LEGAL MEMORANDUM

TO: ROB RICHIE, DAVID MOON

FROM: LEO GOLDBARD

SUBJECT: UNIVERSAL VOTER REGISTRATION LEGISLATION FOR RHODE ISLAND

DATE: 8/1/2005

QUESTION: Do the Federal government, Rhode Island state government, and Rhode Island local institutions each have the power to implement a universal voter registration regime either directly or as a secondary school requirement within their respective jurisdictions and would such a regime violate any federal or state constitutional guarantees?

SHORT ANSWER: The Federal government is empowered to implement a universal voter registration regime for federal elections and Rhode Island state government and school committees are each empowered to implement universal voter registration regimes for state-wide elections within their jurisdictions. A universal voter registration regime would be open to challenge under both the United States and Rhode Island Constitutions on compelled speech, free exercise, substantive due process, equal protection, involuntary servitude, and privacy grounds. However, of these challenges only a narrow free exercise claim alone under the Rhode Island Constitution or combined with a substantive due process claim under the United States Constitution has any real chance of success. In order to forestall this possible challenge, an opt-out provision based on sincere religious

belief possibly should be included in any universal voter registration implementing legislation.

DISCUSSION:

I. INTRODUCTION

FairVote seeks to support legislation implementing universal voter registration at the national, state, and local level. The registration requirement may be implemented either directly or as secondary school requirement. FairVote is currently focused on implementing such legislation in Rhode Island State or localities. This memo seeks to examine the authority of the various levels of government to implement such legislation and the various potential constitutional civil liberties and rights obstacles to its application. The Federal government, Rhode Island state government, and Rhode Island school committees each have the power to implement this legislation. Though a variety of challenges can be brought under the United States and Rhode Island Constitutions, only a free exercise claim is potentially threatening and can easily be precluded through the design of an opt-out provision.

II. GOVERNMENT AUTHORITY

A. FEDERAL AUTHORITY

The Federal government is explicitly empowered to control the time, place and manner of federal elections under Article 1, Section 4 of the United States Constitution. The Supreme Court has specifically ruled that this includes the power to regulate voter

registration for federal elections. *Smiley v. Holm*, 285 U.S. 355 (1932). Federal circuit courts have upheld the National Voter Registration Act; 42 U.S.C.A. §§1973gg et seq.; mandating certain registration procedures for states on these grounds. *Ass'n of Cmty. Org. for Reform Now v. Miller*, 129 F.3d 833 (6th Cir. 1997), *Ass'n of Cmty. Org. for Reform Now v. Edgar*, 56 F.3d 791 (7th Cir. 1995). Hence presuming there are no constitutional rights infringed, implementing universal voter registration for federal elections is clearly within the authority of the federal government.

B. RHODE ISLAND STATE AND LOCAL AUTHORITY

Assuming there are no constitutional concerns, the General Assembly has the power to implement state-wide universal voter registration for state elections within schools or otherwise unimpeded by municipal governments. The General Assembly of Rhode Island possesses plenary power to pass legislation concerning all state matters. *McCarthy v. Johnson*, 574 A.2d 1229 (R.I. 1990). It has specifically been empowered to create a system for voter registration. R.I. CONST., Art. I, Sec. 2. Towns and cities can only restrict this power through the implementation of a home rule charter. R.I. CONST., Art. XIII, Sec. 2, 4. However, a charter can only grant municipal governments authority over purely local matters. The regulation of matters which affect the state can only be undertaken by the General Assembly. *Id*. The Supreme Court of Rhode Island has specifically held that the management of elections and education are matters of state concern. *Royal v. Barry*, 91 R.I. 24, 160 A.2d 572 (1960), *Opinion to the House of*

Representatives, 80 R.I 288, 96 A.2d 627 (1953). Local legislatures hence cannot under their charters regulate the manner in which schools in their jurisdiction are run.

With regard to voter registration generally, the power of municipal governments to institute or block mandatory voter registration has yet to be ruled upon, but is also likely non-existent. The Supreme Court of Rhode Island has ruled that the management of voter registration is part of the electoral function of the state and so not subject to municipal regulation. *Gainer v. Dunn*, 29 R.I. 232, 233, 69 A. 336, 336 (1908). One could argue that requirements to register to vote are distinct from the system of registration itself.. However, even if this premise were accepted the test for whether legislation is local or general rests on whether uniform regulation in the legislated area is necessary, whether the legislated area is traditionally considered a local matter, and most importantly whether the regulation has a significant effect outside the municipality. *Town of E. Greenwich v. O'Neil*, 617 A.2d 104 (R.I. 1992). Given that registration is for statewide and local elections and that registration is explicitly regulated by the state election board, universal voter registration legislation would likely be considered general under this test.

Though local legislatures themselves likely would not be able to mandate voter registration in schools or otherwise, a state authorized local body like a school committee likely would have the power. School committee actions, though local in effect, have the force of state law and so cannot be overturned by the actions of a chartered municipal government. *City of Pawtucket* v. *Pawtucket Teachers' Alliance*, 87 R.I. 364, 141 A.2d 624 (1958), *Royal v. Barry*, 91 R.I. 24, 160 A.2d 572 (1960). School committees and their superintendents have specifically been authorized by the state to develop and

implement general policies and curricular requirements for schools in their localities. R.I. Gen. Laws § 16-2-9, 16-2-11, 16-2-16. The General Assembly has already created requirements for voting instruction in all high schools. R.I. Gen. Laws § 16-22-10. It has also promulgated a centralized approval procedure for the establishment of district-wide community service requirements for graduation by school committees. R.I. Gen. Laws § 16-22-21. These provisions point to the power of school committees to establish voter registration requirements in their respective districts.

However, there is still the possibility that a voter registration requirement would unconstitutionally impinge on the election regulating function of the state, which has not been delegated to the school committees. The management of voter registration by state elections board and *Gainer* indicates that perhaps this would be the case. However, arguably the establishment of a voting registration requirement is well within the power of school committees. Schools by their very nature perform functions that overlap with many areas and the explicit incorporation of community service requirements and voting education into the school curriculum indicate that the General Assembly views the promotion of civic responsibilities as a natural role for schools. Assuming the latter is the case, school committees are a logical pathway to establishing the desired requirements.

III. POTENTIAL CONSTITUTIONAL OBSTACLES

Individuals may bring challenges to a universal voter registration regime under both the United States and Rhode Island Constitutions. The Rhode Island Constitution does not limit itself to protecting the rights enumerated in the United States Constitution.

R.I. CONST., Art. I, Sec. 24. However, in the few instances below where the United States and Rhode Island Constitutions have overlapping guarantees they have generally not been interpreted in divergent fashions. A universal voter registration regime may be challenged as a form of compelled speech, compelled disclosure, or involuntary servitude. It may also be challenged as a violation of substantive due process, free exercise, or equal protection rights. Almost all of these challenges are unlikely to find much traction. Only a narrow state free exercise challenge or a federal free exercise challenge combined with a substantive due process challenge may form a valid claim. This should be avoided with an opt-out provision for sincere religious belief.

A. COMPELLED SPEECH

Individuals have no viable free speech claims against either the Federal or Rhode Island's governments' imposition of universal voter registration either through schools or directly. The act of registration is not expressive and both the Federal and Rhode Island governments are empowered by their authority over elections and justified by their need to prevent voter fraud to require all citizens to register. Implementing the voter registration plan through schools further minimizes liberty concerns. Even if a liberty challenge were judged likely to be successful, it could easily be defused by including an opt-out provision in the legislation.

A potential 1st Amendment challenge to universal voter registration as compelled expression could be made under *West Virginia State Bd. of Educ. v. Barnette*. 319 U.S. 624, 633 (1943). Rhode Island also has a free speech provision in its constitution where a challenge could originate. R.I. CONST., Art. I, Sec. 21. However, such a challenge is

highly unlikely to be successful. Voter registration is not an expressive act and so does not demand 1st Amendment protection. Even if a court were to find that registering to vote contained expressive elements, a universal voter registration requirement clearly regulates voter registration for reasons unrelated to expression. The prevailing legal standard for determining whether an act should be considered expressive and hence deserving of 1st Amendment protection was articulated in *Spence v. Washington*. The requirements are "an intent to convey a particularized message" and a likelihood, "that the message [will] be understood by those who view[] it." 418 U.S. 405, 410 (1974). Registering to vote clearly does not meet this standard. It is no more expressive than filing a tax return. A person registering to vote under a universal registration regime does not intend to convey any specific message, merely basic information required by the state. Though a statement of party affiliation could be regarded as expressive or associative, a citizen can always decline to name their party and still register. Furthermore, registration information is only viewed by election officials who have no reason to derive any message from the registration. Voter registration fails to satisfy either prong.

Even to the degree that voter registration could be viewed as having an expressive element, a universal voter registration requirement aims only to regulate it for reasons unrelated to expression. In *O'Brien v. United States*, the Court held that a government regulation of an expressive act should be upheld, "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential

to the furtherance of that interest." 391 U.S. 367, 377 (1968). Under this standard, universal voter registration should easily survive a 1st Amendment challenge. Both the Federal government and Rhode Island are empowered to manage their elections. *See infra* Part II. The requirement furthers two important interests unrelated to expression: the increase of voter participation and the prevention of voter fraud. These interests arguably cannot be achieved as well in a less restrictive fashion. The imposition on 1st Amendment freedoms is incidental and minor if cognizable at all.

Implementing a universal voter registration through schools only weakens any 1st Amendment claims of individuals. The Court has characterized schools' role in society as "awakening the child to cultural values, … preparing him for later professional training, and … helping him to adjust normally to his environment." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988). Schools are empowered to regulate the speech of their students insofar as it is consistent with the accomplishment of these missions. *Id.* at 266. Arguably, mandatory voter registration is in line with the function of schools and so is a constitutional regulation whether or not voter registration is regarded as expressive. Registering to vote indoctrinates students in the responsibilities and duties of citizens

However, federal courts have already held that analogous community service requirements in public schools do not even reach protected expression. A voter registration requirement for graduation parallels constitutional community service requirements for graduation in schools in that it also creates a requirement of civic participation in the community. Mandatory community service regulations have been challenged on 1st Amendment grounds in the 3rd Circuit as forcing students to ascribe to a state altruistic philosophy. The 3rd Circuit rejected this challenge on the grounds that the

performance of required community service has no expressive element. The 3rd Circuit Court of Appeal noted reasonably that simply fulfilling the curricular requirement did not force a student to endorse the objectives of a program and that it was unlikely to be perceived as such by others. *Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989, 997 (3d. Cir. 1993); *but see Troster v. Pa. Dep't of Corr.*, 65 F.3d 1086, 1087 (3d Cir. 1995) (indicating that the standard for what is expressive has become more lax since *Steirer)*. The First Circuit has indicated agreement with this ruling. *See, South Boston Allied War Veterans Council v. City of Boston*, 875 F. Supp. 891, 919 (1st Cir. 1995) (citing *Steirer* approvingly). The same logic applies to mandatory voter registration for graduation, which is in a fashion simply a specific form of community service. It is difficult to imagine a court invalidating either voter registration or community service requirements on 1st Amendment grounds without invalidating a host of other curricular requirements.

If FairVote wishes to avoid any possibility of a successful 1st Amendment challenge then an opt-out provision should be included in the universal voter registration legislation. Such a provision could allow any person to avoid registering to vote by signing an affidavit indicating their objection to registration. Such a regime would be beyond challenge as citizens would in no way be compelled to seemingly endorse any viewpoint through registration. At the same time, given that the signing of affidavit and registering to vote would involve the same amount of minimal labor this provision is likely to be used only by those small few with sincere objections to voter registration.

B. SUBSTANTIVE DUE PROCESS

A more general liberty claim, based on the 14th Amendment, could also be made against a mandatory voter registration scheme, but also would likely not be successful unless combined with a free exercise claim. 14th Amendment substantive due process protects certain private individual choices from government intrusion. The vast majority of regulations receive only rational basis review. However, if a law abridges a choice involving a fundamental right, defined as one either "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937), or "deeply rooted in this nation's history and tradition" *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977), then it must undergo strict scrutiny. *Reno v. Flores*, 507 U.S. 292, 301-07 (1993). The state must then demonstrate that the law is narrowly tailored to meet a compelling interest. *Id.* The choice of whether or not to register to vote is unlikely to be characterized as fundamental in either of the above senses. Voting itself is considered a fundamental right, *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972), but that does not necessarily imply there is a fundamental right not to vote. Compulsory voting regimes have been implemented in the past in the United States. Richard L. Hasen, *Symposium: Law, Economics, & Norms: Voting Without Law?*, 144 U. Pa. L. Rev. 2135, n.154 (May 1996).

More importantly, the choice of whether or not to vote is separate from the choice of whether or not to register to vote. It is difficult to argue that registering to vote alone involves a fundamental right. The United State Court of Appeals for the First Circuit has already ruled in *Detenber v. Turnage* that the act of registration for the military draft is sufficiently attenuated from the draft and a small enough burden to be constitutional even

were conscription itself challengeable on 14th Amendment substantive due process grounds. The court noted in that case that petitioners could save their challenges for when actually conscripted. 701 F.2d 233, 234 (1st Cir. 1983). Similarly, in the voting context the 14th Amendment challenge should be reserved, if brought at all, for compulsory voting. Registration is not remotely as invasive or onerous. Furthermore, federal appellate courts have ruled that the choice to serve one's community is not a fundamental liberty requiring strict scrutiny. *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 463 (2d Cir. 1996), *Herndon by Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174,180 (4th Cir. 1996). Surely if extended community service does not infringe on a person's fundamental liberty registering to vote falls short as well. Given these precedents it is difficult to imagine a court applying strict scrutiny to a mandatory voter registration scheme on substantive due process grounds.

Even if judged to involve a fundamental right, mandatory voter registration, like registration for the draft, serves a compelling interest under a government function explicitly mentioned in the United States and Rhode Island Constitutions. The First Circuit Court noted that draft registration served an important administrative function of facilitating implementation of conscription in case of war-time. *Detenber*, 701 F.2d at 234. It was hence a necessary and proper action by the state under its war powers. *Id.* In the same fashion, universal voter registration serves the already recognized compelling interest of preventing voter fraud. *Dunn,* 405 U.S. at 345. It is hence a necessary and proper action of the Federal Government under the United States Constitution and of Rhode Island under its constitution to regulate the time, place, and manner of their respective elections. *See* Part II. Given that voter fraud persists under the current voter

registration scheme, universal voter registration is arguably a necessary step and so narrowly tailored to the compelling interest. Mandatory voter registration therefore certainly survives rational basis review, which it would likely undergo, and arguably would also survive strict scrutiny.

Implementing mandatory voter registration as a curricular requirement alters the substantive due process claim against it, but still does not render it unconstitutional. Implemented in this fashion, the government is not imposing the requirement on the basis of its power over elections, but on the basis of its power to educate. The Court has recognized a fundamental right of parents and children to exercise some control over how they are educated in a number of cases. *See e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (striking down a Nebraska law forbidding foreign language instruction); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (striking down a statute requiring attendance at public schools as unconstitutionally "interfering with the liberty of parents and guardians to direct the upbringing and education of children under their control" violates the Constitution); *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927) (overturning Hawaii restriction on foreign language schools and holding that "the Japanese parent has the right to direct the education of his own child without unreasonable restrictions").

However, "there is a world of difference between broad legislative enactments that forbid instruction in private schools or foreign languages and programs that impose specific educational requirements on students attending public schools." Rodney A. Smolla, "The Constitutionality Of Mandatory Public School Community Service Programs", 62 LAW & CONTEMP. PROB. 113, 123-24 (1999). The Court has explicitly

recognized the power of the state to institute compulsory education and prescribe a curriculum for institutions it supports. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Meyer,* 262 U.S. at 402. Mandatory voter registration is plausibly a natural part of a civic education and so the state has a right to include it in its curriculum if it aligns with its educational philosophy. If a parent or child could have any part of a curriculum invalidated merely because they find it objectionable then the entire institution of compulsory education would threatened. A substantive due process challenge alone to universal voter registration is ultimately not plausible in a compulsory education regime.

C. FREE EXERCISE

There is some indication that either a federal or state free exercise claim may warrant strict scrutiny. State courts have interpreted the Rhode Island Constitution's free exercise clause to allow the state to impose on religious beliefs only when the relevant statute is narrowly tailored to achieve a compelling interest. R.I. CONST., Art. I, Sec. 3, *In re Palmer*, 120 R.I. 250 (1978). Under the 1st Amendment's free exercise clause, laws of general application usually need only survive rational basis review when challenged on free exercise grounds, unless a fundamental right is also implicated. *Employment Div. v. Smith*, 494 U.S. 872, 878, 881; *see e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972). However, if a fundamental right is also being violated, such as the right to have some control over one's education, the law's application may have to survive strict scrutiny. *Id.* If a citizen refused to participate in a universal voter registration regime on religious grounds then possibly under the United State Constitution and almost certainly under the Rhode Island Constitution the challenge may lead to strict scrutiny review for the

regime's application in that specific case. As noted above, arguably mandatory voter registration does survive strict scrutiny. However, it may be worthwhile to include an opt-out provision based on sincere religious belief to head off this sort of challenge given that the number of individuals utilizing it would likely be quite small.

D. COMPELLED DISCLOSURE

Potentially a challenge to universal voter registration could be based on its compelled disclosure of private information about individuals, but such a claim would have little traction. Mandatory voter registration would force citizens to make available to the public their addresses and voter history at most. Individuals of course are already forced to disclose this information if they desire to vote. A universal voter registration scheme would only change the stakes, backing up the forced disclosure with criminal penalties or the loss of a high school diploma. However, none of the disclosed information creates a strong privacy interest. Under a voluntary registration scheme every citizen's voter history is already effectively public information. Those whose names are absent from the voter rolls have clearly not voted. At the same time, the disclosure of a person's name and address has generally not been regarded by the federal courts, particularly not by the 1st Circuit courts, as creating a strong privacy interest given the general availability of such information to the public. *See, Fed. Labor Relations Auth. v. U.S. Dep't of Navy, Naval Com*., 941 F.2d 49, 54 (1st Cir. 1991); *Multnomah County Med. Soc. v. Scott*, 825 F.2d 1410 (9th Cir. 1987); *Wine Hobby USA, Inc. v. United States IRS*, 502 F.2d 133, 137 (3d Cir. 1974). *But see Heights Cmty. Cong. v. Veterans Admin.*, 732

F.2d 526, 529 (6th Cir. 1983) (privacy interest in one's home address is an "important privacy interest"), *United States v. Liebert*, 519 F.2d 542, 548 (3d Cir. 1975) (privacy interest in one's home address is a "weighty interest").

This relatively weak privacy interest is unlikely to provide the basis for a successful challenge. The appellate courts have generally applied an intermediate standard of scrutiny to laws compelling disclosure of personal information where a 1st Amendment right is not implicated. *See Federal Labor Relations Authority*, 941 F.2d at 54 (applying balancing test); *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1983), (applying balancing test and noting general consensus on it). This standard demands a simple balancing of the privacy interest against the public interest in disclosure. *Id.* Though the First Circuit has applied strict scrutiny to a compelled disclosure implicating 1st Amendment rights, *Surinach v. Pesquera De Busquets*, 604 F.2d 73, 79 (1st Cir. 1979), that is not the case here. *See infra* Section III.A. A universal voter registration regime would likely survive intermediate scrutiny given the compelling state interests in preventing voter fraud and increasing voter participation discussed above and the weak privacy interest involved.

E. INVOLUNTARY SERVITUDE

Universal vote registration may also be challenged on 13th Amendment grounds as a form of "involuntary servitude." U.S. CONST., amend. XIII. However, such a challenge would have little grounding in 13th Amendment jurisprudence. The Supreme Court has defined the phrase "involuntary servitude" to only include forms of compulsory

labor of approximately equal gravity to that of African slavery. *See United States v. Kozminski*, 487 U.S. 931, 942 (1988) ("The phrase "involuntary servitude' was intended to extend "to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results.'") (quoting *Butler v. Perry*, 240 U.S. 328, 332 (1916)). The state enforces many forms of compulsion considerably more onerous than mandatory voter registration, including the payment of earned income in the forms of taxes, jury duty, and most dramatically conscription.

Multiple federal appellate courts have also already ruled that mandatory community service in schools cannot be construed as involuntary servitude. The courts note that the service is not severe, is not intended to be exploitative, and when implemented as a graduation requirement is not overly coercive. *Herndon by Herndon*, 89 F.3d at 180-81; *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 460 (2d Cir. 1996). Mandatory voter registration, particularly if implemented as an educational requirement, can be characterized similarly along all these rubrics. In light of these rulings, it is nearly certain that a mandatory voter registration plan, however implemented, is not vulnerable to 13th Amendment challenge.

F. EQUAL PROTECTION

A final potential, if highly implausible, challenge to mandatory voter registration could be brought on equal protection grounds under Section 2 or Section 5 of the Voting Rights Act. 42 USCS § 1973 (2005). The Court has held that registration procedures are subject to Voting Rights Act challenges. *Young v. Fordice*, 520 U.S. 273 (1997). Though

a direct universal voter registration requirement would clearly be beyond challenge in this regard, a requirement instituted in schools could potentially have a disparate impact on the voting of protected groups. However, though this is a possibility that implementers of a school-based regime should be aware of, it does not seem very likely to occur. Furthermore, even if a regime could be shown to have a disparate impact along protected class lines, it still may not be vulnerable to a Section 2 challenge. A requirement that leads to one group registering in greater numbers does not actually make it easier for that group to register, nor does it in anyway hinder others from registering. Arguably then, the law cannot be said to create any cognizable unconstitutional retrogression for a protected group.

IV. CONCLUSION

The federal government and Rhode Island state government are each clearly empowered to institute a universal voter registration regime either directly or as a secondary school requirement for their respective elections. Rhode Island school committees could also likely implement such a regime within their jurisdictions. Though an array of federal and state constitutional objections could be brought against a universal voter regime, none have a significant probability of success. The most threatening challenge would be a narrow free exercise claim. However, this challenge could easily be precluded through the inclusion of an opt-out provision based on sincere religious belief in any implementing legislation. A carefully designed universal voter registration regime,

whether implemented at a national or state or local level in Rhode Island should have little to fear from legal challenges.

DRAFT STATUTORY LANGUAGE:

Voter registration as a graduation/advancement requirement:

(1) The school committees of the several cities, towns, and school districts (All schools in the district) shall require each student (of 16 years of age or older) to be registered or pre-registered to vote in accordance with the rules and regulations established by the local board of the city or town in which the school is located before being graduated from high school (before being allowed to register for courses for junior year of high school).
(2) Schools may verify the registration of their students via a registration receipt or form signed by an authorized registration official or school faculty member or other appropriate method designated by their respective school committees (schools).
(3) Students for whom registering to vote would violate a sincere religious belief (Students who have a sincere objection to registering to vote) may sign an affidavit returned to their school stating such and be exempted from this requirement.

Voter registration as a credit against community service requirement:

(1) The school committees of the several cities, towns, and school districts (All schools in the district) shall allow students to fulfill X hours of their school service requirement by registering or pre-registering to vote.
(2) Schools may verify the registration of their students via a registration receipt or affidavit signed by an authorized registration official or school faculty member or other appropriate method designated by their respective school committees.