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Voting with Intensity

Saul Levmore*

Can intense preferences be accommodated in voting schemes without shifting power to wealthier citizens and organized interests? This article first situates the question within the larger issue of the inalienability of some legal rights, and then focuses on collective action problems among voters. These problems offer a way to explain our present rules and intuitions regarding vote buying and related matters in areas ranging from corporate law to associations and to campaign finance reform. But in large-scale general elections, collective action problems are likely to doom strategies for extracting information about intense preferences, and they may even produce perverse results. Still, there may be room for careful innovation, aimed at capturing information about intense preferences.

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I. INTRODUCTION

Imagine that the following announcement is made two weeks before the next presidential election:

We are supporters of candidate B who, as you know, is trailing G in the polls by four percentage points, 52-48. But we feel strongly about our candidate and the policies he supports. We hope that some of you who have planned to vote for the front-runner, G, or not to vote at all, can be convinced to vote for B. Toward this end, we promise that if B is elected we will contribute $1 billion to the environmental causes that G supports.

This sort of promise is probably unenforceable, and it may even be criminal to make an announcement of this kind. The hypothetical offer by some of B's supporters represents an offer to buy votes, or at least to induce some particular voting behavior, and vote buying (and selling) is considered antithetical to democratic principles in both popular and academic accounts. But there are a number of reasons to re-examine the conventional view of vote buying and selling. First, the potential for computerized voting and trading of voting rights means not only that new forms of vote selling are likely to appear but also that restrictions on vote trades will be feasible. If, for example, a seller could condition a sale on a specified use by a buyer, then some vote trading or refined proxy assignments might become quite attractive. Second, there is room for an improved explanation of the con-

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1. See Saul Levmore, Precommitment Politics, 82 VA. L. REV. 567, 581-82 (1996) (suggesting that the Speech and Debate Clause may present one problem with enforcing political precommitments asserted by a member of Congress). I say "probably" unenforceable because a failure to make the payment might result in a claim for fraud. As for the criminality question, note that this is not a payment to a "person" in return for a vote, 18 U.S.C. § 597 (West, WESTLAW through P.L. 106-170), but rather presents a question of corrupt payment or bribe, unless the argument is that it is an indirect payment—but one that is close enough to a direct payment to a person—that offends the statute.
ventional ban on vote selling. Part of my explanation builds on an understanding of a collective action problem among sellers of certain kinds of goods. This explanation suggests where vote trading might be (and has been) tolerated, and it also provides clues for a general theory of inalienability. Finally, the conventional view pays insufficient attention to the likelihood of relatively intense voting preferences. Conventional markets enable intense preferences to be satisfied because participants can bid or substitute for things they very much want. Indeed, there are very few arenas where intense preferences cannot be satisfied. In most settings, however, wealth empowers players to satisfy their preferences, and this presents a problem where voting rights are concerned because these rights are often exercised precisely where we have decided to make decisions through politics rather than markets. The obvious question in the case of voting rights is whether intense preferences can be accommodated without shifting enormous power to wealthier citizens.

Part II of this article sets out a brief theory of inalienability and locates voting rights in this theory, or explanation, of inalienability. Part III explores collective action problems among voters and works with the idea of likely and unlikely voters as separate groups. Likelihood (of voting) may be, but need not be, strongly correlated with intensity. An immediate payoff is that the collective action angle illuminates recent changes in corporate law, where vote selling is now sometimes tolerated. I suggest that these collective action problems offer an improved explanation of our present rules and intuitions even outside of corporate law. At the same time, they suggest some possibilities for change. Part IV examines the idea of accommodating intense preferences. In large-scale general elections, collective action problems are likely to doom a market or other means of extracting information about intense preferences. Indeed, there is the possibility of obtaining perverse results, and this is an outcome that (as we will see) seems abhorrent. Still, there may be room for careful innovation, with some market-like mechanisms, aimed at capturing information about intense preferences.

II. INALIENABILITY, WEALTH, AND THE SURPRISING ROLE OF MARKETS

A. The (Sensible) Conventional Hostility

Inalienability requires explanation. Parties who choose to trade their goods and rights will virtually always be made better off by such trades. Legal rules against these trades are therefore unusual, not to mention inconsistent with conventional notions of liberty, and are likely to be motivated, or at least explained, by reference either to external effects on non-trading parties or to serious social policies.
In the case of voting rights, there is something of a surfeit of plausible, but somewhat flimsy, explanations as to why it is illegal to sell or buy votes in general elections. Following some of the short-cuts cleared by Rick Hasen in an important recent piece, there is, first, the danger that legalized vote buying will benefit wealthy persons who may leverage their superior initial endowments into political advantage. 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 can not or should not control. Vote selling might, for instance, lead to a different foreign policy or to a different public school curriculum even when these policies do not make their supporters economically better off. Second, there is the danger that a market in votes would make winning in politics yet more expensive and in this way put added pressure on winners, once in elected office, to extract payments from interest groups or to divert resources from the common good. There is also the idea that voting is a kind of collective decisionmaking experience, greater than the sum of individual votes, so that something important is lost if an isolated voting right is sold for the individual seller's selfish gain. Hasen labels these three explanations as equality, efficiency, and anti-commodification, respectively. The value of the over-abundance of explanations is that it illuminates the mixed reaction law sometimes has or should have to vote buying outside of general elections, because it is disputable whether the familiar arguments against vote buying in political elections are muted or absent.

These conventional arguments are, as I have already intimated, vulnerable. The equality argument is a bit hollow not only because it fails to dis-

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2. Richard L. Hasen, Vote Buying, 88 CAL. L. REV. 1323, 1329-31 (2000). I will use the expression “vote buying” instead of “vote selling” when it seems appropriate to emphasize something about the purchasers. “Selling” draws attention to the fact that sellers, though they are poorer than buyers, might be made better off through sales. The equality argument is perhaps the most common one found in the literature. See, e.g., Daniel R. Ortiz, The Democratic Paradox of Campaign Finance Reform, 50 STAN. L. REV. 893, 897-901 (1998) (analyzing the position that campaign finance reform is necessary to prevent the wealthy from exerting a disproportionate influence on politics).

3. This “efficiency” argument might of course be used to limit campaign contributions as well, but existing law in this regard is taken as given. As far as I know, the argument appears first in Richard A. Epstein, Why Restrain Alienation?, 85 COLUM. L. REV. 970, 987-88 (1985). For a discussion questioning the “efficiency” argument, see note 24 infra.


5. Legalized vote selling is found in some special districts created to manage resources, in corporate law as discussed in the text accompanying notes 41-45 infra, and perhaps in closed residential communities and the like. See Hasen, supra note 2, at 1348, 1364. It may, of course, be found in slightly camouflaged form in legislative (or informal) logrolling and in political campaign expenditures and fundraising. See id. at 1338, 1359; text accompanying notes 71-80 infra.
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tinguish voting rights from so many other goods—where there are wealth effects but where we normally think that poorer people benefit from their ability to trade—but also because present law permits indirect vote buying in the form of campaign contributions and expenditures. Money plays an enormous role in politics and it might be easy to allow some direct vote sales without increasing that role. It might even be possible that direct sales of votes would reduce the role played by wealth if only because low-income sellers might have the most to gain from the new asset, selling votes in some elections in order to buy votes in others. Wealth effects might also be held constant if vote selling was legalized with a cap on buyers’ expenditures equal to the present limits on campaign spending.6

The efficiency explanation, which posits that the likely increase in the expense of elections would result in an increase of post-election money diverted by elected agents, is much weakened by the observation that self-interested elected officials might extract as much benefit for themselves as possible regardless of the cost of gaining office. It is not obvious whether increasing the cost of a political campaign would generate elected officials who were better or worse agents of the electorate any more than it is clear whether increasing the compensation of elected officials would make things better or worse.7

Finally, the anti-commodification argument, which focuses on the danger that vote selling would undermine the collective decision-making experience, suffers from something of a circularity problem. If legalized vote selling would bear positive effects or could be shown to benefit poorer citizens, then conventional intuitions about commodification would likely be reversed.8 It may well be that the anti-commodification argument has a non-

6. For a discussion on indirect vote buying, see text accompanying notes 33-37 infra.

7. Higher compensation can attract better candidates and encourage agents to perform well in order not to risk losing these highly compensated positions. On the other hand, increased compensation might encourage corrupt practices by those who aspire to these highly compensated posts. I would prefer to label the “efficiency” argument an agency argument because it is about the behavior of the political agent whose honest activities may be inefficient. But I will abide by the prevailing nomenclature.

8. This seems to be the case regarding other possible “markets.” For example, if school vouchers turn out to improve public schools and benefit poor students, commodification will surely become more acceptable. For instance, commodification became more attractive in the case of staffing the armed services as it appeared that conscription was itself unequal and otherwise flawed. See generally, William A. Fischel, The Political Economy of Just Compensation: Lessons From the Military Draft for the Takings Issue, 20 HARV. J.L. & PUB. POL’Y 23 (1996); Susan Rose-Ackerman, Inalienability and the Theory of Property Rights, 85 COLUM. L. REV. 931, 964 nn.92-93 (1985). The case against the Civil War era system of drafting people but allowing them to buy replacement labor is surely reinforced by arguments that this sort of commodification might feed back and affect the country’s willingness to go to war and the method of engaging in war and so forth. In all these cases, the inclination against (or for) commodification seems driven in large part by expected consequences.
instrumentalist component, but this feature is difficult to isolate. There are many arenas where market transactions seem to add to, rather than subtract from, the implicit value of the collectively sponsored asset. For example, public education seems neither demeaned nor particularly commodified by the presence of private schools with explicit tuition tags or even by disclosure and open discussion of per-student expenditures in the public schools.

A different version of this argument might begin with a particular conception of democracy and show how vote buying (but not modest contributions to campaigns, for instance) is antithetical to this conception. But this is not easy to do. If, for example, one begins with a conception of democracy as a deliberative conversation about values that necessarily ends with some head counting (and also some judicial intervention in favor of core values despite a contrary majority vote), it is not obvious that vote buying need be abhorrent. If wealth effects can be controlled, vote trades might focus deliberation rather than supplant it. The hypothetical offer by supporters of the trailing candidate of a payment to environmental causes might, for example, serve to provoke discussion of environmental values. Price tags can defile many things, but they offer a kind of transparency that can promote honest discussion and decisionmaking. My aim in this article is to cast some light on aspects of vote buying, intense preferences, and political decisionmaking that will be useful for many, if not all, perspectives on the nature of democracy itself.

Perhaps the most defensible or intuitive form of the anti-commodification argument stresses the communal nature of voting; a voting right is like an invitation to a party, and both are nontransferable for the same externality reason. One problem with this line of defense is that it leaves no room for intense preferences. Another is that it ignores the comparable externality produced by one’s failure to vote at all.

There is obviously more to be said about the strengths and weaknesses of the several conventional explanations for the ban on vote selling. I think it plain, however, that the inherited explanations allow some room for improvement.

B. The Ban on Vote Selling as Another Restriction on Alienability

1. *Inalienability and fixed output.*

It is possible to think of voting as unique but it is also defensible to think of voting rights as contained in a class of things generally held inalienable.

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9. Thus, the anti-commodification argument seems neither weaker nor stronger in the presence of rules permitting (or restricting) campaign contributions, despite the fact that monetary contributions commodify political participation.
The anti-commodification argument reflects the latter approach. In contrast, the efficiency perspective emphasizes the distinctive quality of voting rights inasmuch as it does not provide purchase on such things as child adoption, military service, and citizenship where regulation in the form of inalienability is also found. It is not clear whether the distinctive qualities of voting improve or weaken the case for inalienability, but my aim here is not to insist on the relevance of distinctive qualities but rather to explore, in positive fashion, some common features of inalienable rights. There are, for instance, collective action problems that are unique to voting, but I defer these problems and their implications for regulating the sale of votes until Part III. The present discussion links votes to other inalienable things, and suppresses discussion of that which is different about voting.

Inalienability is, of course, a large topic of its own, but for present purposes it is useful to enumerate a few inalienable—and indeed generally non-transferable—items.\textsuperscript{10} U.S. law is hardly alone in barring the sale of votes, citizenship, babies, and one's vulnerability to military conscription.\textsuperscript{11} Nor do we generally permit the transfer or sale of positions in government queues; for example, two parties scheduled to meet in court cannot simply bargain to switch court dates with two others who might be especially eager to have their dispute resolved.

An interesting, common characteristic is that the volume or output of these items is relatively fixed and there are no close substitutes. In these cases, while a market might serve as a means of allocating rights or benefits to higher valuing users, it is unlikely to have a supply effect. By way of explanation, consider the features of competitive markets that we commonly extol. Markets are said to encourage efficient producers while they allocate resources and goods to their highest valuing users. One problem with the latter claim is that wealth differentials obfuscate the signals that potential consumers can send about the values they attach to goods. If A is better endowed than B, then A's higher bid for a good does not provide much information as to the relative value that A attaches to the good or to the intensity of A's preference for this good compared to substitutes. Had B been even slightly wealthier, B might have outbid A for the good. To be sure, if C sells a good to A rather than B, we can say that C and A are better off than they would be with a rule of inalienability, but it is obviously possible that utility would be maximized if B rather than A (or C) enjoyed the good in question.

\textsuperscript{10} There are, to be sure, many things that are more transferable than alienable. Body organs and babies, for example, are somewhat transferable in the sense that donors' and biological parents' wishes are normally given substantial consideration. See generally Susan Rose-Ackerman, supra note 8 (arguing that efficiency, specialized distributive goals, and responsible democracy justify inalienability rules in certain contexts).

\textsuperscript{11} See, e.g., CONSCRIPTION: A WORLD SURVEY: COMPULSORY MILITARY SERVICE AND RESISTANCE TO IT (Devi Prasad & Tony Smythe eds., 1968) (surveying more than 70 jurisdictions and finding not one that permits private sales of military service obligations).
Markets have many wonderful features but they do not guarantee that goods will end up where they are most wanted.

This wealth "problem," for lack of a better expression, is closely related to the equality explanation for the ban on vote selling. If we could correct for wealth differentials, vote selling would surely be more attractive to many observers. Where wealth differentials are present, A might buy B's vote (if legally permitted to do so) even though B is an equal or higher valuing user of that vote. And wealthy people like A might systematically favor different political outcomes than would people with endowments more like B's, so that there is at least an argument for barring trades despite the fact that the buyer and seller are made better off than before. This argument applies to some but not most other inalienable commodities. And to the extent that wealth effects, and the inability to be sure that sales move goods and rights to higher valuing users, are linked to the ban on vote selling, there is the question of why we do not bar sales of bread or other commodities, when there is also the problem of these other goods settling on users who simply have more wealth.

Even where egalitarian distribution or some form of central planning does a better job of locating the highest valuing users, markets are likely to do a better job than planners or voters when it comes to encouraging a level of production that not only maximizes wealth but utility as well. Poor citizens might fare better as more things are given out in egalitarian fashion but they will do worse as more things are overproduced and others underproduced in the absence of market signals. This is surely not the place to formalize these claims, and the central point is, in any event, fairly simple: While markets are often advertised as allocating goods to the highest valuing users, unequal wealth makes this claim contestable. The much more easily defended claim, and one that is normally advertised, is that markets encourage a larger economic pie, which is likely to find its way to the hands of many participants, wealthy and impoverished alike. In between is the plausible claim that even with wealth inequality, markets do a good job of encouraging a reasonable level of production of goods; utility is unlikely to be

12. Thus, there may be externalities when citizenship rights are sold from poor to wealthy persons, but perhaps less so when body organs, babies, and military service responsibilities are sold. Where A is wealthier, A might trade good w for B's good v. But if B were wealthier, we would not see this trade of v for w. B is still better off trading with A, unless a ban on exchanges will somehow lead to wealth redistribution or other relevant changes. Therefore, the argument for inalienability needs to include some external effect on C.

13. The question is whether wealth effects, and the likelihood of missing out on high-valuing users, can explain those things held to be inalienable. Even if we have some fabulous method of distributing commodities to the highest valuing users, we must of course recognize that as we remove commodities from circulation, in a manner of speaking, we reduce the incentive to work and to acquire wealth. If this is the best way to undertake redistribution, there is some optimal degree to it.
increased in switching to a scheme in which some non-market force ordered or contracted for production levels. Finally, even where markets enable wealthy but relatively low-valuing users to acquire goods, these purchases do improve the positions of both buyers and sellers.

It is thus possible that markets are superior to likely alternatives at the task of encouraging socially desirable production levels, but that markets are less impressive in allocating goods to high-valuing users. Central planners, egalitarian rules, or social conventions regarding voluntary wealth transfers might well improve upon markets as utility-increasing allocators for any given level of production. It is therefore interesting that many of the goods normally held to be inalienable, ranging from one's place in a queue for a kidney transplant to jury service to college admission, are fairly fixed in output and have no close substitutes.

It goes almost without saying that the preceding discussion is positive rather than normative both because it might have been a mistake to have fixed output in the first place and because there is the normal presumption that voluntary trades between parties increase utility—unless there are serious negative externalities. The observation here is simply that markets may be treated with greater hostility precisely when one of their usual tasks is otherwise accomplished.

2. Applications.

If voting were compulsory everywhere, then the inalienability of voting rights would be a neat example of this idea of inalienability associated with output that is elsewhere fixed. Output is fixed by demographic facts and some basic rules, but a market (or even rising prices) for votes would not encourage more votes, except in the very long run. A normative argument for inalienability now relies on the presence of external effects, and it is buttressed by the obvious wealth effects. If wealthy A purchases B's vote, it is plausible that A and B are slightly better off, but that C is significantly worse off. The argument must assume that transaction costs or wealth effects prevent C from buying B's vote or from paying A or B not to transact with one another.

Even where voting is not compulsory, there is no great need for a market to encourage optimal output. If the market price of a voting right were to rise, it is true that more voting rights would be exercised, so that a market

14. Wealth redistribution will, of course, generate new allocations and therefore new production levels of most goods. However, the point is that a market at least provides some signals to producers.

15. Note that I use the awkward term "fixed" rather than "inelastic" to describe the output level of such things as citizenship rights and military forces. The idea is not that there is price insensitivity but rather that the level is fixed by some external decisionmaker or constraint.
might encourage more supply of a sort. However, because each vote has some impact on the value of others, the casting of additional votes would not indicate the right level of production in the same way that an increase in the price of bread would stimulate greater production of that commodity in a desirable way.

Somewhat similarly, in the case of military conscription, we can think of military planners as first deciding on a staffing level without bothering to think about labor prices as much as a private firm would. Volunteer armies may well deploy fewer troops than comparably situated conscripted armies, but by and large the higher economic cost of volunteers might be roughly comparable to the higher political cost of increased conscription. One way or the other, I think it fair to think of the troop numbers as elsewhere fixed. With a stable population, a market in obligations to perform military service would mostly reshuffle this work toward the poor. Alienability is likely to generate a market infected deeply and broadly with wealth effects. Again, individual trades will make participating parties better off, but it is plausible that there is an externality in the form of distorted political decisions about warmaking once the demographic composition of the army is altered through trades.

In the case of citizenship rights, we can think of the volume as fixed by the host country in some path-dependent manner. Even if the birth rate is sensitive to a market price in citizenship rights (which is unlikely in most countries), a high birth rate might well cause the country to limit immigration so that the volume is fairly insensitive to market signals. And with fixed volume, the market performs one less function. On the allocation side, there would be some trades toward higher valuing users, but this is apt to be dominated by wealth effects, which in turn may well generate external effects in the form of new political equilibria.\(^\text{16}\)

This claim about where we find inalienability in law is much improved by noting the imposition of inalienability outside of formal law. Universities are sometimes in the position of allocating scarce resources among their enrolled students. These resources include desirable dormitory rooms, spaces in oversubscribed courses, and interview slots with on-campus employers. With respect to every one of these goods, some students likely have significantly more intense preferences than others and yet these preferences can normally not be satisfied with money bids or by cross-purchases among students. Inalienability and non-transferability are the hallmarks of these systems. This attempt to eliminate the influence of money might promote a

\(^{16}\) Other inalienable things, such as babies and some body parts, are obviously not fixed in volume, and so the positive and normative arguments must be different. We might focus on the disutility of sensitive observers who do not like seeing certain goods move to wealth-empowered buyers. But this is a slippery slope, and perhaps it is sufficient to say simply that in these areas it is plausible that a central planner could do better in finding a higher valuing user.
sense of community; wealth differentials are minimized once the students enroll. But it is surely noteworthy that if students could use money to bid for these things (from the university or, perhaps safer,\textsuperscript{17} from other students after an initial assignment of rights), wealth might dominate relative intensities in determining final allocations. Moreover, there are means of encouraging allocations to higher valuing users, by first obtaining information about preferences in ways that are mostly unaffected by wealth. Thus, universities can and sometimes do establish shadow markets by issuing points, or some comparable currency, that students can use to bid for these resources from equal starting positions. The university then assigns the scarce goods to the highest bidder. By accepting these points for one kind of good (such as classroom slots) and by centralizing information about students’ bids and enrollment (or other utilization) decisions, the system can enforce the ban on outside currency and on transferability. This ban is likely to block some Pareto-improving moves but, again, wealth effects are suppressed where there is no concern about work effort and the size of the pie, where there is another means of encouraging utility-increasing allocations, and—most telling—where output is fixed, in this case by the university’s dormitory facilities, classroom sizes, and so forth.\textsuperscript{18}

C. Limited Transferability

In virtually all cases where markets are suppressed, there is resort to other mechanisms for occasional transfers to high-valuing users. Hospital committees often allocate available body organs; military conscription systems make room not only for volunteers but also for some citizens with intense preferences against serving the country in this fashion; immigration laws reserve citizenship slots for some high-valuing users. Some of those who gain from these non-market allocation devices are not wealthy and might have been less successful if these rights were openly traded, but in many cases wealth is an advantage.\textsuperscript{19} Somewhat similarly, in the case of political participation, there is some room for those with intense preferences to

\textsuperscript{17} It is “safer” in the sense of reducing the fear that the university would sometimes behave strategically and create shortages in order to maximize its revenue.

\textsuperscript{18} Note that the transferability of queue positions might encourage socially wasteful steps on the part of potential sellers. Opportunistic new entrants might wait in queues in order to have spots to sell. But there are complexities to this argument, and I do not pursue them here.

\textsuperscript{19} Thus, rules against selling children can be explained with reasonable assumptions about the “external” effects on these children, or with various claims about social policy. Yet, there is little doubt that in the universe of prospective adoptive parents, determined, wealthy “buyers” are advantaged, if only because they can employ agents and travel to foreign countries in search of available children.
engage in political activity and to contribute funds; these resources can be used to influence outcomes through advertising and other means.\textsuperscript{20}

If the political arena is unique, it is because participants with intense preferences might choose not to expend much energy or financial resources, even to the extent permitted, because they recognize that their own efforts are likely to accomplish nothing. In other settings, each contributor adds something at the margin because success and failure is not an all or nothing matter. In politics, however, participation will seem irrational to the cool scientific observer. The obvious question, then, is whether there are ways of tapping into intense preferences in the presence of the collective action problem inherent in political elections. This question is deferred until Part IV, in order first to explore the collective action problems among voters and the way in which these problems might explain the familiar hostility to a market in votes.

III. THE COLLECTIVE ACTION PROBLEM AMONG VOTERS

A. Two Collective Action Stories

1. \textit{Precommitting not to sell: the simple collective action story.}

If there is a case to be made for any vote selling, either on grounds that trades are generally beneficial or on grounds that it is good to take intense preferences into account, it might begin with the idea just expressed, that we might lose too much by not permitting any transfers of voting rights. Alternatively, a normative case might build on the possibility of turning the wealth effects argument on its head through the observation that poor people might gain a great deal if they could sell their voting rights. Much as a tax on voting is abhorred as regressive (among other things, perhaps), the ability to sell one's vote would appear to offer a remarkably broad and egalitarian benefit. Whether or not it is the case that those who purchased votes would use their superior initial wealth to gain political power, it would seem that less well-endowed sellers of votes could gain from voluntary trades.

This question of who gains and who loses from limits on alienability suggests once again a longer list of comparable cases or analogies, because

\textsuperscript{20} Direct transfers are barred in the case of voting (and military conscription) but not in the other examples. In some cases, the possibility of occasional direct transfers removes pressure on the general rule of inalienability. Thus, if transferability were an all-or-nothing question, there might be overwhelming sentiment for making kidneys completely alienable, rather than forbidding sales and donations altogether. And if the choice were between forbidding every proposed child adoption or allowing all transfers, it might even be that most observers would prefer a free market rather than a freezing of family units with no "transfers" at all.
there is often controversy about claims of distributional consequences. Often, as in the cases of bans on the sale of labor, sexual contact, and procreative rights, the empirical questions are difficult precisely because output is not exogenously fixed. But my goal in this Part is to explore the distinctive features of voting rights. Voting is unique because each holder of a voting right knows that he or she is unlikely to affect the outcome of an election. Here, however, the focus is not on the overworked question why anyone votes but rather on how sellers might behave in a world where a substantial fraction of voting rights are in fact exercised.

The simple collective action problem, as I will call it, is that if vote selling were legal, many entitled individuals would sell their votes at trivial prices even as these voters recognize that a large block of votes is a valuable asset. But it does no good for an individual to hold out for the value that a buyer might attach to each vote in such a block because there are many other potential sellers willing to part with their shares for some trivial price. Absent some coordination strategy, these voters reason that since others will sell at a low price rather than be left holding essentially worthless rights, they too may as well sell at a price greater than zero but far less than what might be obtained from an eager buyer if these sellers could coordinate.21

Therefore, there is a ready explanation for the rule against vote selling that has nothing to do with wealth effects or with most other inalienability rules. Sellers have something of little or no value when held or exercised individually and so they protect themselves, or can be seen as doing so, by agreeing not to sell their votes. A legal ban on vote selling might be a systemic method of coordinating this agreement. There is no constitutional commitment to or against a market in votes. Nor is there much in the way of explicit recognition of collective action problems alongside the development of legal regulation of voting.22 Still, this would hardly be the first legal rule to be understood as an unarticulated (precommitment) solution to a collective

21. The argument is similar to many other collective action problems. In the corporate context, it has been noted that the collective action problem of shareholders rushing to sell their votes (if permitted to do so) would exert a "strong influence over the market price of votes" that would not ordinarily be entirely offset by competition among bidders. Frank H. Easterbrook & Daniel R. Fischel, Voting in Corporate Law, 26 J.L. & ECON. 395, 411 (1983). This anticipates several of the steps taken here. It is interesting that Easterbrook and Fischel do not say that this collective action problem explains or justifies a ban on vote selling, perhaps because such an approach to collective action problems might then justify some of the very defensive tactics in the face of tender offers that these authors are disinclined to favor. In the corporate context, to be sure, there are market tests as to the wisdom of defensive tactics, but in the voting context it is not as if we can see how the price of a voting right changes with stricter or more relaxed inalienability rules.

22. It is interesting to imagine the legal hurdles that might be placed in front of an attempt to legalize vote selling in general elections (although I do not recommend vote selling in general elections here). Perhaps the Equal Protection Clause would be thought to require equal voting rather than equal ability to vote or sell. Certainly a centralized auction, with no popular election, would run afoul of our constitutional structure if the auction allocated constitutional posts or contained enough legislation to take away the decisionmaking authority of elected officials.
action problem. It is not enough for these potential sellers to be protected against their whipsaw problem, as it is known in corporate law, by a promise that early sellers will be protected in the event of later price increases. If vote selling were permitted, dispersed rights holders might want such a rule like that available for corporate shares in tender offers, such that disinclined sellers need not fear that they must rush to accept a price. However, a problem in the election context is that enough sellers might rush to sell their shares at a price close to zero.

The simple collective action story has its weaknesses. For one thing, why are these potential sellers any better off after they precommit, as it were, not to sell their votes? If it is because a buyer might do something they do not like, then we are back to a kind of efficiency argument that has less to do with the sellers' collective action problem than with the buyer's antisocial intentions. The sellers individually value their voting rights at zero, let us imagine, and the buyer offers each of them a small sum, while the buyer places a yet greater (average) value on these shares. If the sellers could cooperate perfectly, then they might bargain with the buyer and hold out for a better price. Alternatively, we might find them attaching significantly more

23. As such I do not dwell on such fundamental but familiar questions as how persons who cannot coordinate ever agreed on a precommitment strategy or what to make of positive theories that are unaccompanied by evolutionary tales.

24. This is not the place to discuss the Williams Act and whether it is really a good thing, but it might be useful to observe an important difference between voting in the context of tender offers and in general political elections. In the tender offer context, those who do not sell their shares remain on board to enjoy future corporate performance, to sell in a later transaction, or to litigate if they are somehow excluded. But in elections, those who do not sell votes in an initial round enjoy no special or comparable position later on.

25. The "efficiency" argument is based partly on a variety of collective action problems. The argument is that buyers might work harder to extract benefits sufficient to justify their investment in votes. With no collective action problem, the sellers might contract to guard against this "misbehavior" and then perfectly monitor the elected buyer and enforce their contract. In order to avoid juggling all these collective action problems at once, we might simply think of the efficiency problem as arising out of the sellers' inability to specify all that the buyers may not do. This is a familiar problem in politics where there are serious and even insurmountable legal obstacles to political commitments. See Levmore, supra note 1.

One weakness of the efficiency argument is that it imagines the elected official as doing more harm if the official has spent more money to gain power. If the model assumes a selfish actor, it is not obvious why explicit vote buying should make anything worse. A profit-maximizing politician will get away with whatever he can even if it is cheap to be elected.

As we will see, the efficiency story is also a bit just-so in character. Where vote selling is in fact permitted, we take for granted that outright theft and other agency problems by those who are elected must be handled by straightforward rules and their enforcement. In the corporate context, for example, a buyer might spend money in order to gain a position from which insider trading or other non-pro-rata extractions are possible. If vote selling is not permitted, then we might say that the law hopes to discourage such buyers, and that more direct enforcement is costly. But if vote selling is permitted, then the claim is that there are advantages to transactions involving voting rights, and that antisocial behavior can and must be dealt with through more straightforward prohibitions.
value to their combined votes than to their individual rights, perhaps because they would combine with voters who had like preferences, that the same buyer could no longer afford their price. Finally, even if the sellers cooperate, they may take but a small share of the gain from trade with the buyer because of the presence of other groups of sellers who do not combine into a united sellers’ group because of different views as to the desirability of what ready buyers are likely to do once in political power.26

It is sufficient, however, to say simply that the collective action problem among sellers might lead these rights-holders to favor a rule barring vote sales. At the same time, the benefit to these potential sellers from such a rule is likely to be modest. They may prevent a buyer from gaining at their “expense,” but they are not necessarily better off than before.

One interesting possibility is that fearful, potential sellers could legislate a minimum price for vote selling and buying. Transactions would then leave them financially better off than before. Alternatively, likely buyers might suggest such a requirement in order to get sellers to legalize vote selling. But disagreements as to whether given transactions should be barred or left unregulated are not often resolved with minimum price legislation, perhaps because it is not obvious how to set such prices and perhaps because minimum price rules may be harder to enforce than complete bans.27 Still, I think it plausible that the simple collective action problem offered here best explains the conventional ban on vote selling. At the same time, conditions could be stated under which potential sellers, which is to say most voters, would now agree to allow limited vote selling.

2. Likely and unlikely voters.

There are, I think, stronger collective action stories related to vote selling, and they are best told by conceiving of entitled voters as falling into two groups, likely and unlikely voters, or L and U. The simple collective action story already told, and then derailed a bit by the question of how precommitting voters would gain from a ban on sales, might be understood as implicitly focusing on U. This is because there is likely to be a positive correlation between voting and valuing one’s vote highly, and we can expect those...

26. I avoid the question of whether there are more likely to be multiple buyers or multiple, competing groups of organized sellers.

27. The most obvious possibility is to ask for a price that reflects the per-voter expenditures in lively campaigns. It goes almost without saying that we have minimum wage legislation even though there is a comparable valuation problem. Interest groups simply look at market prices, however infected by various collective action problems and other imperfections, and “search” in the direction of prices that are slightly higher than the inherited baseline. This is not a bad strategy. If employment rates suddenly dropped, these same interests could easily obtain a rollback to lower minimum wages. Similarly, minimum vote prices could be set through trial and error.
who attach low values to their votes to part with them more readily. 28 I have no doubt but that one can complicate the matter by constructing an account of why reasonable and even economically rational actors do not vote in the normal course of events but then value their votes relatively highly when the opportunity to sell arises. 29 This account might begin with the notion that a fair number of potential voters who stay away from the polls do so because they have reason to think that those who are likely to vote reflect the division of opinion among all eligible voters in an adequate manner. These observers might value their votes in the sense that they would not want to sell because buyers with many votes might make election results less predictable than they are at present or because these results would become poorer reflections of actual (eligible voter) preferences. There are many other stories that could be told and there is always the danger of confusing the idea of voters attaching high “value,” which may be synonymous with relatively intense preferences, with something deeper which also causes voters not to sell their shares too quickly. But I think it fair to proceed with the simplifying assumption that on average those who vote have higher reservation prices for their voting rights than those who do not. If wealth effects could be set aside, we might again equate high reservation prices with relatively intense preferences.

Other assumptions are also convenient though generally unnecessary. We might imagine that likely and unlikely voters can be identified as such, perhaps because of past behavior, and that likely voters are no more apt to organize or otherwise overcome their own collective action problems than are unlikely voters. Finally, the case for some vote selling in general elections is made stronger by the assumption that likely voters are wealthier than unlikely voters. 30

Unlikely voters, U, may well care little about precommitting to bar the sale of votes. They attach low values to their votes, and they might very much like to precommit to some method of collective sale or even to some minimum sale price. But no organizing intermediary has thus far succeeded in attracting them. A bar on vote selling avoids a kind of exploitation by organized buyers, as discussed in the preceding Section, but leaves U where they were before they cooperated to legislate a ban. If U cannot sell their votes, L will decide the election, but this may or may not be better for most members of U than allowing vote buyers (a subset of L) to decide the election.

28. “Low value” is, of course, partly a function of wealth, so that low-valuing shareholders might simply sell first because they attach greater value to the money that they will receive.

29. Another simple possibility is that non-voters are lethargic or, in rationality terms, inclined to place a high value on their own leisure activities. They may therefore attach a high price, or cost, to the steps necessary to vote—but also to those necessary to hear from buyers and sell one’s vote.

30. These assumptions or simplifications are fairly reasonable, I suspect, but mostly they serve analytic convenience rather than some particular conclusion.
It is more certain that $L$ benefits from a universal rule barring the sale of votes. At a trivial level, $L$’s own votes are more valuable if fewer votes are cast. The gain is trivial because each individual’s vote has negligible impact after votes are purchased from some sellers drawn from $U$. From the point of view of $L$, the serious problem is that organized groups or well-endowed buyers can be expected to accumulate shares sold by $U$, because these low-valuing rights holders will be the first to sell, while the members of $L$ are by assumption as disorganized as $U$ and in no position to bid for these shares. It is as if the active portion of the electorate is being asked whether it would like a rule in which corporations, unions, and other organized interest groups could buy votes. Even if these purchases reflected intense preferences, and even if the electorate thought that some expression of, or credit for, such intensity was a good idea, the answer would likely be “no” because most members of the usual electorate, $L$, do not see themselves as well represented by these groups. Most members of $L$ would prefer to vote and not to have others amass votes through vote buying. In the long run, it is not surprising if legal rules conform to the preferences of the overwhelming majority of $L$. In short, while the simple collective action explanation for the ban on vote selling emphasizes low-valuing, less intense voters who will rush to sell cheaply, the more complex argument focuses on likely, perhaps more intense, voters who do not wish to empower the best organized of their own

31. Imagine that $A$ is representative of a majority of the likely voters, $L$, and that $A$ prefers candidate $X$ over $Y$ by $20$. If $A$ would sell his vote, he would want at least $20$ (more) before selling the vote to $Y$ rather than to $X$. $A$ might also be willing to buy votes, but he knows that $X$'s election will benefit many voters, and so $A$ has no intention of spending his own money in the hope that he is the marginal, or swing, vote purchaser. The same can be said of $B$, $C$, and $D$, the other dispersed likely voters who prefer $X$ by $20$, so to speak. Meanwhile, $E$, $F$, and $G$ form the well-organized minority of $L$, and they each prefer $Y$ over $X$ exactly as $A$ prefers $X$ over $Y$. Finally, $H$ and $I$ are unlikely voters; each would vote for $X$ if voting were costless (but it is not). $H$ (and $I$) would sell her vote to $X$ (or to $A$) for $3$ (or even for $0$), but $H$ would only sell to $Y$ (or to the EFG group) for $23$.

In this example the EFG group can overcome its collective action problem and raise up to $60$ to secure a victory for $Y$. $H$ and $I$ will accept less than that amount for their votes. $A$, $B$, $C$, and $D$ thus prefer a world without vote buying because vote buying allows the organized minority of likely voters to buy votes from unlikely voters. Some unlikely voters, like $H$ and $I$, and the organized minority of likely voters, including $E$, are made better off by these sales, but those who are in $A$'s (unorganized) group are worse off. Their votes will lose value if vote buying takes place. The example supports the intuition that many citizens are worse off if organized interests have more power—and that vote buying is something organized interests are likely to do and not something most dispersed citizens will do. Slightly less obvious is that sellers of votes (drawn from $U$) can be made better off as these interest groups are more powerful. But the point in the text is that although the majority of $L$ may not be well enough organized to raise money for vote buying, this majority of $L$ may be sufficiently organized and perceptive to pass rules against vote buying.

An alternative argument might focus on politicians as a group. These actors can make promises but they might be better off if they cannot buy votes because their line of work might then be more expensive. The argument essentially turns the agency explanation discussed above on its head. See text accompanying note 6 supra. One problem with this explanation is that these same politicians should prefer to be able to make binding promises to the electorate and, as already noted, they cannot.
number. Similarly, we can think of likely voters as precommitting not to compete with one another at yet greater expense. They do this by agreeing to a kind of arms control in the form of a ban on vote buying. This argument about L is consistent with the conjecture that if there were a free market in votes, voters most likely would not purchase additional votes. Voting under present rules can be described as a kind of consumption activity, but there is likely to be dramatically diminishing marginal utility to additional voting activity in a single election. I would not expect those of us who enjoy voting to purchase and engage in more of this activity even at a low price of a few dollars per vote.

In any event, L value their votes more highly than do U, and L can reason that legalization will lead to more vote selling by U. L would approve of legalized vote selling most readily if they forecast great gains from the ability to buy votes. But it is unlikely that many members of L would expect to buy additional voting rights even if it were perfectly legal to do so. If, for example, the best explanation for a given member of L’s inclination to vote is that voting is a form of consumption, then the point is that consumption is now costly and not much enhanced by additional participation. Even if members of L behave as they do because they think that politicians react to the signals they receive about preferences (in which case there is gain from further participation and signaling), then it is still the case that an individual member of L can hardly expect to send much of a signal by buying a tiny fraction of the available voting rights. In short, most members of L are likely to see themselves as part of a dispersed subset of L, and the introduction of saleable voting rights would empower mostly those (few) members of L who were part of organized groups.

To be sure, the most efficiently organized groups, which is to say a subset of L, might like direct vote buying and selling to be legal, and their preferences might be intense enough to make it possible for them to pay some other voters enough to change the rules to permit vote selling. But these purchases are likely to come from U, so that the dispersed majority of L is still better off blocking the sale of votes. Moreover, there is no reason to think that the organized subset of L could bargain in advance with the majority of L in order to secure the right to buy U’s votes.

There are many variations on this theme, but we have already come far enough to see the repeated presence of (at least) two kinds of collective action stories about the ban on vote selling. The first and simplest story has voters appreciating that a buyer might value a large block of their votes at a price much higher than the sum of the values attached by these individual voters to their rights. These individuals head off the threat of exploitation by precommitting not to sell their votes to such a buyer. The second story focuses not on those who are most likely to sell in the event that selling is permitted, but rather on those who are less likely to sell. A majority of these
(likely) voters see that they will be better off if they bar the unlikely voters from selling their shares to buyers who are more organized than are most likely voters.  

B. Direct Versus Indirect Vote Buying

A common reaction to discussion of the ban on vote selling is to observe that we tolerate a form of a market in votes because we allow individuals to contribute (at least to a degree) to political candidates, we permit individuals to contribute to intermediaries that support candidates and causes, and we permit candidates and political parties to spend vast amounts of money advertising and otherwise attracting votes. Wealthy people can not be sure of success when they participate in this market (for this market is more like a gamble than a purchase of a definite item), but then again direct vote buying is also a gamble because the buyer gains more votes but no guarantee of electing the favored candidate. Indeed, at the risk of confusion in terminology, it might be accurate to say that we tolerate indirect vote buying, but we are much more squeamish about direct vote buying and selling. Our rules support the myth that each voter decides how to cast his or her ballot, and (in our non-compulsory system) whether or not to vote in the first place, and we suppress evidence that money influences these voters. Ironically, the amount spent per voter in statewide and national elections—and especially the amount spent on each (likely) undecided voter—may well exceed the market-clearing price we would expect in a world where votes were freely traded.

32. These collective action stories point to important differences between voting rights and most other goods. For voters who wish to be part of winning coalitions (and surely for those who suspend narrowly-defined rationality and work to influence voting outcomes) voting rights are different because their value drops as other players exercise their own voting rights. These voters might oppose a market in voting rights much as any producer might try to enlist the government as an ally in reducing competition. Even voters who are accustomed to losing in politics might oppose a market in votes, because they can see that other interests will enjoy yet greater advantages in organizing and buying votes, and then in exercising political power. And for voters who gain some sort of consumption value from the act of voting, it is likely that little additional value would be garnered from multiple voting opportunities. These voters appreciate the presence of markets for standard commodities, where there is reason to increase consumption from time to time, but they see no comparable benefit in a market for voting rights.

33. This is of course a speculative proposition both because we do not know what free market prices would look like and because the number of truly swing voters is contestable. The important point is that the amounts are not trivial. Candidates for a U.S. Senate seat can easily spend $10 per voter in an election and obviously more than that if we divide only by the number of voters a candidate actually attracts or needs to attract, or if we add in expenditures related to party primaries. Moreover, if we think of no more than one-third of the likely voters as actually open to suggestion, the price (or cost) per vote seems quite significant. Prices might be higher if enough sellers were organized or enough buyers present as to solve the collective action problem.

It goes almost without saying that there are many differences between what I have called "indirect" and "direct" vote buying, and these distinctions must mean a good deal to those who are
There is, I suppose, room for an optimistic view of the direct-indirect distinction. One might believe that advertising provides information and cannot change people's preferences; campaign spending may be wasteful if it takes on too much of an arms-race character, seeking additional voters who will not change the outcome, but by and large it is a good thing to inform voters. This optimistic view about campaign expenditures can (but need not) be combined with an optimistic view of campaign fundraising. Finally, it can support the view that indirect vote "buying" is fine (and even desirable) while direct vote buying is pernicious because of wealth effects.

I suspect that most readers have something of a mixed view of indirect vote buying. We recognize that campaign expenditures provide some useful information and focus attention on candidates and issues. At the same time, much of these expenditures sway votes without providing much in the way of information, and candidates with more money to spend are advantaged. In turn, money flows to candidates who have a good chance of winning, so that there is a substantial advantage to incumbency, and so forth. The question here is whether, against this backdrop, direct vote buying would make things worse, by exacerbating the funding problem, or better, by making more room for the expression of intense preferences.

A different sort of reaction to indirect vote buying begins with the suggestion that voters might prefer much stricter limits on campaign expenditures and contributions. But various campaign finance reforms have run afoul of the Supreme Court's view that campaign expenditures and support are varieties of protected speech. Following the simple collective action story, we might then say that voters precommit not to sell their votes because they recognize that they would individually sell cheaply, and these same voters might also choose to bar indirect vote buying, but other law (over which they have less immediate control) prevents them from doing so. If so, which is to say in a world where indirect vote buying is permitted, it is possible that these voters would now be better off permitting direct vote selling as well.

Put differently, the simplest argument for legalized vote selling has little to do with intense preferences and much to do with the presence of legal rules barring what might be a first-best regulatory regime. If current law forces us to permit indirect vote purchasing, the argument goes, then we are comfortable with the status quo. But this is generally the case with arguments about near-substitutes. In any event, I do not mean to imply that it is inconsistent to favor a ban on direct trades but to allow expenditures and promises that might produce equivalent results. To the contrary, my argument, straddling the already thin line between the positive and the normative, leads to the idea that it is direct vote buying that runs the greater risk of producing perverse results and that this distinction might "explain" the conventional legal rules.

34. See Samuel Issacharoff, Pamela S. Karlan, & Richard H. Pildes, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 618-64 (1998) (presenting cases and comments on the Supreme Court's view that sometimes "money is speech" but that some regulation of contributions, as well as spending caps in return for public financing, is tolerable).
should recognize that this indirection brings about (not only wealth effects which court-made law appears to tolerate but also) a good deal of waste. We might be better off allowing candidates to transfer money to eligible voters than virtually forcing these candidates to spend money on repetitive television commercials and other indirect methods.

This argument seems especially strong where there are limits to the legal spending, as there can be in our presidential campaigns with respect to candidates who have accepted federal funds. When there are no limits, a ban on the most attractive or efficient form of buying is likely to cause substitution to indirect buying, but the ban will also generate a reduction in the activity of vote buying and in this way succeed in making wealth less important. A political camp might spend fifty million dollars on an election, if it can spend as it likes, but only thirty million dollars if it cannot spend the money in the most efficient way. This is because each marginal dollar invested in the second-best way earns a lower expected rate of return. It follows, then, that where candidates have already agreed to a serious limit on their expenditures, the case for deregulation is actually strongest because it is unlikely that wealth would be further empowered by the switch to a regime in which vote buying and selling were permitted. In short, when candidates spend as they like in a regime where direct vote buying is prohibited, it is likely that they would spend even more if the prohibition were removed. Where there is a binding limitation on expenditures and also a prohibition on direct vote buying, the removal of the prohibition will again cause a substitution from indirect influence to direct purchases. But since the spending cap already suppresses wealth effects, it is unlikely that wealth will become more important so long as the spending cap is kept in place.

If this seems counterintuitive, there is a useful analogy to voucher systems that do not permit transfers or monetary supplements. Returning to the example of a university that creates a shadow market for the purpose of allocating limited enrollment courses, it is not terribly surprising that the university is likely to bar sales of these enrollment rights among students. Such sales would make wealth important, and if this were tolerable then the university might as well have auctioned off the resources it held in the first place.35

35. It would not be terribly surprising if cross-sales were permitted because endowments are somewhat evened out by giving everyone points to sell or use. A student who might not buy any of the contested resources in a pure auction system (in order to make attendance at the university as inexpensive as possible) might, by virtue of the initial distribution of course enrollment rights (or parking lot spaces or dormitory rooms), now keep some of this currency in order to compete for a scarce resource. It is also possible that a university would allow transferability in order to encourage some utility-enhancing exchanges, but discourage accompanying side payments in order to minimize the effect of wealth. If such in-kind trades are prohibited, it is likely to be because the university fears its inability to enforce the ban on outside currency.
I have already suggested that this relationship between legalized vote selling and existing constraints on campaigning plays a role in the case for vote selling, but my aim here is not to make a case for legalized vote selling but rather to explore the various collective action problems that explain or inform existing and potential law. In this regard it is not entirely obvious that voters, who sense their collective action problem with respect to selling shares to an eager buyer, would be as concerned with indirect purchases by buyers. In our world, where direct vote selling is forbidden, the collective action consideration is that the most organized interest groups will be able to muster substantial sums in order to influence campaigns and politicians. Legalized vote selling simply allows these organized interests to operate with lower transaction costs. A ban on vote selling may amount to something of a tax (albeit an inefficient one) on organized political activity, forcing those who would spend on political influence to do so indirectly. But this inefficiency may well raise the price of influencing outcomes. Those who would prefer less of this organized political activity may like the tax as compared to no restriction at all.

Returning to the simple collective action problem, that dispersed individual sellers with alienable voting rights will part too readily with their voting rights, it is interesting that there is no comparable problem when buyers are limited to indirect influence through campaign expenditures and promises. Put somewhat differently, if voting rights are inalienable, eager buyers must try to influence dispersed voters with indirect expenditures, and their dispersion now works against the buyers, who must spend enough to draw these disinclined atomistic sellers out of their houses and workplaces and into the polls. Put differently, likely sellers may be too quick to sell at a low price, but it is not as if this translates into an expectation that they will respond too quickly to campaign advertisements.36

It is now possible to see campaign finance issues in a new light. Current law forbids direct vote buying but permits and even protects a willing buyer who is eager to buy votes indirectly through advertising and other campaign expenditures. If direct vote buying were permitted, we would expect buyers to look first to U, the unlikely voters, as a source of low-price sellers. If these buyers sought enough votes as to require purchases from L, the voters previously thought to be likely and perhaps more intense in their preferences for voting, then we might find rules protecting U against whipsaw and holdout problems. Vote-buying law might look like securities law under the Williams Act, with a buyer required to pay inframarginal sellers as much as this buyer pays marginal, later sellers.37 But it is likely that L are split across

36. Some of the analysis changes if voting takes place over a period of days or weeks rather than on a single election day.

issues and candidates so that even the most willing buyer will, in a world where direct vote buying is permitted, purchase perhaps no more than thousands of votes mostly from U, because this is enough to tip the election. Such a buyer will likely adopt a mixed strategy, campaigning for support (though less than is presently the case) and also buying some votes directly. We might imagine that most of the advertising will be aimed at L, with the direct spending trained on U.

This image casts something of a shadow on the ban attached to vote selling. Members of L might benefit from the current scheme in which attention is paid to them, and their votes are influenced or even acquired with promises and advertising. In turn, if voting rights were alienable, much less attention would be paid to L and much more to U. A pessimistic story about current law is thus that likely voters tolerate or even welcome a system in which attention is paid to them. They demonize an alternative system with direct vote selling because this would benefit others. To be sure, each member of L could in this alternative system enjoy that which U will gain, by simply selling votes at the relatively low price buyers will need to offer. But of course one’s status as an L or U has to do with one’s preferences or deeply held views and it is costly to give these up.

C. Encouragements to Vote

Where direct vote buying is illegal, secret balloting is important not only in order to discourage coercion and the like but also because it makes (illicit) vote buying difficult to accomplish. The buyer cannot be sure that the seller will do as promised. But buyers might try, as much as permitted, to target their offers to voters who seem likely to vote their way by offering to pay for the act of voting or, short of that, for a trip to the polls or some other close substitute. This kind of targeted encouragement is direct in that value is transferred to voters; indirect encouragement would include advertisements suggesting that voting is a good thing. If direct vote buying is barred, then direct vote encouragement is likely also to be barred especially when targeted encouragement is possible. Attention has been drawn elsewhere to the obvious alternative of voter encouragement through a compulsory voting rule, however unlikely that may ever be in a culture that emphasizes rights. Thus, I will not pursue the matter here except to note that our apparent disinterest even for untargeted direct encouragement is evidence for the theory that a good way to think about the ban on vote selling is as a response to a collective action problem and as a rule that favors L at the expense of U.38

38. From the equality and efficiency perspectives, if wealthier people are more likely to vote than are their poorer counterparts, then it should be politically correct (as it is) and perhaps economically correct to welcome payments or other policies that encourage voter turnout. And so long as Candidate X cannot target expenditures to attract those members of U who are more likely to
But what if there is a decent case to be made for vote selling, perhaps as a means of giving expression to relatively intense preferences? Does it follow that vote encouraging should be legalized as well? The question is not terribly important because if direct vote buying were permitted it is unlikely that we would see much in the way of encouragements which were less perfectly targeted. Still, there is an independent argument against voter encouragement and inasmuch as it is an inverted form of the argument explored in the remainder of this article it bears mention. The affirmative case for vote selling builds on the power of a market in votes to reflect intensity of preferences. But if a voter much prefers candidate X over Y, then that voter might buy thirty or forty votes from less intense voters in order to cast all these votes in favor of X. Virtually everyone who once contributed to campaigns will now prefer to buy votes—especially if there is a way of recording or advertising one’s loyalty in this manner, if one chooses to do so. An argument against vote encouraging is that if we want intensity to matter, we might actually prefer for those with the weakest preferences to abstain. Vote buying and selling might bring out relatively intense preferences if wealth effects can be eliminated, but we might do better by simply permitting or even placing a hurdle in the way of all voters and then barring encouragements. The very argument used to advance the case for vote selling and buying can in this way suggest that mere vote encouraging is undesirable—and indeed that vote discouraging may be good policy.

I do not put much stock in this argument. The obvious responses include the likelihood that discouragements have differential impact and that many mild preferences ought to outweigh a very few intense ones. A more subtle reaction asks whether, if we value intense preferences for one candidate over another, we should not value an intense preference for greater turnout? I might think that A ought to be able to defeat B when 49% of the population strongly prefers A and 51% weakly prefers B, and vote buying is one way to permit this outcome. But if—even while knowing that payments to U will vote for X, X’s efforts to turn out the vote should be welcome—though a self-interested X might then not invest in voter turnout. From the efficiency perspective, if the fear is that, once elected, X will do more harm the more X needed to spend to acquire office, then we should have no objection to X’s expenditures where X is subject to a binding cap on expenditures. Moreover, the greater the turnout the harder it is for X to know to whom debts are owed. But as already suggested, it is very hard to imagine a practical vote-encouraging plan that would not target some voters rather than others, and perhaps even harder to imagine why a candidate would fund a neutral vote-encouraging campaign. Candidates will advertise their encouragements in those places where they think it more likely that they will attract supporters (or not at all).

Note that under the view advanced in the text we should not expect members of L to work hard to forbid encouragements to U. Members of L may prefer not to share the attention they presently enjoy, but the marginal impact of higher turnout on each member of L is negligible. Of course, the entire matter may be academic because, apart from compulsory voting, it may be thought impossible to avoid or disallow the targeting of encouragements. In this case, everyone’s favorite argument against vote selling becomes a suitable argument against vote encouraging.
bring out voters with weak preferences—some people are willing to pay to increase voter turnout either because they prefer a system in which we have a more accurate poll of the population's preferences, however weakly held, or because they think that higher turnout psychologically commits the polity to the laws that come to pass, then it would seem that this intense preference should also be respected. Moreover, we can have it both ways; payments might encourage voter turnout but then other payments can encourage these marginal voters to vote for one candidate or the other. Vote encouraging and direct vote buying might work well together, although vote encouraging will surely be more expensive if voters have the option of selling their votes.

D. Competition Among Buyers

1. Competition, collective action, and political parties.

The simple collective action problem all but disappears when significant competition among buyers drives up the price of voting rights. It follows that a modified form of the simple argument is that sellers might agree in advance that vote selling should be barred unless there is significant competition among buyers. There is of course the problem of defining significant competition, and this problem may be the same as that noted earlier with respect to the suggestion that these very sellers could protect themselves by establishing a minimum sale price for the transfer of voting rights. It is not enough to point to the presence of the major political parties as reason to expect sufficient competition for votes. After all, there will be jurisdictions in which one party gives up the battle because it cannot raise funds, or in which there are important issues which neither major party wishes to associate with one side or even to commit one way or the other. In these cases, a majority of dispersed (but likely) individual voters may defeat the wishes of the best organized party if voting rights are inalienable. But if vote selling were permitted, this organized party might be able to buy votes (especially from U) in order to overwhelm the dispersed majority.

It is even possible that the major parties have the most to lose from a market in votes. Thus, vote selling might permit third parties to arise and to become more formidable power brokers. In this case, the role of vote selling is not unlike that which might be played by irrevocable proxies.39 Either of these tools might permit precommitment by voters or sellers in a manner that reduces the collective action problem such swing voters face. Vote selling

39. See Levmore, supra note 1, at 585-91 (noting that vote selling that permits third parties to become power brokers is similar to the role played by irrevocable proxies).
and aggregation might empower new parties to play the role that minor parties play in multi-party parliamentary systems.  

But most of this amounts to a kind of just-so story about competition. If ours were a world which permitted vote selling but produced political outcomes that we could somehow know to be very much like those produced in a world where vote selling was forbidden, I would no doubt be arguing here that while vote selling in general suffers from the collective action problems I have described, general elections at the state and national levels are free of these problems because of the presence of the major parties. By virtually guaranteeing potential sellers the presence of two bidders, who in turn raise funds from organized interests and from especially eager or cooperative or even irrational voters, the presence of political parties allows sellers to abandon their fear that a single buyer will succeed at too low a price. We might have some nice questions about whether voters would do better selling their votes directly or through a kind of national auction, but the basic idea is that the presence of two well-endowed competitors could be understood as eliminating the collective action problem confronting potential vote sellers.

The fact that we do not make voting rights alienable—and do not experience much clamor for such deregulation in a world with lively, organized political intermediaries—may suggest that political parties would often shy away from direct competition. Perhaps voters precommit to a rule of inalienability because they cannot rely on the presence of competing parties to bid up the price of their votes and because they cannot specify in advance what sufficient competition looks like. This may be the case even in countries with more than two active political parties. Alternatively, political parties, or some important set of voters, may prefer the current system in which votes are purchased indirectly, albeit somewhat inefficiently. Third, the current system may provide a close enough substitute for direct vote buying that there is not much reason to permit direct purchases and, indeed, there may be other costs associated with a direct system. I think this last possibility is unlikely inasmuch as political systems with greater constraints on indirect vote buying than ours also do not permit direct vote buying. There are of course other explanations for the current state of regulation, but it is more useful to turn to an area where competition among potential buyers does seem to explain the world we know.

2. Vote selling in corporate law.

The traditional rule in corporate law holds direct vote buying unacceptable, which is to say either illegal or invalid. The hostility is closely related to another conventional rule, that irrevocable proxies must be accompanied

40. The effects will depend on how low the threshold is set for gaining a seat.
by a significant “interest.”41 Thus, one who eyed Corporation X and wished to buy some of its voting rights alone was stifled by law, while a creditor, W, who held its debtor’s (Y’s) stock in Corporation X as collateral for a loan was able to vote the X stock because the creditor had some legal interest in the success of X. The rule might have been aimed at the threatening possibility that a competitor of X would seek to undermine X by buying voting rights in X and voting in a way that sabotaged X while benefiting the competitor. If this competitor were forced to buy stock in X in order to vote, then the stock would presumably be much more expensive than voting rights alone, and as more stock in X was acquired the buyer-competitor would naturally prefer X’s success rather than its failure.

Corporate law might seem like an obvious place for experiments in vote buying, but there was for a long time no move in this direction because profit maximizing buyers would normally prefer to own stock rather than voting rights alone. Thus, a buyer who owned some shares of a corporation and wished to displace its management in order to put a new business plan in effect would normally prefer to buy more stock in order to gain a greater share of the returns from the new plan. If A thinks that Corporation Z, which sells for $10 per share, can be improved to $15 per share, A will normally want all of Z’s stock rather than some small fraction of it (along with voting rights sufficient to control Z).42

There are, however, situations in which corporate vote buying might be useful and desirable. State law might allow Z’s managers to defend their turf and to maintain a tilted playing field on which the incumbent managers of Z will hold the insurgent, A, at bay. Federal law places some limits on a state’s ability to tilt the field and thus on these managers’ power to capture the state legislature or courts, but these are weak limits, perhaps because there is an argument to be made in favor of defensive tactics in a world where the buyer might enjoy an advantage over the dispersed shareholders of Z. In any event, A might buy voting rights in order to defeat these defensive tactics. It is common for shareholders of a company such as Z, or at least a supermajority of these shareholders, to be empowered to undo the defensive tactic they earlier put in place, and A’s best strategy may therefore be to buy voting rights in Z. The idea is that legal obstacles make it difficult for A to buy stock without triggering some event, or poison pill, that A wishes to avoid, so that vote buying is a second best route to this acquirer’s aim. It is perhaps for this reason that some states have begun to allow vote buying where it is not fraudulent and where it can satisfy a test of “intrinsic fairness.”43

41. See, e.g., DEL. CODE ANN. tit. 8, § 212(e) (1991) (“A ... proxy shall be irrevocable if ... it is coupled with an interest sufficient in law to support an irrevocable power.”).
42. See Easterbrook & Fischel, supra note 21.
43. See Schreiber v. Carney, 447 A.2d 17, 26 (Del. Ch. 1982) (holding that loan to controlling shareholder arguably in return for shareholder’s vote on a merger found inoffensive because the
Although there is not much law on the subject, I will go along with the current wisdom that vote buying in corporate law is now more acceptable than it once was and that we are soon likely to see more explicit legislative and judicial approval of trading in shareholder voting rights. This may be because courts and legislatures are coming to recognize that an ability to purchase voting rights can provide a useful safety valve where defensive tactics go too far in blocking desirable takeovers. The defending managers might, of course, buy these voting rights themselves, and we can anticipate future litigation over their behavior with regard to these votes or expenditures—whether undertaken with corporate or personal funds.

A second development that might explain an increased tolerance for vote buying in corporate law is the evolution of markets in financial instruments. I have already reported the old rule, that voting rights alone should not be traded but that these rights might be traded if they accompany an interest—even if it is less than a complete interest—in the share of stock which begets the vote. A court which abides by this rule is likely to face difficult questions regarding how much of an underlying interest is required by this legal formula. Shareholders who were eager to avoid the old rule might have tried multiple classes of stock, some voting and some not, but the emergence of markets for various derivative products makes the old rule even less meaningful than before. If a share of a corporation is the combination of an infinite series of appreciation rights, dividend rights, and voting rights (infinite because time periods can be subdivided in endless ways), and these rights are all pliable in the face of packaging and marketing techniques, then it is apparent that a total ban on the sale of voting rights standing alone might simply encourage the sale of a package with a voting right and some other small right. Thus, a court might, for example, need to decide whether with respect to a company whose stock now sells for $10 per share, the sale of the right to vote on any matter put to a shareholder vote in the second quarter of a given agreement was meant to benefit all shareholders and the deal had been worked out by disinterested directors with full disclosure). Schreiber has fared reasonably well in subsequent opinions. See IXC Communications, Inc. v. Cincinnati Bell, Inc., No. C.A. 17324, C.A. 17334, 1999 Del. Ch. LEXIS 210, at *22 (Del. Ch. Oct. 27, 1999) (citing Schreiber for proposition that vote-buying agreements are not illegal per se, but rather voidable only upon a showing that the agreement defrauds or disenfranchises the shareholders); Haft v. Haft, 671 A.2d 413, 420-21 (Del. Ch. 1995) (upholding contract granting irrevocable voting proxy); Weinberger v. Bankston, Fed. Sec. L. Rep. (CCH) ¶ 93,539 (Del. Ch. Nov. 19, 1987) (citing Schreiber for rule that a vote-buying transaction will be upheld if it is intrinsically fair and its object or purpose is not to defraud or disenfranchise stockholders); Kass v. Eastern Air Lines, Inc., 1986 WL 13008, at *3 (Del. Ch. Nov. 14, 1986) (quoting Schreiber in holding that transfer by corporate shareholder of stock voting rights without ownership is "not necessarily illegal" and "must be examined in light of its object and purpose"); Wincorp Realty Inv., Inc. v. Goodtab, Inc., No. 7314, 1983 WL 8948, at *4-5 (Del. Ch. Oct. 13, 1983) (citing Schreiber in stating that a vote-buying agreement is not per se illegal).

44. See note 41 supra and accompanying text.
year along with the right to buy the share at a price of $16 during that quar-

ter, is or is not permissible.

As the package of rights we call a share is carved up into finer and more
complicated parcels, the question arises as to where voting rights are located.
Courts can try to eliminate parcels containing voting rights by denying that
these rights accompany sufficient interests, but then there will be situations
in which no large bundle remains in which to locate the voting right conven-
tionally and statutorily associated with each share. Moreover, as these com-
binations of rights are traded around, it becomes difficult to identify their
owners; courts that wished to enforce the old rule would have trouble doing
so.

In short, as markets have developed to cut up rights in myriad ways,
courts might have despaired of defending some line dividing packages that
do or do not support the voting rights they contain. And because law has
long allowed the sale of voting rights along with something less than a com-
plete ownership package, it is much easier and more reasonable for lawmak-
ers to give up the old game and go along with whatever markets generate.

The preceding explanations for the apparent shift in corporate law are
imperfect. The first explanation slides over the oddity of imagining that the
very courts and legislatures that permit defensive tactics might fear that these
tactics are dangerous and in need of a safety valve in the form of saleable
voting rights. And the second explanation assumes unusual sophistication on
the part of lawmakers. Law often changes after repeated assaults on legal
distinctions, but this explanation has us imagining that lawmakers contem-
plate the evolution of financial instruments and head off assaults by giving
up the fort.

These imperfections suggest that there is room for another explanation
not offered by the cases, legislative histories, or existing academic commen-
tary. I like to think that experience with competitive tender offers has re-
moved the fear of a collective action problem among sellers or sharehold-
ers. Shareholders may once have precommited not to sell their votes too
cheaply but, as we have seen, their collective action problem vanishes in the
presence of competing buyers. Thus, experience with competing bidders for
corporate control, and the premiums they have generated, may have con-
vincing some lawmakers and shareholders to remove the ban on vote selling.
This approach suggests that we might see regulation of vote buying that is
comparable to that found governing share buying. For example, early sellers
may be protected by statute or by charter provisions if prices rise. The im-
portant point for present purposes is that it may be no accident that vote
selling has appeared in corporate law because the competition among buyers
allays sellers’ fears of selling too cheaply because of their collective action
problem. It is remotely possible that experimentation in political elections
will follow.
3. *Vote selling with small numbers.*

The collective action problem is obviously reduced or eliminated when there are few voters. The discussion here suggests that where the number of voters is small, vote buying will be more acceptable—and limited only because of wealth effects. Something along these lines might be in play in the corporate law setting. With few shareholders there is in fact some reason to think that courts would be more hospitable to vote buying, although this tolerance might be understood as empowering minority shareholders quite generally.45

Somewhat similarly, collective action problems might be reduced in the presence of a supermajority voting rule. And, indeed, I think it likely that in the presence of a unanimity requirement, there would be much sympathy for vote buying (unless that itself was thought to generate holdout threats).

E. *Summary*

We have seen that voting fits fairly comfortably in the category of things held inalienable, although the complete ban on trades calls for a special explanation—or leaves room for some deregulation. The special explanation developed here is that collective action problems can explain (or support) the familiar prohibition against vote selling and buying. The simple story is that sellers recognize that they will sell too cheaply. The more intricate story is that most likely voters have nothing to gain and something to lose from a regime which permits unlikely voters to sell their shares to organized buyers. There was also the idea that these collective action problems disappear where competing buyers bid up the market price of votes or when voters are tightly organized into a few groups or simply small in number. Even likely voters will be interested in selling if the price is high enough. An application of this last idea may be found in corporate law where the apparent relaxation of the ban on vote sales can be associated with awareness of tender offers and the likelihood of competing buyers.

It is possible that the presence of political parties makes the likelihood of competition among buyers greatest in politics, in which case there is the question of why direct vote buying in politics seems most horrifying. The most obvious answer is that this is the place we are most eager to keep free of the influence of money, but this answer belies the importance of money in politics. In a sense the question is why, given the role that money does play in politics, there is not more of a move toward direct vote selling as a con-

45. The idea is that minority shareholders await conflicts among major shareholders in order to become part of ruling coalitions. *See generally* Zidell v. Zidell, Inc., 560 P.2d 1091 (Or. 1977) (holding that specific minority shareholders not entitled to special protection when stock sale shifted controlling majority stock ownership to another stockholder).
conscious attempt to get at intense preferences, either as a response to citizens who see that they would gain from trade (while those who might suffer from external effects would seem to be less identifiable and politically potent), or as a response to the various inefficiencies that arise in a regulated environment. Perhaps a parliamentary system with numerous active parties, and therefore potential buyers of votes, would be the most likely place to expect the legalization of vote selling. It would be more likely still if a jurisdiction with multiple parties had a serious cap on indirect spending.

More generally, although the discussion here is organized around the question of vote buying and intense preferences in a general election, the arguments are applicable to other settings and indeed may be most useful as a positive matter in thinking about legislative logrolling. The normal tolerance for vote trading in this arena may reflect confidence and reduced anxiety about collective action problems where there is competition among buyers and low transaction costs. Even jurisdictions with single-subject or other germaneness requirements allow explicit linkages in budget bills which are viewed as single pieces of legislation. Thus, the special tolerance for vote trading in budget bills may reflect the intuition that fairly explicit vote buying is especially acceptable where there is ample competition and ready currency.

46. The single-subject rule, found in many state constitutions, is often liberally construed to favor legislative deals. See, e.g., Steadman v. Hindman, 992 P.2d 27 (Colo. 2000) (holding that the initiative did not contravene the state constitutional single-subject requirement); Masters v. Commissioner, 604 N.W.2d 134 (Minn. Ct. App. 2000) (holding that the statute did not violate the single-subject requirement); Bernstein v. Commissioner of Pub. Safety, 351 N.W.2d 24 (Minn. Ct. App. 1984) (determining that statute does not violate prohibition against laws embracing more than one subject). But the idea is that construction is most liberal, or that various provisions are found most germane to one another, in the case of a budget bill where vote trading is most explicit. Put differently, the common requirement that initiatives be single-subject in scope can be explained as anti-logrolling precisely because it is here that the drafters (of the initiative) have a substantial, competition-reducing, agenda-setting advantage, if only because it is difficult to get a vote on a competing proposal in short order. E.g., CAL. CONST. art. II, § 8(d) ("An initiative measure embracing more than one subject may not be submitted to the electors or have any effect.").

47. On the other hand, we do not readily permit legislators to use "outside" money to trade for votes in the legislature. See generally Levmore, supra note 1, at 586-87 & n.41 ("At the very least, payments made directly to promise-keeping representatives would quickly run afoul of the legislated limits on supplemental income."). Similar constraints, ranging from anti-bribery statutes to campaign finance laws to supplemental income restrictions, apply to state legislators. Id. This suggests either that there is more to the ban than collective action problems or that it is understood that outside money would come from dispersed citizens or interests so that the collective action problem would reappear.
IV. INTENSE PREFERENCES, MODIFIED MAJORITY RULE, AND LIMITED MARKETS

A. Intensities, the Condorcet Jury Theorem, and Pure Majority Rule

I have conceded that there is no real mystery to the ban on vote selling, and indeed I piled onto the preexisting explanations some thinking about collective action problems. At the same time, I have hinted that there are reasons for us to be more open to other explanations. In expository order these reasons include the probability that the current ban favors likely voters over unlikely voters, with the latter more likely to be less privileged; the legality and importance of indirect vote buying, which means that wealth already infects the process; the presence in some elections of caps on this indirect spending, which means that deregulation is unlikely to make wealth much more important than it is now; and the presence of competing political parties and interest groups, which can be expected to bid up the price of votes and thus mitigate the sellers' simple collective action problem. But the affirmative case for some vote buying is based on the idea of giving weight to intense preferences.

The critical question is whether unequal intensity of preferences should play an important role. Returning to the example raised at the outset of this article, if an election between candidates would yield a fifty-two percent to forty-eight percent popular vote, but the forty-eight percent feel more strongly about their first choice than do the fifty-two percent, then the question is whether we might not prefer (or agree in advance) that this intense minority should get its way with or without making payments to the fifty-two. It may be useful to divide this question into a number of elements. One

48. I have suggested but hardly proved that poor people would actually be better off with legalized vote selling. Moreover, there is always the response that wealth redistribution can be done more directly. In the present context this is something of an ironic reaction because it is an argument that might have been raised in the first place against the equality argument. Yet, as every public finance student knows, we would be better off redistributing wealth through an income tax and permitting vote selling than regulating bargains in the name of wealth redistribution. Louis Kaplow & Steven Shavell, Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income, 23 J. LEGAL STUD. 667 (1994).

49. Put differently, the explanations or justifications for the ban on vote selling are a bit just-so in character. If vote selling were legalized, while other things remained inalienable, it would be possible to "explain" the legalization with reference to intensities, a new view of wealth effects, and so forth.

50. I stress the likelihood of unequal and intense preferences because intense preferences alone are unproblematic. A may intensely wish to cause a redistribution from B to A, while B hopes to do the opposite. We do not wish to empower such preferences (and they are zero sum) but we might want to give weight to A's intense interest in policy toward Cuba or animal rights, while B has opposite but much less intense preferences on these matters. It is unequal, intense preferences that are most interesting.
question is whether we can be confident in assessing relative intensities. Another is whether, even assuming confidence, it is a good idea to favor the intense minority. Yet another question is whether there is reason to think that an intense minority will overcome collective action problems at the fundraising end and thus be empowered by some deregulation of vote buying. In any event, one might favor vote selling simply because one is inclined to permit voluntary bargains, or one might permit vote selling as a means of getting at the goal of discovering and satisfying intense preferences. In the latter case, the concern is that a plausible way of assessing intensities might at the same time create serious dangers.

Where unequal intensities are likely, we are quite accustomed to formal and informal schemes that give way to intense and confident minorities. I would go so far as to say that outside of general political elections, virtually every decision that is put to majority vote is in fact tempered by practices that allow intense minority positions to prevail. Thus, friends deciding on an evening’s activity may vote, but members of the group are likely to bend to a strong preference. Faculty members voting on curricular or personnel matters are also likely to respect strong preferences. Among strangers or antagonists similar practices would run the risk of giving way to preferences that are in fact weakly held but expressed as intense for strategic reasons. In these settings, markets or market-like transactions are used in order to provide a check on such strategic play. Thus, corporate shareholders can purchase stock or, as we have seen, even voting rights alone in order to demonstrate their preferences. Legislators can normally engage in logrolling, or perhaps rely on repeat play, to control strategic behavior. Indeed, in those settings where strong minority views are not normally empowered, it is because these voters are unlikely to have relatively intense preferences of the kind we would elevate in order to maximize utility or advance another social goal. I return to some of these examples below, but for now the question is not whether a market is a decent way to get at intense preferences, but rather whether intense preferences ought to be given extra weight. We might think of a “pure” majority decision as one made through a process that looks for evidence of the majority’s judgment; it discourages trades (perhaps by avoiding evidence of intense preferences) and does not encourage private inclinations to defer to intensely expressed judgments.\footnote{I use this weak language because private voters who favor X over Y are free to vote for Y if they sense that other citizens intensely prefer X.}

The Condorcet Jury Theorem tells us that where preferences are held in common and the goal is to find the “right” answer, there is a good argument for encouraging high voter turnout and then taking a pure poll in order to maximize the chance of obtaining the correct answer.\footnote{See, e.g., DENNIS C. MUELLER, CONSTITUTIONAL DEMOCRACY 158-59 (1996) (discussing Condorcet’s 1785 work).} Condorcet’s notion...
is that where each voter has more than an even chance of being right on some matter (with two choices) and voters are a random sample of the population, then the more voters we have, the closer we get to a probability of one of getting the matter right by voting. A “jury” does better than an individual; democracy is about the idea that “more than half of the people are right more than half of the time.”

The theorem assumes that there is a “right” answer to the question at hand, that each voter (or at least a convenient majority) is more likely than not to discern the correct answer, and that we have no way of identifying those who are most likely to be right or even likely to benefit from deliberation. On some issues an expert will obviously do better than a large well-meaning group of voters, although even there, adding in more voters, who are more likely to be right than wrong, will eventually improve the stew. It is where a non-expert is more likely to be wrong than right, or where a non-expert does no better than guess, that we most need experts.

The Condorcet Jury Theorem avoids the problem of strategic voting in a variety of ways. We might imagine voters as sharing a preference to get the right answer, in which case each voter is pleased to contribute but also to be guided by the group’s majoritarian outcome. In other cases, as where preferences vary but are equally intense, it is useful to note that even if a voter prefers his own judgment and is inclined to act and vote strategically in order to push the group toward his own conclusion, there is no reason to think that abiding by the decision of a majority of a large pool of voters is unwise. Voters may do as they like, but the extra information derived from adding in more and more judgments, most of which are more likely than not to be right, will still improve the chance of getting it right.

The Condorcet Jury Theorem and subsequent work also incorporate an equal-intensity assumption. To a degree, this is a way of saying that where preferences are very much in play, there is not a “right” answer. Alternatively, we might say that voters would not agree either ex post or ex ante to abide by pure majority rule if they anticipated that they might have intense preferences. In any event, the case for pure majority decisionmaking is surely greater in some cases than in others.

Where voters serve not as factfinders, but as principals selecting their political agents, or as agents making policy, the equal-intensity assumption is

53. Id. at 152 (quoting E.B. White).

54. One way to think about deliberation among jurors, legislators, and voters quite generally is as an opportunity for participants to evaluate what they hear in order to decide who is “expert” and how much to change one’s vote in light of this expert opinion. But it is noteworthy that although jurors and legislators are virtually required to attend deliberations, voters in large-scale elections are not.

55. See Mueller, supra note 52, at 159-71 (discussing the incorporation of the equal intensity idea in Condorcet’s Theorem and elsewhere).
sensibly relaxed, or less defensible, because there are many issues for which it is likely that one voter's "gain" from a decision is not equal to another voter's "loss." This is certainly the case where voters have different tastes or utility functions such that, even with full information, they are unlikely to agree on what is a right answer. For example, it is easy to imagine that Q and R mildly prefer to have the option of eating meat while S gets positively sick at the prospect of anyone eating something that had a beating heart. Simple majoritarianism does not pretend to do much about different intensities of preferences, but it is easy to imagine that aggregate utility is increased if Q and R bend to S's preference.56

Apart from discerning strategic exaggerations with regard to preferences, a problem with trying to take intensities into account is that we find it difficult to compare different voters' reports of the sentiments they hold, even if these voters are trying to be perfectly honest. Another problem is that it is difficult to distinguish between intensity of preference and confidence in one's views. If this confidence is based on expertise or special information, then we may do well to rely upon it.57 But the question of intensity is not one of expertise or information, though those inputs can lead to more intense sentiments, but rather of preference and utility. Q is likely to agree to do things S's way when S has an especially intense preference and Q's conflicting view is mildly held, if (or especially if) S will similarly bend to Q's preference.56

56. Social practice with regard to these sorts of tastes is interesting. Few people become vegetarians in order to satisfy others' intense preferences. On the other hand, we would not be surprised to find an informed Q and R altering their eating habits in vegetarian S's presence. Perhaps it is easier for them to believe that the sight of meat-eating will upset S more than the act pleases themselves, but harder to assess S's claim about the mere knowledge of a few more or a few less meat-eaters. This is also a good setting for a kind of altruism. If S tried to engineer a vote for a legal intervention forbidding Q and R to eat as they pleased, Q and R might well react with a strong libertarian preference of their own. Another explanation for our (or Q and R's) failure to bend to the will of the passionate vegetarian minority is that while we (or the passionate minority) attach great value to passionate vegetarianism, S might actually prefer for Q and R to have the chance to come around to the vegetarian perspective on their own. If Q and R simply behave like S because of S's intense preferences, they remove this possibility of genuine conversion. If, for example, T is a fervently religious person and P is not, it would be easy to imagine that while T hoped for P's devotion, T would not want P to act as does T simply because T intensely wishes it so.

57. And we will value it more, the more likely it is that non-experts are wrong and the more expensive it is to bring in (mostly right) non-experts. The theorem does not quite hold where some identifiable voters are better informed than others. If there is one expert with a 9/10 chance of being right and two non-experts each with a 2/3 chance of being right, we are more likely to get the matter "right" asking the one expert than we are by relying on a majority vote of the group of three. One in ten times the expert will be wrong, but only 4/9 of the time will the non-experts save the day (because we need them both to get it right (2/3 x 2/3) in order to ouvvote the incorrect expert. Meanwhile 9/10 of the time the expert had it right, but there is a 1/9 chance that the two non-experts will outvote the expert and ruin a good thing. Relying on the known expert gets it right 90% of the time; relying on a majority of the three gets it right about 85% of the time. Had we abided by a majority vote of a pool consisting of our expert, with a 90% chance of correctness, and one million non-experts, each of whom had a 2/3 chance of being right, we could indeed improve things from 90% to more than 99%.
intense preferences. This is obviously the place to suggest that markets are useful, though imperfect, mechanisms for making decisions in a way that takes different intensities into account. But it is useful first to shore up the intuition that in some voting situations we are prepared, if not eager, to take intensities into account.

Consider, for example, a voter who gathers information and hears out X's partisans, but nevertheless prefers candidate Y over X. This voter wonders whether he should vote for X because, although he prefers Y, he is moved by the fact that these fellow voters are so intense and confident about their preferences for X. If he were betting on who would be a better official he would still bet on Y, but as a matter of voting ethics, if that is the word, he is willing to treat fellow citizens' preferences with some or even equal respect. Should we encourage this selfless or perhaps cooperative behavior? My sense is that most of us will find that a vote for X is acceptable, perhaps sensible, or even admirable. We might think of the question as either one of equal respect or one of maximizing utility. Indeed, it might take some work to develop arguments against a vote for X. One such argument, though perhaps a trivial utilitarian one, is that this well-meaning voter may not have a fair sample of fellow voters' sentiments. But this argument disappears in most general elections, where there will be ample information, especially if there is legalized vote selling.

In contrast, when voters act at least in part as agents for future generations or unrepresented interests it is difficult to assess the range of intense preferences. Something of this sort may be at stake when an elected representative votes on important legislation or, more trivially, when a faculty member votes on the appointment of a new colleague. If a colleague tells me that my vote against candidate C for a faculty position is unwise because she has thought long and hard and is passionately in favor of C, I will try to elicit the reasons for her views. But in the end, if the source of this strong preference is hard to pin down, my sense (based on anecdotal evidence) is that it is acceptable and perhaps even admirable for me to vote for C—especially if I disclose that I have changed my vote because of my colleague's intense sentiment. There are many reasons to favor disclosure. It provides information to other voters who might otherwise try to deduce something from my vote; it serves as something of a check on my colleague who might otherwise exaggerate her intensities to different colleagues in a variety of votes; it opens the floor for other voters who might voice conflicting strongly held views and thus provide me (and other non-intense voters) with a better sample of

58. The bargain will be required by Q if Q is selfish and not interested in maximizing social utility alone or if Q despairs of comparing his preferences with S's. Note that the discussion here assumes that there are not many voters with mild preferences to offset S's intensity.

59. There is the familiar idea of being impressed by an intense opinion emanating from someone who rarely has strong views.
intense opinions; and it even allows me to gauge the number of voters who mildly oppose C because my aim is to give some weight to, but not total regard for, my colleague’s strong preference.

I suspect that many readers are more comfortable with the idea of voting according to the perceived intensities held by other voters in faculty votes rather than in general elections and, in turn, in general elections rather than in jury deliberations. The second comparison reflects the boundaries of the Condorcet Jury Theorem rather nicely. A jury is normally asked to do precisely what the theorem addresses; there is remarkably little room for a relatively intense preference for such things as justice, safe streets, or the Sherman Act, and the jury’s task is meant at least in theory to involve non-expert factfinding. The first comparison, between faculty votes and general elections, reflects the difference between a small and large community of voters. In a general election there is more danger that what one perceives of as intense sentiments on one side is a product of the small sample one experiences. There is also the problem of strategic behavior; voters with mild preferences can say that theirs are strong in order to induce the earnest listener to vote their way. These problems are often resolved in small groups. Colleagues who are strongly inclined against candidate C will not be shy about letting me know of their intensities. Openness about lobbying efforts helps in this regard. The small size of the community contributes to honest revelation. Faculties learn to discount the claims of colleagues who always seem to have intense preferences and to elevate claims of intensity by those who rarely express such sentiments. Repeat play improves the game. No doubt there is also the element of expertise; it is more likely that a faculty member has special knowledge about a candidate’s work than an acquaintance has special insight regarding a presidential candidate. This last element does not, of course, contribute to the case for a market in votes with respect to most political elections.

60. It is therefore easy to see why we do not approve of vote buying among members of a jury. First, jurors do not internalize the social interest in adjudication or accurate factfinding. The social interest in deciding these things has little to do with how much a juror would require to vote one way or the other. If a party could pay all citizens to drop criminal charges, then there might be reason to value such a bargain, but the problem with paying a juror is that we exacerbate the agency costs inherent in the situation.

There is perhaps a slightly more plausible case to be made for the proposition that we allow jurors to buy one another’s votes, but the Condorcet Jury Theorem tells us why that is unwise if we seek to maximize the chance of reaching the “right” decisions. It is also easy to see why we do not want judges on a panel to sell votes to one another. The judges are our agents, and it is not their preferences, or even their intense ones, the system wishes to satisfy. If the judges were somehow representative of constituents with diverse intensities, as are elected politicians perhaps, then the case for vote trading or even buying (with constituents’ funds) first becomes plausible. A judge might, of course, defer to another because of the latter’s perceived expertise. In this case, the Condorcet Jury Theorem (and its assumptions) might help the judge decide when to defer. In any event, there is no precommitment to defer, except in the case of specialized courts, and we can think of each judge as weighing arguments including those in favor of deference to expertise.
The case for and against caring about intensities in general elections is now fairly clear. Where we can assume equal intensities and where we are asking voters to get something right, the case for a straight poll with high turnout is strong. But general elections do not seem to fit this description at all, and intense preferences can now be satisfied in a way that promotes aggregate welfare much as is true for standard commodities. Indeed, the case for multiple parties and parliamentary systems, with something other than binary decisions in elections, has been made on the ground that there are different intensities and values in these elections.61

In the end, I think that arguments against taking intensities into account in political elections can be reduced to concerns about administration or enforcement. If we could avoid problems of strategic behavior and the like, then most general elections would be a great deal like most votes by faculty members or by groups of friends choosing a common activity. And in these situations it is difficult to see why intense preferences should not be given greater weight.

Where a senator is voting on a nominee's confirmation, for instance, there is likely to be no right answer of the sort addressed by the Condorcet Jury Theorem, but rather a matter of preferences with varying intensities. There is, first, the obvious question of whether the elected agent who wishes to satisfy constituents should do what a majority would like or should instead weight their views by the intensities with which they are held, assuming these are discernible. The latter approach seems defensible or even correct.

If an elected representative may or should take intensities into account, then there is the question of the desirability of a market for votes in the legislature. This sort of vote selling, or logrolling, has been the subject of a good deal of literature, much of it emphasizing voting paradoxes and reasons to be suspicious of legislative bargains.62 There is no need to rehash this literature here, so long as we do not forget that these trades may enable us to take intense preferences into account, at least in a situation with relatively few voters who can organize or otherwise overcome their collective action problems.63

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61. See Mueller, supra note 52, at 158-59 (discussing the idea that proportional representation is not about finding the “right” answer and that the choice of a “voting rule for a multiparty parliament must be made on the basis of a different set of assumptions from those Condorcet used to justify . . . [it] for jury decisions”).

62. See Hasen, supra note 2, at 1338-48 (discussing examples of beneficial logrolling, inefficient logrolling, paradoxical logrolling, and equality-affecting logrolling); Saul Levmore, Voting Paradoxes and Interest Groups, 28 J. LEGAL STUD. 259, 263-68 & n.6 (1999) (discussing aggregation paradoxes and the possibility of resorting to single-subject restrictions).

63. Hasen cites a number of sources that make the familiar point that logrolling can be efficiency enhancing by allowing decisions to reflect relatively intense preferences, but there is no way to know whether, on the whole, logrolling does more good than harm. Hasen, supra note 2, at 1343. I have already suggested that legal rules about logrolling in legislatures and elsewhere may
The Condorcet Jury Theorem also draws attention to simple majority rule, which the Theorem justifies in particular settings. But in most settings where things are decided by vote, the correct decision rule is by no means obvious. Libertarians and model builders adore unanimity, but holdout problems make unanimity rules quite unattractive. Moreover, supermajority rules obviously exalt the status quo by requiring more votes for any change regardless of whether the starting point reflected in the status quo can be defended. For the present, the question is whether a simple majority rule in general elections changes the case for or against vote buying or any other method of accommodating intense preferences. We will see, I think, that the likely answer is that with many voters, unequal wealth, and some competition among likely buyers, there is an uneasy case for limited vote buying, and that this case does not much depend on the voting rule (short of something like one requiring unanimity). I will continue to assume that a simple majority voting rule is in place, justified in part by the Condorcet Jury Theorem but mostly by the sense that there is no popular cry to change our voting rules and that it is difficult as a theoretical matter to mount much of an argument for an alternative decision rule.

B. Intensity, Markets, and Perverse Results

1. Carryover voting and other limited markets.

Market economies generate many opportunities for participants to see that market processes offer a method, albeit an imperfect one, of weighting decisionmaking in favor of intense preferences. The major imperfection is of course that the more wealth effects are in the picture, the less reason there is to think that markets are allocating goods to high-valuing users or to those with intense preferences. It is not easy to eliminate these wealth effects. Section II-B above discussed the use of shadow markets for allocating some resources, such as university classroom spaces, but these schemes work in closed systems where transferability (and thus exogenous wealth) can be effectively kept at bay.64

reflect intuitions about the presence of competitive markets, which would further reduce any apprehension about collective action problems.

64. Note that the organizer of these shadow markets has no particular interest in encouraging work effort, so he loses nothing by removing the scarce good in question from the universe of those that can be acquired through work. A central planner might be more cautious about handling wealth effects so bluntly. Note also that while these schemes can hardly guarantee allocations to the highest valuing users because participants may be unable to guess at market clearing prices (and there is a ban on post-auction trades in order to eliminate wealth effects), one suspects that they are used more in universities in the United States than in countries such as Cuba, where market mechanisms are less familiar and less admired (and yet where wealth effects are viewed with even more hostility).
A limited market in political elections is not impossible to contemplate, if by limited we mean to incorporate rules that constrain wealth effects. With modern technology we can imagine endowing each voter with an equal number of points to be used over a period of several elections. These votes could not be transferred, but they could be conserved. The idea is to provide a kind of budget constraint under which each voter can try to express her intense preferences. The budget avoids the problem of empowering those individuals who will simply always be (or say they are) intense. And even if constant expressions of intensity are honest, the shadow system with its budget constraint is likely to do better than current voting practices in weighting intense preferences. Individuals will not know the opportunity cost of spending their votes, because this depends on knowledge about future elections, including the issues and candidates that will then be in play, the tightness of the election, and one’s own future preferences. But this sort of uncertainty is present for most decisions and our usual inclination to interfere very little with private attempts to maximize utility should carry over to the political arena. Indeed, a useful thought experiment consists of exploring the objections to a modest change in voting law such that votes could be saved for future elections or perhaps, to a limited degree, borrowed from future elections. It is unlikely that much would be different in this carryover system simply because an individual voter could choose to spend five or ten votes at a time, although it is possible that most voters would devote more effort (on fewer occasions) to studying candidates and issues. Voters or interest groups might try to save votes and invest strategically, but this poses as little risk as it does in most thick markets. The benefit associated with allowing people to spend their votes as they please would seem to overcome such risks.

Limited markets, including the very simple notion of giving each voter multiple votes to spend or conserve over several elections, do not solve any of the familiar collective action problems, and they may create new ones as well. There is the familiar puzzle which begins with the observation that no rational voter expects to make a difference. The carryover scheme just described does not overcome this “problem,” but it certainly does not exacerbate it. If present voting practices encourage something of an accurate poll of voters’ first choices, then carryover voting might do as well at gauging each voter’s intense preferences. There are also collective action problems associated with organizing groups and raising money to influence political

Queues may also work as market substitutes and in some circumstances they may even do a better job at allocating goods to those with the most intense preferences. Queues may eliminate wealth effects but they are also costly in that they take people away from more productive endeavors. When the social norms associated with queues allow those who acquire goods through queue-waiting to turn around and sell these goods, there is an obvious compromise between concerns about disparate wealth and about eliminating desirable trades. But this is obviously not the place to explore queues.
VOTING WITH INTENSITY

outcomes. Again, this problem is not implicated by a rule which gives a voter new freedom to conserve and spend votes.

Other collective active problems arise only because of the conservation, or multi-election, concept. A voter may marshal points to support a strongly held preference, but then be inclined to exercise voting rights when polls suggest that the chance of influence has increased, while nevertheless remaining at some insignificant level. Voter A may prefer candidate X1 in 2002, candidate X2 in 2004, and candidate X3 in 2006, with a very strong preference for X3 over Y3 in that election. In 2002, A is inclined to conserve her points. But in 2004, if polls show that X2 is doing well, or that like-minded voters are expending their points in favor of X2, A may conserve for 2006 because her points will likely be wasted if used in 2004. But if too many voters behave in this way, X2 may lose even though X2 is preferred by an intense majority. And even if that is unlikely because polls are fairly accurate, so that voters (and especially intensely preferring ones) will be warned when their candidate is in danger, it is still the case that some "lucky" voters who favored X2 will conserve their points (if X2 did not need every available point to win) and these voters will be especially empowered in the year 2006 election even though a majority of voters, perhaps more intensely, do prefer Y3 over X3. In a single election to fill multiple seats, there is a well-known and impressive (but still imperfect) solution to this problem, in the form of single transferable voting, or STV.\textsuperscript{65} But it is difficult to imagine some version of STV that would operate over multiple elections, if only because voters know neither who will run in future elections nor how intense their preferences are apt to be.\textsuperscript{66} In any event, the miscalculations that arise over multiple periods can, of course, occur in normal markets with perishable goods, and we hardly rely on these theoretical imperfections to eradicate entire markets. The point here is simply that one can hardly claim that a move to this form of multi-period, or carryover, voting would be unambiguously good.

It is tempting to say that we do not (and would not) allow people to save votes in the manner just sketched because we have an idealized conception of democratic participation, which generates the intuition that it is better for

\textsuperscript{65} STV, as used in Australia and elsewhere to record ordered preferences and to credit "excess" votes to voters' subsequent choices so as not to "waste" votes, is discussed in Saul Levmore, \textit{Parliamentary Law, Majority Decisionmaking, and the Voting Paradox}, 75 VA. L. REV. 971, 1037 n.171 (1989) (hereinafter \textit{Parliamentary Law}).

\textsuperscript{66} Another tempting solution to the problem of wasted votes is to deploy an intermediary who could gather points and information about preferences. But there is the obvious question of how this intermediary will discern intense preferences held by constituents and how strategic communication can be avoided.

\textsuperscript{66} An STV-style procedure could avoid wasted votes in one time period, but this does not solve the individual voter's problem of how many votes to put on the table in the early election period.
all plausible voters to pay some attention to politics in each and every election. But we can solve this problem by limiting the carryover possibilities so that every voter retains at least one vote for every election. Some voters might spread their votes evenly while others preferred to concentrate their votes on a single candidate in a given election, but the latter type would need to reserve at least one vote for each election.

This sort of system makes room for voting with intensity, but it is fraught with strategic behavior and other problems. Indifferent voters might accumulate voting power by default rather than by thought. More generally, voters can easily guess wrong as to how best to conserve and spend their votes. One must guess what future elections will bring in terms of choices, competitiveness, and fellow voters' behavior. X might win today's election, even though a substantial majority prefer Y over X, because Y's supporters disproportionately conserve votes to spend in some future election when, in fact, they may not be needed. The option of conserving votes thus produces the possibility of a perverse result in the present election (or, in another example, a future election) such that the candidate preferred by the majority will lose. Indeed, a relatively intense majority can lose if their strategies prove unwise. A nice feature of our simple, present system is that this sort of perversity does not arise. Of course, our primary campaigns and campaign finance systems can generate perverse results, so my positive claim can be only that in general elections we avoid innovations that threaten perverse results.

The fact that we cannot bank votes to use as we please over several elections is thus one example of the idea that voting law rules out schemes that produce perverse results. We try not to create situations in which participants will see that the result of an election (or other decisionmaking process) is contrary to the one a majority of their number wished. With market-like voting schemes, perverse results—and then dissatisfied citizens—become likely, as strategists are in increasing danger of outsmarting themselves. In future work I plan to expand on this idea, that an important priority in our laws (positively speaking) is that they not generate perverse results (more carefully defined). For the present I think it sufficient to note that if we allow voters to show their intense preferences by saving votes for these intense occasions, then these very voters might be sorry about their strategic exercise of these voting rights.

67. See note 78 infra and accompanying text.

68. See Parliamentary Law, supra note 65, at 991-96 (suggesting that rules evolve in response to dissatisfied majorities recognizing that prevailing rules had produced results that this majority could defeat).

69. It is of course true that markets can produce similarly perverse results because those who save for the future might have valued present consumption more than those who consume today. The result can be perverse because participants do not know future prices, incomes, and so forth.
Nor is this the place to explore limited, or shadow, markets in greater detail. The collective action problems seem difficult, but there is an emerging field of applied economics that works with such shadow market systems, and perhaps we will see some serious proposals for voting markets as that field grows and as experiments with shadow markets for other scarce resources (not previously acquired in markets) spread about.

2. Real markets, small and large.

Perverse results may be possible once buying or conserving of votes is permitted—with or without some control on wealth effects—but it is reasonable to ask for an assessment of this cost of accommodating intense preferences. Is it plausible that a real market would normally enable the intense forty-eight percent to get their way over the mild fifty-two percent? The emergence of markets in shareholder voting rights is surely a hopeful sign that a market in electoral votes is logistically manageable, but it tells us little about the magnitude of the threat of wealth effects or perverse results.

We know that for a real market to work there must be competitive bidders to solve the simple collective action problem. And as a practical matter, L must agree to this switch to an open market, even though it is likely that vote selling will benefit U more than it will L, or at least a majority of L. Both groups will enjoy the benefits associated with allowing intense preferences to carry more weight than mild ones, but L is more likely to sell and gain income.

Consider in this regard a smaller community that might allow decision-making to be influenced by market transactions. Imagine, for example, a cooperative association of residential dwellers or shopkeepers whose association bylaws provide for large expenditures to be authorized only where there is majority support by the membership. There are eleven voters, A through K, and a six to five vote against some proposed improvement is about to be recorded. Imagine now that B, who is intensely in favor of the improvement, can see that he is likely to lose in a close vote. We might imagine that the
voters are arrayed from A to K, with K most strongly opposed and F the
swing vote, but B does not have this full information. K’s opposition might
have something to do with wealth effects or perhaps K simply likes the ex-
isting physical facilities; the swing voter, F, is mildly opposed to the pro-
posed improvement but would likely vote in favor of the expenditure if the
project were slightly less costly. B senses that there might be some member
like F whose vote could be switched in order to form a new and approving
majority.

Which should we prefer: a rule against vote sales; a practice permitting B
to search for F and to offer a side payment in return for F’s vote; or a practice
permitting B to announce that he will personally pay $X of the cost of the
improvement, thus reducing everyone else’s cost by $X/11, so that at this
new price, (B hopes that) at least one of the members of the previous major-
ity will change his or her vote? It is hard to see why vote sales of this sort
should be barred by convention, law, or contractual precommitment.

The choice between side deals and a central auction is, however, an in-
teresting question. One place to begin is to ask whether we expect B to make
the offer to a fellow member in confidence.72 If B makes the offer public to
neighbor J, G may reveal that she has even weaker preferences against the
project and that B might buy her vote for less than $X. On the other hand, K
may see that her majority is about to be dissipated and she may now bid to
hold together enough votes against the project. Of course, the more various
voters see that they can profit from strategic claims about their inclinations,
the less confidence we have that vote selling does much in the way of getting
at true and intense preferences.73

If B’s first step is in the form of a promise to reduce the project’s total
cost by making a payment to the central account (rather than looking to make
a promise of a side payment to the prospective swing voter with the mildest
preference), it is again possible that true preferences will be revealed and that
a market will settle on the “correct” decision in terms of total utility. K may
outbid B, and other intense members may pool their resources to buy votes.74

72. In the faculty vote context, I suggested that disclosure was wise. See text accompanying
note 59 supra. The situation here is a bit different.

73. Thus, D might feign opposition in order to extract a payment from B. There is literature
on “demand-revealing” processes that suggests the value of a centralized process which asks every-
one to reveal preferences, such as how much a new project is worth to a responding member, and
then to abide by the aggregated results. See generally, T. Nicolaus Tideman & Gordon Tullock, A
New and Superior Process for Making Social Choices, 84 J. POL. ECON. 1145 (1976) (explaining a
process for selecting public goods in which each individual may change the outcome which occurs
without her vote by paying a special charge equal to the net cost to others of including her vote). A
problem with this approach in many real settings is that some voters have superior information
about others’ preferences.

74. I continue to imagine that preferences are arrayed from A to K, with A most in favor, K
most opposed, and F in the middle, leaning toward K unless paid to do otherwise. The actors them-
In the end, the more we think that there are intense sentiments on both sides and a few mild, swing voters in the middle, the more likely it is that a market will take some good measure of the situation. But there is no reason to prefer the central auction method. If we require B to make payments to the central account, then we will miss out on some wealth-maximizing moves. In most cases, I think we would prefer for B (or A!) to make a single side payment to F, and for the vote to be six to five in favor of the new project. B and F are made better off, and we have no reason to think that the negative externalities exceed the positive ones.

The question then is what, if anything, changes as we move from eleven members voting on an improvement to thousands or even millions voting to fill a political office. The best case for vote selling is where there are many voters who intensely favor candidate X, many others who intensely prefer X's opponent, Y, and then some voters with milder preferences. In the best case, the intense voters overcome part of the basic rationality paradox and are then the least inclined to sell; indeed X and Y seek these voters' financial contributions in order to purchase swing votes directly or indirectly. The more intensity translates into an ability to hold or purchase more votes, the better the market will work (in the sense of increasing total utility). But this sort of translation may run into immediate difficulty at the front, or fundraising, end because raising money from a large group that will jointly consume the outcome is obviously difficult and rife with collective action problems. Wealth effects, charismatic fundraisers, and free rider problems seem much more likely to determine the outcome than would relative intensities.

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The problem with using a market to get at intensities where there are large numbers of participants is no smaller at the other, vote-trading, end. In the first place, individual voters may maximize their income on grounds that their own votes or sales of voting rights are most unlikely to affect the result. A potential voter who strongly prefers candidate X over Y, and is able to commodify that preference with the thought that she would sell her vote to Y for $500, may well sell to Y for much less than that amount if Y offers her more than X offers—simply because she recognizes that this sale on its own will not determine the winner of the election.

And even if we imagine that voters with intense preferences will not sell to the candidate they hope is defeated because of some principle or some deep risk aversion, it is easy to imagine that swing voters with mild preferences would (much more likely) sell their votes in a manner that perverts the expression of their preferences. Imagine that F is a swing voter, and perhaps an unlikely one, who mildly prefers X over Y and who would sell her vote for $50 to Y if she thought that her vote was the marginal and deciding vote in the election. Once F knows that her vote is unlikely to be the deciding one, F’s selling behavior will tell us little, if anything, about her preferences. Even if F does something other than maximize her income, such as maintaining a wedge between X and Y, perhaps selling to Y only if Y offers some amount more than what F could otherwise earn, there is no reason to think that this amount leaves us with much information about the relative intensity of preferences. F has no reason to sell cheaply to X so she might sell to Y for a higher price than X offers, or force X to spend money buying F’s vote so that X has less left with which to buy other votes. The basic idea is that in the absence of a market for votes, F’s voting right might go unexercised, but at least F has no reason to vote for the candidate she less prefers. But now with money to be made, F has a reason to sell to Y though she prefers X, and even voters with more intense preferences may do the same, selling to the “wrong” buyer. If a substantial number of voters behave in this manner, the market will do nothing to accommodate intensities—and it might well produce a winner that a majority disfavors and that intensely-preferring voters disfavor as well. I have already introduced the idea that laws that produce perverse results might be disfavored, perhaps as part of some evolutionary process. Vote buying (of a kind) might therefore be out of the question because it can produce perverse results. In contrast, if vote buying is not per-

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The reference to fundraising in the text suggests the question of why we encourage charitable organizations in some arenas.
mitted, then a supporter of candidate X has no reason to vote for candidate Y.\textsuperscript{78}

The thrust of the opening example, in which supporters of one candidate offer large payments to the treasury or to a set of causes supported by the opposing candidate, is that there might be ways of accommodating intense preferences and yet avoiding the most likely perverse results. The idea is that this sort of offer might cause someone to switch his vote because he now prefers victory by the candidate he previously disfavored. But there would be little reason to switch if the offer did not really change one’s preferred outcome. One variation is for the offeror to promise a payment the size of which depends on the number of votes (above some threshold, perhaps) received by a given candidate, so that the marginal vote makes some difference. An interesting thing about these variations is that the fixed timetable for a political election removes the danger that a voter will dissemble in order to test the offeror’s reservation price. In contrast, in many smaller-scale settings, where intensities can affect votes or payments, there is the danger of strategic behavior backfiring. In the case of the residential association’s potential investment, for example, a member who intensely favors the investment might dissemble in the hope of extracting a contribution from another member with an intense preference. The first member knows that there will be time to raise one’s contribution because there is no constitutional deadline for action.

At the risk of some repetition, it is useful to summarize the problem of getting at intense preferences in political elections from two perspectives, one offered by small associations and the other by shareholder vote buying in corporate law. The first (eleven-voter) case is one where it is easy to see that different intensities will create room for bargains that increase total utility. An intense buyer might buy the vote of a mild seller, and although there are serious external effects on other members, it is quite plausible that these offset one another and that a market can succeed in the usual terms. There is a great deal that can go wrong, and hardly a guarantee that collective action and strategic behavior problems will be overcome, but it would be surprising if the association precommited to bar vote sales or auctions of any kind. In the extreme, a member can normally acquire votes by purchasing entire property interests. At the same time, as the number of participants rises it seems less likely that a market will succeed in uncovering the relative strengths of intense preferences. In most political elections with thousands of participants, collective action problems and strategic behavior, not to mention wealth effects, would likely dominate, although there may be some

\textsuperscript{78} I promised to defer the perverse results theme to another day, but it should be noted here that if voting law were entirely about avoiding perverse results, then we might expect compulsory voting because uneven voter turnout might lead to odd results. Similarly, uneven fundraising can lead to anti-majoritarian results.
room for modest attempts, such as very limited markets, to get at intense preferences.

In the case of shareholder votes, there is something of a single metric, value maximization, and it is much harder to see why there would be different intensities of preferences. Indeed, there is something of a case to be made for the applicability of the Condorcet Jury Theorem, in which case shareholders might just as well bar the sale of votes, counterintuitive as this seems. They might not resort to a one-person-one-vote rule because small investors might be expected to invest too little in gathering information. In any event, if vote selling is permitted, it is, as discussed earlier, because of difficulties in overcoming defensive tactics, the development of financial instruments, and the reduction in some collective action problems. It is unlikely that a free market in shareholder votes is aimed at (or would succeed in) allowing intense preferences to be satisfied. But limited market schemes, like the one offered hypothetically by the supporters of B in our opening example, do seem likely to get at intensities. It is, after all, an alternative to the candidate himself making the right set of promises—if convincing enough or enforceable—in order to sway the necessary supporters.

3. **Limited markets in other arenas.**

The problems associated with an open market in voting rights, or even with a market limited to aggregate vote buying (as when one candidate or his supporters promise a sum to specific causes that appeal to an opposing candidate’s supporters), do not fully explain or favor the conventional ban on such limited or unlimited markets. The usual thinking behind this sort of observation is a version of “compared to what” questioning. Current voting practices and campaign financing also suffer from various problems, and the question is whether change would be for the better.

But there is a different way to think about the case for limited markets in politics and that is to think about other decisions that we allow to be made with limited markets—aimed in no small part at the question of intense preferences. Consider the enormous work done by nonprofit organizations such as universities, hospitals, and museums. Voluntary contributions, often assisted by tax deductions, are an important source of revenues for these or-

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79. I ignore different tax circumstances and other factors that might lead to clientele effects but also to periodic adjustments in corporate decisionmaking.

80. One way to think about the matter is that the advantages suggested by the Condorcet Jury Theorem are retained if we give each share a vote; we have no reason to think that those who now have more voting rights are less likely to be right than those with fewer shares and voting rights. At the same time, there may be settings in which those with more shares find it worthwhile to gather information. As such, when the straightforward theorem does not hold, because some (well-informed) identifiable voters are more likely to be right than others, we are well-positioned to make the right decision because we have assigned more votes to those shareholders.
organizations. In turn, contributors to these entities face some uncertainty and collective action problems of the kind faced by voters in some limited market schemes. For example, some contributors to charity Z might “prefer” charity Y, but they expect Y to obtain resources from other contributors and sources. These contributors are much like voters in the limited market scheme, whose preference for one candidate or the other is somewhat, but very imperfectly, revealed by promises of funds to specific causes. A second similarity concerns wealth effects. In the charitable sector we recognize that the available tax deduction gives wealthier contributors more of a voice than alternative allocation schemes, much as open markets and most campaign financing schemes come with important wealth effects.

There are, of course, differences between votes and contributions. A marginal contributor to a university might be encouraged to know that whatever other money the university raises, the contributor’s money will be put to some good use. Meanwhile, Congress might be satisfied to know that the charitable deduction provides a sort of matching grant to the university. In contrast, a voter—and especially a buyer of votes—knows that resources are in some sense wasted if the preferred candidate loses.

This example hints at the idea that we might do well to think of a politician or a political party as a familiar nonprofit organization, both in terms of legal constraints and resource allocation. But for now, the simple point is that we accommodate and even take advantage of intense preferences in some sectors despite the obvious collective action and strategic behavior problems that are present. We do so in part because these allocation methods might be superior to pure political decisionmaking on the one hand, and to unfettered markets on the other.

V. CONCLUSION

I have suggested that one reason we do or ought to bar the direct sale of votes in the political arena is that we have little confidence that a market in votes will do a credible job of producing evidence of relatively intense preferences. We might say that collective action problems are so severe that a market is unlikely to work. We do not need such a market to fix output levels and it is hard to make the case that a market will allocate resources or decisionmaking authority to higher valuing users. In the absence of an affirmative case for this market, there are many reasons to fear it. These include wealth effects and collective action problems which can bring about perverse results. There is a positive as well as a normative component to this conclusion. Our rules for general elections seem aimed at avoiding perverse results and, as a normative matter, there is an obvious if contestable argument in favor of political majorities—untainted (as much as possible) by wealth and markets.
Agnosticism or skepticism about the ability of large-scale vote selling to satisfy disparate preferences is on par with the observation that voting is about public goods. It is impossible to exclude people from that which we vote for and there is joint consumption of most outcomes. A market in votes is like a market in national defense or in clean air. Intensities are probably not equal, so we cannot simply insist that majoritarianism is the best we can do, but it is hard to know how individuals value alternative defense policies or levels of air quality.

Political elections as currently organized have many defects but also some obvious virtues. Among these virtues is one I have exploited in part but also deflected, namely that no voter or contributor who prefers presidential candidate G has reason to vote for or to support B. In contrast, a market in votes will create the risk that voters, while holding out for higher prices or waiting to buy at lower prices and so forth, will vote or sell perversely. This does not rise to the level of a paradox, because it is not as if the rational voter is expected to vote for the candidate she least prefers (at the offered price), but it does amount to a serious danger that markets will do harm rather than good, even when measured on their own terms. Another, perhaps overwhelming, defect of a market in voting rights is that wealth effects might dominate preference intensities, just where a majority is inclined to limit the effects of unequal wealth. But there are ways of limiting wealth effects, and clever ideas for limited markets may soon begin to surface. These limited markets may retain the quality of avoiding perverse voting behavior even as they remain simple enough to provide a sense of legitimacy.

Current law in most jurisdictions makes some room for intense preferences. Candidates, parties and interest groups rely on contributions, volunteer labor, differential voter turnout, enthusiasm at rallies and in petition drives, and so forth. If the idea is to take a poll of eligible voters, along the lines suggested by the Condorcet Jury Theorem, then the practical importance of these displays of enthusiasm and intensity of preferences should be regarded as unfortunate, though perhaps too difficult to outlaw. These regulatory tools may also be too dangerous to encourage. But if the idea is that

81. There is the possibility that the voter thinks that G will win but behave better in office if G perceives a smaller margin of victory. Inasmuch as this voter will think the same about signals in most market systems, I will ignore this motive. Similarly, I ignore strategic voting in three-way elections.

82. Of course, our current political system offers this sort of danger when there are three or more candidates, because it is easy for a Condorcet winner to lose in our typical plurality voting systems. I suspect that if it turned out that C would defeat A and also B in pairwise competition, but that A emerged as president, there would be a significant move to change our voting rules. Such realities have arguably caused changes in our parties’ primary election rules. The point in the text is that if strategic behavior appears to decide an election, there would be significant backlash against the limited market rules that spawned this behavior.
we welcome and value intense preferences, and wish to give weight to them so long as wealth effects do not dominate, then it is quite plausible that we could do better by permitting some limited market mechanisms.