

---

---

## Voteauction.net: Protected Political Speech or Treason?

Rebecca Murray<sup>1</sup>

*Cite as: 5 J. High Tech. L. 357 (2005)*

“Never has the American political process been so corrupt. No office was too high to purchase, no man too pure to bribe, no principle too sacred to destroy, no law too fundamental to break.”<sup>2</sup>

### I. INTRODUCTION

Democracy is a combination of vital principles including the freedoms of speech, religion, and the press; an independent judiciary; economic freedoms; a government with checks and balances; and free elections.<sup>3</sup> Free and equal elections are a fundamental foundation of a healthy democracy.<sup>4</sup> When the election system becomes tainted through fraud or undue influence, the other freedoms enjoyed in a democracy become jeopardized.<sup>5</sup> It is the role of the government to ensure the election process remains free from such corruption in order to maintain the legitimacy and integrity of the system.

Voter participation is also necessary to maintain the legitimacy and

---

1. Associate Managing Editor for Suffolk University Law School Journal of High Technology Law, Juris Doctor, May 2005.

2. George Thayer, [quoted in] “A Brief History of Money in Politics” *Center for Responsive Politics*, at <http://www.opensecrets.org/pubs/history/history2.html> (last visited Mar. 1, 2005).

3. See John Norton Moore, *Solving the War Puzzle*, 97 AM. J. INT’L L. 282, 288 (April 2003).

4. *See id.*

5. *See id.*

the integrity of the democratic process.<sup>6</sup> It is estimated that over half of the eligible American voting population turned out to cast their vote in the hotly contested 2000 Presidential Election.<sup>7</sup> These numbers are indicative of the apathetic feelings Americans have towards their political process.<sup>8</sup> In a system where the voter feels money from big business and special interest groups heavily influences the choices of political leaders, the needs of the individual citizens can get lost and ignored.<sup>9</sup>

Through illegal means, the founders of the website [www.Vote-auction.net](http://www.Vote-auction.net) (hereinafter "Vote-auction") intend to give control back to the voter.<sup>10</sup> They contend the voter is transformed into a commodity in the electoral system in the United States; bought and sold through advertisement and the media.<sup>11</sup> The designers of the site set out to create a "direct line" from politician to voter, where Vote-auction would be the unlawful medium for auctioning off votes for money to the highest bidder.<sup>12</sup>

---

6. See Center for Democracy and Voting, at <http://www.fairvote.org/turnout/index.html#2000> (last visited Mar. 1, 2005).

7. See *id.*

8. See The National Election Studies, Center for Political Studies, University of Michigan. "The NES Guide to Public Opinion and Electoral Behavior" (1995-2000), available at <http://www.umich.edu/~nes/nesguide/nesguide.html> (last visited Mar. 1, 2005); See also *On the Motor Voter Act and Fraud: Hearing Before the Senate Committee on Rules and Administration*, 107th Cong. (2001) (statement of Dr. John Samples, Director, Center of Representative Government, The Cato Institute).

9. See Mark K. Anderson, "Close Vote? You Can Bid on It," *Wired News* (Aug. 17, 2000), at <http://www.wired.com/news/politics/0,1283,38229,00.html> (last visited Mar. 1, 2005).

10. Vote-auction.net homepage, at <http://www.Vote-auction.net> (last visited Mar. 1, 2005).

11. See Anderson, *supra* note 9.

12. Vote-auction.net homepage, *supra* note 10. Excerpt from the Vote-auction "How It Works" Page:

The winning bidder for each state will be able to choose who the group will vote for en masse. The free market will determine the value of the votes in each state....The starting bid for each state is \$100, with a minimum bid increase of \$50. [V]ote-auction.com will not receive any money from the auction. The winning bidder will have to contact the [V]ote-auction.com voters in order to provide payment and for the voters to provide verification....Spending money to influence voters is protected by the free speech clause of the First Amendment of the U.S. constitution. A recent U.S. Supreme Court decision...has equated freedom of spending money with the freedom of speech. Freedom of spending and freedom of speech are central components of our capitalist democracy. It is however considered problematic by very local jurisdictions of a few small states of the U.S. if one pays money directly to voters [it is ok to pay campaigners directly]. We understand this twist of modern day society, and have therefore found new ways on how to solve this situation smoothly. We at [V]ote-auction.com offer you the following services: you can register as a potential political candidate, you can register as a potential political

The creators of Vote-auction looked to the Internet as a new vehicle with which to give the power back to the voters.<sup>13</sup> The Internet proves to be a difficult medium to regulate for federal and state governments for a variety of reasons including jurisdictional issues, difficulty in applying existing statutes to cyberspace, as well as anonymity of website creators.<sup>14</sup> Despite the complexity, legislators need to take action to address the novel ways crimes can be committed over the Internet.<sup>15</sup> If action is not taken, the Internet has the potential to be a springboard for illegal voting activity, such as the purchase and sale of votes.<sup>16</sup>

While endeavors to decrease voter apathy and increase voter turnout are usually commended, the Vote-auction site came under much criticism and legal scrutiny from governmental bodies because it violated both federal and state election laws through its facilitation of the sale of votes.<sup>17</sup> State Attorney Generals and local election

---

lobbyist, we provide the forum for the two above-mentioned parties to meet. You donate money to the campaigners of the future. Do here, do it now, do it directly.  
No Fuzz!

See <http://www.Vote-auction.net>.

13. *Id.*; see also Jesse Sigsold, *Vote-Swapping Over the Internet: Free Speech or Voter Corruption?*, 24 HASTINGS COMM. & ENT. L. J. 149 (Fall 2001). Regarding vote-swapping websites in operation during the 2000 Presidential Election, Sigsold comments that without the technology of the Internet, the swapping of votes could not have been accomplished in such a short span of time and "in such a wholesale manner." *Id.* at 151.

14. See Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory* 88 CAL. L. REV. 395, 400-01 (March 2000).

15. *Id.* As cyberspace grows to encompass ever-increasing areas of human thought, interaction, and commerce, it regularly commingles with the sorts of "real world" activity, ranging from product sales to criminal conspiracy, commonly subject to state regulation. As a result, courts and legislators have increasingly applied real world, state-promulgated law to cyberspace activity, steadily constricting the domain of semiautonomous cyberspace rule making. But despite these incursions, supporters of cyberspace self-governance...insist that cyberspace rule making is far more than a set of isolated local arrangements. For them, cyberspace is partly a model and partly a metaphor for a fundamental restructuring of our political institutions. Cyberians view cyberspace as a realm in which "bottom-up private ordering" can and, indeed, should supplant rule by the distant, sluggish, and unresponsive bureaucratic state. By its very architecture and global reach, they contend, cyberspace will ultimately elude the strictures of state-created law, challenging the efficacy and theoretical underpinnings of the territorial sovereign state. *Id.*

16. *Id.* "[G]iven cyberspace's global reach and the difficulty of authenticating the identity of Internet voters, online voting may well be subject to levels of vote buying and voter fraud that make Tammany Hall look like the League of Women Voters." *Id.*

17. 18 U.S.C. §597 (1997) (prohibiting the solicitation, acceptance, or receipt of payment for a vote); Ill. CONST. Art. 3, § 3 (citizens of Illinois guaranteed the rights to free and equal elections); 10 Ill. Comp. Stat. 5/29-1 (2000) (prohibiting giving or promising to lend any valuable consideration in exchange for a vote for a candidate

officials brought legal action against Vote-auction in the city of Chicago, as well as the states of Missouri, Wisconsin, and Massachusetts.<sup>18</sup> The common cause of action in these suits was the website's illegal buying and selling of votes.<sup>19</sup>

The website's main defense was that the content on the website constituted political free speech, and was therefore protected by the First Amendment to the Constitution of the United States.<sup>20</sup> Vote-auction also argued the buying and selling of votes legally occurred throughout the American democratic, yet capitalistic, system on a large scale in every election, and that practice was protected by the Supreme Court's ruling in *Buckley v. Valeo*.<sup>21</sup>

While the First Amendment does protect political speech, and the Supreme Court has deemed campaign spending to be constitutional, there are federal and state laws in every state in the nation that specifically prohibit the purchase, sale, or influence of votes.<sup>22</sup> These statutes are in place to ensure and protect free and equal elections.<sup>23</sup>

---

or public question); *People v. Hoffman*, 5 N.E. 596, 599 (Ill. 1886) (stating elections are free only when the voters have not been subjected to undue influence and they have cast his/her own ballot as their own judgment sees fit); 10 Ill. Comp. Stat. 5/29-4, (2000)(prohibiting interference with voter registration); 10 Ill. Comp. Stat. 5/29-13 (2000)(prohibiting conspiring with others to sell and purchase votes); 10 Ill. Comp. Stat. 5/19-6 (2000 )(prohibiting tampering with an absentee ballot of another)

18. *Board of Election of Chicago v Hans Bernhard*, No 00 CE 031, 2 (Ill Cir Ct Oct 18, 2000); Temporary restraining order by State of Missouri, Press Release, Office of Missouri Attorney General, Missouri judge issues temporary restraining order against Web site that claims it buys and sells votes (Nov. 1, 2000)(on file with author); *State of Wisconsin v. Bernhard*, Dane County Case Number 2000CV002925 (Oct. 31, 2000); Temporary Restraining Order Issued by the Suffolk Superior Court, Press Release, Office of the Massachusetts Attorney General, AG Reilly Warns Voters About Internet Site Offering to Sell Votes to the Highest Bidder (Nov. 3, 2000) (on file with author).

19. Jeremy Derfner, "Buy This Vote!," *Slate* (Aug. 23, 2000) at <http://slate.msn.com/id/88646> (last visited Mar. 1, 2005).

20. See Mark K. Anderson, "Selling Votes or Peddling Lies?" *Wired News* (Oct. 30, 2000), at <http://www.wired.com/news/politics/0,1283,39770,00.html> (last visited Mar. 1, 2005).

21. *Buckley v. Valeo*, 424 U.S. 1 (1976) (holding limits on campaign spending by individuals unconstitutional because they substantially restrict ability of candidates, associations and citizens to engage in protected political free speech).

22. *Id.*

23. *U.S. v. Bruno*, 144 F. Supp. 593, 596 (D. Ill. 1955); *U.S. v. Garcia*, 719 F.2d 99, 101-02 (5th Cir. 1983) (The court held that the term only included paying cash, and like items, such as welfare food vouchers, in exchange for a vote.); See also 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."). See *People v. Hoffman*, 5 N.E. 596, 599 (1886).

While the Supreme Court decided in *Buckley* that campaign spending limits were unconstitutional, years later, in *Brown v. Hartlage*, they differentiated between campaign spending and actual vote purchasing and held states could enact laws proscribing the purchase and sale of votes.<sup>24</sup> In 2000, the Supreme Court upheld a Missouri state law that limited statewide campaign contributions to \$1,075 because the potential to buy votes and create undue influence through large contributions outweighed the First Amendment protections.<sup>25</sup>

Vote-auction is illegal and should be enjoined from operating. While the website may claim the First Amendment protection of political speech, there are federal and state statutes which explicitly prohibit the facilitation of the purchase and sale of votes. The constitutionality of these statutes should be upheld because the government has a legitimate interest in protecting free and equal elections as well as ensuring impartial representation of all people in the political process.

## II. HISTORY

The concept of buying votes is not new in the United States.<sup>26</sup> While the purchasing of votes is likely to be as old as the institution of voting, it is thought the idea was brought to the United States from England.<sup>27</sup> The English had a process called “treating” where candidates would “treat” the voting public to “food and drink in heroic qualities” to win over their support.<sup>28</sup> Elections became less of

---

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

[A] State may surely prohibit a candidate from buying votes. No body politic worthy of being called a democracy entrusts the selection of leaders to a process of auction or barter. And as a State may prohibit the giving of money or other things of value to a voter in exchange for his support, it may also declare unlawful an agreement embodying the intention to make such an exchange. Although agreements to engage in illegal conduct undoubtedly possess some element of association, the State may ban such illegal agreements without trenching on any right of association protected by the First Amendment.”  
*Id.* at 54-55.

25. *Nixon v. Shrink Mo. Gov't. PAC*, 528 U.S. 377, 393 (2000); Richard Hansen, *Vote Buying*, 88 CAL. L. REV. 1323, 1325 (Oct. 2000). “To support the government's interest in such a law against First Amendment challenges, the Court pointed to virtually no evidence besides an affidavit of a Missouri legislator who stated that large contributions have ‘the real potential to buy votes.’” *Id.*

26. See Center for Responsive Politics, “A Brief History of Money in Politics: How Americans Have Financed Elections in the Past,” at <http://www.opensecrets.org/pubs/history/history2.html> (last visited Mar. 1, 2005).

27. Richard Hansen, *Vote Buying*, 88 CAL. L. REV. 1323, 1327 (Oct. 2000).

28. James A. Gardner, “Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution,” 52 U. PITT. L. REV. 189, 232 (Fall, 1990).

a political debate and more of a battle over who could provide the citizens with the most liquor.<sup>29</sup>

In the United States, George Washington, fondly remembered for his patriotism and honesty, was charged with a version of “campaign spending irregularity.”<sup>30</sup> In his 1757 Virginia House of Burgesses race, he purchased rum, beer, and hard cider for those in his district in return for their votes.<sup>31</sup> The practice of outright vote purchasing came about in the late 1830s when \$22 was the going rate of an undecided vote in the New York City mayoral election.<sup>32</sup> In the mid-1800s the big city political machines of Chicago and New York City would take care of poor voters by providing them with coal and food in exchange of their votes.<sup>33</sup> As recently as 1996, twenty-one Georgia residents were indicted for attempting to sell their votes in a Democratic primary for \$20-\$60 a piece.<sup>34</sup>

The secret ballot process was established to prevent the widespread phenomenon of vote buying which was undermining elections in the United States in the late 1800s.<sup>35</sup> In response to the high costs of purchasing votes, the political parties advocated for a secret ballot system.<sup>36</sup> The secret ballot system served to reduce instances of vote buying because it made it increasingly difficult to verify if candidates were getting the result they purchased.<sup>37</sup>

Money is an important force that facilitates political campaigns.<sup>38</sup> In the mid-1800s, changes in the nation increased the need for more campaign funds.<sup>39</sup> The population of the country was growing, people were living further apart and the right to vote was no longer

---

29. *Id.*

30. Center for Responsive Politics, “A Brief History of Money in Politics: How Americans Have Financed Elections in the Past,” *at* <http://www.opensecrets.org/pubs/history/history2.html> (last visited Mar. 1, 2005).

31. *Id.*

32. *Id.*

33. See Jeremy Derfner, “Buy This Vote!,” *Slate* (Aug. 23, 2000) *at* <http://slate.msn.com/id/88646> (last visited Mar. 1, 2005).

34. *U.S. v. McCranie*, 169 F.3d 723 (11th Cir. 1999); *Augusta Chronicle*, “Magazine lists town as corrupt: Political publication ranks Eastman, Ga., based on vote-buying scheme notoriety, 27 federal convictions.” (Feb. 22, 1998).

35. Richard Hansen, *Vote Buying*, 88 CAL. L. REV. 1323, 1327 (Oct. 2000).

36. *Id.*

37. *Id.* at 1328; See also *Civil Rights Implications of Federal Voting Fraud Prosecutions: Hearing before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 99th Cong. 94-105 (1985) (statement of John C. Keeney).

38. Center for Responsive Politics, “A Brief History of Money in Politics: How Americans Have Financed Elections in the Past,” *at* <http://www.opensecrets.org/pubs/history/history2.html> (last visited Mar. 1, 2005).

39. *Id.*

limited to white, property owning males.<sup>40</sup> These factors contributed to the need for candidates to raise more money in order to travel across their districts to reach their growing number of potential constituents.<sup>41</sup>

Candidates needed increased capital, so they turned to businesses to finance their campaigns.<sup>42</sup> The businesses, in turn, expected favors and special protections from the officials whom they helped elect.<sup>43</sup> Even today, many voters are concerned that politicians become the puppets of those businesses that contribute large amounts to candidates' campaigns.<sup>44</sup>

Money also plays a large role in political elections in the form of advertising.<sup>45</sup> Candidates spend sizeable amounts of money on print and electronic advertisements in order to promote their message to the American public.<sup>46</sup> This, too, is a concern to voters because it would appear that the candidate with the most money to spend on the campaign has the most power to influence and gain votes.<sup>47</sup>

In 1976, the Supreme Court ruled on campaign financing,<sup>48</sup> determining that candidates' practices of receiving huge donations and spending large amounts on advertisements were legal under the First Amendment.<sup>49</sup> The Court viewed limits on political donations and spending as invalid restrictions on the First Amendment rights of candidates and citizens to engage in political speech.<sup>50</sup> In contrast, eight years later, the Court made it explicitly clear in *Brown* that it was within the constitutional right of the federal government and the states to directly prohibit the buying and selling of votes.<sup>51</sup>

---

40. *See id.*

41. *See id.*

42. *Id.*

43. *Id.*

44. *See* Anderson, *supra* note 9.

45. *See id.*

46. *Buckley v. Valeo*, 424 U.S. at 22 (holding limits on campaign spending by individuals are unconstitutional because they substantially restrict the ability of the candidates, associations and citizens to engage in protected political free speech). *Id.* at 22.

47. *See id.*

48. *Buckley*, 424 U.S. at 22 (holding that limits on campaign donations are in violation of the First Amendment rights of citizens to engage in political expression) *Id.*

49. *Id.*

50. *See Buckley*, 424 U.S. at 22.

51. *Brown v. Hartlage*, 456 U.S. 54-55 (1982); *See also* 18 U.S.C. 597. Every state prohibits the practice as well. *See* Ala. Code 11-46-68 (1999); Alaska Stat. 15.56.030 (Michie 1999); Ariz. Rev. Stat. 16-1006 (1999); Ark. Code Ann. 7-1-104 (Michie 1997); Cal. Elec. Code 18522 (West 1999); Colo. Rev. Stat. 31-10-1524 (1998); Conn. Gen. Stat. 9-333x (1997); Del. Code Ann. tit. 15 4940 (1998); Fla. Stat. Ann. 104.061 (West 1998); Ga. Code Ann. 21-2-570 (1998); Haw. Rev. Stat.

“Logrolling” is the term used to describe when a candidate makes political campaign promises, as opposed to promises to pay money, in exchange for votes.<sup>52</sup> The California Court of Appeals held in *Stebbins v. White* that a candidate is not within his legal right to promise to perform a valuable service in exchange for a vote when that performance is not connected with the appropriate responsibilities of one who would hold that office.<sup>53</sup> Logrolling is traditionally seen as part of the campaigning process, different from outright bribery.<sup>54</sup> Only once, in *People v. Montgomery*, has a candidate been prosecuted for logrolling.<sup>55</sup> The exchange, however, was based on personal, as opposed to political benefits that were not customarily a duty the candidate would have performed if elected.<sup>56</sup>

---

19-3 (1999); Idaho Code 18-2305 (1998); 10 Ill. Comp. Stat. 5/29-1 (West 1999); 1998 Ind. Adv. Legis. Serv. 3-14-3-19; Iowa Code 722.4 (1997); Kan. Stat. Ann. 25-2409 (1997); Ky. Rev. Stat. Ann. 119.205 (Michie 1998); 1998 La. Acts 18:1461; Me. Rev. Stat. Ann. 602 (West 1998); Md. Code Ann. 13-602 (1998); Mass. Gen. Laws Ann. ch. 56 32 (West 1999); Mich. Comp. Laws 168.931 (1998); Minn. Stat. 211B.13 (1998); Miss. Code Ann. 23-15-889 (1998); Mo. Rev. Stat. 115.635 (1999); Mont. Code Ann. 45-7-101(1)(a) (1999); Neb. Rev. Stat. 32-1536 (1998); Nev. Rev. Stat. Ann. 293.700 (Michie 1998); N.H. Rev. Stat. Ann. 659:40 (1999); N.J. Stat. Ann. 19:34-25 (1999); N.M. Stat. Ann. 1-20-11 (Michie 1998); N.Y. Elec. Law 17-142 (Consol. 1999); N.C. Gen. Stat. 163-275 (1999); N.D. Cent. Code 12.1-14-03 (1999); Ohio Rev. Code Ann. 3599.02 (Anderson 1999); Okla. Stat. tit. 26 16-106 (1998); Or. Rev. Stat. 260.665 (1997); 25 Pa. Consol. Stat. 3539 (1998); R.I. Gen. Laws 17-23-5 (1998); S.C. Code Ann. 7-25-60 (1998); S.D. Codified Laws 12-26-15 (1999); Tenn. Code Ann. 2-19-126 (1999); Tex. Penal Code Ann. 36.03 (1999); Utah Code Ann. 20A-1-601 (1998); Vt. Stat. Ann. tit. 17 2017 (2000); Va. Code Ann. 24.2-1007 (1999); Wash. Rev. Code 29.85.060 (1999); W. Va. Code 3-9-13 (1999); Wis. Stat. 12.11 (1998); Wyo. Stat. Ann. 22-26-109 (1999).

52. See *People v. Montgomery*, 132 Cal. Rptr. 558 (1st Dist. Ct. App. 1976) (In the mayor's race, one candidate promised to vote for another council member's proposed legislation in return for that member's vote for mayor.)

53. *Stebbins v. White*, 190 Cal. App. 3d 769, 786 (1987).

54. *Id.*; see also Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 814 (1985) ("Under our American system open logrolling is normally characterized as bad, but no real stigma attaches to those who participate in it ... and, in fact, all our political organizations operate on a logrolling basis.") *Id.*

55. *People v. Montgomery*, 61 Cal. App. 3d 718 (1976).

56. *Id.* Defendant called a City Councilman and requested he vote for Defendant for Mayor. Defendant promised Councilman that if he got his vote he would be extra receptive to his proposals, as well as proposals by his supporters. The appellate court affirmed the lower court's decision that the exchange constituted bribery without even deliberating on whether or not the legislative vote-trading proposition could constitute bribery. *Id.*



## III. PREMISE

A. *The Creation of Vote-auction*

In the months leading to the 2000 U.S. Presidential Election, graduate student James Baumgartner started the Vote-auction website as the basis of his thesis paper.<sup>57</sup> His purpose for creating the site was to draw attention to flaws in the American electoral system, in which votes appear to be bought and sold on a large scale through campaign fundraising and political advertisements.<sup>58</sup> He argued that one of the main purposes of the website is to enfranchise voters who feel alienated from the political process.<sup>59</sup> Citizens feel the government has not been taking adequate measures to educate voters or promote the need to exercise citizens' civic duty to take to the polls.<sup>60</sup> Vote-auction was founded under the belief that the government has especially failed to reach out to the youth of America to motivate them to get involved with politics and the government.<sup>61</sup> Vote-auction sees its role in the electoral process as a positive one that does not serve to undermine the election process, it serves to encourage and increase the number of citizens who take to the polls.<sup>62</sup>

Within one week of creating the site, the graduate student shut down Vote-auction after the New York Board of Elections informed his academic adviser that the site was in violation of state and federal election code.<sup>63</sup> The New York Board of Elections likened

---

57. Mark K. Anderson, "Close Vote? You Can Bid on It," *Wired News* (Aug. 17, 2000) at <http://www.wired.com/news/politics/0,1283,38229,00.html> (last visited Mar. 1, 2005).

58. CNN Transcript, "Burden of Proof: Democracy on the Block," at <http://www.cnn.com/TRANSCRIPTS/0010/24/bp.00.html> (last visited Mar. 1, 2005).

59. See Vote-auction homepage, at <http://www.Vote-auction.net> (last visited Mar. 1, 2005).

60. *Id.* The creation of laws affecting and regulating national elections and state elections involving federal offices come under the power of Congress. Congress has utilized this power to protect the election process from corruption and prejudice by enacting a number of statutes including the Voting Rights Act of 1965, 42 U.S.C. § 1971 (1965); Americans with Disabilities Act of 1990, 42 U.S.C. § 1212-14 (1990); and the Help America Vote Act of 2002, Pub. L. No. 107-252 (107th Cong., 2002). All three of these serve to protect the electorate by creating a fair system so all citizens may participate in free and equal elections.

61. *See id.*

62. *Id.*

63. See 18 U.S.C. § 597 (1996) (Expenditures to influence voting); NY CLS Elec § 17-142 (1977) (Giving consideration for franchise of votes); NY CLS Elec § 17-144 (1977) (Expenditures to influence voting); See also Jeremy Derfner, "Buy This Vote!" *washingtonpost.com* (Aug. 23, 2000), at <http://slate.msn.com/id/88646> (last visited Mar. 1, 2005).

Baumgartner's creation of the site to treason, an offense punishable by capital punishment.<sup>64</sup> Baumgartner ceased operations of the site on August 18, 2000.<sup>65</sup>

Baumgartner sold the site to a group of Austrian investors, led by Hans Bernhard.<sup>66</sup> Internationally notorious cultural activists "®Tmark" acted as the middle-man to set up the deal between Baumgartner and the foreign investors.<sup>67</sup> Bernhard continued to operate the site from Europe for the purpose of acting as a marketplace to join Americans interested in selling their votes with interested purchasers.<sup>68</sup> As part of the mission statement on the Vote-auction website, the site boasted it would enable voters to profit from their votes while enfranchising voter turnout and promoting the economy.<sup>69</sup>

#### *B. Legal Action Against Vote-auction*

Making good on their previous warning about the site, the New York Board of Elections issued a cease and desist order to Vote-auction immediately after Bernhard gained control.<sup>70</sup> California Secretary of State Bill Jones issued a warning to California residents relating to the creation and use of "online buying schemes" as voter fraud, which would be investigated and prosecuted.<sup>71</sup> The Board of Election Commissioners of the City of Chicago (hereinafter "Board")

---

64. ®TMark homepage, *at*: <http://rtmark.com/voteauction.html> (last visited Mar. 1, 2005).

65. *Id.*

66. Mark K. Anderson, "Austrian Takes Bids on U.S. Votes" *WiredNews* (Sep. 6, 2000) *at* <http://www.wired.com/news/politics/0,1283,38559,00.html> (last visited Mar. 1, 2005).

67. Alex Burns, "Capitol Punishment: Does Voteauction.com Subvert Democracy?" *Disinformation.com* (May 20, 2001), *at* <http://www.disinfo.com/archive/pages/dossier/id505/pg1/> (last visited Mar. 1, 2005) (®Tmark's mission statement: "RTMark's primary goal is to publicize corporate subversion of the democratic process. To this end it acts as a clearinghouse for anti-corporate projects" *at* <http://rtmark.com/voteauction.html> (last visited Mar. 1, 2005)).

68. Voteauction homepage, *at* <http://www.voteauction.net> (last visited Mar. 1, 2005).

69. *Id.*, "[V]ote-auction.com will allow these voters to profit from their democratic capital. By offering their voting capital at auction, these traditionally non-voting citizens will be participating in the democratic process and the expanding economy." *Id.*

70. William Matthews, "Is Vote Selling Parody or Threat?" *FCW.com* (Sep. 25, 2000) *at* <http://www.fcw.com/fcw/articles/2000/0925/pol-vote-09-25-00.asp>, (last visited Mar. 1, 2005).

71. Press Release, Secretary of State of California, Jones Issues Warnings Against Online Voting-Schemes (Aug. 22, 2000) (on file with author).

was also quick to follow with legal action.<sup>72</sup> Board filed for an emergency motion for a temporary restraining order against the operation of the Vote-auction site.<sup>73</sup> Investors Hans Bernhard, Luzius A. Bernhard, Oskar Oberder, Christopher Johannes Mutter, creator James Baumgartner, and domain name provider Domain Bank, Inc. were all named as defendants.<sup>74</sup> The Board of Election Commissioners, as plaintiffs, alleged the Circuit Court of Cook County had jurisdiction over the defendants, despite their nonresident status, because they transacted business and committed tortious acts within Illinois.<sup>75</sup>

Vote-auction instructed vote sellers to send their absentee ballots to the website so it could verify the appropriate candidate was selected.<sup>76</sup> Board claimed this process was a violation of the State of Illinois election code that requires absentee voters, under penalty of perjury, to mark their ballots in secret.<sup>77</sup> Vote-auction required voters to send their ballots to the administrators of the site before being submitted to the Election Commission, which Board alleged was a violation of the statute that mandated all absentee ballots be mailed directly to the Board of Election Commissioners.<sup>78</sup>

In addition to voter fraud, Board alleged that the defendants, through their work with Vote-auction, interfered with Illinois residents' right to "free and equal" elections granted to them by the

---

72. <http://www.disinfo.com/archive/pages/dossier/id505/pg1/> (last visited Mar. 1, 2005).

73. *Board of Election of Chicago v Hans Bernhard*, No 00 CE 031, 2 (Ill. Cir. Ct. Oct 18, 2000) Memorandum from the Board of Election Commissioners of the City of Chicago, to the Circuit Court of Cook County, County Department, County Division (Oct. 2000) at [http://www.Vote-auction.net/VOTEAUCTION/chicago\\_docs](http://www.Vote-auction.net/VOTEAUCTION/chicago_docs) (last visited Mar. 1, 2005).

74. *Id.*

75. *Id.* at 735 ILCS 5/2-209(a)(1), 735 ILCS 5/2-209(a)(2); *Connelly v. Uniroyal, Inc.*, 55 Ill.App.3d 530 (1st Dist. 1977) (providing long-arm jurisdiction over nonresidents to the fullest extent permitted by due process concepts); 55 Ill.App.3d 530, 536; *FMC Corp. v. Varanos*, 892 F.2d 1308 (7th Cir. 1990) (authorizing jurisdiction over non-residents under the Illinois long-arm statute if minimum contacts required by due process are present") 892 F.2d 1308, 1310; *Robbins v. Ellwood*, 141 Ill.2d 249 (1990) (constitutionally mandating the courts to determine whether it is "fair, just and reasonable to require a nonresident defendant to defend an action in Illinois, considering the quality and nature of the defendant's acts which occur in Illinois, or which affect interests located in Illinois.") 141 Ill.2d 249, 565 (1990).

76. Sascha Segan, "Personal (Campaign) Finance: Internet Sites Try to Sell Votes," ABCNews.com (Aug. 20, 2000), at <http://abcnews.go.com/sections/politics/DailyNews/cashvotes000818.html> (last visited Mar. 1, 2005).

77. *Board of Election of Chicago v. Hans Bernhard*, No. 00 CE 031, 2 (Ill. Cir. Ct. Oct 18, 2000); 10 Ill. Comp. Stat. 5/19-5; 10 Ill. Comp. Stat. 5/20-5.

78. *Id.*

Constitution of the State of Illinois.<sup>79</sup> They alleged that buying and selling votes on the Vote-auction website created improper influence which compromised the equality and freedom of the elections.<sup>80</sup> Vote-auction's Internet domain name administrators buckled under the legal pressure from the governmental authorities, and on October 21, 2000, DomainBank.com forced Vote-auction to close.<sup>81</sup> The investors reregistered the site with a non-American company, Network Solutions.<sup>82</sup> Network Solutions subsequently removed Vote-auction from its servers.<sup>83</sup>

### C. *Vote-auction's Defense*

Once legal action was taken against the website, Baumgartner made statements to the media that the suit should be dropped because he never intended to facilitate the sale of votes, no sales of votes had actually been brokered, and the purpose of the website was First Amendment protected political satire.<sup>84</sup> The administrators of Vote-auction claimed they would argue against the action by using the Supreme Court ruling in *Buckley v. Valeo* to establish that money could be used to fund political speech.<sup>85</sup> Despite using the *Buckley* argument, the court would likely find Vote-auction in violation of federal and state statutes that make it illegal to sell or purchase votes.<sup>86</sup> Consistent with the Court's holding in the 1982 decision *Brown v. Hartlage*, it was illegal to purchase or sell votes in constitutionally unprotected speech.<sup>87</sup>

Government's limitations on speech related to elections are in essence problematic since they serve to restrict political speech that is at the heart of the First Amendment.<sup>88</sup> When constraining speech that

---

79. Memorandum from the Board of Election Commissioners of the City of Chicago, to the Circuit Court of Cook County, County Department, County Division (Oct. 2000).

80. Constitution of the State of Illinois; Memorandum from the Board of Election Commissioners of the City of Chicago, to the Circuit Court of Cook County, County Department, County Division (Oct. 2000).

81. Memorandum from the Board of Election Commissioners of the City of Chicago, to the Circuit Court of Cook County, County Department, County Division (Oct. 2000).

82. *Id.*

83. *Id.*

84. See Mark K. Anderson, "Voteauction Booth is Closed," *WiredNews.com* (Oct. 21, 2000); Mark K. Anderson, "Selling Votes or Peddling Lies?," *WiredNews.com* (Oct. 30, 2000).

85. *Buckley v. Valeo*, 424 U.S. 1 (1976).

86. See *id.*; see also 18 U.S.C. 597.

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

88. See *Brown*, 456 U.S. at 52-3 "Whatever differences may exist about

serves to restrict politically based communication, the government must show it has balanced the need to reduce undue influence in elections with encouraging and enabling political discourse and involvement.<sup>89</sup> With regard to this balance, this Note will examine whether the government's reasons for attempting to prohibit the vote bidding on the Vote-auction website are constitutional and proper as a means to protect the integrity of state and federal elections and the representation of the people.

#### IV. ANALYSIS

The issue of whether or not the content facilitating the purchase and sale of votes found on the Vote-auction site constitutes protected political free speech or whether it could be classified as a crime against the government is one that the courts must consider for future elections.<sup>90</sup> Vote-auction argues that speech that relates to political and social change warrants the greatest protection under the First Amendment.<sup>91</sup> Because election related political speech is at a high risk to suffer unlawful suppression, Vote-auction will argue under

---

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." *Id.*

89. See *Kusper et al. v. Pontikes*, 414 U.S. 51, 58-9 (1973) "For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty.... 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.'...If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." (citations omitted). *Id.*

90. See Mark K. Anderson, "Austrian Takes Bids on U.S. Votes" *WiredNews.com* (Sep. 6, 2000) at <http://www.wired.com/news/politics/0,1283,38559,00.html>. Along with the Vote-auction website, other Internet sites were found to have content which was seen to facilitate the purchase and sale of votes. Socially conscious citizens put their votes for the 2000 Presidential Election for sale over the Internet on the online auction site, eBay. The Maryland voter who offered his vote for sale commented his intent was a political prank making the statement that it is a citizen's right to use their vote in the manner of their choosing. Due to his claim it was a political prank, he was not prosecuted because his political speech was protected under the First Amendment of the Constitution.

91. Memorandum from the Board of Election Commissioners of the City of Chicago, to the Circuit Court of Cook County, County Department, County Division (Oct. 2000); See *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).

*Porter v. Jones* that special attention should be given to election related speech so it will not fall victim to the chilling effect.<sup>92</sup>

As with printed speech, a major concern of website content regulations are the chilling effects restrictions could have on free speech.<sup>93</sup> Even if a statute's purpose is to proscribe legitimately harmful speech, it will be struck down as unconstitutional if it serves to simultaneously restrict protected speech.<sup>94</sup> The rationale is to prevent the silencing of legitimate ideas for fear of receiving the punishment targeted to the communications of unlawful ideas, beliefs, and words.<sup>95</sup> This fear which serves to prevent communication is otherwise known as the chilling effect.<sup>96</sup>

#### A. Negative Effects of Vote Buying

As shown in the Supreme Court's holding in *Brown v. Hartlage*, modern society does not look upon the concept of vote buying with favor.<sup>97</sup> This view, however, appears to go against a foundational belief in our capitalistic system that two competent parties can voluntarily enter into an agreement in which they both receive benefit when no harm is done to either party.<sup>98</sup> Once analyzed, it is shown that in this vote buying transaction, harm does come to the parties.<sup>99</sup>

Votes sell for small amounts of money because individual votes are not thought to have much impact on large-scale elections.<sup>100</sup> The poorer members of society are most inclined to sell their votes due to the low prices paid.<sup>101</sup> This creates inequality in the voting process.<sup>102</sup> The poor who have sold their ballots are no longer voting for the candidate whom they feel has their best interests in mind.<sup>103</sup> They are voting for the candidate who is wealthy enough to buy off

---

92. Memorandum from the Board of Election Commissioners of the City of Chicago; *See Porter v. Jones*, 319 F.3d 483, 488 (2003)(holding it was inappropriate for the federal court to abstain from hearing the case because free expression is a significant governmental interest).

93. *Id.* at 874.

94. *Reno v. ACLU*, 521 U.S. at 874.

95. *See id.*

96. *See id.*

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

98. Pamela S. Karlan, *Not by Money but by Virtue Won? Vote Trafficking and the Voting Rights System*, 80 VA. L. REV. 1455, 1475 (1994) (statutes prohibiting the purchasing of votes "actually restrict voters' freedom.").

99. *See id.* at 1459.

100. Richard Hansen, "Vote Buying," 88 CAL. L. REV. 1323, 1329 (Oct. 2000).

101. *Id.*

102. *Id.*

103. *Id.* at 1330.

the votes of the poor.<sup>104</sup> The candidates who purchase votes from the poor traditionally have the wealthy in mind when they begin implementing policy.<sup>105</sup> In communities where the poor do sell their votes to wealthy candidates who ultimately win the election, their economic inequality will transform into political inequality.<sup>106</sup> This serves to undermine the fair representation of the people as well as the election process that allowed the official to take power in the first place.<sup>107</sup>

*B. Applicability of First Amendment Argument*

While the Constitution protects the freedom of political discourse, the First Amendment privilege is not absolute.<sup>108</sup> The government retains the right to preclude and punish limited categories of speech.<sup>109</sup> These categories of speech include statements whose social value is outweighed by the government's interest in maintaining the social order.<sup>110</sup> Therefore, Vote-auction will have a difficult time convincing the court that the content on their site that facilitated the illegal purchase and sale of votes was protected political expression.<sup>111</sup>

James Baumgartner stated he would argue that the website fell under the category of protected political speech under the First Amendment of the United States Constitution.<sup>112</sup> Even though the content of the website is not spoken speech, the Supreme Court has ruled that writings and conduct can be regulated as speech.<sup>113</sup> While it is true the website could be considered political speech, which could possibly find protection under the First Amendment, courts

---

104. Hansen, 88 CAL. L. REV. at 1330.

105. See Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 911 (1998).

106. *Id.*

107. See *id.*

108. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) ("It is well understood that the right of free speech is not absolute at all times and under all circumstances").

109. *Id.* at 572.

110. *Id.* ("It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.") *Id.*

111. See *Chaplinsky*, 315 U.S. at 571.

112. Memorandum from the Board of Election Commissioners of the City of Chicago, to the Circuit Court of Cook County, County Department, County Division (Oct. 2000); See *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); U.S. Const. Amend I.

113. *United States v. O'Brien*, 391 U.S. 367 (1968).

could alternatively construe the contents of Vote-auction as commercial speech.<sup>114</sup> Commercial speech does not receive as broad protection under the First Amendment as political speech.<sup>115</sup>

Vote-auction receives its funding through payment by banner advertisements on their pages.<sup>116</sup> Therefore, the content of the Vote-auction website could be found to be commercial speech by nature if it is found to “propose a commercial transaction.”<sup>117</sup> The facilitation of the purchase and sale of votes could likely be interpreted as proposing a commercial transaction.<sup>118</sup> In *First National Bank v. Bellotti*, the Supreme Court determined that commercial speech is afforded First Amendment protection, unless a compelling state interest could be found which would legitimize restriction of the speech.<sup>119</sup> Commercial speech is protected only if it deals with a lawful activity.<sup>120</sup> Since there are statutes prohibiting the purchase and sale of votes, it would be quite difficult for Vote-auction to come under the First Amendment protection for commercial speech.<sup>121</sup>

The government must prove it has a significant interest it wishes to protect by creating legislation that regulates content of websites.<sup>122</sup> Congress has the ability to make laws that are necessary and proper for effectuating the responsibilities given to it in the Constitution.<sup>123</sup> In *United States v. Simms*, the United States District Court for the Western District of Louisiana found the defendant guilty pursuant to a federal statute that prohibited attempting to purchase votes.<sup>124</sup> The court argued that the Constitution gives Congress the ability to regulate state elections if a federal office appeared on the ballot.<sup>125</sup> The court also stated that corruption free elections are an interest that is highly important for Congress to protect.<sup>126</sup>

Congress’s ability to regulate elections also stems from the

---

114. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989).

115. *Id.* (holding test for protected commercial speech is: it must not be misleading and must be regarding lawful activity, governmental interest must be substantial, regulation must directly advance the governmental interest, must not be less restrictive means to accomplish the goals).

116. Vote-auction homepage, at <http://www.Vote-auction.net>.

117. *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (holding test for commercial speech is whether it proposes a commercial transaction).

118. *See id.*

119. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

120. *Id.*

121. *See id.*

122. *Bd. of Trs. of State Univ. of N. Y. v. Fox*, 492 U.S. 469, 477 (1989).

123. *United States v. Simms*, 508 F. Supp. 1179 (W.D. La 1979).

124. *Id.*; 42 U.S.C. § 1973i(c) (1997).

125. U.S. CONST. art. I, § 4, cl. 1; U.S. Const. art. I, § 8, cl. 18.

126. *United States v. Simms*, 508 F. Supp. 1179 (W.D. La 1979).



Supremacy Clause of the Constitution.<sup>127</sup> The Supremacy Clause establishes that the United States Constitution and federal laws are the supreme law of the land.<sup>128</sup> The U.S. District Court for the Eastern District of Louisiana determined in *United States v. Original Knights of Ku Klux Klan* that Congress possessed the authority to create all “necessary and proper” legislation derived from Article I, Section 4, Clause 1 of the Constitution, on the condition that the regulation is reasonably related to the defense of the integrity of the federal electoral process.<sup>129</sup>

While First Amendment protection of speech is broad, the government may limit speech if it encroaches on areas of important governmental interest.<sup>130</sup> Even if Vote-auction could convince the court it warranted protection as either political or commercial speech, the government would make the strong argument that free and equal elections as mandated by the Constitution are a legitimate governmental interest.<sup>131</sup> The government could further argue that there is no alternate way to protect this interest, other than prohibiting language that serves to facilitate the purchase and sale of votes.<sup>132</sup>

---

127. U.S. CONST. art. IV (“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding”).

128. *Id.*

129. *United States v. Original Knights of Ku Klux Klan*, 250 F.Supp. 330, 353 (E.D. La 1965) (holding the Constitution granted Congress the right to regulate federal elections); *see also McCulloch v. State of Maryland*, 17 U.S. 316 (1819). “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and the spirit of the Constitution are constitutional.” 17 U.S. at 321; *see also* Hugh M. Lee, *An Analysis of State and Federal Remedies for Election Fraud, Learning From Florida’s Presidential Election Debacle*, 63 U. PITT. L. REV. 159 (Fall 2001). In reference to the *Ku Klux Klan* decision, Lee notes,

Furthermore, at least one court has held that “[t]he Nation has a responsibility to supply a meaningful remedy for a right it creates or guarantees.” The federal government has the inherent power to protect federal elections from corruption. Thus, it could be argued that the construction of the statute to exclude the possibility of an election contest would result in an unconstitutional use of the state power to designate the election method, since the state would provide no substantial safeguards for that vote.

63 U. PITT. L. REV. at 208.

130. *Roth v. United States*, 354 U.S. 476, 485 (1957) “All ideas having even the slightest redeeming social importance -- unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion -- have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests.”

131. *Bd. of Trs. of State Univ. of N.Y.*, 492 U.S. at 477.

132. *See id.*

### C. Protection of Political Free Speech

The Supreme Court determined in *FCC v. Pacifica Foundation* the mere fact that people find particular speech to be offensive does not give the people valid reason to suppress it.<sup>133</sup> The popularity, veracity, or utility of the beliefs in question are not considered when determining whether or not speech is protected by the Constitution.<sup>134</sup> With that said, there is not an unlimited scope of protection granted by the First Amendment that protects speech from government regulation.<sup>135</sup>

In *Chaplinsky v. New Hampshire*, speech was separated into two categories: speech that warranted protection and speech that did not.<sup>136</sup> The purpose of protecting some forms of speech is consistent

---

133. *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978); *See Whitney v. California*, 274 U.S. 357 (1927) Justice Brandeis, concurring opinion:

Those who won our independence believed...that public discussion is a political duty, and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

*Id.* at 375-76.

134. *N.A.A.C.P. v. Button*, 371 U.S. 415, 445 (1963) (holding N.A.A.C.P. was protected by the First Amendment in their attempts to assist potential parties in asserting their constitutional rights in court); *See also 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.").

135. *Schenck v. United States*, 249 U.S. 47, 52 (1919) Holmes majority:

We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done...The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force...The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

*Id.*

136. *Chaplinsky*, 315 U.S. 568 (1942) (upheld statute which prohibited use of offense language in a public place because the statute served to protect the public peace).

with the Constitution framers' intent to ensure an unregulated exchange of ideas that could effectuate social or political change.<sup>137</sup> Political speech is thought to be at the very core of protected speech under the First Amendment.<sup>138</sup> The government must withstand the strictest scrutiny when defending its restriction of political speech.<sup>139</sup> This is to grant extra protection to the speaker, because political speech is thought to be the area where the government would be the most prejudicial and harsh.<sup>140</sup>

The government is within its right to curtail and prohibit speech that by its nature works to destroy that which Congress has a right to establish or protect.<sup>141</sup> The Supreme Court held in *Gitlow v. New York* that the liberties granted by the First Amendment could be prohibited only in instances where the speech used creates a "clear and present" danger to the evil the statute intended to prevent.<sup>142</sup> With regard to statutes prohibiting the purchase or sale of votes, the "clear and present" danger caused by the crime would be the destruction of the democratic process through the degradation of free elections.<sup>143</sup>

Vote-auction would be unsuccessful in asserting the First Amendment as a defense against their charges of violating federal and state election statutes.<sup>144</sup> The speech on the Vote-auction website purposefully serves to undermine the federal election process by destroying anonymity and by facilitating the sale of votes.<sup>145</sup> Congress has created statutes to ensure that elections operate freely and fairly for all citizens.<sup>146</sup> Under *Gitlow*, the government is within its Constitutional power to regulate speech such as this, which serves a direct danger to the statutes Congress created to protect the integrity

---

137. *Roth*, 354 U.S. at 484 (1957) (holding obscenity did not fall within the category of protected free speech).

138. *See Whitney v. California*, 274 U.S. at 375-76; *See also* Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 305-06 (1992).

139. *Id.*

140. *Id.* "An insistence that government's burden is greatest when political speech is at issue responds well to the fact that here government is most likely to be biased. The presumption of distrust of government is strongest when politics are at issue." *Id.*

141. *Id.*

142. *Gitlow v. New York*, 268 US 652, 671 (1925) (Brennan, J., majority) "[T]he question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils..." *Id.*

143. *See id.*

144. *See Gitlow*, 268 U.S. at 671 (1925).

145. Vote-auction homepage, at <http://www.Vote-auction.net>; 42 U.S.C. § 1973i(c)(1997).

146. 42 U.S.C. § 1973i(c) (1997); 18 U.S.C. §597 (1997).

of the election process.<sup>147</sup> The purchase and sale of votes goes to the very heart of undermining the election process.<sup>148</sup>

In 1999, the United States Court of Appeals for the Eleventh Circuit affirmed the convictions of the Dodge County, Georgia Sheriff and Councilman for conspiracy to buy votes in a mixed state and federal election.<sup>149</sup> The defendants' supporters sat at tables inside the local courthouse where they actively outbid each other for absentee votes.<sup>150</sup> At trial, the vote bidding process was described by one witness as a lively affair that looked "like an auction."<sup>151</sup> The appeals court found no merit in overturning the defendant's convictions for violating federal and state election law, but they did review whether or not the federal court had jurisdiction over state office candidates in the state and federal mixed election.<sup>152</sup> The *McCranie* court used a Seventh Circuit decision, *United States v. Cole*, in deciding that federal jurisdiction was appropriate as long as at least one federal candidate is on the ballot.<sup>153</sup> The court justified this holding by noting the violation of election law in a mixed election would have an "impact on the integrity of the election."<sup>154</sup> The underlying policy in federal election statutes is to protect the results of the election in addition to the legitimacy of the process.<sup>155</sup> The *McCranie* court found the defendants to have corrupted both the results and the process of the election, therefore the court properly carried out the policy behind the statutes in affirming the defendants' convictions.<sup>156</sup>

The process by which Vote-auction verifies the absentee ballots destroys the anonymity requirement of voting process.<sup>157</sup> Since secret ballots were mandated to reduce the instances of vote buying, this action by Vote-auction serves to further the very evil the secret ballot system was created to prevent.<sup>158</sup> Therefore, the government is within its right to limit speech that functions to degrade elections and impair that which Congress has a Constitutional duty to protect.<sup>159</sup>

---

147. *Gitlow v. New York*, 268 US 652, 671 (1925).

148. See Sisgold, 24 HASTINGS COMM. & ENT. L.J. 149 at 153 (Fall, 2001).

149. *U.S. v. McCranie*, 169 F.3d 723 (11th Cir. 1999).

150. *Id.* at 726.

151. *Id.*

152. *Id.*

153. *U.S. v. McCranie*, 169 F.3d 723, 727 (citing *United States v. Cole*, 41 F.3d 303, 307 (7th Cir.1994)).

154. *McCranie*, 169 F.3d at 727.

155. *United States v. Cole*, 41 F.3d 303, 307 (7th Cir.1994).

156. *McCranie*, 169 F.3d at 727.

157. See Vote-auction homepage.

158. See Hansen, 88 CAL. L. REV. at 1327..

159. See *Whitney v. California*, 274 U.S. 357, 375-76 (1927).

*D. History of Protected Speech on the Internet*

While the debate over what is or is not speech protected by the First Amendment is not novel to the courts, the advent of the Internet has caused courts to take a closer look at what constitutes speech and which categories of speech deserve protection.<sup>160</sup> In 1997, the Supreme Court made the determination that restrictions placed on content of Internet speech would receive the same level of protection as conventional printed speech.<sup>161</sup> With this holding, Congress could not make laws which would treat Internet speech any differently than more traditional forms of written speech found in newspapers and magazines.<sup>162</sup> The courts recognize the rapidly expanding wealth of information found on the Internet.<sup>163</sup> In *Reno v. ACLU*, the Supreme Court stated governmental regulations of the content of the Internet would hinder the exchange of free ideas online rather than promote its development.<sup>164</sup>

*E. Chilling Effect on Election Related Speech*

Speech relating to elections is at an especially great risk of falling victim to the chilling effect.<sup>165</sup> Often, election related speech is unjustly restricted, but because the legal process is frequently a lengthy one, the speaker can get vindication of his or her wrongful suppression only after the election has ended.<sup>166</sup> The issue as to whether the restriction was lawful or not is irrelevant because once the election is over, the restriction has effectively served the purpose of stifling the speaker's message during the most critical time, the election.<sup>167</sup> Therefore, extra sensitivity must be used in dealing with

---

160. See *Reno v. ACLU*, 521 U.S. 844, 853 (1997) (describing the availability and uses for the Internet in today's society).

161. *Id.* at 868-70.

162. See *id.*; see also *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").

163. *Reno v. ACLU*, 521 U.S. 844, 885 (1997).

164. *Id.* (Stevens, J., majority)

[T]he growth of the Internet has been and continues to be phenomenal. 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. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.

*Id.*

165. See *Porter v. Jones*, 319 F.3d 483, 495 (9th Cir. 2003).

166. See *id.*

167. *Id.*; see also *California v. San Pablo and Tulare R. R. Company*, 149 U.S. 308 (1893) (holding the court did not have the power to decide abstract

election related speech, as time is of the essence.<sup>168</sup>

In 2002, Alan Porter, creator of the Internet website *votexchange2000.com*, filed a case before the United States Court of Appeals for the Ninth Circuit against Secretary of State of California, Bill Jones.<sup>169</sup> When Jones sent a cease and desist letter to vote-swapping websites similar to Porter's, Porter responded by suing Jones for First Amendment violations.<sup>170</sup> After learning of the cease and desist order received by *voteswap.com*, Porter stopped operation of his website for fear of being forcefully shut down.<sup>171</sup>

Jones threatened to sue Porter under federal and California state election code because Jones considered Porter's site to be a violation of the prohibition on offering consideration to induce another to vote for a certain candidate or policy question.<sup>172</sup> Porter applied for a temporary restraining order against Jones enjoining Jones from taking any action to restrict Porter's political free speech as manifested in his *votexchange2000.com* website.<sup>173</sup> One day before the election,

---

propositions, moot questions, or declare what the law should be in the future) "But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *Id.* at 314.

168. *Id.*

169. *Porter*, 319 F.3d at 483. (noting that "election cases often fall within [the 'capable of repetition, yet evading review'] exception [to the mootness doctrine], because the inherently brief duration of an election is almost invariably too short to enable full litigation on the merits").

170. *Id.* Jones did not interfere with the operations of other websites such as *NaderTrader.com*, *virtualvotesforNader.com*, and *winwincampaign.org* because he believed these sites did not violate the California election statutes which prohibited the buying and selling of votes. *Id.* at 488.

171. *Id.*

172. *Porter*, 319 F.3d 483; 42 U.S.C. § 1983; Cal. Elec. Code § 18521 (1986) (California Elections Code section 18521 states in relevant part:

A person shall not directly or through any other person receive, agree, or contract for, before, during or after an election, any . . . valuable consideration . . . for himself or any other person because he or any other person: (a) Voted, agreed to vote, refrained from voting, or agreed to refrain from voting for any particular person or measure. . . . (d) Induced any other person to: . . . (3) Vote or refrain from voting for any particular person or measure. Any person violating this section is punishable by imprisonment in the state prison for 16 months or two or three years.

18522 California Elections Code section 18522 states in relevant part:

[A] person . . . shall [not] directly or through any other person . . . pay . . . or offer or promise to pay . . . any . . . valuable consideration to or for any voter or to or for any other person to: (a) Induce any voter to: . . . (2) Vote or refrain from voting at an election for any particular person or measure . . . Any person or candidate violating this section is punishable by imprisonment in the state prison for 16 months or two or three years.

173. *Porter*, 319 F.3d at 488.

the district court denied Porter's application.<sup>174</sup>

After the election, Porter later amended his complaint, bringing suit against Jones as an individual for a permanent injunction preventing Jones from prosecuting or threatening to prosecute against Porter for any "expressive activities in connection with the November 7, 2000 presidential election, including expression conducted on web sites," or any expressive conduct related to future elections.<sup>175</sup> Jones filed a motion to dismiss because Porter now lacked standing since the election was finished.<sup>176</sup> The court used the "Pullman Abstention" doctrine established in *Railroad Commission of Texas v. Pullman Co.* in determining that Porter did have standing, and it was inappropriate for the district court to abstain on the ruling.<sup>177</sup> Yet there was insufficient information for the court to reach a decision.<sup>178</sup> The court noted that in First Amendment cases, freedom of expression is always a matter of federal concern, making it inappropriate for a federal court to ever abstain from such a case.<sup>179</sup> Therefore, it remanded the case for additional proceedings.<sup>180</sup>

Similar to Porter's case, Vote-auction would be able to argue they had standing to enjoin the government from ceasing operation of the site even after the election was finished.<sup>181</sup> The court would grant standing to Vote-auction by using the "Pullman abstention" to determine that the issue was not moot.<sup>182</sup> Freedom of speech is a significant concern the court has an interest in protecting, therefore they would likely hear they case.<sup>183</sup>

Unlike Porter's case, however, where Porter's website served to facilitate the exchange of election related information, Vote-auction would not be able to argue federal and state statutes prohibiting the

---

174. *Id.*

175. *Id.*

176. *Id.*

177. *R. R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941) Under that doctrine, known as "Pullman Abstention," a federal court should abstain only if each of the following three factors is present: (1) the case touches on a sensitive area of social policy upon which the federal courts ought not enter unless no alternative to its adjudication is open, (2) constitutional adjudication plainly can be avoided if a definite ruling on the state issue would terminate the controversy, and (3) the proper resolution of the possible determinative issue of state law is uncertain. *See id.* at 500-502.

178. *Porter*, 319 F.3d at 492 ("the first Pullman factor 'will almost never be present because the guarantee of free expression is always an area of particular federal concern.'") *Id.*

179. *Id.*

180. *Id.* at 495.

181. *See Porter*, 319 F.3d at 488.

182. *See id.*

183. *See Porter*, 319 F.3d at 492.

purchase and sale of votes should be struck down on the basis they serve to chill legitimate speech.<sup>184</sup> These statutes are specific, and are aimed directly at actions and language that serve to effectuate the undermining of elections through the purchase and sale of votes.<sup>185</sup> Vote-auction could not find shelter in the argument that because these statutes are overbroad in their scope, Vote-auction cannot be prosecuted under them.<sup>186</sup>

#### V. CONCLUSION

Vote-auction arguably could increase voter turnout by looking to the American capitalist system and facilitating the sale of the vote to the highest bidder. But at what cost does this increased turnout occur? The founders of this nation intended to give Congress the power to create an election system that was free from corruption. Throughout the history of this nation, subsequent Congresses have used this power to create a system where the elections are not only free, but more equal.

While Vote-auction claims it brings more voters out on election day, it does so at the expense of our forefather's vision of elections free from dishonesty. By brokering the sale of votes, the votes are not uninfluenced. By requiring absentee ballots to be sent to Vote-auction for review, these votes are not anonymous. These actions go towards propagating the very evils Congress has a right to prevent. As a result of the threat of compromised free and equal elections, the federal government and the states have just and compelling cause to restrict the speech content of the Vote-auction website. Whereas the crimes Vote-auction committed may not be elevated to what the New York Board of Elections considered to be treasonous, they certainly were within the constitutional power of the government to prohibit. While the very core of the First Amendment is the protection of political speech, because Vote-auction serves to undermine the very principles of free and equal elections, it should not be allowed to continue to broker the sale of votes for any American federal or state election.

---

184. *See Reno*, 521 U.S. at 874.

185. *See Hansen*, 88 CAL. L. REV. at 1330.

186. *Reno*, 521 U.S. at 874 (1997).