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The Other Election Controversy of Y2K: Core First Amendment Values and High-Tech Political Coalitions

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THE OTHER ELECTION CONTROVERSY OF Y2K: CORE FIRST AMENDMENT VALUES AND HIGH-TECH POLITICAL COALITIONS

MARC JOHN RANDAZZA, ESQ.*

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ABSTRACT

As the 2000 campaign reached its climax, some renegade supporters of Green Party candidate Ralph Nader countered critics' charges that they were "handing the election to Bush" by creating websites encouraging vote-swapping. The theory of this practice was: A Nader supporter in a hotly contested state would agree to vote for Al Gore if a Gore supporter in an uncontested state would vote for Ralph Nader. The object was to help deliver five percent of the popular vote to the Green Party (so that the Greens would receive federal matching funds for the 2004 presidential election) while simultaneously working to prevent a George W. Bush presidency.

With the election less than a week away, and the poll margins closer than any election in recent history, several state election officials acted to snuff out the online vote-swapping movement by threatening vote-swap site operators with fines and/or imprisonment. The chilling effect brought about by the letters from state regulators may have tipped the scales in the 2000 campaign, even though no one knew whether prohibiting vote-swapping was constitutional.

This study introduces the reader to the concept and practice of vote-swapping. It examines the chilling effect of the threats of prosecution issued during the 2000 election and these effects' possible electoral consequences. This study analyzes online vote-swapping under various state laws and state constitutions and extends the analysis to encompass federal election law and federal constitutional law. Finally, this study examines the ethics of vote-swapping and concludes that the practice is legal under most state election laws, protected under most state constitutions, protected by the federal Constitution, and an ethical use of personal voting power.

I. INTRODUCTION

A. *The Issue*

The 2000 presidential election will be remembered as one full of irregularities and controversy. In fact, the 2000 presidential election

produced approximately forty lawsuits during the Florida recount alone.¹ Before the election, multiple candidates filed lawsuits in order to gain full access to the political process. Ralph Nader,² Pat Buchanan,³ and John McCain⁴ all brought their campaigns into the courtroom in order to participate in American democracy.

The circumstances surrounding the 2000 Florida recount are unlikely to repeat. The Florida vote recount that never was, and the subsequent jurisprudential farce of *Bush v. Gore*,⁵ will remain in memory for many years, but their impact on future elections is likely to be purely mechanical.⁶ There was, however, a less-reported controversy during November of 2000 that is likely to re-emerge in the future: online vote-pairing.⁷ This was yet another attempt by individuals outside the traditional Democratic and Republican Party structure to gain access to the political process.

Online vote-pairing started when some members of the Texas Democratic Party, resigned to the fact that Texas was firmly in George W.

1. See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000). For information about other cases, see ROBERT CROWN LAW LIBRARY, STANFORD LAW SCHOOL, ELECTION 2000, at <http://election2000.stanford.edu/> (last visited July 7, 2003).

2. See *Nader v. Blackwell*, 230 F.3d 833 (6th Cir. 2000) (Nader seeking access to the ballot in Ohio); *Nader 2000 Primary Comm. v. Hazeltine*, 226 F.3d 979 (8th Cir. 2000) (Nader seeking access to the ballot in South Dakota); *Nader 2000 Primary Comm. v. Bartlett*, 230 F.3d 1353 (4th Cir. 2000) (unpublished table decision) (Nader seeking ballot access in North Carolina).

3. See *Becker v. Fed. Election Comm.*, 230 F.3d 381, 383 (1st Cir. 2000) (Buchanan's attempt to participate in presidential debates); *Buchanan v. FEC*, 112 F. Supp. 2d 58 (D.D.C. 2000) (same).

4. See *Molinari v. Powers*, 82 F. Supp. 2d 57 (E.D.N.Y. 2000) (John McCain challenging New York Republican party ballot access).

5. Whatever the motivation of the five justices who selected George W. Bush as president in 2000, it cannot be seriously asserted that it was grounded in proper jurisprudence. Even the majority, made up of justices who traditionally shunned equal protection analysis and embraced strong notions of federalism, but supported the converse logic in the 2000 election decision, knew that the logic in *Bush v. Gore* was so poorly crafted that no future courts should rely upon its analysis. See *Bush v. Gore*, 531 U.S. 98, 109 (2000) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities"). See also Laurence Tribe, *eroG .v hsuB and its Disguises, Freeing Bush v. Gore From its Hall of Mirrors*, 115 HARV. L. REV. 170 (2001); Nelson Lund, "Equal Protection My Ass!" *Bush v. Gore and Laurence Tribe's Hall of Mirrors*, 19 CONST. COMMENT 543 (2002); Laurence Tribe, *The Unbearable Wrongness of Bush v. Gore*, 19 CONST. COMMENT 571 (2002); Nelson Lund, *Carnival of Mirrors: Laurence Tribe's "Unbearable Wrongness,"* 19 CONST. COMM. 609 (2003).

6. See, e.g., Jeff Zeleny, Michael J. Berens, and Geoff Dougherty, *Ballots, Rules, Voter Error Led to 2000 Election Muddle, Review Shows*, CHI. TRIB., Nov. 12, 2001, available at <http://www.chicagotribune.com/news/specials/sns-ballots-tribune,0,2317084.story?coll=chi-newsspecials-hed> (last visited July 9, 2003) ("The most comprehensive study of the troubled presidential election in Florida shows the main culprits were simple and fixable: ballot design, inconsistent election rules and voter error.").

7. See, e.g., John Morris, Julie Carpenter, and Jodie Kelley, *Free Speech on the Internet*, in INTERNET LAW AND PRACTICE § 24-18, at 24-27 (2002).

Bush's column, proposed trading their votes with Nader supporters in swing states.⁸ As the 2000 campaign raged, many individuals opposed to the specter of a George W. Bush presidency lobbed charges at Green Party voters that their support would "hand Bush a victory."⁹ Presumably, these critics held the belief that a Nader supporter would rather see Gore in office than Bush.¹⁰

To counter these charges, some Nader-Gore supporters used the relatively new medium of the Internet to play an ancient political game.¹¹ They launched websites to encourage or facilitate *strategic voting*, which would take on the cyberspace moniker of "online vote-swapping."¹²

It is unfortunate that this phenomenon was so widely referred to as vote "swapping."¹³ Perhaps the term invoked images of Napster, the file-swapping service that was under siege during the 2000 campaign season.¹⁴ In fact, some commentators called online vote-swapping "electoral Napster."¹⁵

8. Molly Ivins, *Democratic Steak and Republican Pink Clouds*, CHATTANOOGA FREE PRESS, Aug. 22, 2000, at B6 [hereinafter *Democratic Steak*].

9. See, e.g., Michael Jonas, *Nader Has Stage to Himself*, BOSTON GLOBE, Oct. 1, 2000, City Weekly at 2; Jeff Mapes, *Nader-Gore Choice Disrupts Unity Among Leftist Activists*, PORTLAND OREGONIAN, Nov. 2, 2000, at A13; Lynn Sweet, *Looks Like a Photo Finish*, CHI. SUN-TIMES, Nov. 6, 2000, at 6.

10. The assumption that *all* Nader voters would have voted for Gore was false. Twenty-three percent of Nader supporters said that they would have voted for Bush had Nader not been running. See Peter Dizikes & David Ruppe, *Will Nader Fare Well? How Strong Will Green Party Candidate's Support be on Election Day?*, ABCNEWS.COM, Oct. 26, 2000, at http://abcnews.go.com/sections/politics/DailyNews/naderthreat_001026.html (last visited Jul. 7, 2003) [hereinafter Dizikes & Ruppe].

11. One author cites "theoretical interest in strategic voting" as far back as the Roman Empire. See Gary W. Cox, *Strategic Voting Equilibria Under the Single Nontransferable Vote*, 88 AM. POL. SCI. REV. 608, 608 (1994) [hereinafter Cox] (discussing theoretical interest in the practice dating back to Pliny the Younger). See also David P. Myatt, *Strategic Voting Under the Qualified Majority Rule*, at <http://www.nuff.ox.ac.uk/economics/papers/2000/w7/qualified.pdf> [hereinafter Myatt], citing ROBIN FARQUHARSON, *THEORY OF VOTING* (1969). More recent examples are the 1932 German election that led to the rise of Adolf Hitler and the U.S. presidential race in the same year that led to the election of Franklin D. Roosevelt. Paul Abramson et al., *Third-Party and Independent Candidates in American Politics: Wallace, Anderson, and Perot*, 110 POL. SCI. Q. 349, 354 (1995) [hereinafter Abramson et al.].

12. See, e.g., <http://www.voteswap2000.com> (last visited Dec. 7, 2000) (now defunct); <http://www.winwincampaign.org> (last visited Dec. 7, 2000) (now defunct); <http://www.voteexchange.com> (last visited Dec. 7, 2000) (now defunct); <http://www.nadertrader.org> (last visited Dec. 7, 2000) (now defunct); <http://www.voteswap.com> (last visited July 14, 2003) (no longer operates as a vote-pairing site but as a clearinghouse of information on the subject); <http://www.votetrader.org> (last visited July 25, 2003); <http://www.voteexchange2000.com> (last visited July 25, 2003).

13. See Jamin Raskin, *Nader's Traders: How to Save Al Gore's Bacon by Swapping Votes on the Internet*, SLATE, Oct. 24, 2000, at <http://slate.msn.com/Concept/00-10-24/Concept.asp> (last visited July 7, 2003) [hereinafter Raskin].

14. See *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

15. See, e.g., Andy Hofer, *Nader Traders: Electoral Napster!*, POLITICS ONLINE, at <http://www.politicsonline.com/pol2000/hotsite.asp?id=88> (last visited July 25, 2003).

Writing catchy headlines sometimes necessitates setting aside semantic accuracy, and no headline writer should be criticized for it. This study is more in-depth than a mere headline, and in order to accurately study this strategic voting behavior and attendant political assembly, it is necessary to remove the word “swap” and this word’s attendant baggage from the discussion. “Vote-swapping” is more accurately described as “online coalition building” or “online political assembly.” Nothing actually changed hands and was thus “swapped.” Jamin Raskin, a constitutional law professor at American University, who popularized the term “vote-swapping,” originally referred to the practice as “vote-pairing.”¹⁶ In this study, I revert to Raskin’s less catchy, but more accurate (and baggage-free) rough-draft term.

The online vote-pairing movement seemed to attract primarily Green/Democrat alliance voters.¹⁷ Nevertheless, this strategy could have been beneficial to, for example, Libertarians seeking to increase their party’s power by forming alliances with Republican voters. In fact, one site, Votexchange2000.com, allowed voters to first enter their state before entering their party affiliations.¹⁸ As discussed in Part V, criticism of the practice was almost completely the province of Republican secretaries of state, and praise of the practice was *almost* completely reserved to Democrats and Greens.¹⁹ Although hypothetical hindsight is blurry at best, perhaps if the practice stood to benefit Bush as much as it stood to benefit Gore, Republican election officials would have been less inclined to attempt to suppress the movement.

Building an online vote-pairing coalition is simple and entirely Internet-dependent. For example, in the 2000 election, a voter who wished to support Ralph Nader might have lived in a hotly contested “swing state”

16. Jamin Raskin, *Litigating The Presidency: The Election 2000 Decision and Its Ramifications for the Supreme Court: What’s Wrong with Bush v. Gore and Why We Need To Amend the Constitution To Ensure It Never Happens Again*, 61 MD. L. REV. 652, 699 n.246 (2002) [hereinafter Raskin, *Litigating*] (noting that Raskin originally called the practice vote-pairing).

17. See, e.g., David Foster, *Greens Face Voting Dilemma*, CNN.COM, at <http://www.cnn.com/2000/ALLPOLITICS/stories/11/03/greenparty.ap/> (last visited Mar. 10, 2004); Albert Eisele and Jeff Dufour, *Under the Dome*, THE HILL, Feb. 26, 2004, at http://www.hillnews.com/under_dome/022604.aspx (last visited Mar. 10, 2004); Christine Cupaiuolo, *When a Personal Vote Isn’t Personal*, at <http://www.poppolitics.com/articles/2000-11-02-nadergorelegal.shtml>; Scott Duke Harris, *Ballot Busters: The Archaic Mechanism Used to Elect U.S. Presidents Is Under Assault by People Who Meet on the Internet and Pledge to Swap Votes in Next Year’s Election*, L.A. TIMES MAGAZINE, Nov. 2, 2003, available at 2003 WL 2445497.

18. See <http://www.votexchange2000.com> (last visited July 25, 2003).

19. But see *Talk of the Nation, Interview with Ralph Nader* (NPR radio broadcast, Nov. 17, 2000), transcript available at 2000 WL 21459177 (Nader criticizing vote-pairing).

such as Florida.²⁰ Assuming that the Nader supporter, faced with Nader's inevitable defeat, would have preferred to see Al Gore elected over George Bush,²¹ the Nader supporter faced a quandary. Should he vote his conscience and actually contribute to his third choice at the expense of his second choice?²² One alternative was to pair himself with a Gore supporter in a relatively uncontested state such as Massachusetts with the help of an online vote-pairing site.²³ The Nader supporter in Florida and the Gore supporter in Massachusetts would both recognize that Gore would easily carry Massachusetts; accordingly, the two would agree that taking a vote from Gore in a Democratic stronghold would have no impact on Massachusetts' electoral votes. The Gore supporter in Massachusetts would agree to cast her vote for Ralph Nader, thereby giving the Greens one more vote toward the magic five percent they sought in order to receive federal matching election funds for the 2004 presidential election.²⁴ In exchange, the Nader supporter in Florida would cast a vote for Gore, giving Gore a much-needed vote in a hotly contested and ultimately pivotal state.²⁵ One email vote exchange was later regretted by one of the participants, who happened to use his U.S. government email address.²⁶ The exchange became a matter of public record when the *Washington Times* published the following text obtained from a vote-pairing participant:

Congratulations! You have been matched with Fred Turner from this state: VA. This person's first choice candidate is Al Gore, but he/she is planning on voting for your candidate, Ralph Nader,

20. See Michael Lind, *If a Swing State Cares, It's an Issue*, N.Y. TIMES, Oct. 2, 2000, at A27 [hereinafter Lind] (discussing the importance of "swing states" in American politics, and using Florida as an example).

21. See *supra* note 10.

22. The notion that a vote for Nader was a vote for Bush was not one hundred percent accurate. A vote for Nader would have kept a left-leaning vote from Gore, but did not actually place a vote in Bush's totals. Therefore it was a half vote at best.

23. See Lind, *supra* note 20, at A27 (discussing the importance of "swing states" in United States politics, noting that most of New England was uncontested).

24. See, e.g., Charles Pope, *Take a Stand, Nader Urges Seattle Crowd*, SEATTLE POST-INTELLIGENCER, Nov. 3, 2000, at A1 ("Nader's aim is to collect 5 percent of the vote nationally to establish the Green Party as a major political organization. 'It's time to take a stand' Nader said. 'We want to build a permanent new party of citizens who have been closed out by their own government.'").

25. See Scott Harris, *'Nader Traders' May Have Affected Outcome in Florida*, Nov. 17, 2000 [hereinafter Harris], at <http://www.cnn.com/2000/TECH/computing/11/17/nader.traders.help.gore.idg/index.html> (last visited July 7, 2003).

26. "Nader Traders" Shut Down Their Web Site Under Pressure, WASH. TIMES, Nov. 1, 2000, at A12. (Fred Turner, legislative director for Rep. Alcee L. Hastings used his government email address to participate and when questioned by the Associated Press, he said, "That was a mistake.").

trusting that you will in turn vote for Al Gore according to an honor system that we all support by registering at <http://VoteExchange.com>.²⁷

James Ridgeway introduced America to the concept of online vote-pairing in *The Village Voice* in September 2000.²⁸ Ridgeway reported that since the election promised to be so close, Nader supporters feared that their efforts could bring about a conservative victory.²⁹ Many believed that if Nader were not running, Gore would have been more securely in the lead in the late days of the campaign.³⁰ Concerned with spoiling Gore's chances in what was never more than a two-way race, after the Ridgeway article hit the stands, Nader supporters got to work.³¹ On October 1, 2000, Steve Yoder, a Washington, D.C. technical writer, launched Voteexchange.org.³²

By October 2, 2000 conservative voters were in on the act as well.³³ On that day a message board for FreeRepublic.com³⁴ encouraged of Republican, Libertarian, constitutional, and Reform party candidates to vote-swap with Bush voters in Massachusetts, New York, and Washington, D.C.³⁵ Nevertheless, the conservative vote-swappers did not gain the same momentum and media attention as the "Nader-traders."³⁶

Although there was some media and Internet discussion of the subject, the idea did not truly catch fire until American University constitutional law professor Jamin Raskin promoted the idea in the MSN online

27. *Id.*

28. Professor James Raskin of the American University College of Law is often credited with introducing the practice of vote-swapping, see Raskin, *Litigating*, *supra* note 16, at 699 n.246 ("[Vote-swapping] is a phenomenon I am familiar with because I introduced the idea of vote-trading, which I actually first called 'vote-pairing,' to America in *Slate Magazine* on October 24, 2000, several weeks before election day."). *But see* James Ridgeway, *Beatification of Ralph*, VILLAGE VOICE ONLINE, Sept. 27–Oct. 3, 2000 [hereinafter *Beatification*], available at <http://www.villagevoice.com/issues/0039/ridgeway3.php> (last visited July 25, 2003); *Democratic Steak*, *supra* note 8, at B6.

29. *Beatification*, *supra* note 28.

30. *See, e.g.*, Dizikes & Ruppe, *supra* note 10.

31. *See id.*

32. *See* David Brancaccio, *Marketplace: Internet Vote Broker Appears to Broaden the Playing Field For Voters in A Tight Presidential Race* (NPR Radio Broadcast, Nov. 1, 2000).

33. *See Tall Texan, Vote Swapping? Attn: Bush, Buchanon, Browne, Phillips Voters!*, Oct. 2, 2000, at <http://www.freerepublic.com/forum/a39d85fb603a8.htm> (last visited Jan. 17, 2004).

34. *See id.*

35. *See id.*

36. The practice was so heavily slanted toward Democrat/Green alliances that commentators referred to it as "Nader Trading." *See, e.g.*, *A Guide to Online Gore/Nader Vote-swapping*, at <http://www.voteswap.com> (last visited Jan. 17, 2004); Raskin, *supra* note 13; Lisa Napoli, *Trading Nader, Gore Votes*, MSNBC.COM, Oct. 31, 2000 [hereinafter Napoli], at <http://www.msnbc.com/news/482104.asp> (link now defunct, but site also cited at 34 LOY. L.A. L. REV. 1297, 1298 n.5).

magazine SLATE on October 24, 2000.³⁷ In his article, Raskin explained that the presidential race had narrowed enough that a strong showing by Ralph Nader in ten battleground states had the potential to give George W. Bush the 270 Electoral College votes he needed to win.³⁸ Upon publication of Raskin's article, hits to vote-pairing sites increased exponentially. Prior to the SLATE article, VoteExchange.org arranged 500 swaps in one week. After the Raskin article, VoteSwap2000 arranged 500 trades in 24 hours, and in its short life exchanged more than 5,000 votes.³⁹ Votetrader.org claimed that it arranged 15,000 vote exchanges in several battleground states.⁴⁰

With the election less than a week away, and the poll margins closer than any election in recent history,⁴¹ election officials in Oregon and California struck out against online vote-pairing.⁴² Officials in Florida, Arizona, Minnesota, and Wisconsin declared the practice illegal but did not act with the same zeal as their west-coast counterparts.⁴³

The California Secretary of State, Bill Jones (R) sent an email to Jim Cody, co-creator of VoteSwap2000,⁴⁴ threatening him with prosecution⁴⁵ under California's election code sections 18521⁴⁶ and 18522⁴⁷ as well as criminal conspiracy under Penal Code section 182.⁴⁸ Oregon Secretary of State Bill Bradbury (D) said online vote-pairing, "even without the exchange of money, violate[d] state election laws."⁴⁹ Bradbury sent desist

37. See Raskin, *supra* note 13.

38. See *id.*

39. Napoli, *supra* note 36.

40. Harris, *supra* note 25.

41. Rutherford B. Hayes won the 1876 presidential race by a single electoral vote. See Abramson et al., *supra* note 11. See also Bronislaus B. Kush, *Every Vote Counts in Fight for the White House*, WORCESTER TELEGRAM & GAZETTE, Nov. 3, 2000, at 2 ("The Kennedy/Nixon race of 1960 had a 118,574 popular vote margin, but was a clear electoral college victory for Kennedy. In 1880, James Garfield prevailed over Winfield S. Hancock by a mere 7,018 votes.").

42. See *infra* Part III.

43. See *infra* Part III.

44. <http://www.voteswap2000.com> (last visited Dec. 7, 2000) (now defunct).

45. See *infra* notes 211–12.

46. CAL. ELEC. CODE § 18521(a) (West 2000) ("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 . . . because he or any other person voted . . . agreed to vote, refrained from voting, or agreed to refrain from voting for any particular person or measure.").

47. CAL. ELEC. CODE § 18522(a)(2) (West 2000) ("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 or to or for any voter to or for any other person to . . . induce any voter to . . . vote or refrain from voting at an election for any particular person or measure.").

48. CAL. PENAL CODE § 182 (West 1999 & Supp. 2001) (criminal conspiracy).

49. *Oregon Warns Websites that Promote Vote Trading*, THE RECORD, Nov. 3, 2000, at A26 [hereinafter *Oregon Warns*].

letters to six vote-trading sites—all based outside Oregon—which stated that the sites would be subject to civil penalties in Oregon if they facilitated the trading of Oregonians' votes.⁵⁰ However, Bradbury, the only Democrat to take a swipe at vote-swappers quickly reversed himself.⁵¹

Prior to her involvement in the Florida recount debacle, Katherine Harris (R) declared vote-pairing “illegal.”⁵² Arizona's state election director publicly stated that vote-pairing violated state law.⁵³ Wisconsin officials personally met with one vote-pairing site operator.⁵⁴ Because the law Wisconsin officials relied upon contained penalties of a \$10,000 fine and three years in prison,⁵⁵ the website operator modified his website to include disclaimers which stated that the practice of vote-swapping is illegal; Wisconsin officials took no further action.⁵⁶ Minnesota's Secretary of State made her position clear when she stated, “Vote-swapping undercuts the fundamental tenets that hold our country together.”⁵⁷

On the other hand, Maine and Nebraska officials came to a different conclusion than those in Florida, Arizona, and Wisconsin. Maine Secretary of State Dan Gwadosky (D) said that online vote trading was “perfectly legal.”⁵⁸ In fact Gwadosky not only dispelled any notion of its illegality but also endorsed the practice. “It's a provocative way to use a new medium,” he said.⁵⁹ He continued to praise the practice as likely to increase voter turnout even in Maine, a state with historically one of the best turnout rates in the United States.⁶⁰

Nebraska Secretary of State Scott Moore (R) seemed to accept the legality of the practice. He stated, “Obviously, if money was changing hands or threats or intimidation was occurring, then I would have a

50. See Scott Harris, *ACLU Takes Up Vote-Swapping Fight*, THE INDUSTRY STANDARD, Nov. 2, 2000, at <http://www.thestandard.com/article/display/0,1151,19890,00.html> (now defunct) (on file with author).

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

52. Telephone Interview with Katherine Harris, Florida Secretary of State (Nov. 1, 2000).

53. *Websites Shut Selves Down*, ARIZ. REPUBLIC, Nov. 2, 2000, at A8 [hereinafter *Websites*]; Margie Wylie, *Nader Backers Elect to Trade Their Vote*, PLAIN DEALER, Nov. 1, 2000, at 2A [hereinafter Wylie].

54. Wylie, *supra* note 53, at 2A.

55. WISC. STAT. ANN. § 12.11 (West 2002).

56. Wylie, *supra* note 53, at 2A.

57. See Press Release, *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%2011-1-00.doc> (last visited July 7, 2003).

58. David Connerty-Marin, *Nader-Gore Vote-swapping is Deemed Legal in Maine*, PORTLAND PRESS HERALD, Nov. 1, 2000, at A1 [hereinafter Connerty-Marin].

59. *Id.*

60. *Id.*

problem.”⁶¹ Moore added, “I’m not saying it’s right, I’m just not saying there is any illegal activity in this one.”⁶²

B. Research Questions

If the First Amendment means anything, it means that Americans have the right to speak freely in a public forum on matters of political importance.⁶³ With the rise of the Internet as a powerful medium of mass communication and a new public forum, anyone with a dial-up account “can become a town crier with a voice that resonates farther than it could from any soapbox.”⁶⁴ The fact that the medium is new does not justify a change in our established core values regarding freedom of expression and association.⁶⁵ However, online vote-pairing needs to be studied in the context of how technology and law interact with strategic voting behavior. Accordingly, the following questions will be answered by this study:

What was the reaction of state election officials toward this behavior? How did different states confront the issue? Which state election officials acted within the confines of their proper authority, and which officials, if any, exceeded their mandate, or shirked their responsibility?

What was the reaction of the Federal Elections Commission toward online vote-pairing? Did this behavior run afoul of any federal laws?

What are the constitutional considerations of online vote-pairing? Does the federal Constitution demand that it be permitted, even in states which may properly suppress it under their state laws and constitution?

Finally, this study will address the ethics of online vote-pairing. If the practice is not prohibited, should it be?

This study explores one of the effects the Internet had, and will continue to have, on presidential politics. There have been studies on the effect of Internet communication on voting behavior but only by looking at the Internet as a more evolved medium of mass communication.⁶⁶

61. Andrew Cain, “Nader Traders” Shut Down Under Pressure, WASH. TIMES, Nov. 1, 2000, at A12.

62. *Id.*

63. See ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) [hereinafter MEIKLEJOHN]. See also Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 23 (1971) [hereinafter Bork] (“[E]ven without a first amendment . . . representative democracy . . . would be meaningless without freedom to discuss government and its policies. Freedom for political speech could and should be inferred even if there were no first amendment.”).

64. *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (striking down the Communications Decency Act and stating that restrictions on website content are afforded the same protection as traditional print).

65. See *id.*

66. Jeffrey H. Birnbaum, *Politicking on the Internet*, FORTUNE, Mar. 6, 2000 at 84; Torsten

Online vote-pairing takes the interaction of voting behavior and the Internet to a higher level, where political coalitions and movements are actually created in cyberspace. An assessment of the legal questions raised by vote-pairing facilitates understanding how this practice is, will, and should be governed. Evolution in Internet technology will likely move more traditional political activity into cyberspace. Therefore, a study of online vote-pairing is a study of the genesis of the next level of political action and activism in cyberspace.

C. Research Methodology

The majority of this study will rely on federal and state election codes, case law, attorney general opinions, and official statements. Oregon and California are the only states that took punitive action against online vote-pairing operations.⁶⁷ However, since Arizona, Florida, Maine, Minnesota, Wisconsin, and Nebraska officials weighed in on the issue with some degree of credibility, this study will include an analysis of the vote-pairing phenomena in the context of these states' laws and constitutions as well.

There were other states whose officials publicly voiced opposition to online vote-swapping. Kansas' Secretary of State Ron Thornburgh was quoted as saying, "I will do everything I can to vigorously prosecute vote-swapping."⁶⁸ However, Thornburgh admitted a lack of knowledge as to whether it was illegal.⁶⁹ Given that Thornburgh spoke with what some could characterize as questionable credibility, his comments will not warrant an exploration of Kansas law. Additionally, unnamed Missouri and Texas officials allegedly spoke against the practice but took no action and were not named in the news source that reported their comments.⁷⁰ Accordingly, although the article noting these comments has significant indicia of reliability, none of these states presents a novel enough legal issue to warrant analysis based on unnamed sources.⁷¹

Busse, *Global Politicking Hits Web*, COMPUTERWORLD, Aug. 12, 1996, at 12; Thomas J. Johnson, *Doing the Traditional Media Sidestep: Comparing the Effects of the Internet and Other Nontraditional Media with Traditional Media in the 1996 Presidential Campaign*, JOURNALISM AND MASS COMM. Q., Spring 1999, at 99; Catherine A. Steele et al., *The Impact of Traditional and Nontraditional Media Forms in the 1992 Presidential Election*, JOURNALISM AND MASS COMM. Q., Summer 1996, at 2; Noreen O'Leary, *Audio and Video Newscasts Proliferate on the Internet*, ADWEEK, Feb. 28, 2000, at 52.

67. See *infra* Part III.

68. *Another Lost Cause?*, TOPEKA CAPITAL-JOURNAL, Nov. 6, 2000, at A4.

69. See *id.*

70. See Lynda Gledhill, *California Shuts Down Vote-Trader Web Site*, SAN FRANCISCO CHRON., Oct. 31, 2000, at A3.

71. See *id.*

D. Part Outline

Part I contains the research questions, the literature review, and the research methodology.

Part II is divided into four sections: a study of strategic voting behavior; a study of political action in cyberspace before the 2000 presidential election; an introduction to the re-electoral college; and a study of the chilling effect.

Part III looks at online vote-pairing through the prism of state law. California, Oregon, Minnesota, Florida, Wisconsin, Maine, Nebraska, and Arizona are included due to the fact that these states acted, directly or indirectly, on the issue. Each state's election law is presented and studied, with attendant constitutional analysis where the state's jurisprudence deviates from, or offers more instruction than, federal constitutional jurisprudence.

Part IV analyzes federal law. The Federal Election Law—42 United States Code § 1973i(C)—begins Part IV, and federal constitutional concerns follow. I theorize that strict scrutiny is applicable to state action against online vote-pairing.⁷² Thereafter, the study works through each prong of the strict-scrutiny test.

Part V adds an ethical dimension to the study by looking at the practice of online vote-pairing beyond the question of whether it is legally *permissible* and answering the question whether it is *ethical*.

Part VI gives the reader the author's legal and ethical conclusions on the matter of online vote-pairing.

E. Literature Review

Soon after vote-pairing became a legal controversy, three commentators jumped into the fray with scholarly articles examining the legality of the practice.⁷³ To date, my research has identified six scholarly works that examine the issue of online vote-pairing in the 2000 presidential race. The author of this Article, an associate at Becker &

72. The lack of case law on this subject at the time of this writing requires a certain amount of theorizing.

73. Jesse Sisgold, Note: *Vote-Swapping Over the Internet: Free Speech or Voter Corruption?*, 24 HASTINGS COMM. & ENT. L.J. 149 (2001) [hereinafter Sisgold]; Brad Worley, Comment: *Nader's Traders v. State Regulators: Examining the Controversy Over Internet Vote-Swapping in the 2000 Presidential Election*, 2 N.C. J. L. & TECH. 32 (2001) [hereinafter Worley]; Marc J. Randazza, *The Constitutionality of Online Vote-Swapping*, 34 LOY. L.A. L. REV. 1297 (2001) [hereinafter Randazza II]; Marc J. Randazza, *Breaking Duverger's Law is not Illegal; Strategic Voting, the Internet and the 2000 Presidential Election*, UCLA J. L. & TECH. 6 (2001) [hereinafter Randazza I].

Poliakoff, wrote two of the six. An associate at Covington and Burling authored a newsletter article,⁷⁴ and an associate at Sidley & Austin authored a law review article.⁷⁵ Third-year law students at the University of North Carolina and the University of California, Hastings College of Law, wrote the remaining two law review articles as student notes.⁷⁶

My article in the *LOYOLA OF LOS ANGELES LAW REVIEW*⁷⁷ examines the online vote-pairing phenomenon in the context of other Internet-based political activity. The article examines the actions of state regulators in California and Oregon against a backdrop consisting of their respective state election laws,⁷⁸ state constitutions,⁷⁹ the federal election laws,⁸⁰ and finally the federal Constitution.⁸¹ After a discussion of the constitutionality of online vote-pairing, I concluded that the practice of online vote-pairing was permissible under both California and Oregon election law, protected by the California and Oregon Constitutions, and fully-protected under the federal Constitution.⁸² In the *LOYOLA OF LOS ANGELES LAW REVIEW*, I only studied California and Oregon.⁸³ Additionally, this article failed to dig into the politics behind or political implications of online vote-pairing. Finally, the question of whether the practice of online vote-pairing is ethical was beyond the scope of this first article.

Deborah Matties published a short piece about the vote-pairing controversy in the *COMMUNICATIONS LAWYER*, a newsletter.⁸⁴ In this piece, Matties reported on the issue of online vote-trading and foreshadowed a later appellate decision on the issue by questioning Judge Kelleher's decision⁸⁵ to reject the vote-pairing site operators' petition for an injunction against the California Secretary of State that would have prohibited the Secretary from threatening vote-pairing site operators.⁸⁶

74. Deborah Matties, *The First Amendment, the California Secretary of State, and Nader Trader Websites*, 18 *COMM. LAW.* 32 (2001).

75. John M. Rushing, *Vote-swapping and Free Speech: Voice, Politics, and Choice*, 7 *TEX. F. ON C.L. & C.R.* 73 (2002) [hereinafter Rushing].

76. Sisgold, *supra* note 73; Worley, *supra* note 73.

77. Randazza II, *supra* note 73.

78. *Id.* at 1312–23.

79. *Id.*

80. *Id.*

81. *Id.* at 1323–35.

82. *Id.* at 1312–35.

83. *Id.*

84. Deborah Matties, *The First Amendment, the California Secretary of State, and Nader Trader Websites*, 18 *COMM. LAW.* 32 (2001).

85. *Id.* at 33–34. Kelleher was the judge who decided *Porter v. Jones* (D. Cal. 2000) (No. 00-11700), the federal district court decision regarding online vote-pairing. His decision was later reversed by *Porter v. Jones*, 319 F.3d 483 (9th Cir. 2003).

86. *See infra* Part III for a full discussion of this issue.

Brad Worley's article, *Nader's Traders vs. State Regulators*⁸⁷ recognizes that the model of vote-pairing can affect its legality, and he categorizes the vote-pairing sites as falling into the "encouragement model," "bulletin board model," or "the automatic brokering model."⁸⁸

Worley calls sites that offer "little practical assistance" in facilitating a vote-pairing action, but merely opine on the subject, the "encouragement model."⁸⁹ Worley's "bulletin board model" describes chatboards designed to facilitate person-to-person contact among potential vote-swappers; however, these sites provide nothing more than an electronic bulletin board for one's contact information.⁹⁰ The "automatic brokering model" is the model that actually links users together to facilitate a private agreement to vote-swap⁹¹ and is the only model that constitutes online vote-pairing.

After describing his three models of online vote-pairing, Worley's legal analysis focuses on state election statutes and the concept of "valuable consideration."⁹² Worley's article rests on the premise that the issue of the legality of online vote-pairing will be resolved by (1) whether a vote is a thing of value;⁹³ and (2) whether the individual state examining the practice has case law which draws analogies to online vote-pairing in its analysis of its election law.⁹⁴ Worley examines neither the constitutional implications nor the federal law implications of online vote-pairing. In all reality, Worley has a point. As discussed in Part III of this study, from a tactical standpoint, it would have been better to fight for vote-pairing sites on the "valuable consideration" front. Regardless, the issue contains questions of such constitutional gravity that Worley's article is handicapped by a lack of any constitutional or federal analysis. A constitutional analysis is important because any regulation of online vote-pairing (at the very least) *implicates* free speech and free assembly concerns.

In *Breaking Duverger's Law Is Not Illegal*,⁹⁵ I expanded the scholarship on this issue by examining online vote-pairing against a backdrop of political science research pertaining to strategic or tactical

87. Worley, *supra* note 73.

88. Worley, *supra* note 73, at 60.

89. *Id.* at 60–61.

90. *Id.* at 61–62.

91. *Id.* at 62–64.

92. *Id.* at 64.

93. *Id.* at 64–65.

94. *Id.* at 52–60.

95. Randazza I, *supra* note 73.

voting. This article substantially consists of my first article, *The Constitutionality of Online Vote-Swapping*,⁹⁶ with a few improvements, updates, and an added-on section discussing strategic voting theory. While this is an important issue to consider when looking at online vote-pairing, I would be overly egotistical if I claimed that *Breaking Duverger's Law Is Not Illegal* contributed a great amount to legal scholarship on this issue.

Jessie Sisgold authored an article on the subject in the *HASTINGS COMMUNICATIONS AND ENTERTAINMENT LAW JOURNAL*.⁹⁷ Sisgold's study covers a lot of the same ground covered by *The Constitutionality of Online Vote Swapping*.⁹⁸ Sisgold, like Worley, devotes a great amount of analysis to a consideration of what the term "valuable consideration" means in the context of California election law.⁹⁹ Sisgold most notably delves into a discussion of legislative logrolling and campaign contributions as legally similar to the practice of online vote-pairing¹⁰⁰ and alludes to the possible slippery slope of outlawing vote-pairing, which could lead to absurd legal and political conclusions.¹⁰¹

Sisgold analyzes the possible rationales for prohibiting the brokering of votes,¹⁰² essentially running online vote-trading through Richard Hasen's vote-buying analysis.¹⁰³ Sisgold adopts Hasen's analysis of vote-alienation on political equality and political efficiency rationales and concludes that neither justifies a prohibition of vote-pairing.¹⁰⁴ Sisgold's eventual conclusion states, "This is good for democracy" without studying the ethical implications of online vote-pairing.¹⁰⁵

Sisgold adds to the existing scholarship by applying Hasen's logic and describes the rationales behind vote-bribery statutes as protective of equality, efficiency, or merely a proper use of state power to determine that a vote is not property to be bought or sold.¹⁰⁶ Sisgold states that as a result of the technology gap between rich and poor, the equality rationale may be somewhat applicable to efforts to stifle vote-pairing since the poor will have less computer access and Internet access than the wealthy.¹⁰⁷

96. See *supra* note 73.

97. Sisgold, *supra* note 73.

98. See *supra* note 73.

99. Sisgold, *supra* note 73, at 159–60.

100. *Id.* at 160–61.

101. *Id.* at 163.

102. *Id.* at 164–67.

103. Richard Hasen, *Vote Buying*, 88 CAL. L. REV. 1323 (2000).

104. *Id.* at 161.

105. *Id.* at 167.

106. *Id.* at 164–67.

107. *Id.* at 165.

The efficiency rationale for prohibiting vote-pairing stems from the fact that online vote-swaps are inherently unpoliceable, and therefore, it is inefficient to permit the practice.¹⁰⁸ Sisgold suggests that this is an inadequate argument to require state anti-fraud laws to come to bear against online vote-swappers.¹⁰⁹

Sisgold finally offers an alternative rationale for prohibiting vote-swapping: “that votes belong to the community as a whole and thus should not be alienable by individual voters.”¹¹⁰ However, he states that, “this is a thin branch on which to rest an argument against an encroachment of core First Amendment protection—political speech.”¹¹¹ Sisgold gives no analysis of online vote-pairing against a backdrop of political science theory and omits a study of most states that weighed in on the issue.

John Rushing’s article in the TEXAS FORUM ON CIVIL LIBERTIES AND CIVIL RIGHTS¹¹² covers the same ground as Sisgold’s, with a brief discussion of the electoral college. Rushing provides a well-written but limited analysis of the issue with little added scholarship regarding state concerns, political theory, or ethics.

In conducting my research on this issue for this study, it came as a surprise that only six scholarly works existed, even more than three years after the events of 2000 unfolded. To be certain that no additional works had been written, I returned to the University of Florida, all of its databases and journals, the Internet, Westlaw, and Lexis. I searched for any term that might possibly describe online vote-pairing and even looked through every scholarly article that mentioned the word “Nader.” I conducted an exhaustive search of the literature (popular as well as academic) available at the University of Florida, in print and electronically¹¹³ under multiple searches.¹¹⁴ On a weekly basis, from

108. *Id.* at 166.

109. *Id.* at 166.

110. *Id.* at 166.

111. *Id.* at 167.

112. Rushing, *supra* note 75.

113. I searched to the following publications until July 21, 2003: Academy of Management Journal; Administrative Science Quarterly; African Historical Studies; American Historical Review; American Journal of International Law; American Journal of Sociology; American Political Science Review; American Quarterly; American Sociological Review; Asian Survey; Annals of the Association of American Geographers; British Journal of Political Science; British Journal of Sociology; Comparative Politics; Comparative Studies in Society and History; Economic Geography; Economic History Review; Eighteenth-Century Studies; English Historical Review; Ethnohistory; Family Coordinator; French Historical Studies; Hispanic American Historical Review; Historical Journal; History and Theory; History of Education Quarterly; History Teacher; Industrial and Labor Relations Review; International Affairs (Royal Institute of International Affairs); International Journal of Middle East Studies; International Organization, International Studies Quarterly; Journal of African

January 8, 2003 until July 22, 2003, I conducted repeated Lexis, Westlaw, and Internet searches (primarily using Google) with redundant search terms with multiple combinations of “vote,” “trade,” “swap” “strategic,” and “Nader.” After all of these exhaustive searches, only the original six law journal articles revealed any kind of research on this subject. This study also reflects the most serious comments in the news media and newsletters as well, even though almost all of what was written did not involve academic research or an otherwise helpful discussion of the issues.

I cannot testify as to why so little was written about this topic, but my theory is that given the fact that the recount of 2000 was such a media frenzy, this narrower issue was subsumed in the tidal wave of commentary and observation surrounding the recount, Katharine Harris, *Bush v. Gore*,¹¹⁵ and dimpled chads. In any event, those issues are behind us, but online vote-pairing lies ahead.

History; Journal of American History; Journal of Black Studies; Journal of British Studies; Journal of Conflict Resolution; Journal of Contemporary History; Journal of Economic History; Journal of Health and Social Behavior; Journal of Human Resources; Journal of Interdisciplinary History; Journal of Marriage and the Family; Journal of Modern African Studies; Journal of Modern History; Journal of Negro History; Journal of Peace Research; Journal of Politics; Journal of Southern History; Journal of the History of Ideas; Midwest Journal of Political Science; Military Affairs; New England Quarterly; PS, Past and Present; Political Science Quarterly; Public Opinion Quarterly; Renaissance Quarterly; Russian Review; Social Forces; Sociology of Education; Sociometry; Speculum; Western Political Quarterly; William and Mary Quarterly; World Politics; MERIP Reports; Reviews in American History; Sixteenth Century Essays and Studies; Sociological Methodology; Studies in the Renaissance; Political Theory; American Journal of Political Science; Contemporary Sociology; Journal of Health and Human Behavior; Modern China; Social Psychology; Mississippi Valley Historical Review; International Security; Social Psychology Quarterly; Political Behavior; Family Relations; European Sociological Review; Renaissance News; Theory and Society; Journal of Southern African Studies; Annual Review of Sociology; Sixteenth Century Journal; International Journal of African Historical Studies; Far Eastern Survey; Legislative Studies Quarterly; Academy of Management Review; Journal of Palestine Studies; Conflict Resolution; Sociological Theory Sociological Forum; Journal of Educational Sociology; Marriage and Family Living; Family Life Coordinator; MERIP Middle East Report; Gender and Society; Middle East Report; Journal of Military History; PS: Political Science and Politics; Political Research Quarterly; Mershon International Studies Review; Journal of the British Institute of International Affairs; Journal of the Royal Institute of International Affairs; International Affairs (Royal Institute of International Affairs 1931–1939); International Affairs Review Supplement; Cambridge Historical Journal; Proceedings of the American Political Science Association; Journal of the American Military Institute; Journal of the American Military History Foundation; Journal of Social Forces; Background on World Politics; Journal of the Academy of Management; Memorandum (Institute of Pacific Relations, American Council); Living; and Coordinator.

114. The search terms and connectors used in this follow-up research were: “vote-swapping” OR “vote-swapping” OR “voteswap” OR “vote-swap.” Then I searched the same publications, Lexis, Lexis-Nexis Academic Universe, Westlaw, Google, JSTOR, Ebsco, and Dogpile for the same. I then repeated my search in all aforementioned search engines, databases, and publications for “strategic” AND “voting” AND “nader” AND “2000”; “swap” AND “online” AND “nader” AND “2000”; and, “vote” and “swapping” within ten words of each other.

115. 531 U.S. 98 (2000).

II. DUVERGER'S LAW, POLITICAL MOVEMENTS, AND THE CHILLING EFFECT

A. *Strategic Voting and Duverger's Law*

Ostensibly, the purpose of a democratic election is to poll the electorate to measure its preference concerning an issue or a candidate. However, the simple-majority and single-ballot (SMSB) system, such as that in the United States, has an inherent flaw in gauging the actual preferences of the electorate.¹¹⁶ The SMSB system directs voting behavior in a manner that prefers a two-party system, regardless of the actual preference of the electorate. As a result, “the simple-majority single-ballot system favors the two-party system.”¹¹⁷ (In the 1950's Maurice Duverger wrote on this topic so successfully that this concept has taken on his name—*Duverger's Law*.) In SMSB systems as we have in the United States, some voters who would prefer the leadership of a third-party do not vote for their preferred candidate.¹¹⁸ Instead, voters frequently abandon their preferred candidate in favor of another because of contextual factors (such as a candidate's chance to ultimately win) that surround the election.¹¹⁹ Usually this occurs when the voter's most preferred candidate is a less viable candidate than the two front-runners in an election. To reduce the chances of his or her least-preferred candidate winning, the voter selects a lesser choice among the two front-runners.¹²⁰ Traditional political science and logic tells us that the net effect is the reduction of the number of viable political parties.¹²¹

116. See MAURICE DUVERGER, *POLITICAL PARTIES, THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* (Barbara & Robert North trans., 1954) [hereinafter DUVERGER, *POLITICAL PARTIES*].

117. See *id.* See also MAURICE DUVERGER, *LES PARTIS POLITIQUES* 247 (3d ed. 1958) (“le scrutin majoritaire à un seul tour tend au dualisme des parties”).

118. See, e.g., DUVERGER, *POLITICAL PARTIES*, *supra* note 116, at 217; GARY COX, *MAKING VOTES COUNT: STRATEGIC COORDINATION IN THE WORLD'S ELECTORAL SYSTEMS* 13 (1997) [hereinafter *MAKING VOTES COUNT*].

119. See Cox, *supra* note 11, at 611; Thomas Gschwend, *Ticket Splitting and Strategic Voting: Evidence from the 1998 Election in Germany*, Address at the Annual Meeting of the American Political Science Ass'n (Aug. 30–Sept. 3, 2000), at http://www.sowi.uni-mannheim.de/lehrstuehle/lspoll/gschwend_apsa00.pdf (last visited July 10, 2003).

120. This is what Duverger referred to as the “psychological effect” of the simple plurality system. See DUVERGER, *POLITICAL PARTIES*, *supra* note 116, at 207–35 (discussing the coalescence of two main parties); *MAKING VOTES COUNT*, *supra* note 118, at 13 (discussing Duverger's propositions); Cox, *supra* note 11, at 611, 616; John Fuh-Sheng Hsieh et al., *Strategic Voting in the 1994 Taipei City Mayoral Election*, 16 *ELECTION STUD.* 153, 154 (1997) [hereinafter Hsieh et al.] (discussing the meaning of “strategic voting”).

121. This is commonly referred to as “Duverger's Law.” See DUVERGER, *POLITICAL PARTIES*, *supra* note 116, at 217. See also Cox, *supra* note 11; William Riker, *The Two Party System and Duverger's Law: An Essay on the History of Political Science*, 76 *AM. POL. SCI. REV.* 753, 757 (1982) [hereinafter Riker] (showing support for Duverger's Law while demonstrating that writing on the law

In the 1990s, Gary Cox followed up on Duverger's research and published multiple works describing what he called the *Duvergerian* and *non-Duvergerian* equilibria.¹²² Cox wrote that in an SMSB election, the electorate may reach an equilibrium under which only the two dominant candidates survive, and third parties are marginalized to the point of non-importance.¹²³ This, the current dominant condition of American politics, is known as the *Duvergerian* equilibrium.¹²⁴ Alternatively, a *non-Duvergerian* equilibrium exists when there is a clear front-runner, but the two candidates fighting for second place are of sufficient parity that neither candidate's backers are willing to forego their support.¹²⁵ This is rare in U.S. politics but occurred in the Chilean National Election in 1978¹²⁶ and in the Taipei mayoral race in 1994.¹²⁷

Arthur Holcombe recognized Duverger's Law (before it took on that moniker) in 1910, when Holcombe wrote, "the tendency under the system of plurality elections toward the establishment of the two-party system is almost irresistible."¹²⁸ Even Holcombe was not the first to write about the shortcomings of the SMSB system. In 1869, Henry Droop, an English barrister, posited that each voter in an SMSB system has a choice between the two front-runners, suggesting that voting for a trailing candidate is essentially throwing the vote away.¹²⁹

James Buchanan and Gordon Tullock examined the legislative equivalent of vote-pairing by looking at "vote trading" or "logrolling" in legislative bodies.¹³⁰ Buchanan and Tullock described how the practice

predates Duverger); A.N. Holcombe, *Direct Primaries and the Second Ballot*, 5 AM. POL. SCI. REV. 532, 540 (1911) [hereinafter Holcombe] (the tendency of plurality elections to create a two-party system is "irresistible").

122. Cox, *supra* note 11.

123. *Id.*

124. MAKING VOTES COUNT, *supra* note 118. See also William Riker, *A Mathematical Proof of Duverger's Law*, in MODELS OF STRATEGIC CHOICE IN POLITICS (Peter C. Ordeshook ed. 1989).

125. Roger Myerson and Robert Weber, *A Theory of Voting Equilibria*, 87 AM. POL. SCI. REV. 102 (1993) [hereinafter Myerson & Weber]; Cox, *supra* note 11; ARTURO VALENZUELA, THE BREAKDOWN OF DEMOCRATIC REGIMES: CHILE (1978) [hereinafter VALENZUELA] (discussing the 1958 Chilean presidential election in which the right wing candidate won the election with 31.2% of the vote, the leftist candidate gathered 28.5%, and the centrist received 20.5%. Although the left and center were more likely to ally against the right and could have easily changed the results had there been strategic voting, the relative strength of both non-right candidates dampened any incentive to enter into strategic voting); Hsieh, *supra* note 120, at 160 (demonstrating the non-Duvergerian equilibrium in the 1994 Taipei City election).

126. VALENZUELA, *supra* note 125.

127. Hsieh et al., *supra* note 120, at 154.

128. Holcombe, *supra* note 121, at 535-52.

129. H.R. Droop, *On the Political and Social Effects of Different Methods of Electing Representatives*, cited in Riker, *supra* note 121, at 756.

130. JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962) [hereinafter

permits legislators to add levels of preference to simple yea or nay votes.¹³¹ For example, a legislator engaging in logrolling may improve his position by voting for a measure that he does not strongly support in exchange for receiving support on a matter he advocates strongly.¹³²

Steven Brams and William Riker elaborated on this phenomenon in *The Paradox of Vote Trading*.¹³³ In this work, Riker and Brams studied legislative bodies and wrote that although logrolling improves the relative position of legislative vote-traders, it also creates external costs for the non-traders.¹³⁴ For example, a failure to engage in vote-trades with legislative colleagues could encourage retributive action by a legislator who might otherwise have supported another's bill but refuses to do so out of a desire to encourage the other legislator to "play ball."¹³⁵ Accordingly, Riker and Brams theorized that although the sum of a vote-swap may be good for the traders, in the end, the trade may disadvantage everyone involved, including the traders themselves.¹³⁶ However, this theory is based on the likelihood that vote-trading in legislative bodies will inevitably repeat, with trades continuing ad infinitum.¹³⁷ While this possibility is understandable in the legislative context, it is unlikely that citizen voters will have enough regular interaction surrounding votes to create a pattern of compromise and mutual reliance.¹³⁸

A slew of authors have discussed the principles Duverger articulated. Gary Cox,¹³⁹ T.R. Palfrey,¹⁴⁰ and Roger Myerson and Robert Weber¹⁴¹ all used mathematical models to demonstrate that multi-candidate elections

BUCHANAN & TULLOCK]. *But see* COLO. CONST. art V., § 40 (prohibiting legislative vote-trading by constitutional mandate in Colorado); WIS. STAT. ANN. § 13.05 (West 2003) (prohibiting legislative vote-trading by statute); *Roberts v. Millikin*, 93 P. 2d 393 (Wash. 1939) (equating vote-trading with "malfeasance in office"); WASH. REV. CODE ANN. § 29.82.010 (West 2003) ("'Misfeasance' or 'malfeasance' in office means any wrongful conduct that affects, interrupts, or interferes with the performance of official duty"), amended by 2003 Wash. Legis. Serv. Ch. 111 (S.S.B. 5221) (West 2003).

131. BUCHANAN & TULLOCK, *supra* note 130, at 145.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Legislators are colleagues who work together on a regular basis, while the electorate is called together to vote only periodically.

139. Cox, *supra* note 11.

140. T.R. Palfrey, *A Mathematical Proof of Duverger's Law*, in *MODELS OF STRATEGIC CHOICE IN POLITICS* (Peter C. Ordeshook ed., 1989). However, Palfrey recognizes that the law may not hold up in some unusual situations. *Id.*

141. Myerson & Weber, *supra* note 125.

under the plurality rule will tend to result in only two candidates receiving a significant number of votes.¹⁴²

There is great political scientific evidence that many voters in a SMSB election do not vote for their preference, as they would be expected to.¹⁴³ Instead, they tend to vote for the “lesser of two evils” or they vote on other strategic grounds (e.g., against one candidate by voting for the next strongest candidate).¹⁴⁴ Therefore, the idea that voters would vote for someone other than their first choice is not alien to the practice of democracy. However, online vote-pairing placed a new twist in Duverger’s law by allowing electors to upset the Duvergian equilibrium and promote their true preferences in an election without the constraints that inhere in the SMSB election.

B. Political Movements and the Internet

The Internet, as a ganglion of online networks, has created a rapid global communication system that permits new forms of social and political organization and coordination.¹⁴⁵ Vincent Casaregola and Robert Cropf wrote that the Internet provides citizens with “the opportunity to engage in an unprecedented communal process of sharing information and creating new knowledge.”¹⁴⁶

It did not take long for political candidates, parties, and political action committees to recognize the Internet’s potential as “a powerful campaign tool with the potential to significantly influence the outcome of [elections].”¹⁴⁷ The vast communicative power of the Internet makes it a super-broadcasting tool that allows nearly anyone to jump into the political fray, regardless of economic means.¹⁴⁸

142. *Id.*

143. *See, e.g.,* Cox, *supra* note 11; Holcombe, *supra* note 121.

144. *Id.*

145. Vincent Casaregola & Robert A. Cropf, *Virtual Town Halls: Using Computer Networks to Improve Public Discourse and Facilitate Service Delivery*, RES. AND REFLECTION, Vol. 4, No. 1, (Oct. 1998), at http://www.iog.ca/policy/CP/Public%20Library/library_reference_virtual_town_halls.html (last visited July 10, 2003).

146. *Id.*

147. Use of the Internet for Campaign Activity, 64 Fed. Reg. 60,360 (Nov. 5, 1999); *see also* Mark S. Bonchek, *Grassroots in Cyberspace: Using Computer Networks to Facilitate Political Participation*, at §§ 5.1–5.3 (1994) [hereinafter Bonchek], at <http://organizenow.net/techtips/bonchek-grassroots.html> (now defunct) (on file with author).

148. *Id.*

1. First-Level Online Political Organization

In July of 1989, an organization of Chinese students living in the U.S. organized a lobbying campaign to persuade Congress to protect them from Communist Chinese threats of reprisal for their support of the Tiananmen Square pro-democracy demonstrators.¹⁴⁹ The lobbying committee used email and Internet newsgroups to organize 43,000 students at 160 colleges and universities and gain widespread media attention with only four days notice.¹⁵⁰ The bill passed, largely as a result of the students' use of telecommunications to coordinate the disparate parts within their coalition.¹⁵¹

Also in 1989, a group of twenty activists in Santa Monica, California, organized the SHWASHLOCK (showers, washers, and lockers) movement online.¹⁵² "They eventually overcame neighborhood and City Council resistance, obtaining a \$150,000 line item in the budget and approval for converting an old bath house to a facility for the homeless."¹⁵³ The group also created a job bank co-op for the homeless and a campaign to include Santa Monica schools in an international program to educate school children about electronic communication.¹⁵⁴ A follow-up survey of the activists revealed that "it was the online process that enabled the group to plan and execute these various efforts."¹⁵⁵

As another example of first-level online political organization, The Christian Coalition used its website on July 7, 1994 to urge its allies to contact Congress and demand an end to federal support for the National Endowment for the Arts.¹⁵⁶ Three days later, a group of freshman Republican Congressmen called for an end to federal support for the

149. See Mark S. Bonchek, *From Broadcast to Netcast: The Internet and the Flow of Political Information* 45 (1997), available at <http://www.esri.salford.ac.uk/ESRCResearchproject/papers/bonch97.pdf> (last visited Jan. 17, 2004). See also, Tiananmen Square Protests of 1989, at http://en.wikipedia.org/wiki/Tiananmen_Square_protests_of_1989 (now defunct) (on file with author) (discussing Tiananmen Square uprising as the event that led to the creation of the Independent Federation of Chinese Students and Scholars). Many Chinese found themselves persecuted by the Chinese government after it crushed the nascent and ill-fated pro-democracy movement of the summer of 1989. See Arnold Zeitlin, *Nearly 10 Years on, Bloody Crackdown at Tiananmen Square Stirs Vigorous Debate*, at <http://www.freedomforum.org/templates/document.asp?documentID=5817> (now defunct) (on file with author).

150. See Bonchek, *supra* note 147, at § 5.2.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. Ed Schwartz, *NetActivism: How Citizens Use the Internet*, at <http://www.oreilly.com/catalog/netactivism/excerpt/> (last visited July 14, 2003).

156. *Id.*

NEA.¹⁵⁷ Analysts credited the Congressmen's actions to the online coalition building power of the Internet.¹⁵⁸

These actions could theoretically have been accomplished without the Internet. Had the Chinese students or the Christian Coalition owned a TV network, or possessed enough funds to buy sufficient airtime to make their cause heard nationwide, the result may have been the same. In these examples of first-level online organization, the Internet brought a powerful voice to people who otherwise might not have an impact, but their actions were not unique to cyberspace. The Internet acted as a tool of democratization, but the conduct was not entirely Internet-dependent. The Internet, in these circumstances, acted as a super-leafleting tool or a cheap means of advertising to a mass audience.

2. *Second-Level Online Political Organization*

The next level of using the Internet as a political action tool is the actual use of cyberspace as a "place" for the creation of online coalitions.¹⁵⁹ In 1998, Bart-Jan Flos of the Politeia Network for Citizenship and Democracy in Europe suggested the use of the Internet to form coalitions led by already elected politicians.¹⁶⁰ Mark Bonchek and Edward Schwartz demonstrated the strength of the Internet as a replacement for capital in the organization of grassroots political movements.¹⁶¹

Dave D'Alessio studied the impact of the world wide web on the 1996 presidential election.¹⁶² He found that the potential for the Internet to compensate for a lack of campaign funds was great, but that this was not the true value of Internet campaigning.¹⁶³ D'Alessio wrote that the true value of the Internet in political campaigns would be socializing voters to

157. *Id.*

158. *Id.*

159. See Philip Giordano, *Invoking Law as a Basis for Identity in Cyberspace*, 1 STAN. TECH. L. REV. 1, 4 (1998) (suggesting that the Internet is not just a means of communication, but a "place"); Linda M. Harasim, *Networks as Social Space*, in GLOBAL NETWORKS 15-34 (Linda M. Harasim ed., 1993) (same).

160. Bart-Jan Flos, *Teledemocracy VIII: The Formation of On-line Coalitions*, 11 Politeia Online Newsletter (Sept. 1998), at http://www.dds.nl/~scene/newsletter/archive/okt_98/nl_11198.html (last visited June 20, 2001) (now defunct).

161. Bonchek, *supra* note 147, at §§ 5.1-5.3; Ed Schwartz, *NetActivism: How Citizens Use the Internet*, at <http://www.oreilly.com/catalog/netactivism/excerpt/> (last visited July 14, 2003).

162. Dave D'Alessio, *Use of the World Wide Web in the 1996 US Election*, 16 ELECTORAL STUD. 489 (1997) [hereinafter D'Alessio].

163. *Id.* at 492.

seek out political information on the web.¹⁶⁴ Furthermore, D'Alessio found that web hits to political sites hovered at an unremarkable level until approximately 60 days before the election, when hit counts jumped substantially and continued on a rising trend until the week before the election.¹⁶⁵ In the day before the election, hits increased precipitously from the previous day, and on the day of the election, hits spiked even more.¹⁶⁶

The idea of the Internet as a tool of political organization evolved into its next form in November of 2000. At that time, the Internet became more than an alternative to phone banks and expensive advertising. Instead, users harnessed the Internet to create a vote-pairing, coalition-building movement unique to cyberspace with the potential for massive political repercussions.

C. *The Electoral College*¹⁶⁷

Article II, Section 1 of the U.S. Constitution establishes the existence of the Electoral College, establishing a mechanism whereby each state has a number of electors equal to the number of senators and representatives it sends to Congress.¹⁶⁸ These electors are then entrusted to vote for the President and Vice-President of the United States.¹⁶⁹ Each state must appoint its electors by the Tuesday following the first Monday in November, and no Senator, Representative, or person holding an office of trust or profit under the United States may serve as an elector.¹⁷⁰ Aside from these requirements, there are no constitutional or federal constraints

164. *Id.*

165. *Id.* at 495.

166. *Id.*

167. Although the construction and function of the Electoral College in the United States might be common knowledge to some readers, a perfunctory review of the mechanics of the Electoral College is nonetheless valuable.

168. U.S. CONST. art. II, § 1, cl. 1–2 (“The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows: Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”). This is further codified by 3 U.S.C. § 3 (2000):

The number of electors shall be equal to the number of Senators and Representatives to which the several States are by law entitled at the time when the President and Vice President to be chosen come into office; except, that where no apportionment of Representatives has been made after any enumeration, at the time of choosing electors, the number of electors shall be according to the then existing apportionment of Senators and Representatives.

For the purposes of the Electoral College, the District of Columbia is a “State.” 3 U.S.C. § 21 (2000).

169. *Id.*

170. 3 U.S.C. § 1 (2000).

on the states' selection of electors, provided that the individual electors are constitutionally fit to serve.¹⁷¹

In forty-eight states and the District of Columbia, the electoral votes for each state are awarded by state-wide popular election, with the majority winner taking all the electoral votes for that state. Yet almost half of the states impose no restrictions upon elector conduct. Once appointed, the electors may cast their vote for whomever they please regardless of the result of the popular vote in these states.¹⁷² Most remaining states' electors are bound to vote for the candidate determined by the popular vote in their states.¹⁷³ Only Maine and Nebraska apportion their electors proportionally based on how the state vote is split.¹⁷⁴ Each congressional district in these states is polled to apportion its electoral vote, and the winner overall in the state takes the two senatorial electoral votes.

To understand online vote-pairing, the operative fact regarding the Electoral College is that whether a candidate for president wins a state by a single vote or a landslide, the electoral votes are apportioned to the winner. Even in Maine and Nebraska, it is a "winner take all" apportionment of congressional districts: electoral votes.

D. The Chilling Effect

1. What is the Chilling Effect?

The secretaries of state who sought to stamp out online vote-pairing certainly achieved their goal. Although nobody was certain whether prohibiting vote-pairing was constitutional, the effect brought about by state action in California, Oklahoma, and Wisconsin was immediate.¹⁷⁵

171. The author notes that the 14th Amendment to the U.S. Constitution prohibits anyone from serving as an elector if the person engaged in insurrection, rebellion, or gave comfort to an enemy of the United States, after previously taking an oath not to do so. U.S. CONST. amend. XIV, § 3.

172. These states are: Arizona, Arkansas, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, and West Virginia. NATIONAL ARCHIVES AND RECORDS ADMINISTRATION WEBSITE, at http://www.archives.gov/federal_register/electoral_college/electoral_college.html (last visited July 10, 2003).

173. The states with restrictions are: Alabama, Alaska, California, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Vermont, Virginia, Washington, Wisconsin, and Wyoming. *Id.*

174. See ME. REV. STAT. ANN. tit. 21-A, § 802 (West 2003) ("One Presidential elector shall be chosen from each congressional district and 2 at large"); NEB. REV. STAT. 32-710 (1999) ("One presidential elector shall be chosen from each congressional district, and two presidential electors shall be chosen at large").

175. See *Porter v. Jones*, 319 F.3d 483, 492-93 (9th Cir. 2003) (recognizing that California's

The statements made by secretaries of state of Arizona, Florida, and Minnesota, while threatening no prosecutorial action¹⁷⁶ (or in the case of Minnesota, threatening prosecution after the sites had already shut down)¹⁷⁷ certainly contributed to the existing detrimental effect.

The Supreme Court defines the “chilling effect” as the “collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it.”¹⁷⁸ This effect is recognized as affecting free association rights¹⁷⁹ as well as free speech rights.¹⁸⁰ A chilling effect exists when citizens are apprehensive to exercise their rights to free expression or free association due to the threat of the expense and inconvenience of criminal prosecution.¹⁸¹ This effect may exist when there is direct prosecution or restraint or when the state action is merely a comment by an official perceived to have the requisite power to prosecute.¹⁸² The landmark case of *Near v. Minnesota* explains that when citizens are apprehensive about exercising their rights to free expression or free association due to the threat of criminal prosecution, constitutionally protected rights can be chilled.¹⁸³

Nonetheless, the Court hinted that it might allow restraint on the lawful “publication of the sailing dates of [military] transports or the number and location of troops.”¹⁸⁴ Courts engage in a balancing test to determine

actions taken against vote-pairing sites constituted a chilling effect and stating that plaintiffs alleged a “colorable prior restraint claim”); <http://www.voteswap2000.com/> (last visited Nov. 3, 2000) (now defunct); Wylie, *supra* note 53, at 2A; Scott Harris, *Vote Green—Somewhere Else*, INDUSTRY STANDARD, Nov. 13, 2000, available at <http://www.findarticles.com>.

176. See Wylie, *supra* note 53, at 2A (discussing Arizona’s response).

177. See Christine Cupaiuolo, *When a Personal Vote Isn’t Personal*, at http://www.poppolitics.com/articles/2000-11-02_naderelegal.shtml (now defunct) (“Minnesota Secretary of State Mary Kiffmeyer e-mailed VoteSwap2000.com on Monday, asking them to ‘cease and desist’ vote-swapping activities in the state of Minnesota. (They already had.)”).

178. *Smith v. California*, 361 U.S. 147, 151 (1959) (holding ordinance that prohibited the possession of “obscene” or “indecent” material in a bookstore to be unconstitutional due to its tendency to inhibit not only unprotected expression but also protected expression).

179. See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479, 493–94 (1965) (holding statute that defined “subversive organization” was unconstitutional due to potential “chilling effect” on defendant’s associational rights).

180. See *Thornhill v. Alabama*, 310 U.S. 88, 97–98 (1940) (citing *Near*, 283 U.S. at 713).

181. See *Thornhill v. Alabama*, 310 U.S. 88, 97–98 (1940).

182. See *Laird v. Tatum*, 408 U.S. 1, 12–13 (1972) (“[C]onstitutional violations may arise from the deterrent, or ‘chilling’ effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights.”); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) (internal citations omitted).

183. See *Near v. Minnesota*, 283 U.S. 697, 722–23 (1931) (holding Minnesota statute that authorized prior restraints on publication of defamatory materials unconstitutional).

184. See *Near*, 283 U.S. at 716. See also *N.Y. Times Co. v. United States*, 403 U.S. 713, 726–27 (1971) (Brennan, J., concurring) (stating that when national security information is implicated, the

whether the detrimental effect is sufficiently counterbalanced by valid governmental interests, but the government must meet a heavy burden to convince a court to sustain state action that chills constitutionally protected activity.¹⁸⁵ Therefore, a chilling effect is not *per se* unconstitutional, but since its existence can stifle “the flow of democratic expression and controversy at one of its chief sources,”¹⁸⁶ state actions that chill free expression are held up to heightened scrutiny.¹⁸⁷

2. *Was There a Chilling Effect?*

The statements and actions of the secretaries of state, in their quest to shut-down the vote-pairing sites, sent shivers through cyberspace that affected website operators nationwide.¹⁸⁸ For example, the day after California contacted VoteSwap2000, the website posted the following message: “We are not lawyers . . . Our advice is to err on the side of caution, and if you can’t determine for sure that you are not in violation of any laws, you should not participate in vote-swapping.”¹⁸⁹

Despite site operators’ support of Ralph Nader, and the questionable constitutionality of the actions of the secretaries of state, none of the site operators were willing to risk prison or fines. At least three vote-pairing sites, citing threats of litigation, closed down immediately after California Secretary of State Jones’s letter to VoteSwap2000 became public.¹⁹⁰ One Florida-based site, PresidentGore.com¹⁹¹ was designed to specifically exclude Californians because its operator was uncertain of California’s jurisdiction over its operator.¹⁹² Without determining whether the secretaries of states’ actions were permissible or unconstitutional, it is not far-fetched to theorize that the secretaries of state may have had a profound effect on the outcome of the 2000 presidential election by

government has the burden of proving that disclosure would have severe consequences for national security).

185. *See, e.g.*, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964).

186. *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952) (invalidating loyalty oath that ignored the element of scienter).

187. *See, e.g.*, *N.Y. Times Co.*, 376 U.S. at 256.

188. *See* Wylie, *supra* note 53, at 2A.

189. <http://www.voteswap2000.com/> (last visited Nov. 3, 2000) (now defunct).

190. *Oregon Warns*, *supra* note 49, at A26.

191. <http://www.presidentgore.com/> (last visited Nov. 5, 2000) (now defunct).

192. When the user filled out the vote-swap form, if the user entered “California” in the “state” field, he received the following message: “As at least one other site has had issues with CALIFORNIA law not permitting the swap of their votes, we have disallowed submissions from California. I’m sorry for this, but I don’t want to get in trouble over this.” <http://www.presidentgore.com/> (last visited Nov. 5, 2000) (now defunct).

creating a nationwide “chilling effect” on the publication and use of vote-pairing websites.¹⁹³

3. *What Were the Electoral Consequences of the Chilling Effect?*

Had the 2000 election been decided by a large margin, the vote-pairing debate would still be of constitutional importance because political speech and association was crushed by the mere threat of prosecution.¹⁹⁴ However, because the entire election was resolved by a razor-thin margin, it is easy to speculate that the vote-pairing movement could have had a profound effect upon the outcome of the election. As late as November 17, 2000, pundits claimed “Nader Traders” could have tipped Florida toward Al Gore.¹⁹⁵

The effect of online vote-pairing upon the 2000 election is not based on hindsight alone. In its waning days, the 2000 presidential campaign was a cliffhanger between Al Gore and George W. Bush. With less than a week to go, no pundits could definitively say who was actually in the lead. With a total of 538 electoral votes up for grabs and 270 needed to win the presidency, as of October 30, 2000, Bush securely held 202 electoral votes to Gore’s 190, and 146 electoral votes were too close to call.¹⁹⁶ On November 3, CNN.com reported 224 electoral votes for Bush, 181 for Gore, and 133 that were too close for CNN.com to call.¹⁹⁷ Meanwhile REUTERS reported that Bush had 217 electoral votes, Gore had 200, and 121 electoral votes were too close to call.¹⁹⁸

The candidacy of Ralph Nader, the Green Party’s nominee for President, added to the unpredictability of the 2000 race. The Greens, previously notable only for their insignificance in American politics, promised to have resounding influence in the presidential election. The Florida polls as of November 3, 2000, showed Gore with 46% of the vote, Bush with 42% of the vote, and Nader with 6% of the vote.¹⁹⁹ With a

193. See Harris, *supra* note 25.

194. See *supra* note 179.

195. Harris, *supra* note 25.

196. See Michael Griffin, *An Electoral Elite Will Have Last Word: In a Close Race, Florida and 12 Other States Likely Will Choose the Next President, According to an Orlando Sentinel Analysis*, ORLANDO SENTINEL, Oct. 30, 2000, at A1.

197. <http://www.cnn.com/interactive/allpolitics/0010/electoral.map/map3.html> (last visited Jan. 17, 2004).

198. See REUTERS, *Bush With Slight Edge in Electoral College Count* (Nov. 3, 2000), at http://dailynews.yahoo.com/h/nm/20001103/pl/campaign_electoral_dc.html. (now defunct).

199. These percentages are from a Zogby tracking poll, conducted from October 31 to November 2, 2000, for Reuters/MSNBC, which surveyed 659 likely Florida voters with a margin of error of plus or minus 4% (released, 11/2/00). This tracking poll was a rolling sample of 200 likely voters each 24-

margin of error of +/- 4%, Florida's all-important twenty-five electoral votes remained unclaimed.²⁰⁰ Pennsylvania's twenty-three electoral votes were similarly precarious with 45% supporting Gore, 41% supporting Bush, and 8% supporting Nader.²⁰¹ Washington, formerly narrowly in the Gore column,²⁰² went to a dead toss-up on November 3 with 44% supporting both Gore and Bush and 6% supporting Nader.²⁰³ Nationally speaking, as of October 27, 2000, 56% of Nader supporters said that if Nader were not running, they would have voted for Gore, while 23% favored Bush, and 21% would not have voted at all.²⁰⁴ Given these numbers, had Nader not been in the race, Gore would have appeared to have had a firm lead in Florida, Pennsylvania, and Washington a week before the election.

As the wind blew out of California and chilled vote-pairing operations nationwide, the national race for electoral votes was tight, with Bush holding 217 likely votes, Gore holding 200, and 121 too close to call.²⁰⁵ With the race as close as it was, even New Hampshire's four electoral votes, traditionally forgotten about the day after its primary race,²⁰⁶ were still influential enough that neither campaign had abandoned the state (Bush 45%, Gore 40%, Nader 5%).²⁰⁷

Voteexchange2000.org arranged 257 exchanges for Florida voters between October 26, 2000 and October 30, 2000, when it shut down due

hour period, with the three most recent 24-hour surveys added together for a likely voter sample of 600. For an additional poll compilation, see <http://www.electyou.com/electoralmapping.htm> (last visited July 25, 2003).

200. *Id.*

201. These percentages are from a Zogby tracking poll, conducted from October 31 to November 2, 2000 for the TOLEDO BLADE and the PITTSBURGH POST-GAZETTE that surveyed 603 likely Pennsylvania voters with a margin of error of plus or minus 4% (released, 11/2/00). This tracking poll was a rolling sample of 200 likely voters for each 24-hour period, with the three most recent 24-hour surveys added together for likely voter sample of 600. For an additional poll compilation, see <http://www.electyou.com/electoralmapping.htm> (last visited July 25, 2003).

202. See Ronald Brownstein, *Campaign 2000: Liberals Beat Drum For Gore, Hope Nader Backers Listen*, LOS ANGELES TIMES, Nov. 1, 2000, at A16.

203. These percentages are from a Zogby tracking poll conducted October 31 to November 2, 2000, for REUTERS and MSNBC. The poll surveyed 508 likely Washington voters with a margin of error of plus or minus 4.5% (released, 11/2/00). This tracking poll was a rolling sample of 200 likely voters for each 24-hour period, with the three most recent 24-hour surveys added together for a likely voter sample of 600. For an additional poll compilation, see <http://www.electyou.com/electoralmapping.htm> (last visited July 25, 2003).

204. See Dizikes & Ruppe, *supra* note 10.

205. *Inside Politics* (CNN TV Broadcast Nov. 6, 2000) (Transcript # 00110600V15).

206. Mike Recht, *Close Presidential Race Pulls Small States Out of Obscurity*, TELEGRAPH ONLINE (Nashua, N.H.), Oct. 31, 2000, at <http://www.nashuatelegraph.com>.

207. An American Research Group poll that was conducted from October 31 to November 1, 2000, surveyed 600 likely New Hampshire voters with a margin of error of +/- 4% (release, 11/2/00) (source on file with author).

to fear of prosecution from California's and Oregon's Secretaries of State.²⁰⁸ Given that the buzz surrounding the vote-pairing phenomenon had just begun, it is likely that the rate of votes being swapped would have increased until Election Day.²⁰⁹ However, had the rate of vote-pairing remained constant, 2056 votes could have been exchanged by this one site in Florida alone. That many more votes for Al Gore in Florida would have given twenty-five more electoral votes to Gore nationally, which thus would have changed the outcome of the 2000 presidential race. Had the sites continued to run, the circus following the election may never have occurred. Alternatively, had the sites been shut down immediately, the race may not have been decided by such a close margin, and George W. Bush may have been able to claim victory on Tuesday, November 7 instead of waiting until December and the resolution of *Bush v. Gore*.²¹⁰

Given the razor-thin margin of the election during the first days of November 2000, the secretaries of state should have foreseen the potential effect of their actions upon the election. Did they act correctly? Had they not acted, could it have changed the outcome of the election? Were other secretaries of state delinquent in not acting similarly? Although any effect upon the results of the election is mere speculation, at the time that the secretaries of state acted (or refrained from acting), such an effect was certainly foreseeable. The resolution of the debate over the propriety of their conduct could have great implications for future elections and the concept of democracy in a new-media society.

III. VOTE-PAIRING AND STATE LAW

While federal constitutional concerns may ultimately govern the legal status of online vote-pairing, it is important to study this new method of political organization under state election law. In most circumstances, it appears that the secretaries of state who sought to prohibit the practice relied upon a misapplication of their state's respective electoral laws. This part of the study will analyze the state election law of each state where officials took some kind of action or issued a statement on the legality of vote-pairing. Where appropriate, it will also discuss state constitutional protections.

208. See, e.g., James Rosen, *Backers of Gore, Nader Make Deal: E-trades; Green Voters in Close States 'Swap' Votes for Gore in Pro-Bush States*, NEWS TRIB. (Tacoma, Wash.), Nov. 2, 2000, at A1.

209. See D'Alessio, *supra* note 162, at 494-95 (demonstrating that during the 1996 campaign, hits to election oriented websites increased rapidly as election day approached, with 1996's election day attracting "more than twice as many [hits] than on any other day.')

210. 531 U.S. 98 (2000).

A. Procedural History and Kelleher's Abstention

California's secretary of state Bill Jones (R) fired the first volley in the battle over vote-pairing by threatening to imprison the operators of VoteSwap2000.org.²¹¹ "You can't trade a dollar for a vote, a job for a vote, or a vote for a vote," said Jones spokesman Alfie Charles. Justifying Jones' crackdown on vote-pairing, Charles said, "[I]t's the Secretary of State's job to protect the integrity of the election process."²¹²

Soon thereafter, the California ACLU fired back and filed suit in federal court seeking an injunction to prevent Jones from acting against vote-pairing sites due to the First Amendment implications of Jones' actions.²¹³ As of Monday, November 6, 2000 (the day before the 2000 election), the ACLU's federal court motion for a temporary restraining order against Jones languished in U.S. District Court Judge Kelleher's chambers.²¹⁴ Eventually, Kelleher ruled that the vote-pairing sites were not entitled to a restraining order preventing Jones from prosecuting or threatening to prosecute their operators or participants.²¹⁵ Kelleher's reasoning for denying the motion is unknown because his ruling was a simple one-line denial of the motion.²¹⁶ Months later, Kelleher declined to rule on the underlying First Amendment question. Kelleher relied on the *Pullman* doctrine²¹⁷ and abstained from making a decision.²¹⁸

211. California's Secretary of State Jones said that VoteSwap2000.org:

[S]pecifically offers to broker the exchange of votes throughout the United States of America. This activity is corruption of the voting process in violation of Elections Code sections 18521 and 18522 as well as Penal Code section 182, criminal conspiracy . . . any person or entity that tries to exchange votes or broker the exchange of votes will be pursued with utmost vigor.

Email from California Secretary of State to operator of Vote-Swap 2000, forwarded on Nov. 1, 2000).

212. ASSOCIATED PRESS, *ACLU Fights To Protect Vote-Brokering Web Sites*, Nov. 2, 2000 [hereinafter *ACLU Fights*], available at <http://www.freedomforum.org/templates/document.asp?documentID=3518>.

213. See, e.g., Patricia Jacobus, *ACLU Files Suit Favoring Vote-Swapping Sites*, CNET NEWS.COM, Nov. 27, 2000, at <http://news.com.com/2100-1023-249071.html>; ACLU Fights, *supra* note 212.

214. *Porter v. Jones* (D. Cal. 2000) (No. 00-11700). Although the temporary restraining order was applied from Nov. 3, 2000, a week prior to the election, Kelleher did not rule until Nov. 7, and the denial was not transmitted to the parties until Nov. 8, which was the day before the election. See Brief of Plaintiff, at 4, at http://www.nvri.org/library/cases/Porter_v_Jones/PorterOpeningAppealBrief.pdf.

215. *Porter v. Jones* (D. Cal. 2000) (No. 00-11700).

216. Patricia Jacobus, *Judge Rejects Request To Stop Vote-Swap Crackdown*, CNET NEWS.COM, Nov. 6, 2000, at <http://news.com.com/2100-1023-248208.html?legacy=cnet> (now defunct) (on file with author).

217. See *Railroad Commission v. Pullman* 312 U.S. 496 (1941); *Porter v. Jones*, 393 F.3d 483, 492 (2003) (interpreting *Pullman*).

218. See *Porter v. Jones*, 314 F.3d 483, 492 (9th Cir. 2003); *Porter v. Jones*, 393 F.3d 483, 492 (9th Cir. 2003).

Railroad Commission v. Pullman stands for the proposition that a federal district court may decline to adjudicate a controversy that is properly before it when such a controversy may be resolved in state courts.²¹⁹ The doctrine is designed to avoid conflicts between state legislatures and federal courts by permitting federal courts to abstain from deciding sensitive federal constitutional questions when state law may decide the question or render it moot.²²⁰

A federal court may only properly invoke the *Pullman* doctrine if:

(1) the case touches on a sensitive area of social policy upon which the federal courts ought not enter unless no alternative to its adjudication is open, (2) constitutional adjudication plainly can be avoided if a definite ruling on the state issue would terminate the controversy, and (3) [the proper resolution of] the possible determinative issue of state law is uncertain.²²¹

The U.S. Ninth Circuit Court of Appeals held that the first prong of the *Pullman* test was absent in *Porter v. Jones*.²²² In fact, the appeals court observed that in First Amendment cases, the first *Pullman* factor “will almost never be present because the guarantee of free expression is always an area of particular federal concern.”²²³ Specifically, the Ninth Circuit held that Kelleher’s ruling was an abuse of discretion because “constitutional challenges based on the first amendment or free expression are the kind of cases that the federal courts are particularly well-suited to hear. That is why abstention is generally inappropriate when first amendment rights are at stake.”²²⁴

Although some of America’s greatest legal minds including Alan Dershowitz and Laurence Tribe fought on behalf of the ACLU,²²⁵ the legal giants appear to have made a tactical error in bringing their action in federal court. Although bringing suit in federal court was *jurisdictionally* proper,²²⁶ from a strategic standpoint, it might have been superior to fight the vote-pairing legal battle in each applicable state court. The ACLU

219. See *Porter v. Jones*, 319 F.3d 483, 492 (9th Cir. 2003) (reversing Kelleher’s abstention as an abuse of discretion). See also *Pullman*, 312 U.S. at 501; *Canton v. Spokane Sch. Dist. No. 81*, 498 F.2d 840, 845 (9th Cir. 1974).

220. See *San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095, 1104 (9th Cir. 1998).

221. *Porter*, 319 F.3d at 492.

222. 393 F.3d at 492.

223. *Id.* at 492 (quoting *Ripplinger v. Collins*, 868 F.2d 1043, 1048 (9th Cir. 1989)).

224. *Id.* (quoting *J-R Distribs., Inc. v. Eikenberry*, 725 F.2d 482, 487 (9th Cir. 1984)).

225. *Id.*

226. See *Porter*, 319 F.3d at 483.

could have sought an interpretation of each state's election law from each individual state's courts. The state courts could have ducked the constitutional issue and would likely have based their rulings on simple interpretations of state election laws. Generally, courts will avoid constitutional questions when statutes may be interpreted on other grounds.²²⁷ However, given that (with the exception of Arizona) anti-vote-pairing secretaries of state appeared to have stretched the intent of their respective states' laws, vote-pairing cases could have turned on these grounds. The constitutional question might have then remained unsettled, but at least the websites would have had a chance of survival at the crucial moment when they came into play.

B. California

1. California Procedure

The proper forum for the initial resolution of *Porter v. Jones* (the California vote-pairing case) was a California state court. While the ruling would have made less press and would have had less persuasive precedential value than a federal court decision, the rights of the voters could have been better served had the ACLU team sought injunctive relief against the Secretary of State in a California state court through a writ of mandate (the California equivalent of a restraining order).²²⁸ This remedy is appropriate where denial of relief permits an immediate infringement on First Amendment rights.²²⁹

2. California Constitutional Law

California courts follow the rule that when a prosecution creates an "ominous, chilling effect on the free exercise of political speech . . . [a]

227. See, e.g., *Salinas v. United States*, 522 U.S. 52, 59–60 (1997) (statute should be construed to avoid constitutional question if possible); *Arizona v. Evans*, 514 U.S. 1, 33 (1995) (federal courts will avoid constitutional questions when an alternative basis of decision is available); *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 481 (1989) ("Statutes should be construed to avoid constitutional questions."); *Boos v. Barry*, 485 U.S. 312, 333 (1988) ("[I]t is well established that statutes should be construed to avoid constitutional questions if such a construction is fairly possible."); *Heckler v. Mathews*, 465 U.S. 728, 741–42 (1984) ("Statutes should be construed to avoid constitutional questions."); *N.Y. v. Ferber*, 458 U.S. 747, 769 n.24 (1982); *Ashwander v. TVA*, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring) (same).

228. See *Gonzales v. City of Santa Paula*, 226 Cal. Rptr. 164, 167 (Cal. Ct. App. 1986).

229. See, e.g., *Gonzales*, 226 Cal. Rptr. at 167 (citing *Wilson v. Superior Court*, 13 Cal. 3d 652, 656, 532 P.2d 116, 117 (1975)); *Durran v. Cassidy*, 28 Cal. App. 3d 574, 578–79, 104 Cal. Rptr. 793, 796–97 (1972).

petition for writ of mandate is appropriate.”²³⁰ The California Constitution affords greater protection to free speech and association than the federal Constitution.²³¹ As long as federal rights are protected, California legal principles will prevail in California state courts.²³² Given this fact, an independent survey of California constitutional law is unnecessary, but an analysis of the California election law is crucial.

3. *California Election Law*

The California Secretary of State threatened to prosecute the operators of VoteSwap2000²³³ for violations of California Elections Code sections 18521(a)²³⁴ and 18522(a)(2).²³⁵ These provisions prohibit citizens from giving or receiving payment or other “valuable consideration” to induce any voter to vote for a particular person or measure.²³⁶ Jones believed that the exchange of promises to vote for certain candidates fit the definition of “valuable consideration.”²³⁷ California law defines “valuable consideration” as follows:

Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully

230. *Gonzales*, 226 Cal. Rptr. at 166 (citing *Wilson v. Superior Court*, 13 Cal. 3d 652, 656 (1975)); *Duran v. Cassidy*, 104 Cal. Rptr. 793, 797 (Ct. App. 1972).

231. See *Gonzales v. City of Santa Paula*, 226 Cal. Rptr. 164, 168 (Cal. Ct. App. 1986); *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 343–46 (Cal. 1979), *aff'd*, 447 U.S. 81 (1980) (“[P]ast decisions on speech and private property testify to the strength of ‘liberty of speech’ in this state.”).

232. See *Gonzales v. City of Santa Paula*, 226 Cal. Rptr. 164, 168 (Cal. Ct. App. 1986); *Robins*, 592 P.2d at 907–10.

233. See also Farhad Manjoo, *Vote-swapper Swatted Down*, WIRED NEWS, Oct. 31, 2000, at <http://www.wired.com/news/politics/0,1283,39892,00.html>.

234. CAL. ELEC. CODE § 18521(a) (West 2000) (“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 . . . because he or any other person voted, agreed to vote, refrained from voting, or agreed to refrain from voting for any particular person or measure.”).

235. CAL. ELEC. CODE § 18522(a)(2) (West 2000) (“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 to or for any other person to induce any voter to vote or refrain from voting at an election for any particular person or measure.”).

236. CAL. ELEC. CODE § 18522(2)(2) (West 2000).

237. Scott Duke Harris, *Ballot Busters: The Archaic Mechanism Used to Elect U.S. Presidents Is Under Assault by People Who Meet on the Internet and Pledge to Swap Votes in Next Year’s Election*, L.A. TIMES MAGAZINE, Nov. 2, 2003, available at 2003 WL 2445497.

in law.”²⁴⁷ Therefore, absent the elements of valuable consideration” that make it truly valuable, the consideration is merely gratuitous.²⁴⁸

The right to vote is a right that both parties might otherwise exercise, as is the right to refrain from voting, or the right to vote for whomever one pleases. The promises made in the arrangement of an online vote-swap did not change these rights. When voters agreed to swap their votes, they retained all of their rights to vote or refrain from voting, or to vote for whichever candidate they chose. Their pledge was unenforceable, and they were free to withdraw at any time without detriment. Therefore, at best, the agreements could be deemed gratuitous consideration. Gratuitous consideration is consideration that “is not founded upon any such loss, injury, or inconvenience to the party to whom it moves as to make it valid in law.”²⁴⁹ As such, the acts of vote-swappers were no more than exchanges of mere gratuitous consideration, and the website operators were working outside the scope of the statute.

C. Oregon

On November 2, 2000, Oregon Secretary of State Bill Bradbury said online vote-pairing, even without the exchange of money, violated his state’s voting corruption law.²⁵⁰ Bradbury acted swiftly and sent desist letters to six vote-trading sites that were based outside Oregon.²⁵¹ Although Oregon initially also targeted sites that merely advocated vote-pairing, by November 2 the Oregon Elections Board softened its position only to prohibit entering into a contract to trade votes or facilitate such activity.²⁵²

247. BLACK’S LAW DICTIONARY 307 (6th ed. 1990).

248. *Id.* at 1550–51.

249. *Id.*

250. *Oregon Warns*, *supra* note 49, at A26. *See also* OR. REV. STAT. § 260.665 (West 1999).

251. *Oregon Warns*, *supra* note 49, at A26. This raises interesting questions as to whether he would even have been able to assert jurisdiction over the operators. This issue is beyond the scope of this study, but there have been many excellent studies of this question. *See, e.g.*, Brian E. Daughdrill, Comment, *Personal Jurisdiction and the Internet: Waiting For The Other Shoe To Drop On First Amendment Concerns*, 51 MERCER L. REV. 919 (2000); Kevin R. Lyn, *Personal Jurisdiction and the Internet: Is A Home Page Enough To Satisfy Minimum Contacts?*, 22 CAMPBELL L. REV. 341 (2000); Todd D. Leitstein, Comment, *A Solution For Personal Jurisdiction on the Internet*, 59 LA. L. REV. 565 (1999).

252. *See* Press Release, Oregon Secretary of State, Secretary of State Moves to Close Vote-Swapping Sites, Nov. 2, 2000, at <http://www.sos.state.or.us/executive/pressrel/110200swap.html> (last visited July 4, 2003).

1. Oregon Election Law

Oregon's voting corruption law states that "[n]o person, acting either alone or with or through any other person, shall directly or indirectly subject any person to undue influence with the intent to induce any person to register or vote in any particular manner."²⁵³ The statute defines "undue influence" as including the "giving or promising to give money, employment or other thing of value."²⁵⁴

Oregon's Secretary of State interpreted "thing of value" to include the exchange of a co-equal vote. Therefore, according to the State Election Division, any individual pair of voters engaging in an arrangement to swap votes was in violation of Oregon law,²⁵⁵ as was any website operator who facilitated such an arrangement.

Analysis of whether online vote-pairing is illegal under Oregon law hinges on the question: Is a vote a "thing of value that would be used to induce a person to vote?" There is only one reported case in Oregon interpreting Oregon Revised Statute section 260.665 ("section 260.665"). Although this decision offers a nearly perfect roadmap for analysis of this issue under Oregon law, due to a procedural technicality, it offers little in the way of precedent upon which a court, the Secretary of State, or citizens can rely.

*Oregon Republican Party v. State*²⁵⁶ dealt with a plan by the Oregon Republican Party to mail applications for absentee ballots with the voter's name pre-printed on them.²⁵⁷ The application was to include a letter urging the voter to apply for an absentee ballot, if the voter was unsure of being able to vote on Election Day, and a postage-paid envelope in which the voter could send the application to Republican Party headquarters.²⁵⁸ The Party would then have the applications forwarded to the county clerk, who would have the ballots sent to the individual voters.²⁵⁹ The Republican Party sought a declaration that the mailing would not violate the election

253. OR. REV. STAT. § 260.665(2)(c) (West 1999).

254. *Id.* § 260.665(1).

255. See Telephone Interview with Jennifer Hertel, Program Representative, Oregon State Election Division (Nov. 6, 2000) (confirmed by email from Norma Buckno, Oregon State Election Division, to Marc J. Randazza (Mar. 28, 2001) (on file with author)). Hertel stated that the individual voters would be in violation of Oregon Revised Statute section 260.665 but acknowledged that there would be no practical way to prosecute individual voters due to the impossibility of verifying exactly how each voter cast his or her ballot. See *id.*

256. 717 P.2d 1206 (Or. Ct. App. 1986) [hereinafter *Oregon Republican I*].

257. *Id.* at 1207.

258. See *Oregon Republican I*, 717 P.2d at 1207.

259. See *id.*

statute, but the Circuit Court of Marion County, Oregon, held that it would violate the statute due to the fact that the stamped envelope was a “thing of value.”²⁶⁰

The Oregon Republican Party appealed to the Court of Appeals of Oregon, which reversed the finding of the circuit court, and agreed that such a mailing would not violate section 260.665.²⁶¹ The court wrote that when considering whether a “postage paid envelope is a thing of value that would be used to induce a person to vote,” the parties in the case had incorrectly focused on the first part of the question.²⁶² The decisive factor was not whether the stamped envelope was valuable consideration, but rather whether there existed improper intent to induce persons to register or vote.²⁶³ Since inducement requires a promise of an advantage as a result of performing the desired act, for an act to be held as inducement, there must be persuasion coupled with a benefit or the absence of a threatened detriment.²⁶⁴ Therefore, in order for inducement to exist, there must be a benefit greater than what is involved in the act of voting.²⁶⁵ The law requires something with value independent of the right of suffrage.²⁶⁶ The court held that the envelope was a “thing of value” but that it did not reward the act of voting.²⁶⁷

This decision would appear to quell the vote-swap controversy, at least in the State of Oregon. However, the Oregon Supreme Court rendered *Oregon Republican I* moot upon appeal because the election was over.²⁶⁸ While not accepting that the doctrine of “capable of repetition, yet evading review” existed in Oregon, the Supreme Court of Oregon stated that if it did, it would not be applicable to this case.²⁶⁹ Because the Republican

260. *Id.* (trial court opinion unpublished, but trial court reasoning derived from published court of appeals decision).

261. *See id.* at 1208.

262. *See id.*

263. *See id.*

264. *See id.*

265. *Id.*

266. *Id.*

267. *See id.*

268. *See Or. Republican Party v. State*, 722 P.2d 1237 (Or. 1986) [hereinafter *Oregon Republican II*]. *See also Brumnett v. Psychiatric Sec. Review Bd.*, 848 P.2d 1194, 1196 (Or. 1993) (“Cases that are otherwise justiciable, but in which a court’s decision no longer will have a practical effect on or concerning the rights of the parties . . . [are] moot.”).

269. *See Oregon Republican II*, 722 P.2d at 1237. *See also Brumnett*, 848 P.2d at 1196 (“Cases that are otherwise justiciable, but in which a court’s decision no longer will have a practical effect on or concerning the rights of the parties . . . [are] moot.”); *Barcik v. Kubiacyk*, 895 P.2d 765, 774–75 (Or. 1995) (“[C]apable of repetition, yet evading review” has been rejected by the Oregon Supreme Court); *Pham v. Thompson*, 965 P.2d 482, 485 (Or. Ct. App. 1998) (“Oregon does not recognize the ‘capable of repetition, yet evading review doctrine.’”); *Safeway, Inc. v. Or. Pub. Employees Union*,

Party did not allege that it intended to utilize the same plan in the future, the issue evaded review.²⁷⁰ Therefore, the decision of the court of appeals in *Oregon Republican I* was reversed and remanded with instructions to dismiss the appeal as moot.²⁷¹

The court of appeals obediently followed the Oregon Supreme Court's instructions and wrote, in a *per curiam* opinion, "Dismissed as moot."²⁷² The majority did not write a single additional word.²⁷³ However, in a scathing concurrence, Judge Van Hoomissen foresaw the vote-swap controversy when he wrote:

The Supreme Court could have decided the issue on its merits and should have done so. Meanwhile, political parties, campaign committees, candidates and public officials responsible for enforcement of the election laws are left guessing about the legality of the conduct proposed here. More litigation, more expense and more delay are the only results of the Supreme Court's directive to this court.²⁷⁴

2. *Oregon Constitutional Analysis*

Van Hoomissen not only foresaw the constitutional issue presented by online vote-pairing but also offered guidance to the resolution of the issue on free speech grounds in his concurrence in *Oregon Republican I*. Van Hoomissen, in examining the legislative intent behind section 260.665, wrote: "[a]n election offense does not exist unless the act tends to produce the types of evils that the statute was designed to avoid."²⁷⁵ Judge Van Hoomissen's concurrence states that it is consistent with his interpretation of the statute to say that the giving of a thing of value does not include giving an item or service that does no more than facilitate the act of deliberative voting.²⁷⁶

954 P.2d 196, 198 (Or. Ct. App. 1998).

270. See *Oregon Republican II*, 722 P.2d at 1238. But see, e.g., *Whipple v. Or. Sch. Activities Ass'n*, 629 P.2d 384, 421 n.3 (Or. Ct. App. 1986) ("[M]atters of public interest should sometimes be resolved by the courts even in the face of apparent mootness of the particular case at hand.").

271. *Oregon Republican II*, 722 P.2d at 1238–39.

272. *Or. Republican Party v. State*, 726 P.2d 412, 412 (Or. Ct. App. 1986) [hereinafter *Oregon Republican III*].

273. *Id.*

274. *Id.* (Van Hoomissen, J., concurring).

275. *Oregon Republican I*, 717 P.2d at 1209–10 (Van Hoomissen, J., concurring).

276. *Id.* at 1210.

Van Hoomissen noted that the court did not address the constitutional aspects of the case that he believed were present, but his opinion suggests that Bradbury's application of section 260.665 violated Article I, Section 8 (freedom of speech)²⁷⁷ and Article I, Section 26 (freedom of assembly)²⁷⁸ of the Oregon Constitution.²⁷⁹ Van Hoomissen's analysis also suggests that Bradbury's move was likely violative of the First and Fourteenth Amendments of the U.S. Constitution.²⁸⁰ Since Oregon's Constitution usually provides greater protection to freedom of speech and assembly than the federal Constitution,²⁸¹ there is no necessity for federal analysis when there is a violation of the state constitution.²⁸²

Bradbury's application of section 260.665 impacted First Amendment rights to freedom of speech and assembly. The websites expressed political opinion and facilitated the assembly of citizens to achieve a common political goal. As such, the application of the statute must be subjected to strict scrutiny under the Constitution.²⁸³ Under this level of scrutiny, suppression of online vote-pairing is impermissible.

Initially, Bradbury's actions implicated Article 1, Section 8 and Article I, Section 26 of the Oregon Constitution. However, given his re-statement of position on November 2, 2000, only Section 26, the Oregon Constitution's guarantee of freedom of association, was implicated.²⁸⁴ This provision states, in pertinent part, "No law shall be passed restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good"²⁸⁵

Therefore, the constitutional question becomes whether, under Oregon law, a constitutional prohibition against laws suppressing freedom of association can be overridden by the actions of a secretary of state that

277. OR. CONST. art. I, § 8 ("No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.")

278. OR. CONST. art. I, § 26 ("No law shall be passed restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good; nor from instructing their Representatives; nor from applying to the Legislature for redress of grievances.")

279. *Oregon Republican I*, 717 P.2d at 1210.

280. *Id.*

281. *See, e.g.*, *Deras v. Myers*, 535 P.2d 541, 549 (Or. 1975).

282. *See id.* at 549.

283. *State v. Tusek*, 630 P.2d 892, 894 (Or. Ct. App. 1981); *Crane*, 612 P.2d at 737-38. *See also State v. Hodges*, 457 P.2d 491, 492-93 (Or. 1969).

284. Press Release, Oregon Secretary of State, Secretary of State Moves to Close Vote-Swapping Sites, Nov. 2, 2000, at <http://www.sos.state.or.us/executive/pressrel/110200swap.html> (last visited July 4, 2003).

285. OR. CONST. art. I, § 26.

directly restrain freedom of association.²⁸⁶ This is a proposition that the Supreme Court of Oregon has already rejected.²⁸⁷ If the Secretary of State threatened citizens with prosecution that resulted in a restraint of Oregonians from assembling together to consult for their own common good, a balancing test is neither necessary nor proper.²⁸⁸ Bradbury violated the constitutional rights of Oregonians.

D. Florida

Before Katharine Harris gained fame (or infamy) for her involvement in the 2000 vote recount debacle, she weighed in on the issue of online vote-pairing. On November 2, 2000, the author of this study called the then Secretary of State and questioned her as to her opinion on the issue. Harris stated that the practice was “absolutely illegal” under Florida law.²⁸⁹ When pressed as to what statutes the practice violated, Harris stated that the practice was certainly illegal because “a vote is to be voted, not traded or swapped.”²⁹⁰ Despite this position, Harris never took public action against the online vote-pairing sites and never issued any official releases on the matter.

Based on her statements, one could argue that the current Secretary of State lacks Harris’ conviction on the subject. Representatives of the Florida Department of State, Division of Elections, seemed confused as to how to apply Florida election law to vote-pairing. When questioned, Sharon Larson, Assistant General Counsel to the Florida Department of State, Division of Elections stated her expert opinion that online vote-pairing “could possibly” be a violation of the law.²⁹¹ Regardless, Larson suggested that any such violations were beyond the concern of the Division of Elections. “The Department of State does not have prosecutorial authority,” she said.

Searching for a more definite answer, I pressed the Secretary of State’s office for an answer more definite than “maybe.” The General Counsel’s office deferred the inquiry to the judgment of the secretary’s public relations professionals. Bill Spann, Communications Director for the Florida Department of State, finally issued this official statement:

286. See *Deras v. Myers*, 535 P.2d 541, 544 (Or. 1975).

287. *Id.*

288. *Id.* at 545–46 n.6.

289. Telephone Interview with Katharine Harris, Secretary of State, Florida, Nov. 2, 2000.

290. *Id.*

291. See Email from Sharon Larson, Assistant General Counsel to the Florida Department of State Division of Election, to Marc J. Randazza (July 18, 2003) (on file with the author).

[V]ote-swapping may, in fact, constitute voter fraud, and all Florida citizens should be aware of that. Specifically, the process of vote-swapping may violate Florida Statute sections 104.045 and 104.061. The Florida Department of State considers any allegation of voter fraud to be a very serious matter and would immediately inform the proper investigative authority.²⁹²

Given that Florida was the most closely divided state in 2000, it is foreseeable that vote-pairing could have an effect in Florida in 2004.²⁹³ As one of the top prizes in the Electoral College, vote-pairing demands analysis under Florida law. This is especially true in light of the fact that the Secretary of State's General Counsel's office is so unsure as to whether the practice is illegal.

As Spann mentioned above, Florida has two statutes that "may" be implicated by the practice of online vote-pairing: Florida Statute section 104.045,²⁹⁴ the Florida "vote selling" statute, and Florida Statute section 104.061,²⁹⁵ the Florida statute prohibiting the corrupt influence on the practice of voting. The Florida vote selling statute provides:

104.045. Vote selling: Any person who:

- (1) Corruptly offers to vote for or against, or to refrain from voting for or against, any candidate in any election in return for pecuniary or other benefit; or
- (2) Accepts a pecuniary or other benefit in exchange for a promise to vote for or against, or to refrain from voting for or against, any candidate in any election, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

As discussed in Part IV, the federal vote-buying statute²⁹⁶ is limited to instruments of corruption that are pecuniary in nature. Section 104.045 dispenses with this limitation and specifically includes pecuniary benefits and "other" benefits.

292. See Email from Bill Spann, Communications Director for the Florida Department of State, to Marc J. Randazza (July 21, 2003) (on file with the author).

293. See American University News Press Release, Jan. 1, 2001, at <http://domino.american.edu/AU/media/mediaref.nsf/0/fa835b21d699441a852569d10077aa8d?OpenDocument> (last visited July 13, 2003) (Jamin Raskin was quoted in the release as saying, "If Republican state officials had not shut down the vote-trading movement in Florida, it is very possible that Al Gore would have won that state.").

294. FLA. STAT. ANN. § 104.045 (West 2002).

295. FLA. STAT. ANN. § 104.061 (West 2002).

296. 42 U.S.C. § 1973i(c) (2000).

Related Florida laws such as Florida Statute section 104.012, the Florida election law governing the giving of consideration for voter registration, prohibits the giving of “anything of value that is *redeemable in cash* to any person in consideration for his becoming a registered voter”²⁹⁷ By expressly prohibiting the exchange of pecuniary or monetary benefits for a voter’s registration, the Florida Legislature is presumed to have intended to exclude other types of benefits from the statute’s prohibition.²⁹⁸ The Legislature did not include such a limitation in section 104.045, and therefore, one cannot be read into it.

The Florida vote selling statute has expansive language that provides that any person who *corruptly* offers to vote for or against a candidate in exchange for not only a pecuniary but also any *other benefit*, or accepts a pecuniary or *other benefit* in exchange for a *promise* to vote for or against a candidate is guilty of a third degree felony.²⁹⁹ The language of this statute suggests that the Florida vote selling statute is intended to encompass behavior that might include online vote-pairing. However, the Florida Division of Elections interpreted this statute as permitting the transfer of something of value, pecuniary or otherwise, as long as the consideration given is not bestowed with the intent to “buy” or “corruptly influence” another’s vote.³⁰⁰

Unless online vote-pairing is held to be an act of a nature that is tantamount to “corruption,” then it is clear that online vote-pairing would not be punishable under section 104.045. However, what “corrupt intent” means is certainly open to interpretation.

It is difficult to argue that “corruption” includes conduct that is regularly blessed in other political arenas.³⁰¹ Perhaps this political consideration is why Larson was reluctant to take a firm legal position on the issue. However, the term “corruption” has a degree of vagueness to it that makes judicial predictions uncertain. Appellate decisions interpreting this term are not very illuminating, but they shed enough light on the subject to suggest that online vote-pairing does fit within the boundaries of this law.³⁰² Most cases define “corruption” in the context of the Florida Corrupt Voting Practices Act, Florida Statute section 104.061, which provides:

297. FLA. STAT. ANN. § 104.012 (West 2002) (emphasis added).

298. See Op. Div. Elect. 87-08 (Aug. 3, 1987).

299. FLA. STAT. ANN. § 104.045 (West 2002).

300. See Op. Div. Elect. 87-08 (Aug. 3, 1987).

301. See Part V, *Ethical Analysis*.

302. See, e.g., *Shiver v. Apalachee Pub. Co.*, 425 So. 2d 1173 (Fla. 1st DCA 1983); *Trushin v. State*, 425 So. 2d 1126 (Fla. 1983); *Russ v. State*, 832 So. 2d 901 (Fla. 1st DCA 2002).

Fla. Stat. § 104.061 Corruptly Influencing Voting

(1) Whoever by bribery, menace, threat, or other corruption whatsoever, either directly or indirectly, attempts to influence, deceive, or deter any elector in voting or interferes with him or her in the free exercise of the elector's right to vote at any election commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084 for the first conviction, and a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084 for any subsequent conviction.

(2) No person shall directly or indirectly give or promise anything of value to another intending thereby to buy that person's or another's vote or to corruptly influence that person or another in casting his or her vote. Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. However, this subsection shall not apply to the serving of food to be consumed at a political rally or meeting or to any item of nominal value which is used as a political advertisement, including a campaign message designed to be worn by a person.

Florida decisions interpreting this law have held that section 104.061 is intended to prohibit conduct that is “nonprotected” and “clearly criminal.”³⁰³ Although the definition of key terms in the statute, such as “anything of value,” “other corruption,” and “corruptly” will vary in the minds of reasonable observers, Florida appellate decisions uniformly hold that the statute and its key terms are not unconstitutionally vague.³⁰⁴

The benchmark in Florida for unconstitutional vagueness is whether a statute gives fair notice to a person of ordinary or “common intelligence” of what constitutes forbidden conduct.³⁰⁵ Any doubt as to what is prohibited is resolved in favor of the accused and against the prosecution.³⁰⁶

Given that the statute is limited to what is “clearly criminal conduct,”³⁰⁷ theoretically there should be little need for extensive analysis beyond this

303. See *Shiver v. Apalachee Publ'g Co.*, 425 So. 2d 1173, 1175 (Fla. 1st DCA 1983).

304. See *Trushin v. State*, 425 So. 2d 1126 (Fla. 1983); *Russ v. State*, 832 So. 2d 901 (Fla. 1st DCA 2002).

305. *Russ*, 832 So. 2d at 906; *Bouters v. State*, 659 So. 2d 235, 238 (Fla. 1995); *State v. Hagan*, 387 So. 2d 943, 945 (Fla. 1980).

306. *Russ*, 832 So. 2d at 906–07; *State v. Wershow*, 343 So. 2d 605, 608 (Fla. 1977).

307. *Shiver*, 425 So. 2d at 1175.

point. As even the General Counsel's Office of the Secretary of State could not definitively figure out if online vote-pairing violated Florida law, a person of "common intelligence" should not reasonably be expected to divine the answer. However, it does not take more than a citizen of average intelligence to determine that (despite the best intentions of the Florida appellate courts) greater analysis is not only warranted but also necessary.

In *Trushin v. State*³⁰⁸ the defendant, an attorney, circulated a letter throughout a Miami Beach apartment complex promising to prepare a will, free of charge, to all residents who pledged to vote for a particular slate of candidates in a runoff election.³⁰⁹ Trushin was charged with promising something of value with the intent to buy votes and corruptly influence voting under section 104.061(2).³¹⁰ On appeal, Trushin claimed that the terms "anything of value" and "corruptly" were unconstitutionally vague.³¹¹ However, the Florida Supreme Court considered only the "anything of value" language because Trushin failed to raise the vagueness of the term "corruptly" at the district court level.³¹²

The Florida Supreme Court held that the term "anything of value" was not unconstitutionally vague.³¹³ The court reasoned that any person of "ordinary mental capacity" was capable of understanding that section 104.061 prohibited the giving of any item of any value whatsoever so long as the unlawful intent prohibited by the statute was present.³¹⁴ The law prohibits only the giving of something, or the mere promise to do so, "only when the defendant intends thereby to buy [a] vote or to corruptly influence casting a vote."³¹⁵ The statute's intent is to prohibit an individual from conditioning his or her vote upon the receipt of a "personal benefit."³¹⁶

Trushin's last stand was an argument that the preparation of a will was not "a thing of value."³¹⁷ The Florida Supreme Court abstained from this determination and held that this is a decision for the trial court, which should only be overturned if the decision was clearly erroneous.³¹⁸

308. 425 So. 2d 1126 (Fla. 1983).

309. *See id.* at 1127.

310. *Id.* at 1127–28.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.* at 1131 (internal quotation marks omitted).

316. *See id.*

317. *Id.* at 1132.

318. *Id.*

The question as to whether “other corruption” was unconstitutionally vague would wait nineteen years for an answer, until *Russ v. State*³¹⁹ came before Florida’s First District Court of Appeals. In ruling on this issue, the appellate court again relied on the “person of ordinary or common intelligence” test and determined that the term “corruption” neither had a technical nor specialized definition and that the words were understandable in common parlance.³²⁰

Given the fact that Russ engaged in clear threats and menacing behavior, there is little room to criticize the First District Court of Appeals for ducking the question and holding that Mr. Russ’s behavior might have fallen inside the clearly marked outline of the term “corruption.” However, the court left only an implied definition of “corruption” for us if we wish to look at the novel question of online vote-pairing.

Because the issue is so novel and un contemplated by the statute, it is fair to assume with some degree of confidence that a court would be hard-pressed to hold whether two electors discussing mutual preferences and coordinating their votes falls either within the purview of an exchange of “things of value” or the catchall “other corruption.” Since any doubt must be resolved in favor of the defendant,³²¹ the great doubt that even the state election board harbors must be resolved in favor of the protected nature of online vote-pairing.

Even if one of Florida’s lower courts were presented with the question, the application of section 104.061 to encompass a prohibition against online vote-pairing should likely fail before a challenge of unconstitutional overbreadth as applied. In Florida, the overbreadth doctrine applies to statutes, or the application thereof, that are “susceptible of application” to constitutionally protected conduct such as political speech.³²²

A successful overbreadth challenge must establish that the application of the statute reaches a “substantial amount of constitutionally protected conduct.”³²³ Given that the most sacrosanct of constitutionally protected rights, freedom of assembly and speech in a political context, are implicated by any prosecution of persons engaged in online vote-pairing, and that their definitions provided by the statutes were written before the phenomenon even existed, any such prosecution would most likely fail, even before being subjected to federal constitutional scrutiny.

319. 832 So. 2d 901 (Fla. 1st DCA 2002).

320. *Id.* at 906–07.

321. *See* *State v. Wershow*, 343 So. 2d 605, 608 (Fla. 1977).

322. *Russ*, 832 So. 2d at 907 (citing *Carricarte v. State*, 384 So. 2d 1261, 1262 (Fla. 1980)).

323. *See id.* (citing *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982)).

E. Minnesota

1. Minnesota Election Law

On November 1, 2000, Minnesota Secretary of State Mary Kiffmeyer issued what could have been the most melodramatic statement of the 2000 election:

[Vote-pairing] seriously undermine[s] the integrity of the Minnesota electoral process and the high confidence that Minnesotans place on election results Minnesotans participate in political parties, nominate candidates, and work in campaigns with a high degree of expectation that their votes will have a significant and above-board impact on the election. . . . Vote-swapping is the ultimate in voter fraud. It proposes to change the outcome of the election through an underhanded scheme. . . . Fair and honest elections are the core foundation of our democracy. Vote-swapping undercuts the fundamental tenets that hold our country together. Vote-swapping cannot be permitted and will not be allowed in the State of Minnesota.³²⁴

Kiffmeyer's prediction that online vote-pairing would bring about electoral Armageddon was derived from her arguably mistaken interpretation of Minnesota Statutes section 211B.13,³²⁵ the section of the Minnesota election law governing bribery, treating, and solicitation:³²⁶

211B.13 Bribery, treating, and solicitation.

Subdivision 1. Bribery, advancing money, and treating prohibited. A person who willfully, directly or indirectly, advances, pays, gives, promises, or lends any money, food, liquor, clothing, entertainment, or other thing of monetary value, or who offers, promises, or endeavors to obtain any money, position, appointment, employment, or other valuable consideration, to or for a person, in order to induce a voter to refrain from voting, or to vote in a particular way, at an election, is guilty of a felony. This section does not prevent a candidate from stating publicly preference for or support of another candidate to be voted for at the same primary or

324. See 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%2011-1-00.doc> (last visited July 7, 2003).

325. *Id.*

326. MINN. STAT. ANN. § 211B.13 (West 2003).

bound to suffer, as an inducement to the promisor, is a good consideration for a promise.²³⁸

California courts have never interpreted the California Election Code to prohibit the type of behavior in which vote-swappers engaged. The general rule in California is that the gravamen of a charge of election corruption is an improper promise, usually of a pecuniary nature.²³⁹ For a promise made by a candidate to be “improper,” it must offer or imply a service or benefit, conferrable directly upon the voter, that “does not involve the proper administration of the office sought.”²⁴⁰ For example, in one case, a promise by a campaign worker to help free a voter’s brother from jail in exchange for an absentee ballot vote did not relate to the proper duties of the candidate (city councilman) and was therefore both “improper” and unlawful.²⁴¹

Generally speaking, under California law, the term “valuable consideration” is not necessarily money or a material benefit.²⁴² Consideration exists if the person to whom the promise is made loses any right he could have otherwise exercised or the person making the promise receives any benefit he would otherwise not have had.²⁴³ Both need not exist in order for there to be consideration, but if neither condition is met, there is no consideration.²⁴⁴

If the promise leaves a party able to perform or withdraw at will without detriment, there is no consideration, and the contract is void.²⁴⁵ If even one of the promises given in an agreement leaves a party with the option to perform or withdraw at will, then the promise is illusory and provides no consideration.²⁴⁶

In comparison to “valuable consideration,” “gratuitous consideration” is defined as consideration “which is not founded upon any such loss, injury, or inconvenience to the party to whom it moves as to make it valid

238. CAL. CIV. CODE § 1605 (West 1982).

239. *See Stebbins v. White*, 235 Cal. Rptr. 656, 667–68 (Cal. Ct. App. 1987).

240. *Id.* at 667. *See also* *Bush v. Head*, 97 P. 512, 515 (Cal. 1908).

241. *See Stebbins*, 235 Cal. Rptr. at 668.

242. *See Estate of Bishop*, 25 Cal. Rptr. 763 (Cal. Ct. App. 1962).

243. *See Southern Cal. Enter., Inc. v. Walter & Co.*, 178 P.2d 785, 790–91 (Cal. Ct. App. 1947); *Chrisman v. S. Cal. Edison Co.*, 256 P.2d 618, 621 (Cal. Ct. App. 1927) (stating that if the promisor is not otherwise lawfully entitled to the benefit, the benefit is sufficient to claim valuable consideration).

244. *See Jordan v. Scott*, 177 P. 504, 505 (Cal. Ct. App. 1918).

245. *See Mattei v. Hopper*, 330 P.2d 625, 626 (Cal. 1958); *Cox v. Hollywood Film Enter., Inc.*, 240 P.2d 713, 716 (Cal. Ct. App. 1952).

246. *See Pease v. Brown*, 8 Cal. Rptr. 917, 921 (Cal. Ct. App. 1960).

election. Refreshments of food or nonalcoholic beverages of nominal value consumed on the premises at a private gathering or public meeting are not prohibited under this section.

Subdivision. 2. Certain solicitations prohibited. A person may not knowingly solicit, receive, or accept any money, property, or other thing of monetary value, or a promise or pledge of these that is a disbursement prohibited by this section or section 211B.15.³²⁷

Although the plain language of the Minnesota Election Bribery Law offers little clue as to where Kiffmeyer found her definition of “fraud,” for the purposes of this study, it must be assumed that she derived her interpretation somewhere beyond her personal politics.³²⁸ However, Kiffmeyer’s very own Minnesota Campaign Manual appears to suggest a very different conclusion.³²⁹ The Manual explains section 211B.13 as follows:

Bribery. As stated previously, there is a prohibition against giving any thing of *monetary* value to any person for the purpose of influencing that person’s vote.³³⁰

The logical fulcrum on which online vote-pairing balances under section 211B.13 is the question as to whether the coordination of an online vote-swap is a “thing of monetary value” or “valuable consideration.” Given its textual clarity, section 211B.13 has been rarely interpreted in the courts. However, there are a few Minnesota Attorney General opinions interpreting the statute and its predecessor.

The most recent (1995) Attorney General opinion interpreting the Minnesota Election Bribery Law considered a situation involving a Minnesota town’s offer to provide money, land, roads, and utilities for a courthouse and related buildings if an initiative passed to move the county seat to that town.³³¹ The Minnesota Attorney General concluded that this “offer” of significant real property and services was arguably a violation of section 211B.13.³³² However, “the weight of authority tip[ped] against such a determination.”³³³

327. See MINN. STAT. ANN. § 211B.13 (West 2003).

328. See *Ethics* discussed at Part V of this study.

329. See Minnesota Campaign Manual 2002, at <http://www.sos.state.mn.us/election/CampaignManual/campaignmanual-02.pdf> (last visited July 10, 2003).

330. *Id.* (emphasis added).

331. See Minn. Op. Atty. Gen. 106e, April 10, 1995, at 1–2.

332. *Id.* at 7.

333. See *id.* at 7.

In arriving at this determination, the Minnesota Attorney General distinguished the town's offer from offers by candidates for office to serve without pay or at reduced pay.³³⁴ Such had been determined in an attorney general's opinion from 1932 to have the potential to reduce electoral contests to a "race to the bottom," with candidates willing to serve for the least pay having an undue advantage.³³⁵ Meanwhile coordinated civic action carried no such risk.³³⁶

A 1954 Attorney General Opinion (referenced in the 1995 Opinion) dealt with circumstances similar to the 1995 opinion, wherein a town made an offer of a gift of land and money to help finance courthouse construction if a referendum to move the county seat succeeded.³³⁷ The Attorney General wrote that such an offer was not a violation of the Corrupt Practices Act (a predecessor of section 211B.13) due to the public nature of the offer and benefit to be derived therefrom.³³⁸ Basing his analysis on a survey of court decisions in other states, the Attorney General wrote that since the party to be influenced was an entire electorate and the thing offered was of a public nature and not of a nature intended to benefit any individuals, "the elements requisite to constitute a bribery or a corrupt and unlawful influence within the meaning of bribery and corrupt practice statutes [was] lacking."³³⁹

As mentioned above, judicial interpretations of section 211B.13 are few. However, the Minnesota courts have considered analogous circumstances that are of instructive value when reading section 211B.13. For example, Minnesota Statute section 210A.34 prohibited corporations from making a contribution of any money, property, free services, or other thing of value to any political party, nomination, election, or appointment to any political office.³⁴⁰ In response, corporations formed political action committees ("PACs").³⁴¹ In examining PACs, the Minnesota Supreme Court held:

A conduit PAC merely aids the political process by stimulating and facilitating the involvement of a larger number of citizens. So long

334. *Id.*

335. *See id.*

336. *See* Minn. Op. Atty. Gen. 104a-9 (Jan. 29, 1932).

337. *See* Minn. Op. Atty. Gen. 627-B-3 (May 6, 1954).

338. *See id.*

339. *See id.*

340. MINN. STAT. ANN. § 210A.34 (West 2003).

341. *See generally* Gil Troy, *The Road to Hell . . . Where Reform Got Us in the Past: A Historian Suggests Reformers May Be Naïve*, at <http://www.tompaine.com/feature2.cfm/ID/2721>; *see also* <http://www.fec.gov/info/appfour.htm>.

as the sponsoring entity exerts no influence on the member to contribute to a particular candidate, group of candidates, or type of candidate, the member is merely exercising his personal right to contribute to candidates of his choice. There may well be circumstances under which some subtle pressures are placed on conduit PAC members to support specific candidates, but this could be guarded against by protecting the anonymity of the individual contributor's choice. For the same basic reasons, except for the further lack of the statutorily required "thing of value," independent PAC's [sic] are not violative of the legislative intent.³⁴²

The Minnesota Supreme Court additionally analyzed the statute to determine which specific mischief was to be remedied by the statute. Finding that it was "the disproportionate influence on the political process by corporate interests,"³⁴³ the Court held that PACs were outside of that disproportionate influence, and thus their incidental expenditures that benefited candidates were not violative of the law.³⁴⁴

By these same principles, although there is no authority that appears to support Kiffmeyer's position, there is support for the opposite position. Minnesota election laws uniformly have been interpreted to find a "thing of value" to include "things which have a value measurable in money."³⁴⁵ Even if that "thing of value" is of negligible worth, it must be something that has some palpable monetary value.³⁴⁶

The specific mischief that section 211B.13 seeks to cure is that of bribery, not of the assembly and communication of Minnesota citizens to trade *ideas* leading to a decision as to how to vote. However, even if there were a colorable argument to support Kiffmeyer's threat against vote-pairing operators and users, any such interpretation would be violative of the Minnesota Constitution (discussed immediately below) and the U.S. Constitution (discussed further below).

342. Minnesota Ass'n of Commerce and Indus. v. Foley, 316 N.W.2d 524, 529 (Minn. 1982).

343. *Id.*

344. *Id.*

345. LaBelle v. Hennepin County Bar Ass'n, 288 N.W. 788, 792 (Minn. 1939).

346. See, e.g., Miller v. Maier, 161 N.W. 513 (Minn. 1917) (providing cocktails to voters while soliciting their support is prohibited); Minn. Op. Atty. Gen. 627f-1 (Mar. 20, 1917) (candidate giving cigars to voters in the election room while polls were still open was in violation of Corrupt Practices Act); Minn. Op. Atty. Gen. 627f-1 (June 3, 1930) (distribution of free tickets to a county fair violated Corrupt Practices Act).

2. *Minnesota Constitutional Law*

Article I, Section 3 of the Minnesota Constitution provides:

The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects being responsible for the abuse of such rights.

Kiffmeyer's cease and desist demand of November 1, 2000 was a prior restraint of expression and, as such, would bear a heavy presumption against its validity under the Minnesota (and U.S.) Constitution.³⁴⁷ It is most likely that a Minnesota court would consider Kiffmeyer's interpretation of section 211B.13 (or any other state action which prohibited online political discussion) as running afoul of either the Minnesota or U.S. Constitutions. The Minnesota Supreme Court has held that (in most cases) Article I, Section 3 of the Minnesota constitution extends protections to free speech identical to those embodied in the First Amendment to the U.S. Constitution.³⁴⁸ That being said, Minnesota court decisions interpreting Article I, Section 3 primarily rely on United States Supreme Court First Amendment decisions. Therefore, a discussion of Minnesota constitutional law may be deferred, and the reader may refer to Part IV for the federal constitutional analysis.³⁴⁹

F. *Arizona*

The Arizona State Election Director, Jessica Funkhouse (R), told the press that Arizona law prohibited the practice of online vote-pairing.³⁵⁰ Funkhouse said, "It's illegal in Arizona to give anything of value to vote in a certain way."³⁵¹ According to Funkhouse, "anything of value" includes another person's vote.³⁵²

347. See *Alexander v. City of St. Paul*, 227 N.W.2d 370, 373 (Minn. 1975).

348. See, e.g., *State v. Wicklund*, 576 N.W.2d 753, 756 (Minn. Ct. App. 1998) (free speech protection is not broader under the state constitution than under the federal); *State v. Century Camera, Inc.*, 309 N.W.2d 735, 738 n.6 (Minn. 1981) (same). Cf. *State v. Davidson*, 481 N.W.2d 51, 57 (Minn. 1992) (the state constitution may give broader protection than the federal).

349. *Id.*

350. See Wylie, *supra* note 53, at 2A.

351. *Id.*

352. *Id.*

I. Arizona Election Law

In making her assessment, Funkhouse relied upon Arizona's election corruption law, Arizona Revised Statute section 16-1014,³⁵³ which provides, in relevant part:

§ 16-1014. Corruption of electors; classification

A. 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, or to give, offer or promise an office, place or employment, or to promise or to procure or endeavor to procure an office, place or employment, 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, or to induce the voter to go to the polls, or remain away from the polls at an election, or on account of the voter having voted or refrained from voting for any particular person or measure, or having gone to the polls or remained away from the polls at an election.³⁵⁴

Section 16-1014 has received little appellate review in Arizona. The sole reported case mentioning the law offers no discussion of it but did recognize an obvious application of it—that a promise of a pay raise to school employees in exchange for their support of a budget-override initiative was a violation of the law.³⁵⁵

Given that there is so little instruction from the Arizona courts as to how to apply the Arizona election corruption law creatively, a broader survey of Arizona decisions is needed to determine whether an online vote-pairing participant's promise to vote fits within the term "other valuable consideration," and, if so, whether such an interpretation fits within the intent of section 16-1014.

There is some support in Arizona law for Funkhouse's position that a vote could be considered to be "valuable consideration." In *State v. Steiger*,³⁵⁶ a defendant (Steiger) was a supporter of the then executive director of the State Board of Pardons and Paroles.³⁵⁷ Steiger threatened

353. *Id.*

354. ARIZ. REV. STAT. § 16-1014 (1980).

355. *Miller v. Picacho Elem. Sch. Dist.*, 857 P.2d 1308, 1313 (Ariz. 1993) (Hathaway, J., dissenting), *rev'd on other grounds*, 877 P.2d 277 (Ariz. 1994).

356. 781 P.2d 616 (Ariz. Ct. App. 1989).

357. *Id.* at 618.

Johnson, a member of the Board, who was leaning toward voting to remove the director of the Board.³⁵⁸ Steiger threatened that he would “see to it that you [Johnson] no longer serve as a Justice of the Peace, and I will further take every step necessary to have you removed from the Board.”³⁵⁹ As a result of this attempt to influence Johnson’s vote, Steiger was charged with a violation of section 13-1804, theft by extortion.³⁶⁰

The prosecutor’s use of a theft statute in this circumstance was a creative interpretation of the law, and Steiger argued to the Arizona Court of Appeals that the statute was unconstitutionally vague because it did not clearly indicate that a “vote” was within the definition of “property” as used in the extortion statute.³⁶¹ The appeals court rejected Steiger’s argument and recognized that Arizona law defines “property” as “anything of value, tangible or intangible.”³⁶² The court then continued to discuss that Johnson’s vote was no less “valuable” than his right to vote free from outside pressure³⁶³ and held: “Because a vote is an intangible and something of value, it is included within the definition of property in A.R.S. § 13-1804(A)(8) [extortion].”³⁶⁴

It does not automatically follow that Arizona courts would hold similarly when confronted with a gratuitous promise to vote a certain way, arranged between voters, free of pressure. However, given the Court of Appeals’ words in *State v. Steiger*, it is certain that Funkhouse’s interpretation of “anything of value” was not completely without support in the law. On the other hand, the *Steiger* court’s opinion falls with some logic within the intent of a statute intended to prohibit extortion, but the same might not be said for the election corruption law.³⁶⁵ The intent of the election corruption law is to prevent commerce in items of value in exchange for influence over an elector’s voting decision.³⁶⁶ In the online vote-pairing context, the participant *wants* to vote for the candidate for whom he or she votes, in stark contrast to Johnson who was under threat of losing her job.

Regardless of the legislative intent, it appears that the balance of the law tips in favor of Funkhouse’s definition of “thing of value,” and given

358. *Id.*

359. *State v. Steiger*, 781 P.2d 616, 618 (Ariz. Ct. App. 1989).

360. *Id.* at 617.

361. *Id.* at 620.

362. *Id.* (citing ARIZ. REV. STAT. § 13-105(29) (1995)).

363. *Id.*

364. *Id.*

365. *See* 1984 Op. Atty. Gen. Ariz. 110 (Aug. 28, 1984).

366. *See id.*

the *Steiger* opinion, a vote should be considered to be “valuable consideration” under Arizona law.

2. *Arizona Constitutional Law*

Although Funkhouse’s interpretation of the terms of art contained in section 16-1014 appears to be sound, the application of the law to prevent online vote-pairing might run afoul of the Arizona Constitution and its protection of free expression. Article 11, Section 6 of the state constitution provides: “Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.” Arizona courts give great deference to free speech concerns.³⁶⁷ Such rights “go[] to the heart of the natural rights of citizens to impart and acquire information which is necessary for the well being of a free society.”³⁶⁸ The scope of protected activity under the Arizona Constitution is greater than that protected by the First Amendment to the U.S. Constitution.³⁶⁹

When we look at a theoretical state action to prohibit online vote-pairing in Arizona, the threshold question is not whether section 16-1014 is constitutional on its face. Statutes are presumptively constitutional in Arizona, and the text of the law does not appear to suffer from facial vagueness or overbreadth.³⁷⁰ The fact is that the issue of the election corruption law’s applicability is due to the novel nature of online vote-pairing and not to any weaknesses in the drafting of the statute.³⁷¹ Aside from the context of online vote-pairing, there is little doubt as to what section 16-1014 prohibits, and the text of the law is clear and understandable by citizens of ordinary intelligence, thus giving notice of the conduct it prohibits.³⁷²

367. See, e.g., *New Times, Inc. v. Ariz. Bd. of Regents*, 519 P.2d 169 (Ariz. 1974).

368. *Id.* at 173.

369. See, e.g., *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm’n*, 773 P.2d 455, 459 (Ariz. 1989); *Phoenix Newspapers, Inc. v. Superior Court*, 418 P.2d 594, 596 (Ariz. 1966); *Empress Adult Video & Bookstore v. City of Tucson*, 59 P.3d 814, 818 (Ariz. Ct. App. 2002); *Martin v. Reinstein*, 987 P.2d 779 (Ariz. Ct. App. 1999).

370. See *New Times, Inc.*, 519 P.2d at 173 (statutes come to the court clothed with a presumption of constitutionality); *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) (Arizona courts resolve all uncertainties in favor of a statute’s constitutional firmness).

371. See *State v. McLamb*, 932 P.2d 266, 274 (Ariz. Ct. App. 1997) (the fact that a statute could have constitutionally impermissible applications does not render it constitutionally void on overbreadth grounds) (citing *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984)).

372. See *Bird v. State*, 908 P.2d 12, 18 (Ariz. Ct. App. 1995).

Because the election corruption law is firm and specific, there is little inherent danger of arbitrary or discriminatory enforcement.³⁷³ It is therefore not the law that needs to be subjected to constitutional analysis but rather an application thereof that might implicate constitutionally protected speech.³⁷⁴

In deciding whether conduct holds sufficient communicative power to bring notions of free speech into play, courts will ask whether there was an intent to convey a particularized message and whether there was a likelihood that those who received it would understand the message.³⁷⁵ Online vote-pairing sites certainly had an intent to communicate a particularized message, and the fact that the sites facilitated reasoned agreements is persuasive evidence that the message was understood by its recipient. As such, there is little doubt that Arizona courts could justifiably see this issue in any light other than that cast by the free expression provision of the Arizona Constitution (and the First Amendment to the U.S. Constitution).

Given the fact that vote-swapping involves constitutional rights protected by the free expression provision of the Arizona Constitution, any test of such an application of section 16-1014 should be conducted under the rule of strict scrutiny.³⁷⁶ This highest level of constitutional scrutiny is engaged with a more exacting eye by Arizona courts than by federal courts.³⁷⁷ When presented with the possibility that constitutionally protected rights might be tread upon, Arizona courts will avoid, when possible, “attempts to erode [those] rights by balancing them against regulations serving governmental interests.”³⁷⁸

While the government has the constitutional power to prohibit corruption in elections, it does not have the power to restrict protected political speech.³⁷⁹ Political speech is entitled to the highest level of constitutional protection.³⁸⁰ Because any restraint of online vote-pairing sites would throw a roadblock between members of the electorate seeking to engage in political debate and caucus, but only on a particular subject,

373. *See id.*

374. *See id.*

375. *See id.* (citing *Texas v. Johnson*, 491 U.S. 397, 404 (1989)).

376. *See* *Mountain States Tel. & Tel. Co. v. Arizona Corp.* Comm’n, 773 P.2d 455, 462 (Ariz. 1989).

377. *See id.*

378. *See id.*

379. *See* *Lafaro v. Cahill*, 56 P.3d 56, 61 (Ariz. Ct. App. 2002); *KZPZ Broad., Inc. v. Black Canyon City Concerned Citizens*, 13 P.3d 772, 778 (Ariz. Ct. App. 2000).

380. *KZPZ Broad., Inc.*, 13 P.3d at 778 (citing *Buckley v. Am. Constitutional Law Fdn.*, 525 U.S. 181, 186–87 (1999)).

there is the presumption that this is a content-based restriction on free expression.³⁸¹ Even if it were given the benefit of doubt and considered content-neutral, the government would need to prove that it was restricting no more speech than necessary to serve the governmental interest of prohibiting corrupt elections.³⁸² To enjoin this conduct would be to enjoin conduct beyond the scope of the legislative intent of the statute. Disrupting an online vote-pairing site prohibits progressive (and theoretically, in the future, tech-savvy conservatives) political elements from being placed in contact with one another, after which the topic of debate is up to them. Such a prohibition is equivalent to shutting down an online dating service because some users made arrangements for prostitution over the network, while others use it for legal reasons.

3. *Arizona Conclusion*

Against this strict backdrop of scrutiny and the heavy burden required to suppress speech, an interpretation of section 16-1014 that prohibited online vote-pairing would likely be found to run afoul of Article 11, Section 6 of the State Constitution. However, until an appellate court rules on the issue, this conclusion is uncertain.

What is certain is that Funkhouse did not attach a novel definition to “valuable consideration” under her state’s election laws. Her application of the statute appears reasoned and not entirely improper. However, if subjected to constitutional scrutiny, the balance of the analysis seems to indicate that online vote-pairing would be protected under the Arizona Constitution.

G. *Wisconsin*

The operator of NaderTrade.org, Jeff Cardille, found himself in the unenviable position of being called in for a personal interview with the Wisconsin Attorney General.³⁸³ At this meeting, the Wisconsin officials told Cardille that vote-pairing was illegal under Wisconsin law and punishable by three years in prison and a \$10,000 fine.³⁸⁴ Once NaderTrade.org agreed to cease its operations and post disclaimers on the

381. *Id.*

382. *See Lafaro*, 56 P.3d at 61.

383. *See Wylie*, *supra* note 53, at 2A.

384. *Id.*

site informing all visitors that the practice was illegal, the Wisconsin Attorney General backed off on his threats to prosecute.³⁸⁵

Wisconsin is one of the few states that prohibit vote-pairing on a *legislative* level. Wisconsin Statute Annotated section 13.05 makes it a felony for legislators to engage in vote-swapping, which the law calls “logrolling”:

13.05. Logrolling prohibited. Any member of the legislature who gives, offers or promises to give his or her vote or influence in favor of or against any measure or proposition pending or proposed to be introduced in the legislature in consideration or upon condition that any other person elected to the same legislature will give or will promise or agree to give his or her vote or influence in favor of or against any other measure or proposition pending or proposed to be introduced in such legislature, or who gives, offers or promises to give his or her vote or influence for or against any measure on condition that any other member will give his or her vote or influence in favor of any change in any other bill pending or proposed to be introduced in the legislature, is guilty of a Class I felony.³⁸⁶

Perhaps with this statute in mind, the Wisconsin Attorney General chose to threaten Mr. Cardille. However, this statute is specifically tailored to limit the actions of legislators, not voters. The Wisconsin election bribery statute is found at section 12.11, and it, like most state election laws, relies on the term “anything of value.”³⁸⁷ The Wisconsin law prohibits anyone from offering, giving, or lending anything of value, or any job, privilege, or immunity to any person in order to induce the person to vote, refrain from voting, or voting for a certain candidate.³⁸⁸

This catchall term, “valuable consideration,” would normally require a perusal of case law to determine exactly how the state interprets this term. However, in Wisconsin, the legislature has done this work for us. Section 12.11(1) specifically defines “valuable consideration” under the state election bribery law to include:

[A]ny amount of money, or any object which has utility independent of any political message it contains and the value of

385. *See id.*

386. WIS. STAT. ANN. § 13.05 (West 2003).

387. *Id.* § 12.11.

388. *Id.* § 12.11.

which exceeds \$1. The prohibitions of this section apply to the distribution of material printed at public expense and available for free distribution if such materials are accompanied by a political message.³⁸⁹

A vote-swap promise clearly falls within the exception carved out by the Wisconsin legislature and outside the statute's prohibition. A vote-swap does not involve money, nor is it an object. A vote-swap pledge has no utility independent of the political message it contains. The Wisconsin Attorney General clearly misapplied Wisconsin law when he threatened NaderTrade.org.

H. States That Explicitly Permitted Online Vote-Pairing

Maine's Secretary of State, Dan Gwadosky, joined Nebraska's Secretary of State, Scott Moore, in sanctioning the legality of online vote-pairing. The only two states that permit an apportionment of their electoral college votes on a basis other than winner-take-all, Maine and Nebraska, also stand out as the only two states from where official statements did not threaten vote-pairing operators or participants.

1. Maine

In contrast to his counterparts in California, Oregon, Arizona, Wisconsin, and Minnesota, Maine Secretary of State Dan Gwadowsky neither threatened to prosecute online vote-swappers, nor did he give an official statement that the practice was punishable under Maine law. In fact, Gwadowsky stood out as the only state official to condone the practice both in law and in practice. Gwadowsky said, "It's a provocative way to use a new medium."³⁹⁰

While Gwadowsky's enthusiasm for vote-pairing is beyond the scope of this study, his decision to endorse it should be studied against a backdrop of Maine law. To begin, Maine's prohibition against bribery in political matters is enshrined in the State's Constitution.³⁹¹ The relevant article of the Maine Constitution provides:

The Legislature may enact laws excluding from the right of suffrage, for a term not exceeding ten years, all persons convicted of

389. *Id.* § 12.11(1).

390. Connerty-Marin, *supra* note 58, at A1.

391. *See* ME. CONST. art. 9, § 13.

bribery at any election, or of voting at any election, under the influence of a bribe.³⁹²

The Maine Legislature followed this mandate and enacted the state's law prohibiting bribery in official and political matters, Maine Revised Statute section 602.³⁹³ This law provides, 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;

B. Being a public servant, party official, candidate for electoral office or voter, he solicits, accepts or agrees to accept any pecuniary benefit from another knowing or believing the other's purpose to be as described in paragraph A, or fails to report to a law enforcement officer that he has been offered or promised a pecuniary benefit in violation of paragraph A.

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

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

392. ME. CONST. art. 9, § 13.

393. ME. REV. STAT. ANN. tit. 17, § 3602 (West 2003).

(3) A subscription to a newspaper, news magazine or other news publication.³⁹⁴

Given that the Maine statute limits its applicability to benefits in the form of an economic gain, little additional analysis is necessary in order to determine that Gwadowsky had it right. Online vote-pairing is permissible under Maine law.

2. *Nebraska*

Nebraska's secretary of state, Scott Moore, did not share his Maine counterpart's enthusiasm for online vote-pairing. In fact, in a news interview, he seemed to disapprove on a moral level but kept this judgment separate from his interpretation of state law.³⁹⁵ Nebraska's election bribery law provides:

§ 32-1536. Bribery; prohibited acts; penalty.

(1) Any person who accepts or receives any valuable thing as a consideration for his or her vote for any person to be voted for at any election shall be guilty of a Class II misdemeanor.

(2) 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.³⁹⁶

Nebraska's use of the term "valuable thing" seems to imply an object and not a vote, but there is a degree of ambiguity inherent in the term. There are no appellate court decisions interpreting the bribery statute, and the statute is equally without mention in the archives of the opinions of the Nebraska Attorney General. There is, however, instruction available in the Nebraska Constitution. Article XV, Section 1 provides for the oath of office for Nebraska elected officials, and the oath provides, in pertinent part:

I have not improperly influenced in any way the vote of any elector, and have not accepted, nor will I accept or receive, directly or indirectly, any money or other valuable thing from any corporation,

394. *Id.*

395. Associated Press, "Nader Traders" Shut Down Their Web Site Under Pressure, WASH. TIMES, Nov. 1, 2000, at A12.

396. NEB. REV. STAT. ANN. § 32-1536 (West 2003).

company or person, or any promise of office, for any official act or influence for any vote I may give or withhold on any bill, resolution, or appropriation.³⁹⁷

It only follows that if a vote is a “valuable thing” then any candidate for office in Nebraska who promises anything in exchange for a vote would be in violation of his or her oath of office, and by extension, the Nebraska Constitution. Logically, Moore’s conclusion is sound. Online vote-pairing is not illegal under any rational interpretation of Nebraska law.

I. *General State Conclusions*

At this point, it is instructive to note that during the 2000 presidential election, there were individuals who used the Internet to attempt to “sell” their votes.³⁹⁸ It should be apparent by this point in this study, that these sites are not considered to be within the purview of the above analysis. Every state election statute prohibits selling or offering to sell a vote for pecuniary gain, and the Supreme Court has held that despite any constitutional concerns, such solicitation falls outside of the protections offered by the First Amendment.³⁹⁹

The secretaries of state who moved against online vote-pairing sites regarded this online networking as the application of undue influence in the voting process and made a leap: that discussion equals money.⁴⁰⁰ With the exception of Arizona, this was in direct contradiction to their respective states’ laws.⁴⁰¹ However, most secretaries of state posited that

397. NEB. CONST. art. XV, § 1 (emphasis added).

398. See, e.g., Richard Stenger, *Constituent Puts Vote up for Sale on Ebay*, CNN.com (Aug. 16, 2000), at <http://www.cnn.com/2000/TECH/computing/08/16/internet.vote/index.html> (last visited July 27, 2003) [hereinafter Stenger, *Ebay*] (quoting Maryland officials stating that offering to sell a vote was punishable by fines and imprisonment in Maryland); Richard Stenger, *Vote for Sale?, Pulling a “Political Prank” Marylander Puts Ballot on Ebay*, CNN.com (Aug. 17, 2000) [hereinafter Stenger, *Vote*], at <http://www.cnn.com/2000/fyi/news/08/17/vote.sale/index.html> (last visited July 27, 2003); Jeremy Derfner, *Buy This Vote!*, SLATE (Aug. 23, 2000) [hereinafter Derfner], at <http://slate.msn.com/id/88646/> (reporting on voteauction.com) (last visited July 27, 2003); Ronna Abramson, *Want To Sell Your Vote? Not So Fast*, SLATE (Oct. 13, 2000) [hereinafter Ronna Abramson], at <http://slate.msn.com/id/91418/> (last visited July 27, 2003); David Weber, *Web Site Auctioning Vote as a ‘Joke’ Ordered Stopped*, BOSTON HERALD, Nov. 8, 2000, at 14 [hereinafter Weber]; Stefan Bechtold, *Governance in Namespaces*, 36 LOY. L.A. L. REV. 1239 (2003) [hereinafter Bechtold] (discussing the shutdown of voteauction.com).

399. See *Brown v. Hartlage*, 456 U.S. 45, 55 (1982).

400. However, the Supreme Court has made the converse statement: money equals speech. See *Buckley v. Valeo*, 424 U.S. 1 (1976).

401. OR. REV. STAT. § 260.665 (1999); CAL. ELEC. CODE § 18521(a) (2000); CAL. ELEC. CODE § 18522(a) (2000).

sites merely discussing online vote-pairing were permissible under their offending states' laws. For example, consider California⁴⁰² and Oregon:⁴⁰³ It was the conduct of "brokering" votes that was explicitly prohibited under California law and the application of "undue influence"⁴⁰⁴ that ran afoul of Oregon law.

When vote-swap participants agreed to pair their votes, they engaged in speech and association related to a campaign for political office. Each voter agreed with another to coordinate his or her vote in order to achieve a common political goal. There was no exchange of money or goods, and there was no enforceable binding arrangement.⁴⁰⁵ For the most part, this lack of a pecuniary exchange weakened the claims of the secretaries of state who believed that there was an illegal contract inherent in an online vote-swap. Jessica Funkhouse of Arizona appears to be the only election official who spoke out against online vote-pairing, but she did not speak completely out of turn.⁴⁰⁶

IV. FEDERAL ANALYSIS

A. *Federal Election Law*

1. *Matching Funds Law*

The online vote-pairing movement had its roots in some of the more bizarre nuances of U.S. election law. The electoral college has had the effect of creating a duopoly in American politics, and the federal matching funds law smothers infant political movements in their cradle.⁴⁰⁷ This state

402. The California Secretary of State said that <http://www.winwincampaign.org/> (defunct) was permissible under California law. Burden of Proof, CNN television broadcast, Nov. 2, 2000.

403. Letter from Paddy McGuire, Chief of Staff, Oregon Elections Division, to Jeffrey Cardille, Operator of www.nadertrader.com and www.nadertrader.org (Nov. 3, 2000) (on file with author). See also Oregon Secretary of State Press Release, Nov. 2, 2000, at <http://www.sos.state.or.us/executive/pressrel/110200swap.html> (last visited July 25, 2003).

404. OR. REV. STAT. § 260.665(1) (1999) ("As used in this section, 'undue influence' means 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."). For elaboration, see also *Oregon Republican Party v. State*, 717 P.2d 1206, 1207, *rev'd on other grounds*, 726 P.2d 412 (1986) (Or. Ct. App. 1986) ("[T]he promise of an advantage as a result of performing the desired act; it is persuasion coupled with a benefit or the absence of a threatened detriment.").

405. Brief for Plaintiffs at 2, *Porter v. Jones*, (D. Cal. 2000) (No. 00-11700) (on file with author).

406. See text accompanying notes 355–66.

407. See, e.g., Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, 341 [hereinafter *Duopoly*] (noting that the Republicans and Democrats use "campaign

of affairs gave rise to the bottleneck in democracy that forced the left-leaning coalition of Green/Democrat supporters into action.

The purpose of most online vote-pairing sites was to circumvent the mechanisms that protect the duopoly and, for the most part, to help Ralph Nader's Green party achieve a sufficient percentage of the popular vote in the 2000 presidential race so that the Greens would qualify for funding in 2004, while simultaneously helping (or at least not harming) Al Gore's chance for victory in the electoral college. It is crucial for the reader to note that not all vote-pairing participants were Gore/Nader allies. Also, despite the fact that online vote-pairing was primarily a Green/Democrat alliance movement in 2000, it is just as likely that a Reform/Republican, Libertarian/Republican, or any other manner of cyber-coalition could rise up in future elections.⁴⁰⁸

Even in 2000, votexchange2000.com provided a far more complex algorithm than the typical Green/Democrat alliance.⁴⁰⁹ Votexchange2000.com allowed the visitor to select his or her state, the candidate the visitor preferred to win the election (among Bush and Gore) and then allowed the visitor to select which alternative candidate he or she wished to support.⁴¹⁰ After filling in the fields, the visitor was asked for his or her email address, and the site connected the visitor with a similarly minded voter in another state.⁴¹¹

Federal law provides for the voluntary public financing of candidates for presidential office.⁴¹² The law differentiates between the "major" political parties and "minor" or "new" parties.⁴¹³ The eligible presidential candidates from each major party are entitled to equal payments limited by the Federal Election Campaign Act of 1971.⁴¹⁴ Candidates of minor parties are eligible only for funding if their party received a threshold number of votes in the previous election equal to five percent or more of the total number of votes cast.⁴¹⁵ Once a party meets this threshold, it is entitled to

finance laws, policies regulating access to public television, patronage practices, partisan gerrymandering, and potentially a wide variety of other measures" to lock third parties out of the political process).

408. *See supra* Part II.

409. *See* <http://www.votexchange2000.com/questionnaire.html> (last visited July 25, 2003).

410. *Id.*

411. *See* Appendix B for a screen shot of votexchange.com.

412. 26 U.S.C. § 9004-06 (2001).

413. *Id.* § 9002 (1976).

414. *Id.* § 9004(a)(1) (2001).

415. *Id.* § 9004(a)(3).

a proportional amount of funds pegged to the percentage of votes the party received in the previous election.⁴¹⁶

2. *Federal Election Corruption Law—42 U.S.C. § 1973i(c)*

Article I, Section 4 of the United States Constitution establishes congressional authority to regulate presidential elections.⁴¹⁷ The Supreme Court has interpreted this clause as granting Congress “very broad authority” to enact legislation to prevent corruption in presidential elections.⁴¹⁸ Given the fact that Congress has substantive legislative jurisdiction over the right to prevent corruption in presidential elections, its authority in this area is extremely broad⁴¹⁹ as long as the exercise of this authority does not trample any other constitutionally protected right.⁴²⁰

Congress has long recognized the damage to our democracy that would result if federal elections were tainted by bribery, vote buying, or manipulation. Using its plenary power, Congress enacted 42 U.S.C. § 1973i(c) “as the means to overcome this public evil in those instances wherein it does, or could, infect a federal election.”⁴²¹ 42 U.S.C.A. § 1973i(c) criminalizes fraudulent voting or registration in every election where national candidates appear on the ballot.⁴²² The law prohibits payment, offers of payment, or acceptance of payment, in exchange for a vote.⁴²³

The threshold question in the online vote-pairing context, in light of appellate court decisions construing § 1973i(c), is whether a vote is a “payment” or other applicable type of benefit bestowed upon an elector, when the elector swaps votes. Amidst a backdrop of action by state officials, the U.S. Department of Justice failed to move against any of the vote-pairing website operators. A spokesperson at the Department was quoted as saying, “[T]here is no pecuniary exchange, and [vote-pairing] is

416. *Id.* § 9004.

417. U.S. CONST. art. I, § 4 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.”).

418. *See, e.g.,* *Burroughs v. United States*, 290 U.S. 534, 549 (1934); *Buckley v. Valeo*, 424 U.S. 1, 132 (1976).

419. *See M’Culloch v. Maryland*, 4 Wheat. 316 (1819).

420. *See Buckley*, 424 U.S. at 132.

421. *See United States v. Bowman*, 636 F.2d 1003, 1012 (Fifth Cir. 1981).

422. *See United States v. Lewis*, 514 F. Supp. 169 (M.D. Pa 1981).

423. 42 U.S.C. § 1973i(c) (2001) (prohibiting conspiracy “with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or voting.”).

an agreement amongst private parties.”⁴²⁴ Additionally, the spokesperson stated there is no violation in terms of voter fraud.⁴²⁵

To successfully prosecute a defendant under § 1973i(c), there is no requirement that the government show specific intent to affect the outcome of a federal election.⁴²⁶ The congressional intent in passing the statute was to protect the integrity of the *right to vote* by protecting the integrity of the *vote*.⁴²⁷ “[T]he payment itself, *not* the purpose for which it is made, is the harm and the gist of the offense.”⁴²⁸

The federal vote-buying statute proscribes all activities with the potential to damage the integrity of a federal election.⁴²⁹ The Fourth Circuit of the U.S. Court of Appeals has held, similar to the Fifth Circuit, that whether the violator intends to expose the federal election to corruption or the possibility of corruption is of no legal effect.⁴³⁰ All that need be shown to establish a violation of § 1973i(c) is that the defendant bought or offered to buy a vote and that this activity exposed a federal election to the mere possibility of corruption.⁴³¹ There is no requirement that actual corruption take place, nor is there a requirement that the defendant have the specific intent to expose the election to corruption.⁴³²

The courts have not spoken on the issue of whether Congress would have the right to regulate a purely statewide election.⁴³³ However, the Fifth Circuit held that it is proper to apply § 1973i(c) to any election in which state and federal candidates for office appear on the ballot.⁴³⁴ The rationale being that even if corruption were directed solely at the state candidates, the potential for corruption of a federal race makes the conduct proper for Congress to regulate.⁴³⁵

In *United States v. Cole*, the defendants were convicted of corruption in an election in which all the candidates for federal office were running unopposed.⁴³⁶ The defendants argued that since the federal aspect of the

424. See Cerolyn Cresser, *A Vote For a Vote*, THE DAILY IOWAN, Nov. 2, 2000, available at 2000 WL 28358386.

425. *Id.*

426. See *Bowman*, 636 F.2d at 1011.

427. See *id.*

428. *Id.* at 1012.

429. See *id.*

430. See *United States v. Carmichael*, 685 F.2d 903 (4th Cir. 1982), *cert. denied*, 459 U.S. 1202 (1983). See also *infra* note 434 and accompanying text.

431. See *id.* at 908.

432. *Id.*

433. See *Bowman*, 636 F.2d at 1012 (specifically declining to consider this issue).

434. *Id.*

435. *Id.*

436. *United States v. Cole*, 41 F.3d 303, 306 (7th Cir. 1994).

election could not possibly be impacted by the corruption, the federal law would be inapplicable.⁴³⁷ The defendants conceded that § 1973i(c) would apply to the election if the race were opposed but argued that absent an opposition, no corrupt influence could exist.⁴³⁸ The Seventh Circuit disagreed with this argument and construed § 1973i(c) to apply in any mixed federal/state election, regardless of whether the candidates for federal office faced opposition.⁴³⁹

The amount of money used to bribe a voter is of no consequence. *United States v. Campbell*⁴⁴⁰ involved a payment of \$50. *United States v. Saenz* involved a \$45 welfare voucher and a six-pack of beer.⁴⁴¹ *United States v. Daugherty*⁴⁴² involved a mere \$3, and *United States v. Lewin*⁴⁴³ involved a payment of a single dollar. The law is equally unforgiving, no matter how insignificant the compensation. However, benefits must be individual in nature.⁴⁴⁴ The assistance of a civic group to prospective voters, or even a continuance of employees' fringe benefits, are not prohibited by the statute.⁴⁴⁵

Whether the actual corruption takes place, or whether the participants in the scheme intended that it take place, is irrelevant.⁴⁴⁶ However, for "corruption" to exist under the statute, there must be at least an offer of pecuniary gain to the voter.⁴⁴⁷ This pecuniary gain need not be in the form of cash.⁴⁴⁸

The definition of "payment" in §1973i(c) is not necessarily limited to the transfer of money or its equivalent.⁴⁴⁹ The legislative history of the Act makes it clear that Congress contemplated an exchange of a benefit beyond actual cash.⁴⁵⁰ *The Congressional Record* shows that a non-

437. *Id.*

438. *Id.*

439. *Id.*

440. *See* *United States v. Campbell*, 845 F.2d 782, 787 (8th Cir. 1988).

441. *See* *United States v. Saenz*, 747 F.2d 930, 935 (5th Cir. 1984).

442. *See* *United States v. Daugherty*, 952 F.2d 969, 971 (8th Cir. 1991).

443. *See* *United States v. Lewin*, 467 F.2d 1132, 1135 (7th Cir. 1972).

444. *See id.*

445. *See id.* at 1136.

446. *See* *United States v. Bowman*, 636 F.2d 1003, 1011 (5th Cir. 1981).

447. *See* *United States v. Garcia*, 719 F.2d 99, 101–02 (5th Cir. 1983) (explaining that Congress' intent was to prohibit the offering or giving of items of pecuniary value to an individual voter in exchange for his vote).

448. *Id.* ("We therefore find that Congress did not intend to restrict the term payment . . . to offers of money Payment . . . includes the offer of redeemable, cash-equivalent, food vouchers.").

449. *See id.* at 101.

450. *Id.* (quoting 111 CONG. REC. S8423 (daily ed. Apr. 26, 1965) (statement of Sen. Williams) ("Third, the amendment would provide a penalty for anyone offering or accepting money or *something of value* in exchange for registering or voting.")) (emphasis added)).

monetary payment would qualify as a “payment.”⁴⁵¹ However, the Fifth Circuit held that this definition is limited to benefits of a truly pecuniary nature.⁴⁵²

In *United States v. Garcia*, the defendants were indicted under the federal vote-buying statute.⁴⁵³ Garcia was the county welfare director and was responsible for distributing vouchers for food, clothing, prescriptions, and medical services to indigent citizens.⁴⁵⁴ The defendants were accused of offering food vouchers to voters in exchange for their pledges to vote for certain candidates in the primary election.⁴⁵⁵ The defendants challenged § 1973i(c) as unconstitutionally vague.⁴⁵⁶ The gravamen of their vagueness argument was that if food vouchers could be included as “payment” under § 1973i(c), then no citizen could be certain of what was proscribed and what was permitted.⁴⁵⁷ The court rejected this analysis of § 1973i(c), relying on the legislative history to support the conclusion that § 1973i(c) was never intended to be limited to cash payments.⁴⁵⁸

In *United States v. Garcia*, voters received a government benefit—welfare vouchers.⁴⁵⁹ The voters stated that they believed that receipt of the vouchers depended upon how they agreed to vote and not upon their eligibility.⁴⁶⁰ Therefore, a federal prosecutor could foreseeably expand this analysis and claim that the exchange of votes is the exchange of a government benefit—the right to vote—for another vote. This is somewhat of a nonsensical stretch, but multiple state election officials made similar stretches. If this issue arises again, and the party in power does not stand to benefit, as it did in 2000, federal conduct may be entirely different.

The defendants in *Garcia* further argued that unless the government showed that the recipients of the vouchers would have been otherwise ineligible to receive them, nothing was truly “paid” to them.⁴⁶¹ The Fifth

451. *Id.* (quoting 111 CONG. REC. S8986 (daily ed. Apr. 29, 1965) (statement of Sen. Jarvits) (“I wish to make it as clear as it is possible to make it that it is intended solely to prohibit the practice of offering or accepting money or a fifth of liquor, or something—some payment of some kind—for voting or registering.”)).

452. *See, e.g., Garcia*, 719 F.2d at 100. *See also* *United States v. Lewin*, 467 F.2d 1132, 1136 (7th Cir. 1972).

453. *Garcia*, 719 F.2d at 100.

454. *Id.*

455. *Id.*

456. *Id.* at 101.

457. *Id.*

458. *Id.*

459. *Id.*

460. *Id.* at 100.

461. *Id.* at 103.

Circuit found that although the recipients were already eligible for this government benefit, and thus were not receiving anything to which they were not otherwise entitled, the receipt of the vouchers still amounted to a pecuniary benefit since the vouchers came in specific dollar denominations and could be directly exchanged for goods as if they were cash.⁴⁶² In light of the above analysis, it appears that the Justice Department's statement, that there is no voter fraud in online vote-pairing, was correct. However, this statement and analysis only controls the federal Voting Fraud Act. What if Arizona's election officials, properly interpreting their own state law, attempted to prosecute an online vote-pairing site operator or participant? No matter where the small skirmishes over this issue are fought, eventually the matter will come down to an analysis under the First Amendment.

B. Federal Constitutional Law

The acts of the individual secretaries of state touch upon the core of constitutionally protected necessities for democracy—the trinity of speech, assembly, and association. Online assembly, association, and speech intended to further public political goals are at the core of First Amendment values.⁴⁶³

Freedom of speech is essential to a self-governing society.⁴⁶⁴ The constitutional guarantee that speech shall remain unencumbered by governmental intervention exists to ensure the free exchange of ideas for the promotion of political and social change.⁴⁶⁵ When speech involves political issues, the U.S. Supreme Court has consistently recognized it as the core of First Amendment values.⁴⁶⁶ Even jurists who would protect only a narrow sliver of what is now untouchable agree that political speech must be protected.⁴⁶⁷

462. *Id.* at 101.

463. *See, e.g.,* *Boos v. Barry*, 485 U.S. 312, 318 (1988) (protecting political speech outside foreign embassies); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (members of an organization organized for lawful political motives may not be punished for association with other members who may act unlawfully). *Cf. Connick v. Myers*, 461 U.S. 138, 145 (1983) (“[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest,” federal courts will not normally protect the employee’s speech).

464. *See generally* MEIKLEJOHN, *supra* note 63, at 26–27.

465. *See Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

466. *See, e.g., Boos*, 485 U.S. at 318 (protecting political speech outside foreign embassies). *Cf. Connick*, 461 U.S. at 147 (explaining that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, federal courts will not normally protect his speech).

467. Bork, *supra* note 63, at 23 (“[E]ven without a first amendment . . . representative democracy

Restraint of websites promoting online vote-pairing implicates both the specifically enumerated First Amendment protection for freedom of speech and the closely related and entwined freedom of association.⁴⁶⁸ Like the right to free speech, the right to assemble in furtherance of a common political goal is fundamental to our system of government and law.⁴⁶⁹

1. Content-Based Speech Regulation

It is presumptively unconstitutional for the state to burden speech based on its content.⁴⁷⁰ Political speech is zealously guarded as the core value protected by the First Amendment,⁴⁷¹ “[f]or speech concerning public affairs is more than self-expression; it is the essence of self-government.”⁴⁷² At the very pinnacle of this core value is the notion that

... would be meaningless without freedom to discuss government and its policies. Freedom for political speech could and should be inferred even if there were no first amendment.”)

468. See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.”); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937); *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (explaining that the right to associate in order to express one’s views is “inseparable” from the right to speak freely).

469. See, e.g., *Cal. Democratic Party v. Jones*, 530 U.S. 567 577 (2000) (holding that members of a political party have the right to select their nominees for higher office); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 336 n.1 (1995) (quoting J. Brandeis in his concurring opinion in *Whitney v. California*, 274 U.S. 357, 374 (1927), that the right of assembly is a fundamental right).

470. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46–47 (1986); *U.S. v. Playboy Entertainment Group*, 529 U.S. 803 (2000) (“It is rare that a regulation restricting speech because of its content will ever be permissible.”); *Simon & Schuster v. N.Y. State Crime Victims Board*, 502 U.S. 105, 115 (1991) (striking down New York’s “Son of Sam” law due to financial disincentives to expression created by a law requiring proceeds to criminals from expression describing their crime be placed in escrow for the benefit of the victims).

471. See *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966). The majority wrote:

Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.

Id. See also *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964) (holding that the First Amendment demands unfettered and uninhibited robust political debate); Bork, *supra* note 63, at 23 (“Even without a first amendment . . . representative democracy . . . would be meaningless without freedom to discuss government and its policies. Freedom for political speech could and should be inferred even if there were no first amendment.”). See also Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 305–06 (1992) (“[A]n insistence that government’s burden is greatest when political speech is at issue responds well to the fact that here government is most likely to be biased. The presumption of distrust of government is strongest when politics are at issue.”).

472. *Garrison v. La.*, 379 U.S. 64, 74–75 (1964). See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). Justice Brandeis wrote in his concurring opinion:

speech related to a campaign for political office is worthy of the “fullest and most urgent application” of First Amendment protection.⁴⁷³ In *Police Dep’t of Chicago v. Mosley*,⁴⁷⁴ the city of Chicago passed an ordinance prohibiting all picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute.⁴⁷⁵ The Supreme Court held that the ordinance discriminated on the basis of viewpoint because it distinguished between peaceful picketing to further a labor cause and other forms of peaceful picketing.⁴⁷⁶ Under this ordinance, the message on the picket sign would determine whether the picketer was engaged in protected speech or guilty of disorderly conduct.⁴⁷⁷ This is clearly impermissible, as “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”⁴⁷⁸ “To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.’”⁴⁷⁹

Regulations are content-based when they distinguish permissible speech from impermissible speech on the basis of the ideas or views expressed.⁴⁸⁰ Courts presume that government actions are invalid when

[The Founding Fathers] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

Id.

473. *Burson v. Freeman*, 504 U.S. 191, 196 (1992) (citing *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

474. *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92 (1972).

475. *Id.* at 93. In *Mosley*, Chicago’s Municipal Code, § 193-1(i) provided that a person commits the crime of disorderly conduct when he “[p]icket[s] or demonstrat[es] on a public way within 150 feet of any primary or secondary school building . . . provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute. . . .”

476. *Id.* at 95–96.

477. *Id.* at 95.

478. *Mosley*, 408 U.S. at 95.

479. *Mosley*, 408 U.S. at 96 (quoting *New York Times Co. v. Sullivan*, 376 U.S. at 270).

480. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 197 (1992) (“Whether individuals may exercise their free-speech rights near polling places depends entirely on whether their speech is related to a political campaign.”).

they suppress speech on the basis of its message, ideas, subject matter, or content.⁴⁸¹ In fact, “[i]t is rare that a regulation restricting speech because of its content will ever be permissible.”⁴⁸² This is because the government attacks the very heart of the First Amendment when it restricts speech due to the message it conveys.⁴⁸³ Restrictions based on the message conveyed impede society’s search for truth,⁴⁸⁴ impair the individual’s right to meaningful self-fulfillment,⁴⁸⁵ and obstruct the ability of citizens to fully participate in a system of deliberative self-government.⁴⁸⁶

Laws that impair speech with a blind eye toward the ideas and views expressed are content-neutral and often permissible.⁴⁸⁷ For example, the U.S. Supreme Court has held that government may restrict *all* speech emanating from a sound-amplification truck regardless of the message broadcast.⁴⁸⁸ Billboards may be prohibited to minimize visual clutter and enhance aesthetics.⁴⁸⁹ Also, the Court upheld a National Park Service anti-camping rule that prohibits people from sleeping on the National Mall as part of a coordinated political statement because it was equally applicable to traditional campers.⁴⁹⁰ Each of these regulations impacted

481. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Mosley*, 408 U.S. at 95 (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”). See also *Cohen v. Ca.*, 403 U.S. 15, 24 (1971); *Street v. N.Y.*, 394 U.S. 576 (1969); *NAACP v. Button*, 371 U.S. 415, 445 (1963); *Wood v. Georgia*, 370 U.S. 375, 388–389 (1962); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

482. *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 818 (2000).

483. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46–47 (1986); *Playboy*, 529 U.S. at 803 (“It is rare that a regulation restricting speech because of its content will ever be permissible.”). For a complete discussion of content-neutral analysis, see Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

484. *Id.* at 56 (citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“The best test of truth is ‘the power of the thought to get itself accepted in the competition of the market.’”)); *McConnell v. Federal Election Comm’n*, 124 S. Ct 619, 730 (2003); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 349 (1995); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990); *Hustler v. Falwell*, 485 U.S. 46, 51 (1988); *Herbert v. Lando*, 441 U.S. 153, 186 (1979).

485. See *id.* (citing *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

486. *Id.* (“[I]n a self-governing nation, the people, not the government, ‘are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.’”) (quoting *First National Bank v. Bellotti*, 435 U.S. 765, 791 (1978)).

487. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (city requirement that concerts use city sound equipment and city technician valid under First Amendment as a time, place, and manner regulation); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (prohibition on the posting of signs on lampposts did not address the content of the signs); *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981) (regulation requiring that organizations may sell and solicit funds only from designated kiosks was an even-handed rule applying to all potential participants).

488. See *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949).

489. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507–10 (1981).

490. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984).

speech, potentially even political speech, but none was created for the purpose of impairing speech based on its message.⁴⁹¹

Even the most fundamental of constitutional rights may be curtailed if the infringement passes a strict scrutiny test.⁴⁹² Speech, assembly, and associational rights may be infringed only by regulations that are designed to serve a compelling governmental interest,⁴⁹³ are unrelated to the suppression of ideas; and are means that are narrowly tailored to achieve the stated interest—they must be the least restrictive and least drastic means available to achieve the stated purpose.⁴⁹⁴

The application of strict scrutiny hinges on whether the restriction severely burdens rights of speech⁴⁹⁵ or association.⁴⁹⁶ If a restriction severely burdens these rights, then this elevated standard applies.⁴⁹⁷ However, most cases eliminate this step; without examining the degree of burden a restriction creates, they simply state that if *political* speech or association is at issue, then strict scrutiny applies.⁴⁹⁸ In *NAACP v.*

491. Facially even-handed regulations on speech are not always content-neutral. *See, e.g., NAACP v. Button*, 371 U.S. 415, 423, 428–29 (1963) (Virginia law prohibiting attorneys from accepting business from anyone who was not a party to a suit or that had no pecuniary interest in the case held to impermissibly prevent NAACP’s political action).

492. *Burson v. Freeman*, 504 U.S. 191, 208–09 (1992) (prohibition of the solicitation of votes and distribution of campaign materials within 100 feet of the polls is permissible). *See also infra* note 494.

493. *Playboy*, 529 U.S. at 813 (articulating strict scrutiny test); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (rejecting the strict scrutiny test on grounds of overbreadth); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (explaining that freedom of association is a fundamental element of personal liberty which may be curtailed if the restriction passes strict scrutiny); *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 45 (1983); *Board of Airport Comm’rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 572–573 (1987); *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *United States v. Grace*, 461 U.S. 171, 177 (1983); *Sanitation Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 997 (2d Cir. 1997) (“Even regulations that substantially infringe upon [the right of expressive association] will pass constitutional muster if they serve compelling government interests unrelated to the suppression of ideas, and those interests cannot be achieved through less restrictive means.”).

494. *Id.*

495. *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 208 (1999) (“[R]estrictions on core political speech so plainly impose a ‘severe burden.’”); *Eu v. San Francisco County Democratic Cent. Comm’n*, 489 U.S. 214, 222–23 (1989). *See also* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (Kennedy, J., concurring in judgment)); *Consolidated Edison Co. of New York, Inc. v. Public Serv. Comm’n of New York*, 447 U.S. 530, 536, (1980); *Mosley*, 408 U.S. at 95.

496. *See* *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (“An individual’s freedom to speak, to worship, and to petition the government could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward these ends were not also guaranteed.”). *See also* *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–61 (1958).

497. *See San Fran. County Democratic Cent. Comm’n*, 489 U.S. at 222–23 (1989).

498. *Buckley*, 525 U.S. at 207 (“When core political speech is at issue, we have ordinarily applied strict scrutiny without first determining that the State’s law severely burdens speech.”); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995) (same).

Alabama ex rel Patterson,⁴⁹⁹ the Supreme Court stated, “[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”⁵⁰⁰

Strict scrutiny has been applied to situations involving solicitation of voters and distribution of literature within 100 feet of a polling place entrance,⁵⁰¹ regulation of campaign promises,⁵⁰² and a law prohibiting businesses from making expenditures to influence the outcome of referenda.⁵⁰³ Unquestionably, if a political group’s associational rights are implicated, strict scrutiny must apply.⁵⁰⁴

2. *Freedom of Association*

Political speech, which is protected by the First Amendment, “is undeniably enhanced by group association.”⁵⁰⁵ The Constitution not only protects the freedom of citizens to join together to discuss and further their common political beliefs,⁵⁰⁶ but affirmatively demands it.⁵⁰⁷ Moreover, the right to associate for the advancement of political beliefs is “an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”⁵⁰⁸

However, even the fundamental constitutional right of association may be infringed if the state’s action passes the test of strict scrutiny.⁵⁰⁹ If the

499. 357 U.S. 449 (1958).

500. *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449, 460–61 (1958).

501. *Burson v. Freeman*, 504 U.S. 191 (1992).

502. *Brown v. Hartlage*, 456 U.S. 45, 52–54 (1982) (finding that the state has a legitimate interest in protecting the integrity of the electoral process, but when it seeks to do so by “restrict[ing] directly the offer of ideas by a candidate to the voters,” strict scrutiny is triggered).

503. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978).

504. *See Tashjian v. Republican Party*, 479 U.S. 208, 225 (1986) (holding that burdens on the associational rights of a political party must be subjected to strict scrutiny); *see also Buckley*, 525 U.S. at 207–09 (1999); *Norman v. Reed*, 502 U.S. 279 (1992) (holding that burdens on association by limiting new parties’ access to the ballot is subject to strict scrutiny); *San Francisco County Democratic Cent. Comm’n.*, 489 U.S. at 223–26 (1989); *Storer v. Brown*, 415 U.S. 724, 756 (1974).

505. *Patterson*, 357 U.S. at 460.

506. *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (holding state law mandating that only party members, and not independents, may vote in party primaries placed “an unconstitutional burden on the fundamental freedom of political association guaranteed by the First and Fourteenth Amendments to the United States Constitution.”) (citing *Tashjian v. Republican Party*, 479 U.S. 208, 214–15 (1986)).

507. MEIKLEJOHN, *supra* note 63, at 26–27.

508. *Patterson*, 357 U.S. at 460 (quoting *Gitlow v. New York*, 268 U.S. 652, 666 (1923)); *Palko v. Connecticut*, 302 U.S. 319, 324 (1937).

509. *Burson v. Freeman*, 504 U.S. 191 (1992) (prohibition of the solicitation of votes and

government seeks to regulate associational rights, it must demonstrate that it is doing so to further a compelling state interest, unrelated to the suppression of ideas, that cannot be achieved by any less restrictive means.⁵¹⁰

In *Roberts v. United States Jaycees*, the Supreme Court held that while the freedom to associate presupposes a freedom from compelled association, the government was nevertheless justified in forcing the Jaycees to admit women.⁵¹¹ The Court was persuaded that the state of Minnesota had a compelling state interest in ending discrimination against women, and requiring the Jaycees to open their membership to women was a valid step toward this goal.⁵¹² Despite the fact that forcing the Jaycees to admit women adversely impacted the associational freedoms of the Jaycees, this regulation passed strict scrutiny.⁵¹³

In a similar case with the opposite result, *Boy Scouts of America v. Dale*,⁵¹⁴ the Court held that a state anti-discrimination law could not properly bar the Boy Scouts from prohibiting an openly gay assistant scoutmaster from serving.⁵¹⁵ The Court held that since one of the sincerely held beliefs of the Boy Scouts is that homosexuality is immoral,⁵¹⁶ forcing them to include a homosexual scoutmaster would significantly burden their associational right to disfavor homosexuality.⁵¹⁷

In *Brown v. Socialist Workers '74 Campaign Committee*,⁵¹⁸ the Court held that in the context of the Socialist Workers' Party ("SWP"), an Ohio statute that mandated the disclosure of campaign contributors and fund recipients would unconstitutionally burden associational rights.⁵¹⁹ The Court held that given the historical public hostility toward the SWP, such public disclosures would subject contributors and recipients to harassment

distribution of campaign materials within 100 feet of the polls is permissible); *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (the compelling governmental interest in maintaining an armed forces in time of war justifies the suppression of the speech element of the expressive political conduct of burning a draft card); *Cf.*, *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (law prohibiting the publication of political editorials on an election day is an "obvious and flagrant" violation of the principles of the First Amendment).

510. *See, e.g., Roberts*, 468 U.S. at 623.

511. *Id.*

512. *Id.*

513. *Id.*

514. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

515. *Id.* at 659.

516. *Id.* at 656.

517. *Id.* at 659.

518. *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982).

519. *Id.* at 101-02.

and reprisals, effectively discouraging them from acts of protected political association.⁵²⁰

One could argue that the framers of the Constitution intended to extend freedom of expression and association only to technologies existing in the 1700s.⁵²¹ However, even strict constructionists argue that courts must apply constitutional values to new circumstances, especially when those circumstances arise due to changes in technology.⁵²² Cyberspace is entitled to the same degree of protection as other more traditional public forums and media.⁵²³

Under strict scrutiny, a regulation must be narrowly tailored to achieve a compelling governmental interest.⁵²⁴ Although the First Amendment may be considered to encompass the most sacrosanct of rights, on rare occasions there are competing governmental interests to which the First Amendment rights of speech must yield.⁵²⁵ For example, fair trial rights have been held to trump the First Amendment in specific circumstances.⁵²⁶ The government's interests in order, safety, and traffic outside abortion clinics, as well as its interests in safeguarding property rights and women's freedom to pursue reproductive health services, are sufficient to allow the use of fixed buffer zone limits on abortion protesters.⁵²⁷ And in circumstances most analogous to the issue at hand, in order to assure "fair and honest" elections, the right to freedom of speech is frequently trumped⁵²⁸ because the right to cast a ballot in an uncorrupt election is just as important as the right to discuss that election.⁵²⁹

520. *Id.*; see also *Patterson*, 357 U.S. 449, 462–63.

521. Robert Corn-Revere, *New Technology and the First Amendment: Breaking The Cycle of Repression*, 17 HASTINGS COMM. & ENT. L.J. 247, 308 (1994).

522. *Ollman v. Evans*, 750 F.2d 970, 996 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985) (Bork, J., concurring) (holding that the First Amendment must be interpreted "to encompass the electronic media.").

523. *Reno v. ACLU*, 521 U.S. 844, 870 (1997) ("We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.").

524. See, e.g., *Playboy*, 529 U.S. at 813; *Perry Educ. Ass'n.*, 460 U.S. at 45.

525. See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951); *Schenck v. United States*, 249 U.S. 47 (1919).

526. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (holding that First Amendment yields to fair trial rights).

527. *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 382 (1997).

528. See, e.g., *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000) (holding campaign contributions, although protected, yield to the maintenance of the appearance of uncorrupt elections); *Burson*, 504 U.S. 191 (maintaining a polling environment free from intimidation trumps free speech); *Brown*, 456 U.S. 45 (holding that integrity of electoral process trumps free speech); *Buckley*, 424 U.S. at 58 (campaign contribution limits are justified to prevent appearance of corruption).

529. See *Burson*, 504 U.S. 191; *Brown*, 456 U.S. 45 (stating that the state has a legitimate interest

There would be little value in open debate prior to an election in which the democratic process itself was subverted by intimidation and fraud. Accordingly, “states have a legitimate interest in preserving the integrity of their electoral process.”⁵³⁰ The prevention of corruption, or even the appearance of corruption, in government has been held to be a compelling governmental interest validating the restriction of constitutionally protected speech.⁵³¹

If the compelling governmental interest is the integrity of the polling process, the state may infringe upon free speech rights to achieve this interest.⁵³² However, even the most compelling governmental interest may not be promoted by overbroad means that suppress otherwise protected expression.⁵³³ Because of the danger of governmental censorship of politically disfavored ideas, content-based restrictions can be employed only when absolutely necessary to achieve the compelling interest asserted.⁵³⁴

C. Federal Constitutional Conclusions

1. Regulation of Vote-Swap Sites Requires Strict Scrutiny

The secretaries of states’ actions and statements against the vote-pairing website operators’ rights to disseminate information of a political nature, issued on the eve of a pending election, implicate core First Amendment values to such an extent that strict scrutiny must apply.⁵³⁵ Those secretaries that acted less dramatically nevertheless contributed to a dangerous chilling effect of constitutionally protected conduct. The impact

in protecting the integrity of the electoral process, but when it seeks to do so by restricting speech, strict scrutiny is triggered).

530. *Brown*, 456 U.S. at 52 (explaining that the state has a legitimate interest in protecting the integrity of the electoral process, but when it seeks to do so by restricting speech, strict scrutiny is triggered).

531. *See Buckley*, 424 U.S. at 58 (restriction of campaign contributions is justified by the need to prevent actual or apparent quid pro quo corruption in the electoral process).

532. *See, e.g., Brown*, 456 U.S. at 45.

533. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 395–96 (1992); *Patterson*, 357 U.S. at 449.

534. *See, e.g., Burson*, 504 U.S. at 199; *R.A.V.*, 505 U.S. at 395–96; *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

535. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214–15 (1986) (explaining that the burdens of the associational rights of a political party must be subjected to strict scrutiny); *see also Buckley*, 525 U.S. at 212; *Norman v. Reed*, 502 U.S. 279, 288–89 (1992) (burdening association by limiting new parties’ access to the ballot is subject to strict scrutiny); *Eu*, 489 U.S. at 224–25 (noting that laws that restrict a political party’s right to endorse candidates are subject to strict scrutiny); *Storer v. Brown*, 415 U.S. 724, 728–29 (1974) (holding that restrictions that limit a candidate’s right to political association are subject to strict scrutiny).

upon the rights of association of these sites' users and potential users should independently trigger strict scrutiny.⁵³⁶ Given the fact that both groups' rights were implicated, only strict scrutiny would be logical.

2. *Actions by the Offending Secretaries of State Were Not Content-Neutral*

The secretaries of state regulated (or attempted to regulate) protected political speech and association in a public forum.⁵³⁷ In many cases, these actions were enough to trigger strict scrutiny.⁵³⁸ However, to determine the appropriate level of scrutiny applicable to their actions, it is first necessary to determine whether the secretaries of states' actions were content-based or content-neutral.⁵³⁹

According to one website operator's counsel, the threat of prosecution turned on the particular message the sites carried: the "user's willingness to participate in an exchange of unenforceable pledges as a methodology for communicating a political viewpoint."⁵⁴⁰ Websites containing any other content were not subject to threats of reprisal by the government.⁵⁴¹

While the vote-pairing battle raged, the Republican National Committee had a website that permitted users to enter their names, addresses, email addresses, and other personal information so that they could "Get involved with the Republican Party!"⁵⁴² The Democratic National Committee had a similar website inviting visitors to sign up and "Take Action!"⁵⁴³ The Libertarians,⁵⁴⁴ Natural Law Party,⁵⁴⁵ and the Yahoo! personals⁵⁴⁶ each had web forms permitting users to enter their names in a database in order to communicate with other individuals with common political or social goals. The secretaries of state considered illegitimate the simultaneous goals of electing Al Gore as President and

536. See *Burson*, 504 U.S. at 199.

537. See *supra* Part III.

538. See, e.g., *Buckley*, 525 U.S. at 207; *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (same); *Eu v. San Fran. County Democratic Cent. Committee*, 489 U.S. 214, 222–23 (1989) (same).

539. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791.

540. Brief for Plaintiffs at 12, *Porter v. Jones*, (D. Cal. 2000) (No. 00-11700).

541. *Id.*

542. <http://www.rnc.org/RNCWeb/action.asp>, replaced by <http://www.gopteamleader.com/> (last visited July 7, 2003).

543. <http://www.democrats.org/action/takeaction.html> (last visited July 7, 2003).

544. <http://www.lp.org/action/email.html> (last visited July 7, 2003).

545. http://www.natural-law.org/get_involved.html (last visited July 7, 2003).

546. <http://www.personals.yahoo.com/> (last visited July 7, 2003).

helping the Green Party acquire five percent of the popular vote.⁵⁴⁷ As such, this does not appear to be a content-neutral regulation, but one that specifically targets the political goals of the so-called “Nader traders.” In as much as they restricted websites that urged people to vote in a particular manner in a publicly held election, their actions were unconstitutional under strict scrutiny.⁵⁴⁸

3. *Compelling Governmental Interests*

a. *Compelling Interest: The Prevention of Corruption*

The interest alleged by the secretaries of state was the elimination of “undue influence”⁵⁴⁹ or “corruption”⁵⁵⁰ from the voting process in their respective states. These interests are certainly compelling state interests.⁵⁵¹ Given this fact, the secretaries would have had little difficulty arguing they were motivated to act by a desire to further a compelling state interest by restricting the speech and associational rights of the website operators and users. However, it does not appear that their actions bore a reasonable relationship to the compelling governmental interest.

If a vote-swap is an actual situation of “bartering” votes, it could be construed as conduct that the state can legitimately prohibit.⁵⁵² However, as demonstrated above, nothing in this arrangement was truly bartered. Voters entered into a discussion and convinced one another to vote a certain way based on common political goals. The Court has drawn a distinction between entering into an exchange of this type and an illegal exchange by distinguishing between voting based on a promise of public political action and voting based on an illegal exchange for “private profit.”⁵⁵³

There can be no determination, or even serious assertion, that anyone entered into a vote-swap arrangement for private profit or any other form of enrichment. Perhaps if the “vote-swap” sites been more correctly named “vote consensus” sites, or “vote strategically” sites, they would have

547. *See supra* Part III.

548. *See Mills v. Alabama*, 384 U.S. 214, 219 (1966).

549. Letter from Bill Bradbury to website operators (Nov. 2, 2000) (on file with author).

550. Email from California Secretary of State to operator of Vote-swap 2000 (forwarded Nov. 1, 2000) (on file with author).

551. *See Buckley v. Valeo*, 424 U.S. 1, 58 (1976) (restriction of campaign contributions is justified by the need to prevent actual or apparent quid pro quo corruption in the electoral process).

552. *Id.*

553. *Brown*, 456 U.S. at 55 (soliciting an agreement to vote for pecuniary gain is an illegal exchange due to its relationship to private profit).

passed by unnoticed. “Barter” only exists in this situation as a matter of semantic misfortune. The trades are unenforceable, confer no private benefit, and do not transfer anyone’s voting authority.⁵⁵⁴ To the contrary, these websites and their users engaged in political speech and association, which is protected by the First Amendment.⁵⁵⁵

b. Compelling Interest? Protecting the Duopoly

In *Timmons v. Twin Cities Area New Party*,⁵⁵⁶ the Supreme Court upheld a Minnesota law banning “fusion parties.”⁵⁵⁷ Fusion is “the nomination by more than one political party of the same candidate for the same office in the same general election.”⁵⁵⁸ In *Timmons*, a minor political party, the “New Party,” sought to nominate Andy Dawkins as its candidate for state representative, but he was already on the ballot as a candidate under the banner of another party.⁵⁵⁹ Minnesota election officials refused to accept the nomination because of a Minnesota statute which stated: “No individual shall be named on any ballot as the candidate of more than one major political party.”⁵⁶⁰

The New Party filed suit, claiming that the Minnesota ban unconstitutionally infringed on its members’ right to free association.⁵⁶¹ The Court held that while the Minnesota ban did affect the New Party’s members’ right to free association, it did so in service of compelling governmental interests of “ballot integrity” and “political stability.”⁵⁶²

Some of the Court’s reasoning is inapplicable to the online vote-pairing model. For example, the Court considered the Minnesota arguments that fusion tickets could exploit the ballot in misleading ways:

554. Brief for Plaintiffs at 5, *Porter v. Jones*, (D. Cal. 2000) (No. 00-11700) (quoting Hasen, *Vote Buying*, 88 CAL. L. REV. 1323, 1338–48 (2000)).

555. *Boy Scouts of America*, 530 U.S. at 660–61 (“[The Founding Fathers] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.”). See also *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[W]ithout free speech and assembly[,] discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

Id.

556. 520 U.S. 351 (1997). For an excellent criticism of *Timmons*, see *Duopoly*, *supra* note 407.

557. *Id.* at 369–70.

558. *Twin Cities Area New Party v. McKenna*, 73 F.3d 196, 197–98 (8th Cir. 1996).

559. *Timmons*, 520 U.S. at 354.

560. *Id.*; MINN. STAT. § 204B.04 (1991).

561. *Timmons*, 520 U.S. at 355.

562. *Id.* at 370.

Petitioners contend that [a] candidate or party could easily exploit fusion as a way of associating his or its name with popular slogans and catchphrases. For example, members of a major party could decide that a powerful way of “sending a message” via the ballot would be for various factions of that party to nominate the major party’s candidate as the candidate for the newly-formed “No New Taxes,” “Conserve Our Environment,” and “Stop Crime Now” parties.⁵⁶³

The Court also considered Minnesota’s argument that fusion parties might allow new minor parties artificially to gain popularity by affiliating themselves with a popular candidate and bootstrapping that candidate’s appeal onto their own group.⁵⁶⁴

Neither of these arguments applies to online vote-pairing because vote-pairing does not affect nominations or the ballot. Nonetheless, the Court’s determination that states possess a “strong interest in the stability of their political systems” is problematic and could be a constitutional sticking point should online vote-pairing come before the Court.⁵⁶⁵ Specifically, the Court determined that “[t]he Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two-party system.”⁵⁶⁶

The Court concluded that the Minnesota statute did not create a severe burden and accordingly did not apply strict scrutiny.⁵⁶⁷ Instead, the Court applied a lesser standard which merely required that “the asserted regulating interests are sufficiently weighty to justify the limitation on the party’s rights.”⁵⁶⁸ The Court concluded that “the burdens Minnesota’s fusion ban imposes on the New Party’s associational rights are justified by

563. *Id.* at 365.

564. *Id.* at 366.

565. *Id.* at 367.

566. *Id.*

567. The fact that the Supreme Court relied on dicta to create new law with potentially expression-stifling consequences is better discussed by Richard Hasen in *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331 (1997). *Timmons*, 520 U.S. at 364. *Id.* at 307 (citing and quoting *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 107 (1990) (Scalia, J., dissenting) (“The stabilizing effects of [a two-party] system are obvious.”); *Davis v. Bandemer*, 478 U.S. 109, 144–45 (1986) (O’Connor, J., concurring) (“There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government.”); *Branti v. Finkel*, 445 U.S. 507, 532 (1980) (Powell, J., dissenting) (“Broad-based political parties supply an essential coherence and flexibility to the American political scene.”).

568. *Timmons*, 520 U.S. at 364 (internal quotation marks omitted).

correspondingly weighty valid state interests in ballot integrity and political stability.”⁵⁶⁹

The implication of *Timmons* for online vote-pairing is obvious. Online vote-pairing and Minnesota fusion parties are quite factually distinct. But, if a state regulator switched gears and relied on the interest of political stability instead of relying on the justification that their actions were taken to protect the electoral process from corruption, then this *could* be a constitutional sticking point for a challenger of such a prohibition⁵⁷⁰

4. *The Offending Secretaries of States’ Actions Were Not the Least Restrictive Method of Serving the Governmental Interest*

Prohibiting vote-pairing websites in order to prevent corruption in the political process is misguided. The secretaries relied upon statutory provisions against the exertion of undue influence upon a voter or the voting process. Were these agreements in some manner enforceable, then the voters who entered into them would enter the polls subject to the external influence of an enforceable contract preventing them from voting according to their own political beliefs. Even content-based restrictions on political speech in a public forum would be permissible if this were the case.⁵⁷¹

However, the agreements were in no manner binding or enforceable. Upon entry into the voting booth, voters were motivated only by their conscience and self-interest. There can be no valid determination that any vote-swapper entered the voting booth compelled to vote by any motivation other than the desire to achieve his or her own personal political goals.

Not only did the threats of prosecution place an unnecessary burden on providers of protected content but such threats did not effectively address the harm they sought to prevent. The government bears the burden of demonstrating that the regulation will in fact address the problem of corruption of the electoral process.⁵⁷² Since all the sites were only putting individuals in contact with one another by email, an allegation of coercion

569. *Id.* at 369–70 (internal quotation marks omitted).

570. Although this theory has not been tested, it is the author’s opinion that this sticking point would be forced to yield to the contrarian view due to the great factual distinctions between fusion parties and online vote-pairing coalitions.

571. *Burson*, 504 U.S. 191.

572. *See Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 664 (1994) (government bears the burden of demonstrating that its restrictions will prevent the alleged harms in a direct and material way).

is fanciful at best.⁵⁷³ Had the contact taken place in close proximity to the polling place, the analysis might be different, but absent this kind of direct coercion and considering the voluntary nature of participation in the program, governmental regulation of vote solicitation was an impermissible burden on speech.⁵⁷⁴

V. ETHICAL ANALYSIS

A. Introduction

The majority of this study is devoted to the question of whether online vote-pairing is legal and constitutionally protected. However, to end the inquiry with a legal conclusion leaves the study incomplete. There are an ample number of practices that involve *legal* behavior that is not necessarily *ethical*. For example, an attorney who leaves no stone unturned when representing a client, who follows a research thread to an absurd extent, and who is motivated more by a desire to pad his timesheet than by a desire to provide the client with zealous representation is not breaking the law.⁵⁷⁵ Absent fraud, no criminal or civil sanctions await the attorney, although the state bar may elect to take professional disciplinary action.⁵⁷⁶

Despite the legal ramifications or constitutionality of online vote-pairing, no discussion of this phenomenon is complete without an examination of the ethics of bringing together cyberspace, the Electoral College, and the building of a political party.

573. Brief for Plaintiffs at 14, *Porter v. Jones*, (D. Cal. 2000) (No. 00-11700) (on file with author); see also *Burson*, 504 U.S. 191; *Mills*, 384 U.S. 214.

574. *Burson*, 504 U.S. at 210; *Mills v. Alabama*, 384 U.S. 214, 218–20 (1966).

575. See, e.g., William G. Ross, *The Ethics of Time-Based Billing by Attorneys*, 58 ALA. LAW. 40 (1997).

576. See, e.g., ELLEN R. PECK AND ROBERT L. KEHR, RULING ON THE RULES, LOS ANGELES COUNTY BAR ASSOCIATION, at <http://www.lacba.org/showpage.cfm?pageid=752>; Toledo Bar Assn. V. Zerner, 718 N.E.2d 1283 (Ohio 1999); Laurie Cunningham, *State Justices Suspend Robles Indefinitely*, PALM BEACH DAILY BUS. REV., Apr. 4, 2003, at 8; *The Florida Bar v. Robles*, 846 So.2d 1150 (Fla. 2003) (unpublished table opinion).

*B. The Issue is Rampant With Bias*⁵⁷⁷

Like the *Bush v. Gore* Supreme Court decision, the divergent opinions over the ethics of vote-pairing are determined almost solely on the basis of the political sympathy of the official giving the opinion. The chart on the following page displays each election official responsible for comments or action regarding vote-pairing sites, his or her party affiliation (if known), his or her position on vote-pairing, whether action was taken against vote-pairing sites, and whether the official correctly applied the state's election law.

State	Party Affiliation	Position on Vote-pairing	Action on Vote-pairing	Correct Application of Election Law?
AZ	R	Anti	Statement	No
CA	R	Anti	Threat	No
KS	R	Anti	Threat	No ⁵⁷⁸
ME	D	Pro	Statement	Yes
MN	R	Anti	Threat	No
MO	NP	Anti	None	Not Analyzed
NE	R	Anti	None	Yes
NY	R	Anti	Threat	Not Analyzed
OR	D	Anti	Threat/Aborted	No

577. In the interest of full disclosure, the author will reveal his political biases. The author's parents are two of five registered republicans in their voting district in Massachusetts. The author's father calls refers to the author as "that goddamned liberal." Despite this fact, the author is a registered Republican and served as a volunteer for the 2000 McCain presidential campaign. The author supported Bill Weld (R), Paul Celucci (R), and Mitt Romney (R) for Governor of Massachusetts. The author wrote himself in for President in 1992 and 1996 in unsuccessful bids for the White House. Therefore, the author considers himself to have been unbiased as far as a preference for or against either major party in the 2000 presidential election. He was equally disgusted by both.

578. Although Kansas law is not analyzed in this study, the Secretary of State himself admitted no knowledge of an applicable law. *Another Lost Cause*, TOPEKA CAP. J., Nov. 6, 2000, at A11; *Vote Trading Lambasted*, at http://www.kansas.com/arch/2000fall/11_02_00/news/votetrade.com (now defunct) (on file with author).

State	Party Affiliation	Position on Vote-pairing	Action on Vote-pairing	Correct Application of Election Law?
WI	NP	Anti	Threat	No
Fed.	D	Pro	None	Yes

Although far from scientific, the above chart shows that party affiliation was the greatest indicator of whether a state election official would move against online vote-pairing. Maine's Democratic Secretary of State commented that online vote-pairing was a "provocative use" of new media;⁵⁷⁹ meanwhile, Minnesota's Republican Secretary of State melodramatically stated, "Vote-swapping undercuts the fundamental tenets that hold our country together."⁵⁸⁰

This is not to suggest that the Republican Party engaged in an anti-First Amendment conspiracy. The author predicts that had the tables been reversed and a Libertarian-Republican coalition formed on the Internet, Democratic secretaries of state would have been just as vigorous in their opposition to online vote-pairing.

As the above chart indicates, several state election officials expressed the opinion that vote-pairing was illegal or unethical. In sharp contrast, the popular media had very few commentators who spoke ill of the new practice. The critics included a student at the University of West Virginia who wrote an editorial in the school newspaper which stated that "[s]ociety has gone way too far this time. By encouraging this type of behavior, how will this [2000] election's outcome be one of truth?"⁵⁸¹ Ken Layne wrote in the *USC Annenberg Online Journalism Review*, "[vote-pairing is] a terrific plan, equally useful for a Buchanan fan who lives in a battleground state where Dubya needs all the votes he can muster."⁵⁸²

Nebraska's Republican Secretary of State, Scott Moore, who refrained from trying to subdue the vote-pairing practice, added "I'm not saying it's

579. Connerty-Marin, *supra* note 58, at A1.

580. See Press Release, Secretary of State Mary Kiffmeyer Asks Vote Swap Web Sites to "Cease and Desist" in Minnesota, Minnesota Secretary of State Mary Kiffmeyer (Nov. 1, 2000), at <http://www.sos.state.mn.us/office/voteswap%2011-1-00.doc> (last visited July 7, 2003).

581. Christina Schrum, *Vote-swapping Besmirches Point Of Educated Voting*, WESTERN FRONT ONLINE (Nov. 7, 2000), at <http://westernfront.wvu.edu/2000/November/opinions3597.html> (now defunct) (on file with author).

582. Ken Layne, *Vote-swapping Isn't Adultery, and Other Lessons From Decision 2000*, USC ANNEBERG ONLINE JOURNALISM REV. (NOV. 6, 2000) (modified Apr. 4, 2002), at <http://www.ojr.org/ojr/business/1017962745.php> (last visited July 14, 2003).

right, I'm just not saying there is any illegal activity in this one."⁵⁸³

The only author to date, with the exception of the author of this work, who has commented in any way on the ethical implications of this practice in a scholarly journal is Jesse Sisgold of the University of California at Hastings.⁵⁸⁴ Sisgold wrote: "Vote-swapping gives citizens a chance to say more precisely what they think about the country's politics. This is good for democracy."⁵⁸⁵ However, Sisgold did not elaborate.

C. *Vote-Pairing in Other Contexts*

As online vote-pairing is a new phenomenon, there are few commentaries on the ethics of the practice.⁵⁸⁶ To evaluate the ethical implications of the practice, this study analyzes analogous behavior.

The words "vote-swapping" conjure up images of Franco-Russo collusion in the 2002 Winter Olympics; therefore, this Part will discuss this subject and its ethical implications. This Part will follow up with a discussion of vote-pairing among appellate judges and politicians, studying the ethical implications of vote-trading in each specific context. The eventual goal is to draw some kind of parallel to high-tech political vote-pairing.

1. *Vote-Pairing Among Olympic Judges*

After the 2002 Winter Olympics, the very term "vote-swapping" conjures images of wrongdoing. In the 2002 Winter Olympics, French figure-skating judge Marie-Reine Le Gougne voted for a Russian pairs team over a Canadian couple, despite what many believed to be the clear superiority of the Canadian pair.⁵⁸⁷ Following the public outcry, Alimzan Tokhtakhounov was arrested in Italy on U.S. charges, after being accused of being behind the scheme to get Gougne to vote for the Russian pairs team, in exchange for a Russian judge's vote for the French ice-dancing team.⁵⁸⁸ The controversy resulted in two gold medals being awarded for

583. *Nader Traders Shut Down Their Web Site Under Pressure*, WASH. TIMES, Nov. 1, 2000, at A12.

584. Sisgold, *supra* note 73, at 167.

585. *Id.*

586. Cf. Christina Schrum, *Vote Swapping Besmirches Point of Educational Voting*, THE WESTERN FRONT ONLINE (Nov. 7, 2000) at <http://westernfront.wvu.edu/2000/November/opinions3597.html> (last visited July 14, 2003).

587. See Tom Hays, *Russian Charged in Olympic Skating Scandal; Reputed Mobster Linked to Plot to Bribe Judges*, THE RECORD, Aug. 1, 2002, at A9.

588. See *id.*

the same event—one to the Russian pair and the other to the Canadian pair.⁵⁸⁹ The International Skating Union quickly proposed reforms to reduce the possibility of vote-pairing from figure skating.⁵⁹⁰

There is little debate as to the ethical implications of the Franco-Russian collusion in the Olympic games. The proper objective of a figure skating judge is to evaluate the ability of the skater to the best of his or her ability and judge the performance in a fair and unbiased manner.⁵⁹¹ Any collusion or vote-pairing in this context is improper and unethical.⁵⁹²

2. *Vote-Pairing and the Judiciary*

The mere suggestion that appellate judges might engage in vote-pairing draws criticism from some of the highest echelons of legal punditry. Richard Posner strongly condemned any suggestion of the practice.⁵⁹³ Einer Elhauge wrote, “[u]nder prevailing ethical norms judges cannot engage in the sort of logrolling that legislators commonly employ.”⁵⁹⁴

Despite some minority views to the contrary,⁵⁹⁵ the dominant belief is that appellate judges will vote on legal principle and “not trade votes as though they were so many horses at a swap meet.”⁵⁹⁶ Although no judge will likely admit it, Evan Caminker believes that on multi-member courts,

589. *See id.*

590. *See Skating Revolution Proposed*, ST. PETERSBURG TIMES (Feb. 19, 2002), at http://www.stpetersburgtimes.com/2002/02/19/Olympics/Skating_revolution_pr.shtml (last visited July 15, 2003).

591. *See, e.g.*, Amy Shipley, *Skating Dances Around Judges' Choices*, THE WASHINGTON POST, May 12, 2002 at D1 (reporting that national bias among skating judges has “drawn accusations ranging from cheating to poor sportsmanship.”); Vicki Michaelis, *New Judging For Skating Still Leaves Room For Political Bias*, USA TODAY, June 10, 2002, at 7C.

592. *See, e.g.*, Chris Broussard, *Shaky Calls Breed Talk of Conspiracies*, N.Y. TIMES, May 9, 2003, at D1 (discussing officiating in the NBA, “[T]he officials’ motives should not be in question,” said Stu Jackson, the N.B.A.’s senior vice president of basketball operations. “Their motives are very simple and very clear, and that is to administer the game safely and fairly with an eye on getting calls correct. That is their only motive.”).

593. *See* RICHARD A. POSNER, *OVERCOMING LAW* 126 (1995) (“[V]ote trading by judges is condemned”), *cited in* Evan H. Caminker, *Sincere And Strategic Voting Norms On Multimember Courts*, 97 MICH. L. REV. 2297, 2380 n.10 (1999).

594. Legislative vote-trades are discussed *infra* in this part. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 106 (1991).

595. *See, e.g.*, Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry into Fundamental Rights and Suspect Classifications*, 80 GEO. L.J. 1787, 1826 n.164 (1992) [hereinafter Stout] (arguing that vote trading on multi-member courts helps to gauge the preferences of the justices and promotes stability of appellate voting and its accuracy in measuring group preferences, but acknowledging that the judicial appointment process may mean that not all subgroups of society are adequately represented.).

596. Paul H. Edelman & Jim Chen, *The Most Dangerous Justice: The Supreme Court at the Bar of Mathematics*, 70 S. CAL. L. REV. 63 (1996) [hereinafter Edelman & Chen].

judges and justices routinely trade votes implicitly.⁵⁹⁷ This practice is completely unregulable by the legislature. The legislative branch only has the power to establish some rules of procedure.⁵⁹⁸

Caminker wrote an exhaustive study of this phenomenon, which I will not endeavor to fully recap in this study. However, suffice it to say that Caminker's conclusion was that vote-pairing in the judiciary is unethical.⁵⁹⁹ Professor Caminker feared that widely accepted vote-trading among judges might cause this to become the dominant means of deciding cases.⁶⁰⁰ Instead of using persuasion to lobby colleagues, judges would be in a constant state of barter for opinions.⁶⁰¹ Caminker additionally feared that vote-trading on multi-member courts could create a "continual imbalance of judicial influence over discrete realms."⁶⁰² For example, if one group of justices had strong convictions about free speech issues but weak convictions about antitrust issues⁶⁰³ and another group of justices held opposite priorities, vote-swapping would allow the first group to dictate free speech doctrine and the second could dictate antitrust doctrine.⁶⁰⁴ This would create a departure from the appellate court's equilibrium position with respect to these particular issues.⁶⁰⁵

The proposition that judicial vote-pairing is improper and unethical is difficult to refute. Judicial opinions should reflect reasoned and learned judicial thought, borne of the maturation of their legal theory and collective decision-making by the judicial body.⁶⁰⁶ They should not reflect a mere measurement of the justices' ability to cooperate.⁶⁰⁷ While debate and compromise are a normal exercise in any deliberative body, when a judge strays from application of the law in favor of expediency or collegiality, the judge strays from a proper judicial role.

597. See Evan H. Caminker, *Sincere And Strategic Voting Norms On Multimember Courts*, 97 MICH. L. REV. 2297 (1999).

598. See Michael S. Paulsen, *Lawson's Awesome*, 18 CONST. COMMENTARY 231, 232 (2001) [hereinafter Paulsen] ("Congress simply has no power to pass any laws that affect the process of judicial case-deciding . . .").

599. Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2380 (1999) ("While vote trading and other strategic maneuvers can plausibly be viewed as furthering legitimate judicial objectives, I have sketched a number of objections suggesting that vote trading nevertheless constitutes improper judicial behavior.").

600. See *id.* at 2373–74.

601. See *id.*

602. *Id.* at 2378.

603. See *id.*

604. See *id.*

605. See *id.*

606. See Edelman & Chen, *supra* note 596, at 139.

607. *Id.*

Despite Lynn Stout's opinion to the contrary,⁶⁰⁸ the need for appellate judges to engage in vote-trading in order to help gauge judicial preferences is unnecessary. The ability of judges to render dissenting and concurring opinions assists not only the preference-gauging function, but allows the preferences of a minority justice to morph over time into the prevailing law.⁶⁰⁹ Louis Brandeis and Oliver Wendell Holmes brought more influence to the evolution of American jurisprudence than many justices brought in their entire careers. Where would American jurisprudence be had Holmes traded his vote in *Olmstead v. United States*?⁶¹⁰ The case itself would have come out the same way, but the foundation of the law surrounding wiretapping would never have been built, and *Katz v. United States*⁶¹¹ might never have even been granted certiorari.

Closer to home in the vote-pairing context, Holmes and Brandeis both offered dissenting and concurring opinions, with no effect upon the outcome of the cases, in *Abrahms v. United States* (Holmes)⁶¹² and *Whitney v. California*⁶¹³ (Brandeis joined by Holmes). These two pieces of uncontrolling dicta later became the foundations of First Amendment jurisprudence.⁶¹⁴ Prior to Holmes' dissent in *Abrahms*, John Stuart Mill's "marketplace of ideas" theory had no place in jurisprudence. Now, the marketplace of ideas is firmly entrenched in the conscience of the American judiciary.⁶¹⁵

It is unlikely that any citizen would prefer to have his or her rights decided on the basis of a vote-trade rather than a reasoned examination of the actual merits of his or her case, especially when the outcome of the case could be incarceration, the death penalty, or a strong impact on civil rights. "[L]egislative-style 'logrolling' and negotiating would be reprehensible conduct in a judge and would violate the core principles governing the judicial role."⁶¹⁶ In fact, if there were a widespread

608. Stout, *supra* note 595, at 1826 n.164.

609. See, e.g., *Katz v. United States*, 389 U.S. 347, 353 (1967) (adopting Oliver Wendell Holmes's dissent in *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Holmes, J., dissenting)).

610. 277 U.S. 438, 471 (1928) (Holmes, J., dissenting).

611. 389 U.S. 347, 353 (1967).

612. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

613. 274 U.S. at 375 (1927) (Brandeis, J., joined by Homes, J., concurring).

614. See, e.g., *Cohen v. California*, 403 U.S. 15, 24 (1971); *Street v. New York*, 394 U.S. 576 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269–270 (1964) (and cases cited); *NAACP v. Button*, 371 U.S. 415, 445 (1963); *Wood v. Georgia*, 370 U.S. 375, 388–389 (1962); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

615. See, e.g., *Red Lion Broad. Co., Inc. v. FCC*, 395 U.S. 367, 377, 384 (1969) (the public interest requires "ample play for the free and fair competition of opposing views") (quoting *Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. 32, 33 (1929)).

616. *Nipper v. Smith*, 39 F.3d 1494, 1535 (11th Cir. 1994).

perception that appellate courts engaged in logrolling, the very legitimacy and effectiveness of the courts would be threatened. “[T]he Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.”⁶¹⁷ Would it be plausible to the nation to hear that First Amendment rights were rolled back because Justice Scalia owed Justice O’Connor a vote from a previous decision on maritime jurisdiction? It is most likely that the court would lose its air of legitimacy if it came with a perception that its decisions were made in any manner other than as a product of law.⁶¹⁸

With regard to the judiciary, the rights of society, or at least the parties before the court, hang in the balance of the decision. In criminal cases, the defendant has a right to counsel and a right to an impartial jury.⁶¹⁹ These values were established to safeguard the goal that the merits of the case should prevail on any given day.⁶²⁰ Given the potential for impact upon the rights of litigants and citizens alike, a judge should not depart from standard judicial procedure in the name of expediency or intra-court politics.

3. *Vote-Pairing in the Political Arena*

The framers of the Constitution would have recognized the practice of online vote-pairing as a modern equivalent of a procedure they affirmatively embraced at the Constitutional Convention of 1787.⁶²¹ At the Convention, The Committee on Standing Rules and Orders originally held that delegates’ votes would be recorded and entered in the minutes of each meeting.⁶²² However, at the urging of Rufus King and George Mason, this measure was revoked because of a fear that delegates would thereby be bound to their past statements, thus stifling persuasive caucus and vote-pairing.⁶²³

617. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 866 (1992); see also Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L. J. 703, 783 (1994) (adherence to established law provides the court with its legitimacy).

618. See John C. Yoo, *Bush v. Gore: In Defense of the Court’s Legitimacy*, 68 U. CHI. L. REV. 775, 782 (2001).

619. U.S. CONST. amend. VI.

620. See, e.g., *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971) (recognizing the fact-finding duty of the jury).

621. See Dana Lansky, *Proceeding to a Constitution: A Multi-Party Negotiation Analysis of the Constitutional Convention of 1787*, 5 HARV. NEGOT. L. REV. 279, 302 (2000).

622. See *id.* at 301–02.

623. See *id.*

More than 200 years later, legislative vote-trading is part of the normal business of the United States Congress.⁶²⁴ In fact, both the federal and state legislative bodies are prime soil for cultivation of vote-trades. Legislative voting is public, thus easily-monitored, and retaliation for unreciprocated vote trades is simple and inexpensive.⁶²⁵ Of course, whether legislative vote-trading occurs is not the most relevant question. The question is: Is it *ethical*?

The Supreme Court of Mississippi has held that legislative vote-pairing is a normal, proper part of the legislative process.⁶²⁶ “Compromises are reached. Votes are traded; you vote for my bill and I’ll vote for yours.”⁶²⁷ Many judges and scholars agree that the very nature of the legislative process requires compromise, and in some cases, trading of votes.⁶²⁸ There are some political scientists who theorize that vote-trading actually creates value, allowing individuals to exchange sets of preferences for another, thus making all voters better off and none worse off.⁶²⁹

There is no debate that a legislator or other public officeholder trading votes for personal gain is both illegal and unethical.⁶³⁰ However, even traditional compromise-based vote-pairing among politicians is not universally accepted. For example, Wisconsin⁶³¹ and Washington⁶³² have enacted statutes prohibiting lawmakers from agreeing to vote for their colleagues’ legislation in exchange for support on other initiatives.

624. See *Michel v. Anderson*, 14 F.3d 623, 632 (D.C. Cir. 1994) (discussing vote-trading as part of the normal consensus-building process in the House of Representatives).

625. See Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT. L. REV. 707, 721–23 (1991) [hereinafter Baker].

626. *Cuevas v. Royal D’Iberville Hotel.*, 498 So.2d 346, 359 (Miss. 1986).

627. *Id.*

628. See *Christian Science Reading Room v. San Francisco*, 807 F.2d 1466, 1471 (9th Cir. 1986) (Norris, J., dissenting from the court’s rejection of a rehearing en banc); Tom C. Rawlings, Comment, *Employment Division, Department of Human Resources v. Smith: The Supreme Court Deserts the Free Exercise Clause*, 25 GA. L. REV. 567, 589 (1991) (recognizing that legislators routinely swap votes to pass pet projects).

629. See Baker, *supra* note 625, at 721.

630. See, e.g., *Young v. Edwards*, 207 N.W.2d 126, 131 (Mich. 1973) (vote trading impermissible where a legislator engages in it to gain a pay raise or a position); *Raynovich v. Romanus*, 299 A.2d 301, 308 (Penn. 1973) (Eagen, J., dissenting); *Commonwealth v. Clapps*, 512 A.2d 1219 (Pa. Super. Ct. 1986) (politicians charged with conspiracy, bribery, and ethics violations for trading votes for jobs); *Wright v. State*, 202 S.W. 236 (Ark. 1918) (trading votes for a promise to use political influence to bring about supporters’ nominations to public service positions).

631. See WISC. STAT. ANN. § 13.05 (West 2003) (prohibiting legislative vote-trading by statute).

632. See *Roberts v. Millikin*, 93 P. 2d 393 (Wash. 1939) (equating vote-trading with “malfeasance in office”); WASH. REV. CODE ANN. § 29.82.010 (West 2003) (“‘Misfeasance’ or ‘malfeasance’ in office means any wrongful conduct that affects, interrupts, or interferes with the performance of official duty”), amended by 2003 Wash. Legis. Serv. Ch. 111 (S.S.B. 5221) (West 2003).

Colorado goes one step further and prohibits legislative vote-trading under the State Constitution.⁶³³

Regardless of the jurisdiction's legal posture toward legislative vote-trading, scholars and judges alike recognize that bargaining is a necessary component of the political process.⁶³⁴ However, the ethical line begins to blur when legislators are seen as supporting a bill out of a desire to serve themselves (perhaps supporting a colleague's bill in exchange for that colleague's support in gaining a committee seat). The ethical yardstick, when examining legislative behavior, is to decide whether the vote-trade was done for a corrupt reason. Of course, this then begs the question, what does "corrupt" mean?

"Attempts to cabin the definition of 'corruptly' within a single rule have proven unsatisfactory."⁶³⁵ Judge Kozinski of the U.S. Court of Appeals for the Ninth Circuit brings the reader through a minefield of definitions in his dissent in *United States v. Dorri*.⁶³⁶ Kozinski presents a collection of definitions from "done with the intent to secure an unlawful benefit either for oneself or for another,"⁶³⁷ to the Black's Law Dictionary definition of the word, referring to a wrongful design to acquire an advantage, pecuniary or otherwise.⁶³⁸ Finally, Kozinski settles on the premise that "corruptly" can only be defined on a case-by-case basis.⁶³⁹ Kozinski's final thesis sounds a lot like the "I know it when I see it"⁶⁴⁰ test that Potter Stewart laid down in his concurrence in *Jacobellis v. Ohio*.⁶⁴¹ Kozinski's case-by-case basis conclusion raises some grave doubts. The jury instruction at issue in *U.S. v. Dorri* instructed the jurors that: "An act is 'corruptly' done if it is done voluntarily and intentionally to bring about either an unlawful result or a lawful result by some unlawful method with a hope or expectation of either financial gain or other benefit to one's self or to another."⁶⁴²

633. See COL. CONST. art. V, § 40 (prohibiting legislative vote-trading by constitutional mandate in Colorado).

634. See, e.g., Francesco Parisi and Jonathan Klick, *The Differential Calculus of Consent*, LAW AND ECONOMICS WORKING PAPER SERIES, at http://papers.ssrn.com/abstract_id=316482 (last visited July 14, 2003).

635. See *United States v. Dorri*, 15 F.3d 888, 894 (9th Cir. 1994) (Kozinski, J., dissenting).

636. *Id.*

637. *Id.* (Kozinski, J., dissenting) (citing *United States v. Popkin*, 943 F.2d 1535, 1540 (11th Cir. 1991)).

638. *Id.* (citing BLACK'S LAW DICTIONARY 345 (6th ed. 1990)).

639. *Id.*

640. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

641. *Id.*

642. *Dorri*, 15 F.3d at 890.

Under this instruction, unethical behavior would be punished, while unorthodox behavior done for an uncorrupt reason would not. The Colorado constitutional and Washington and Wisconsin statutory prohibitions against legislative vote-trading take all discretion over one method of compromise out of the hands of each legislator.⁶⁴³ This is too harsh. If a legislator obeys the law but looks pragmatically beyond the result of an individual vote, seeking greater consensus-building and perhaps some other proper benefit to his constituents in the future, it cannot be considered to be “corrupt” and should likely not be considered “unethical.” If a legislator exchanged a vote for a personal gain, pecuniary or otherwise, then the exchange would be corrupt and thus unethical. Absent corrupt intent or effect, therefore, a legislator building consensus should not be considered to be unethical.

D. Ethical Conclusion

The full ethical conclusion with regard to online vote-pairing is discussed in Part VI of this study, in conjunction with a legal conclusion on the issue. However, in the above examples, the overriding logic suggests that whether a vote-trade ventures into the realm of the unethical turns on whether the trade negatively impacts the rights of others, or whether it is somehow “corrupt.”

VI. CONCLUSIONS

There are two questions that this study endeavors to answer. The first is whether vote-pairing is *legal*. To some extent, the individual state studies in Part III, *supra*, answer this question. However, the constitutional legal parachute must be opened and checked for holes. This Part begins by doing so. This Part then picks up where Part V ends and reconciles the ethical conclusion.

643. *See supra* Part III.

A. *Legal Conclusion*

The online vote-pairing phenomenon involved thousands⁶⁴⁴ of people nationwide gathering in the new town square to associate for the furtherance of a common political goal. California Secretary of State Bill Jones should have been aware of this fact, given the decision that he had just lost in *California Democratic Party v. Jones*.⁶⁴⁵ In that case, the United States Supreme Court gave Jones a civics lesson in interference with the right to political association:

Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. . . . Consistent with this tradition, the Court has recognized that the First Amendment protects “the freedom to join together in furtherance of common political beliefs.”⁶⁴⁶

Had thirty thousand people met in a convention hall to form a political coalition, few would question the meeting’s legality. In a less extreme example, had a husband and wife discussed their presidential preferences, discovered that they had opposite views, and thus decided to both refrain from voting, a prosecutor would certainly have had no place bringing the couple to court.

Nevertheless, the secretaries of state of California, Oregon, Florida, Arizona, and Wisconsin reacted to new technology by imperiling a fundamental constitutional right.⁶⁴⁷ However, the Constitution demands that government regulations that burden political speech and assembly rights must withstand some degree of scrutiny. The positions taken by the then secretaries of state would likely fail such scrutiny.

644. According to a study conducted by <http://votetrader.org/results/> (last visited July 13, 2003), www.nadergore.com facilitated the pairing of 221 participants and had 314 individual visitors, www.nadergore.org had 300 participants and 1791 visitors, www.tradevotes.com had 310 participants and 1851 visitors, www.voteexchange.com had 9698 participants and 58509 visitors, www.voteexchange.org had 692 participants 88524 visitors, www.voteswap2000.com had 2500 participants and 29850 visitors, www.voteswap2000.net had 6325 participants and 37760 visitors, www.votetrader.org had 228 participants and 1486 visitors, www.voteexchange2000.com had 3000 participants and 17910 visitors, and www.winwincampaign.org had 10251 participants and 60460 visitors. From this data, votetrader.org estimated that there were 36,025 participants. It is not far-fetched to theorize that some of the individual visitors also participated in vote-exchanges with other individuals without use of these websites as coordination engines.

645. *California Democratic party v. Jones*, 530 U.S. 567 (2000).

646. *Id.* (citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214–15 (1986)).

647. *See supra* Part III.

A citizen pledging to swap votes followed her conscience, un-policed and unobserved in the voting booth.⁶⁴⁸ Even Oregon officials admitted that there was no way to ascertain how another person voted.⁶⁴⁹ A citizen using a website to pledge a vote could have changed her mind, or may not even have been a citizen or a registered voter.⁶⁵⁰ Website users could have used fictitious or multiple email addresses or identities because information on the website and information concerning the entire arrangement is not verifiable.⁶⁵¹ Even if the agreement could be verified, the end result is a vote cast to achieve a preferred political goal, albeit in a non-traditional manner. Before being threatened with prosecution, the websites that facilitated vote-swapping facilitated political association and speech.⁶⁵² They asked a user a series of questions about her political goals and geographic location and then used that information to match her with another user who had complimentary political goals. Once so matched, the two voters could arrange coordinated political action.⁶⁵³

Ultimately, what controls this issue is that vote-pairing is protected by the federal Constitution. Voting to achieve a political goal is the essence of democracy.⁶⁵⁴ The vote-pairing websites took the consensus-building aspect of the political meeting and political speech from the town hall and transferred it into cyberspace. That the political meeting and discussion took place in the digital world as opposed to a meeting room does not change the level of constitutional protection that should be afforded.⁶⁵⁵ While this phenomenon may have broken Duverger's law⁶⁵⁶ and inverted his theories of strategic voting, no American law was broken. Online vote-pairing is legal and subject to the highest level of constitutional protection.

It is certain that no individual component of vote-pairing was illegal. When the user visited a vote-pairing site, the site would ask the voter his or her state of residence. Nothing illegal there. The next step was to ask

648. Brief for Plaintiffs at 2, *Porter v. Jones*, (D. Cal. 2000) (No. 00-11700) (on file with author).

649. Telephone interview with Jennifer Hertel, Program Representative, Oregon State Election Division (Nov. 6, 2000) (Hertel stated that the individual voters would be in violation of OR. REV. STAT. § 260.665 but acknowledged that there would be no practical way to prosecute individual voters due to the impossibility of verifying exactly how each voter cast his or her ballot).

650. *Id.*

651. *Id.*

652. Brief for Plaintiffs at 11, *Porter v. Jones*, (D. Cal. 2000) (No. 00-11700) (on file with author).

653. *Id.* at 7.

654. *Cf. Meyer v. Grant*, 486 U.S. 414, 421 (1988) (the expression of a desire for political change and a discussion of the merits of the proposed change is afforded the highest level of First Amendment protection).

655. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997) (website content is afforded the same First Amendment protection as traditional print).

656. *See supra* Part II.

the voter about his or her preferences in the presidential race. Again, nothing illegal there. The next step was for the site to find someone with an analogous preference and match the two users up. At this point, the activity the users arranged was out of the site-operator's hands. Each user in the pair would be sent the other's email address, and if they were able to reach a level of trust and agreement, then they would agree to vote-pair. Conceivably, the two might not be able to agree, might not trust each other, or might decide that they preferred to discuss how to manufacture illegal drugs, engage in prostitution, or hatch a murder-for-hire plot. The sites had no control over what the two voters discussed. If they conspired to violate drug laws, then the paired voters committed a crime. But, no vote-pairing participant was accused of this. Vote-pairing participants were, after the sites put them in contact with each other, engaged in a private conversation, ostensibly about their support for a certain political ideology. To call this "illegal" is to toss aside any notion of freedom of association and freedom of speech.

If there were evidence that these sites were used primarily for illegal activity, or that they were intended to do so, the conclusion would be different. As discussed in Part III, individuals did attempt to sell their votes online during the 2000 election, although most examples were found to be hoaxes or practical jokes.⁶⁵⁷ It is clear that the above analysis does not apply to this kind of behavior. Every state election statute prohibits selling or offering to sell a vote for financial gain, and such an arrangement would be beyond the protections of the First Amendment.⁶⁵⁸

B. Ethical Conclusion

Despite its clear legality, online vote-pairing was not without its detractors. In fact, Ralph Nader himself was an outspoken opponent of the practice.⁶⁵⁹ Nader said, "I like people to vote their conscience and vote for who they'd really like to be elected."⁶⁶⁰ Other Greens echoed his sentiment. David Silva, a staunch Green Party member in Santa Cruz,

657. See, e.g., Stenger, *Ebay*, *supra* note 398 (quoting Maryland officials stating that offering to sell a vote was punishable by fines and imprisonment in Maryland); Stenger, *Vote*, *supra* note 398; Derfner, *supra* note 398 (reporting on voteauction.com); Abramson, *supra* note 398; Weber, *supra* note 398, at 14; Bechtold, *supra* note 398 (discussing the shutdown of voteauction.com).

658. See *Brown*, 456 U.S. at 55.

659. See, e.g., Interview with Ralph Nader, Talk of the Nation (Nov. 17, 2000), *available at* 2000 WL 21459177.

660. *Id.*

California called the practice “silly,” and “probably illegal . . . or it should be.”⁶⁶¹

However, aside from Nader, Silva, Oregon’s Democratic Secretary of State Bill Bradbury, a handful of Republican secretaries of state, an undergraduate student at West Virginia University, and the editorial board of *The Grand Rapids Press*, there were no published commentaries citing specific criticism of the movement.⁶⁶²

The *Grand Rapids Press* ran the most articulate criticism of the practice in an editorial on November 4, 2000, stating: “The online dealmaking diminishes the American electoral process. Citizens should vote their convictions when they enter the voting booth, not close the deal on a brokered interstate agreement. Mr. Nader has said that specifically in urging his supporters to reject the temptation.”⁶⁶³

Nader’s ire was understandable, in that Nader frequently was quoted as supporting neither Gore nor Bush, seeing no difference between them.⁶⁶⁴ Neither, the *Grand Rapids Press*, the undergraduate student, nor any one of the secretaries of state seemed to understand the practice and appeared to rely on the baggage-laden term “vote-swapping” as the ground upon which they rested their unsupported conclusions. The secretaries of state merely stated that the practice was “illegal” because it ran afoul of their states’ laws, but never elaborated.⁶⁶⁵

Voting to achieve a political goal is the essence of democracy,⁶⁶⁶ and democracy is meaningless without the ability of citizens to assemble to promote their political views.⁶⁶⁷ The author questions whether such assembly approached unethical behavior, and if it does, questions what this means as far as an ethical analysis of all political organizations. In the Olympic vote-trading scandal, the skaters expected to be judged fairly, and the spectators expected to view a fairly judged competition. Without some

661. Dan White & Darrell Cole, *Green Party Members Seeing Red Over Defections*, SANTA CRUZ SENTINEL, Nov. 5, 2000, at F1.

662. A thorough search of online sources revealed no additional published commentaries criticizing the ethics of online vote-pairing.

663. *Voting Your Conscience: Presidential Election Should not be Treated as a Swap Meet*, GRAND RAPIDS PRESS, Nov. 4, 2000, at A12.

664. See, e.g., Todd Gitlin, *Nader: Savior or Spoiler?*, ANCHORAGE PRESS, Nov. 2, 2003, available at <http://www.anchoragepress.com/archives/documentf4ac.html> (last visited July 27, 2003); Louis Freedberg, *Nader Denies Spoiling Gore’s Shot at Victory*, SAN FRAN. CHRON., Nov. 8, 2003, at A3.

665. To the extent that they did, their statements are fully reported in Part III of this study, *supra*.

666. See *Meyer*, 486 U.S. at 421 (the expression of a desire for political change and a discussion of the merits of the proposed change is afforded the highest level of First Amendment protection).

667. See *California Democratic Party v. Jones*, 530 U.S. 564, 574 (2000).

fundamental level of impartiality and fairness, the entire process of judging the event becomes nonsensical.

With regard to the judiciary, again, the impact is upon the rights of the individual standing before the court and the rights of the citizenry bound by the case law the court can establish. Federal judges are appointed, ostensibly, for their legal expertise and their ability to judge the law and the facts fairly.⁶⁶⁸ Furthermore, a multi-judge court is established for the purpose of diluting each individual judge's voice and to force the judges to debate and come up with the legally correct answer.⁶⁶⁹ Judges are fallible, but the belief is that, in the end, the adversarial process will create good law. Vote-pairing on judicial panels is clearly ethically corrupt because it reduces decisions impacting the rights of citizens to be judged impartially to a horse-trade which has the potential to send someone to prison (or roll back the rights of all citizens in the jurisdiction) based on factors extrinsic to the facts and the law of the case at bar.

The ethical analysis of vote-trading changes when it enters the political arena, both when it comes to a politician and an individual voter. Politicians and individual voters alike organize themselves politically on the basis of consensus. Politicians form coalitions and blocs while individuals organize themselves into political parties. Forming a coalition, political party, or voting bloc by necessity requires cooperation; however, the element of corruption, seeking improper gain in exchange for support, is different than establishing a political consensus.

Corruption would exist in a vote-trading arrangement if a politician traded his or her vote for a pecuniary gain or if a voter traded a vote for the same.⁶⁷⁰ This element is absent in the context of online vote-pairing as it appeared in the 2000 presidential election. The participants in the 2000 vote-swaps formed an online caucus to promote a Progressive-Democrat coalition that could be properly described as the first political coalition to exist solely in cyberspace.

The mere fact that a practice is legal or constitutionally protected does not always answer the question as to whether it is ethical.⁶⁷¹ Both threads of logic run with each other in online vote-pairing. Online vote-pairing is

668. See, e.g., *Perry v. Kemna*, 356 F.3d 880, 888 (8th Cir. 2004).

669. Cf. Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 PENN. L. REV. 1639 (2003).

670. See, e.g., *Stebbins v. White*, 235 Cal. Rptr. 656, 670–71 (1987) (discussing judicial corruption; see also Federal Voter Corruption Act, 42 U.S.C. § 1973i(c)).

671. See Paulsen, *supra* note 598, at 232 (Congress cannot pass any laws that affect the judicial case-deciding process.).

void of corrupt intent or outcome and is a perfectly ethical use of an individual's personal political power.

C. Conclusion

With the sole exception of Jessica Funkhouse, State Election Director for Arizona, every state regulator who attempted to smother the online vote-pairing movement did so under an erroneous application of his or her state's election law.⁶⁷² Although Funkhouse appears to have properly interpreted her state's law, even her analysis fails to pass constitutional muster. High-tech strategic voting in the form of online vote-pairing was the world's first online political coalition, and any attempt to stifle it runs afoul of the First Amendment.

Often First Amendment advocates find themselves with strange bedfellows. Nazis,⁶⁷³ Klansmen,⁶⁷⁴ and child pornographers⁶⁷⁵ are usually at the forefront of First Amendment debate. Online vote-pairing is not a case in which a First Amendment advocate must suspend ethical beliefs in order to support the greater good of free expression. Online vote-pairing is legal, ethical, and constitutionally protected.

The fact remains that online vote-pairing could have a significant impact on future elections. This study has examined the ramifications of the practice under state law, federal law, and under an ethical lens. However, questions remain for future study.

One frequent question raised in discussions about the topic is the subject of the faithless vote-pairing participant. Given that the process of online vote-pairing has no mechanism for enforcement of a promise, all participants trust other participants to live up to their promise. This speaks to the issue of *should a voter participate in vote-pairing?* This question is clearly beyond the scope of this study. This study is intended to analyze online vote-pairing under state election laws, constitutional analysis, and an ethical lens. Any suggestion that the practice should be outlawed because someone might participate dishonestly is laughable, and such an

672. See *supra* Part III.

673. See, e.g., *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (granting stay of injunction that would allow Nazis to march in Skokie, Illinois while the Nazis appealed lower court's injunction due to First Amendment concerns).

674. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (reversing a Ku Klux Klan leader's conviction for advocating unlawfulness as a means of political reform as a violation of the First Amendment).

675. See, e.g., *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2001) (holding that a ban on "virtual child pornography" was unconstitutionally overbroad because it abridged the freedom to engage in a substantial amount of lawful speech).

argument asserted by a state regulator would invite an amicus brief from Ebay's general counsel.⁶⁷⁶ Stifling a means of communication because someone might use it to lie is as ludicrous as outlawing the telephone because people arrange illicit marital affairs over the phone lines.

This brings us to a follow-up question of *is online vote-pairing a good idea?* Again, this is a philosophical question that is beyond an examination of whether it is legal and ethical. Whether it is a good idea seems to turn on one's personal views toward democracy. A Republican or a Democratic activist is unlikely to approve of a process that opens the political process to increased competition. Staunch Green Party supporters spoke out against the process, even as it stood to benefit their movement. However, the author's instinct is that anything that brings another cart into the marketplace of ideas is good for democracy.

Off the philosophical bent and into the mechanical is the question: How does an online vote-pairing site affect a candidate's disclosure requirements under state and federal campaign financing laws? Jeff Cardille, creator of one of the more popular vote-pairing sites, is reported to have spent \$200 to post his site.⁶⁷⁷ Should either Al Gore or Ralph Nader have reported this as a campaign contribution?

Additional study should also be focused on online vote-pairing and its exacerbation of the technology gap. Does this practice, which requires access to a computer and Internet access, marginalize the poor? When online coalition politics requires an "entry fee" that many underprivileged voters cannot afford, is its goal of broadening participation in democracy frustrated by its very instrumentalities?

Another angle of study for this practice is its effect or use by minorities. Is online vote-pairing subject to abuse by racists? It is imaginable that (for example) racist voters on both sides of the Democrat-Republican divide could ally themselves against a minority candidate. On the other hand, minority voters on either side of the divide could bring themselves together in a coalition to increase minority participation in politics far beyond the hopes of Lani Guinier, without racial gerrymandering by state legislatures.⁶⁷⁸

676. See, e.g., Miguel Helft, *Fraud on EBay Lands Culprit in Jail*, THE INDUSTRY STANDARD, Nov. 2 1999, at <http://www.thestandard.com/article/0,1902,7375,00.html> (now defunct) (on file with author) (although the fraud culprit was prosecuted and incarcerated, not a single commentator suggested that Ebay should be shut down because users committed fraud on its system).

677. See Meg Kissinger, *UW's Student's Web Site Promotes Vote Trading to Aid Nader, Gore*, MILWAUKEE J. SENTINEL, Nov. 1, 2000, at 1B, available at 2000 WL 26093361.

678. See Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589 (1993) (advocating cumulative voting to rank voter

Of course, the very issue of online vote-pairing will (now that the Ninth Circuit of the U.S. Court of Appeals has remanded the issue to a federal trial court) be the subject of continued litigation.⁶⁷⁹ Where will that case end? Is a petition for certiorari to the U.S. Supreme Court in the future for high-tech coalition politics? If so, will the Supreme Court follow precedent and protect the right to political association on the Internet or will it create novel interpretations of federalism and equal protection as it did in *Bush v. Gore*?⁶⁸⁰ Will a center-right coalition take advantage of the technology and turn the tables on Maine's Democratic Secretary of State's statement that this was a "provocative use of a new medium" to defeat a Democratic candidate?

Even as this study was on its way to press, Libertarians were advocating the use of online vote-pairing to register protest against George W. Bush without conferring an unintended electoral benefit upon John F. Kerry.⁶⁸¹ Meanwhile, Nader apparently finally embraced the practice for the 2004 election season,⁶⁸² and the operator of www.voteswap.com updated his site to state boldly: "NOTE: Voteswap will return for 2004 shortly!"⁶⁸³

As the 2004 election season dawns, and *Porter v. Jones* winds its way through the courts,⁶⁸⁴ it is apparent that the other election controversy of Y2K is far from resolved. These questions can only be answered by the 2004 election, the eventual outcome of *Porter v. Jones*, and further study of the issue.

preferences and thus increase minority political representation).

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

680. 531 U.S. 98, 123 (2000) (Stevens, J., dissenting) (majority's position was clearly counter to notions of federalism, and the majority valued expediency over accuracy in tabulating votes).

681. See Chuck Muth, *Vote Swapping: Protesting Bush Without Electing Kerry* (Mar. 14, 2004), at http://www.opinioneditorials.com/contributors/muth_20040314.html (last visited Apr. 7, 2004).

682. See Bill Adair, *Nader Clings To Lonely Quest*, ST. PETERSBURG TIMES (Mar. 28, 2004).

683. See <http://www.voteswap.com> (last visited Apr. 7, 2004).

684. See *Porter v. Jones*, 00-CV-11700 (On Dec. 12, 2003 Judge Kelleher entered a case management order that all law and motion matters, except for motions in limine, must be heard by May 17, 2004).