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Virtual Politics and the 2000 Election: Does First Amendment Protection Extend to Political Speech on the Internet?

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NOTES

VIRTUAL POLITICS AND THE 2000 ELECTION: DOES FIRST AMENDMENT PROTECTION EXTEND TO POLITICAL SPEECH ON THE INTERNET?

I. INTRODUCTION

Upon entering the Internet address “gwbush.com,” computer users probably hope to be linked to the official website of Texas Governor George W. Bush, the Republican nominee for United States President.¹ Actually, “georgewbush.com” is the Governor’s official website, and “gwbush.com” is a website containing parodies of the official site as well as other political satire, which could only be described as far from reverent.²

A Boston-based computer consultant, Zack Exley, runs the parody site with the help of “rtmark.com.” Rtmark.com, a site criticizing the influence of corporations on both politics and other aspects of American life, provides some of the content for Exley’s parody site.³

In April 1999, Exley received a letter from Washington attorney Benjamin Ginsburg on behalf of Bush.⁴ Ginsburg claimed that Exley violated copyright laws through Exley’s use of the official Bush website material and complained about links to “offensive” websites.⁵

Significantly, Ginsburg also sent a letter to the Federal Election Commission (FEC) the following month, alleging that the parody site

¹ *Does First Amendment Protect Internet Speech? Libel Suit, FEC Complaint Raise Constitutional Issues*, POL. FIN. & LOBBY REP., May 26, 1999, at 1.

² *Id.*

³ Malcolm MacLachlan, *Bush Campaign Battles Parody Site*, TECHWEB, May 20, 1999 (visited May 12, 2000) <<http://www.techweb.com/wire/story/TWB1999052050003>>.

⁴ *Id.*

⁵ *Id.* A few days after receiving the letter, Exley removed some of the offending material taken directly from the official site. However, unflattering commentary on Bush’s character and politics still characterize the website.

violated the Federal Elections Campaign Act of 1971 because it had not been registered⁶ with the FEC as a political committee.⁷ According to this letter, Exley spent more money on the site than is legally permitted by the Act.⁸ Ginsberg asserted that this fact, combined with the site's stated purpose of harming Bush's campaign, obligated Exley to follow FEC guidelines.⁹ Although registration as a political committee does not require a fee, the parody site would be required to list its contributors.¹⁰ Further, the site could not accept corporate donations.¹¹

Currently, this is an unresolved issue. On August 19, 2000, the FEC will have its first hearing on the regulation of political content on the Internet. If the FEC rules in Bush's favor, the operators of political websites will be required to either register with the government by forming a Political Action Committee (PAC) or face fines.¹² Registering with the FEC as a PAC is a complex process that may serve to prevent many individuals from publishing their views on personal websites.

Bush's reaction to the parody site has only added fuel to the fire of Internet free speech supporters. For example, according to gwobush.com, "[w]hen asked at a press conference whether 'the plug should be pulled' on a website that discussed drug use in his past, Bush said, in front of several

⁶ According to the Federal Election Commission, the process of filing a complaint is as follows: [a]nyone who believes that a violation of the law has occurred may file a complaint with the FEC. The complaint should contain a statement of facts related to the alleged violation and any supporting evidence available. The complaint must be signed and contain the complainant's name and address. It must also be sworn to and notarized.

FEC Website (visited Mar. 25, 2000) <<http://www.fec.gov/citizen-guide.html>>.

⁷ MacLachlan, *supra* note 3.

⁸ FEC Website (visited Mar. 25, 2000) <<http://www.fec.gov/about.html>>. The Federal Election Commission (FEC) was created in 1975 to administer and enforce the Federal Election Campaign Act (FECA). The FECA governs the financing of federal elections. And the FEC, an independent regulatory agency, serves to disclose campaign finance information, to enforce the provisions of FECA, including limits and prohibitions on contributions, and to oversee the public funding of Presidential elections. The President appoints, and the Senate confirms, the Commission's six members. Further, each commission member serves for six years, with two seats being subject to appointment every two years. To further ensure impartiality, the law requires that no more than three Commissioners be members of the same political party. Finally, a minimum of four votes is required for any Commission action. *Id.*

⁹ MacLachlan, *supra* note 3.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

television cameras, 'Yes' and added, 'There ought to be limits to freedom.' ¹³ Obviously, Bush's comment proved to be ammunition for free speech advocates.

Exley would be unable to maintain the site if the FEC decides to force his site to register as a political committee because of the costs of consultation with attorneys and accountants to meet the requirements.¹⁴ He contends that "if everyone who was talking about candidates on the Internet had to go through that process, it would definitely inhibit political speech."¹⁵

Ginsberg admits that his client hopes that forcing Exley to register his site will establish a precedent that other political satirists and critics will be forced to follow.¹⁶ According to Ginsberg, "[o]ne of the really interesting things in this election cycle that is different from the past is the way information can be disseminated. There is a lot of scurrilous material that needs to be addressed."¹⁷

In a related Internet controversy, Judge Joan Orie-Melvin of Pittsburgh has filed a defamation suit against an anonymous author who accused her, via the Internet, of judicial misconduct.¹⁸ The author accused the judge of lobbying on behalf of a local attorney seeking a judgeship. Judge Orie-Melvin denies the author's contentions and recently filed a defamation suit against him.¹⁹

Orie-Melvin, an Allegheny County Superior Court judge, is seeking \$50,000 in damages from the author of the alleged defamatory statements.²⁰ To prevail in court, she must prove both that she suffered the damages she is claiming and that the author had "actual malice," knowledge of the statement's falsity or at least a reckless disregard for its truthfulness.²¹

The Orie-Melvin case has another interesting twist. Before prevailing in her defamation suit, or even getting to court, the Judge must find her enemy,

¹³ *gw bush.com* (visited May 12, 2000) <<http://www.gwbush.com/epl.htm>>. Currently, visitors to the website can purchase a T-shirt that bears this now-infamous Bush quote: "There ought to be limits to freedom." There are also links on the site to Vice President Al Gore parody websites that are equally unflattering, including <<http://www.AllGore.com>> and <<http://www.NoGore.org>>.

¹⁴ MacLachlan, *supra* note 3.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Dennis Roddy, *Judging Right of Free Speech*, PITTSBURGH POST-GAZETTE, Sept. 4, 1999, at A11.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964); Roddy, *supra* note 18.

the anonymous website author. And though she is a Pennsylvania resident, Judge Orie-Melvin filed her suit in Loudoun County, Virginia in order to force America Online, Inc. to reveal its customer's identity.²² Along with First Amendment issues, this case involves difficult jurisdictional questions. Judge Orie-Melvin and the author are both Pennsylvania residents, so it seems that Virginia is not the appropriate venue for personal jurisdiction purposes.

According to the executive director of the Virginia branch of the American Civil Liberties Union (ACLU), Ken Willis, political speech is not afforded the same protection on the Internet as such speech enjoys in the traditional media.²³ He contends that "the complaint [by Judge Orie-Melvin] would not have lasted a nanosecond had the offending words been published in a newspaper."²⁴

Some politicians and public officials, including Bush and Orie-Melvin, seem to be concerned that Internet users now have the ability to disseminate negative political information to an audience of millions. Until now, this ability was reserved predominantly for the official print and broadcast media. Willis warned that politicians should not fight these changes: " '[t]hey should get used to it [the burgeoning electronic publishing community]. This is standard soapbox rhetoric, only now the forum is worldwide rather than a handful of people gathered in a public park.' "²⁵

Willis and the ACLU won a victory in the United States Supreme Court's 1997 *Reno v. ACLU* decision.²⁶ This landmark decision struck down the Communications Decency Act of 1996, which was enacted by the United States Congress in part to rid the Internet of obscenity.²⁷

Although the *Reno* case involved pornography, not politics, this decision has paved the way for a freer flow of discourse on the Internet. Further, public figures like Bush and Orie-Melvin will have a more difficult time

²² Roddy, *supra* note 18.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Reno v. ACLU*, 521 U.S. 844 (1997).

²⁷ The Communications Decency Act of 1996 was enacted as Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

defending their names when the Internet is involved, as political critics and satirists can now likely use the *Reno* decision as a shield.²⁸

In addition, the *Reno* decision paves the way for an increased emphasis on electronic campaigning, or “virtual politics,” which has already begun to change the political landscape for the November 2000 elections. Though some politicians are wary of electronic speech excesses, many political candidates are spending millions of dollars on perfecting their own online sales pitches.²⁹

This Note considers the First Amendment’s protections of Internet speech, trends, and the challenges of electronic politics. As more people become involved in the electronic political process, more issues and concerns regarding political speech will likely be raised. The *Reno* case, though dealing with Internet obscenity, stands for the proposition that free speech on the Internet will receive the same protection as traditional broadcast media has historically enjoyed and thus brings to the foreground the difficulties facing politicians wary of Internet political speech.

II. THE INTERNET

The development of the Internet, an international network of computers, began in 1969 as a United States military program entitled “ARPANET.”³⁰ The program was created to allow computers operated by the military, defense contractors, and universities conducting defense research to communicate in the event that part of the network was damaged in a war or some other conflict.³¹

Although the military’s ARPANET has long since disappeared, it served as a model for the development of the modern-day Internet, which allows millions of people to communicate and to access vast amounts of

²⁸ See *infra* notes 70-76 and accompanying text (discussing how *Reno*’s broad approval of Internet discourse paves the way for free political speech on the Internet).

²⁹ See the presidential candidates’ websites, including *Al Gore 2000* (visited May 12, 2000) <<http://www.algore2000.com>>; *The George W. Bush for President Official Homepage* (visited May 12, 2000) <<http://www.georgewbush.com>>; and the former candidates’ websites, including *John McCain for President Official Site* (visited May 12, 2000) <<http://www.mccain2000.com>>; (visited May 12, 2000) <<http://www.billbradley.com>>; *The Steve Forbes Official Home Page* (visited Mar. 20, 2000) <<http://www.Forbes2000.com>>.

³⁰ *Reno*, 521 U.S. at 846.

³¹ *Id.* at 850.

information from anywhere in the world.³² Over the past twenty years, the Internet has grown tremendously. In 1981, there were only about 300 "host" computers, machines which store information and relay communications.³³ By 1996, that number skyrocketed to about 9.4 million, and approximately sixty percent of these host computers were located in the United States.³⁴ About 200 million people are estimated to have used the Internet last year, compared to about one-fifth of that number three years before.³⁵

Internet users can access the World Wide Web, one facet of the Internet, from a variety of sources including colleges and universities, corporations, and libraries. Also, for a small hourly charge, a growing number of computer coffee shops provide Internet access. Commercial online services including America Online, CompuServe, the Microsoft Network, and Prodigy provide access to their proprietary networks as well as links to the broader resources of the Internet at-large.³⁶

On the Internet, "e-mail," "listserves," "newsgroups," "chat rooms," and the World Wide Web are available to the interested computer user. These information-gathering and dissemination methods can be employed to share text, sound, pictures, and video images: "[t]aken together, these tools constitute a unique medium—known to its users as cyberspace—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet."³⁷

Electronic mail, or e-mail, allows people to send electronic messages to another individual or group of people. By contrast, a "mail exploder" is an e-mail group in which people subscribe to the group and can send messages, which are then forwarded to the other subscribers.³⁸ Similarly, newsgroups also serve regular members, but non-subscribers can often access these postings as well.³⁹

Thousands of such groups flourish on the Internet, and about 100,000 messages are posted every day, according to some estimates.⁴⁰ Participants

³² *Id.* at 848.

³³ *Id.*

³⁴ *Id.*

³⁵ *Reno*, 521 U.S. at 848.

³⁶ *Id.* at 850.

³⁷ *Id.* at 851.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Reno*, 521 U.S. at 846.

can post messages in newsgroups, or two or more people can communicate more immediately through a chat room.⁴¹ Upon entering the chat room, participants can engage in real-time dialogue by typing back and forth. Chat rooms have developed around a diverse variety of subjects, including sports, music, and politics.

The World Wide Web (Web), however, is the most well-known area for communication on the Internet. The Web allows its users to search for and retrieve information from documents stored in remote computers located all over the world.⁴² These documents are often just files containing information.⁴³ But more elaborate documents, commonly known as Web “pages,” are incredibly popular. Web pages or “websites” have their own “addresses,” which allow the computer to call up the page for the interested user.⁴⁴ Companies, universities, politicians, and individuals maintain their own Web pages, and links to other related sites are often available on a particular Web page. Usually, access to such information is free.⁴⁵ However, some Web pages allow access only to those who have purchased the privilege.⁴⁶

In *Reno*, the United States Supreme Court summarized the character of the Internet:

From the publishers’ point of view, it constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can “publish” information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals. Publishers may either make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege.⁴⁷

⁴¹ *Id.* at 846.

⁴² *Id.*

⁴³ *Id.* at 849.

⁴⁴ *Id.*

⁴⁵ *Reno*, 521 U.S. at 849.

⁴⁶ *Id.*

⁴⁷ *Id.* at 851.

III. FIRST AMENDMENT PROTECTION OF INTERNET SPEECH

According to the First Amendment of the United States Constitution, "Congress shall make no law . . . abridging the freedom of speech."⁴⁸ The First Amendment has been interpreted as protecting the free expression of ideas, and although the First Amendment only expressly addresses acts by Congress, it has been held to apply to the entire federal government,⁴⁹ as well as to state governments through the Fourteenth Amendment.⁵⁰

The rationale underlying the solicitous protection of speech lies in democratic principles; the regulation of speech is seen as having a "chilling effect" on the free flow of ideas.⁵¹ The courts have concluded that the "public must be free to express their ideas without excessive and intrusive regulation."⁵²

In *West Virginia State Board of Education v. Barnette*,⁵³ the United States Supreme Court stated

[w]e can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes . . . [b]ut freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.⁵⁴

Because of the recent explosion of Internet use, questions have arisen regarding the free speech protections of this "new" medium. The United

⁴⁸ U.S. CONST. amend. I. The amendment reads, in its entirety, as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." *Id.*

⁴⁹ See *United States v. O'Brien*, 391 U.S. 367 (1968) (applying the First Amendment to a federal law regarding selective service registration certificates in the context of expressive conduct).

⁵⁰ See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (analyzing a state's "fighting words" statute under the First Amendment).

⁵¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 300 (1964).

⁵² James V. Dobeus, *Rating Internet Content and the Spectre of Government Regulation*, 16 J. MARSHALL J. COMPUTER & INFO. L. 625, 635 (1998).

⁵³ 319 U.S. 624 (1997).

⁵⁴ *Id.* at 641-42.

States Supreme Court has provided at least some guidance about how the First Amendment should be understood in the context of the Web. In a 1952 case dealing with film,⁵⁵ the Court stated as follows:

[n]or does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method of expression tends to present its own peculiar problems . . . [b]ut the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule.⁵⁶

In *Joseph Burstyn, Inc. v. Wilson*, the Court overruled its 1915 *Mutual Film Corp. v. Industrial Commission* decision, where it had rejected the notion that motion pictures should receive constitutional protection.⁵⁷

The *Joseph Burstyn, Inc.* decision, though it has since been distinguished on other grounds, paved the way for a media-specific First Amendment analysis in the years to come. In addition, the Court in *Joseph Burstyn, Inc.* reasoned that a medium does not have to be employed exclusively as a serious commentary on free speech in order to receive constitutional protection.⁵⁸

In other words, simply because the Bush site possesses comic and entertainment value to some people does not put it outside the utmost protections that political speech has enjoyed. Instead, the *Joseph Burstyn, Inc.* Court concluded that the importance of motion pictures as an organ of public opinion with respect to freedom of speech and of the press is not diminished by the fact that they are designed to entertain as well as to

⁵⁵ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). The Court found that a New York statute authorizing a Board of Regents to view and license films that were "sacreligious" was unconstitutional. However, there are limits.

According to the Court, the fact that motion pictures are included within the free speech and free press guaranty of the First and Fourteenth Amendments does not authorize "absolute freedom to exhibit every motion picture of every kind at all times and places." *Id.* at 502.

⁵⁶ *Id.* at 503.

⁵⁷ *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230 (1915). Thirty-seven years after *Mutual Film Corp.* came the *Joseph Burstyn, Inc.* decision, and silent films were replaced by "talking pictures" during this time interval.

⁵⁸ *Joseph Burstyn, Inc.*, 343 U.S. at 501.

inform.⁵⁹ This tradition, with its presumption of free speech protection regardless of the medium or character, will assist political critics like Exley as they challenge and are challenged by politicians on these mostly uncharted legal waters of the Internet.

IV. *RENO V. ACLU*: WHAT IT MEANS FOR THE FUTURE OF INTERNET POLITICAL SPEECH

Reno represents the first legal challenge to the censorship provisions of the Communications Decency Act (CDA).⁶⁰ The CDA, as challenged, made it a crime, punishable by up to two years in jail and/or a \$250,000 fine, for anyone to engage in speech that is deemed "indecent" or "patently offensive" on a computer network if the speech can be viewed by a minor.⁶¹

Because of the importance and novelty of this case, it was on an accelerated track from the beginning. Apparently, Congress predicted legal challenges, even writing into the Act an expedited path, through special review provisions, to the United States Supreme Court.⁶² And, as expected, a legal challenge to the CDA was filed on the same day that the Act was signed into law by President Clinton.⁶³ A second challenge was filed by

⁵⁹ *Id.*

⁶⁰ *Reno*, 521 U.S. at 844.

⁶¹ 47 U.S.C.S. § 223 (Law. Co-op. Supp. 1999). Some of the relevant provisions of the Act include the following: first, § 223(a) "Whoever—(1) in interstate or foreign communications—(B) by means of a telecommunications device knowingly—(i) makes, creates, or solicits, and (ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene . . . or indecent, . . . knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication . . . shall be fined under Title 18, or imprisoned not more than two years, or both." Second, § 223(d) prohibits the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age. Under § 223(e)(5), defendants can avoid prosecution if they have "taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication" or if they have restricted access by "requiring use of a verified credit card, debit account, adult access code, or adult personal identification number."

⁶² *Reno*, 521 U.S. at 845.

⁶³ The CDA was signed into law the President Clinton on February 8, 1996. *ACLU v. Reno*, 929 F. Supp. 824, 826 (E.D. Pa. 1996).

nearly twenty plaintiffs.⁶⁴ Soon afterward, these suits were consolidated and reached the United States Supreme Court styled as *Reno v. ACLU*.

In 1996, the United States District Court for the Eastern District of Pennsylvania issued a preliminary injunction preventing the Government from enforcing the challenged provisions of the CDA.⁶⁵ In the District Court, the ACLU argued that the censorship provisions were unconstitutional because they criminalized expression protected by the First Amendment.⁶⁶

In granting the preliminary injunction, the three-judge panel agreed that the CDA's effort to censor speech within the unique medium of Cyberspace violated the First Amendment.⁶⁷ The censorship provisions were deemed unconstitutional because they would criminalize expression that is considered protected by the First Amendment, expression that was merely "indecent."⁶⁸

The Government chose to appeal the preliminary injunction ruling, thus giving the United States Supreme Court its first opportunity to consider how traditional free speech principles should be applied to the Internet.⁶⁹ And, in a victory for Internet free speech advocates, the Court affirmed the lower court decision, holding that the CDA is an unconstitutional restriction on free speech.⁷⁰

The landmark seven-to-two decision was written by Justice Stevens.⁷¹ The Court held that the CDA places an "unacceptably heavy burden on protected speech," one that "threatens to torch a large segment of the Internet community."⁷² Justice O'Connor, who was joined by Chief Justice

⁶⁴ The plaintiffs in *Reno v. ACLU* included the American Civil Liberties Union, Human Rights Watch, Electronic Privacy Information Center, Electronic Frontier Foundation, Journalism Education Association, Computer Professionals for Social Responsibility, National Writers Union, ClariNet, Institute for Global Communications, Stop Prisoner Rape, AIDS Education Global Information System, BiblioBytes, Queer Resources Directory, Critical Path AIDS Project, Wildcat Press, Justice on Campus, Brock Meeks d/b/a CyberWire Dispatch, The Safer Sex Web Page, The Ethical Spectacle, and Planned Parenthood Federation of America. *Id.* at 825.

⁶⁵ *Reno*, 929 F. Supp. at 824.

⁶⁶ *Id.* at 828-30.

⁶⁷ *Id.*

⁶⁸ *Id.* at 848.

⁶⁹ *Reno*, 521 U.S. at 848.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 850.

Rehnquist, concurred with the judgment while dissenting in part along more narrow lines.⁷³

In its decision, the Court explained that “[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”⁷⁴ In short, the Court held that the Government’s interest in preventing children from being exposed to harmful material “does not justify an unnecessarily broad suppression of speech addressed to adults.”⁷⁵

The Court also impliedly agreed with the ACLU’s argument that the Internet is analogous to the print, rather than broadcast, medium and as such should be afforded full First Amendment protections.⁷⁶ The Court also noted its approval of the increase in discourse in Cyberspace, stating:

[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 government regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it.⁷⁷

This presumption of validity for Internet speech paves the way for increased freedom to criticize public figures to a widespread audience. As political dialogue on the Internet grows, electronic campaigning will also likely see a meteoric rise in popularity.

Internet speech has also been threatened by state legislation. Three days before the *Reno* decision, federal district judges in New York and Georgia

⁷³ *Id.* at 886. Justice O’Connor and the Chief Justice did not join the majority because they viewed: [t]he Communications Decency Act of 1996 as little more than an attempt by Congress to create ‘adult zones’ on the Internet. Our precedent indicates that the creation of such zones can be constitutionally sound. Despite the soundness of its purpose, however, portions of the CDA are unconstitutional because they stray from the blueprint our prior cases have developed for constructing a ‘zoning law’ that passes constitutional muster.

Id.

⁷⁴ *Reno*, 521 U.S. at 885.

⁷⁵ *Id.* at 875.

⁷⁶ *Id.* at 868-69.

⁷⁷ *Id.* at 885.

struck down Internet censorship laws.⁷⁸ In the Georgia case, *ACLU v. Miller*,⁷⁹ Judge Marvin Shoob found a law banning anonymous speech on the Internet to be an unconstitutional restriction on free speech.⁸⁰ This law, he argued, "affords prosecutors and police officers with substantial room for selective prosecution of persons who express minority viewpoints."⁸¹ The court held, in relevant part, that: (1) the fact that a state court had not yet interpreted the statute did not warrant abstention;⁸² (2) users were substantially likely to show that the statute imposed content-based restrictions that were not narrowly tailored to achieve a compelling state interest;⁸³ (3) users were substantially likely to succeed on their claims that the statute was unconstitutionally overbroad and vague;⁸⁴ (4) there was a substantial threat that users would suffer irreparable injury if a preliminary injunction was not issued;⁸⁵ (5) the balance of hardships weighed in favor of issuing a preliminary injunction;⁸⁶ and (6) a preliminary injunction would promote the public interest.⁸⁷

*American Libraries Association v. Pataki*⁸⁸ examined a New York state law virtually identical to the CDA.⁸⁹ Judge Loretta A. Preska ruled that the law violated the Commerce Clause of the United States Constitution because it attempted to regulate activity beyond the state's borders.⁹⁰ Judge Preska reasoned that the Internet fit within the parameters of interests traditionally protected by the Commerce Clause,⁹¹ and that the statute projected New York law into conduct occurring only outside of New York.⁹²

This placed burdens on interstate commerce that exceeded any local benefit that could come from the regulation.⁹³ In addition, the New York

⁷⁸ *Id.* at 844.

⁷⁹ 977 F. Supp. 1228, 43 U.S.P.Q.2d (BNA) 1356 (N.D. Ga. 1997).

⁸⁰ *Id.*

⁸¹ *Id.* at 1234.

⁸² *Id.* at 1231.

⁸³ *Id.* at 1232.

⁸⁴ *ACLU v. Miller*, 977 F. Supp. at 1233-34.

⁸⁵ *Id.* at 1235.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ 969 F. Supp. 160 (S.D.N.Y. 1997).

⁸⁹ *Id.*

⁹⁰ *Id.* at 183-84.

⁹¹ *Id.* at 181-82.

⁹² *Id.* at 173-77.

⁹³ *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 177-81 (S.D.N.Y. 1997).

law would subject the Internet, with its inherent interstate character, to inconsistent regulations.⁹⁴

Reacting to the *Reno* ruling, Ann Beeson, an ACLU attorney who worked on the *Reno* case, stated:

[t]oday's Supreme Court ruling, together with the New York and Georgia decisions, creates a body of law that will help ensure that the free speech principles embodied in our Constitution apply with the same force on the Internet as they do in the morning paper, in the town square, and in the privacy of our own homes.⁹⁵

The Georgia and New York cases were the first challenges to state legislative attempts to regulate the Internet.⁹⁶ Currently, more than twenty states have passed or are considering such laws, according to Beeson.⁹⁷ However, the *Reno* decision, and its presumption of validity for Internet speech, foreshadows a dramatic expansion of political activity and participation via the Internet.

V. ELECTRONIC CAMPAIGNING

In the 2000 election, voters do not have to spend a great deal of time researching the candidates' positions on issues. Reading the newspaper or watching the news is no longer required to determine which candidate to support. With the growth of the Internet, selecting a candidate is as easy as pointing and clicking.⁹⁸ The candidates make it even easier by printing their website addresses on posters and campaign literature. Former Presidential candidate Senator Bill Bradley and other former presidential hopefuls

⁹⁴ *Id.* at 167.

⁹⁵ *Supreme Court Rules: Cyberspace Will Be Free! ACLU Hails Victory in Internet Censorship Challenge* (visited June 26, 1997) <<http://www.aclu.org/news/n062697a.html>>.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See, for example, the following political websites: *politics.com* (visited May 12, 2000) <<http://www.politics.com>>; *Politics 2000* (visited May 12, 2000) <<http://www.salon.com/politics2000/>>; *MSNBC* (visited May 12, 2000) <<http://www.msnbc.com>>; *presidentialelection.com* (visited May 12, 2000) <<http://www.presidentialelection.com>>.

hopefuls frequently mentioned their website address (e.g., "billbradley.com") at speeches and rallies.

In addition, there are dozens of nonpartisan websites that assist voters in determining which candidate to support.⁹⁹ For example, at "SelectSmart.com"¹⁰⁰ visitors are prompted to answer a list of questions revealing their political tendencies.¹⁰¹ After a brief wait, the site reveals a perfect political match.¹⁰² There is even a ranking of which candidates are most popular among people visiting the site.¹⁰³

While campaign contribution reports are available on the Federal Election Commission's website, some candidates are choosing to post their FEC reports on their websites. Other candidates' websites feature their contribution lists or links to the FEC's official site.¹⁰⁴

A recent article in the New Republic featured Rick Segal, a director of a Cincinnati marketing firm, but not for his work for an international corporation or a local business.¹⁰⁵ Instead, Segal worked as a consultant for presidential hopeful and media tycoon Steve Forbes.¹⁰⁶ Segal helped to plan a "netwar" for Forbes.¹⁰⁷

Segal's techniques, which he believes are applicable to candidates as well as to companies, involve using high-technology methods to reach and persuade the target audience.¹⁰⁸ In this first presidential election of the Internet age, it seemed that Forbes was betting on the fact that technology will redefine politics, similar to the way that television in the 1950s revolutionized popular culture and distinguished John F. Kennedy from his rival, Richard Nixon, in the first-ever televised presidential candidate debate.¹⁰⁹

Other presidential candidates also worked under the assumption that the Internet can be used to sway voters. There is support for their assumption,

⁹⁹ See *supra* note 98 (providing examples).

¹⁰⁰ *American Presidential Candidate Selector* (visited May 12, 2000) <<http://www.SelectSmart.com>>.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *How SelectSmart.com Visitors Responded* (visited May 12, 2000) <<http://www.SelectSmart.com>>.

¹⁰⁴ *FEC Website* (visited May 12, 2000) <<http://www.fec.gov>>.

¹⁰⁵ Dana Milbank, *Virtual Politics*, THE NEW REPUBLIC, July 5, 1999, available at <<http://www.tnr.com/archive/0799/070599/coverstory070599.html>>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

as tens of millions of Americans are now online.¹¹⁰ Approximately seventy percent of voting-age Americans will have access to the Internet by election day in November, 2000.¹¹¹

The Internet played only a minor role in the 1996 election, and "like the dullest corporate sites, the candidates' websites in 1996 were little more than notice boards."¹¹² In 1995, only eleven percent of those going to the Iowa caucus had Internet access, compared to fifty-seven percent now.¹¹³ And in New Hampshire, the numbers jumped from fourteen percent in 1995 to sixty-eight percent of primary voters this year.¹¹⁴

However, while potential voters now often have access to the Internet, the 2000 election will be telling: will voters be influenced by what they learn online about the politicians at their technologically-advanced multimedia websites? If the 1998 Minnesota gubernatorial campaign was any indication, the candidates' investment in their personal websites will likely pay off. Now-Governor Jesse Ventura's website recruited volunteers and, more importantly, allowed him to get his message across inexpensively.¹¹⁵ Both his candidacy as an Independent and his eventual victory beat the odds,¹¹⁶ as he became the first professional wrestler-turned-governor two years ago.¹¹⁷

As proven by Governor Ventura, Internet campaigning can have many advantages, the most significant of which is cost-effectiveness. A creative website can be a great source of inexpensive media publicity.¹¹⁸ The press often clamors to cover new technology, so it is also a relatively easy way to get additional media coverage.¹¹⁹ Similarly, websites allow a candidate to inform the press of their daily plans and appearances.¹²⁰

Further, a candidate's website helps to mobilize contributors and volunteers. Anyone interested in sending money or volunteering their time

¹¹⁰ *Reno*, 521 U.S. at 852.

¹¹¹ *Id.*

¹¹² *The Battle for the White House: America's Presidential Election Campaign Is in Full Swing, Not Least on the Internet*, THE ECONOMIST, Sept. 18, 1999, at 6.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See Governor Jesse Ventura's Official Website (visited Mar. 24, 2000) <<http://www.jesseventura.com>>.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *The Battle for the White House: America's Presidential Election Campaign Is in Full Swing, Not Least on the Internet*, THE ECONOMIST, Sept. 18, 1999, at 6.

¹¹⁹ *Id.*

¹²⁰ See *The George W. Bush for President Official Home Page*, *supra* note 29 (demonstrating this).

to a particular candidate can simply visit his website and point and click to contribute either time or money.¹²¹ Most sites allow visitors to send an online contribution by credit card. Some sites also have a form that can be printed out and mailed in with a personal contribution check.¹²² Most of the candidates' websites also send regular e-mail updates to their constituents, notifying them of upcoming events.¹²³

The Internet can also be a useful tool in targeting potential supporters.¹²⁴ Although expensive, this relatively new practice can assist candidates in honing their message and targeting likely supporters.¹²⁵ Some predict that Americans will receive pitches from political candidates via the Internet as early as this election.¹²⁶ A September 1999 study by the Democratic consulting firm The Mellman Group found that this Internet targeting may replace direct mail as the "direct mail universe . . . is dwarfed by the potential Internet market."¹²⁷

Vastly-expanded consumer databases have allowed candidates to have a great deal of information about potential voters.¹²⁸ If you are a registered voter,

[c]hances are the candidates know not just your name, address, and voting history but also your age and the age of your children, whether you smoke cigars, where you shop, where you attend church, what kind of car you drive, how old it is, whether you're on a diet, and what type of pet you have.¹²⁹

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *White House 2000 Internet Campaigning: Is Direct Mail Doomed?*, 10 AMERICAN POLITICAL NETWORK, THE HOTLINE, no. 9, Oct. 19, 1999.

¹²⁵ *Id.*

¹²⁶ *Id.* The article contends that "Americans will be besieged with pitches from political candidates seeking contributions, and as many of them will come through the Internet as through the letter carrier."
Id.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Milbank, *supra* note 105.

Using databases and sophisticated software, a campaign staff can determine their candidate's likeliest supporters.¹³⁰ Although this targeting technology can be costly, it may be crucial for a long-shot candidate like Forbes, who was willing to spend fifty million on the presidential primaries.¹³¹

It remains to be seen whether gathering personal information about voters is an appropriate or successful means of eliciting political support. Privacy advocates undoubtedly cringe at the thought of politicians researching everything from their buying habits to their dog's name. Indeed, a legislative response may be in order to prevent marketing firms from selling this sort of information to political campaigns.

But these concerns did not seem to slow Forbes. He started his campaign on the Internet and used it to advertise and gain sponsors.¹³² He also created a tool termed the "e-Precinct," which encouraged supporters to form "e-blocks," "e-neighborhoods," and an "e-National Committee."¹³³ It was grassroots politics with a technological twist.

On June 16, 1999, Forbes held a "virtual fundraiser" in which participants were invited to attend a private online group chat with the candidate for the cost of a ten-dollar credit card contribution.¹³⁴ Other candidates followed suit, including former Presidential hopeful Senator John McCain who held online town hall meetings and fundraisers.¹³⁵

Fundraising is not the only political tradition that is experiencing a millenium update. Polling, too, is being conducted online for many

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *The Steve Forbes Official Home Page*, *supra* note 29. An excerpt from the Forbes website explains this "e-activism":

[w]e're out to build the largest grassroots organization in the history of representative democracy, and we're counting on you to help us do it. Basically, we're asking you to play an on-going role in recruiting new volunteers and contributors. We're asking you to start by sending a pre-packaged e-Precinct Organizer Message to like-minded family members and friends who you think might be interested in helping in the campaign. You'll get credit not only for the members you recruit directly, but also for members they recruit as well. Your designation in the e-organization will depend on how many members ultimately join off of your first spark of patriotic activism. [Ex: 12 members = e-Block; 25 members = e-Neighborhood; 50 members = e-Precinct; 250 members = e-City; 1000 members = e-State; 2500 members = e-Region; 5000 members = Member of the e-National Committee].

Id.

¹³⁴ *Id.*

¹³⁵ *John McCain for President Official Site*, *supra* note 29.

candidates.¹³⁶ Instead of questioning a few hundred people, as in a traditional poll, pollsters pose a few questions to thousands of people found in one of the consumer marketing databases.¹³⁷ Pollsters then analyze this data to determine if they should target you.¹³⁸ To do this, pollsters perform a computer analysis of your personal characteristics to determine whether you will vote, how likely it is that you can be persuaded, and what "sales pitch" will persuade you.¹³⁹

Forbes' pollster and media strategist, John McLaughlin, believed that this type of targeted ad campaign would be successful.¹⁴⁰ According to McLaughlin, "[w]e've gone from mass media to demassified media. People are overloaded with information. If you don't talk to them directly, they're going to lose interest."¹⁴¹ Bill Dalcol, Forbes' former campaign manager, agrees that targeting works: "[y]ou don't have to shotgun anymore. You can now bullet."¹⁴²

These new techniques share the goal of creating a more customized campaign, based on each potential supporter's preferences. As the politicians bring the mass media campaign to a more local level, greater participation may be the result. However, the mass audience on the Internet makes candidates more susceptible to online jabs as well. As more people become involved in the online political process, more issues and concerns regarding political speech will likely be raised.

VI. PROBLEMS WITH ELECTRONIC CAMPAIGNING

Various problems face those who hope to participate in the new electronic campaign movement. "Cybersquatting" is one of the most prevalent Internet issues facing politicians like Republican presidential nominee George W. Bush. Bush's campaign, after being lambasted by the author of gwobush.com, attempted to buy up other Internet names such as

¹³⁶ Milbank, *supra* note 105.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Milbank, *supra* note 105.

¹⁴² *Id.*

"bushsucks.com" in an effort to prevent other parody sites from cropping up.¹⁴³

Congress threw its hat into the Internet domain names controversy in October 1999.¹⁴⁴ The House Judiciary Committee unanimously approved legislation aimed at outlawing "Cyberpiracy," preventing computer users from obtaining pirated trademarks on their Web pages.¹⁴⁵ Although aimed at corporate and brand names, the legislation would also be relevant to politicians. Cyberpiracy involves computer users buying popular names like "www.coke.com," then holding the names while trying to sell them to the relevant corporation or to the highest bidder.¹⁴⁶

Companies, unlike politicians, often have trademarks to protect their names and logos. However, many companies have no alternative but to pay the exorbitant costs demanded by Cyberpirates or become ensnared in legal battles to enforce their trademark rights.¹⁴⁷

The House Legislation was sponsored by Representative James Rogan, a Republican from California, and was titled the Trademark Cyberpiracy Prevention Act.¹⁴⁸ In August, the Anti-Cybersquatting Consumer Protection Act, a similar measure, was passed by the Senate.¹⁴⁹ Under the Senate Act, a company could obtain up to \$100,000 in damages from those improperly using their trademarks or trade names.¹⁵⁰

However, this legislation will not help disgruntled politicians like Governor Bush or Judge Orie-Melvin or former presidential hopeful Senator Orrin Hatch of Utah. Hatch was upset to learn that a Miami entrepreneur who buys Internet sites with famous names had purchased

¹⁴³ *The Battle for the White House: America's Presidential Election Campaign Is in Full Swing, Not Least on the Internet*, *supra* note 112.

¹⁴⁴ Lance Gay, *Congress Cuts in on Internet—Pirates with Brand Names May Have to Go*, DAYTON DAILY NEWS, Oct. 17, 1999, at 15A.

¹⁴⁵ *Id.*; H.R. REP. NO. 106-412 (1999).

¹⁴⁶ Gay, *supra* note 144. For instance, one entrepreneur with the Internet domain name rights to <<http://www.warnerpictures.com>> and <<http://www.warnerrecords.com>> is seeking \$350,000 from Warner Brothers for the domain names. *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See Pub. L. No. 106-113, 113 Stat. 1501 (1999); H.R. REP. NO. 106-412 (1999) (discussing amendments to the Lanham Act).

¹⁴⁹ Pub. L. 106-113, 113 Stat. 1501 (1999).

¹⁵⁰ See Pub. L. No. 106-113, 113 Stat. 1501 (1999); S. REP. NO. 106-140 (1999) (discussing amendments to the Lanham Act).

"senatororrinhatch.com."¹⁵¹ The Miami businessman then offered to sell the site to the Senator for \$45,000.¹⁵²

Although legislation is one option for solving the Cyberpiracy problem, it may be an issue that is best left to the market. Trademark and corporate names are different than politicians' names, and to prevent someone from purchasing or using the name "George W. Bush" or "Orrin Hatch" because they may create a parody site could be seen as a limitation on political speech. It may or may not be admirable to charge someone tens of thousands of dollars to "buy back" their name, but it could be very difficult to regulate the market in Internet names.

Congress could place a cap on the amount that someone can charge for a popular name or address. Like the corporate Cyberpiracy legislation, Congress could formulate legislation to protect public figures from being bilked by Cybersquatters. However, it would be difficult to create such legislation without unduly restricting people's freedom of expression rights. For example, it would be difficult to determine who is a public figure. What if your name was Dan Rather, and you bought a domain name incorporating that name before the newscaster did? Would you be forced to turn it over, or only ask a set price for it? What if it was worth more to you than the set price?

Alternatively, Congress could restrict the price tag of any Internet name to a certain amount. However, this alternative is inconsistent with our traditional free market economy. And limiting the amount anyone could spend on a website name could create a black market, with willing buyers and sellers violating the law. It could also be expensive and laborious to ensure that such a law was not being violated. On the other hand, violators may be discovered and brought to the attention of law enforcement by the concerned public figure who wanted his or her name back.

Insisting that only Barbra Streisand be able to buy "barbrastreisand.com" may seem like a reasonable solution. However, should Ms. Streisand have dibs on "barbra.com," "barbarocks.com," "barbrasucks.com," and "barbramusic.com" as well? This seems to be a slippery slope, as it would not seem fair to earmark every possible permutation of Ms. Streisand's name, preventing others named "Barbra" from having a chance to create their own self-titled website.

¹⁵¹ Gay, *supra* note 144.

¹⁵² *Id.*

Exley, the author of the Bush parody site, claims that his website caused the Bush campaign to purchase about sixty Internet names including phrases like bushbites.com and bushsux.org.¹⁵³ However, Bush campaign staff persons have been quoted in the media as saying that they bought the sites in 1998, before Exley's site.¹⁵⁴ Exley's claims are supported by the fact that most of these websites were not registered to Bush's associate, Karl Rove, until February 12, 1999.¹⁵⁵

Solutions are currently being sought for the problem of Cybersquatting. The Internet Corporation for Assigned Names and Numbers (ICANN), a nonprofit organization, oversees the assignment of Internet Domain names.¹⁵⁶ Internet managers have recently put into place an internal dispute procedure to settle ownership fights over "prized Internet real estate."¹⁵⁷

Alternative dispute resolution processes like this may be preferable to costly court battles. However, only time will tell whether such procedures will be successful in convincing each party to come to a non-adversarial solution.

Jurisdictional issues are also raised by Internet litigation.¹⁵⁸ The Internet is often thought of as a vast, nebulous space, which raises the question: where should a lawsuit arising in Cyberspace be brought? For example, if a Georgia resident claimed defamation by a website author in Pennsylvania who used an account hosted by America Online, which is based in Virginia, it is not clear where the suit should be brought.¹⁵⁹ Jurisdictional issues become even more complicated when the controversy stems from an e-mail discussion group that has national or international distribution.

The recent decision in *Barrett v. Catacombs Press*¹⁶⁰ provides guidance for those facing Internet jurisdiction questions. In *Barrett*, an Oregon resident

¹⁵³ MacLachlan, *supra* note 3. Exley claims that the Bush campaign bought all the Internet names because of him.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Gay, *supra* note 144.

¹⁵⁷ *Id.*

¹⁵⁸ To hear a case, the court must have personal jurisdiction over the parties. See *Pennoyer v. Neff*, 95 U.S. 714 (1877) (acknowledging this basic principle in American jurisprudence). Further, according to BLACK'S LAW DICTIONARY, "jurisdiction in personam" is "power which a court has over the defendant's person and which is required before a court can enter a personal or in personam judgment." BLACK'S LAW DICTIONARY 854 (6th ed. 1990).

¹⁵⁹ Wendy Leibowitz, *E-Litigation Borders in Net Space*, 21 NAT'L L. J., June 14, 1999, at B21.

¹⁶⁰ 44 F. Supp. 2d 717 (E.D. Pa. 1999).

posted allegedly defamatory messages on her website about Barrett, a psychiatrist from Pennsylvania.¹⁶¹

The United States District Court refused to subject the defendant to personal jurisdiction in Pennsylvania, where the plaintiff had filed his complaint.¹⁶² Judge Franklin Van held that no legal basis existed to exercise personal jurisdiction over the Oregon defendant.¹⁶³

According to the court, the defendant did not have sufficient systematic and continuous contacts with Pennsylvania to support a finding of general jurisdiction.¹⁶⁴ The plaintiff failed to show that the defendant's Internet activities, which included e-mails, listserve postings, and a website, constituted sufficient minimum contacts required for a court to assert personal jurisdiction.¹⁶⁵ Even her e-mail contacts with the plaintiff were not sufficient to allow the court to assert personal jurisdiction over the defendant.¹⁶⁶ The court also held that the plaintiff failed to provide any evidence to illustrate that the defendant's websites intended to target Pennsylvania residents,¹⁶⁷ as would be required under the alternative test for personal jurisdiction articulated in *Calder v. Jones*.¹⁶⁸

The Judge admitted that telephone calls and e-mails *could* be enough to subject a defendant to personal jurisdiction, provided there were "other indications of substantial connection."¹⁶⁹ Further, the defendant had only physically been in Pennsylvania a couple of times, more than a decade before the lawsuit.¹⁷⁰ The court also pointed out that not only was the defendant's speech not targeted at Pennsylvania, it was "part of a larger public debate on fluoridation issues."¹⁷¹

Significant to this analysis, the court held that messages posted on e-mail discussion groups and on websites were to be treated like "passive" websites,

¹⁶¹ *Id.* The dispute began because Barrett and the defendant disagreed about the fluoridation of water. The debates were posted on each party's websites.

¹⁶² *Id.* at 719.

¹⁶³ *Id.* at 721.

¹⁶⁴ *Id.* at 719.

¹⁶⁵ Barrett v. Catacombs Press, 44 F. Supp. 2d 717, 721 (E.D. Pa. 1999).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 730.

¹⁶⁸ 465 U.S. 783 (1984).

¹⁶⁹ Barrett, 44 F. Supp. 2d at 728; see also FED. R. CIV. P. 12(b)(2) (stating that a lack of personal jurisdiction defense may be made by motion rather than by pleading).

¹⁷⁰ Barrett, 44 F. Supp. 2d at 723.

¹⁷¹ *Id.* at 723.

which do not solicit business from or target any particular state.¹⁷² This ruling, if followed, is important in that defendants cannot be sued in a state where they have no significant contacts just because they maintain a website on the Internet.

However, the *Barrett* decision clarifies that Internet activity does not immunize a defendant from being haled into court in the forum state. The judge explained, “[p]ersonal jurisdiction clearly exists, for example, when Internet activity involves business over the Internet, including online contracts with residents of a foreign jurisdiction or substantial interactivity of a commercial nature with the website.”¹⁷³

In *Barrett*, the court applied an incarnation of the familiar two-part test to determine whether personal jurisdiction was proper: (1) did the defendant’s contact amount to continuous and systematic contact with the forum state? and (2) would exercising personal jurisdiction over the defendant comport with due process under the Constitution?¹⁷⁴ The court answered in the negative for the defendant in *Barrett*, finding that posting messages on a website or to an e-mail group did not constitute systematic and continuous contacts.¹⁷⁵

To date, courts have roughly divided Internet activities into three categories for the purposes of minimum contacts analysis: (1) websites that are “passive,”¹⁷⁶ (2) those that allow a user to exchange information with the website source, and (3) those websites that exist somewhere between the other two on a continuum of activity.¹⁷⁷

The majority of courts addressing this issue have found personal jurisdiction wanting where the defendant’s only contacts with the forum were through a “passive” website.¹⁷⁸ This is good news for potential defendants like Exley who merely post a message “passively” without any necessary contact with the forum state.

¹⁷² *Id.* at 730.

¹⁷³ *Id.* at 724.

¹⁷⁴ *Id.* at 729.

¹⁷⁵ *Barrett*, 44 F. Supp. 2d at 729.

¹⁷⁶ A “passive” website is one that merely provides information and/or advertising. *Thompson v. Handa-Lopez, Inc.*, 998 F. Supp. 738, 742-43 (W.D. Tex. 1998).

¹⁷⁷ *Mid City Bowling Lanes & Sports Palace, Inc. v. Ivercrest, Inc.*, 1999 WL 76446, *5 (E.D. La. 1999).

¹⁷⁸ *Fix My PC, LLC v. NFN Assocs., Inc.*, 1999 WL 184130 (N.D. Tex. 1999); *Ivercrest, Inc.*, *supra* note 177; *Rubbercraft Corp. v. Rubbercraft Corp.*, 1997 WL 835442 (C.D. Cal. 1997).

VII. CONCLUSION

The First Amendment, under current case law, seems to protect electronic political speech in the same manner that it protects traditional publishers and broadcasters. The analysis of the court in *Reno* and other modern First Amendment cases focuses on the Internet as a unique medium where free speech traditions are recognized.

If Internet speech is not afforded the same protections, the American public will likely be deprived of valuable political discourse. Ideally, the Internet will be preserved and encouraged as an open arena for politicians and constituents alike, much like the public square of days past.

Some, like George W. Bush, are attempting to challenge the proposition that electronically-published Internet speech should be treated in the same manner as printed or broadcast media. On August 19, 2000, the FEC will have its first hearing on regulating political content on the Internet. If the FEC rules in Bush's favor, the operators of political websites will be required to either register with the Government by forming a PAC or face fines. Registering with the FEC as a PAC is a complex process that may prevent some individuals from publishing their views on personal websites.

The FEC and Congress should be cautious about silencing political commentators such as Exley. Just as motion pictures were once treated differently than print media in the context of the First Amendment and later brought within its protections, so too must the FEC and Congress be careful not to indirectly limit speech by excessive regulation of the Internet. The Internet is an extraordinary medium for America, allowing everyday citizens to participate in the political process. Stubbornly protecting electronic speech ensures that the voice of democracy is not silenced.

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