

LEGAL IMPLICATIONS OF AUTOMATIC VOTER REGISTRATION



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Question:

Does Automatic Voter
Registration
Violate
the Constitution?

First Amendment:
“Congress shall make no
law...abridging the
freedom of speech...”



“The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state.”

Thornhill v. Alabama, 310 U.S. 88, 95 (1940)

The Right to Vote

- * While not enshrined in the U.S. Constitution, the right to vote is fundamental: “[T]he political franchise of voting . . . [t]hough not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will under certain conditions, nevertheless [] is regarded as a fundamental political right, because preservative of all rights.” Yick v. Wo, 118 U.S. 356, 370 (1886)
- * While corporations and other entities have some rights under the First Amendment, the right to vote belongs solely to an individual

Voting is inherently political speech



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. 2d341, 348, 296 N.Y.S.2d 771, 778, 244 N.E.2d 250, 255 (1968)).



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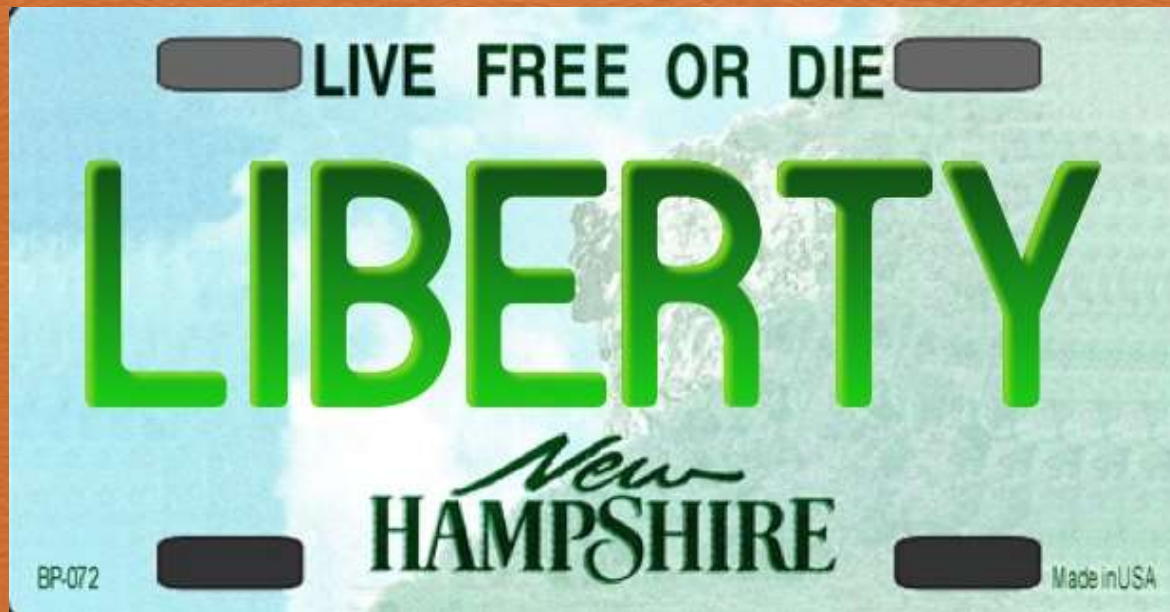
Three principles:

- 1) the Constitutionally guaranteed right to freedom of expression also includes a right to abstain from expression
- 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

W.Va. Bd. of Ed. v. Barnette, 319 U.S. 624 (1943):
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.



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.



Strict Scrutiny Standard

"Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."

Reynolds v. Sims, 377 U.S. 533, 561-62 (1964)

Strict Scrutiny

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.

Question:

Is automatic voter registration 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).)

Question:

Does Oregon (or any other jurisdiction) have a compelling reason to speak for individuals by automatically registering them to vote and requiring them to opt out if they don't want to be registered?

Reasons for Automatic Registration

- * Increases the franchise
- * Fewer interactions with/requests for info from the state
- * Convenient for voters whose inertia or distance from a registration/public agency office prevents them from registering
- * Utilizes the DMV's citizenship data
- * Puts the burden of registering on the state rather than the voter
- * May increase voter participation
- * Provides for fewer interfaces lowering data error rates
- * Makes use of technology in the voting context
- * It's more efficient and economical for the state

Questions:

Do those reasons
constitute a compelling
governmental interest?

Is automatic registration
narrowly tailored to
serve that interest?

"The Constitution protects expression and association without regard to . . . the truth, popularity, or social utility of the ideas and beliefs which are offered."

NAACP v. Button, 371 U.S. 415, 444-45 (1963)

Is Opt Out Adequate?

- * Will it protect those individuals who do not want to participate in our representative democracy?
- * Is the individual who does not want to register permanently deprived of that form of protest?
- * In jurisdictions that do not have open primaries, is it placing a burden on the voter to declare a party affiliation?
- * Will it adequately protect the individual who does not want his/her personal information shared with candidates/political parties/PACS before he/she has the time or opportunity to opt out?
- * Does it expand the interests of the state, which are limited in the context of voter registration to fixing standards for qualification (See Harper v. VA Bd. of Elections, 383 U.S. 633 (1966)), over those of the individual?
- * Does it constitute compelled speech such that it is government intrusion?

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.



Should We Care?

“The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.” Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring)

Some Additional Questions:

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

Proceed with Caution and Do More Research



Contact Info:

* Christy McCormick

* cmccormick@eac.gov

* (301) 563-3965