

LEGAL IMPLICATIONS OF AUTOMATIC VOTER REGISTRATION

Panel: Oregon's Automatic Voter Registration (and Other Registration Innovations)

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Free Speech

The First Amendment provides that: "Congress shall make no law...abridging the freedom of speech..."

Right to Vote

The Right to Vote is not guaranteed by the Constitution; however the fundamental right to vote is protected by laws and case law. Only individuals, not other entities given the legal status of "person" (e.g. corporations), are afforded the right.

Political Speech

Generally, speech is political if its point is to comment on government action.

There are two types of political speech, direct and indirect. Pure, direct political speech is the act of voting. Other direct political speech includes actions that an individual makes in an effort to support the election of the candidate (or issue) of his or her choice. Direct political speech also includes campaign contributions such as money or in kind donations that effect on the ability of a candidate to conduct a campaign.

Indirect political speech includes forms of action intended to affect votes, contributions and ideas in order to influence the outcome of an election. Indirect political speech includes all media, advertising, and publications.

Free Speech Rights

Courts apply "strict scrutiny," to free speech rights cases. This concept holds that a government restriction on free speech is presumed unconstitutional until the government proves otherwise. Courts do "not presume acquiescence in the loss of fundamental rights," (Ohio Bell Tel. Co. v. Pub. Utils. Comm'n, 301 U.S. 292, 307 (1937)) and should "indulge every reasonable presumption against the waiver of fundamental rights" (Johnson v. Zerbst, 304 U.S. 458 (1938)). Therefore, the government must have a very compelling reason to interfere in free speech rights.

Negative Speech Rights

The First Amendment free speech clause includes not just the right TO speak, but the right not to speak. This is also called negative speech rights: state actions that compel individuals to carry or foster the message of another (Wooley v. Maynard, 430 U.S. 705, 715 (1977)), or, the state forcing individuals to express or disclose his or her views (Pacific Gas & Electric Co. v. Public Util. Comm'n of Cal., 475 U.S. 1, 11 (1986) (Rehnquist, J., dissenting)). There are three principles underpinning a negative speech claim: 1) the Constitutionally guaranteed right to freedom of expression also includes a right to abstain from expression (e.g., an individual has the inherent right to abstain from the reciting the Pledge of Allegiance); 2) an individual's First Amendment rights trump all possible economic motives, which means that economic efficiency does not outweigh the rights of the individual; 3) in order to protect individuals from the governmental tyranny, First Amendment rights take precedent over governmental interests.

Content-Neutral?

A question to consider is whether registering to vote is a "content-neutral" proposition. Content-neutral regulations limit expression without regard to the content or communicative impact of the message that is conveyed and are often upheld if they are found to be reasonable or "necessitated by a compelling governmental interest," and are "narrowly tailored to serve that interest." (Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982).)

Injury to Individual Interests

Courts will look at the injury to an individual's rights by analyzing whether the requirement associates the individual with a particular point of view or message. Does it affect the individual's external identity: self-identification, or how a person wishes to present him/her self, and/or, does it affect an individual's internal beliefs: a person's freedom of conscience?

Remedy?

Is an opt-out, or right to disavow enough to protect the individual? More speech? Such remedies may be irrelevant to an injury inflicted in the first place. Once the government compels speech or expression, the individual so subjected is deprived of the opportunity to refrain from speaking at all. Is that person involuntarily being forced to affirm our form of government? Imagine being automatically registered with the Communist Party or with the National Socialist German Government. Or, perhaps, the individual just does not want to

participate – is that enough? Are the state’s interests of efficiency, economy, or public interest strong enough to overcome an individual’s interest in non-engagement of the political process? Other questions include whether an opt-out at the department of motor vehicles could protect an individual in advance of the registration, whether a conscientious objector waiver could be provided, or if notifications of opt-out requirements would be enough to overcome Constitutional concerns.

Some Relevant Cases:

Wooley v. Maynard, 430 U.S. 705 (1977); New Hampshire could not constitutionally require citizens to display the state motto, “Live Free or Die” on their license plates when it was offensive to their moral convictions. The Court held that the State's interests in requiring the motto did not outweigh free speech principles under the First Amendment, including "the right of individuals to hold a point of view different from the majority and to refuse to foster ... an idea they find morally objectionable." The state's interest in motor vehicle identification could be achieved by "less drastic means."

W.Va. Bd. of Ed. v. Barnette, 319 U.S. 624 (1943); the free speech clause of the First Amendment protected students from being forced to salute the American flag and say the Pledge of Allegiance in school; the state did not have the power to compel speech in that manner for anyone. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." Known as the case that required “scrupulous protection of the Constitutional freedoms of the individual” and put free speech and constitutional rights "beyond the reach of majorities and officials."

Frazier v. Winn, 535 F.3d 1279 (11th Cir. 2008); This case involves Florida's Pledge of Allegiance statute, which stated in part, "When the pledge is given, civilians must show full respect to the flag by standing at attention...." Court held standing at attention cannot be compelled.

Knox v. SEIU, 567 U.S. 310 (2012); The First Amendment requirement that non-union members covered by union contracts be given the chance to "opt out" of special fees for the union's political fund was insufficient. Setting new precedent, the majority ruled that non-members shall be sent notice giving them the option to "opt in" to special fees.

Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977); Public school teachers in Detroit had sought to overturn the requirement that they pay fees equivalent to union dues on the grounds that they opposed public sector collective bargaining and objected to the ideological activities of the union. The Court held that a government employer and union may reach an agreement requiring employees to pay an agency service fee to cover the

costs of collective bargaining, contract administration, and grievance adjustment. However, objecting employees have a constitutional right to opt-out and withhold payment of any union fees that support political and ideological causes.

Keller v. State Bar of California, 496 U.S. (1990); Attorneys who are required to be members of a state bar association have a First Amendment free speech right to refrain from subsidizing the organization's political or ideological activities.

Rumsfeld v. FAIR, 487 U.S. 781 (1988); The Court ruled that the federal government under the Solomon Amendment could constitutionally withhold funding from universities if they refuse to give military recruiters access to school resources. Law schools were unwilling to allow recruiters onto campus because they considered the military's so-called, "Don't ask, don't tell" policy discriminatory. The Court noted that even though precedents had "established the principle that freedom of speech prohibits the government from telling people what they must say" the Solomon Amendment neither denied the institutions the right to speak, nor required them to say anything.

USAID v. Alliance for Open Society International, 570 U.S. ___ (2013); The U.S. Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 authorized appropriations to fund nongovernmental efforts to combat HIV/AIDS worldwide, with conditions that: no funds "may be used to promote or advocate the legalization or practice of prostitution" and no funds may be used by an organization "that does not have a policy explicitly opposing prostitution". Funding recipients were required to agree that they opposed prostitution. The Court held the requirement violated the First Amendment by compelling as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program. By demanding that funding recipients adopt and espouse, as their own, the Government's view on an issue of public concern, the First Amendment was violated.

Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985); "There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect." (quoting Estate of Hemingway v. Random House, Inc., 23 N.Y. 2d 341, 348, 296 N.Y.S.2d 771, 778, 244 N.E.2d 250, 255 (1968)).

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 650 (1985); "[C]ompulsion to speak may be as violative of the First Amendment as prohibitions on speech."

Glickman v. Wileman Brothers & Elliott, Inc., 521 U.S. 457 (1997); The Agricultural Marketing Agreement Act (AMAA) mandating of payments used for the creation of generic

advertisements in support of the industry as a whole did not violate an objecting fruit company's right to free speech. The dissenting opinion, written by Justice Souter and followed in later opinions acknowledges the effect on the First Amendment rights of the individuals and companies : "The legitimacy of governmental regulation does not validate coerced subsidies for speech that the government cannot show to be reasonably necessary to implement the regulation... the scope of First Amendment protection likewise justifies the protection of those who object to subsidizing it against their will"

Central Hudson Gas & Electric Corp. v. Public Serv. Commission, 447 U.S. 557(1980); Provides what is known as the Central Hudson Test: the law may not "impose any restraint on the freedom of any producer to communicate any message to any audience; compel any producer to engage in any actual or symbolic speech; or compel the producers to endorse or finance any political or ideological views." "Since commercial speech is not subject to any categorical exclusion from First Amendment protection...it becomes subject to a second First Amendment principle: that compelling cognizable speech officially is just as suspect as suppressing it." In other words, the individual's right to express that which he or she chooses predominates regardless of the government's or society's stated economic motives.

United States v. United Foods, 533 U.S. 405 (2001); In 1990 Congress passed the Mushroom Promotion, Research, and Consumer Information Act (MPRCIA) mandating mushroom companies to pay assessments to fund generic advertisements promoting mushroom sales. United Foods refused to pay claiming that the MPRCIA was in violation of its First Amendment Right to free expression. The Supreme Court found MPRCIA to be in direct conflict with United Foods right to free expression (seemingly directly contradicting its previous ruling in *Glickman* case, see above). In the majority opinion, Justice Kennedy wrote that the "mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity."

Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988); A North Carolina statute required professional fundraisers for charities to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations. The Supreme Court held it unconstitutional, writing, "There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say."

Additional Questions:

- 1) Would this be necessary if the NVRA was properly implemented?
- 2) Does this mean the NVRA has failed?
- 3) Why not go to a North Dakota model of no registration?
- 4) What will this do to turnout percentages?
- 5) Is it advisable to turn the voter registration function over to another agency over which a registrar has no control?
- 6) Are there privacy implications?
- 7) Are there security implications?
- 8) Should interested parties (e.g., campaigns) be able to access DMV records?
- 9) What about individuals who do not interact with the DMV?
- 10) Can we trust the data?

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