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Comment: Nader's Traders vs. State Regulators: Examining the Controversy over Internet Vote Swapping in the 2000 Presidential Election

Brad Worley

Vote swappers nationwide organized during the 2000 campaign to cast their presidential ballots strategically within the Electoral College system. Their mission: help Vice President Al Gore win enough states to take the presidency while ensuring that Ralph Nader received five percent of the popular vote, thus qualifying the Green Party for federal campaign funding in 2004.

This comment examines the legal issues surrounding Internet vote swapping, a relatively new phenomenon on the national political scene. Following a summary of the events surrounding the rise of Internet vote swapping in the weeks prior to the 2000 presidential election, this comment will examine the main arguments in what promises to be the first case to address the issue (*Porter v. Jones*), various state statutes and their interpretation by secretaries of state and other election officials, and the issues requiring legislative resolution before the next presidential election.

The Rise of the Great Online (Vote) Swap Meet

Sowing the Seeds

The concept of Internet vote swapping perhaps arose from the marriage of outright vote solicitation and a practical joke hatched by Texas Democrats resigned to certain loss in the Republican presidential nominee's home state. On August 15, 2000, six eBay users received national attention when they offered their votes for sale on the popular auction site.¹ By the next day, eBay had removed the highly questionable auctions from the site.²

Around the same time, James Baumgartner, a graduate student from Troy, N.Y., launched VoteAuction.com, a site devoted exclusively to the auctioning of votes for money.³ The site purported to auction blocs of votes by state, checking the absentee ballots before money changed hands to ensure the voters actually carried out the transaction.⁴

When the New York City Board of Elections objected to this apparent sale of votes, Baumgartner shut down the site and sold the rights to foreign interests.⁵ (This would hardly be the end of the VoteAuction.com saga. Following the site's sale, at least four states⁶ and the city of Chicago⁷ instituted actions

¹ Jeremy Derfner, *Buy This Vote!*, SLATE, Aug. 23, 2000, at http://slate.msn.com/netelection/entries/00-08-23_88646.asp.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Janet Kornblum, *Votes Up For Auction Draw Official Inquiries*, USA TODAY, Aug. 23, 2000, at 3D.

⁶ J.K. Dineen, *Vote-Swap Web Sites Shut Down*, N.Y. DAILY NEWS, Nov. 1, 2000, at 5. One state that sought to terminate VoteAuction.com was California, which

against the site. Austrian businessman Luzius "Hans" Bernhard moved the site to at least two different domain names despite injunctions banning the site's operation under any name.⁸ Baumgartner at various times claimed his motivation was to make money,⁹ to gather information for a master's thesis,¹⁰ and to create an Internet hoax.¹¹)

While the online world focused on vote selling, members of the Texas Democratic Party hatched the idea of offline vote swapping. These "merry pranksters" proposed to trade Gore votes for Nader votes in other states in which Gore had a better chance of victory.¹² These vote swappers questioned the potential legal ramifications.¹³

Vote Swapping Goes Online

The first major online vote swapping sites began independently in October 2000, neither apparently knowing of the other's existence.

later led the way in attempting to shut down numerous vote swapping sites. See Robert MacMillan, *California Ends Vote-Trade Web Gold Rush*, NEWSBYTES, Oct. 31, 2000, at <http://www.newsbytes.com/news/00/157474.html>.

⁷ Lee Copeland, *Online Vote Bidding Declared a Web Hoax*, COMPUTERWORLD, Nov. 13, 2000, at 7.

⁸ *Id.*

⁹ Kornblum, *supra* note 5, at 3D.

¹⁰ Dineen, *supra* note 6, at 5.

¹¹ Copeland, *supra* note 7, at 7.

¹² Molly Ivins, *Democratic Steak and Republican Pink Clouds*, FORT WORTH STAR-TELEGRAM, Aug. 20, 2000 at 4 (Editorial).

¹³ *Id.*

On October 1, Steve Yoder created the Vote Exchange Program at www.voteexchange.org.¹⁴ Yoder, who described himself as “a registered Democrat in the District of Columbia who voted for Nader in 1996 and plans to do so again this year,”¹⁵ explained why he created the site:

The intent of the Vote Exchange Program is to provide an alternative for those who want a viable Green Party but wish to avoid the disastrous effects of electing George Bush One of the inspirations for this site was a line from a speech this summer by Ralph Nader, in which he encouraged Greens to “be strategic” in how they vote.¹⁶

The site offered an electronic bulletin board on which users could communicate with other users around the country to discuss vote swapping “with those in other states who are willing to trade votes with you.”¹⁷ It determined user eligibility based on state of residence and the projected electoral results as determined by the daily calculations of CNN and ABCNews.¹⁸

¹⁴ *2000 Presidential Campaign: States Oppose Vote-Trading Scheme*, FACTS ON FILE WORLD NEWS DIGEST, Nov. 1, 2000, available at LEXIS, News Library, Facts on File World News Digest File.

¹⁵ Vote Exchange Program, Frequently Asked Questions, at <http://voteexchange.org/vote006.htm> (last visited Feb. 6, 2001) (on file with the North Carolina Journal of Law & Technology).

¹⁶ *Id.*

¹⁷ Vote Exchange Program, at <http://voteexchange.org/vote003.htm> (last visited Feb. 6, 2001) (on file with the North Carolina Journal of Law & Technology).

¹⁸ Vote Exchange Program, Eligibility for the Vote Exchange Program: Nader Voters, at <http://voteexchange.org/vote004.htm> (last visited Feb. 6, 2001) (on file with the North Carolina Journal of Law & Technology). See also Vote Exchange

The site also assured potential users that Bush supporters bent on sabotaging the system had no incentive to depress either Nader votes in swing states or Gore votes in blowout states.¹⁹

Voteexchange.org received virtually no national attention at the time of its launch. Three and one-half weeks later, a second vote-swapping website appeared that would receive a great deal more media coverage than did its predecessor.²⁰

Jeff Cardille, a graduate student at the University of Wisconsin-Madison, launched Nader Trader²¹ on October 23, 2000.²² Although Voteexchange.org had been in operation for more than three weeks, Cardille claimed he had not heard of the site and got the idea of starting a vote-swapping site from a housemate.²³

Program, Eligibility for the Vote Exchange Program: Gore Voters, *at* <http://voteexchange.org/vote005.htm> (last visited Feb. 6, 2001) (on file with the North Carolina Journal of Law & Technology).

¹⁹ Vote Exchange Program, Frequently Asked Questions, *at* <http://voteexchange.org/vote007.htm> (last visited Feb. 6, 2001) (on file with the North Carolina Journal of Law & Technology).

²⁰ Nader Trader founder Jeff Cardille became a frequently-quoted figure within a week of his site's launch. See Kavita Kumar, *Gore, Nader Backers Using Web Sites to Arrange Vote Swaps*, Cox News Service, Oct. 27, 2000; *Weekend All Things Considered* (NPR radio broadcast, Oct. 29, 2000), available at LEXIS, News Library, National Public Radio File; Helen Kennedy, *E-Vote Swaps Boost Nader*, N.Y. DAILY NEWS, Oct. 29, 2000, at 28; Christine Cupaiuolo, *Trading Places*, PopPolitics.com, *at* <http://www.poppolitics.com/articles/2000-10-31-voteswap.shtml>.

²¹ Nader Trader could be accessed at both www.nadertrader.com and www.nadertrader.org. Those Internet surfers with a less-than-supportive view of the site's purpose could also access Nader Trader by accessing www.nadertrator.org. See *Ewell's Talks in San Diego Continuing?*, DURHAM (N.C.) HERALD-SUN, Nov. 3, 2000, at C1.

²² Cupaiuolo, *supra* note 20.

²³ See Kennedy, *supra* note 20, at 28.

Nader Trader offered no mechanism for users to trade votes with fellow voters. Instead, the site encouraged swing state residents to “contact a Gore-voting friend in a strongly Bush-leaning state and informally agree that your friend will vote for Nader, while you will vote for Al Gore.”²⁴

Cardille became an instant celebrity²⁵ and his site became the most-visited of all vote swapping sites, registering 93,369 hits through October 29²⁶ and more than 90,000 additional hits on October 30 alone.²⁷ By Election Day (November 7), the site claimed more than 750,000 hits.²⁸

Raskin's Revolution: Copycats and Naysayers

On October 24, Jamin B. Raskin, a professor of constitutional law at American University, published an opinion piece in the online news and lifestyle journal *Slate* outlining the rationale of vote swapping.²⁹ Raskin likened the practice to Senate “pairing,” in which senators match up with colleagues planning to vote on the opposing side of a bill when both plan

²⁴ Charles Babington, *Nader Traders' Add New Twist to Battlegrounds*, Washington Post Online Extras, at <http://www.washingtonpost.com/wp-dyn/articles/A18987-2000Oct26.html>.

²⁵ By the end of his site's whirlwind first week of operation, Cardille had been the subject of an interview broadcast nationwide on National Public Radio. *Weekend All Things Considered*, *supra* note 20.

²⁶ MacMillan, *supra* note 6.

²⁷ Jeremy Derfner, *Is Vote-Swapping Legal?*, SLATE, Nov. 1, 2000, at http://slate.msn.com/netelection/entries/00-11-01_92442.asp.

²⁸ Nader Trader Post-Election Home Page, at <http://www.nadertrader.org> (last visited Feb. 6, 2001) (on file with the North Carolina Journal of Law & Technology).

²⁹ Jamin Raskin, *Nader's Traders*, SLATE, Oct. 24, 2000, at <http://slate.msn.com/Concept/00-10-24/Concept.asp>.

to be absent for the vote and record the "pairing" in the *Congressional Record*.

Arguing that "it is the highest form of democratic politics to consult your fellow citizens about electoral choices,"³⁰ Raskin encouraged citizens to "join forces through the Internet and become professors of the Electoral College rather than dropouts from it."³¹ Unaware that two vote-swapping sites encouraging users to pair themselves through private or semi-private negotiation already existed,³² Raskin suggested that a site could allow users to register by state and automatically match voters with a sorting program.³³

In the immediate wake of Raskin's column, a slew of vote-swapping sites appeared online. At least three sites launched during the following week credited the Raskin column as the impetus.³⁴ Two of these sites (*Voteswap2000.com*³⁵ and *Winchell's Nader Trader*³⁶), as well as at least four additional

³⁰ *Id.*

³¹ *Id.*

³² Scott Harris, *Voteswap2000.com Elects to Shut Down*, THE STANDARD, Oct. 31, 2000, at <http://www.thestandard.com/article/display/0,1151,19828,00.html>.

³³ Raskin, *supra* note 29.

³⁴ See Kumar, *supra* note 20 (*Voteswap2000.com*); Farhad Manjoo, *Vote Trade: The Democratic Way?*, WIRED NEWS, Oct. 31, 2000, at <http://www.wired.com/news/politics/0,1283,39860,00.html> (*Winchell's Nader Trader*); Caroline Chen and Jerome Woody, *Trading Off: Internet Spawns a New Way of Voting*, DAILY ORANGE (Syracuse, N.Y.), Nov. 7, 2000, available at LEXIS, News Library, University Wire File. (*Voteswap.com*).

³⁵ See Kumar, *supra* note 20 (*Voteswap2000.com*).

³⁶ *Winchell's Nader Trader* had users register under either a "Gore Supporters in Blowout States" or "Nader Supporters in Swing States" pledge. The Nader pledge, for example, read: "As a Nader supporter in a tossup state, I have decided to vote for Gore but do so in the explicit hope that Gore voters in Republican states will correspondingly cast their ballots for Nader." The user then typed in her state of residence and clicked on an icon labeled "Register." *Trading Votes* (*Winchell's*

sites (PresidentGore.com,³⁷ Tradevotes.com,³⁸ Votetrader.org,³⁹ and Votexchange2000.com⁴⁰), featured some variation on the automatic user-matching system proposed by Raskin.

Nader Trader Home Page), at <http://voteswap2000.net> (last visited Feb. 9, 2001) (on file with the North Carolina Journal of Law & Technology).

³⁷ PresidentGore.com required users to create user names. To register with the system, a user had to provide a user name and password, her first and last names, the name of the candidate for which she currently planned to vote, home state, and e-mail address. User Information (PresidentGore.com), at

<http://www.presidentgore.com/user.asp> (last visited Feb. 9, 2001) (on file with the North Carolina Journal of Law & Technology). To make a trade, the user entered the user name, password, and the user name of the person with which she planned to trade. Confirm (PresidentGore.com), at

<http://www.presidentgore.com/confirmuser.asp> (last visited Feb. 9, 2001) (on file with the North Carolina Journal of Law & Technology). To verify the trade, the user re-entered the same information as on the "Confirm" page. User Information (PresidentGore.com), at <http://www.presidentgore.com/verifytrade.asp> (last visited Feb. 9, 2001) (on file with the North Carolina Journal of Law & Technology).

³⁸ Tradevotes.com redirected users to a German site that facilitated the trade. How It Works (Tradevotes.com), at <http://www.tradevotes.com/> (last visited Feb. 9, 2001) (on file with the North Carolina Journal of Law & Technology). The German site, named Voter Match, offered this explanation of its program: "If the automated matching software matches two individuals with interests deemed to be compatible, each of the two individuals concerned will be sent an E-Mail (sic) message containing his or her name and the E-Mail (sic) address with which they registered, the name and E-Mail (sic) address with which the individual with whom they were matched registered, as well as an indication of which type of state in which each of the matched individuals indicated he or she is registered to vote. States are categorized by type, a state-type being one of the following three: 'Swing State', 'Bush-controlled State', and 'Gore-controlled state'. After the election this software will be switched off, and all data stored by it will be deleted." Voter Match Policies and Notices, at <http://endymion.ling.uni-potsdam.de/votermatch/policies.html> (last visited Feb. 9, 2001) (on file with the North Carolina Journal of Law & Technology).

³⁹ Votetrader.org instructed users in the following manner: "To participate and be paired, fill in the appropriate form below. When a suitable match is available in our database, you will be notified of their name and contact information. Because voters are paired individually, you can contact your match and discuss election

With the proliferation of sites available for vote swapping began a rush of media attention and an explosion in user interest. In addition to the previously noted increase in traffic to Nader Trader, the second-generation sites recorded first a trickle and then a flood of users ready to swap their votes.

In its first day of operation (October 26), Voteswap2000.com recorded 500 trades;⁴¹ by the time it closed operations four days later, more than 5000 voters had been matched.⁴² During the same time period, Votexchange2000.com reported having registered “a few thousand people,”⁴³ while Steve Yoder’s Voteexchange.org, now diverting a good deal of traffic to the larger Voteswap2000.com, had a cumulative total of 230 matches through both e-mail pledges and its message board.⁴⁴

Raskin, for his part, appeared pleased with the sites’ success. After receiving more than 100 e-mails from *Slate* readers in response to his column, Raskin claimed to be

issues on your own. Under no circumstances will votetrader.org release your information except to your designated partner.” Below these instructions two forms (one for those who planned to vote for Gore, the other for those who planned to vote for Nader) required the user to enter her state of voter registration, first and last names, and e-mail address. Votetrader.org, at <http://votetrader.org/> (last visited Feb. 9, 2001) (on file with the North Carolina Journal of Law & Technology).

⁴⁰ Votexchange2000.com employed a multi-layered decision tree, discussed in full below. See Votexchange2000 Questionnaire, at <http://www.votexchange2000.com/questionnaire.html> (last visited Feb. 8, 2001) (on file with the North Carolina Journal of Law & Technology).

⁴¹ Kumar, *supra* note 20.

⁴² Associated Press, *Nader Traders’ Shut Down Their Web Site Under Pressure*, WASHINGTON TIMES, Nov. 1, 2000, at A12.

⁴³ Cupaiuolo, *supra* note 20.

⁴⁴ *Id.*

“astonished by the power of the Internet to get an idea out like that.”⁴⁵

Not all shared Raskin’s enthusiasm, however. While critics considered the idea of vote swapping morally and ethically questionable,⁴⁶ no less an authority than the Nader campaign denounced the practice on purely political grounds. Stacy Malkan, a Nader campaign representative, summed up the Naderites’ view: “Our position is a vote for the lesser of two evils is still a vote for evil. We are asking people to vote their conscience.”⁴⁷

Like most items on the campaign trail seem to do, vote swapping even found its way into a Washington scandal. Fred Turner, legislative director for Rep. Alcee Hastings (D-FL), used his official government e-mail address to swap his vote at *Voteexchange.com*.⁴⁸ House rules prohibit the use of congressional resources for campaign purposes; Turner later admitted that he “shouldn’t have done it.”⁴⁹

Vote swapping came under increasing legal scrutiny. Justice Department officials found that none of the sites violated federal law on the basis that vote swappers exchanged nothing of monetary value.⁵⁰ In a November 2 press conference, Attorney General Janet Reno stated that she “would urge caution” in

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Wendy Melillo, *A New Strategy: Vote Swapping*, ADWEEK EASTERN EDITION, Oct. 30, 2000, at 4.

⁴⁸ See Associated Press, *supra* note 42, at A12.

⁴⁹ *Id.*

⁵⁰ See Jon Matthews, *Internet Vote Swapping Leaves Officials in Quagmire*, Scripps Howard News Service, Oct. 30, 2000, available at LEXIS, News Library, Scripps Howard News Service File; Cupaiuolo, *supra* note 20.

investigating vote-swapping sites.⁵¹ Ultimately, however, vote-swapping sites would soon meet a major challenge from a source closer to home: the states.

⁵¹ Attorney General Janet Reno, News Briefing (Nov. 2, 2000), *available at* LEXIS, News Library, FDCH Political Transcripts File. The Attorney General was somewhat noncommittal on the whole. The full exchange on vote swapping was as follows:

“QUESTION: Another election question, Ms. Reno: there’s been a lot of discussion about web sites that encourage people to trade their votes: greensforgore.com and Nadertraders and so forth. Has the Department looked into that question?”

“RENO: My understanding is that 42 U.S.C. § 1973 prohibits offering or promising voters anything of value for voting in elections where federal candidates are on the ballot. This statute also forbids selling votes in a federal election and prohibits voters from – 18 U.S.C. § 597 prohibits voters from soliciting expenditures in consideration of their votes.

“And finally, U.S.C. § 2(a) makes it – 18 U.S.C. § 2(a) makes it unlawful for any person to aid and abet another to commit a crime.

“These are criminal statutes that carry penalties. Any voter who solicits or accepts payment for his or her vote over the Internet and Internet web sites that knowingly assist voters to do so would arguably violate the law.

“QUESTION: But that is just for selling something of value or soliciting or whatever. If you offer to trade a vote for a vote, would that be covered?”

“RENO: I think I’d have to look at just what the “vote for vote” was, but I would urge caution.

“QUESTION: I’m a little confused. If Beverly and I say – well, if Beverly says, “I support candidate A. If you vote for candidate A, then I’ll vote for candidate C.” Is that illegal? I mean, that’s essentially what’s going on here. There’s no real exchange of value. It’s just people trying to influence somebody else on how to vote.

“RENO: I think we’d exercise caution.” *Id.*

States Stop the Swaps: California Takes On Voteswap2000.com

On October 30, California became the first state to take action against Internet vote swapping. Secretary of State Bill Jones informed Voteswap2000.com operators Jim Cody and Ted Johnson in a letter that their site violated the state's Elections and Penal Codes.⁵² In response to the threat of prosecution, Voteswap2000.com immediately ceased operations.⁵³ Both Voteexchange.org and Votexchange2000.com, though not cited in Jones's letter, shut down voluntarily within the next day.⁵⁴

Those sites that chose to remain open took steps to avoid Voteswap2000.com's fate. Most added disclaimers discouraging users from swapping votes without checking their respective state laws.⁵⁵ PresidentGore.com barred California users from

⁵² Farhad Manjoo, *Vote Swapper Swatted Down*, WIRED NEWS, Oct. 31, 2000, at <http://www.wired.com/news/politics/0,1283,39892,00.html>. The California controversy is discussed more fully below.

⁵³ *Id.*

⁵⁴ Larry Margasak, *3 Gore-Nader Vote Trading Sites Shut Down*, DAYTON DAILY NEWS, Nov. 1, 2000, at 5A.

⁵⁵ Voter Match, the German site affiliated with Tradevotes.com, offered a typical warning: "Some States have warned that participation in the exchange of votes with or by anyone in those states constitutes illegal behavior. The administrators are not aware of the particular language or intention of these laws, and also are not aware of which states or what laws may or may not pertain to the individuals using this site, so it is recommended that everyone planning to register with this site check his or her local state laws to make sure that he or she may legally participate. This site's software is not designed to accurately interpret local state laws of states within the U.S. This is the responsibility of the participating individuals alone. The administrators do not encourage anyone to commit any act against their better judgment." Voter Match Policies and Notices, at <http://endymion.ling.uni-potsdam.de/votermatch/policies.html> (last visited Feb. 9, 2001) (on file with the North Carolina Journal of Law & Technology).

participating in its vote-swapping program. The site advised users, "Please note, we've disallowed voters in California from signing up. There are potential legal problems in that state and we don't want the trouble. If you don't like this policy, please email (sic) your attorney general."⁵⁶

After California targeted Voteswap2000.com, other states investigated the various vote-swapping sites for potential illegalities. Officials in at least three states (Arizona,⁵⁷ Minnesota,⁵⁸ and New York⁵⁹) declared that some or all of the sites violated state law. Maine⁶⁰ and Nebraska⁶¹ officials decided that the sites did not violate state law. Oregon first found Nader Trader to be illegal in that state,⁶² then reversed its position the next day.⁶³ At least four additional states took some action to determine exactly what their statutes would and would not allow.⁶⁴

⁵⁶ Welcome to PresidentGore.com, at <http://presidentgore.com/> (last visited Feb. 9, 2001) (on file with the North Carolina Journal of Law & Technology).

⁵⁷ See Margie Wylie, *Vote Trading Sites Prove Popular, Despite Brewing Ethical and Legal Concerns*, Newhouse News Service, Oct. 31, 2000, available at LEXIS, News Library, Newhouse News Service File.

⁵⁸ Leslie Brooks Suzukamo, *Gore and Nader Voters Swap Votes Online*, SAINT PAUL (Minn.) PIONEER PRESS, Nov. 1, 2000, available at LEXIS, News Library, Saint Paul Pioneer Press File.

⁵⁹ Chen and Woody, *supra* note 34.

⁶⁰ David Connerty-Marin, *Nader-Gore Vote Swapping Is Deemed Legal in Maine*, PORTLAND (Me.) PRESS HERALD, Nov. 1, 2000, at 1A.

⁶¹ See Associated Press, *supra* note 42, at A12.

⁶² Jeff Mapes, James Mayer and Steven Carter, *Vice Presidential Candidates Will Visit Oregon Once More*, THE OREGONIAN, Nov. 3, 2000, at B7.

⁶³ Jeff Mapes, *Bradbury Says Vote Trading Sites OK*, THE OREGONIAN, Nov. 4, 2000, at B1.

⁶⁴ See Wylie, *supra* note 57 (Wisconsin); Associated Press, *supra* note 42, at A12 (Kansas, Missouri); Eve Modzelewski, *North Siders to Send 25 Nader Votes to Indiana for Gore Votes*, PITTSBURGH POST-GAZETTE, Nov. 3, 2000, at A-10 (Pennsylvania).

On November 2, the ACLU of Southern California filed a motion on behalf of six plaintiffs, including Votexchange2000.com's Alan Porter, for a temporary restraining order against Jones for "threatening criminal prosecution" against Voteswap2000.com.⁶⁵ U.S. Central District Judge Robert Kelleher denied the motion with a one-sentence order.⁶⁶

On November 27, Porter and his five co-plaintiffs filed a federal lawsuit against Jones to clarify the legal issues surrounding vote swapping in California in time for future elections.⁶⁷ Judge Kelleher ultimately granted the Secretary of State's motions to dismiss the plaintiffs' claim for damages and to stay the claims for declaratory and injunctive relief. As of this writing, the plaintiffs intend to appeal the orders to the Ninth Circuit Court of Appeals.⁶⁸

Aftermath

The controversy surrounding the legality of vote-swapping sites did little to chill their emerging popularity. Following the demise of Voteswap2000.com, yet another site

⁶⁵ Robert MacMillan, *Vote Buying, Swapping Sites Spawn New Lawsuits*, NEWSBYTES, Nov. 2, 2000, at <http://www.newsbytes.com/news/00/157612.html>.

⁶⁶ Scott Harris, *In Vote-Swap Fight, ACLU Loses First Round*, INFO WORLD DAILY NEWS, Nov. 7, 2000, at

<http://www.infoworld.com/articles/hn/xml/00/11/07/001107hmvotexchange.xml>.

⁶⁷ *ACLU Defends Vote-Swapping Sites*, NATIONAL JOURNAL'S TECHNOLOGY DAILY, Nov. 28, 2000, AM Edition, available at LEXIS, News Library, National Journal's Technology Daily File.

⁶⁸ E-mail from Peter Eliasberg, Staff Attorney, ACLU of Southern California, to author (Mar. 19, 2001, 14:10:17 PST) (on file with the North Carolina Journal of Law & Technology).

(WinWin Campaign⁶⁹) launched, with a hybrid pledge/advice model that its operators claimed met legal standards in all jurisdictions.⁷⁰

The entrance of WinWin Campaign into the fray brought the total number of sites devoted to vote swapping to at least sixteen: Gore-Nader Vote Trader,⁷¹ Greens for Gore,⁷² NaderGore.org, Nader Trader, Nader's Traders.com,⁷³ PresidentGore.com, SwapVote.com, Tradevotes.com, Voteexchange.com, Voteexchange.org, Votexchange2000.com, Voteswap.com,⁷⁴ Voteswap2000.com, Votetrader.org, Winchell's Nader Trader, and WinWin Campaign. In addition, cyber-entrepreneurs snapped up a number of related

⁶⁹ WinWin Campaign is available online at www.winwincampaign.org and www.winwincampaign.com.

⁷⁰ See WinWin Campaign: Information, *at*

<http://www.winwincampaign.org/legal.html> (last visited Feb. 8, 2001) (on file with the North Carolina Journal of Law & Technology). See also Russell Garland, *Woman Aims to Help Gore, Nader*, PROVIDENCE JOURNAL, Nov. 5, 2000, at A18.

⁷¹ Gore-Nader Vote Trader was available at nadergore.com.

⁷² Greens for Gore was available at greensforgore.com. Rather than operating a vote-swapping system per se, the site operated as a type of news outlet for vote-swapping strategy and philosophy. Greens for Gore, *at* <http://greensforgore.com/archive/index.html> (last visited Feb. 9, 2001) (on file with the North Carolina Journal of Law & Technology).

⁷³ Nader's Traders.com was available at www.naderstraders.com. At some point, the site shut down operations and posted the simple message, "please visit www.voteexchange.org." Nader's Traders Home Page, *at* <http://rcr.csun.edu/kevinm/naderstraders.htm> (last visited Feb. 8, 2001) (on file with the North Carolina Journal of Law & Technology).

⁷⁴ Voteswap.com was available at www.voteswap.com. Like Greens for Gore, the site had no mechanism for arranging trades but maintained a number of links to other swapping-related sites and media coverage. Voteswap.com, *at* <http://www.voteswap.com/> (last visited Feb. 9, 2001) (on file with the North Carolina Journal of Law & Technology).

domain names, such as votexchange.com, votexchange.net, nadertrader.net and naderstraders.org.⁷⁵

In an election in which several states' close results baffled voting experts for first hours and then days, the number of swapped votes pledged nationwide numbered in the thousands. According to Votetrader.org, the only site to attempt a comprehensive post-election count of votes swapped over the Internet, eleven of the largest sites combined for an estimated 16,024 swaps among 36,025 participants, with at least 2.8 million total hits.⁷⁶ In the hotly contested state of Florida alone, Votetrader.org estimated that 1412 would-be Nader voters made online pledges to vote for Gore instead. Of sites surveyed, latecomer WinWin Campaign logged the most hits (1,338,259) and participants (10,251). Other sites reporting at least 5000 vote-swapping participants were Votexchange.com (9698), Winchell's Nader Trader (6325) and Voteswap2000.com (5000).

⁷⁵ See <http://votexchange.com/> (last visited Feb. 8, 2001) (on file with the North Carolina Journal of Law & Technology); <http://votexchange.net/> (last visited Feb. 28, 2001) (on file with the North Carolina Journal of Law & Technology); <http://www.nadertrader.net/> (last visited Feb. 8, 2001) (on file with the North Carolina Journal of Law & Technology); <http://www.naderstraders.org/> (last visited Feb. 9, 2001) (on file with the North Carolina Journal of Law & Technology).

⁷⁶ All statistics in this paragraph were posted on Election 2000 Vote Swapping Results, <http://votetrader.org/results/> (last visited Feb. 9, 2001) (on file with the North Carolina Journal of Law & Technology). These statistics include tallies from 11 of the aforementioned 16 sites with the following exceptions: Nader's Traders.com (no reason given for omission, but likely resulting from early shutdown); Votetrader.org and Greens for Gore (no swapping mechanism); SwapVote.com and PresidentGore.com (failed to provide result tallies). *Id.* Statistics were obtained "either from published statistics at each site or directly from the sites' administrators." *Id.* Some figures were estimates "obtained by extrapolation using average traffic and registration patterns across all sites." *Id.*

Given the impressive success of these sites and the unsettled state of the law, future attempts to facilitate online vote swapping appear inevitable. While both Gore and Nader failed to reach the goals the sites were designed to help them achieve, the interest generated by the sites makes it likely that "strategic voting" will remain a part of the electoral landscape. Votexchange2000.com operator Alan Porter is already looking ahead to the next presidential campaign, having registered the domain name Votexchange2004.com.⁷⁷ The decision in the pending California case (*Porter v. Jones*) no doubt will have an important effect on the future of online vote swapping.

State Election Statutes: Keeping Up With the Joneses or Hands Off?

Votexchange2000.com Fights Back: Porter v. Jones

The *Porter* case arose from the events surrounding California Secretary of State Bill Jones's letter to Voteswap2000.com operators Jim Cody and Ted Johnson.⁷⁸ In that letter, the Secretary of State wrote that the site "specifically offers to broker the exchange of votes throughout the United States of America. This activity is a corruption of the voting

⁷⁷ Press Release, ACLU of Southern California, ACLU Amends Voter-Matching Web-Site Lawsuit (Nov. 27, 2000), at <http://www.aclu-sc.org/news/releases/20001127voteamendedcomplaint.shtml> (last visited Feb. 8, 2001) (on file with the North Carolina Journal of Law & Technology).

⁷⁸ See Manjoo, *supra* note 52.

process in violation of Elections Code sections 18521 and 18522 as well as Penal Code section 182, criminal conspiracy.⁷⁹

California Elections Code § 18521 reads:

§ 18521. Receipt of consideration for specified vote.

A person shall not directly or through any other person receive, agree, or contract for, before, during, or after an election, any money, gift, loan, or other valuable consideration, office, place, or employment 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.
- (b) Remained away from the polls.
- (c) Refrained or agreed to refrain from voting.
- (d) Induced any other person to:
 - (1) Remain away from the polls.
 - (2) Refrain from voting.
 - (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.⁸⁰

California Elections Code § 18522 reads:

⁷⁹ *Id.*

⁸⁰ CAL. ELEC. CODE § 18521 (2001).

§ 18522. Giving of consideration to influence vote.

Neither a person nor a controlled committee shall directly or through any other person or controlled committee pay, lend, or contribute, or offer or promise to pay, lend, or contribute, any money or other valuable consideration to or for any voter or to or for any other person to:

- (a) Induce any voter to:
 - (1) Refrain from voting at any election.
 - (2) Vote or refrain from voting at an election for any particular person or measure.
 - (3) Remain away from the polls at an election.

- (b) Reward any voter for having:
 - (1) Refrained from voting.
 - (2) Voted for any particular person or measure.
 - (3) Refrained from voting for any particular person or measure.
 - (4) Remained away from the polls at an election.

Any person or candidate violating this section is punishable by imprisonment in the state prison for 16 months or two or three years.⁸¹

The Secretary of State's office clarified its view in response to media inquiries. The letter specifically cited Voteswap2000.com for jurisdictional reasons.⁸² (The site operated from Los Angeles.⁸³) Beth Miller, a spokeswoman for the Secretary of State, indicated that, in her office's view, "swapping votes and selling votes is exactly the same thing."⁸⁴ William Wood, chief counsel for the Secretary of State, said, "In this case, the valuable consideration would be the vote itself."⁸⁵

Although Voteswap2000.com shut down without taking further action upon receiving the letter, another site operator, Votexchange2000.com's Porter, initiated the suit against Jones. Porter's co-plaintiffs in the case included Patrick Kerr, a California voter, and Steven Lewis, a Massachusetts voter, each of whom claimed the Secretary of State's threat prevented them from exercising political speech and associational rights by vote swapping because of their fear of prosecution; Scott Tenley and William Davis, California voters who believed the Secretary of State's actions chilled their ability to communicate with others in such a way; and the Democratic Law Students Association at UCLA, who as a group claimed the same injury.⁸⁶

⁸¹ CAL. ELEC. CODE § 18522 (2001).

⁸² Manjoo, *supra* note 52.

⁸³ *Id.*

⁸⁴ Wylie, *supra* note 57.

⁸⁵ Harris, *supra* note 32.

⁸⁶ Complaint for Declaratory and Injunctive Relief, *Porter v. Jones* (No. 00-11700 RJK (Mcc)), available at <http://www.aclu-sc.org/docs/complaintporter.pdf> (last

In their motion for a temporary restraining order, the plaintiffs argued that Votexchange2000.com “is not and could not be a mechanism for forming binding agreements to vote for particular candidates. . . . Any even putative arrangement reached is wholly unenforceable.”⁸⁷ Because actual vote swapping is impossible *per se*, the argument continued, “the website is about pure political speech and association.”⁸⁸ Thus, the “speech” falls under the category of First Amendment protection.

The plaintiffs responded to Jones’s interpretation of §§ 18521 and 18522 that “no money is changing hands, nor is an unenforceable pledge to vote for a specific candidate a commodity of value.”⁸⁹ Paradoxically, the plaintiffs took the position that the same speech that could not be considered “a commodity of value” was evidently valuable enough to be “entitled to core First Amendment protection.”⁹⁰

Keeping Up With the Joneses: Arizona, Minnesota and New York

While California targeted primarily Voteswap2000.com, at least three other states also found violations of their election statutes inherent in certain vote-swapping sites.

visited Feb. 8, 2001) (on file with the North Carolina Journal of Law & Technology).

⁸⁷ Memorandum of Points and Authorities in Support of Plaintiffs’ Application for a Temporary Restraining Order, at 1, *Porter v. Jones* (No. 00-11700 RJK (Mx)), available at <http://www.aclu-sc.org/docs/briefporter.pdf> (last visited Feb. 8, 2001) (on file with the North Carolina Journal of Law & Technology).

⁸⁸ *Id.*

⁸⁹ *Id.* at 2.

⁹⁰ *Id.*

Arizona state election director Jessica Funkhouse concluded that vote-swapping sites violated state law.⁹¹ Like California Secretary of State Jones, Funkhouse considered the idea that the promise of another vote is an item “of value” central to her interpretation.⁹² The applicable statute, A.R.S. § 16-1014, much like Cal. Elec. Code §§ 18521 and 18522, provides in relevant part:

It is unlawful for a person, directly or indirectly, by himself or through any other person knowingly: 1. To treat, give, pay, loan, contribute, offer or promise money or other valuable consideration, . . . to or for a voter, or to or for any other person, to induce the voter to vote or refrain from voting at an election for any particular person or measure.”⁹³

Although Funkhouse determined that vote swapping fell within this category, she evidently took no action against any particular sites because she was not “aware of any vote-swapping sites operating among Arizona citizens.”⁹⁴

In Minnesota, Secretary of State Mary Kiffmeyer interpreted state law to mean that all sites offering vote swapping—including the purportedly legal-everywhere WinWin Campaign—violated fair-campaign statutes.⁹⁵ According to Kiffmeyer, the operation of such sites “is selling

⁹¹ See Wylie, *supra* note 57.

⁹² *Id.*

⁹³ ARIZ. REV. STAT. § 16-1014 (2000).

⁹⁴ Wylie, *supra* note 57.

⁹⁵ See Suzukamo, *supra* note 58.

the electoral process. This is not the right use of the Internet or of your vote.”⁹⁶

Minnesota Statute § 211B.13 sets out specific parameters such as “any money, food, liquor, clothing, entertainment, or other thing of monetary value” that may not be used to induce voters to vote a certain way.⁹⁷ Like the Arizona statute, however, the Minnesota statute includes the open-ended term “valuable consideration” on the list of forbidden inducements.⁹⁸

Unlike Arizona, many election trackers (and vote swapping sites) considered Minnesota to be a swing state. On November 1, Kiffmeyer e-mailed the operators of Voteswap2000.com—which by this point had already closed as a result of prodding by California’s Secretary of State—and asked them to “cease and desist” vote swapping activities in the State of Minnesota.”⁹⁹ Taking a strong stance, Kiffmeyer asserted, “Vote swapping is the ultimate in voter fraud. It proposes to change the outcome of the election through an underhanded scheme. . . . Vote swapping cannot be permitted and will not be allowed in the State of Minnesota.”¹⁰⁰

New York officials also sought to shut out vote-swapping sites from operating in their state.¹⁰¹ The State Board of

⁹⁶ *Id.*

⁹⁷ MINN. STAT. § 211B.13 (2000).

⁹⁸ *Id.*

⁹⁹ Press Release, Minnesota Secretary of State, Secretary of State Mary Kiffmeyer Asks Vote-Swap Web Sites to “Cease and Desist” in MN (Nov. 1, 2000), at <http://www.sos.state.mn.us/office/voteswap.htm> (last visited Mar. 1, 2001) (on file with the North Carolina Journal of Law & Technology).

¹⁰⁰ *Id.*

¹⁰¹ Chen and Woody, *supra* note 34. This article erroneously reports that “a Seattle-based Web site, www.nadertrader.com, received a letter from the New York State Board of Elections warning the site to shut down because it violated New York state law.” *Id.* In fact, neither www.nadertrader.com (Nader Trader) nor the Seattle-

Elections interpreted Art. II, § 3 of the New York Constitution to ban vote swapping since each party offers an inducement, namely to enhance the parties' shared goal of furthering Nader's effort to receive federal money.¹⁰² Art. II, § 3 reads in relevant part:

No person who shall receive, accept, or offer to receive, or pay, offer or promise to pay, contribute, offer or promise to contribute to another, to be paid or used, any money or other valuable thing as a compensation or reward for the giving or withholding a vote at an election, or who shall make any promise to influence the giving or withholding any such vote, or who shall make or become directly or indirectly interested in any bet or wager depending upon the result of any election, shall vote at such election . . .¹⁰³

Because the interstate nature of the Internet makes blocking New York users practically impossible, asking violators to shut down their sites "was the only option available."¹⁰⁴

N.Y. Elec. Law § 17-142 takes a different approach from the Arizona and Minnesota statutes. Like those states, New

based Winchell's Nader Trader received such a letter. The State Board instead targeted two different sites: Gore-Nader Vote Trader and NaderGore.org. The State Board sent cease and desist letters to the sites and their Internet service providers. E-mail from William McCann, Attorney, New York State Board of Elections, to author (Mar. 20, 2001, 18:06:13 EST) (on file with the North Carolina Journal of Law & Technology).

¹⁰² *Id.*

¹⁰³ N.Y. C.L.S. CONST. Art. II, § 3 (1999).

¹⁰⁴ Chen and Woody, *supra* note 34.

York uses the term “valuable consideration.” However, the statute does not limit the analysis there:

Except as allowed by law, any person who directly or indirectly, by himself or through any other person: . . .

3. Gives, offers or promises any office, place, employment or *valuable thing* as an inducement for any voter or other person to procure or aid in procuring either a large or a small vote, plurality or majority at any election district or other political division of the state, for a candidate or candidates to be voted for at an election; or to cause a larger or smaller vote, plurality or majority to be cast or given for any candidate or candidates in one such district or political division than in another; . . . is guilty of a felony.¹⁰⁵ (Emphasis added.)

In New York, therefore, the inclusion of the term “valuable thing” would seem to allow an even broader range of interpretation. The presence of the term could be construed—and was by the State Board of Elections—to include even items with no monetary value such as votes. It would appear that the promise itself—the shared goal of assisting Nader in gaining five percent of the national vote while Gore wins enough states to win the election—is itself the impermissible “valuable thing,” since no money changes hands between vote swappers.

¹⁰⁵ N.Y. ELEC. LAW § 17-142 (Consol. 2001).

Hands Off: Maine, Nebraska and Oregon

Not all states rushed to shut down vote-swapping sites. Maine's statutes do not ban vote swapping outright, nor do they include the catchall term "valuable consideration." In stark contrast to the opinions of his peers in California and Minnesota, Secretary of State Dan Gwadosky called vote swapping "a provocative way to use a new medium."¹⁰⁶

The straightforward language of Maine's anti-inducement statute certainly simplified Gwadosky's job of interpretation. 17-A M.R.S. § 602 reads in relevant part:

§ 602. Bribery in official and political matters

1. A person is guilty of bribery in official and political matters if:

A. He promises, offers, or gives any pecuniary benefit to another with the intention of influencing the other's action, decision, opinion, recommendation, vote, nomination or other exercise of discretion as a public servant, party official or voter; . . .

2. As used in this section and other sections of this chapter, the following definitions apply. . . .

¹⁰⁶ See Connerty-Marín, *supra* note 60, at 1A.

C. "Pecuniary benefit" means any advantage in the form of money, property, commercial interest or anything else, the primary significance of which is economic gain; it does not include economic advantage applicable to the public generally, such as tax reduction or increased prosperity generally. "Pecuniary benefit" does not include the following:

- (1) A meal, if the meal is provided by industry or special interest organizations as part of an informational program presented to a group of public servants;
 - (2) A meal, if the meal is a prayer breakfast or a meal served during a meeting to establish a prayer breakfast; or
 - (3) A subscription to a newspaper, news magazine or other news publication.
3. Bribing in official and political matters is a Class C crime.¹⁰⁷

Since the illegal inducement would appear to require as its "primary significance" economic gain, the promise of one's vote clearly lies outside the intent of the statute.

Like the New York statute, Nebraska's election bribery statute makes it illegal for a voter to receive "any valuable thing

¹⁰⁷ ME. REV. STAT. ANN. tit. 17-A, § 602 (West 2000).

as a consideration for his or her vote for any person to be voted for at any election.”¹⁰⁸ In addition, “any person who, by bribery, attempts to influence any voter of this state in voting, uses any threat to procure any voter to vote contrary to the inclination of such voter, or deters any voter from voting shall be guilty of a Class II misdemeanor.”¹⁰⁹

Unlike their counterparts in New York, however, Nebraska officials found the sites not to violate state law.¹¹⁰ Secretary of State Scott Moore saw no problem with vote swapping, saying, “Obviously, if money was changing hands or threats or intimidation was occurring, then I would have a problem. . . . I’m not saying it’s right, I’m just not saying there is any illegal activity in this one.”¹¹¹

Oregon Secretary of State Bill Bradbury found most vote-swapping models to be illegal in that state.¹¹² Bradbury said, “Entering into a contract to trade your vote, even without the exchange of cash, violates Oregon’s undue influence statute.”¹¹³

Oregon’s Rev. Stat. § 260.665 describes undue influence in the election context to mean “force, violence, restraint or the threat of it, inflicting injury, damage, harm, loss of employment or other loss or the threat of it, fraud or giving or promising to give money, employment or other thing of value.”¹¹⁴

¹⁰⁸ NEB. REV. STAT. § 32-1536 (2000).

¹⁰⁹ *Id.*

¹¹⁰ Associated Press, *supra* note 42, at A12.

¹¹¹ *Id.*

¹¹² Mapes, Mayer and Carter, *supra* note 62, at B7.

¹¹³ *Id.*

¹¹⁴ OR. REV. STAT. § 260.665 (1999).

Bradbury reversed his position the next day with respect to Nader Trader.¹¹⁵ The site, which, unlike many, offered no direct mechanism for brokering vote swaps, did not actually offer a “thing of value” under the meaning of the Oregon statute. Paddy McGuire, an aide to Bradbury, said that the reversal came after the Secretary of State’s office realized it had “misinterpreted” the way the site operated.¹¹⁶

Unresolved Issues and Possible Resolutions

Does the Model Matter?

Although more than a dozen sites offered advice and communication about vote swapping in some form, only three major models—the encouragement model, the bulletin board model, and the automatic brokering model—emerged before the states cracked down on potential voter fraud violations. (A fourth, in the form of WinWin Campaign, emerged after the automatic brokering model failed in several states. It combined the state-specific advice of the automatic brokering model with the hands-off bulletin board user-to-user communication of the bulletin board model.¹¹⁷)

The model that caused the least legal trouble for its operators was the “encouragement model.” These sites, most notably Nader Trader and Greens for Gore, offered little

¹¹⁵ See Mapes, *supra* note 63, at B1.

¹¹⁶ *Id.*

¹¹⁷ See WinWin Campaign: Strategic Voting, at <http://www.winwincampaign.org/strategy.jsp> (last visited Feb. 8, 2001) (on file with the North Carolina Journal of Law & Technology).

practical assistance in actually linking voters from separate states who did not know each other previously. Instead, these sites generated interest in the vote-swapping concept and provided outlets for the vote-swapping community.

A philosophical question remains about the legal effect of such "encouragement" of online vote swapping. While Nader Trader clearly did not hold a position as a vote broker, the site left little doubt that it favored the idea of vote swapping and gave advice to users about how to exchange votes (namely, to conspire with friends and family in other states).

While even the strictest state election fraud statutes have thus far been interpreted to permit this behavior, the invocation by California of its criminal conspiracy statute could present problems down the road for sites operating under the encouragement model. One could argue that the operator of the site that encourages such behavior and advises others of how to carry it out may be knowingly participating in a conspiracy to commit election fraud. The difficulty in proving intent on the vote-swappers' end of the alleged conspiracy inherently complicates such a case. Moreover, such a case would depend on the applicability of vote swapping generally to an individual state's voting fraud statute—an issue that has yet to be adjudicated.

The second model, the bulletin board model, raises more questions under state election statutes. These sites (such as Voteexchange.org), in addition to the advice and information of the encouragement model, provide a bulletin board on which users can negotiate trades publicly for themselves.

While the bulletin board model solves the practical problem of actually providing a mechanism under which users can make promises to trade votes with other users, it provides

clear evidence of users' willingness to swap votes—and creates an open record for prosecutors to use in proving intent. This model also moves one step closer to the actual brokering of votes by inviting voters to use their site for the purpose of trading votes.

This model likely remains as safe as the encouragement model to the extent that operators remain passive forum providers rather than active vote-swap facilitators. Again, one could make a case for conspiracy, although the fact that passive forum providers have no individualized, direct contact with users provides them a solid defense.

The automatic brokering model of vote swapping has generated the most legal controversy. Because each of the states that took action against site operators directly challenged this particular model, one must understand precisely how these sites operate differently from the other models.

Votexchange2000.com provided the following description of its operating model in its motion for temporary restraining order in *Porter v. Jones*. (Citations to other court documents have been omitted.)

The web site also contained an interactive questionnaire that would enable people to input a state, and a preferred political candidate. The site would inform the user of the likelihood of their preferred candidate's chances in that state, as well as the likelihood of either of the major party's candidates prevailing in that state.

Finally, the site enabled a person who was concerned that his or her vote for a minor party candidate such as Ralph Nader or Pat Buchanan would hurt his or her preferred major candidate's

chance of winning in that state the opportunity to obtain the e-mail address of someone in another state who shared both his or her desire to vote for a minor party candidate and about that vote's effect on his or her preferred choice between Al Gore and George W. Bush.

The web site made clear that if they were "matched" with a voter in another state, they could contact that voter to discuss their voting intention or to make pledges about their voting intention. ("As soon as we find someone whose voting preferences complements yours, we send each of you the others (sic) email (sic) address. From here on, it is up to both of you to contact each other and take it from there.") The web site did not provide the name or address of the other person. The web site did not purport to guarantee whether the other person was indeed a resident of another state, much less a registered voter. Finally, the site did not demand that the voter enter into a contract, or require the user to be bound by any discussion or agreement.¹¹⁸

Because these sites act as active facilitators of vote swapping, the operators run the risk of being co-venturers with

¹¹⁸ Memorandum of Points and Authorities in Support of Plaintiffs' Application for a Temporary Restraining Order, at 9, *Porter v. Jones* (No. 00-11700 RJK (Mxx)), available at <http://www.aclu-sc.org/docs/briefporter.pdf> (last visited Feb. 8, 2001) (on file with the North Carolina Journal of Law & Technology). See also *Votexchange2000 Questionnaire*, at <http://votexchange2000.com/questionnaire.html> (last visited Feb. 8, 2001) (on file with the North Carolina Journal of Law & Technology).

their users. As such, whether they fall within or outside the limits of state statutes depends heavily on the interpretation of state authorities. Even with the little precedent available for statutory interpretation on this issue, it is clear that the law is, if anything, unclear. Note the very different treatment of the term “valuable thing” by elections officials in New York (vote swapping illegal) and Nebraska (vote swapping legal).

Clearly, the site model made a difference in at least one state’s enforcement in 2000. New York officials decided to single out two sites (Gore-Nader Vote Trader and NaderGore.org) operating under the automatic brokering model for scrutiny.¹¹⁹ The State Board of Elections felt that cases against sites that did not automatically broker trades but merely operated as “free speech sites” should not be pursued for policy and/or legal reasons.¹²⁰

Your Vote Counts--But Is It “Valuable”?

As intriguing as any issue in vote swapping is the “speech” argument presented by the plaintiffs in *Porter v. Jones*. The argument casually concludes that another person’s vote does not constitute a “valuable consideration” under the meaning of the applicable California statutes. Instead, the vote

¹¹⁹ E-mail from William McCann, Attorney, New York State Board of Elections, to author, *supra* note 101 (on file with the North Carolina Journal of Law & Technology).

¹²⁰ *Id.*

falls under the umbrella of constitutionally-protected political speech along the lines of *Buckley v. Valeo*.¹²¹

This argument posits a readily apparent conceptual incongruity. How can a promise of such value to the Constitution and society as a whole possibly fail to meet the "valuable consideration" standard? While it might be technically possible to interpret "consideration" as requiring monetary value for the recipient (as specifically denominated in the Maine statute) while the speech itself qualifies as "valuable," such a construction still leaves ample room for criticism.

On a practical level, the fact that so many users eagerly swapped their votes clearly indicates that, unless all users on both sides of the promises considered their own votes worthless, the anticipation of the "traded" vote being cast on the recipient's behalf in another state creates something of value to the recipient. While this "valuable thing" probably does not have a monetary value, it does exist in the form of the desired result (Gore wins the Electoral College vote, Nader reaches five percent).

The Future: Back to the Swap Meet or Back to the Drawing Board?

The eventual disposition of *Porter v. Jones* will no doubt have a significant effect on the future of Internet vote swapping. No matter which side eventually emerges victorious, the litigation process itself certainly will reveal the extent to which a

¹²¹ See *Buckley v. Valeo*, 424 U.S. 1 (1976) (overturning various campaign finance restrictions as violating political-expression protections of U.S. CONST. amend. I).

Secretary of State will continue fighting issues of vote swapping on the state level.

As in many other emerging areas of Internet law, the decentralized state election statutes have proven to clash with the jurisdiction-busting nature of the Internet. Since vote swapping would only appear to work in federal races (the Electoral College system, in which the aggregate of individual state elections, rather than the popular vote, selects the president, provides the motivation for like-minded votes to be shifted from one place to another), federal election legislation clarifying what vote swappers can or cannot do would seem to be the logical way of resolving conflicts.

Barring national consensus, the combination of separate state rules and disparate, unpredictable interpretation of statutes not created to deal with the problems of cyberlaw will continue to bewilder site operators as they prepare for 2004. Assuming that the interest in third-party candidates will not falter from the precedents of the past three presidential elections, the stage is set for more battles between site operators and state election officials in years to come.