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."); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (stating that the First Amendment demands unfettered and uninhibited robust political debate); Bork, *supra* note 13, 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."); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 305-06 (1992) ("[A]n in-

public affairs is more than self-expression; it is the essence of self-government."<sup>181</sup> 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.<sup>182</sup>

Even the most fundamental of constitutional rights may be curtailed if the infringement passes the test of strict scrutiny.<sup>183</sup> Speech, assembly, and associational rights may be infringed only by regulations that are designed to serve a compelling governmental interest; are unrelated to the suppression of ideas; and are narrowly tailored to achieve the stated interest.<sup>184</sup>

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sistence 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.").

181. *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.").

182. *Burson v. Freeman*, 504 U.S. 191, 196 (1992) (citing *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971))).

183. See *Burson*, 504 U.S. at 211 (holding that the 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, 376-77 (1968) (stating that the compelling governmental interest in maintaining 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*, 384 U.S. at 219 (explaining that the law prohibiting the publication of political editorials on an election day is an "obvious and flagrant" violation of the principles of the First Amendment).

184. See *United States v. Playboy Entm't Group*, 529 U.S. 803, 879 (2000) (articulating the strict scrutiny test); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (same); *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 572-73 (1987); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (stating that the freedom of association is a fundamental element of personal liberty which may be curtailed if the restriction passes strict scrutiny); *United States v. Grace*, 461 U.S. 171, 177 (1983); *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983); *Sanitation & Recycling Indus. v. City of N.Y.*, 107 F.3d 985, 997 (2d Cir. 1997) ("Even

The application of strict scrutiny hinges on whether the restriction severely burdens speech<sup>185</sup> or associational rights.<sup>186</sup> If so, then strict scrutiny applies.<sup>187</sup> However, most cases eliminate this step and simply state that if *political* speech or association is at issue, then strict scrutiny applies without examining the degree of burden created by the restriction.<sup>188</sup> *NAACP v. Alabama ex rel. Patterson* 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.<sup>189</sup>

Strict scrutiny has been applied to the solicitation of voters and distribution of literature within 100 feet of the entrance to a polling place,<sup>190</sup> regulation of campaign promises,<sup>191</sup> and a law prohibiting businesses from making expenditures to influence the outcome of referenda.<sup>192</sup> If associational rights of a political group are

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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.").

185. See *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 208 (1999) ("[R]estrictions on core political speech so plainly impose a 'severe burden.'"); *Eu*, 489 U.S. at 222-23; see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (citing *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991); *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 536 (1980); *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972)).

186. See *Roberts*, 468 U.S. at 622 (stating that 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).

187. See *Eu*, 489 U.S. at 225.

188. See *Buckley*, 525 U.S. at 207-08 ("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, 347 (1995) ("When a law burdens core political speech, we apply 'exacting scrutiny' . . .").

189. See *Patterson*, 357 U.S. at 460-61 ("[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.").

190. See *Burson*, 504 U.S. at 193.

191. See *Brown v. Hartlage*, 456 U.S. 45, 52 (1982) (holding that 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. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 767, 786 (1978).



implicated, strict scrutiny must apply.<sup>193</sup> Given that the users of vote-swapping sites were communicating and associating for purely political reasons, strict scrutiny must apply.

The actions of Oregon and California in restricting the vote-swap Web site operators' rights to disseminate information of a political nature on the eve of a pending election implicated core First Amendment values to such an extent that strict scrutiny must apply. If this were not enough, the fact that associational rights of users and potential users of these sites were impacted independently triggers strict scrutiny. Given the fact that both are implicated, no other result would be logical.

*B. Were the Restrictions by the Secretaries of State  
Content-Neutral?*

The actions of Oregon and California regulated protected political speech and association in a public forum. In many cases, this was enough to trigger strict scrutiny.<sup>194</sup> However, it is necessary to determine whether the actions by the secretaries of state were content-neutral or content-based in order to precisely determine the appropriate level of scrutiny under which their actions should be examined.<sup>195</sup>

Regulations that distinguish permissible speech from impermissible speech on the basis of the ideas or views expressed are content-based.<sup>196</sup> Above any other principle in First Amendment law, when the government acts in a manner to restrict speech due to its

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193. See *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214-15 (1986) (explaining that the burdens on the associational rights of a political party must be subjected to strict scrutiny); see also *Buckley*, 525 U.S. at 212; *Norman v. Reed*, 502 U.S. 279, 288-89 (1992) (burdening association by limiting new parties' access to the ballot is subject to strict scrutiny); *Eu*, 489 U.S. at 224-25 (noting that laws that restrict a political party's right to endorse candidates is subject to strict scrutiny); *Storer v. Brown*, 415 U.S. 724, 728-29 (1974) (holding that restrictions that limit a candidate's right to political association are subject to strict scrutiny).

194. See *Buckley*, 525 U.S. at 207-08; *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345-47 (1995); *Eu*, 489 U.S. at 222-24 (1989).

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

196. See, e.g., *Burson v. Freeman*, 504 U.S. 191, 197 (1992) ("Whether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign.").

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

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197. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove 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) (stating that the general rule is that government may not proscribe the content of individual expression); *Street v. New York*, 394 U.S. 576, 592 (1969) (stating that it is firmly established that ideas may not be prohibited merely because they are offensive); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open . . ."); *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, 444-45 (1963) (holding that the Constitution protects speech without regard to the beliefs offered); *Wood v. Georgia*, 370 U.S. 375, 388-89 (1962) ("Under our system of government, counterargument and education are the weapons available to expose these matters, not abridgment of the rights of free speech and assembly."); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) ("The vitality of civil and political institutions in our society depends on free discussion."); *De Jonge v. Oregon*, 299 U.S. 353, 364-65 (1937) ("[L]egislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.").

198. *United States v. Playboy Entm't Group*, 529 U.S. 803, 822 (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. See *id.* at 56 n.42 (citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is 'the power of the thought to get itself accepted in the competition of the market.'")).

201. See *id.* at 56 n.44 (citing *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[I]n our constitutional system, the protection of free expression is designed to enhance personal growth, self-realization, and the development of individual autonomy.")).

202. See *id.* at 56 n.43 (citing *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 791 (1978) ("[I]n a self-governing nation, the people, not the government, 'are entrusted with the responsibility for judging and evaluating the relative merits of

Laws that impair speech with a blind eye toward the ideas and views expressed are usually content-neutral.<sup>203</sup> The U.S. Supreme Court has held that when government wishes to restrict *all* speech coming out of a sound-amplification truck regardless of the message broadcast, this is a permissible regulation.<sup>204</sup> Similarly, the Court found permissible a law that prohibited the use of billboards to minimize visual clutter and to enhance aesthetics,<sup>205</sup> and a National Park Service anti-camping rule that applied to traditional campers, as well as people seeking to sleep on the national mall as a part of a coordinated political statement.<sup>206</sup> All of these regulations impacted speech, including potentially political speech. No regulations, however, were created for the purpose of impairing speech based on its message.<sup>207</sup>

According to counsel for some of the Web site operators, 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."<sup>208</sup> Web sites that contained any other content were not subject to threats of reprisal by the government.<sup>209</sup>

The Republican National Committee had a contemporaneous Web site, which permitted users to enter their name, address, e-mail

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conflicting arguments."").

203. See, e.g., *Rock Against Racism*, 491 U.S. at 803 (holding that a city requirement that concerts use city sound equipment and technicians is valid under the First Amendment as a time, place, and manner regulation); *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (holding that prohibition on 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) (holding that regulation requiring that organizations sell and solicit funds only from designated kiosks was an even-handed rule applying to all potential participants).

204. See *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949).

205. See *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 507-09 (1981).

206. See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 292-93 (1984).

207. Facially even-handed regulations on speech are not always content-neutral. See, e.g., *Button*, 371 U.S. at 423, 444 (holding that a Virginia law prohibiting attorneys from accepting business from anyone who was not a party to a suit or that had no pecuniary interest in the case impermissibly prevented NAACP's political action).

208. Brief for Plaintiffs at 5, *Porter v. Jones* (D. Cal. 2000) (No. 00-11700).

209. See *id.*

address, and other personal information so that they could "Get involved with the Republican Party!"<sup>210</sup> The Democratic National Committee had a similar Web site inviting visitors to sign up and "Take Action!"<sup>211</sup> The Libertarians,<sup>212</sup> Natural Law Party,<sup>213</sup> and the Yahoo! personals<sup>214</sup> all had Web forms permitting users to enter their names into a database in order to communicate with other individuals with common political or social goals. The one 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 Web sites that urged people to vote in a particular manner in a publicly held election, the actions of the secretaries of state are presumed to be unconstitutional.<sup>215</sup>

### *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.<sup>216</sup> 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.<sup>217</sup> Fair trial rights have been held to trump the

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210. Republican National Committee, *Get Involved With the Republican Party!*, at <http://www.rnc.org/RNCWeb/action.asp> (last visited Feb. 21, 2001).

211. Democratic National Committee, *Take Action!*, at <http://www.democrats.org/action/takeaction.html> (last visited Feb. 21, 2001).

212. See Libertarian Party, *Get Involved!*, at <http://www.lp.org/action/e-mail.html> (last visited Feb. 22, 2001).

213. See A Natural Law Party, *Participation Sign Up Form*, at [http://www.natural-law.org/get\\_involved.html](http://www.natural-law.org/get_involved.html) (last visited Feb. 21, 2001).

214. See *Yahoo! Personals*, at <http://personals.yahoo.com/> (last visited Feb. 22, 2001).

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

216. See, e.g., *United States v. Playboy Entm't Group*, 528 U.S. 803, 879 (2000); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

217. See, e.g., *Dennis v. United States*, 341 U.S. 494, 507-08 (1951); *Gitlow v. New York*, 268 U.S. 652, 666-67 (1925); *Schenck v. United States*, 249 U.S. 47, 51-52 (1919).

First Amendment in specific circumstances.<sup>218</sup> 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.<sup>219</sup> 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.<sup>220</sup> The right to cast a ballot in an uncorrupt election is just as important as the right to discuss that election.<sup>221</sup>

There would be little value in a wide-open debate prior to an election, when the democratic process itself could be subverted by intimidation and fraud. "[S]tate[s] ha[ve] a legitimate interest in upholding the integrity of the electoral process itself."<sup>222</sup> 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.<sup>223</sup> Therefore, the prohibition of the giving of gifts or money to voters in exchange for their support was permissible.<sup>224</sup>

The interest alleged by both secretaries of state was the elimination of "undue influence"<sup>225</sup> or "corruption"<sup>226</sup> from the voting

218. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333, 350-51 (1966) (holding that the First Amendment yields to fair trial rights).

219. See *Schenck v. Pro-Choice Network*, 519 U.S. 357, 382 (1997).

220. See, e.g., *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402-05 (2000) (stating that campaign contributions, although protected, yield to the maintenance of the appearance of uncorrupt elections); *Burson v. Freeman*, 504 U.S. 191, 206 (1992) (maintaining a polling environment free from intimidation trumps free speech); *Brown v. Hartlage*, 456 U.S. 45, 52 (1982) (stating that the integrity of the electoral process trumps free speech); *Buckley v. Valeo*, 424 U.S. 1, 47-48 (1976) (stating that campaign contribution limits are to prevent appearance of corruption).

221. See *Burson*, 504 U.S. at 207; *Brown*, 456 U.S. at 52 (holding that 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. *Brown*, 456 U.S. at 52.

223. See *Buckley*, 424 U.S. at 45 (stating that the restriction of campaign contributions was justified by the need to prevent actual or apparent quid pro quo corruption in the electoral process).

224. See *Brown*, 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.").

225. Letter from Bill Bradbury to Web site operators (Nov. 2, 2000) (on file with author).

226. E-mail from California secretary of state to operator of Vote Swap 2000

process in their respective states. These interests are certainly well within the boundaries of what the law defines as a compelling state interest.<sup>227</sup> Given this fact, Oregon and California would have little difficulty arguing that they were motivated to act by a desire to further a compelling state interest when they restricted the speech and associational rights of the Web site operators and users. However, it does not appear that their actions bore a reasonable relationship to the compelling governmental interest. Therefore, if vote swapping is actually "bartering" of votes, it may be conduct that the state can legitimately prohibit.<sup>228</sup> As demonstrated above, nothing in this arrangement was truly bartered. Voters discussed and convinced one another to vote a certain way based on common political goals. The Court drew a distinction between an exchange of this type and an illegal exchange by distinguishing between voting based on a promise of public political action and voting based on an illegal exchange for "private profit."<sup>229</sup>

There could be no determination, or even serious assertion, that anyone entered into a vote-swapping arrangement for private profit or any other form of enrichment. Perhaps if the vote-swapping sites had been more correctly named "vote consensus" sites or "vote strategically" sites, they would have passed by unnoticed. The fact is that the only barter in this situation exists as a matter of semantic misfortune. The vote swaps were unenforceable, conferred no benefit upon either voter, and did not transfer anyone's voting authority.<sup>230</sup> These Web sites and their users engaged in political speech and association—the absolute core of the First Amendment.<sup>231</sup>

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(Nov. 1, 2000) (on file with author).

227. See *Buckley*, 424 U.S. at 45 (holding that the restriction of campaign contributions is justified by the need to prevent actual or apparent quid pro quo corruption in the electoral process).

228. See *Brown*, 456 U.S. at 54.

229. See *id.* at 55 (holding that a solicitation to enter into an agreement to vote for pecuniary gain is an illegal exchange due to its relationship to private profit).

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

231. See *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2457 (2000) (citing *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 po-

*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, then the state may suppress fundamental rights to achieve this interest.<sup>232</sup> However, even the most compelling governmental interest may not be promoted by broad means which suppress otherwise protected freedoms.<sup>233</sup> The danger of governmental excess and censorship of politically disfavored ideas requires that content-based restrictions be employed only when absolutely necessary to achieve the interest asserted.<sup>234</sup>

The prohibition of vote-swapping Web sites in order to prevent corruption in the political process was misguided. Both secretaries of state relied upon statutes prohibiting the exertion of undue influence on a voter. Certainly, if these agreements were enforceable in some manner, 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.<sup>235</sup>

However, the agreements were in no manner binding or enforceable. Upon entering the voting booths, citizens were bound only by their consciences and the desire to further their own interests. There can be no valid determination that any vote swapper entered the voting booth compelled to vote by any motivation but the achievement of their own individual political goals.

While the threat of prosecution placed a great burden on providers of protected content, it did not effectively address the harm it sought to prevent. The government bears the burden of demonstrat-

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litical 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.")).

232. See, e.g., *Brown*, 456 U.S. at 52-54.

233. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395-96 (1992); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-66 (1958).

234. See *R.A.V.*, 505 U.S. at 395-96; *Burson v. Freeman*, 504 U.S. 191, 199 (1992); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Patterson*, 357 U.S. at 460-66.

235. See *Burson*, 504 U.S. at 196-99, 206-12.

ing that the regulation will in fact address the problem of corruption of the electoral process.<sup>236</sup> Since the Web sites were only capable of putting individuals in contact with one another by e-mail, the existence of coercion was fanciful at best.<sup>237</sup> Moreover, given the lack of proximity to the polls and the voluntary nature of participation in the program, governmental regulation of the solicitation of votes was an impermissible burden.<sup>238</sup>

## VII. CONCLUSION

The vote-swap phenomenon was the result of thousands of people nationwide coming together 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 acted out of unfamiliarity with the new technology and imperiled the most fundamental of constitutional rights. The Constitution demands that any government actor wishing to restrict the fundamental rights to free speech and assembly bear a heavy burden,<sup>239</sup> something which the secretaries of state did not carry; nor would they be able to.

The actions of the secretaries of state were invalid under the very laws they sought to apply. As demonstrated above, California law does not characterize a swapped vote as "valuable consideration." Likewise, under Oregon's voting corruption law, the element of "undue influence" remains unmet.<sup>240</sup>

A citizen pledging to swap votes voted his or her conscience, unpoliced and unobserved in the voting booth.<sup>241</sup> Even the state of Oregon admitted that there was no way to ascertain how a person

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236. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 624, 664-68 (1994) (illustrating that the government bears the burden of demonstrating that its restrictions will prevent the alleged harms in a direct and material way).

237. See Brief for Plaintiffs at 14, *Porter v. Jones* (D. Cal. 2000) (No. 00-11700).

238. See *id.*; *Burson*, 504 U.S. at 210; *Mills v. Alabama*, 384 U.S. 214, 218-20 (1966).

239. See *Burson*, 504 U.S. at 199.

240. See Interview with Jennifer Hertel, *supra* note 116.

241. See Brief for Plaintiffs at 2, *Porter v. Jones* (D. Cal. 2000) (No. 00-11700).



voted.<sup>242</sup> A citizen pledging to vote could have changed his or her mind, and in fact may not even have been a citizen or a registered voter.<sup>243</sup> Users of the Web sites could have used fictitious or multiple e-mail addresses or identities, for no information on the Web site or through the entire arrangement is verifiable.<sup>244</sup>

Even if the agreement could be verified, what would have occurred was that voters would have cast their votes in order to achieve their preferred political goal albeit in a nontraditional manner. Before the threats of prosecution, these Web sites acted as facilitators of political association and speech.<sup>245</sup> They asked users a series of questions about their political goals and geographic location, then used that information to match them up with other users with complementary political goals. Once so matched, two voters could arrange a coordinated political action.<sup>246</sup>

However, the controlling fact in this case was that vote swapping is protected by the Federal Constitution. Despite the fact that the users of vote-swapping sites communicated in a nontraditional manner, voting to achieve a political goal is the essence of democracy.<sup>247</sup> The vote-swapping Web sites took the consensus building of the political meeting and political speech from the town hall and transferred them into cyberspace. The fact 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 was afforded.<sup>248</sup> Vote swapping is legal, constitutionally protected,

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242. See Interview with Jennifer Hertel, *supra* note 116 (stating that the individual voters would be in violation of Oregon Revised Statute section 260.665, but acknowledging 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).

243. See *id.*

244. See *id.*

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

246. See *id.* at 7.

247. See *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988) (stressing that the First Amendment affords the highest level of protection to discussions of a desire for political change or the merits of the proposed changes).

248. See *Reno v. ACLU*, 521 U.S. 844, 868-70 (1997) (holding that restrictions on Web site content are afforded the same protection as traditional print).

and should be recognized as such before it once again becomes an electoral issue in 2004.

