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“VOTE BUYING”

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Vote Buying

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The buying of votes in political elections, or “core vote buying,” is illegal in every state and in federal elections. Although vote buying bans are ubiquitous and uncontroversial, rationales offered for such bans are more contestable than may first appear. In Part I of this article, Professor Hasen explores equality, efficiency, and inalienability arguments supporting a ban on core vote buying. Each rationale depends upon debatable normative and positive assumptions about the nature of voting and the political system.

Determining which rationale or rationales support the ban on core vote buying is more than an academic exercise. As Part II explains, a host of other political practices have a superficial resemblance to core vote buying. But one cannot make a normative judgment on whether these “non-core” vote buying practices should be illegal, legally tolerated, or encouraged by simply questioning whether the practices “look enough like

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vote buying” and therefore should be illegal. Instead, one must ask whether the rationales developed in Part I--equality, efficiency, and inalienability--support or oppose a ban on the non-core vote-buying practice. Part II uses the rationales to examine five non-core vote-buying practices: legislative logrolling, vote buying in corporate elections, payments for turnout, campaign promises and contributions, and voting in special district elections. It concludes that the three rationales developed in the Article offer a good first cut at deciding whether these practices should be illegal, legally tolerated, or encouraged.

INTRODUCTION

Sarah is entitled to vote in an upcoming election. Bob wants Sarah to vote according to his preferences; indeed, he wants this outcome badly enough that he is willing to buy Sarah's vote. If Bob and Sarah are voting in a federal or state election, it is illegal for Bob (the buyer) to pay Sarah (the seller) for her vote or for Sarah to take anything of value from Bob in exchange for her vote.¹

Sarah and Bob's proposed transaction constitutes an example of *core vote buying*, or explicit vote buying in political elections, the simplest, most traditional form of vote buying. Laws prohibiting core vote buying must rank among the least controversial election laws in the United States.

1. See 18 U.S.C. § 597 (1999) (imposing a fine or imprisonment on anyone who “makes or offers to make an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate,” as well as on anyone who “solicits, accepts, or receives any such expenditures in consideration of his vote or the withholding of his vote”); see also 18 U.S.C. § 598 (1999); 42 U.S.C. § 1973i(c) (1999) (imposing a fine or imprisonment on anyone who offers or accepts payment either for registration to vote or for voting). Every state prohibits the practice as well. See ALA. CODE § 11-46-68 (1999); ALASKA STAT. § 15.56.030 (Michie 1999); ARIZ. REV. STAT. § 16-1006 (1999); ARK. CODE ANN. § 7-1-104 (Michie 1997); CAL. ELEC. CODE § 18522 (West 1999); COLO. REV. STAT. § 31-10-1524 (1998); CONN. GEN. STAT. § 9-333x (1997); DEL. CODE ANN. tit. 15, § 4940 (1998); FLA. STAT. ANN. § 104.061 (West 1998); GA. CODE ANN. § 21-2-570 (1998); HAW. REV. STAT. § 19-3 (1999); IDAHO CODE § 18-2305 (1998); 10 ILL. COMP. STAT. 5/29-1 (West 1999); 1998 Ind. Adv. Legis. Serv. § 3-14-3-19; IOWA CODE § 722.4 (1997); KAN. STAT. ANN. § 25-2409 (1997); KY. REV. STAT. ANN. § 119.205 (Michie 1998); 1998 La. Acts 18:1461; ME. REV. STAT. ANN. tit. 17-A, § 602 (West 1998); MD. CODE ANN. art. 33, § 13-602 (1998); MASS. GEN. LAWS ANN. ch. 56, § 32 (West 1999); MICH. COMP. LAWS § 168.931 (1998); MINN. STAT. § 211B.13 (1998); MISS. CODE ANN. § 23-15-889 (1998); MO. REV. STAT. § 115.635 (1999); MONT. CODE ANN. § 45-7-101(1)(a) (1999); NEB. REV. STAT. § 32-1536 (1998); NEV. REV. STAT. ANN. § 293.700 (Michie 1998); N.H. REV. STAT. ANN. § 659:40 (1999); N.J. REV. STAT. § 19:34-25 (1999); N.M. STAT. ANN. § 1-20-11 (Michie 1998); N.Y. ELEC. LAW § 17-142 (Consol. 1999); N.C. GEN. STAT. § 163-275 (1999); N.D. CENT. CODE § 12.1-14-03 (1999); OHIO REV. CODE ANN. § 3599.02 (Anderson 1999); OKLA. STAT. tit. 26, § 16-106 (1998); OR. REV. STAT. § 260.665 (1997); 25 PA. CONS. STAT. § 3539 (1998); R.I. GEN. LAWS § 17-23-5 (1998); S.C. CODE ANN. § 7-25-60 (Law. co-op. 1998); S.D. CODIFIED LAWS § 12-26-15 (Michie 1999); TENN. CODE ANN. § 2-19-126 (1999); TEX. PENAL CODE ANN. § 36.03 (West 1999); UTAH CODE ANN. § 20A-1-601 (1998); VT. STAT. ANN. tit. 17, § 2017 (1999); VA. CODE ANN. § 24.2-1007 (Michie 1999); WASH. REV. CODE § 29.85.060 (1999); W. VA. CODE § 3-9-13 (1999); WIS. STAT. § 12.11 (1998); WYO. STAT. ANN. § 22-26-109 (Michie 1999).

Indeed, vote buying is such a powerful image of electoral corruption that opponents of a host of other electoral practices, from the giving of large campaign contributions to legislative logrolling, sometimes draw an analogy to core vote buying in making their case.² The Supreme Court just this year in *Nixon v. Shrink Missouri Government PAC*³ upheld a Missouri law limiting individual campaign contributions to statewide candidates to \$1,075. To support the government's interest in such a law against First Amendment challenges, the Court pointed to virtually no evidence besides an affidavit of a Missouri legislator "who stated that large contributions have 'the real potential to buy votes.'"⁴

Despite the almost universal condemnation of core vote buying,⁵ commentators disagree on the underlying rationales for its prohibition. Some offer an equality argument against vote buying: the poor are more likely to sell their votes than are the wealthy, leading to political outcomes favoring the wealthy.⁶ Others offer an efficiency argument against vote buying: vote buying allows buyers to engage in rent seeking that diminishes overall social wealth.⁷ Finally, some commentators offer an inalienability argument against vote buying: votes belong to the community as a whole and should not be alienable by individual voters.⁸ This inalienability argument may support an anti-commodification norm that causes voters to make public-regarding voting decisions.

Some readers will find all three of these rationales—equality, efficiency, and inalienability⁹—unconvincing. For those readers, this Article offers a challenge to find a better rationale for the vote-buying ban (or a call to lift the ban). Others, probably most readers, will believe that one or more of the three rationales justify the ban on vote buying. For these

2. See, e.g., CHARLES LEWIS, *THE BUYING OF THE PRESIDENT* (2000).

3. 120 S. Ct. 897 (2000).

4. *Id.* at 907 (citation omitted). For an analysis of the lack of evidence, see Richard L. Hasen, *Shrink Missouri, Campaign Finance, and "The Thing that Wouldn't Leave,"* 17 CONST. COMMENTARY (forthcoming Sept. 2000).

5. Henry Manne suggested approval of political vote buying in an early article on the topic, despite noting that it "could result in a redistribution [of wealth] from the less wealthy to the more wealthy." Henry G. Manne, *Some Theoretical Aspects of Share Voting*, 64 COLUM. L. REV. 1427, 1428 (1964). Saul Levmore opposes vote buying, but he presents a nuanced consideration of the enforceability of agreements among groups of voters to vote as a bloc, a practice analogous to voting agreements in corporate law. See Saul Levmore, *Precommitment Politics*, 82 VA. L. REV. 567, 606-10 (1996) [hereinafter Levmore, *Precommitment Politics*]. On voting agreements in corporate law, see *infra* Part II.B. Levmore further explores and endorses very limited forms of vote buying in *Voting with Intensity*, __ STAN. L. REV. (forthcoming ____ 2000) [hereinafter Levmore, *Voting with Intensity*].

6. See *infra* Part I.A.

7. See *infra* Part I.B.

8. See *infra* Part I.C.

9. Daniel Ortiz suggests these three reasons, though not using my labels, in Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 911 (1998).

readers, the rationales will help not only to explain the ban on core vote buying itself but also to understand myriad other similar, *non-core* vote-buying situations.

Consider, for example, whether someone should be allowed to pay voters to boost voter turnout. Federal law prohibits the practice,¹⁰ but at least a few states allow it.¹¹ Should the practice be illegal, legal but discouraged, or encouraged? One way to analyze questions like this one is to ask how similar the given practice is to core vote buying: if the non-core vote-buying practice is similar enough to core vote buying, it should be illegal. This approach, however, fails to provide an explicit standard for assessing the relevant similarities between core and non-core vote buying. This Article argues that a better method is to consider which, if any, of the reasons supporting the ban on core vote buying (equality, efficiency, inalienability) apply as well to the non-core vote-buying practice in question. In the example of payments to boost turnout, the equality argument suggests that such payments should be encouraged, the inalienability argument suggests that the payments should be illegal, and the efficiency analysis is indeterminate.¹² Because the three rationales lead to different results for some non-core vote-buying practices like paying for turnout, assessing the practice's desirability sometimes requires a normative judgment about the relative merits of the competing values—equality, efficiency, or inalienability—at stake. Although other criteria may be used to assess a law's desirability,¹³ these three provide a good first cut at analyzing vote-buying prohibitions.

Part I of this Article sets forth in greater detail the three main reasons—equality, efficiency, and inalienability—for banning vote buying. The arguments against vote buying under each criterion are more complex and contestable than they may first appear. Part II applies the equality, efficiency, and inalienability criteria to five non-core vote-buying practices: (a) legislative logrolling; (b) corporate vote buying; (c) payments to increase turnout; (d) candidate campaign promises and campaign

10. See federal sources cited *supra* note 1.

11. The practice appears most developed in California, see *infra* Part II.D, but it exists in other states as well. See, e.g., *Dansereau v. Ulmer*, 903 P.2d 555, 560 (Alaska 1995) ("Although [Alaska law] prohibits a person from paying another person to vote for a particular candidate, proposition, or question, no Alaska Statute prohibits a person from compensating another person for voting *per se*."); *Naron v. Prestage*, 469 So. 2d 83 (Miss. 1985) (upholding a candidate's use of a lottery to increase voter turnout under Mississippi law).

12. See *infra* Part II.C.

13. See *infra* notes 214–215 and accompanying text.

contributions; and (e) voting in special district elections.¹⁴ The analysis reveals similarities and differences between seemingly diverse election practices, as well as how varying conceptions of political equality may come into play in evaluating election laws. Part II concludes that some of these practices violate only one or two of the three anti-vote-buying criteria, and that a decision on each practice's desirability turns on a normative evaluation of these criteria. The Conclusion offers some thoughts on interpreting the results of the vote-buying analyses in Part II.

I

WHY BAN VOTE BUYING

Despite current law,¹⁵ vote buying has a long, if ignoble, history in the United States. Though vote buying probably has been around as long as voting,¹⁶ James Gardner traces the prevalence of the practice in the United States back to eighteenth-century England, where "treating," that is "treating the voters to food and drink in heroic quantities" in order to gain their favor," was an evidently universal practice:¹⁷ "The practice . . . transformed election campaigns into contests between the candidates to provide the most whiskey to eligible voters."¹⁸

The lack of a secret (or Australian) ballot appears to have facilitated the widespread practice of vote buying.¹⁹ Secret ballot voting did not exist in most states before the 1880s or 1890s.²⁰ Prior to that, voters generally brought in ballots printed by the political parties. Each party used a different color ballot, making it easy to verify how each voter had voted.²¹ Eventually the high costs of buying votes led political parties to push for the secret ballot.²² The rise of the secret ballot in turn resulted in a

14. I have arranged these not in order of deviations from the case of core vote buying, but roughly from those practices which courts and scholars have considered in the greatest detail to the least detail.

15. See *supra* note 1.

16. See, e.g., E.S. STAVELY, GREEK AND ROMAN VOTING AND ELECTIONS 78-79 (1972) (noting payments to voters in ancient Athens to attend the Assembly).

17. James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 232 (1990) (footnote omitted).

18. *Id.*

19. See Jac C. Heckelman, *The Effect of the Secret Ballot on Turnout Rates*, 82 PUB. CHOICE 107, 108-09 (1995) (citing sources on early American vote-buying practices).

20. See Alan Gerber, *The Adoption of the Secret Ballot 1* (June 1993) (unpublished manuscript, on file with the author); see also Heckelman, *supra* note 19, at 111 tbl.1 (providing years in which each state adopted the secret ballot).

21. See Gerber, *supra* note 20, at 7.

22. See *id.* at 1-2. Gerber's argument is roughly one based on a prisoners' dilemma. "While [eliminating the secret ballot] would harm a political party if the other party could continue to bribe

significant decline in voter turnout; Jac Heckelman, in fact, attributed an 8.2 percent decline in voter turnout to the emergence of secret voting.²³

With the rise of the secret ballot and the concomitant increase in the cost of verifying that vote buyers were getting what they paid for, vote buying almost certainly has declined,²⁴ though it has not been eliminated.²⁵ As with many illegal practices, vote buying is difficult to detect because parties engaging in it do so surreptitiously. Nonetheless, there are occasional prosecutions for vote buying. One recent prosecution in a race for county commissioner of Dodge County, Georgia, involved two competing candidates who bid against each other for absentee ballots inside the county courthouse.²⁶ "At trial, a Dodge County magistrate described the rowdy courthouse atmosphere during the absentee voting period as 'a successful flea market.' One of the vote buyers in [one candidate's] camp also testified that the open bidding for votes was '[l]ike an auction.'"²⁷ The candidates' staffs marked the absentee ballots, thereby eliminating the verification problem raised by the secret ballot.²⁸ We can expect such incidents to proliferate as alternative voting procedures like vote-by-mail and internet voting facilitate verification of vote-buying deals.

Modern society views vote buying with opprobrium. As Justice Brennan wrote in *Brown v. Hartlage*,²⁹ "[n]o body politic worthy of being called a democracy entrusts the selection of leaders to a process of auction or barter." Intuition supports the ban, but what is behind that intuition?

effectively, when both parties must act under the new regime simultaneously, they may both be better off when the ability to bribe is limited." *Id.* at 2.

23. See Heckelman, *supra* note 19, at 110.

24. See Gerber, *supra* note 20 at 2 ("The secret ballot eliminates the ability of a vote buyer to verify how the voter actually casts his ballot, and therefore the incentive to bribe the voter will disappear."); see also Heckelman, *supra* note 19, at 115 ("No longer able to verify the voters' choices, political parties left the vote market altogether.").

25. A related practice is paying "street money" to "haulers" and "flushers" to get out the vote. On this practice, see LARRY J. SABATO & GLENN R. SIMPSON, *DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS* 187-206 (1996); Pamela S. Karlan, *Not by Money but by Virtue Won? Vote Trafficking and the Voting Rights System*, 80 VA. L. REV. 1455, 1462 (1994). No doubt, some of the money paid to these haulers and flushers ends up in the hands of voters. See Al Cross, *Ban on Vote Hauling Dies, But New Scrutiny is Possible*, *COURIER-JOURNAL*, Feb. 20, 1998, at 4B (discussing possible disclosure requirements). For a fictional account, see TOM WOLFE, *A MAN IN FULL* 100-07 (1998). A 1985 Department of Justice report lists some federal prosecutions for vote buying and related vote fraud. See *Civil Rights Implications of Federal Voting Fraud Prosecutions: Hearing before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 99th Cong. 94-105 (1985) (statement of John C. Keeney).

26. See *United States v. McCranie*, 169 F.3d 723, 726 (11th Cir. 1999) ("Incredibly, each of the two camps—McCranie and Mullis—actually set up tables inside the courthouse at opposite ends of the hall, where supporters on both sides openly bid against each other to buy absentee votes.").

27. *Id.* (citations omitted).

28. See *id.*

29. 456 U.S. 45, 54 (1982).

After all, the ban conflicts with the traditional rule that two competent and willing parties should be able to engage in transactions that make each better off without harming other individuals.³⁰ I turn now to the three classes of arguments made against vote buying, all of which purport to show how these transactions can harm other individuals, and sometimes the buyer and seller of votes as well.

A. *The Equality Argument Against Vote Buying*

All else being equal, those who are poor are more likely to sell their votes for a small sum than those who are wealthy. The reason is intuitive: a dollar is worth more to a poor person than to a rich person because people get greater value out of initial dollars than later dollars. Economists call this principle the “declining marginal utility of money.”³¹

Pamela Karlan notes that vote-buying prosecutions usually involve small sums of money.³² In the Dodge County case,³³ the closest real world example I have found of a competitive vote-buying market in the United States, votes were sold for \$20 to \$40 per vote.³⁴ It is not surprising that the price of votes usually is small, given the infinitesimal chance each vote would be decisive in a large election.³⁵ These low prices will attract more poor voters than wealthier voters.

30. See Karlan, *supra* note 25, at 1457 (laws prohibiting vote buying “actually restrict voters’ freedom”). For a similar debate in the context of blackmail, see Symposium, *Blackmail*, 141 U. PA. L. REV. 1565 (1993).

31. For a look at this phenomenon, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 500-504 (5th ed. 1998). McCloskey uses the declining marginal utility of money to argue specifically against vote buying. See DONALD N. McCLOSKEY, *THE APPLIED THEORY OF PRICE* 201 (1982).

32. See Karlan, *supra* note 25, at 1458-59 & n.13 (citing cases with payments of three dollars or five dollars, a \$45 welfare voucher and a six-pack of beer; and \$20 in one transaction and \$30 in another). Before the rise of the secret ballot, costs were higher in constant dollars. See Gerber, *supra* note 20, at 7-8 (noting that in the 1880s, votes “appear to have been worth several dollars each”). Heckelman places a figure for the same period in the \$2 to \$20 range. See Heckelman, *supra* note 19, at 108-09; see also Gerber, *supra*, at 42 (“Based upon anecdotal evidence, it is possible that the amount of money distributed on election day before the adoption of the Australian ballot totalled the modern day equivalent of several billion dollars in cash.”).

33. See *United States v. McCranie*, 169 F.3d 723, 726 (11th Cir. 1999); *supra* text accompanying notes 26-27.

34. See *McCranie*, 169 F.3d at 726; see also SABATO & SIMPSON, *supra* note 25, at 298 & n.94 (citing cost of a vote as \$50 or a range of \$20 to \$150 depending upon “the market and how tight the race is”).

35. In a smaller election like the one in Dodge County, vote prices are likely to be higher: the vote differential between the two candidates for county commissioner was only 31 votes out of approximately 11,000 votes to be cast. See *McCranie*, 169 F.3d at 725. Still, the prices were relatively low. See *supra* text accompanying note 34.

When the poor sell their votes more than others, political equality³⁶ will suffer.³⁷ If voters choose candidates for public office at least in part based on the voters' economic interests, and these economic interests vary depending upon one's wealth, candidates chosen in elections where the wealthy buy the votes of the poor more likely will reflect the views of the wealthy. Thus, economic disparities will translate into political disparities in the election of candidates.³⁸

Saul Levmore writes that the "paramount objection to raw vote buying [is that] wealth will prevail where it should not."³⁹ We do not sell votes in an open market (Dodge County aside) because principles of equality apply to the political market that simply are inapplicable to the economic market: Even if the poor would be willing to accept money in return for giving up the right to vote, egalitarians object to the sale, believing that rich and poor should have equal influence over political outcomes.⁴⁰

36. People may quarrel over precisely what steps are required to assure "political equality." For my own thoughts on this topic, see Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CALIF. L. REV. 1, 6 (1996) (advocating "egalitarian pluralism" in which "each person has roughly equal political capital regardless of preexisting disparities in wealth, education, celebrity, ability, or other attributes"). Here, I begin with a weaker definition of political equality along the lines of "one person, one vote," and later explore the nature of political equality in greater detail.

37. An indirect equality effect may arise from the sale of votes as well. As Karlan explains, "[i]f poor people 'allow' their votes to be bought, they may be viewed by the rest of the electorate as undeserving of political respect; because the majority perceives them as lacking autonomy, it may disregard their points of view." Karlan, *supra* note 25, at 1459. Thus, candidates chosen by the non-poor will have a further incentive to disregard the wishes of the poor. Also, turnout of poor voters may decrease if they view a wealth-driven electoral system increasingly stacked against their interests.

38. See Ortiz, *supra* note 9, at 911 (arguing that when "marginal social groups" sell their votes, they do long-term damage to themselves by "impair[ing] their already meager political power and thereby reinforc[ing] their social subjugation").

39. Levmore, *Precommitment Politics*, *supra* note 5, at 609; see also *id.* at 607 n.84 ("[V]ote buying concerns us because it is likely to disadvantage disenfranchised and less wealthy citizens"); JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 271 (1962) ("If the distribution of *economic* power among the citizens is unequal, open buying and selling of political votes might be said to give 'unfair' advantages to the richer members of the group."); Robert Charles Clark, *Vote Buying and Corporate Law*, 29 CASE W. RES. L. REV. 776, 804 (1979) (arguing that vote buying should not be adopted in the political sphere because "[t]he rich would have an advantage in election campaigns greater than what they already possess"); Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 963 (1985) ("Vote selling is widely recognized to be inconsistent with egalitarian democratic principles because it biases political decisions in favor of the wealthy."); James Tobin, *On Limiting the Domain of Inequality*, 14 J.L. & ECON. 263, 269 (1970) ("A vote market would concentrate political power in the hands of the rich, and especially in those who owe their wealth to government privilege.").

40. Note that the equality argument does not depend on vote buying being secret. An egalitarian would be just as offended if the vote buying in Dodge County were legal and open. Karlan avoids this issue by claiming that even if vote buying were legal, it would have to occur in secret because "given our current political rhetoric . . . a candidate who overtly paid for the votes of a discrete class of voters would likely lose as many votes from persons repelled by her behavior as she could buy." Karlan,

Some people may not be convinced by an equality argument against vote buying. They may believe that true equality is an improper or unachievable goal for an electoral system.⁴¹ For example, eliminating the use of wealth to influence politics through a vote-buying ban may simply shift the political advantage to those who possess a different desirable attribute, like celebrity.⁴²

Saul Levmore also notes that the equality argument has an unstated empirical or normative assumption: "Implicit in this argument is either the idea of an imperfect capital market, for otherwise poorer people would borrow to win elections and then repay their loans with some of the fruits of political power, or the idea that politics is about things that markets would not or could not do."⁴³ Given the probability of imperfect capital markets,⁴⁴ the case against the equality argument is the normative issue recognized by Levmore: Should politics be a realm where wealth prevails?

B. *The Efficiency Argument Against Vote Buying*

An efficiency analysis puts aside equality questions⁴⁵ and instead asks whether the ban on vote buying increases or decreases overall social

supra note 25, at 1469. But if vote buying were made legal, it would probably be because political rhetoric has changed so that the practice is acceptable. Given this new reality, the question would remain whether vote buying is objectionable on equality grounds. *See also infra* notes 201-202 (discussing the relevance of secrecy in context of campaign promises).

41. Or they may define equality differently. On the many meanings of equality, see generally DOUGLAS RAE, *EQUALITIES* (1981).

42. Cf. Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1049-52 (1996) (making a similar argument against campaign finance reform). I do not know Smith's views on outright vote buying.

43. Levmore, *Voting with Intensity*, *supra* note 5, at 3; *see also* Gary M. Anderson & Robert D. Tollison, *Democracy In the Market Place*, in *PREDICTING POLITICS: ESSAYS IN EMPIRICAL PUBLIC CHOICE* 285, 292 (W. Mark Crain & Robert D. Tollison, eds., 1990) ("If capital markets were perfect, low income competitors would not be at a comparative disadvantage [to buy votes] because they could borrow against the expected value of redistributed income resulting from the electoral victory."). Anderson and Tollison offer convincing reasons why the poor cannot easily overcome these market problems. *See id.* at 294. Levmore offers no evidence to the contrary.

Levmore also calls the equality argument a "bit hollow" because of the supposed ability of contributors to buy votes in the form of campaign contributions or expenditures. Levmore, *supra*, at 5. But there are important differences between outright vote selling on the one hand and voters buying access to politicians on the other. Most importantly, buying votes to win an election determines the identity of the elected official, whereas contributions and expenditures provide only influence over that official. In addition, in the case of access there is no guaranteed result that is being purchased. *See infra* Part II.D. So the rich cannot get around the vote-buying ban simply by using campaign contributions (much less through use of independent expenditures).

44. *See* Anderson & Tollison, *supra* note 43, at 294.

45. *See, e.g.,* BUCHANAN & TULLOCK, *supra* note 39, at 275 ("We are aware, of course, that other [non-economic] arguments can be developed to justify the moral attitudes on vote-trading that seem to exist. We neither wish to deny the value of these arguments nor to compare them with those we have presented.").

wealth (regardless of its distribution). Laws that increase social wealth are called “Kaldor-Hicks efficient,” and those scholars accepting efficiency as a normative criterion argue that only Kaldor-Hicks efficient laws should be adopted.⁴⁶

At first blush, a ban on vote buying appears inefficient. Why should the law prohibit two competent parties like Bob and Sarah from making an exchange that makes both of them better off?⁴⁷ Indeed, because a rule of “one person, one vote” does not allow people to register the intensity of their preferences for or against a candidate or ballot issue in an election, money seems a useful way to express intensity of preference.⁴⁸

Upon closer examination, however, there is reason to doubt that arms-length bargaining will produce efficient results in all cases. When votes are purchased, the risk exists that they will be purchased in ways that ignore negative externalities, or ill effects on third parties. Richard Epstein has put forward the efficiency argument against vote buying most forcefully:

Why would one want to purchase a vote? The most probable answer is to obtain control of the public machinery in ways that allow a person to recover, at the very least, the money that was paid out to the individuals who sold their votes, with something left to compensate the buyer for the labor and entrepreneurial risk. If vote selling were fully legal, there would be no reason to limit sales to ones for hard cash, for individuals could make (secured) promises to make payments from the public treasury after the election. Vote buyers would finance their purchases out of the pockets of third parties.⁴⁹

In efficiency terms, vote buying arguably leads to a decline in overall social wealth because those who buy votes will do so in order to capture

46. For greater detail on this economic analysis, see Hasen, *supra* note 36, at 14-17. For a defense of Kaldor-Hicks efficiency as a normative criterion, see POSNER, *supra* note 31, at 12-17.

47. See BUCHANAN & TULLOCK, *supra* note 39, at 270 (“Individual votes on political issues seem to be among the scarce commodities or services that many members of the community consider inappropriate for open buying and selling.”).

48. Cf. Hasen, *supra* note 36, at 35-37 (arguing that campaign finance vouchers allow voters to register intensity of preference through the dollars they earmark for candidates, parties, or interest groups).

49. Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970, 987-88 (1985) [hereinafter Epstein, *Alienation*]. For a similar statement of the position, see Richard A. Epstein, *Are Values Incommensurable, or is Utility the Ruler of the World?*, 1995 UTAH L. REV. 683, 706 [hereinafter Epstein, *Utility*] (“[T]he prospective office holder who buys votes does so with the expectation that he can recoup his costs by looting the public treasury, which costs his sellers less than he pays them, for it is the rest of the public that pays the price of the transaction.”). See Cass Sunstein also acknowledges the efficiency argument against vote buying. Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 849 (1994) (“Vote trading is objectionable in part because it would allow inappropriate concentration of political power in the hands of a few. The prohibition therefore overcomes a collective action problem.”). Ortiz notes the argument, but does not explicitly say he agrees with it. See Ortiz, *supra* note 9, at 911.

government subsidies. The money spent to obtain the subsidy is a social loss that otherwise could have gone to a productive social use; the transfer of wealth through the subsidy itself has no efficiency effect.⁵⁰ Accordingly, this “rent seeking” is inefficient.⁵¹ We block the seemingly efficient vote-buying transaction between Bob and Sarah because it has negative externalities.⁵²

Epstein probably is right that vote buying generally is inefficient, though in some circumstances vote buying could increase efficiency.⁵³ Suppose, for example, that without vote buying, a majority of newly elected legislators would pass an inefficient tort law. If vote buying were legal, those individuals who expected to lose under this tort law might buy the votes of enough voters to elect enough legislators to block passage of the law. So long as the costs of the vote buying are less than the inefficiencies of the proposed tort law, the vote buying would be efficient.⁵⁴

To put the point more generally, Epstein’s efficiency argument depends upon an unstated empirical assumption that there would be less rent seeking in a political regime without vote buying than there would be in a regime with vote buying. The lack of a legalized vote-buying market and the problems of measuring the amount of rent seeking make empirical tests of the proposition difficult. The only empirical test of the proposition of which I am aware reached the opposite conclusion. Anderson and Tollison argue that adoption of the secret ballot increased the growth of government.⁵⁵ They hypothesize that before the secret ballot, the rich bought the

50. Epstein hints that the transfer itself could be inefficient as well. He sees the ban as preventing “widespread theft.” Epstein, *Utility*, *supra* note 49, at 706 n.26; *see also id.* at 707 (“Vote selling . . . is part and parcel of a range of theft transactions when the sale of the vote is linked by a theory of self-interest to the use to which it is put.”) This view suggests that if enough people view their tax dollars “stolen” by the government, they may make additional efforts to hide their money from the government, thereby having an additional negative effect on efficiency.

51. For more on rent seeking, see Gordon Tullock, *Rent Seeking*, in *THE NEW PALGRAVE: THE WORLD OF ECONOMICS* 604, 604-09 (John Eatwell et al. eds., 1991).

52. *See* Kenneth J. Arrow, *Invaluable Goods*, 35 J. ECON. LITERATURE 757, 765 (1997) (stating that “votes are not to go to the highest bidder” and suggesting that the reason “may well be analyzed as externalities”); *see also* ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 192 (1957) (“[I]ntroduction of a wide-open vote-selling market will not [be Pareto superior], since transactions therein will almost inevitably make someone worse off.”). *But see* ARTHUR M. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADEOFF* 11-12 & n.14 (1975) (arguing that concern over externalities does not justify a vote-buying ban).

53. For a similar argument about theft, see Richard L. Hasen & Richard H. McAdams, *The Surprisingly Complex Case Against Theft*, 17 INT’L REV. L. & ECON. 367 (1997).

54. This analysis ignores the very real possibility that legalized vote buying might create a dynamic process where competition for the sale of votes leads to greater resources being put into the competition than would be lost by the tort law. My point is only that vote buying is not inefficient *in every case*.

55. *See* Anderson & Tollison, *supra* note 43, at 302.

votes of the poor to prevent redistributive rent seeking.⁵⁶ Nonetheless, Epstein's point seems correct in the modern era. Anderson and Tollison acknowledge that "a free market would still permit rent-seeking interest groups among the rich to attempt to use government regulation to their advantage against competing wealth owners as well as against the nonwealthy."⁵⁷ We might well have more overall rent seeking today under a legalized regime of vote buying even if redistributive legislation to the poor declined.

James Buchanan and Gordon Tullock offer another argument as to the inefficiency of vote buying. They claim that a legalized vote market would be imperfect because stable coalitions of vote buyers and sellers would emerge and monopolistically prevent competition for the sale of votes.⁵⁸ Their argument ultimately is less plausible than Epstein's, however, because while it depends upon market imperfections,⁵⁹ Buchanan and Tullock do not offer a convincing reason to expect such imperfections. Why would stable vote-trading coalitions emerge rather than a competitive market? They suggest the answer is grounded in wealth inequalities, but they do not commit to this position.⁶⁰ Their argument that vote buying is inefficient ultimately turns upon the lack of a competitive market. Although never explicitly acknowledged,⁶¹ the logical conclusion is that in a perfect market vote buying should be legal.

Besides the critiques just offered within the economics paradigm, some people reject efficiency as a normative criterion for choosing election laws. Politics is about more than overall social wealth; it is also about distribution of wealth and each individual's right to influence the process of

56. See *id.* at 286-87.

57. *Id.* at 286.

58. See BUCHANAN & TULLOCK, *supra* note 39, at 273.

59. See *id.* at 271-72 (offering hypothetical vote-buying exchange in perfect market that the authors claim is efficient). Buchanan and Lee have offered a positive argument that vote buying would take place if legal, but it too depends upon the market imperfections of asymmetrical information. See James M. Buchanan & Dwight R. Lee, *Vote Buying in a Stylized Setting: Reply*, 65 PUB. CHOICE 287, 288 n.2 (1990). This model corrects errors in James M. Buchanan & Dwight R. Lee, *Vote Buying in a Stylized Setting*, 49 PUB. CHOICE 3 (1986). Darryn Abraham suggested the necessary corrections in *Vote Buying in a Stylized Setting: Comment*, 65 PUB. CHOICE 281 (1990).

60. Compare BUCHANAN & TULLOCK, *supra* note 39, at 272 (using hypothetical to illustrate market imperfection in which the wealthy (C) buy the vote of the poor (B) to exploit the rest of society (A)) with *id.* ("[W]e need to allow, not for predictable differences in economic position, but for differences in interest on particular issues, which may or may not be based on differences in economic status."); see also *id.* at 124-25 (suggesting, without elaboration, that vote-buying market would be imperfect because of a combination of price and non-price rationing of votes); Manne, *supra* note 5, at 1428 (noting that Buchanan and Tullock's market imperfection claim "is not elaborated at length").

61. The authors themselves are ambivalent about their analysis, noting that "[t]he whole institution of vote buying and selling is exceedingly difficult to analyze because of the unique nature of the items traded." BUCHANAN & TULLOCK, *supra* note 39, at 273.

representative government.⁶² I turn now to the final argument against vote buying, inalienability, to address these concerns.

C. *The Inalienability Argument Against Vote Buying*

The inalienability argument against vote buying differs from equality and efficiency concerns in that it is based upon a moral judgment that votes should not be salable or transferable.⁶³ Indeed, prohibiting the alienation of votes is broader than most inalienability claims,⁶⁴ where transfer, but not sale, is allowed. For example, “the market inalienability of human organs does not preclude—and indeed may seek to foster—transfer from one individual to another by gift.”⁶⁵ Margaret Jane Radin suggests the reason for the broad inalienability of votes is that voting rights “seem to be moral or political duties related to a community’s normative life.”⁶⁶ Radin thus makes a non-instrumentalist argument that vote buying is “wrong.”⁶⁷ She states that nontransferable rights such as voting “at the same time may implicate affirmative duties”⁶⁸ and “ought to be exercised.”⁶⁹

In contrast to Radin, Cass Sunstein makes an instrumentalist inalienability argument suggesting a broader anti-commodification norm of voting.⁷⁰ Such a norm may encourage individuals to vote in the public

62. See Hasen, *supra* note 36, at 15.

63. The term “inalienability” also may signify that the good cannot be sold, but it may be transferred freely. See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1849-50 (1987). Radin calls this latter concept “market-inalienability.” See *id.* at 1850.

64. See *id.* at 1854 (arguing that voting is one of the “broader inalienabilities that preclude loss as well as transfer”). Tobin also notes that votes cannot be transferred. See Tobin, *supra* note 39, at 269.

65. Radin, *supra* note 63, at 1854-55.

66. *Id.* at 1854.

67. Karlan characterizes Radin’s position as saying that vote buying “involves voters selling an asset that is not entirely theirs to sell.” Karlan, *supra* note 25, at 1457. Karlan further explores the issue of vote buying and commodification in Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697, 1709-14 (1999) [hereinafter Karlan, *Politics by Other Means*]. Karlan uses Radin’s inalienability position to make what appears to be an equality argument. “The real question becomes whether prohibiting the voter’s sale of her vote is the most effective and fair way to ensure that the community is not sold short.” Karlan, *supra* note 25, at 1466-67. Here, Karlan understands “community” not as the entire body politic, but rather a cognizable interest group. “Trafficking is problematic not for its effect on fungible individual voters but because of its effect on the political behavior and strength of identifiable, traditionally underrepresented groups of voters and because of its distortion of the postelection relationship between an elected official and her constituency.” *Id.* at 1474. Karlan’s argument may indeed be convincing on equality grounds, but I want to focus on an inalienability argument that is distinct from equality concerns.

68. Radin, *supra* note 63 at 1854 n.21.

69. *Id.*

70. See Sunstein, *supra* note 49, at 849. I have written elsewhere about how norms of voting may arise and explain why people bother to vote given the usually infinitesimal chances of affecting the outcome. See Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2138-42 (1996). The anti-commodification norm is different, aimed not at explaining why people vote but how people vote.

interest rather than to vote solely in their self-interest. As Sunstein explains, “[i]f votes were freely tradable, we would have a different conception of what voting is *for*—about the values that it embodies—and this changed conception would have corrosive effects on politics.”⁷¹ Under this argument, money should not be brought into the calculus of voting because society wants to encourage individuals not to focus their voting decisions solely upon their own economic well-being.⁷² Thus, an anti-commodification norm of voting, driven by the inalienability of votes, serves the instrumental purpose of promoting public-regarding voting. This purpose is separate and distinct from both equality and efficiency arguments against vote buying, and, like the other two arguments, could alone support a ban on vote buying.

Like the equality and efficiency arguments, the inalienability argument depends on some unproven empirical assumptions. In particular, Sunstein’s inalienability argument assumes that an anti-commodification norm related to voting exists, and that this norm causes people to make public-regarding voting decisions. Widespread societal distaste with vote buying makes the first empirical claim plausible,⁷³ but the second claim is more dubious. We know that the sale of votes would cause many vote sellers not to vote in a public-regarding way. But how do we know that the sale of votes would make people (at least those people who do not sell their votes) more likely to vote in their short-term economic self-interest? If most people would not in fact change their voting criteria, vote buying may not be much of a problem.

Additionally, Sunstein’s view of the anti-commodification norm assumes that voting should be *for* making public-regarding vote decisions. Certainly self-interest enters into some people’s decisions on how to vote,

For an introduction to the norms literature, see generally Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997).

71. Sunstein, *supra* note 49, at 849. He further explains that a ban on vote buying is “an effort to make a certain statement about the pricelessness . . . of the right to vote.” Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 964-65 (1996); see also Karlan, *supra* note 25, at 1466 (noting that voters “occupy a position of public trust”). As I noted above, see *supra* note 49, Sunstein also acknowledged Epstein’s efficiency argument against vote buying. Given what Epstein views as the adequacy of the efficiency argument, Epstein questions why the “second half of the explanation” is necessary. Epstein, *Utility*, *supra* note 49, at 706 n.26. As Part II demonstrates, because some non-core vote-buying practices violate only one of these two arguments, one must have a position on whether either of these arguments alone is sufficient to justify a ban on the practice.

72. See Karlan, *Politics by Other Means*, *supra* note 67, at 1714 (“If voters think of their vote as simply something to be auctioned to the highest bidder, they are likely to see the sole purpose of the political process as maximization of their own short-term self-interest.”) (footnote omitted).

73. It is probably the same norm that supports widespread antagonism to buying one’s way out of jury service or compulsory military service.

and voting along such lines is not necessarily objectionable.⁷⁴ To the extent that the inalienability argument rests on this instrumentalist concern over how people should make their voting decisions, it is vulnerable to attack by those rejecting the need to assure public-regarding voting. Moreover, Radin's non-instrumentalist inalienability claim that vote buying is "wrong"⁷⁵ is a normative claim that probably requires more discussion than Radin's brief mention.

The three rationales against core vote buying potentially provide independent reasons to ban the practice. But each rationale depends upon certain empirical assumptions and normative positions that are not universally held. Readers may reject one or more of the three rationales and perhaps one or more of the empirical claims made to support any one of the criteria.

Those who question all three rationales will need to look elsewhere for a reason to support the ban. Saul Levmore has recently proposed that the collective action problems of voters help explain the vote-buying prohibition.⁷⁶ If vote buying were legal, many individuals would sell at too low a price; despite the value offered by a large bloc of votes, it does an individual no good to hold out for a high price when many are willing to sell for a trivial sum. Thus, the law solves the collective action problem by preventing all voters from selling their votes.⁷⁷

Levmore's explanation is provocative and no doubt contains an element of truth, but it explicitly assumes away the problem of origins: how would such a law have developed in the first place?⁷⁸ Chalking it up to an "evolutionary tale"⁷⁹ is unconvincing, because it is just as plausible that the law would have evolved to allow vote selling through a cartel mechanism, which would allow many more people to share in the profit from vote-selling. The solution that no one sells is probably not the best outcome for at least those willing to sell at above the non-trivial price.

74. See *Brown v. Hartlage*, 456 U.S. 45, 56 (1982) ("The fact that some voters may find self-interest reflected in a candidate's commitment does not place that commitment beyond the reach of the First Amendment. We have never insisted that the franchise be exercised without taint of individual benefit."). Pluralist theory takes the same view of self-interest. See Hasen, *supra* note 36, at 8-18 (describing pluralism).

75. See *supra* text accompanying note 67 (suggesting non-instrumentalist concern over vote buying).

76. See Levmore, *Voting with Intensity*, *supra* note 5, at 13.

77. See *id.* Levmore has a more complex collective action explanation, but the essential logic is the same. See *id.* at 17-20.

78. See *id.* at 12 n.21.

79. *Id.*

The remainder of my Article has little to say for those who remain unconvinced by the equality, efficiency, or inalienability rationales, although it may convince these readers to reconsider the rationales in light of different examples. To those who accept at least one of the rationales, however, deciding which rationales are persuasive is a crucial step in evaluating the host of non-core vote-buying practices that I describe in Part II.

II

IF IT LOOKS LIKE VOTE BUYING . . . TAKE A CLOSER LOOK

In 1891, a court analyzed the justification for laws banning corporate election vote buying in the following way: "Servants of a corporation should be employed and paid upon their merits; and buying votes for an office in a corporation is of the same objectionable character as buying them for a public office. The same may be said of buying the right to control the business policy and management of the affairs of a corporation."⁸⁰

This kind of analysis is not sufficiently precise. In what ways are the two practices similar? More to the point, the better question to ask is whether the objectionable feature of core vote buying is also present in the non-core vote-buying practice (like corporate vote buying). Because there are at least three distinct rationales against core vote buying, however, we need to consider whether equality, efficiency, or inalienability supports a ban on the non-core vote-buying practice. If the factors point in different directions, a practice may not be sufficiently "analogous" to vote buying to justify banning it. Instead, the answer in a mixed case will turn on a normative judgment about equality, efficiency, and inalienability. In this Part, I analyze five non-core vote-buying practices under the rubrics of equality, efficiency, and inalienability.

A. *Legislative Logrolling*

Return to our hypothetical exchange between Bob and Sarah. Recall that Bob wants to buy Sarah's vote. In this case, however, Bob and Sarah are both legislators, and Bob wants to buy Sarah's vote by offering his own vote on legislation that Sarah favors and Bob opposes. Some call this

80. *Cone's Ex'rs v. Russell*, 21 A. 847, 849 (N.J. Ch. 1891). For other cases along the same lines, see Thomas J. André, Jr., *A Preliminary Inquiry into the Utility of Vote Buying in the Market for Corporate Control*, 63 S. CAL. L. REV. 533, 542 n.26 (1990).

process “vote trading,” “horse trading,” or “logrolling,”⁸¹ but there is no doubt that the exchange is functionally equivalent to vote buying. The main difference is that votes are purchased with other votes, not with money or other things of value.

For purposes of my discussion here, I limit consideration of legislative logrolling to political deals, such as Bob agreeing to vote for a road in Sarah’s district if Sarah agrees to vote for a road in Bob’s district. I do not consider cases where Bob agrees to vote for a road in Sarah’s district if Sarah agrees to vote for a private bill exempting Bob from payment of property taxes.⁸² Such an exchange is defended by no one, and is likely a bribe.⁸³ Thus, I focus solely on whether political vote trades should be allowed.

Conventional wisdom holds that legislative logrolling occurs all the time. For example, then-Senator Al Gore remarked in his 1992 book: “As a member of the Southern ‘farm bloc’ in Congress, I have followed the general rule that I will vote for the established farm programs of others in farm states . . . in return for their votes on behalf of the ones important to my state.”⁸⁴ It is not common knowledge, however, that the practice is (at least nominally) illegal in a number of states. For example, Wisconsin imposes a fine of \$500 to \$1,000 and imprisonment of between one and four and a half years⁸⁵ for 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 or against any other measure or proposition pending or proposed to be introduced in such legislature.⁸⁶

81. The name “logrolling” apparently stems from the “early American practice of neighbors gathering to help clear land by rolling off and burning felled timber.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1058 (3d ed. 1992). For an early political science discussion of American logrolling, see ARTHUR F. BENTLEY, THE PROCESS OF GOVERNMENT 370 (1908) and DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION 362-68 (Knopf 1965). No one appears to refer to the process as “vote buying,” suggesting perhaps a public perception that logrolling differs somehow from the core vote-buying situation.

82. On this distinction, see Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 807 (1985).

83. See *id.* at 814; see also *United States v. Dorri*, 15 F.3d 888, 894 (9th Cir. 1994) (Kozinski, J., dissenting) (“Legislative logrolling—Senator A tells Senator B ‘I’ll vote for your bill if you vote for a bailout of Corporation C’—isn’t corrupt unless A owns a chunk of C.”). Of course, the line between personal and political gain is fuzzy, but I will ignore the gray cases here.

84. AL GORE, EARTH IN THE BALANCE 340 (1992), quoted in Thomas Stratmann, *Logrolling*, in PERSPECTIVES ON PUBLIC CHOICE THEORY 322, 338 (Dennis Mueller ed., 1997).

85. See WIS. STAT. § 13.05 (1999).

86. *Id.*

Not surprisingly, there are no reported cases of prosecutions under the Wisconsin law.⁸⁷ Indeed, the only reported prosecution for logrolling I have located in any state is a California case, *People v. Montgomery*.⁸⁸ This case involved a city council member running for mayor in a race decided by the city council. The mayoral candidate agreed to vote for another council member's proposed legislation in exchange for that council member's vote for mayor. As Lowenstein points out, *Montgomery* is not a typical logrolling case because the exchange there arguably was for the personal, not political, benefits of one of the legislators.⁸⁹

The lack of reported prosecutions may be due in part to difficulties in enforcing anti-logrolling laws. "Because explicit logrolling is likely to take place outside of public view and between willing trading partners, violation of any regulation will be difficult to detect or prove."⁹⁰ But no doubt part of the reason for the lack of reported prosecutions is that society (or at least prosecutors) may see legislative logrolling as beneficial, or at least as ubiquitous legislative behavior that is not worthy of punishment.⁹¹ Indeed, some states so tolerate legislative logrolling that they expressly exempt the practice from their anti-bribery laws.⁹²

The relevant question then is a normative one: should legislative logrolling be legal, or even encouraged? Answering this question, in part, turns on how the question is framed. Call the practice "vote buying" and it sounds like it should be illegal. But call it, as an Alaska statute does, "legitimate compromise between public servants"⁹³ and it sounds laudatory. To move this inquiry beyond semantics, however, I now consider the equality, efficiency, and inalienability concerns of legislative logrolling. In

87. Discussing anti-logrolling laws, Lowenstein notes that "[s]uch prohibitions are old and, to say the least, rarely enforced." DANIEL H. LOWENSTEIN, *ELECTION LAW—CASES AND MATERIALS* 441 (1995).

88. 132 Cal. Rptr. 558 (Ct. App. 1976).

89. See Lowenstein, *supra* note 82, at 814 ("Perhaps *Montgomery* is distinguishable from the typical case of logrolling on the theory that the benefit sought by the defendant—a vote for himself for mayor—represented a more immediate political benefit for himself than, for example, a park in his district that would make him more popular among his constituents.").

90. Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law*, 80 VA. L. REV. 625, 639 (1994).

91. See BUCHANAN & TULLOCK, *supra* note 39, at 140 ("Under our [American] system open logrolling is normally characterized as 'bad,' but no real stigma attaches to those who participate in it. The press describes open logrolling arrangements without apparent disapproval, and, in fact, all of our political organizations operate on a logrolling basis.").

92. Alaska, for example, provides that "concurrence in official action in the cause of legitimate compromise between public servants" is not a "benefit" for purposes of its bribery laws. ALASKA STAT. § 11.56.130(2) (Supp. 1999).

93. *Id.*

so doing, I will highlight the salient similarities and differences between our core vote-buying example and legislative logrolling.

I begin with efficiency concerns because these concerns have most often animated commentary on the logrolling process.⁹⁴ For decades, political scientists, economists, and legal scholars have struggled with an efficiency analysis of logrolling.⁹⁵ While these efforts have contributed a great deal toward understanding logrolling's efficiency (or lack thereof), so too has this efficiency analysis brought into sharper focus both equality and inalienability concerns.

Scholars initially posited that logrolling can be socially efficient.⁹⁶ To take an example given by Thomas Stratmann,⁹⁷ three legislators (1, 2, and 3) are voting on two proposed laws (*a* and *b*). Table 1 lists the dollar values (perhaps representing the overall dollar value of the legislation to their districts) that each legislator assigns to the passage of each proposed law:

TABLE 1
Legislator

<i>Law</i>	1	2	3
<i>a</i>	5	-1	-1
<i>b</i>	-1	5	-1

Suppose first that an anti-logrolling law is in force. In that case, both laws fail. Legislators 2 and 3 vote against proposed law *a*. Legislators 1 and 3 vote against proposed law *b*. The failure of proposed laws *a* and *b* means that the total payoff to all players is 0.

Now suppose that logrolling were legal. Legislators 1 and 2 form an agreement where Legislator 1 agrees to vote for *b* in exchange for Legislator 2 agreeing to vote for *a*. In that case, both laws pass. The passage of laws *a* and *b* means that the total social wealth increases by \$6,⁹⁸ a more efficient result than that found in the absence of vote trading. The

94. For convenience, I analyze each of the five non-core practices from the perspective of efficiency, equality, and inalienability, in that order.

95. I do not intend this section as a complete review of the literature on the economics of logrolling. For a clear, recent introduction to the literature, see generally Stratmann, *supra* note 84. For another excellent review of logrolling in the context of a debate over the desirability of the initiative process, see Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707, 721-32 (1991).

96. For one of the earliest economic analyses, see BUCHANAN & TULLOCK, *supra* note 39, at 134-45.

97. See Stratmann, *supra* note 84, at 323; see also Thomas Schwartz, *Vote Trading and Pareto Efficiency*, 24 PUB. CHOICE 101, 102 (1975).

98. For *a* and *b* each, social wealth is the sum of the utilities to Legislators 1, 2, and 3, equaling \$3 (5 + -1 + -1).

analysis therefore demonstrates that vote trading, at least under these conditions, increases efficiency.

But now consider a slight variation on the hypothetical, as illustrated in Table 2.⁹⁹

TABLE 2
Legislator

<i>Law</i>	1	2	3
<i>a</i>	5	-3	-3
<i>b</i>	-3	5	-3

The only difference in the two tables is that each value of -1 in Table 1 has been replaced by -3 in Table 2. Again, as in Table 1, if logrolling were illegal, both proposed laws would fail, leading to a total payoff for all players of 0. Again, as in Table 1, if logrolling were legal, Legislators 1 and 2 would have an incentive to trade votes. And again, as in Table 1, if the vote trades take place, both *a* and *b* pass the legislature. The difference here is that logrolling leads to an overall decline in social wealth. In particular, Legislators 1 and 2 logroll themselves into a situation where social wealth declines by \$2. Legislator 3 bears a \$6 cost. This example suggests that logrolling may lead to inefficient results. Indeed, the parallel to Epstein's argument against core vote buying¹⁰⁰ is apparent: Legislators 1 and 2 seek rents from Legislator 3 to make themselves (or their districts) better off.

The indeterminate efficiency analysis suggested by these two examples actually is a great oversimplification of the issues involved. Riker and Brams, for example, have presented examples to show a "paradox of vote trading" whereby "everyone gains from individual trades—and so has a positive motive to logroll—and yet everyone also loses if all such trades are carried out."¹⁰¹ In addition, legislators in the position of Legislator 3 in Table 2 sometimes have enough at stake that they are willing to pay Legislator 1 or 2 to break the original logrolling deal, leading to a series of logrolling cycles with no apparent end.¹⁰² The efficiency analysis is even further complicated by the possibility that a legislator could misstate her preferences to secure support for measures the legislator wants, or that the

99. See Stratmann, *supra* note 84, at 324.

100. See *supra* note 49 and accompanying text.

101. William H. Riker & Steven J. Brams, *The Paradox of Vote Trading*, 67 AM. POL. SCI. REV. 1235, 1240 (1973).

102. See DENNIS C. MUELLER, PUBLIC CHOICE II 85-86 (1989); *id.* at 183-84 (presenting numerical example where cycling occurs through logrolling).

legislator could fail to follow through on logrolling promises when issues are taken up sequentially.¹⁰³

The extent to which cycling and cheating are serious problems depends upon whether the market for legislative votes can be centralized. In a centralized vote trading market, vote brokers monitor behavior and enforce logrolling deals. Koford suggests that party leaders serve this role in Congress.¹⁰⁴

In sum, the efficiency analysis of legislative logrolling is indeterminate.¹⁰⁵ The greatest factor suggesting efficiency is the idea of mutual gains from trade: logrolling translates a one legislator, one vote regime that does not register intensity of preference very well into a regime that allows vote trades to express intensity.¹⁰⁶ The greatest factor suggesting inefficiency is the externality problem identified by Epstein in his analysis of core vote buying. Mutual gains from trade often are at the expense of third parties.¹⁰⁷

Turning from efficiency to equality, the question becomes whether legislative logrolling violates principles of political equality. Recall that the central equality argument against core vote buying is that it allows wealth disparities to disrupt political equality because the poor are more likely to sell their votes than are the rich.¹⁰⁸ This concern about wealth in the core vote-buying case is absent from the legislative logrolling situation. At least formally, all legislators are equal; in every vote, each legislator has one

103. See MUELLER, *supra* note 102, at 85.

104. See Kenneth J. Koford, *Centralized Vote Trading*, 39 PUB. CHOICE 245, 245 (1988); see also Tim Groseclose and James M. Snyder, Jr., *Buying Supermajorities*, 90 AM. POL. SCI. REV. 303, 303 (1996) (discussing why vote buyers would try to pad their majorities to prevent competitors from trying to steal away votes). For a summary of the evidence from Congressional voting supporting this thesis, see Stratmann, *supra* note 84, at 335-39.

105. See Stratmann, *supra* note 84, at 322 ("Today, no consensus exists in the normative public choice literature as to whether logrolling is on net welfare enhancing or welfare reducing . . .").

106. See WILLIAM J. BAUMOL, *WELFARE ECONOMICS AND THE THEORY OF THE STATE* 45 (2d ed. 1965) (arguing that "log-rolling transforms voting from a procedure which takes into account only ordinal preferences to one which can reflect the strength of feeling"); see also Tomas J. Philipson & James M. Snyder, Jr., *Equilibrium and Efficiency in an Organized Vote Market*, 89 PUB. CHOICE 245, 245 (1996) ("Vote trading and vote buying are often proposed as ways to improve majoritarian collective decisions, by allowing such decisions to reflect the relative intensity of different voters' preferences in and across issues.")

107. This is not the case when there is a positive-sum game involved. See MUELLER, *supra* note 102, at 84; Stratmann, *supra* note 84, at 324; William F. Shughart II & Robert D. Tollison, *Interest Groups and the Courts*, 6 GEO. MASON L. REV. 953, 958 (1998) ("[W]hen the benefits of collective action exceed the costs, vote trading can be welfare-enhancing—more proposals can be approved than in the absence of such vote trading."). Writing well before Epstein, Thomas Schwartz argued that the real efficiency issue is the ability of the Constitution to prevent transfer of assets from one part of the population to another. See Schwartz, *supra* note 97, at 109. Schwartz regarded logrolling as inevitable, whether done in a single bill or across bills: "It matters little whether you buy a barrel-full of pork, or enough pieces of pork to fill a barrel." *Id.*

108. See *supra* Part I.A.

vote to cast. I ignore the problem of wealthy legislators buying their preferred position on legislation through private bills providing financial benefits to poorer legislators because, as mentioned above,¹⁰⁹ the analysis here excludes from consideration vote trades inuring to the personal benefit of legislators.

Sherman Clark's recent essay¹¹⁰ demonstrates the relationship between equality and legislative logrolling. He cleverly modifies mathematical logrolling examples like the ones used in the efficiency analyses above under the presumption that each legislator has an equal amount of influence: "We achieve an equal allocation by representing each individual's preferences not in terms of absolute utility, but rather in terms of the portion of each representative's political power that he or she is willing to devote to each issue."¹¹¹ Applying his approach to Table 2 would yield Table 3:

TABLE 3
Legislator

<i>Law</i>	1	2	3
<i>a</i>	5/8	-3/8	-4/8
<i>b</i>	-3/8	5/8	-4/8

Here, if logrolling were illegal, neither *a* nor *b* would pass: Legislators 2 and 3 would vote against *a*, and Legislators 1 and 3 would vote against *b*. If logrolling were legal, Legislators 1 and 2 would agree to a vote trade, thereby passing both *a* and *b*. In that case, Legislators 1 and 2 would end up with 2/8 (1/4) each, or 4/8 (1/2) total, but Legislator 3 would be at -1.

Clark concedes that even under his transformation, results may be inefficient.¹¹² But he argues the results are consistent with principles of political equality, at least as he understands the term:

Given a sufficient number of issues—a healthy market, if you will—whoever is willing to pay the most for a vote has a good chance of getting it. If, in the end [Legislator 2] is willing to allot

109. See text accompanying notes 82-83.

110. See Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998).

111. *Id.* at 460. To equalize power, the absolute value of each legislator's preferences on laws *a* and *b* must sum to 1.

112. See *id.* at 461 (granting that logrolling may reduce aggregate utility). In my particular numerical example, logrolling is inefficient. Without logrolling, both measures fail with a social wealth of 0. With logrolling, both measures pass, with social wealth of -1/2, (5/8 + -3/8 + -4/8) twice.

more of his or her limited and equal share of voting power to passing any given issue than [Legislator 3] is willing to allot to defeat that issue, the measure in question may well be passed, no matter how much more intense [Legislator 3's] preference, need, or expected utility may be. This is as it should be.¹¹³

Clark's analysis demonstrates that logrolling, unlike vote buying, is consistent with political equality, at least with a political equality that posits that "no citizen have more input than any other" or that "allocate[s] equal amounts of potential utility to each representative."¹¹⁴ I have great sympathy with this view of political equality, which neatly parallels my own arguments for how campaign finance vouchers may achieve political equality.¹¹⁵

But Clark's view of equality might be controversial. For scholars who focus more on equality among groups, rather than individuals, logrolling might exacerbate rather than ameliorate political inequality. As Baker points out, the work of Lani Guinier and others shows how "prejudice can severely (and irrationally) constrain the logrolling opportunities available to certain interest group representatives within a legislature."¹¹⁶ For example, if Legislators 1 and 2 refuse to deal with Legislator 3 because of her race, Legislator 3 effectively will be deprived of political capital that the other legislators have to trade. However, it is unclear how often such prejudice would prevent logrolling, and perhaps those legislators who fail to logroll because of irrational prejudice will be at a comparative disadvantage in getting reelected.

A more pervasive problem with Clark's analysis is his assumption that, even absent irrational prejudice, legislators have equal political capital with which to make trades. While every legislator does have an equal vote for issues coming to the floor, it does not follow that all legislators have the same political capital with which to trade. Committee chairs, for example, will have greater political capital with which to trade because they often can use the legislature's rules to block consideration of bills or to allow (or prevent) debate on amendments. This (at least arguable) political inequality within the legislature means that legislative logrolling may not take place among true political equals. Clark's analysis therefore makes a case that logrolling does not offend notions of political equality, but it depends

113. *Id.*

114. *Id.* at 460.

115. See Hasen, *supra* note 36, at 28-31.

116. Baker, *supra* note 95, at 729 (citing Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1126 (1991)).

upon an unstated, contestable assumption that legislators have equal political capital with which to trade votes.

Finally, consider the interaction of inalienability and logrolling. Recall Sunstein's point that the sale of votes would change the meaning of what voting is *for*, and that these changed values would have a corrosive effect on politics.¹¹⁷ These same inalienability concerns are not present when it comes to logrolling. There is no exchange of dollars or other personal goods for votes in logrolling as there is in core vote buying. Instead, votes are exchanged for other votes, reducing the possibility of securing immediate personal benefits from voting.

Now it is possible that logrolling could have a different "corrosive" effect on politics. If voters believed that politicians were unprincipled and were simply exchanging votes on pork-barrel projects for their own districts, voters could lose faith in the political system. But this corrosive effect is not the result of logrolling *per se*. Rather it is the result of legislators passing particular kinds of laws. In contrast, if legislators trade votes between two pieces of public-regarding legislation, the corrosive effect might not appear. This analysis of course depends upon voters viewing pork barrel politics as less legitimate than other legislation.

Nonetheless, perhaps logrolling undermines an anti-commodification norm by treating each piece of legislation as subject to trade and not to be considered on its own merits. I am unpersuaded by this argument, however, because logrolling does not appear to add much to the already-existing commodification of legislation. Voters and legislators know that legislators work under budgetary constraints, and know that the legislative enterprise must be somewhat comparative because there are not unlimited sums to fund all desired legislation. In sum, inalienability concerns do not counsel against the legality of logrolling given existing political realities.

Before leaving the topic of legislative logrolling, it is useful to see how the above analysis sheds light on some related questions. For example, some people point to the legislature's ability to logroll as an advantage of representative democracy over the initiative process.¹¹⁸ Logrolling is much more likely to happen "where the number of voters is fairly small; and it could hardly take place at all if voting was secret. Logrolling is thus more likely to be found when decisions are being made in committees and

117. See *supra* note 71 and accompanying text.

118. Compare Clark, *supra* note 110 (arguing that the ability to logroll makes representative democracy better than the initiative process on "populist" grounds), and Stratmann, *supra* note 84, at 327 ("Logrolling allows intense minorities to have their way on some issues."), with Baker, *supra* note 95 (arguing that the ability to logroll does not make representative democracy more favorable than the initiative process to minorities).

assemblies than when they are being made by popular elections and referendums.”¹¹⁹ The rule requiring that initiatives be about only a single subject reflects the concern that voters cannot logroll, but must vote the entire package of legislation up or down.¹²⁰

Is it an advantage or disadvantage that logrolling takes place in legislatures, but not in the initiative process? The equality, efficiency, and inalienability analyses help answer that question. Someone committed to efficiency as a normative criterion, for example, might view the ability to logroll in representative democracy as an insufficient reason to prefer that mode of legislation over direct democracy, given the indeterminate results of the efficiency analysis.

Finally, consider the question of judicial logrolling. In a provocative new article, Evan Caminker questions why vote trading on the Supreme Court should be objectionable.¹²¹ This is not the place to undertake a detailed analysis of Caminker’s position. I note here only that Caminker deals well with an inalienability concern, focusing on whether vote trading would undermine judicial legitimacy.¹²² Caminker does not really address the equality concerns, but Clark’s assumption of equality among those with a vote, more questionable among legislators, is slightly less questionable among Supreme Court Justices.¹²³ Caminker briefly but provocatively argues against applicability of an efficiency analysis to the question of judicial vote trading, suggesting its inapplicability because “the currency of trade is legal principle rather than preference satisfaction.”¹²⁴ But if Caminker is correct that Justices can measure the costs of deviations from

119. ROBERT SUGDEN, *THE POLITICAL ECONOMY OF PUBLIC CHOICE: AN INTRODUCTION TO WELFARE ECONOMICS* 184 (1981); see also Baker, *supra* note 95, at 721 (setting forth three criteria for logrolling to take place).

120. See Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936, 954 (1983) (recognizing but rejecting this rationale for the single-subject rule). Some states subject legislation passed by legislatures to the single subject rule as well. Compare *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984) (holding more restrictive single subject rule applies to legislation passed by initiative) with *Oregon Educ. Ass’n v. Phillips*, 727 P.2d 602 (Or. 1986) (rejecting Florida approach). Application of the single subject rule to legislation makes it difficult to logroll within the same bill, but does nothing to police logrolling across bills.

121. See Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297 (1999).

122. See *id.* at 2351-54; see also *supra* text following note 117 (arguing that vote trading in legislatures probably would not undermine legislative legitimacy).

123. Like committee chairs in a legislature, the Chief Justice of the Supreme Court, who assigns opinions, has something more to trade than other Justices. It is not clear that we should even apply an equality analysis to Justices, who do not represent voters in the same way that legislators do. But see *Chisolm v. Roemer*, 501 U.S. 380, 398, 401 (1991) (holding that judges are “representatives” for purposes of the Voting Rights Act).

124. Caminker, *supra* note 121, at 2370 n.197.

their preferred judicial outcomes, some efficiency analysis may be possible.

B. Corporate Vote Buying

Bob again has offered to buy Sarah's vote. This time Sarah is a shareholder in Corporation X, and Bob wants to buy Sarah's vote in a Corporation X shareholder election¹²⁵ for cash. Bob thus wants to separate Sarah's ownership of her stock from the right to vote her shares.¹²⁶ In the corporate context, vote buying "despite its negative connotation, is simply a voting agreement supported by consideration personal to the stockholder, whereby the stockholder divorces his discretionary voting power and votes as directed by the offeror."¹²⁷

Traditionally, it was illegal for someone to pay cash or give other consideration to a shareholder in exchange for her vote,¹²⁸ perhaps reflecting the facile analogy to core vote buying. Though the law recognized the legality of agreements among shareholders to pool their votes to overcome collective action problems,¹²⁹ these voting agreements and voting trusts¹³⁰ did not extend to exchanges where money or other consideration were part of an explicit exchange.¹³¹

In recent years, however, courts and legislatures have moved away from their strict prohibition on corporate vote buying. In the landmark case

125. The election could be for the board of directors or it could be a shareholder referendum, such as a referendum on whether the corporation should pursue a merger.

126. "Every share has a nexus of rights that usually includes the right to dividends, the right to vote, and the right to distribution of the company's remaining assets upon dissolution." Zohar Goshen, *Controlling Strategic Voting: Property Rule or Liability Rule?*, 70 S. CAL. L. REV. 741, 774 (1997).

127. *Schreiber v. Carney*, 447 A.2d 17, 23 (Del. Ch. 1982).

128. The first Restatement of Contracts, for example, prohibited vote buying. RESTATEMENT (FIRST) OF CONTRACTS § 569 (1932) ("A bargain by an official or a shareholder of a corporation for a consideration enuring to him personally to exercise or promise to exercise his powers in the management of the corporation in a particular way is illegal."). Though shareholder votes could not be sold, they could (and still can) be transferred without consideration, such as through a proxy agreement. *See* REV. MODEL BUS. CORP. ACT § 7.22(b) (Supp. 1997). In this way, corporate votes have always differed from votes in political elections. *See supra* text accompanying note 64.

129. *See infra* note 142.

130. On the difference between voting agreements and voting trusts, see REV. MODEL BUS. CORP. ACT §§ 7.30, 7.31 (1984); 5 WILLIAM MEADE FLETCHER ET AL., *FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 2064 (perm ed. rev. vol. 1996). Saul Levmore has argued for the use of voting agreements among voters in political elections. *See* Levmore, *Precommitment Politics*, *supra* note 5. Levmore persuasively argues that such an agreement would not violate equality concerns because the precommitments are mutual. *See id.* at 609. Of greater concern is whether voting agreements in political elections would violate inalienability concerns. Negotiations over such agreements could serve to commodify the vote, undermining the public-regarding purpose of voting.

131. For example, New York law prohibits a shareholder from selling his vote "for any sum of money or anything of value," N.Y. BUS. CORP. LAW. § 609(e) (Supp. 2000), unless it is part of a voting agreement between two shareholders to vote the shares held "by them" in a particular way. *Id.* § 620(a) (1986).

Schreiber v. Carney,¹³² the influential Delaware Chancery Court held that corporate vote buying is legal so long as it is not fraudulent¹³³ and meets a test of “intrinsic fairness.”¹³⁴ The legality of corporate vote buying varies from jurisdiction to jurisdiction. The Georgia legislature, for example, eliminated a statute banning vote buying on grounds that the ban “frustrated legitimate transactions.”¹³⁵ But the law has not evolved to the point where one could conclude that corporate vote buying generally is legal.¹³⁶

I turn now to the normative question whether corporate vote buying should be legal. The older court cases condemning the practice gave little justification beyond the facile analogy to core vote buying in the political sphere.¹³⁷ But there are salient differences between the political and corporate spheres,¹³⁸ and a careful consideration of corporate vote buying through the lenses of efficiency, equality, and inalienability reveals little reason to treat the two cases the same.

I first consider efficiency arguments for and against corporate vote buying. As with logrolling, scholars have not reached consensus on whether the practice is efficient, but the better reasoned arguments point

132. 447 A.2d 17 (Del. Ch. 1982).

133. See *id.* at 25-26 (“[V]oting agreements in whatever form . . . should not be considered illegal *per se* unless the object or purpose is to defraud or in some way disenfranchise the other stockholders.”).

134. *Id.* at 26 (“Because vote buying is so easily susceptible of abuse it must be viewed as a voidable transaction subject to a test for intrinsic fairness.”). André discusses how this fairness test would apply to corporate vote-buying claims. See André, *supra* note 80, at 629-36. Delaware courts have upheld vote buying in the subsequent cases of *Wincorp Realty Investments, Inc. v. Goodtab, Inc.*, 8 DEL. J. CORP. L. 535 (Del. Ch. 1983), and *Weinberger v. Bankston*, Fed. Sec. L. Rep. (CCH) ¶ 93,539 (Del. Ch. 1987).

135. GA. CODE ANN. § 22-722 cmt. (1998) (“The omission of the language of former § 14-2-119(f), which prohibits the sale of a vote is deliberate. Older cases holding sales of votes to be against public policy are inapposite in the context of economic relationships, and the doctrine frustrated legitimate transactions.”); see also William J. Carney, *Changes in Corporate Practice Under Georgia’s New Business Corporation Code*, 40 MERCER L. REV. 655, 669-70 (1989) (commenting that former Georgia prohibition on corporate vote buying “represents one of the last vestiges of the unity of the law of public and private corporations, and the use of the political analogy to regulate private corporations”).

136. Compare EDWARD P. WELCH & ANDREW J. TUREZYN, *FOLK ON THE DELAWARE GENERAL CORPORATION LAW FUNDAMENTALS* § 151.3, at 255 (2000) (“votes may not be purchased”), with *id.* § 218.3, at 412 (“A more favorable judicial attitude has developed in recent years with respect to voting agreements that may arguably be construed as vote buying.”). For articles examining the evolution of the law in this area in greater detail, see André, *supra* note 80, at 540-51; Clark, *supra* note 39, at 790-93; Steven A. Barnoff, Note, *The Standstill Agreement: A Case of Illegal Vote Selling and a Breach of Fiduciary Duty*, 93 YALE L.J. 1093, 1097-1101 (1984); Michael D. Schmitz, Note, *Shareholder Vote Buying—A Rebuttable Presumption of Illegality*, 1968 WIS. L. REV. 927, 935-36.

137. See *supra* text accompanying note 80.

138. See Richard L. Hasen, *Pluralism with a Corporate Face*, 85 VA. L. REV. 1671, 1676 (1999); Manne, *supra* note 5, at 1441 (distinguishing conflicts among voters in political elections from the lack of such conflicts among shareholders in corporate elections).

toward efficiency. To bring the efficiency analysis into sharper focus, consider three different examples of why Bob would want to buy Sarah's vote rather than simply buy Sarah's shares (which would include Sarah's vote).¹³⁹

Example 1: Bob and Sarah are both shareholders in a small, closely held corporation. Strategic and collective action considerations lead to a situation where, absent a binding agreement, no shareholder has an incentive or an ability to obtain a majority in a given shareholder election.

Example 2: Bob is considering a bid to take over publicly traded Corporation X, and he needs a majority of the target shareholders to vote an exception to a share purchase rights plan (a "poison pill") so that he will be able to make a tender offer for the corporation.¹⁴⁰

Example 3: Bob wants to obtain voting control of Corporation X so that he can cause the corporation to provide a benefit to himself (a practice termed "looting").¹⁴¹

Vote buying in the first example hardly seems objectionable on efficiency grounds. Delaware and other states have recognized the legality of voting trusts and voting agreements as means to overcome collective action problems that may arise among shareholders.¹⁴² André persuasively makes the efficiency case for vote buying in the second example. Some corporate boards have adopted, without shareholder approval, "poison pills" that effectively prevent potential bidders from making tender offers to take over the corporation unless the bidder receives prior shareholder approval to make the offer. Vote buying allows the bidder to buy from the shareholders the right to make a tender offer, but it does not commit the shareholders to

139. These three examples are not exhaustive. For example, sometimes a corporate borrower exchanges with the lender the right to vote shares for the duration of the loan. *See, e.g., Dan Gallagher, Lidak President Goes Public to Chastise Board*, SAN DIEGO DAILY TRANSCRIPT, Mar. 5, 1998, at 1A, available in 1998 WL 9406346 (reporting that lender's proposed financing of up to \$130 million was contingent upon borrower placing stock in voting trust controlled by lender).

140. André explains this in detail. *See* André, *supra* note 80, at 565-72.

141. On looting, *see* Clark, *supra* note 39, at 795-99. Outside the looting/principal-agent issue, I have found no examples suggesting that corporate vote buying is inefficient.

142. *See* DEL. CODE ANN. tit. 8, § 218 (1998); *see also* Ringling Bros.-Barnum & Bailey Combined Shows v. Ringling, 53 A.2d 441 (Del. 1947); WELCH & TUREZYN, *supra* note 136, § 218; 5 FLETCHER, *supra* note 130, § 2064. As Clark explains, "[v]oting trusts and vote pooling agreements are basically devices created to solve the peculiar and troublesome collective action problems of closely held corporations, such as the difficulty of achieving cooperation and avoiding voting deadlocks." Clark, *supra* note 39, at 802. Voting trust certificates are securities under federal law, *see, e.g.,* 12 C.F.R. §208.34(b)(11) (1999), and under some state laws as well, *see, e.g.,* CAL. CORP. CODE § 25019 (Deering 1999).

accept any offer. Vote buying in this context appears to increase overall social wealth.¹⁴³

It is the third example of vote buying, "looting," that worries those committed to efficiency. Looting is a variation on Epstein's rent-seeking theme;¹⁴⁴ for example, a vote buyer buys enough votes to have herself appointed as an overcompensated consultant for the corporation. At first blush, the possibility of looting, and similar principal-agent problems, suggest corporate vote buying is inefficient.¹⁴⁵

Upon closer examination, legalized corporate vote buying probably would not increase looting. Unlike voters in the political market, shareholders have means besides voting to control principal-agent problems.¹⁴⁶ Corporate officers and directors¹⁴⁷ and even controlling shareholders owe

143. For a detailed efficiency analysis that includes discussion of agency problems, see André, *supra* note 80, at 588-636.

144. Epstein himself briefly commented on corporate vote buying: "This compromise solution, that votes may be sold with shares, helps reduce the risk of the diversion of common pool assets, just as it does when the sale of water rights is tied to the sale of riparian lands." Epstein, *Alienation*, *supra* note 49, at 985.

145. Easterbrook and Fischel argued against corporate vote buying, primarily because of principal-agent problems. See Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 410-11 (1983) [hereinafter Easterbrook & Fischel, *Voting in Corporate Law*]; see also FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 75-76 (1991) [hereinafter EASTERBROOK & FISCHEL, *ECONOMIC STRUCTURE*]. McChesney aptly criticizes Easterbrook and Fischel's analysis of vote buying in Fred S. McChesney, *Positive Economics and All That—A Review of The Economic Structure of Corporate Law by Frank H. Easterbrook and Daniel R. Fischel*, 61 GEO. WASH. L. REV. 272, 292 (1992) (book review) (noting that their "model [of corporate vote buying] 'predicts' any conceivable position that the law might take. No falsifiable conclusion has been reached . . ."). In addition, McChesney rejects two of Easterbrook and Fischel's core arguments about the positive workings of a legalized corporate vote market. The first argument is that bidders would see no difference between buying shares and buying votes. As McChesney explains, "[a]ssuming that the right to vote has value independent of the other accoutrements of share ownership—which it must if the entire subject of vote selling has any relevance—the claim seems incorrect." *Id.* at 291 n.100. The second of Easterbrook and Fischel's core arguments is that shareholders would receive too little for their votes. McChesney notes that "[t]he authors do not explain why distribution of the gains from trade, which in this case supposedly would be unfavorable to shareholders, is economically undesirable. Ordinarily, the division of the gains from trade is a distributional concern about which an economic model . . . is unable to pass judgment." *Id.* at 291 n.97. Finally, McChesney correctly criticizes the authors for failing to discuss "why, as a positive matter, traditional limitations on vote selling have progressively eroded in both case and statutory law." *Id.* at 292 n.103; see Easterbrook & Fischel, *Voting in Corporate Law*, *supra*, at 410 n.38 (criticizing Clark, *supra* note 39, for failing to "explain why vote buying is universally condemned").

146. See generally Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627 (1999); Clark, *supra* note 39, at 804 ("But in the political arena, nothing corresponds to the derivative suit as a way to overcome difficulties of collective action; an individual citizen cannot sue 'on behalf of' the polity to remove an incompetent politician or to force him to return embezzled funds.").

147. See *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985); see also *Loft, Inc. v. Guth*, 2 A.2d 225, 238 (Del. Ch. 1938), *aff'd*, 5 A.2d 503 (Del. 1939).

fiduciary duties to the corporation;¹⁴⁸ shareholders can bring a derivative suit or seek an injunction if necessary to stop a self-dealing transaction.¹⁴⁹ In Delaware for example, vote buying may be challenged if it defrauds shareholders or fails to meet the test of "intrinsic fairness."¹⁵⁰ Thus, shareholders have means of policing the most inefficient transactions caused by vote buying, such as Bob's looting in the third example above.¹⁵¹ While these policing methods may not be perfect, because they present their own set of transaction costs and collective action problems, shareholders in public corporations can employ market forces to discipline self-dealing. Given that shares of inefficient companies decline in value as shareholders sell their holdings in such corporations,¹⁵² there is a "Wall Street Rule" that "if shareholders do not like what management is doing, they will sell on the market."¹⁵³ Although an exit may not be done in time to prevent the ill effects of one time looting, exit will police a pattern of looting.

As an aside, a ban on vote buying probably would stop few transactions that are the functional equivalent of vote buying. It is relatively easy in the corporate context to separate the voting interest of a share of stock from its other interests. Since the demise of SEC Rule 19c-4,¹⁵⁴ and subject to state corporation law,¹⁵⁵ a corporation may issue stock offering shareholders a choice of a greater dividend or greater voting rights.¹⁵⁶ Finally, as mentioned above, voting agreements and voting trusts that fall short of explicit vote buying are legal in many jurisdictions. Thus, a ban on explicit vote buying will simply increase the transaction costs of

148. See *Zahn v. Transamerica Corp.*, 162 F.2d 36, 42 (3d Cir. 1947); WELCH & TUREZYN, *supra* note 136, § 151.5.

149. See, e.g., DEL. CORP. CODE § 144.

150. See *supra* note 133. For a look at older cases policing vote buying in the presence of self-dealing, see Schmitz, *supra* note 136, at 931-32.

151. See Clark, *supra* note 39, at 798 ("[A]ny looting that actually follows equity-centered vote buying will violate existing legal rules against embezzlement, fraud, or self-dealing."). Not all vote buyers or vote sellers will be officers, directors, or controlling shareholders of the corporation. But these persons have a fiduciary obligation to ensure that no vote buyer loots the corporation.

152. See André, *supra* note 80, at 625.

153. Robert B. Thompson, *Shareholders as Grown-ups: Voting, Selling, and Limits on the Board's Power to "Just Say No,"* 67 U. CIN. L. REV. 999, 1002 (1999).

154. Rule 19c-4 prevented corporations from engaging in these so-called "dual class recapitalizations." 17 C.F.R. 240.19c-4 (1999). A Court of Appeals struck down the law as falling beyond the SEC's jurisdiction, holding the matter is subject to state corporations law. See *Business Roundtable v. SEC*, 905 F.2d 406, 408 (D.C. Cir. 1990).

155. The general rule is that corporate voting takes place on a one share, one vote basis, but shareholders may agree to deviations from this voting practice. See DEL. CODE ANN. tit. 8, § 212(a) (1991); REV. MODEL BUS. CORP. ACT § 7.21(a) (1984); 5 FLETCHER, *supra* note 130, § 2045; WELCH & TUREZYN, *supra* note 136, § 212.1.

156. See André, *supra* note 80, at 620 ("[T]he effect of corporate vote buying differs little from a dual class recapitalization.").

engaging in vote buying by requiring a more cumbersome method to reach the same result. Someone committed to a corporate vote-buying ban will need to close these loopholes as well.

If I am correct that legal corporate vote buying would not increase agency problems within the corporation, and if there are other efficiency gains to be achieved by allowing such trades, a normative efficiency analysis points in favor of corporate vote buying, subject to policing of self-dealing by the courts.

The equality and inalienability analyses both are relatively straightforward, and neither rationale provides a strong argument against corporate vote buying. Recall the paramount equality objection to core vote buying is that it lets wealth prevail where it should not—in political elections.¹⁵⁷ Again, the equality idea is that wealth should be irrelevant to distribution of political power. That is not a valid objection to vote buying in corporate elections, where the paramount concern is producing shareholder wealth, not equality of all citizens. According to one classic court opinion, “A business corporation is organized and carried on primarily for the profit of the stockholders.”¹⁵⁸ Political equality therefore is not violated if shareholders sell their votes,¹⁵⁹ as Robert Clark notes, “[t]hat the rich have an advantage in corporate takeovers and proxy contests is not much more objectionable than the fact that the rich can buy better television sets.”¹⁶⁰

One possible egalitarian objection to this analysis is that the distinction between political elections and elections in (at least large, publicly-traded) corporations is overdrawn. Under this analysis, corporations have a great effect on social and economic conditions in a community, justifying rules protecting shareholder democracy, or, more broadly, protecting various individuals and groups in society whose interests are affected by corporate decisions.¹⁶¹ I cannot resolve this debate here, but only note that

157. See *supra* text accompanying note 39.

158. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919). The modern view provides corporations with slightly more leeway in meeting the goal of maximizing corporate profits and shareholder value. See, e.g., *Paramount Comm., Inc. v. Time, Inc.*, 571 A.2d 1140, 1150 (Del. 1990) (“[A] board of directors, while always required to act in an informed manner, is not under any *per se* duty to maximize shareholder value in the short term, even in the context of a takeover.”).

159. I have argued elsewhere that the overall economic power of corporations can affect political equality. See Hasen, *supra* note 36, at 42; see also *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 659-60 (1990) (discussing “corrosive effect” that corporate spending can have on political campaigns). But this point is far removed from the internal voting rules for corporate elections.

160. Clark, *supra* note 39, at 804.

161. Some states empower corporations to “[m]ake donations for the public welfare or charitable, scientific or educational purposes” in addition to their traditional function of maximizing corporate profits and shareholder value. DEL. GEN. CORP. § 122(9); see also REV. MODEL BUS. CORP. ACT § 3.02(13). Some states also permit corporate directors to consider factors other than shareholder value

the relevant question in any case is whether corporate vote buying undermines political equality, not whether it “looks like” core vote buying.

The inalienability objection to core vote buying similarly is inapposite to the case of corporate vote buying. An inalienability rule may encourage public-regarding voting in political elections, but few expect shareholders to consider anything but narrow economic self-interest in corporate elections, whether or not votes are for sale.¹⁶² Thus, we need not worry, to paraphrase Sunstein, that shareholders will forget what voting in corporate elections is *for*; voting in corporate elections is for maximizing profit, and vote buying is fully consistent with this purpose.¹⁶³ In sum, corporate vote buying may “look like” core vote buying on a superficial level, but the two practices are not similar under any important rubric.¹⁶⁴

when exercising their duties. *See, e.g.*, N.Y. BUS. CORP. § 717(b)(2)(v) (Supp. 2000) (“In taking action . . . a director shall be entitled to consider . . . the effects that the corporation’s actions may have in the short-term or in the long-term upon . . . the ability of the corporation to provide . . . goods, services, employment opportunities and employment benefits and otherwise to contribute to the communities in which it does business.”); *see also* ALI PRINCIPLES OF CORPORATE GOVERNANCE § 2.01(b)(2) (“Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business . . . may take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business . . .”). For further information on corporate constituency statutes, *see* Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14 (1992). One means of providing such protection might be a ban on corporate vote buying, though it could be argued that allowing vote buying in the context might increase political equality by giving non-shareholders a voice in corporate decisions. For an analogous argument in the context of special district elections, *see infra* Part II.E.

162. *See* Schreiber v. Carney, 447 A.2d 17, 25 (Del. Ch. 1982) (rejecting as “butmoded” an argument that shareholders must consider the interests of other shareholders in casting votes in corporate elections). *But see supra* note 161 and accompanying text (arguing for application of democratic principles to corporate governance and suggesting such governance is about more than self-interest).

163. Again, if one takes a broader view of the corporation’s role in society, the inalienability analysis may differ from my analysis here.

164. This analysis of corporate vote buying could prove useful in considering other business transactions in which vote buying is possible. For example, Kevin Kordana and Eric A. Posner recently have offered a preliminary economic analysis of whether vote buying in the context of Chapter 11 bankruptcies would be efficient. *See* Kevin A. Kordana & Eric A. Posner, *A Positive Theory of Chapter 11*, 74 N.Y.U. L. REV. 161, 220-30 (1999). As with corporate vote buying, principal-agent problems are a prime concern in the bankruptcy context. *See, e.g., id.* at 220-25 (discussing whether managers of bankrupt entity would engage in efficient vote-buying transactions). But there are differences from the corporate context, such as the “bicameral” nature of bankruptcy voting, in which votes must be approved by both a “one dollar, one vote” house and a “one claim, one vote” house. *See id.* at 226. The authors acknowledge that their analysis of bankruptcy vote buying is quite preliminary. *See id.* at 230 (“We have only scratched the surface of a very complex problem.”). A comparison to corporate vote buying could be helpful to future analyses of bankruptcy vote buying. Kordana and Posner initially rely upon Stratmann’s logrolling models, *see supra* Part II.A., to argue that vote buying in the bankruptcy context may or may not be efficient. *See* Kordana & Posner, *supra*, at 225-26. But they acknowledge that claim buying in bankruptcy is less similar to vote trading as it is to vote buying. *See id.* at 226. For this reason, it would have been more fruitful for them to draw on the corporate voting literature than the logrolling literature. In analyzing other voting features of Chapter 11, Kordana and Posner look to corporate law. *See id.* at 202 (comparing unilateral voting in corporate context to bicameralism in

C. *Payments to Increase Turnout*

I return now to an issue raised first in the introduction to this Article: should Bob be able to pay Sarah to vote if he makes sure not to influence how Sarah votes, only that she votes at all? California, for example, allows voters to receive incentives for voting, so long as the incentives are not offered to induce a voter not to vote, or to vote or refrain from voting for a particular candidate or ballot measure,¹⁶⁵ and so long as no federal candidates are on the ballot.¹⁶⁶

California's experience with the measure is mixed. Some incentives appear to be motivated by a patriotic desire to get out the vote. A few years ago, merchants in the city of San Ramon offered those people with voting stubs "savings on hams and oil changes, free checking at a local bank, restaurant discounts, and even a visit to a chiropractor."¹⁶⁷ But other incentives show partisan manipulation of the law. Nothing in the California law requires that all voters in a given election be given the incentive, and any political organization with even rudimentary understanding of demographic voting patterns can target incentives to get out the vote of likely supporters.¹⁶⁸

Such targeting occurred in a recent Oakland, California, special election for a state assembly seat. A candidate preferred by the state Democratic party, former Oakland Mayor Elihu Harris, was in electoral trouble. In response, the party offered \$5 coupons for free chicken dinners exclusively in poor, African-American neighborhoods, where voters likely to support Harris lived.¹⁶⁹ It is not clear how many voters cast their ballots because of the incentive. In any case, Harris did not get enough votes to

bankruptcy context). Frederick Tung argues that vote buying in bankruptcy should be allowed only if parties to the bankruptcy proceeding would have a limited right to enjoin trades that harmed them, much like Delaware shareholders have a right to bring a derivative suit claiming that a vote-buying transaction fails the test of intrinsic fairness. *See* Frederick Tung, *Confirmation and Claims Trading*, 90 NW. U. L. REV. 1684, 1749 (1996).

165. *See* CAL. ELEC. CODE § 18522(a) (West 1996).

166. Such incentives do not violate California law, but they violate federal law's prohibition on vote buying. *See* *United States v. Garcia*, 719 F.2d 99, 102 (5th Cir. 1983) (holding that the federal prohibition on vote buying applies to nonfederal candidates who are on the same election day ballot as candidates for federal office).

167. *Vote-buying? No, But Take 10% Off*, N.Y. TIMES, Nov. 8, 1995, at C22.

168. Heckelman therefore misses the points of California Democrats giving away Yum-Yum donuts. He calls the secret ballot a "hole" in the donut plan, Heckelman, *supra* note 19, at 119-20, but fails to realize that demographic patterns are enough to overcome the secret ballot when incentives may be offered in selected neighborhoods. Lowenstein argues that this practice is close to the line of impropriety but not over the line: "If you made the offer available to certain voters, it would be at the troublesome end of the spectrum," but "inducing people to vote shouldn't be illegal." Marsha Ginsburg, *Registrar Rips Demos for Free Food Offer; Calls Alameda County Election Giveaway Repugnant*, S.F. EXAMINER, Feb. 8, 1999, at A-3 (quoting Lowenstein).

169. *See* State Capitols Report, *Once Around the Statehouse Lightly* (Apr. 5, 1999).

avoid a runoff, and the chicken incident became part of racial politics in the runoff election, ultimately contributing to Harris's defeat and to the election of Audie Bock,¹⁷⁰ the first Green Party candidate for a state office, not to mention a barrage of chicken jokes.¹⁷¹

California could lessen the possibility of partisan manipulation by providing that any payments made, or incentives offered, to increase turnout must be made available (and perhaps equally publicized) to all voters eligible to vote in the given election. This move, however, would not eliminate partisan manipulation of the process because payments for voting offered election-wide would be a greater incentive for the poor to vote than for the non-poor.¹⁷² Democrats, who attract greater numbers of poor voters on average than Republicans, benefit from such laws, which explains why California Democratic legislators have opposed Republican attempts to repeal the California law allowing payments for turnout.¹⁷³

I consider now the normative question whether payments for turnout should be allowed, either with or without a requirement that the buyer offer the incentive to all voters. Consider first the economic arguments regarding payments for turnout. Unlike the cases of logrolling and corporate voting, I know of no published economic analyses of this issue.¹⁷⁴ The primary efficiency concern of core vote buying, the fear of increased rent seeking, does not appear to materialize from payments to increase turnout. There are some secondary, less important, economic effects, however. One law and economics scholar objects to using carrots or sticks to increase turnout on grounds that "slackers" should not decide elections.¹⁷⁵ More felicitously, an economist might argue that paying people to vote will skew the use of

170. See *id.*

171. See, e.g., Philip Matier & Andrew Ross, *Whole Lotta Clucking Going On Over Chicken-Dinner Votes*, S.F. CHRON., Feb. 5, 1999, at A19 (quoting elected official who commented that "The chickens came home to roost"); Benjamin Pimentel, *Chicken Dinners Don't Sit Well with Greens*, S.F. CHRON., Feb. 11, 1999, at A19 ("The Green Party is crying foul over the Democratic Party's poultry politics.").

172. This follows from the principle of the declining marginal utility of money. See *supra* note 31 and accompanying text. Dan Lowenstein suggested to me upon reading an earlier draft that clever buyers wishing to attract the votes of the wealthy might offer free golf balls. But golf balls still might be more attractive to the poor than to the rich. The poor could resell them at a low price, while the rich may see the opportunity cost of their time as too high to justify voting just to get a few golf balls.

173. See Marsha Ginsburg, *Chicken Deal Ruffles Feathers in Oakland; Giveaway by Democrats Deemed Close to Vote-Buying, But Not Illegal*, S.F. EXAMINER, Feb. 4, 1999, at A-8.

174. Anderson & Tollison briefly argue that turnout by the poor increases redistributive legislation favoring the poor. See Anderson & Tollison, *supra* note 43, at 302. But no one has undertaken an in-depth economic analysis of the issue.

175. This particular scholar prefers not to be identified. Cf. Jac C. Hekelman, *Revisiting the Relationship Between Secret Ballot and Turnout*, 28 AM. POL. Q. 194, 197 (2000) (noting that as the number of voters fell after the institution of secret ballot, "the quality of the average voter may have increased").

voting as a measure of intensity of preference. Those who do not vote under this view are those without intense preferences on an electoral outcome.¹⁷⁶ Payments for voting interfere with this rudimentary measure of preference intensity by causing those without intense preferences on electoral outcomes to vote nonetheless.¹⁷⁷

Another economic objection to payments for voting is that the payments, at least if they came from the government, would be high because the government would have to pay all voters, not just those who otherwise would not vote.¹⁷⁸ Though the transfers themselves are efficiency-neutral, the transaction costs to facilitate the transfers are social waste: raising taxes and setting up a bureaucratic mechanism to pay people to engage in an activity they would otherwise have engaged in seems to be an inefficient use of resources.¹⁷⁹

On the other hand, Karlan defends the idea of payments on equality grounds: "If nominal payments can have significant effects at the margin in bringing nonvoters to the polls and inducing likely voters to stay home, then perhaps the government ought to pay eligible citizens to vote."¹⁸⁰ Noting that poor people tend to play lotteries more than other groups in the population, Karlan endorses Nolan Bowie's suggestion that voters receive a lottery ticket when casting a ballot, and that the winner of the lottery receive a hefty prize.¹⁸¹

The equality argument to increase turnout is strong. The empirical evidence unambiguously shows that wealthier, better-educated whites are more likely to vote than other groups in society.¹⁸² Payments for voting would increase voting by the poor (who tend to be disproportionately from minority groups). Incentives to increase turnout like payment for voting promote political equality by making sure that elections represent the views of rich and poor voters alike (as well as the views of minority voters).

176. See Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 968-69 (1988).

177. In addition, candidates and parties would miss a signal of disapproval from otherwise apathetic voters.

178. See Hasen, *supra* note 70, at 2172.

179. It appears that payments to voters in ancient Athens constituted the biggest item in the government's budget. See MOSES H. HANSEN, *THE ATHENIAN ECCLESIA* 133 (1983).

180. Karlan, *supra* note 25, at 1472.

181. See *id.* at 1472 n.54. For a real-world example of such a lottery, see *Naron v. Prestage*, 469 So. 2d 83 (Miss. 1985).

182. See STEVEN J. ROSENSTONE & JOHN MARK HANSEN, *MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA* 43-45 (1993); see also ABA *STANDING COMM. ON LAW AND THE ELECTORAL PROCESS, THE DISAPPEARANCE OF THE AMERICAN VOTER REVISITED* 93-94 (1990).

Inalienability concerns, however, point strongly against payment for turnout. One court upholding a candidate's lottery aimed at boosting turnout recognized the issue: "[S]uch a scheme encourages the electorate, whose motivation to vote should be a sense of civic duty, to go to the polls out of an ignoble desire for short-term financial enrichment."¹⁸³ Sabato and Simpson similarly argue that

while paying to suppress turnout is clearly wrong, paying large sums to a select few to *gin up* turnout is not really morally superior. The vote, which tens of thousands gave their blood and sweat to secure, is not a commodity that ought to be crassly traded for cash in the political marketplace.¹⁸⁴

The concern here is that payments for turnout, whether directed to all voters or targeted only at voters in certain areas, brings a money calculation into the picture in much the same way as core vote buying. It tells us that voting might be *for* getting a discounted ham, and not *for* choosing the best leaders. To be sure, there is less danger here than with core vote buying, because there would be fewer cases of people voting against their own preferences—payments for turnout do not require the voter casting a ballot in the way that the buyer wants. But the equation of incentives for voting could still have a "corrosive effect" on politics, even though the payment is just about getting people to vote, not telling them how to vote.

Karlan recognizes the commodification objection, but she says it could be "handled in a variety of ways that would actually increase voters' sense of political efficacy" such as by giving transportation vouchers rather than cash to voters.¹⁸⁵ Though I think transportation vouchers to get people who need them to the polls are a good idea, I am less optimistic than Karlan that transportation vouchers would increase turnout much.¹⁸⁶ It seems that there has to be a benefit beyond the facilitation of voting to motivate those who otherwise would not vote. But it is the very fact that the

183. *Naron*, 469 So. 2d at 86.

184. SABATO & SIMPSON, *supra* note 25, at 205.

185. Karlan, *supra* note 25, at 1473. Such vouchers apparently are not a form of illegal vote buying under federal law. See *Dansereau v. Ulmer*, 903 P.2d 555, 561-64 (Alaska 1995) (holding that free gasoline payments to get voters to the polls did not violate federal law).

186. Transportation vouchers lower costs, but other cost-lowering methods may be more effective. A study of same-day voter registration found that "simply reducing citizens' administrative costs modestly affects the likelihood that they will vote." Craig Leonard Brians & Bernard Grofman, *When Registration Barriers Fall, Who Votes? An Empirical Test of a Rational Choice Model*, 99 PUB. CHOICE 161, 171 (1999). The authors conclude that "political participation requires political mobilization and education." *Id.*

incentive is something other than facilitation of voting that commodifies the value of the vote.

Thus, though equality concerns may support payment for turnout, inalienability suggests such payments should not be made and the efficiency analysis is indeterminate. Note here that there may be other ways to increase turnout (the reason these payments are supported by an equality rationale) without paying voters. Easing voter registration, for example, lowers the costs of voting, thereby increasing turnout without putting a price on the vote or creating skewed incentives for people to vote. A more extreme measure is a compulsory voting law.¹⁸⁷ Such a law penalizes people for not voting. The evidence indicates that compulsory voting laws increase turnout,¹⁸⁸ but they do not raise the same inalienability concerns.¹⁸⁹ It is also cheaper to require people to vote than to pay for turnout, in part because compulsory voting laws have low enforcement costs.¹⁹⁰

D. Campaign Promises and Campaign Contributions

I turn now to the most difficult of the non-core vote-buying practices to analyze: the use of explicit and implicit campaign promises by candidates to secure votes. Bob now is a candidate for office, Sarah is a voter who owns real property, and Carl is a potential contributor to Bob's campaign. During a campaign speech, Bob promises that if elected to office, he will lower real property taxes by ten percent. It is also known that Bob, like other politicians, will give Carl and other contributors to Bob's campaign increased access to Bob to express their views on issues that Bob, if elected, must face as a legislator. Bob wants Carl's contribution because he needs money to convince voters to vote for him.

Certainly almost all exchanges along the lines described above, either between Bob and Sarah or between Bob and Carl, are legal. But we can imagine cases that come closer to the line of illegal conduct. In the candidate-voter hypothetical, imagine if the property tax relief is targeted at only homeowners with homes valued below \$100,000, or is targeted at only homeowners in Sarah's neighborhood, or on Sarah's block, or only at Sarah. Surely this last promise is virtually indistinguishable from core vote buying. In the candidate-contributor scenario, an explicit promise by Bob

187. See Hasen, *supra* note 70.

188. See *id.* at 2170-71.

189. "A half-dozen Yum-Yum doughnuts does not send the same message to a voter as does a government law compelling all to vote. The doughnut inspires an outcome-oriented calculus; the law suggests moral authority or social consensus." *Id.* at 2172.

190. See *id.* at 2170 n.135.

to give preferred access to Carl in exchange for a campaign contribution may be a bribe.¹⁹¹

The Supreme Court addressed the candidate-voter scenario without much analytic clarity in *Brown v. Hartlage*.¹⁹² In *Hartlage*, a candidate for county commissioner promised to return to the public treasury part of his salary if elected.¹⁹³ Kentucky courts had interpreted their vote-buying law to prohibit such promises,¹⁹⁴ and a Kentucky appellate court voided the commissioner's election on that basis.¹⁹⁵

Justice Brennan, writing for the Supreme Court, held that the Kentucky law violated the candidate's First Amendment rights.¹⁹⁶ But the Court had an extraordinarily difficult time explaining how to differentiate the candidate's promise from illegal vote buying. The Court explained that vote buying could be prohibited because it "remains in essence an invitation to engage in an illegal exchange for private profit."¹⁹⁷

But it is equally plain that there are constitutional limits on the State's power to prohibit candidates from making promises in the course of an election campaign. Some promises are universally acknowledged as legitimate, indeed "indispensable to decisionmaking in a democracy" and the "maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system."¹⁹⁸

Ultimately, the Court threw up its hands at trying to distinguish between illegal vote buying and legal campaign promises.¹⁹⁹ It was enough for the Court to note that the promise "was made openly, subject to the comment and criticism of his political opponent and to the scrutiny of the voters."²⁰⁰ But surely the openness of the promise cannot be the sole, or even the most important, factor distinguishing the two cases. Candidates

191. See Levmore, *Precommitment Politics*, *supra* note 5, at 573 n.14.

192. 456 U.S. 45 (1982).

193. The practice still occurs. See Jim Newton, *The Times Poll*, L.A. TIMES, Apr. 9, 2000, at A1 (noting that Los Angeles mayor Richard Riordan accepts just \$1 per year as salary).

194. See KY. REV. STAT. § 121.055 (1982); Sparks v. Boggs, 339 S.W.2d 480 (Ky. Ct. App. 1960).

195. See *Brown v. Hartlage*, 618 S.W.2d 603 (Ky. Ct. App. 1981).

196. See *Hartlage*, 456 U.S. at 52-56.

197. *Id.* at 55.

198. *Id.* (citations omitted).

199. See *id.* at 56 ("[T]he precise nature of the promise, the conditions upon which it is given, the circumstances under which it is made, the size of the audience, the nature and size of the group to be benefited, all might, in some instance and to varying extents, bear upon the constitutional assessment.").

200. *Id.* at 57.

held their recent vote auction in Dodge County out in the open;²⁰¹ its public nature did not render it any more legitimate.²⁰²

The distinction here has troubled many scholars. Karlan characterizes the dichotomy as the “wholesale-retail” puzzle: one can sell votes by making large “wholesale” promises, but such promises on the personal “retail” level are illegal.²⁰³ Like the Supreme Court, however, Karlan relies upon the contrast between the open nature of campaign promises and the secret nature of core vote buying to distinguish the cases.²⁰⁴

Nor is there scholarly unanimity on whether campaign promises that target public resources are good or bad. Promises by candidates as to what they would do in office are consistent with a view of representatives as accountable to the people. In an attempt to make candidates more accountable, Levmore suggests ways to make such promises enforceable, such as the use of enforcement bonds that are forfeited if politicians break their promises.²⁰⁵ But Epstein notes that candidate promises allow politicians to give away rents.²⁰⁶ Epstein’s rather chimerical solution is to shrink the size of government so that politicians would not have government benefits to trade for votes.²⁰⁷

The efficiency, equality, and inalienability rationales shed some light on this problem. Consider first the efficiency rationale of campaign promises and contributions. On the positive side, campaign promises are a means of providing information to voters so that they may make an informed choice. Contributions allow contributors to show their intensity of preference for a candidate. On the negative side, economists have recognized that promises to identifiable groups of voters, as in the candidate-voter scenario, lead to interest group rent seeking. As Aronson and Shepsle argue, promises such as a promise to increase funding for the high school band or to place a moratorium on new liquor licenses “all produce private, divisible benefits for identifiable groups in the community, but at a

201. See *supra* text accompanying note 26.

202. See Lowenstein, *supra* note 82, at 829-31 (rejecting secrecy as the missing element to separate bribery from legitimate dealings between politicians and voters); see also *supra* note 40.

203. Karlan, *supra* note 25, at 1460; see also Karlan, *Politics by Other Means*, *supra* note 67, at 1714.

204. See *id.* at 1468-69.

205. See Levmore, *Precommitment Politics*, *supra* note 5, at 571-98. Robert Clark makes a more extreme suggestion: “A candidate could promise to pay cash to those who vote for him so long as the offer is made available to all citizens eligible to vote in the particular election, all who accept the offer are paid the same amount per vote, and full disclosure is made concerning what the politician plans to do in office.” Clark, *supra* note 39, at 805.

206. See Epstein, *Alienation*, *supra* note 49, at 988.

207. See *id.* The solution is chimerical because the modern state will have plenty of rents to give away even if it seeks to provide only public goods. See Hasen, *supra* note 36, at 16.

collective cost that probably exceeds those benefits.”²⁰⁸ The sale of access to campaign contributors is likely to increase rent seeking as well.²⁰⁹

The equality rationale appears indeterminate in the candidate-voter scenario, though not the candidate-contributor scenario. Considering Bob-Sarah first, the question is whether campaign promises to identifiable groups of voters offend notions of political equality. Until we get down to the level where the candidate’s promise is virtually indistinguishable from core vote buying, political equality does not seem threatened by such campaign promises. The reason is not the openness or public nature of the promises, but the very fact that the promises are unenforceable and therefore unlikely to motivate any voting behavior. It is well known that campaign promises are not worth very much; these are not exchanges, but rather signals by politicians as to the steps they plan to take in office. Candidates clearly cannot keep many of the promises they make once they are in office, and voters know it.²¹⁰

Of course, the more targeted the promise, and the more likely it is that the candidate can deliver on the promise, the greater the threat to political equality. As with core vote buying, candidates can more easily buy off the poor with promises of a small pecuniary benefit (for example, roll back the price of public transportation by a few cents), than they can buy off the rich. The danger to political equality here is not that the poor receive benefits promised by a candidate (something that is consistent with a view of the politician as the voters’ representative), but that a candidate who buys off the poor with a small pecuniary benefit could then pursue other policies that in the aggregate would do more harm to the poor than benefit them.²¹¹

208. Peter H. Aronson and Kenneth A. Shepsle, *The Compensation of Public Officials as a Campaign Issue: An Economic Analysis of Brown v. Hartlage*, 2 SUP. CT. ECON. REV. 213, 257 (1983); see also Epstein, *Alienation*, *supra* note 49, at 988.

209. This would not necessarily be true in a more competitive interest group market. See Hasen, *supra* note 36, at 32.

210. As John Ferejohn recently put it in his article, *It's Not Just Talk*, 85 VA. L. REV. 1725, 1734 (1999), “A candidate promises to deliver some benefit to a group, but she has no way of verifying that the individual voters in the group actually carry out their part of the deal. In such circumstances, the candidate’s promise is not really an exchange at all, but is instead an expression of solidarity interest . . . a vague unsecured promise, or a forlorn hope.” Consider the recent uproar by term limits opponents regarding the members of Congress who pledged to abide by a voluntary term limit and then reneged. See B. Drummond Ayres, *Political Briefing: Breaks Promise, Pays a Price*, N.Y. TIMES, June 20, 1999, at A20.

211. Because these policies may be less visible to poor voters than, say, a fare decrease, poor voters may misperceive their net losses should the candidate be elected. I am not arguing that poor voters are more likely to be misled than other voters. I am claiming that all voters are more likely to focus on initial tangible benefits and to discount or ignore non-salient costs. When this fact is combined with the fact that the poor are more likely to sell their votes because of the declining marginal utility of money, it means that the poor are more likely to suffer ill effects from vote buying.

Though the candidate-voter promise scenario does not necessarily undermine political equality, the candidate-contributor scenario surely does. In this circumstance, politicians sell access to those who can pay for it. As I have explained elsewhere in great detail,²¹² politicians' sale of access undermines notions of political equality because access affects political power. Indeed, it is this equality rationale, not an analogy to core vote buying, that provides the strongest reason to limit campaign contributions.²¹³

Inalienability suggests greater caution in both the candidate-voter and candidate-contributor scenarios. A candidate's promise of a pecuniary benefit, such as a tax cut, to an identifiable class of voters may cause voters to focus more on their narrow self-interest rather than on the public good. Similarly, a candidate's express or implied promise to provide greater access to those who donate to his campaign will undermine what representation is for: representing all of his or her constituents. But note that the inalienability rationale against candidate promises, like the equality rationale, strengthens as the promise narrows and becomes more likely to be fulfilled. General promises to serve the people or even to lower taxes are less objectionable under the inalienability rationale because they do not encourage voters to focus on self-interest to the same degree.

The efficiency and inalienability rationales appear to disfavor the legality of at least some campaign promises and campaign contributions. However, unlike other non-core vote-buying practices like corporate vote buying, campaign promises and campaign contributions implicate other values, most importantly First Amendment values.²¹⁴ This is not the place to debate the conflict between the First Amendment and these other values in our electoral system; here I just note the conflict.

First Amendment values and the desire to ensure electoral accountability must be considered along with equality, efficiency, and inalienability concerns. As the Supreme Court noted in *Brown v. Hartlage*, "The fact that some voters may find their self-interest reflected in a candidate's commitment does not place that commitment beyond the reach of the First Amendment. We have never insisted that the franchise be exercised without taint of individual benefit."²¹⁵ The proper focus here must be on delineating how targeted and enforceable the campaign promise must be

212. See, e.g., Hasen, *supra* note 36; Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627 (1999).

213. Cf. Ortiz, *supra* note 9, at 912 (arguing that campaign spending influences voters who do not pay attention or respond to advertising stimulus in a way that may be equivalent to vote buying).

214. I explore the conflicts in greater detail in Hasen, *supra* note 36 and in Hasen, *supra* note 212.

215. *Brown v. Hartlage*, 456 U.S. 45, 56 (1982).

before it crosses the line into illegal vote buying. My own view is that the promise must be targeted to a small group or an individual and likely enforceable before it crosses the line into impropriety or illegality. A strong First Amendment advocate may reject application of my three criteria on deciding such a case; my list of criteria is by no means exclusive. The point, however, is that it is irrelevant how close these practices look to core vote buying.

E. Vote Buying in Special District Elections

The final example of non-core vote buying requires a bit of background. In *Reynolds v. Sims*,²¹⁶ the Supreme Court held that voting in state legislatures must take place with equally-weighted votes, now known as the "one person, one vote" principle. The Court extended this principle to local governments in *Avery v. Midland County*.²¹⁷ The Court also has made it virtually impossible for a jurisdiction holding a general election to deny the vote to a resident, citizen, adult non-felon.²¹⁸

Despite these rules, the Supreme Court in *Avery* suggested an exception to these principles for "a special purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents."²¹⁹ I refer to such areas as "special districts." The Court first recognized the validity of a special district election in *Salier Land Co. v. Tulare Lake Basin Water Storage District*.²²⁰ *Salier* involved a California water storage district that stored and distributed water for agricultural purposes. Though seventy-seven people lived in the district,²²¹ only landowners were enfranchised to vote, receiving one vote for every \$100 of assessed land value.²²²

The *Salier* court held that it was permissible to deny the vote to non-landowners and to apportion voting power based on land values.²²³ In responding to an argument by lessees that they should not be disenfranchised, the Court noted that

216. 377 U.S. 533 (1964).

217. 390 U.S. 474 (1968).

218. See *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 625-30 (1969). I say "virtually impossible" because the *Kramer* court did not explicitly overrule *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959), which permitted the use of fairly applied literacy tests. But it is hard to see how *Lassiter* survives *Kramer*. See SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* 53 (1998).

219. *Avery*, 390 U.S. at 483-84.

220. 410 U.S. 719 (1973).

221. See *id.* at 723.

222. See *id.* at 724 n.6.

223. See *id.* at 734-35.

California has not left the lessee without remedy for his disenfranchised state. Sections 41002 and 41005 of the California Water Code provide for voting in the general election by proxy. To the extent that a lessee entering into a lease of substantial duration, thereby likening his status more to that of a landowner, feels that the right to vote in the election of directors of the district is of sufficient import to him, he may bargain for that right at the time he negotiates his lease.²²⁴

In this paragraph, the Supreme Court appears to sanction, indeed encourage, vote buying in these special district elections.²²⁵ Here I explore whether vote buying should be allowed in these elections.

The issue is of more than passing interest. The Supreme Court²²⁶ and other courts²²⁷ have recognized the special district election exception in a variety of circumstances. Two current notable uses of special district elections are for business improvement districts (BIDS)²²⁸ and for special assessments, such as street lighting, which California now requires to be approved with votes “weighted according to the proportional financial obligation of the affected property.”²²⁹

With this background, I can set forth the final hypothetical. Bob and Sarah live in California and own property on the same block, and both have received an assessment ballot to vote on whether owners of property on the block should be assessed for the cost of new street lighting. Bob wants the lighting; he has children who play outside at night, and he thinks his children will be safer if the street is well lit. Sarah owns her property but lives outside California, renting out the property to business owners who have no need for the night lighting. She opposes the assessment. Should Bob be able to pay Sarah for her vote, say \$100 over the amount she would be assessed, in this special district election? The California

224. *Id.* at 733.

225. See DANIEL H. LOWENSTEIN, ELECTION LAW: TEACHER’S MANUAL 28-29 (1995).

226. See *Ball v. James*, 451 U.S. 355 (1981).

227. See, e.g., *Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098 (7th Cir. 1995) (applying exception to local school councils).

228. See *Kessler v. Grand Cent. Dist. Management Ass’n*, 158 F.3d 92 (2d Cir. 1998) (recognizing *Salyer* exception for Grand Central Business Improvement District); see also Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 431-45 (1999) (analyzing whether BIDS should be subject to “one person, one vote” principles).

229. CAL. CONST. art. XIII D, § 4(e). Voters adopted this rule and related measures through an initiative, Proposition 218. See Ken Ellingwood & Richard Winton, *Local Fee Races Discard Idea of 1 Person, 1 Vote*, L.A. TIMES, June 16, 1997, at A1.

Elections Code provision against vote buying does not apply to this election,²³⁰ and nothing else in the law appears to prohibit vote buying here.

Invoking the efficiency, equality, and inalienability criteria, I turn now to the normative question: how, if at all, does this differ from core vote buying? The efficiency argument in special district elections appears to track the efficiency analysis of core vote buying. When we do not consider externalities, the sale of votes in special district elections appears to benefit both Bob and Sarah. As Lowenstein remarks, the Supreme Court's recognition of the possibility of trade in *Salyer* seems to confirm its belief in the Coase theorem—in the absence of transaction costs, lessors and lessees will bargain to an efficient allocation of votes.²³¹ But the efficiency analysis must consider the third party effects as well. Vote buying may benefit the two parties to the exclusion of third parties, like the non-landowning residents in *Salyer* whose homes could be flooded depending on the votes of landowners and large lessees who bargained for the vote.²³²

The political equality analysis turns on whether one believes that there is indeed something “special” about these special district elections. To the extent these elections are identical to regular political elections, political equality argues against the legality of vote buying.²³³ But if these districts are not political entities but are more like corporations,²³⁴ political equality concerns do not apply.

The Supreme Court explained that special district elections are not subject to “one person, one vote” principles because the districts disproportionately burden one class of voters, such as the landowners in *Salyer*, and because they have a “special limited purpose,”²³⁵ such as the supply of water. At the extreme, the argument is that these districts are not really governments at all, but rather are private entities that have the trappings of government so that they can do things like raise money through government bonds or use government power of eminent domain.

230. CAL. GOV'T CODE § 53753(e)(4) (assessment ballot elections do not constitute an election for voting pursuant to relevant portions of the California Constitution or the elections code); see also Derek P. Cole, *Implementing Proposition 218: Will the Curtain Finally Close on Property Tax Reform in California?*, 29 MCGEORGE L. REV. 739, 756 (1998).

231. See LOWENSTEIN, *supra* note 225, at 28-29.

232. See *infra* text accompanying note 238. The vote-buying analysis here is separate from an economic analysis of whether the *Salyer* exception itself is efficient. Riker defended the *Salyer* line of cases, believing that deviations from “one person, one vote” principles were necessary to protect private property rights. See William H. Riker, *Democracy and Representation: A Reconciliation of Ball v. James and Reynolds v. Sims*, 1 SUP. CT. ECON. REV. 39, 59 (1982).

233. See *supra* Part I.A.

234. See *supra* Part II.B.

235. *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 720-21 (1973); see also *Ball v. James*, 451 U.S. 355, 363 (1981).

From an equality standpoint, however, the fact that these districts have government powers to raise money and condemn land, argues in favor of treating these elections like political elections generally.²³⁶ Arguably, when the government has such power over people's lives, it should not be able to exercise it without giving all residents an equal vote.²³⁷ In addition, some have rejected the Court's empirical claims in these special district election cases that the burden disproportionately falls on some small group rather than all residents. In *Salyer*, for example, one non-landowning resident of the district who was denied the vote had his house flooded under 15 feet of water because of a decision by the elected water district board of directors.²³⁸

These political equality arguments, however, go less to the question of vote buying than to the more fundamental question whether the Court should have created an exception to "one person, one vote" for special district elections.²³⁹ The more immediate question to consider is whether, *within* the special district election scheme, vote buying enhances or detracts from political equality. The answer is unclear. Vote buying in special district elections could enhance political equality by allowing those who are disenfranchised a method to repurchase their franchise. In addition, even if Bob is wealthier than Sarah, it does not seem objectionable to allow Bob to pay Sarah to vote to provide a collective benefit like lighting. Not all special election districts involve assessments for the provision of quasi-public goods, however, and in some circumstances payments for votes could lead to decisions that undermine political equality. The non-landowning resident in *Salyer* whose house remained underwater is a potent example of someone whose interests would not be taken into account

236. See Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 361-62 (1993).

237. See Briffault, *supra* note 228, at 444 ("One person, one vote is required where elected local governments have power to *govern*—to make policy, mandate payments, and coerce compliance—and can act outside the close control of a higher-level democratic government."). But see Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 92, 107-08 (1998) (arguing in favor of property owner voting in special block-level neighborhood districts on grounds such "institutions promise to improve the supply of local public goods, spawn inner-city microenterprises, and augment social capital"); Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 469 (1989) (arguing from a communitarian perspective that these special districts are not political communities appropriate for "the realization of the self-constitutive values of citizenship").

238. See *Salyer*, 410 U.S. at 737-38 (Douglas, J., dissenting).

239. Much has been written about this broader question. See the sources cited in LOWENSTEIN, *supra* note 87, at 98-100. For a recent judicial criticism, see *Kessler v. Grand Central District Management Association*, 158 F.3d 92, 126 (2d Cir. 1998) (Weinstein, J., dissenting) (discussing *Salyer* and commenting, "Suffrage so diluted is a charade").

in vote buying between large commercial landowners and large commercial lessees.

The inalienability question tracks the debate whether special election districts are more like government entities or like private corporations. Inalienability suggests no vote buying in government elections, but has no objection to vote buying in corporate elections.²⁴⁰ As with equality, the inalienability analysis may turn upon each particular special district. Water management districts may look like private enterprise, but a district to assess payments for a quasi-public good like street lighting looks like government. In the latter case, the inalienability of an assessment vote might cause Sarah to consider whether the installation of lighting on her street is in the public interest, and not what pecuniary gain she may receive for a "yes" vote. Thus, to the extent these special district elections affect the polity generally, inalienability argues against vote buying.

In sum, the question whether vote buying should be allowed in special district elections turns perhaps in part on whether one accepts the Supreme Court's view that these special districts are not really governments at all. The more they perform the same political functions, the stronger the equality and inalienability arguments against vote buying. The efficiency analysis is different, focusing on the likelihood that vote-buying agreements in these special districts will have negative externalities.

CONCLUSION

The analysis in Part II shows that non-core vote-buying practices may superficially resemble core vote buying, but they differ from both core vote buying and each other. Table 4 summarizes the results of my equality, efficiency, and inalienability analysis of these vote buying arrangements. Note that these are only my judgments as to how these criteria should apply. Someone committed to a broader view of the role of the corporation,²⁴¹ for example, would answer the equality (and perhaps the inalienability) question differently for corporate vote buying.

240. See *supra* Parts I.C and II.B.

241. See *supra* text accompanying notes 157-164.

TABLE 4
SHOULD VOTE-BUYING PRACTICES BE LEGAL?

Criterion	Core	Logrolling	Vote-Buying Practice				Special District Elections
			Corporate	Pay for Turnout	Campaign Promises/Contributions		
Efficiency	no	unclear	yes	unclear	unclear for both	no	
Political Equality	no	unclear/yes	yes	yes	yes for most promises: no for contributions to secure promises	unclear/no	
Inalienability	no	yes	yes	no	unclear for both	no	

The table reveals a number of interesting results. First, there are two cases where the three criteria are unanimous: in core vote buying, where the unanimous answer is a ban on vote buying, and in corporate vote buying, where the unanimous answer is to legalize the practice. This outcome alone points out the error of simply eyeballing a practice to see if it looks “enough” like core vote buying to ban it: corporate voting looks more like core vote buying than anything else, yet the results could not be more different from one another.

The analyses of special district elections show an almost unanimous result against vote buying. The equality and inalienability analyses are indeterminate, but turn on whether these districts properly may be viewed as government entities. To the extent special district elections approximate governmental bodies, the law should treat special district elections in the same way that it treats ordinary vote buying. The Supreme Court did not fully explore this question in *Salyer* when it hinted that voters might alienate their votes in special district elections.²⁴²

Unlike vote buying, corporate vote buying, and special district elections, payment for turnout is a mixed case where the three metrics point to different results. Equality, on the one hand, favors payments for turnout; inalienability on the other hand discourages such payments. The efficiency rationale is unclear. Of course, other methods to increase turnout—methods that do not involve payments—could sidestep these unclear policy results. But the best method, compulsory voting, is not a politically viable solution.²⁴³

In the absence of non-payment alternatives, one’s position on the turnout issue requires choosing among the values of efficiency, equality, and inalienability. The equality-efficiency debate is an old one that has appeared in other election law debates. The efficiency analysis of vote buying, however, may add something to this debate. A reader who rejects Epstein’s rent-seeking argument²⁴⁴ or Buchanan and Tullock’s collusion argument²⁴⁵ may believe the problem is with economic analysis, not with the ban on core vote-buying ban. In other words, Kaldor-Hicks efficiency is a poor criterion for choosing election law rules if it fails to make a convincing argument against vote buying.

The potency of the inalienability argument against turnout incentives is murky. Presumably turnout incentives cause voters to cast ballots

242. *Salyer*, 410 U.S. at 733.

243. See Hasen, *supra* note 70, at 2173-78.

244. See *supra* note 49 and accompanying text.

245. See *supra* note 58 and accompanying text.

because they get an immediate, self-interested incentive, not because of enlightened public interest. It is difficult to quantify, though, the degree to which turnout incentives cause voters to vote in their own self-interest, rather than according to the public good. Despite this difficulty, the revulsion many people feel toward vote buying suggests there is something to the inalienability argument. Thus, the choice about turnout payments depends upon difficult empirical assessments and a choice of which values to foster through election law. An analogy to vote buying provides no shortcut to a decision on whether or not to favor the practice.

Logrolling also looks like a mixed case, even though the efficiency analysis is indeterminate. Despite careful empirical study of logrolling, scholars have been unable to conclude that the practice is usually efficient.²⁴⁶ But an equality argument for logrolling suggests that, at least to the extent there is rough equality among logrollers, the practice should be encouraged. The tradeoff then is whether to sacrifice possible efficiency losses in order to gain on equality, as some like Sherman Clark have suggested.²⁴⁷ Those who oppose logrolling on efficiency grounds also would have to consider whether the enforcement costs of a logrolling ban would be too high.

Finally, the case of campaign promises and campaign contributions shows that the analysis along the lines of equality, inalienability, and efficiency is not always enough to decide whether a non-core vote-buying practice should be legal. In this case, First Amendment values and the nature of representation may lead one to favor the legality of practices that undermine one, two, or even all three of the values given center attention here.

The ease with which courts and scholars condemn vote buying masks a great deal of complication and contradiction beneath the surface. If nothing else, I hope this Article provides some tools for assessing which election practices, although superficially similar to core vote buying, should be legal or even encouraged.

246. See *supra* note 105.

247. See *supra* notes 112-113 and accompanying text.

