

International Vote Buying

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This Article examines the widely practiced—and widely ignored—phenomenon of “international vote buying” among states, that is, conduct whereby states offer material benefits to other states in exchange for their votes or decisions in international institutions. Domestically, such behavior would be patently illegal as bribery or election fraud. Yet under international law, it is both legal and relatively routine. Should this be so? Is vote buying corruption, or an acceptable feature of international relations? Scant attention has been devoted to these questions; this Article therefore represents a modest attempt to fill that void. Building on insights from the domestic sphere, this Article presents a new normative framework for assessing international vote buying. In so doing, it aims to foster debate about this important and underappreciated phenomenon, as well as to reassess our intuitions about the nature of international decisionmaking.

INTRODUCTION

It is widely understood and accepted that states make political tradeoffs with one another in the international arena. The United States has trod carefully with China to secure its cooperation on North Korea sanctions¹ and has paused North Atlantic Treaty Organization (“NATO”) expansion as a concession to Russia, arguably in exchange for its help with Iran.² Among European and North American allies, deals are cut on climate change and the war on terror.³ Such bargains might be criticized as being overly pragmatic—an abandonment of moral principles—or politically imprudent, but rarely, if ever, are they considered “corrupt” in the legal sense. Yet, consider the following: in December 2009, Russia offered the island state of Nauru \$50

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1. See, e.g., Louis Charbonneau, *U.S., Allies Urge Sanctions for North Korea Firms; China Resists*, REUTERS, May 1, 2012, available at <http://www.reuters.com/article/2012/05/01/us-korea-north-un-idUSBRE84014Y20120501>; Mark Landler & Steven Lee Myers, *U.S. Sees Positive Signs from China on Security Issues*, N.Y. TIMES, Apr. 26, 2012, available at <http://www.nytimes.com/2012/04/27/world/asia/us-is-seeing-positive-signs-from-chinese.html>.

2. See John Vinocur, *Russia Seeks Quid Pro Quo to Rein Iran In*, N.Y. TIMES, Feb. 15, 2010, available at <http://www.nytimes.com/2010/02/16/world/middleeast/16iht-politicus.html>; see also John Vinocur, *Central and Eastern European Countries Issue Rare Warning for U.S. on Russian Policy*, N.Y. TIMES, July 20, 2009, available at <http://www.nytimes.com/2009/07/21/world/europe/21iht-politicus.html>.

3. See, e.g., *EU Leaders Reach Climate Deal*, BBC NEWS, Dec. 12, 2008, available at <http://news.bbc.co.uk/2/hi/europe/7778787.stm>; Hans-Jürgen Schlamp, *EU Parliament Balks at US Data Deals*, SPIEGEL ONLINE, July 10, 2010, available at <http://www.spiegel.de/international/europe/the-americans-want-to-blackmail-us-european-parliament-balks-at-us-data-deals-a-721811.html>.

million in exchange for its extending diplomatic recognition to Abkhazia and South Ossetia, the two separatist provinces in Georgia.⁴ In 2008, Iran paid \$200,000 to the Solomon Islands in exchange for future votes against Israel in the U.N. General Assembly.⁵ In 2003, the United States pledged millions of dollars to Angola in connection with a U.N. Security Council vote that would have paved the way for the invasion of Iraq.⁶

The illustrations above point to what might be called “international vote buying” by states. In the domestic context, many, if not all, of these behaviors would be outlawed as bribery or election fraud.⁷ Yet, on the international level, they are a routine feature of relations between countries—the second of a realist’s “three tools of the statesman,” namely, “logic, bribes, and threats.”⁸ Moreover, they are perfectly legal.⁹ The phenomenon of international vote buying has received considerable attention in the economics literature¹⁰ and is occasionally reported in the press;¹¹ among legal scholars, however, it has gone largely unexamined. This Article therefore seeks to redress, in part, the existing lacuna, and to shed light on the following question: *should international law attempt to regulate or prohibit international vote buying?*

To examine the practice of vote buying is, in some sense, to question the very foundations of international decisionmaking bodies. What does the existence of a thriving—and *lawful*—vote market imply about the legitimacy of such institutions? It is evident that as a method for re-infusing wealth and muscle into ostensibly “legalized” decisionmaking processes, vote buying runs along the fault line between the normative aspirations of interna-

4. See Luke Harding, *Tiny Nauru Struts World Stage by Recognising Breakaway Republics*, GUARDIAN, Dec. 14, 2009, available at <http://www.guardian.co.uk/world/2009/dec/14/nauro-recognises-abkhazia-south-ossetia>; Ellen Barry, *Abkhazia is Recognized—by Nauru*, N.Y. TIMES, Dec. 15, 2009, available at <http://www.nytimes.com/2009/12/16/world/europe/16georgia.html>; see also Audrey Young, *Russia Accused of Pacific Bribery*, NEW ZEALAND HERALD, Oct. 4, 2011, available at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10756359.

5. See Itamar Eichner, *Report: Iran 'Bought' Solomon Island [sic] Vote Against Israel*, YNETNEWS (Isr.), Nov. 22, 2009, available at <http://www.ynetnews.com/articles/0,7340,L-3808621,00.html>.

6. See Jeanne Cummings & Robert Block, *U.S. Bids Against France for Votes in U.N.*, WALL ST. J., Feb. 26, 2003, at A4; Dafna Linzer, *Security Council Members with Pivotal Iraq Votes Receive Billions in Aid from U.S.*, ASSOC. PRESS NEWSWIREs, Mar. 5, 2003.

7. See *infra* Part II.

8. Charles Maynes, *Logic, Bribes, and Threats*, 60 FOREIGN POL'Y 111, 111 (1985).

9. See *infra* Part I.

10. See, e.g., Ilyana Kuziemko & Eric Werker, *How Much Is a Seat on the Security Council Worth? Foreign Aid and Bribery at the United Nations*, 114 J. POL. ECON. 905, 907 (2006); Fumiko Tamura & Takuma Kunieda, *Vote-Buying Behavior in the Security Council: Theory and Evidence from U.S. Foreign Aid* (Oct. 6, 2005) (unpublished manuscript) (on file with author); Axel Dreher, Peter Nunnenkamp & Rainer Thiele, *Does US Aid Buy UN General Assembly Votes? A Disaggregated Analysis*, 136 PUB. CHOICE 139 (2008); Axel Dreher & Nathan M. Jensen, *Independent Actor or Agent? An Empirical Analysis of the Impact of U.S. Interests on International Monetary Fund Conditions*, 50 J.L. & ECON. 105 (2007); Axel Dreher, Jan-Egbert Sturm & James Raymond Vreeland, *Global Horse Trading: IMF Loans for Votes in the United Nations Security Council*, 53 EUR. ECON. REV. 742 (2009); Charles Kegley & Steven Hook, *U.S. Foreign Aid and U.N. Voting: Did Reagan's Linkage Strategy Buy Deference or Defiance?*, 35 INT'L STUD. Q. 295 (1991).

11. See *supra* notes 4–5.

tional law, on one side, and the realities of power politics, on the other. But does vote buying undermine the international system, or is it a necessary escape valve for the pressures of *realpolitik*? Does it unfairly aggrandize the power of the rich, or is it a laudable channel of income for poor countries? Does vote buying distort decisionmaking, or instead enable it to reflect states' preferences more accurately? These and other similar questions rest at the heart of this Article. More broadly, this Article also implicates an insoluble debate about how we ought to envision international relations: as a reality to be explained or as a set of practices that can be normatively judged and shaped.

For the purposes here, the concept of "vote buying" is generally limited to exchanges of valuable consideration for a vote or decision on a matter concerning the wider community of states. The Article will not attempt to articulate a single definition of international vote buying, nor will it seek to address the full range of bargains and interactions that occur on the international plane. Instead, it will develop a typology of the most common practices that might reasonably be considered vote buying, and then employ this typology to identify factors that may tip the normative scales for or against various international practices. The Article's mere labeling of a certain practice as "international vote buying" is not, in itself, meant to presuppose any sort of normative judgment.

It is somewhat surprising how little has been written on vote buying from an international law perspective, given the frequency with which countries purchase each other's votes. To date, only two legal scholars have addressed the subject in any detail. The first, Alexander Gillespie, has argued that international vote buying should be banned because it is a form of corruption that undermines international democracy.¹² More recently, Ofer Eldar has taken a very different perspective to argue instead that a prohibition on international vote buying (or, more broadly, vote trading) would be unjustified.¹³ Approaching the normative question through a consequentialist paradigm—that is, by postulating whether vote buying produces "good" international outcomes on balance—Eldar concludes that vote buying ultimately advances, rather than undermines, global welfare.¹⁴

These opposing positions, while surely valuable in themselves, leave a considerable gap in the literature. On one side, Gillespie takes for granted that international vote buying is indeed "corruption" and that the international order is "predicated on principles that are very similar to those in democratic domestic systems."¹⁵ If we were to accept those premises, the

12. See Alexander Gillespie, *Good Governance, Corruption & Vote Buying in International Forums*, 1 N.Z. Y.B. INT'L L. 103 (2004) [hereinafter *Good Governance*]; see also Alexander Gillespie, *Transparency in International Environmental Law: A Case Study of the International Whaling Commission*, 14 GEO. INT'L ENVTL. L. REV. 333 (2002) [hereinafter *Transparency*].

13. See Ofer Eldar, *Vote-Trading in International Institutions*, 19 EUR. J. INT'L L. 3 (2008).

14. See *id.* at 7, 38–39.

15. Gillespie, *Good Governance*, *supra* note 12, at 104.

argument against international vote buying would be straightforward, as Gillespie demonstrates. Yet, in a world where we still speak of superpowers and geopolitics, one might easily doubt that international relations and domestic democracy are as similar as Gillespie suggests. That is not to say that domestic analogies are meritless, but they are by no means self-evident. It does not *automatically* follow that because vote buying is illegal domestically, it should also be illegal between states.

Moreover, Gillespie's critique makes no mention of possible benefits from vote buying, such as wealth redistribution to poor states or a more accurate reflection of states' preferences; nor does it confront the present reality that much of the international community appears satisfied to maintain the practice. Whatever our intuitions about the rightness or wrongness of the current system, it is surely significant that no constituency of states has ever emerged to *oppose* vote buying—indeed, rich states and poor states alike have an interest in its continued legality.

On the other side, Eldar defends vote buying's normative merits in a manner that entirely sidesteps the reasons why vote buying is objectionable domestically. Eldar's consequentialist framework—which, to recall, posits that vote buying is beneficial to the world on balance—takes account of only one aim, namely, welfare maximization. And because Eldar measures welfare solely by reference to the outcomes reached on particular international decisions, the framework necessarily ignores a host of other values we might think are important. For example, what about fairness, the integrity of the system, or perceptions of legitimacy? Eldar's welfarist paradigm cares nothing about these, but provides no justification as to why we should prefer “good” international decisions to the exclusion of any other concerns.

Even more fundamentally, we might question whether Eldar's consequentialist paradigm is able to determine satisfactorily what counts as a “good” outcome at all.¹⁶ There is rarely agreement in the international community over this question; what is good for one party may be detrimental to another. Granted, one can imagine scenarios in which self-interest might impel a state to favor an outcome that is obviously “bad” or “wrong.” However, even where broadly accepted norms exist—for example, as regards genocide, torture, or slavery—the sorts of decisions that are affected by vote buying often fall beyond straightforward application of these values. Indeed, the very existence of vote buying suggests disagreement; if there were consensus among states, there would be no need to buy votes. Eldar's framework assumes that we can know and identify the “good” outcome entirely apart from any prior decisionmaking process, and that we have a universally-

16. See, e.g., Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 821 (1994) (“Because any conception of consequences is interpretive and thus evaluative in character, simple consequentialism is not a feasible project for law.”).

shared hierarchy of values by which we can weigh competing “goods” against one another.¹⁷ Both assumptions are disputable at best.

For the reasons just described, the existing debate about international vote buying remains far from complete. Yet both prior contributions underscore helpful insights: Gillespie demonstrates that there is potential value in comparing the international to the domestic, in the sense that the domestic arena provides a rich and well-developed set of normative considerations by which to test our intuitions about vote buying among states; meanwhile, Eldar reminds us that vote buying, despite its negative domestic associations, may indeed be far less problematic—desirable, even—in the international context. This Article therefore seeks to build on these competing approaches by offering a new normative framework for analysis.

The Article pursues its goal in the following way: it examines the rationales underpinning the anti-bribery and anti-vote buying norms that exist in various domestic legal systems and then extrapolates to the international level to ask whether these rationales can be convincingly applied to the practices and contexts that characterize vote buying among states. In other words, this Article draws on domestic-level reasoning, but does not assume that such reasoning is easily transposable into the international sphere. Instead, it asks, what features must international voting systems exhibit if these domestic rationales are to retain their force once transposed? What understandings would we need to hold regarding the nature of the international order?

The normative conclusions that follow from this approach are necessarily contingent; they depend on our prior views as to how the international system works, as well as to how it should work. The scope of persistent disagreement over such questions is so vast that to endorse a single viewpoint at the outset would leave the ensuing analysis blind to criticisms emanating from other perspectives. At the same time, to argue for any particular vision of the international order would require a far deeper inquest than this Article can offer. The compromise is this: those who would seek an unequivocal answer to the original question—that is, whether vote buying should be banned under international law—will inevitably be dissatisfied; the benefit, however, will hopefully be a more nuanced inquiry and more thoughtful guidance, whereby readers can reach their own conclusions.

The Article is organized as follows: Part I offers a brief typology of international vote buying to illustrate the scope of the project. Next, Part II lays out the current contours of international law with respect to the practice of

17. For example, how are we to weigh the “good” of environmental protection against the “good” of development when the two are in conflict? There is, obviously, pervasive disagreement over which value should be prioritized. Another criticism is that any such consequentialist model is steeped in and dependent upon highly speculative counterfactuals. Many times, it is impossible to know with certainty what outcome would have ensued if a different decision had been chosen; therefore, we cannot ever verify whether the “greater good” was indeed achieved.

vote buying among states. It demonstrates, in short, that international law has very little to say on the matter. Turning to the domestic analogy, Part III then examines various countries' domestic-level prohibitions on bribery and election fraud, as well as the rationales that animate these laws. In particular, it identifies five main sets of concerns: citizenship, equality, efficiency, reason giving, and system integrity. Part IV returns to the international level, suggesting the general considerations that must inform a transposition of the domestic rationales to the international sphere. Finally, to further develop the normative question posed initially, Part V considers whether these rationales, as transposed to the international level, could support an international legal norm against vote buying.

I. INTERNATIONAL VOTE BUYING: A TYPOLOGY

What exactly *is* international vote buying?¹⁸ To illustrate the scope of the issue—and, moreover, what is at stake—this Part provides a nonexhaustive typology of international vote buying among states. For those who would advocate a democratic international order, this section also serves as a reminder of how far short of that ideal the system currently falls. The aim here is by no means to catalogue every reported instance of vote buying, nor to highlight every possible context in which it occurs; it is merely to sketch the basic contours of the phenomenon. By offering some concrete examples at the outset, it will be possible to refer back to these and similar cases in later discussion.

A. *Voting in the United Nations*

In a 2006 study, Harvard economists found that a country's U.S. aid increases by fifty-nine percent when it assumes a temporary seat on the Security Council.¹⁹ This effect is even more pronounced during years in which key diplomatic events take place (when members' votes should be especially valuable), and the timing of the effect closely tracks a country's election to, and exit from, the Council.²⁰ Similarly, statistical studies have shown that general budget support and grants are linked with voting compliance in the General Assembly.²¹ These data are not, in themselves, evidence of explicit quid pro quo vote buying. Nevertheless, they are suggestive of the influential role that money plays in voting at the United Nations. In the words of

18. It may also be worth clarifying at the outset what "international vote buying" is *not*. In particular, my conception of international vote buying does not include any transactions wherein an *individual* receives personal compensation for his or her country's vote. This sort of behavior evinces a clear principal-agent problem and is easily condemnable as bribery under both domestic and international law.

19. See Kuziemko & Werker, *supra* note 10, at 907.

20. See *id.*

21. See generally Dreher, Nunnenkamp & Thiele, *supra* note 10.

one former State Department official, “checkbook diplomacy is as old as checkbooks.”²²

1. *Security Council Resolutions*

Anecdotal evidence of vote buying in the U.N. Security Council abounds.²³ This is perhaps unsurprising, as the Security Council’s authority is immense; it has “primary responsibility for the maintenance of international peace and security,” including the power to authorize the use of force.²⁴ The Security Council is comprised of fifteen members, five of whom enjoy permanent seats and veto power; the other ten (nonpermanent) members are elected by the General Assembly to two-year terms, without the possibility of immediate reelection.²⁵ Nonprocedural matters require a super-majority of nine votes—and no veto—in order to pass.²⁶

Because of the Security Council’s power and relatively small membership, individual votes are highly coveted. In the lead-up to the 2003 U.S. invasion of Iraq, for example, the *Wall Street Journal* declared that “a bidding war” had erupted between the United States and France as they “compete[d] for undecided votes in the United Nations Security Council on a new resolution clearing the way for a war.”²⁷ The United States was desperately trying to line up the requisite nine votes; six nonpermanent members—Angola, Cameroon, Chile, Guinea, Mexico, and Pakistan—remained undecided. The *Journal* wrote:

Angolan President Jose Eduardo dos Santos isn’t usually a super-power intimate. But thanks to his country’s seat on the council, he is juggling calls lately from President Bush and French President Jacques Chirac. “There is no doubt that the Angolans see this situation as an opportunity to enhance their relationship with Washington and absolutely they have a shopping list,” said one U.S. official.²⁸

The Angolan Ambassador to the United Nations told the press, “for a long time now, we have been asking for help to rebuild our country after years of war. No one is tying the request to support on Iraq but it is all happening at the same time.”²⁹ Meanwhile, French newspapers reported U.S. offers of im-

22. Stan Crock & Lee Walczak, *Dollar Diplomacy*, BUS. WK., Mar. 9, 2003, available at http://www.businessweek.com/magazine/content/03_10/b3823043.htm.

23. For a long list of such anecdotes, though presented without much corroboration, see John Pilger, *John Pilger Reveals How the Bushes Bribe the World*, NEW STATESMAN, Sept. 23, 2002, available at <http://www.newstatesman.com/node/143829>.

24. See U.N. Charter arts. 24, 42.

25. See *id.* art. 23.

26. *Id.* art. 27, para. 3.

27. Cummings & Block, *supra* note 6, at A4.

28. *Id.*

29. *Id.*

migration and agricultural concessions to Mexico in exchange for its vote.³⁰ The White House was strident in its denials: Press Secretary Ari Fleischer insisted the Security Council decision was “a matter of the merits” and that “the President [was] not offering quid pro quos.”³¹ When reporters pressed him, Fleischer reproached the journalists, telling them, “But think about the implications of what you’re saying. You’re saying that the leaders of other nations are buyable. And that is not an acceptable proposition.”³² The press corps burst into laughter.³³

2. *General Assembly Resolutions*

Truly blatant instances of vote buying are less commonly reported with regard to General Assembly resolutions, perhaps in part because the stakes are lower: General Assembly resolutions are nonbinding. By contrast to the Security Council’s powerful mandate, the General Assembly’s purpose is simply to discuss matters within the scope of the U.N. Charter and to make recommendations to U.N. Members and the Security Council on such matters.³⁴ As the United Nations’ only universal forum, it is comprised of all 193 U.N. Member States;³⁵ each member of the General Assembly—that is, each Member State of the United Nations—is entitled to one vote.³⁶ A two-thirds supermajority of members present and voting is required for any decision on an “important question,”³⁷ while other decisions require only a simple majority.³⁸ Voting on resolutions is public, conducted by standing or a show of hands or, if requested, by a roll-call vote.³⁹

Despite the General Assembly’s relative strategic insignificance, cases of vote buying do make their way into the press on occasion. For example, Iran is alleged to have recently promised \$200,000 to the Solomon Islands to vote against Israel.⁴⁰ Presumably, however, the price of General Assembly

30. See Samuel Gardaz, *Au Conseil de sécurité, la chasse aux voix des indécis bat son plein entre Washington et Paris*, LE TEMPS (SWITZ.), Feb. 26, 2003; Alexandrine Bouilhet, *Les arguments de Bush pour rallier les tièdes*, LE FIGARO (Fr.), Feb. 25, 2003.

31. Ari Fleischer, White House Press Sec’y, Press Briefing (Feb. 25, 2003).

32. *Id.*

33. *Id.*

34. See U.N. Charter art. 10.

35. *Id.* art. 9, para. 1.

36. *Id.* art. 18, para. 1.

37. *Id.* art. 18, para. 2. So-called important questions “shall include: recommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1 of Article 86, the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members, questions relating to the operation of the trusteeship system, and budgetary questions.” *Id.*

38. *Id.* art. 18, para. 3.

39. Rules of Procedure of the General Assembly, U.N. Doc. A/520/Rev.17, at 87 (Sept. 2007).

40. See *supra* note 5; see also Jordana Horn, ‘Thank God We Don’t Need to Be Recognized Again’, JERUSALEM POST, Sept. 24, 2010, available at <http://www.jpost.com/Magazine/Features/Article.aspx?id=188836>.

votes is far lower than the millions of dollars commanded by Security Council votes.

3. U.N. Elections

The preponderance of vote buying in the General Assembly occurs in relation to elections, which differ in significant respects from voting on resolutions. U.N. elections determine which countries and individual representatives will have membership in, or leadership of, various U.N. organs and subsidiary bodies. They take place by secret ballot⁴¹ and have long been surrounded by allegations of quid pro quos. While apparent or rumored payoffs are commonplace across a wide spectrum of election contexts,⁴² for purposes of illustration, I focus here only on elections to the Security Council and the Human Rights Council (“HRC”).⁴³

Each year, the U.N. General Assembly elects five countries to a two-year seat on the Security Council.⁴⁴ Campaigning is usually intense, although unsuccessful candidates sometimes drop out of the race before the vote, leaving the actual election a *fait accompli*.⁴⁵ Nevertheless, most recent years have witnessed at least one closely contested vote; indeed, the race between Guatemala and Venezuela in 2006 remained undecided through forty-seven rounds of balloting.⁴⁶ It is important to note that, despite employing secret balloting, the United Nations has mandated standards for the election of nonpermanent Security Council members. Votes are to be cast with “due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.”⁴⁷ However, while the geographical criterion is

41. See, e.g., Rules of Procedure of the General Assembly, *supra* note 39, at 25, 38.

42. Observers noted, for example, that South Korea tripled its aid to Africa the month after its foreign minister, Ban Ki-Moon, announced his candidacy for the U.N. Secretary-General post. See Richard Beeston, Richard Lloyd Perry & James Bone, *Millions of Dollars and a Piano may put Korean in UN's Top Job*, THE TIMES, Sept. 29, 2006. Among many other cases, vote buying allegations also surrounded the election of the United Nations Educational, Scientific, and Cultural Organization's (“UNESCO”) director in 1999. See Alan Riding, *UNESCO's New Director is Envoy from Japan, Its Biggest Donor*, N.Y. TIMES, Oct. 21, 1999, at A5.

43. I also bracket out inducements offered to ambassadors in their individual capacity because such gifts, though certainly not insignificant in scope or scale, fit easily within the traditional rubric of corruption. See, e.g., Anne Penketh, *Vote-buying at the United Nations? It's the Other Guy*, AGENCE FRANCE-PRESSE ENGLISH WIRE, Feb. 12, 1999; *Greek Government “Not Bearing Gifts” for UN Diplomats*, AGENCE FRANCE-PRESSE ENGLISH WIRE, July 21, 1998; *WHO Tightening Rules*, Victor Cohn, WASH. POST, May 11, 1993.

44. U.N. Charter art. 10.

45. This was the case, for example, in 2009. See Security Council Report, *Security Council Elections 2009*, 2009 SECURITY COUNCIL REP. MONTHLY FORECAST at 1, 22–23 (2009), available at http://www.securitycouncilreport.org/monthly-forecast/2009-10/lookup_c_gIKWLeMTIsG_b_5471321.php (noting that Poland had withdrawn in favor of Bosnia's candidacy for the Eastern European seat, leaving the race uncontested).

46. The impasse was only resolved after both candidates agreed to withdraw and nominate Panama as a replacement. See *Panama Voted to U.N. Security Council*, USA TODAY, Nov. 7, 2006.

47. U.N. Charter art. 23, para. 1.

broadly accepted—each regional bloc has “its own” seat or seats—the requirement that countries consider a candidate’s “contribution . . . to the maintenance of international peace and security” is of doubtful influence.⁴⁸

Examples of vote buying in these elections are plentiful. For instance, when Japan was running (successfully) for a Security Council seat in 2006, it pledged \$410 million in new aid to its small Pacific Island neighbors at a leaders’ summit “and walked away with unified support for Tokyo’s bid to join the U.N. Security Council.”⁴⁹ Yet, secret balloting complicates the task of verifying that promises are kept.⁵⁰ During Venezuela’s unsuccessful bid against U.S.-backed Guatemala the same year, the *San Francisco Chronicle* reported the view of Global Policy Forum executive director James Paul:

Venezuela is at a distinct disadvantage in its year-long global campaign of checkbook diplomacy—countries receiving Chavez’s oil largesse can cast their secret ballots against him with no fear that he will find out, while the United States can use surveillance to reward loyalty and punish disloyalty with precision and certitude.⁵¹

Australia complained of lost vote pledges when it suffered defeat in 1996; the country’s U.N. ambassador suggested vote buying was at play and that, just before the election, “delinquent states’ dues were paid in the understanding that they would vote in a certain way.”⁵² In addition to vote buying, the offering of reciprocal vote promises—that is, vote trading—is also “usual business” in elections to the Security Council and other bodies such as the HRC.⁵³

Indeed, the HRC provides another ripe example of electoral manipulation. The HRC was established in 2006 specifically to replace the Commission on Human Rights, which had become notorious as “an ineffective tool of cynical politics” and “a showpiece of dysfunction.”⁵⁴ With this background in mind, the Resolution founding the HRC stresses “the importance

48. See *id.* art. 10.

49. *Japan Lavishes Aid on Pacific Islands*, *TAIPEI TIMES*, May 28, 2006.

50. The UN Elections Campaign, a project of the World Federalist Movement-Institute for Global Policy that monitors U.N. election practices, explains: “A candidate cannot rely on every country’s assurances of support for its candidature Candidates thus tend to ‘deduct a percentage’ off of the promises they have received, knowing that some countries—especially small countries with small missions—cannot support every candidate they promise to.” *Analysis of Security Council Elections, Open Letter to UN Member States*, UN ELECTIONS CAMPAIGN MONITOR, Nov. 14, 2007, <http://www.unelections.org/?q=node/490>.

51. Robert Collier, *Venezuela Reportedly Loses Bid for Security Council Seat*, *S.F. CHRON.*, Oct. 26, 2006.

52. *Australia Ambassador Hints at Vote Buying to Win Security Council Seats*, *GLOBE AND MAIL*, Oct. 23, 1996.

53. *Analysis of Security Council Elections, Open Letter to UN Member States*, *supra* note 50 (“Delegates to the UN have explained to UNelections.org that it is ‘usual business’ to base votes for the Security Council, Human Rights Council, and other bodies and posts not on shared positions on political issues, but on exchanges of support.”).

54. Editorial, *Human Rights and the U.N.*, *N.Y. TIMES*, May 3, 2005, available at <http://www.nytimes.com/2005/05/03/opinion/03tue3.html>.

of ensuring universality, objectivity and non-selectivity in the consideration of human rights issues” as well as “the elimination of double standards and politicization.”⁵⁵ As with the Security Council, the HRC’s forty-seven members are elected by secret ballot;⁵⁶ nevertheless, “when electing members of the Council, Member States shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto.”⁵⁷ Once elected, HRC members are required to “uphold the highest standards in the promotion and protection of human rights.”⁵⁸

Monitoring non-governmental organizations (“NGOs”) have reported that vote trading (if not outright vote buying) is commonplace with elections to the HRC. Indeed, both Amnesty International and Human Rights Watch have cited the practice as a reason behind the continued presence of members with poor rights records.⁵⁹ The HRC has included Saudi Arabia, Cuba, Russia, Nigeria, Egypt, and other states with dubious commitments to human rights adherence; the work of the Council—like that of its predecessor—has been largely to condemn Israel and little else.⁶⁰

In summary, then, it appears that vote buying is endemic to many, if not all, of the U.N. institutions that have strategic importance. Whether in the Security Council or the General Assembly, the pattern is fairly clear: if the outcome matters, states will pay to influence it.

B. *Voting in Closed-Membership Organizations*

The United Nations is not the only international organization in which states’ votes are bought and sold; vote buying occurs in closed-membership organizations as well. The International Whaling Commission (“IWC”), which has eighty-eight participating states, is a widely publicized example. A bitter contest between the pro-whaling and anti-whaling factions of the organization has led to intensive membership recruitment over the past few

55. G.A. Res. 60/251, Preamble, U.N. Doc. A/RES/60/251 (Apr. 3, 2006).

56. It is worth noting that members of the predecessor Commission on Human Rights were not elected by the General Assembly at all, but were merely nominated via regional slates. *Id.* ¶ 7.

57. *Id.* ¶ 8.

58. *Id.* ¶ 9.

59. See Letter from Bolivia Acobol, et al., to U.N. Member States: Embrace Competitive Elections to Human Rights Council (Aug. 13, 2009), available at <http://www.hrw.org/news/2009/08/13/letter-un-member-states-embrace-competitive-elections-human-rights-council>; Letter from Yvonne Terlingen, Head, Amnesty Int’l Office to the United Nations to H.E. The Permanent Representative: Elections of Fourteen Members of the Human Rights Council, TIGO IOR 40/2007.049 (Apr. 30, 2007).

60. See, e.g., *Ban Ki-moon Criticizes UN Human Rights Council for Singling Israel Out*, HAARETZ, June 21, 2007, available at <http://www.haaretz.com/news/ban-ki-moon-criticizes-un-human-rights-council-for-singling-israel-out-1.223672>. Ban’s office issued a statement saying, “The Secretary-General is disappointed at the council’s decision to single out only one specific regional item given the range and scope of allegations of human rights violations throughout the world.” *Id.*

decades; the IWC's roster has doubled in the past ten years and now includes eight land-locked countries.⁶¹

Japan, which leads the pro-whaling camp, has been especially active in buying support. As the Prime Minister of Antigua told the press in 2001, "as long as the whales are not an endangered species," he "[didn't] see any reason why" his country should not support Japan, "and the quid pro quo is that they will give us some assistance."⁶² An investigation in 2010 by the London newspaper *The Sunday Times*, in which undercover journalists posed as potential vote buyers, revealed similarly blatant vote buying.⁶³ One official from Guinea told an undercover reporter that, in the newspaper's words, "his country had little interest in whales but had been persuaded to become a member of the IWC by Japan 10 years ago."⁶⁴ A policy adviser to the Marshall Islands "seemed keen on taking up the reporters' offer of aid to switch the vote."⁶⁵ And an official from Kiribati "described the reporters' offer to buy his country's vote with aid as 'attractive' [and] said his ministers would 'weigh' the offer against the aid provided by Japan."⁶⁶ The official told the undercover journalist, "I think we will have to see what we get. At the end of the day it's the benefit, yeah."⁶⁷ Japan, meanwhile, has long denied that it purchases other countries' votes.⁶⁸

Admittedly, the IWC is a particularly striking illustration, and it is important to remember that organizations may have different voting structures from one another.⁶⁹ The point, though, is that vote buying is not confined to the United Nations; where voting takes place amid sharp disagreement and wealth differentials, the conditions for vote buying are ripe.

C. State Recognition

Of all of the vote buying that takes place on the international stage, the most lucrative "market" may be state recognition. Admission to the United Nations requires a two-thirds approval of the General Assembly, but a pattern of recognition by individual states inevitably precedes such a vote; U.N. membership merely ratifies a pre-existing reality of widespread recognition. Accordingly, diplomatic recognition is highly coveted by contested territo-

61. See *Membership and Contracting Governments*, INT'L WHALING COMM'N, <http://www.iwcoffice.org/members> (last visited Nov. 4, 2012).

62. *Whaling Ban Under Threat*, CNN (July 24, 2001), <http://europe.cnn.com/2001/WORLD/europe/07/23/whaling/index.html>.

63. *Flights, Girls and Cash Buy Japan Whaling Votes*, SUNDAY TIMES, June 13, 2010, available at <http://www.timesonline.co.uk/tol/news/uk/article7149086.ece>.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. For instance, as discussed briefly *infra* Parts II and IV.B, some international organizations have weighted voting structures by which countries' formal degree of influence is linked to a factor such as monetary contribution.

ries. In December 2009, Russia paid \$50 million to Nauru to recognize the independence of South Ossetia and Abkhazia, Georgia's two separatist provinces.⁷⁰ This was not the first time Nauru had made such a deal; the island state severed diplomatic ties with Taiwan in 2002, having allegedly received \$130 million from China, but then re-established them just three years later after it received a better offer.⁷¹ Kiribati and the Marshall Islands have similarly recognized and "de-recognized" Taiwan more than once,⁷² and other examples are plentiful.⁷³

While the decision whether to recognize a state is not "voting" in the strict sense—and there are competing views on whether questions of state recognition are governed by objective legal criteria⁷⁴ or are instead left entirely to the realm of politics⁷⁵—there are nonetheless parallels between recognition-buying and "core" vote buying in the sense that both involve the selling of a state's decision on a matter of concern to the wider community.⁷⁶

D. *Treaty Negotiation*

Further from "core" vote buying practices are the quid pro quo exchanges that accompany treaty negotiation. Of course, with bilateral treaties—essentially contracts between states—the quid pro quo constitutes the very substance of the agreement. With multilateral treaties, however, numerous parties must be induced to join, and adoption of the treaty text itself may be subject to a vote among potential signatories.⁷⁷ In this context, seemingly extraneous side-payments may be employed to increase assent.

70. See *supra* note 4.

71. *Id.*

72. See Andre Vitcek, *The Foreign Aid Games in the Region*, ISLANDS BUS., 2007, http://www.islandsbusiness.com/islands_business/index_dynamic/containerNameToReplace=MiddleMiddle/focusModuleID=17866/overrideSkinName=issueArticle-full.tpl; Tamara Renee Shie, *China Woos the South Pacific*, ASIA TIMES, Mar. 29, 2006, available at <http://www.atimes.com/atimes/China/HC29Ad01.html>.

73. See, e.g., Daniel Flitton, *Australia Lashes Russia Over Aid*, THE AGE, Oct. 17, 2011, available at <http://www.theage.com.au/national/australia-lashes-russia-over-aid-20111016-11rjv.html#ixzz1bWYOakPo> (reporting that, in addition to the Nauru deal, "Moscow has convinced Tuvalu—with a population of about 10,500 and suffering acute water shortages—to set up formal ties with South Ossetia and Abkhazia after an undisclosed grant").

74. See Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19.

75. See, e.g., Written Contribution of the Authors of the Unilateral Declaration of Independence (Req. for Advisory Op.), Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Serbia v. Kosovo), (Apr. 17, 2009), available at <http://www.icj-cij.org/docket/files/141/15678.pdf>.

76. That disputed territories like Kosovo keep running tallies of their international recognition count bears witness to the fact that the number of recognitions matters beyond the immediate end of establishing bilateral relations with those "recognizing" states. See Countries That Have Recognized the Republic of Kosovo, Ministry of Foreign Affairs of Kosovo, available at <http://www.mfa-ks.net/?page=2,33>. Of course, the identity of the "recognizing" states also matters a great deal—realistically, recognition by a major power "counts more" than recognition by Kiribati or the Marshall Islands—and in this sense, state recognition does not strictly follow the "one country, one vote" principle employed in most institutionalized voting settings.

77. See *infra* note 82.

Notably, the resemblance to vote buying exists not so much in paradigmatic “transfer payment” cases like the Montreal Protocol on Substances that Deplete the Ozone Layer, which provided for the establishment of a fund (valued at \$2.55 billion to date) to “help developing countries comply with their obligations under the Protocol,”⁷⁸ but instead where payments are made *outside* the treaty mechanism altogether.

E. Foreign Aid and Development Assistance

Foreign aid is both very similar to and very different from the types of vote buying discussed initially in this Part. On the one hand, a substantial proportion of vote buying payoffs are delivered in the form of aid.⁷⁹ On the other hand, truly altruistic assistance—if such a thing exists at all—is an undertaking that few would condemn, and conditionality is generally unobjectionable when it concerns matters such as human rights adherence and free elections. The conceptual similarity to vote buying arises if we believe that “buying friendship” is essentially tantamount to buying votes. On such a view, Israel’s friendly (and generous) alliance with the Federated States of Micronesia—by virtue of which the latter has received “technical aid on agriculture, health, and other issues” and the former has received “dependable votes in the United Nations”⁸⁰—is no different than Iran’s paying the Solomon Islands to vote against Israel.

II. THE ROLE OF INTERNATIONAL LAW

As the examples in the prior section demonstrate, the practice of vote buying is neither rare nor isolated. One might then ask how international law affects the vote-buying market, if indeed it plays any role at all. The purpose of this section is to describe the current international legal framework.

Those conversant in public international law will appreciate already that most international voting is governed by the principle of “one country, one vote.” This system is the norm in the United Nations (notwithstanding the Security Council veto possessed only by the five permanent members)⁸¹ and is implicit in the Vienna Convention on the Law of Treaties (“VCLT”), which governs all aspects of international treaty-making and application.⁸²

78. About the Multilateral Fund, Multilateral Fund for the Implementation of the Montreal Protocol, <http://www.multilateralfund.org/aboutMLF/default.aspx>.

79. See, e.g., Harding, *supra* note 4; Barry, *supra* note 4; Linzer, *supra* note 7.

80. Howard Schneider, *Israel and Pacific Republics, United by an Island Mentality*, WASH. POST, Feb. 1, 2010. The article concludes, “There is no quid pro quo, of course, but also no surprise that in the annual round of U.N. resolutions criticizing Israel, Micronesia and Nauru are regular members of what Israeli diplomats like to call their ‘moral minority.’”

81. U.N. Charter art. 18, para. 1, art. 27, para. 1.

82. See Vienna Convention on the Law of Treaties art. 9(2), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT] (“The adoption of the text of a treaty at an international conference takes

With the exception of some international financial institutions that use a weighted voting system,⁸³ it is also applied by nearly every other intergovernmental organization in which states vote.⁸⁴ The “one country, one vote” principle is, in a sense, the default rule; unless parties agree to adopt a different scheme, Andorra’s vote counts as much as India’s does.

What may surprise is that there is no generally applicable norm of international law that prohibits states from selling their votes in international institutions or bars other states from buying them. The U.N. Charter is silent on vote buying in the General Assembly or the Security Council;⁸⁵ the bodies’ respective rules of procedure are similarly silent.⁸⁶ The U.N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States denounces “the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind,” but contains no explicit reference to vote buying and is, in any case, nonbinding.⁸⁷

It is also doubtful whether vote buying could be considered “coercion” within the meaning of the Declaration. Although there are several international anticorruption conventions in force—most notably the United Nations Convention Against Corruption (“UNCAC”),⁸⁸ concluded in 2003—they address the behavior of individual actors, not states per se.⁸⁹ For example, the Preamble to the UNCAC notes the damaging effects of “the illicit acquisition of *personal* wealth”;⁹⁰ not once does it mention payments into the

place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.”).

83. Two examples are the World Bank and the International Monetary Fund. See Elizabeth McIntyre, *Weighted Voting in International Organizations*, 8 INT’L ORG. 484, 484–97 (1954) (discussing unequal voting rights in international organizations).

84. I bracket out the European Union, which has progressed so far toward a constitutional order that it no longer bears comparison to more “traditional” international institutions.

85. See U.N. Charter arts. 18, 27.

86. See Rules of Procedure of the General Assembly, *supra* note 39, at 22–26; Provisional Rules of Procedure of the Security Council, U.N. Doc. S/96/Rev.7 (Dec. 21, 1982).

87. G.A. Res. 2625 (XXV), U.N. Doc. A/8082, at 122 (Oct. 24, 1970). Limited efforts to combat vote buying have been made in the context of closed-membership organizations, such as the IWC, but without much success. In 2001, the IWC—which, as noted, has faced massive problems with vote buying, particularly by its member Japan—issued a Resolution stressing “the importance of adherence to the requirements of good faith and transparency” and affirming “the complete independence of sovereign countries to decide their own policies and freely participate in the IWC (and other international forums) without undue interference or coercion from other sovereign countries.” Resolution on Transparency Within the International Whaling Commission, Res. 2001–1, available at <http://iwcoffice.org/index.php?cID=2597&cType=Document>. This declaratory statement applies only with regard to the IWC and its members, however; by no means is it a binding, generally applicable norm of international law (nor does it seem to have influenced voting patterns within the IWC itself).

88. United Nations Convention Against Corruption, U.N. Doc. A/58/422 (Oct. 31, 2003) [hereinafter UNCAC].

89. See, e.g., Julie Nesbit, *Transnational Bribery of Foreign Officials: A New Threat to the Future of Democracy*, 31 VAND. J. TRANSNAT’L L. 1273, 1297–1313 (1998).

90. UNCAC, *supra* note 89, Preamble (emphasis added).

state treasury. In any case, there is nothing in the mainstream literature to suggest that the UNCAC applies to states *qua* states.⁹¹

In the absence of a positive norm against international vote buying, one might try to read a prohibition into states' general obligation of good faith. The practice of vote buying seems, at first glance, to be a "bad faith" use of international voting mechanisms—or so one could argue.⁹² However, the concept of good faith entails that "[e]very State has the duty to fulfill in good faith its obligations under the generally recognized principles and rules of international law."⁹³ Thus, the duty of good faith cannot independently generate a new norm; it depends upon a pre-existing obligation created by a generally recognized principle or rule. The International Court of Justice ("ICJ") upheld this interpretation in *Case Concerning Border and Transborder Armed Actions*, stating that "[the principle of good faith] is not in itself a source of obligation where none would otherwise exist."⁹⁴

One might also find an argument for prohibition in the civil law doctrine of "abuse of rights," which, in the international context, encompasses cases in which "a State exercis[es] a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State"⁹⁵ However, in the absence of consensus about the proper purpose of international voting rights, the abuse of rights doctrine provides at most a hypothetical line of attack against international vote buying. The issue has never been litigated before the ICJ or any other prominent international court; accordingly, no such court has ever held that international vote buying or selling does, in fact, constitute an abuse of rights.

The overall picture, then, is essentially this: vote buying among states is an issue about which international law currently has very little, if anything, to say.

III. DOMESTIC APPROACHES TO BRIBERY & ELECTION FRAUD

As the section above indicates, existing international law provides few obvious starting points for thinking about approaches toward vote buying. And while various international relations theories can offer predictive in-

91. See, e.g., Philippa Webb, *The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?*, 8 J. INT'L ECON. L. 191 (2005).

92. See Gillespie, *Transparency*, *supra* note 12, at 345 (arguing that "the possible purchase of another country's votes is possibly the worst-case scenario of bad faith in international relations, because it completely distorts any attempts at making international institutions open, free and transparent").

93. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/RES/25/2625 (Oct. 24, 1970).

94. *Border and Transborder Armed Actions (Nicar. v. Hond.)*, 1988 I.C.J. 69, 106 (Dec. 20).

95. Alexandre Kiss, *Abuse of Rights*, in 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 4, 4 (Rudolf Bernhardt & Peter Macalister-Smith eds., 1992), quoted in Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 MCGILL L.J. 389, 389 (2002).

sights (albeit conflicting ones) as to what drives states, how states behave, and what assumptions international law should adopt,⁹⁶ they do not independently supply an answer to the normative question whether international vote buying is good or bad.

By contrast, many countries' domestic legal systems have long regulated or prohibited various forms of vote buying through bribery statutes and election law. The fact that domestic vote buying has already been the object of substantial intellectual effort—both in the legal sense of designing prohibitions and in the scholarly sense of justifying (or opposing) those prohibitions⁹⁷—makes it a useful starting point for assessing its international counterpart.⁹⁸

Yet this Article's comparison of international and domestic vote buying is a careful one; it tests, rather than assumes, the validity of the analogy itself. The dual aim is both to suggest considerations that the international legal discourse has overlooked and also to highlight reasons why our domestic intuitions may be untenable in the international context. In employing domestic-level rationales to assess international vote buying, this Article does not purport to exhaust the list of possible normative benchmarks: its purpose is to further the conversation using a familiar and well-examined reference point.⁹⁹

Even at the domestic level, the issue of vote buying is hardly straightforward. Some practices are clearly illegal, while others are irreproachable; in the middle, a wide range of behavior exists in uncertain shades of gray. As commonly understood, classic bribery is merely “the black core of a series of concentric circles representing the degrees of impropriety in official behavior.”¹⁰⁰ This Part examines prevailing domestic-level approaches toward acts that might be considered vote buying. Which sorts of practices are illegal, and which are permitted? More importantly—why? The section begins by examining the paradigmatic contexts in which vote buying occurs. Next, it sketches out the contours of election fraud and bribery, which are widely criminalized, then compares several “dubious” practices that are in fact legal (at least in some notable jurisdictions). Finally, it concludes by laying out the main rationales that underpin domestic vote-buying prohibitions.

96. See, e.g., *infra* notes 254, 259.

97. See *infra* Part III.C.

98. As discussed briefly *supra* Part II and detailed in Webb, *supra* note 91, there are also several international conventions aimed at combating domestic or transnational corruption. These conventions confirm and strengthen domestic-level prohibitions, but do not address themselves to international vote buying as such.

99. An alternative analogy to domestic political voting, for example, could be found in corporate shareholder voting. See, e.g., Robert Charles Clark, *Vote Buying and Corporate Law*, 29 CASE W. RES. L. REV. 776 (1979); Henry T. C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811 (2006) (discussing vote buying in this context).

100. Daniel Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 786 (1985).

A. *Vote Buying in Context*

As voting is a cornerstone of democratic political processes, it is predictably employed in a great many contexts. Citizens vote to elect their governmental representatives; legislators vote on the passage of laws; judges (in panels) vote on the application and interpretation of those laws. In each of these cases, the voting decisions are made with reference to different standards and entail varying notions of accountability.

The first and most fundamental form of voting is citizens' election of representatives to public office. The right to vote and to be elected at genuine periodic elections is enshrined in the International Covenant on Civil and Political Rights ("ICCPR")¹⁰¹ and various other human rights instruments,¹⁰² as well as in the domestic laws of democratic countries (indeed, in many less-than-democratic countries, as well). Suffrage is to be universal and equal, and voting is to take place by secret ballot.¹⁰³ At the outset, a few features of this arrangement are worth noting. First, universality and equality of suffrage mean that each citizen's vote counts exactly as much as any other citizen's does; equality among individuals is therefore a value that the system seeks to uphold. Second, secret balloting serves as a mechanism to shield voters from undue influence—including vote buying. Indeed, in many corrupt jurisdictions the introduction of the secret ballot has spelled the demise of vote buying, since confidentiality necessarily prevents the "buyers" from verifying that the "sellers" (that is, voters) in fact voted for the candidate promised.¹⁰⁴ A corollary of secrecy is that individual voters—unlike elected representatives or judges—are not held accountable for their votes. Each voter is entitled to vote as he or she pleases, solely on his or her own behalf.

A second form of voting is the type that occurs in legislatures: representatives vote on the passage of laws. By contrast to the secrecy of citizen voting, legislators' voting records are public. This transparency is a crucial method of ensuring accountability; representatives are expected to vote on behalf of their constituents or to further the public interest. Although democratic theorists do differ on the question of whom, precisely, elected officials are

101. International Covenant on Civil and Political Rights art. 25, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR].

102. See, e.g., Universal Declaration on Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810, at 71 (Dec. 10, 1948); Protocol No. 1 to the European Convention for the Protection of Human Rights art. 3, Mar. 20, 1952, E.T.S. 9; American Convention on Human Rights art. 23(1)(b), Nov. 21, 1969, 144 U.N.T.S. 123, 9 I.L.M. 99.

103. ICCPR, *supra* note 101, art. 25(2).

104. BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS 5–6 (2002); see also Saul Levmore, *Voting with Intensity*, 53 STAN. L. REV. 111, 133 (2000) ("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."). For an excellent political-economy discussion of the advantages and disadvantages of secrecy, see Ernesto Dal Bó, *Bribing Voters*, 51 AM. J. POL. SCI. 789, 798–99 (2007).

obliged to represent,¹⁰⁵ the underlying point is that representatives are *not* free to vote as they please. They must make decisions by reference to some standard apart from their own personal preference.

A third, less obvious form of voting is judicial decisionmaking. Of course, the “voting” aspect of judicial decisionmaking is most apparent with juries, or when cases are heard before a panel of judges and the outcome is determined by a “majority prevails” rule.¹⁰⁶ When a case is heard before a single judge, there is only one “vote” being cast; a one-vote majority bears less obvious resemblance to our traditional conceptions of voting. Nevertheless, for the purposes of this Article, it will be useful to consider even this latter sort of judicial decisionmaking as falling within a voting paradigm. Like elected representatives, jurors and judges are not free to vote however they wish; they are constrained by the law and the facts at hand. Although jurors are not expected to explain or justify the verdicts they announce, they must nonetheless swear to decide impartially and “according to the evidence.”¹⁰⁷ The constraints on judges are even stronger; conceding that, in many cases, several opposing outcomes may each be defensible, judges are still bound (in most systems) to give reasons for their decisions. This reason-giving requirement is a vital facet of judicial integrity and accountability.¹⁰⁸

105. Historically, this debate has divided into the “delegate” theory, which holds that representatives should simply follow the expressed preferences of their constituents, and the “trustee” theory, which argues that representatives should follow their understanding of the best action to pursue, that is, something akin to the “public interest.” See Political Representation, Stanford Encyclopedia of Philosophy (Jan. 2, 2006), available at <http://plato.stanford.edu/entries/political-representation/>.

106. I acknowledge that some countries do not allow dissenting opinions; in these cases, the “voting” is never observed.

107. See, e.g., N.J. STAT. ANN. § 2B:23-6 (West 2012); *Jury Act 1977* (NSW) 72A (Austl.); 234 PA. CODE § 640(B) (2001); COURT ADM’R, SUPERIOR COURT OF THE STATE OF DEL., HANDBOOK FOR JURORS SERVING IN THE SUPERIOR COURT OF THE STATE OF DELAWARE 5 (1994); *Inside a Court Room – Going to Court*, JUDICIARY OF SCOTLAND, <http://scotland-judiciary.org.uk/13/0/Inside-a-Court-Room> (last visited Oct. 31, 2012).

108. See, e.g., Evan Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 U. MICH. L. REV. 2297, 2344 (1999) (noting that, according to many judicial paradigms, “the legitimacy of courts’ authority turns on the fact that adjudication is a forum of justification or reason giving, in a way that other forms of decisionmaking are not. If a judge does not have a reasoned justification for a legal decision, she has no legitimate claim to the exercise of coercive authority over the litigants”); Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 18–19 (1997). The same considerations largely apply also to a fourth context, namely administrative decisionmaking. The U.S. Administrative Procedure Act, for example, explicitly requires that decisions “shall include a statement of . . . findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record.” 5 U.S.C. § 557(c) (2009). The law on the reason-giving requirement in administrative law is set out in 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 8.5 (3d ed. 1994).

B. *Bounds of the Law*

1. *Prohibited Vote Buying*

In many countries, buying votes from members of the electorate is explicitly prohibited under election law or the criminal code.¹⁰⁹ Mere offers and promises are also banned, as are solicitation and acceptance.¹¹⁰ Thus, both the offeror and the offeree may be punished. Statutes vary as to the breadth of the prohibition; in Germany, it is illegal to offer or accept “gifts or other benefits,” while the Canada Electoral Act refers specifically to “bribes” and the U.S. federal vote buying statute prohibits “expenditures.”¹¹¹ Notwithstanding these minor differences, the main emphasis of the provisions is the same: it is illegal to pay citizens to vote or refrain from voting, or to vote or refrain from voting for a particular candidate. While secret balloting generally undermines the effectiveness of the latter tactic (buying votes for a specific candidate), vote buying may nevertheless be effective in encouraging turnout (buying the act of voting generally);¹¹² the statutes thus cover both types of behavior.

The provisions above pertain to payments or benefits conferred on members of the general electorate. A different form of vote buying—namely, purchasing the votes of public officials—is regulated under the law of bribery.¹¹³ In the United States, bribery¹¹⁴ typically entails five elements: one must corruptly offer a benefit to a public official with the intent to influence the recipient in carrying out an official act.¹¹⁵ The laws apply also, *mutatis mutandis*, to the recipient of such a bribe.¹¹⁶ In other countries, the elements are slightly different,¹¹⁷ but the common thread is that bribery requires a

109. See, e.g., 18 U.S.C. § 597 (2009); 42 U.S.C. § 1973i(c) (2008); STRAFGESETZBUCH [StGB] [PENAL CODE] May 15, 1871, Bundesgesetzblatt, Teil I [BGBl. I] 945 and 3332, as amended, § 108b; Canada Elections Act, S.C. 2000, ch. 9, § 481.

110. *Id.* These laws apply regardless of the buyer’s identity or position; while candidates and political parties are the most likely culprits, it is worth bearing in mind that individual voters, too, might conceivably engage in vote buying if they have a strong interest in the election outcome.

111. *Id.*

112. See generally Simeon Nichter, *Vote Buying or Turnout Buying: Machine Politics and the Secret Ballot*, 102 AM. POL. SCI. REV. 19 (2008). Where voting is compulsory, for example, in Belgium, the utility of “turnout-buying” is probably minimal.

113. Some jurisdictions also treat electoral vote buying under the aegis of bribery law. See Federal Election Fraud Fact Sheet, United States Attorney’s Office, District of New Hampshire, available at <http://www.justice.gov/usao/nh/press/2012/electionfraud.html> (noting “those States where vote buying is a ‘bribery’ offense”).

114. For a comprehensive treatment of the crime of bribery, see Lowenstein, *supra* note 100.

115. Lowenstein, *supra* note 100, at 796.

116. See, e.g., 18 U.S.C. §§ 201(b)(2), 203(a)(1) (2009).

117. For example, some countries do not limit bribery laws to acts involving a public official. Australia applies its bribery provisions to transactions involving any “agent or someone else.” See *Criminal Code (Theft, Fraud, Bribery and Related Offences) Amendment Act 2004* (ACT) s 356 (Austl.). Germany’s statutory provisions cover both public servants and business agents. See StGB, *supra* note 109, §§ 299, 331–34. France extends its laws even further to include anyone who “holds or occupies, within the scope of his professional or social activity, a management position or any occupation for any person . . . or any other

certain nexus between the benefit conferred by the offeror and the act performed by the recipient in his or her capacity as an agent. Generally, only a quid pro quo exchange will suffice for criminal bribery.¹¹⁸ A gift given in the mere hope of favorable consideration—but without any expectation thereof—is not a bribe, but may constitute a lesser offense.¹¹⁹ The most notable difference between countries relates to the timing of the bribe; some jurisdictions consider bribery only to include payment made in respect of future acts,¹²⁰ while others explicitly cover both *ex ante* and *ex post facto* payments.¹²¹ Nevertheless, among the former jurisdictions, after-the-fact “gratitude payments” are often criminalized as a less serious offense of “unlawful gratuity” or similar.¹²²

2. *Non-prohibited Peripheral Practices*

Notwithstanding the prohibitions outlined above, there are also many practices that resemble vote buying that are *not* illegal. Among individual electors, the closest analogue to prohibited vote buying is its payment-in-kind manifestation, namely vote trading. In a sense, vote trading is merely a particular subspecies of vote buying; instead of paying for votes with money or favors, vote-traders buy votes with votes. Yet, perhaps surprisingly, individual vote trading is currently protected in the United States on free speech grounds.¹²³ As long as there is no material benefit changing hands, individ-

body.” See C. PÉN. § 445-1. Many civil law jurisdictions also exclude the “corrupt intent” requirement featured in U.S. (and other common law) formulations of bribery.

118. For instance, the Swiss authorities stipulate: “In bribery, the undue advantage is connected to a specific act or omission. The relationship is one of exchange.” State Secretariat for Economic Affairs, *Swiss Criminal Law on Corruption*, available at <http://www.seco.admin.ch/themen/00645/00657/00659/01395/index.html?lang=en>. However, agreement as to the deal is usually *not* necessary; implicit understandings suffice in most jurisdictions, as long as the quid pro quo is present.

119. See *infra* note 122.

120. See, e.g., *Criminal Code (Theft, Fraud, Bribery and Related Offences) Amendment Act*, *supra* note 117, § 356; 18 U.S.C. § 201.

121. See, e.g., C. PÉN. § 435-2; StGB, *supra* note 109, § 332.

122. In jurisdictions with stringent definitions of bribery, less egregious acts are frequently still criminalized as a milder offense. Australia, for example, distinguishes between bribery and “other corrupting benefits”: “The more serious offences of giving and receiving a bribe will apply where a payment is dishonestly made or offered *with the intention* that a favour will be given, whereas the less serious corrupt benefits offences will apply to dishonest benefits *that tend* to influence the performance of a duty.” Explanatory Statement, *Criminal Code (Theft, Fraud, Bribery and Related Offences) Amendment Bill 2003 (ACT)*. In a similar vein, U.S. law differentiates benefits conferred “with intent to influence” a future official act from those conferred merely “for or because of” any past or future official act. See COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT, HOUSE ETHICS MANUAL 79 (2008). Japan stipulates lesser penalties in the case of benefits accepted “in connection with [an official’s] duties” than when “the official agrees to perform an act in response to a request.” See KEIHO [Penal Code], art. 197. The common thread in these provisions is that there are some benefits falling short of outright bribes which are nevertheless improper rewards exerting undue influence over the recipient; these lesser offenses, too, merit penal sanctions.

123. *Porter v. Bowen*, 496 F.3d 1009 (9th Cir. 2007), *rev’g, en banc, denied by Porter v. Bowen*, 518 F.3d 1181 (9th Cir. 2008). The court reasoned that “[vote trading] agreements plainly differ from conventional (and illegal) vote buying, which conveys no message” and that “vote swapping is not an ‘illegal

ual voters may trade their votes as they wish.¹²⁴ The same is true for Canada and the United Kingdom (among others), where the legality of vote trading schemes has been upheld by the elections authorities.¹²⁵

In a similar vein, the provision of constituent benefits such as “pork” (that is, the allocation of public works projects to a legislator’s geographic constituency) and “casework” (that is, acting as an intermediary for constituents in dealing with government agencies) can be analogized to vote buying on the part of representatives seeking re-election.¹²⁶ Indeed, as Pamela Karlan writes, “The de facto ‘payments’ that accrue to a candidate’s supporters—from patronage, pork, preferential access, and the differential provision of public services—surely dwarf the sorts of compensation voters receive directly for their votes in any of the reported vote-buying schemes.”¹²⁷ Of course, such practices are a normal and legally permissible aspect of politics,¹²⁸ while pork barrel politics may be inefficient in terms of the overall public interest,¹²⁹ it is generally tolerated as a means of cementing the “electoral connection” between representatives and their electorates.¹³⁰

In the legislative context, vote trading (commonly known as “log-rolling”) is a widely acknowledged practice; lawmakers frequently engage in reciprocal “deal-making” as they deem necessary.¹³¹ Although legislative vote trading meets with greater disapproval in Europe than in the United States, in practice it remains commonplace.¹³² Nevertheless, even in the

exchange for *private* profit’ since the only benefit a vote swapper can receive is a marginally higher probability that his preferred electoral outcome will come to pass.” *Id.* at 1020.

124. The court in *Porter* took pains to note: “The [vote-swapping] websites did not encourage the trading of votes for money, or indeed for anything other than other votes. Votexchange2000.com actually included a notation that ‘It is illegal to pay someone to vote on your behalf, or even get paid to vote yourself. Stay away from the money. Just vote’ (emphasis in original). And there is no evidence in the record, nor has the Secretary argued, that any website users ever misused the vote-swapping mechanisms by offering or accepting money for their votes.” *Id.* at 1023.

125. See *Online Vote-swapping Legal but Voter Beware, Elections Canada Warns*, CBC NEWS, Sept. 17, 2008, available at <http://www.cbc.ca/news/canada/story/2008/09/17/vote-swapping.html>; Ben Russell, ‘Vote Swappers’ Aim to Wipe Out Leading Conservatives in Internet Campaign, INDEPENDENT, Mar. 29, 2005, available at <http://www.independent.co.uk/news/uk/politics/vote-swappers-aim-to-wipe-out-leading-conservatives-in-internet-campaign-8002644.html>.

126. It is worth noting that “pork barrel policy”—as contrasted with general benefit legislation—is largely facilitated by legislative vote trading, discussed above.

127. Pamela Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697, 1710 (1999).

128. The question, then, is how such patronage differs from illegal vote buying. Fundamentally, the answer is that benefits conferred through the workings of the political process are “legitimate”; they are not improper expenditures within the meaning of vote buying prohibitions. The U.S. Supreme Court, for example, reasoned in *Brown v. Hartlage* that “so long as the hoped-for personal benefit is to be achieved through the normal processes of government, and not through some private arrangement, it has always been, and remains, a reputable basis upon which to cast one’s ballot.” 456 U.S. 45, 56 (1982).

129. See *infra* note 163.

130. See generally DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).

131. A related tactic is to cobble together individually unpopular pieces of legislation into a single bill that, taken as a whole, will enjoy enough overall support to pass. See, e.g., David D. Kirkpatrick, *Trading Votes for Pork Across the House Aisle*, N.Y. TIMES, Oct. 2, 2006 (quoting Rep. John P. Murtha at length on the subject of vote trading).

132. See GORDON TULLOCK, ARTHUR SELDON & GORDON BRADY, GOVERNMENT FAILURE: A PRIMER IN PUBLIC CHOICE 29 (2002) (noting that “[v]ote trading is much more open in the American

United States, the practice is not universally accepted—particularly when it approximates true vote buying by employing budgetary appropriations, and some states prohibit it altogether.¹³³ Overall, then, legislative vote trading is something of a gray area: frowned upon, but generally tolerated as long as the bargaining remains within the system.¹³⁴

Again as to the legislature, lobbying and campaign financing are also worth noting briefly. Both practices are frequently compared to bribery, as they involve the provision of benefits from private entities to public officials in the hope—potentially, at least—of receiving some advantage in return. Of course, in its “pure” form, lobbying is meant to persuade lawmakers on the merits of various policy issues, rather than sway them with material inducements. Still, in recognition of the risk that favors and perks will indeed influence legislators’ votes, the practice is subject to various legal restrictions.¹³⁵ Likewise, the dangers of quid pro quo corruption, as well as the possibility that resources will skew the field of political competition, underlie various countries’ limitations on campaign financing.¹³⁶

In the judiciary, the possibility for vote trading arises when cases come before multi-judge panels, as is the norm in the United States at the appel-

legislature than in Europe, although it certainly occurs everywhere”); *see also id.* at 34–35 (discussing the morality of log-rolling).

133. For example, in 2007, the House of Representatives enacted a rule to ban trading votes for earmarks. *See Reforming Earmarks and the Appropriations Process*, U.S. CONGRESSMAN BILL FOSTER, <http://web.archive.org/web/20101202014205/http://foster.house.gov/transparencyreport/earmarkreform.htm>. An equivalent amendment was introduced in the Senate in 2009, but failed narrowly; following the vote, the amendment’s sponsor, Senator Jim DeMint (R-S.C.), accused the provision’s opponents of “endorsing political bribery.” Press Release, Sen. Jim DeMint, Senate Democrats Vote to Continue Earmark Vote-Trading (Dec. 23, 2009), available at http://www.demint.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=BD71448a-b030-dfb5-7be8-1c5493413dc8&ContentType_id=A2165b4b-3970-4d37-97e5-4832fcc68398. At the state level, several legislatures specifically prohibit vote trading of any kind and follow “single-subject” rules that restrict lawmakers’ ability to craft package deals. *See, e.g.*, CAL. PENAL CODE § 86 (2006) (“Every member of either house of the Legislature . . . who . . . gives, or offers or promises to give, any official vote in consideration that another Member of the Legislature . . . shall give this vote either upon the same or another question, is punishable by imprisonment in the state prison for two, three, or four years”) (emphasis added). Surprising as it may be to U.S. congressional observers today, the Supreme Court asserted in 1854 that “what, in the technical vocabulary of politicians is termed ‘log-rolling,’ is a misdemeanor at common law, punishable by indictment.” *Marshall v. Balt. & Ohio R.R. Co.*, 57 U.S. 314, 336 (1854).

134. Compare, for example, “earmark vote buying” to criminal bribery: the former occurs exclusively within the legislative process and involves neither a payment from a private citizen nor a benefit to a legislator in his private capacity; criminal bribery involves both.

135. *See, e.g.*, Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735 (2007).

136. *See, e.g.*, MICHAEL PINTO-DUSCHINSKY & ALEXANDER POSTNIKOV, CAMPAIGN FINANCE IN FOREIGN COUNTRIES: LEGAL REGULATION AND POLITICAL PRACTICES (1999). Notably, the U.S. Supreme Court’s decision in *Citizens United*, which held that the government may not restrict independent political expenditures by corporations and unions, expressly *eliminated* “fairness” or “equality” as a rationale for regulating corporate expenditures on election-related communications. *See Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 904, 912–13 (2010) (describing *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) as “[seeking] to defend the antidistortion rationale as a means to prevent corporations from obtaining an unfair advantage in the political marketplace,” and overruling it on other grounds) (internal quotation marks omitted).

late level.¹³⁷ There seems to be agreement among scholars that “while explicit vote trading seems to be shunned in word and deed, a softer form of tacit trading may well be commonplace.”¹³⁸ However, the nature of judicial decisionmaking places much stricter limits on the scope of acceptable reciprocity; the type of vote trading behavior that is conventional in the legislative context would widely be viewed as being inconsistent with the imperatives of judicial integrity.¹³⁹

As this very brief overview demonstrates, the bounds between legal and illegal vote buying evince numerous internal tensions, inconsistencies, and even ambiguities. It is not my intention here to engage in a detailed discussion of politics’ dark underbelly; what is important to recognize is simply that, despite explicit vote-buying prohibitions, there remains a substantial realm of questionable behavior that is permitted even domestically. The question of what should be illegal and what should be permitted does not lend itself to obvious answers; there is legitimate disagreement over where to draw lines. Equally important to recognize, however, is that this disagreement has not obstructed countries from banning at least *some* forms of vote buying. This fact will be worth bearing in mind when considering the international sphere in Parts IV and V; complexity, dissension, and uncertainty are not uniquely international challenges.

C. Rationales Against Vote Buying

If the laws on vote buying are contradictory, vague, or over- and underinclusive—as many feel they are—it is likely because the very concept of vote buying is deeply contested. Some observers would like to see bans on peripheral practices such as legislative vote trading,¹⁴⁰ while a few outlying commentators defend even core vote buying as a mode of enhancing efficiency in certain circumstances.¹⁴¹ Nevertheless, for the most part, our normative intuitions are that vote buying is wrong; the prevalence of legal prohibitions against the practice attests to this fact.

In what follows, I gather the rationales against vote buying or vote selling into five general categories: citizenship, equality, efficiency, reason-giving, and system integrity. Many of these explanations have been explored in prior

137. See, e.g., Caminker, *supra* note 108, at 2331–33.

138. *Id.* at 2332.

139. The Code of Conduct for U.S. Judges makes no mention of vote trading; however, many such forms of exchange would likely contravene the Code’s general requirement to avoid impropriety or the appearance thereof. The Canon 2A in the Code states, “A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” JUDICIAL CONFERENCE OF THE UNITED STATES, CODE OF CONDUCT FOR U.S. JUDGES (2009).

140. See, e.g., TULLOCK, SELDON & BRADY, *supra* note 133, at 41.

141. See, e.g., Michael S. Kochin & Levis A. Kochin, *When is Buying Votes Wrong?*, 97 PUB. CHOICE 645, 653–57 (1998).

work;¹⁴² however, as this Article ultimately investigates a different range of voting practices than other articles have done, the rationales explored below do not mirror those of other authors precisely.¹⁴³

1. *Citizenship*

The first set of justifications seeks to challenge the “market” paradigm in which vote buying operates. Vote buying is inherently wrong, the argument goes, because to buy or sell votes is to damage the very meaning of voting. Proceeding from Margaret Radin’s suggestion that voting is not merely a right, but an act that also reflects “moral or political *duties* related to a community’s normative life,” voting serves an expressive function that is undermined by commodification.¹⁴⁴ It follows, then, that the right to vote must not entail the right to *sell* one’s vote. As Pamela Karlan put it, “If voting is a public function, not solely a private right, then the voter, like the juror, has no right to sell the power entrusted or delegated to her.”¹⁴⁵

Of course, this line of reasoning aims primarily at vote buying among individual members of the electorate. It hardly needs to be said that the elected representative, judge, or administrative official may not sell the decisionmaking authority the public has vested in him or her; to do so would be a gross violation of the public trust, and the very essence of corruption. What the “non-commodification” argument endeavors, however, is to extend elements of this reasoning to private individuals. While the substance of one’s vote may reflect a private choice, the act of voting is a collective rite; and to misperform one’s role—that is, by selling one’s vote—devalues the

142. The most comprehensive summary of rationales can be found in Richard Hasen, *Vote Buying*, 88 CALIF. L. REV. 1323, 1327–37 (2000).

143. The arguments against vote buying are diverse and complex. Some of the arguments concern the objectionable nature of vote buying, while others raise opposition to vote selling. Some are deontological, meaning they speak to why vote buying is wrong in and of itself; others are consequentialist, that is, they locate the harms of vote buying mainly in the bad results it produces. Adding to the complexity is the fact that the rationales do not map neatly onto the various voting contexts examined above in Part III.A. Some rationales apply to both legislative and judicial voting, for example, while others apply only to the electoral context. Conversely, some types of vote buying prohibitions—for instance, the norm against buying off individual electors—may be justified on several grounds, while other prohibitions draw support from only a single main rationale.

144. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1854 (1987) (emphasis added); cf. Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 936 (1985) (treating voting as an inalienable right, rather than as an inalienable duty).

145. Karlan, *supra* note 127, at 1711. Radin also writes about the “dual nature” of voting: “Non-transferable rights that at the same time may implicate affirmative duties fall into a category I think of as community-inalienability. Examples are the right-duty to vote in political elections and the right-duty to become educated. Rights of this kind not only may not be lost through change of hands, extinguishment, or cancellation, but also ought to be exercised.” Radin, *supra* note 144, at 1854 n.21. Radin also cites Laurence Tribe, who argues that “rights that are relational and systemic are *necessarily* inalienable: individuals cannot waive them because individuals are not their sole focus.” Laurence Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 333 (1985).

act for the entire community.¹⁴⁶ This rationale obviously draws heavily on a republican ideal of citizenship and civic participation¹⁴⁷ to which some may not ascribe; those who prioritize individual autonomy may find the citizenship rationale unpersuasive.¹⁴⁸ Nevertheless, the view has a certain resonance; Michael Sandel's assertion that "an excessive role for markets corrupts an ideal [that voting] properly express[es] and advance[s]" indeed enjoys a long line of precedent among philosophers and legal thinkers.¹⁴⁹

An expressivist understanding of voting may shed light, also, on why vote trading is permitted while vote buying is resolutely banned. While vote selling is an abdication of civic duty, going to the effort of swapping one's vote may actually evince a laudable level of democratic engagement. The court in *Porter v. Bowen*, which upheld the practice of vote trading in the United States, suggested as much:

At their core, [the contested vote-swapping mechanisms] amounted to efforts by politically engaged people to support their preferred candidates and to avoid election results that they feared would contravene the preferences of a majority of voters in closely contested states. Whether or not one agrees with these voters' tactics, such efforts, when conducted honestly and without money changing hands, are at the heart of the liberty safeguarded by the *First Amendment*.¹⁵⁰

146. This view is not universally shared, of course. Saul Levmore, for example, calls the deontological feature of the non-commodification argument "difficult to isolate." See Levmore, *supra* note 104, at 116 ("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.")

147. Michael Sandel provides an eloquent articulation of this view: "According to the republican conception of citizenship, to be free is to share in self-rule. This is more than a matter of voting in elections and registering my preferences or interests. On the republican conception of citizenship, to be free is to participate in shaping the forces that govern the collective destiny According to this view, to participate in politics is not just a means to securing a regime that enables people to seek their own ends; it is also an essential ingredient of the good life. For strong republicans, deliberating about the common good under conditions where the deliberation makes a difference calls forth human capacities—for judgment and compromise, for argument and reflection, for the taking of responsibility—that would otherwise lie dormant. On this view, the purpose of politics is to call forth and cultivate distinctive human faculties that other pursuits, such as work or art, do not cultivate in the same way. With this conception of citizenship in mind, we can . . . consider how commodification corrupts the good of self-government" Michael Sandel, Prof. of Gov't at Harv. Univ., *What Money Can't Buy: The Moral Limits of Markets*, Address Delivered at Brasenose College, Oxford (May 11–12, 1998), in 19 TANNER LECTURES ON HUM. VALUES, at 108–09.

148. Cf. Pamela Karlan, *Not by Money but by Virtue Won? Vote Trafficking and the Voting Rights System*, 80 VA. L. REV. 1455, 1458 (noting that "in contrast to the unambiguously autonomy-expanding character of anti-intimidation laws, anti-[vote]-trafficking measures actually restrict a voter's options").

149. Sandel, *supra* note 147, at 107–08. There is a consequentialist thread to this argument as well; Cass Sunstein, for instance, has contended that a free market for votes would engender a "different conception of what voting is for" and that this "changed conception would have corrosive effects on politics." Sunstein, *supra* note 16, at 849.

150. Porter, *supra* note 123, at 1020.

Thus, to restate, the emphasis of the citizenship rationale is on participation in, and obligation to, a political community; vote buying is unacceptable because it runs counter to the ideals of collective self-governance.

2. *Equality*

The second set of arguments against vote buying stresses its corrosive effects on political equality. That every citizen's preferences should be weighed equally is a basic tenet of democracy;¹⁵¹ the "one person, one vote" principle embodies this proposition.¹⁵² The concern regarding vote buying is that the poor, owing to their financial desperation, would be disproportionately more likely to sell their votes,¹⁵³ resulting in their systematic and progressive disenfranchisement.¹⁵⁴ On this theory, the ban on vote buying serves a prophylactic function; it prevents the impoverished voter from entering into a market transaction that, from that voter's individual perspective, would be advantageous.¹⁵⁵

This rationale rests on a few initial assumptions. The first is that resources are distributed unequally at the outset—in other words, that there are indeed "rich" and "poor" individuals within a given population. As Saul Levmore claims, "If we could correct for wealth differentials, vote selling would surely be more attractive to many observers."¹⁵⁶ In this line, the

151. See, e.g., ROBERT A. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* 2 (1971) (noting that the "unimpaired opportunity" of all full citizens to "have their preferences weighed equally" is a necessary condition for democracy); ROBERT DAHL, *DEMOCRACY AND ITS CRITICS* 109–11 (1989) (including "voting equality" among the requisite "five criteria for a democratic process").

152. See, e.g., Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1392 (1994) ("Certainly economic equality is not required in a democracy; but it is most troublesome if people with a good deal of money are allowed to translate their wealth into political influence. It is equally troublesome if the electoral process translates poverty into an absence of political influence. Of course economic inequalities cannot be made altogether irrelevant for politics. But the link can be diminished between wealth or poverty on the one hand and political influence on the other. The 'one person-one vote' rule exemplifies the commitment to political equality.").

153. See Karlan, *supra* note 148, at 1470 ("Because vote trafficking is most likely to occur among economically powerless voters, who are relatively unable to extract and enforce more valuable candidate commitments and who are relatively likely to be tempted by the paltry sums available in the typical vote buying operation, it is particularly threatening to the quality of these voters' representation. What makes vote buying so troubling is that certain identifiable groups of voters are particularly likely to be the target of vote trafficking schemes.").

154. Robert Dahl notes that voting equality is imperative to prevent the prospect of "an infinite regress of potential inequalities in [less-endowed citizens'] influence over decisions." DAHL, *DEMOCRACY AND ITS CRITICS*, *supra* note 151, at 109. Daniel Ortiz writes in the campaign finance context that the arguments against the infusion of money into electoral politics "all rest on a single fear: that, left to themselves, various political actors will transform economic power into political power and thereby violate the democratic norm of equal political empowerment." Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 895 (1998); see also Karlan, *supra* note 148, at 1457 (noting that "a predictable consequence of vote trafficking is that identifiable, often historically disempowered, groups are particularly likely to sell their political power at an unfair discount").

155. Cf. Levmore, *supra* note 104, at 114–15 (arguing that the equality rationale "is a bit hollow" in part because it "fails to distinguish 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").

156. *Id.* at 118.

equality argument has no persuasive force against vote *trading*, since each person is endowed with one vote. The second assumption relates to collective action problems. Many proponents of the equality argument point out that when votes are sold, it is usually for paltry sums of money.¹⁵⁷ The reason is that any individual voter has only a minuscule prospect of affecting the outcome of an election; it is therefore rational for her to sell her vote. If everyone were to think similarly, however, the election result might indeed be influenced—in which case the vote sellers would end up severely undercompensated.¹⁵⁸ An organized market would mitigate this problem by enabling sellers to bargain collectively and thereby command an appropriate price for their votes. Nevertheless, even if concerns about undercompensation were remedied, it might not settle the issue; some would likely still object on grounds that we should affirmatively desire all groups, including the poor, to be represented in the political process. In this vein, vote buying plainly “debilitates the egalitarian spirit of democracy” and is offensive for that reason alone.¹⁵⁹

3. *Efficiency*

The efficiency rationale refutes the proposition that a market for votes should (in theory) lead to greater overall social welfare by enabling “gains through trade.” It does not posit that vote buying will *never* be more efficient than a prohibition; it merely asserts that vote buying will not *always* be more efficient. Overall, whether or not vote buying would lead to greater overall voter preference satisfaction is an empirical question.¹⁶⁰

To begin, the efficiency argument *for* vote buying goes something like this: a “one person, one vote” system is flawed because it cannot account for differences in voters’ intensity of preference. The votes of an apathetic non-partisan and an impassioned activist are weighed equally, despite the fact that a particular outcome would be “worth” much more to the second voter. If the second voter could buy the first voter’s vote, both would be better off; the first voter would have received compensation (in an amount at least as high as what her vote was “worth” to her), and the second voter would have

157. See Karlan, *supra* note 148, at 1458–59, n.13 (citing cases where individuals sold their vote for as little as three or five dollars).

158. In this regard, the equality rationale intersects with the efficiency rationale discussed in the next section. Were voters to organize, they could sell their votes as a “control block” (assuming the sellers collectively possessed enough votes to do so) and thereby command an adequate price.

159. Frederic Charles Schaffer, *Why Study Vote Buying?*, in ELECTIONS FOR SALE: THE CAUSES AND CONSEQUENCES OF VOTE BUYING 1, 9 (Frederic Charles Schaffer ed., 2007).

160. See Tomas Philipson & James Snyder Jr., *Equilibrium and Efficiency in an Organized Vote Market*, 89 PUB. CHOICE 245, 247 (1996) (noting that, from a theoretical perspective, “there is still no general model of optimal and expectationally consistent vote buying or vote trading in a decentralized environment”). Note that Dal Bó, *supra* note 104, at 792–95, offers an ingenious (if somewhat unrealistic) model in which vote “buyers” can manipulate voting outcomes *for free* through the use of conditional promises. In such cases—admittedly unlikely to occur—the resulting “capture” will be clearly inefficient.

received greater influence (at a price no higher than what it was “worth” to her). Vote buying thus increases social welfare.

The efficiency argument *against* vote buying responds as follows: the “mutually beneficial transaction” hypothesis is incomplete, because it fails to account for the transaction’s effects on third parties and, moreover, ignores collective action problems that lead voters to sell at inadequate prices. When these factors are considered, vote buying may actually lead to lower social welfare. Moreover, we might question the market’s basic ability to *measure* intensity of preference accurately, because a poor person will ascribe more value to a given dollar than a rich person will.

Defenders of theoretical vote buying have pointed out that the likelihood of inefficient outcomes is lower in small group settings, where transaction costs are lower and organization (collective action) is easier.¹⁶¹ If this is true, then the efficiency arguments against vote buying may be significantly weaker in the legislative context¹⁶²—for example, trading earmarks for votes—but the fact remains that, in practice, the resulting “pork barrel legislation” does frequently produce a net loss for society.¹⁶³

Obviously, the entire efficiency discourse rests on a model of democratic decisionmaking that involves simply aggregating the preferences of individual voters.¹⁶⁴ Whether maximizing preference satisfaction should alone be the goal of our system is by no means agreed.¹⁶⁵ Certainly there are some contexts—for example, judicial decisionmaking—where we tend to think that efficiency (so conceived) is *not* the proper aim; who prevails in court surely should not be determined by the parties’ relative “willingness to pay.” Even in the legislative or general electoral arenas, one might argue that the efficiency paradigm—which, after all, has nothing independent to say about what voters *should* prefer—impoverishes our understanding of citizenship, political discourse, and democracy broadly.¹⁶⁶ It is this impulse—a fundamentally different conception of what democracy ought to be about—that animates many of the other strands of argument against vote buying.

161. See, e.g., Philipson & Snyder, *supra* note 160 (arguing that where there is an *organized* market for votes, legislative vote buying will be efficient).

162. *Id.*

163. See, e.g., Kenneth Schepsle & Barry Weingast, *Political Preferences for the Pork Barrel: A Generalization*, 25 AM. J. POL. SCI. 96, 100 (1981) (equating pork barrel with inefficiency). *But cf.* Donald Wittman, *Why Democracies Produce Efficient Results*, 97 J. POL. ECON. 1395 (1989) (arguing that democratic markets work as well as economic markets).

164. See, e.g., Daryl Levinson, *Market Failures and Failures of Markets*, 85 VA. L. REV. 1745, 1750 (1999) (observing that “if the primary purpose of voting is to aggregate private preferences, a free market in votes would have the advantage of allowing strongly interested voters to register their greater intensities of preference by purchasing the votes of relatively disinterested voters”).

165. See, e.g., Sunstein, *supra* note 152, at 1392 (“Politics should not simply register existing preferences and their intensities, especially as these are measured by private willingness to pay. In the American constitutional tradition, politics has an important deliberative function.”).

166. In the words of Justice Brennan, “No body politic worthy of being called a democracy entrusts the selection of leaders to a process of auction or barter.” Brown, *supra* note 128, at 54.

4. Reason-Giving

As suggested above, even if vote buying *were* an efficient way to increase voter preference satisfaction, many would doubtless still oppose the practice. Democracy, they argue, is not simply about giving people what they want; it “requires adherence to the norm of reason-giving.”¹⁶⁷ Vote buying is antithetical to this latter conception of politics because “[p]eople can purchase things because they want them, and they need not offer or even have reasons for their wants.”¹⁶⁸ While a free market for votes might potentially leave voters more “satisfied,” the corollary is that such a system ratifies every preference regardless of its content: if voters want it, it is “good” (or, in any case, worth crediting). A market-based conception of democracy says nothing about right or wrong, reasonable or unreasonable, worthy or frivolous—that is, the market is silent on the question of what voters *should* want. To the contrary, it considers all preferences normatively equal on a per-unit basis. For this reason, among others, many insist that any “well-functioning democracy distinguishes between market processes of purchase and sale on the one hand and political processes of voting and reason-giving on the other.”¹⁶⁹

The norm of reason-giving, which is allied closely to a deliberative conception of democracy,¹⁷⁰ likely holds greater force in some voting contexts than in others. For example, while individual citizens should, on this view, *have* acceptable reasons when they cast their ballots in referenda or to elect public officials, they do so in secret; they are neither required nor expected to justify their vote to others. Legislators, by contrast, debate publicly; they are expected to argue their position and provide reasons why their preference is indeed preferable.¹⁷¹ This reason-giving requirement is stronger yet with regard to judges; judicial decisions must be justified not merely with reasons, but by reference to a specific set of normative standards, that is, the law.¹⁷²

167. Sunstein, *supra* note 152, at 1393.

168. *Id.*

169. *Id.* at 1390. See also Schaffer, *supra* note 159, at 9 (noting that vote buying “subverts the meaning of elections as instruments of collective decisionmaking, since it tends to replace deliberation over public issues with narrow calculations of individual interest”).

170. See, e.g., AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 3 (2004) (“Most fundamentally, deliberative democracy affirms the need to justify decisions made by citizens and their representatives. Both are expected to justify the laws they would impose on one another Its first and most important characteristic, then, is its *reason-giving* requirement.”) (emphasis in original).

171. See Karlan, *supra* note 148, at 1469 (noting that in “our current political rhetoric,” even pork-barrel legislation “requires a public-spirited, or at least a constituency-wide, justification”).

172. These differences suggest that one forum for decisionmaking may be preferable to another depending on the circumstances. Writing of the Iraq War, Gutmann and Thompson suggest that the reasons proffered in a deliberative democracy “are meant both to produce a justifiable decision and to express the value of mutual respect. It is not enough that citizens assert their power through interest-group bargaining, or by voting in elections. No one seriously suggested that the decision to go to war should be determined by logrolling, or that it should be subject to a referendum. Assertions of power and

Arguably, selling votes to the highest bidder runs counter to the ideals of reason-giving (and reason-having) in several ways. First, it undermines the normative force of any values or standards that we might think should underlie decisionmaking. After all, “to provide a reason for an act is paradigmatically to provide, if only implicitly, a general prescription—a rule, standard, or guideline—encompassing that act.”¹⁷³ Much of the deliberative process consists of appeals to shared norms; to the extent that vote buying circumvents this process, it risks weakening these norms.¹⁷⁴ Second, vote buying also dampens democratic debate, in the sense that those who disagree with a particular proposition may simply be “bought off,” rather than persuaded on the merits. Both sides of the argument, pro and contra, are less likely to be voiced when money does the talking. And lastly, in situations where decisionmaking must occur with reference to predetermined norms—as in the judicial or administrative setting—vote buying undercuts the disciplining function of reason-giving by divorcing the outcome from the factors that ought to determine it.

5. *System Integrity*

The final rationale for prohibiting vote buying is that to allow the practice could fatally erode public confidence in the governmental system. This rationale is admittedly circular; it takes as given that the public perceives vote buying as “wrong.” If vote buying were legal, the public might consider the practice acceptable—in which case confidence need not suffer. Nevertheless, because many people are likely to find at least one of the above four rationales persuasive, the “system integrity” argument adds another reason to worry about vote buying. “To the extent that policies frequently are formed by processes contrary to the processes sanctioned by the overall political system”—or, indeed, by processes that most citizens consider to be morally tainted, even if legal—“the system may break down.”¹⁷⁵ This fear is perhaps most apt with regard to peripheral (that is, nonprohibited but suspect) “vote-buying” practices such as campaign contributions and constituent patronage, where the similarity to illegal vote buying—which is already

expressions of will, though obviously a key part of democratic politics, still need to be justified by reason.” GUTMANN & THOMPSON, *supra* note 170, at 4.

173. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 642 (1995). More broadly, Schauer argues that “to provide a reason for a decision is to include that decision within a principle of greater generality than the decision itself.” *Id.* at 641. He continues, “Implicit in the process [of reason-giving] is the notion that one who offers a reason for a result (or a rule) is, at least at that time, committed to the reason as well as to the less general result.” *Id.* at 644.

174. *But cf.* Levmore, *supra* note 104, at 116 (“[I]f 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.”).

175. Lowenstein, *supra* note 100, at 804.

assumed to be unethical—leaves many with a sense that corruption is at play.¹⁷⁶

IV. FROM CITIZENS TO STATES: TRANSPOSING DOMESTIC RATIONALES

To most observers, the rationales for a vote-buying prohibition seem compelling in the domestic context, at least when taken together. But to what degree is the analogy convincing in the international setting? Many features of our domestic systems—for example, hierarchy of authority and independent administration of the law, to name only a few—do not exist fully on the international level. Moreover, the subjects of the law are radically different. The question as to whether the domestic rationales against vote buying retain normative and intellectual force when transposed into the realm of sovereign states thus requires careful treatment. The purpose of this Part is to test the degree to which citizenship, equality, efficiency, reason-giving, and system integrity are applicable at the international level. In so doing, this section lays the groundwork for the next Part, which weighs normative conclusions regarding an international legal prohibition.

Each of the sub-parts in this section follows the same general structure: after briefly re-summarizing the rationale at issue, each sub-part asks first whether (or in what circumstances or on which assumptions) the *rationale itself* should be a relevant consideration when assessing the normative merits of vote buying among states. Next, proceeding on the assumption that at least some may find the rationale important at the international level, each sub-part then examines whether *international vote buying* runs as far afoul of the rationale as domestic vote buying does. Finally, each sub-part concludes with a short summary.

A. Citizenship

To recall, the citizenship argument against vote buying holds that selling one's vote is inherently wrong: a sort of abdication of civic duty or a rebellion against the republican ideal. For those who agree that democratic participation has *meaning*, and that such meaning is damaged when votes are bought and sold on the market, the citizenship rationale is likely persuasive, at least to some extent.

But are states like citizens? To be sure, diplomats speak frequently of the “international community”; the world's organization of states is the “United Nations.” Yet, few would assert that the 193 members of the United Nations constitute anything like a world demos. Moreover, the re-

176. Thus, in the words of the U.S. Supreme Court, avoiding the mere “appearance of improper influence” is “also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.” *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (citing *Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 565 (1973)).

publican ideal of citizenship directs itself to individual human beings; it speaks to the notion that participation in politics “calls forth human capacities—for judgment and compromise, for argument and reflection, for the taking of responsibility—that would otherwise lie dormant.”¹⁷⁷ It is doubtful whether an abstract entity like a state could partake of this ideal.¹⁷⁸

Further complicating any notion of citizenship at the international level is the strong and longstanding tradition of autonomy among states¹⁷⁹—a tradition inevitably at odds with community and collective endeavor. State autonomy not only underpins our voluntaristic/consent-based system of international law,¹⁸⁰ it also has (historically, at least) lent support to the notion that individual states possess complete freedom of contract: if the parties consent, the law should not purport to interfere. For example, writing in 1966 and citing an impressive list of international legal scholars, Alfred Verdross observed that it was then “the general opinion of writers and jurists of international law” that “the power of states to conclude international treaties” was, in principle, “unlimited”: “[States] are in principle competent to enter into international agreements on any subject whatever.”¹⁸¹ If states may agree to whatever they choose,¹⁸² it follows that they may agree with one another to buy and sell votes. Thus, for those who remain committed to this strictly voluntarist, positivist conception of international law, the citizenship rationale against vote buying has little to commend itself.

Nonetheless, for others, the citizenship rationale ought not be dismissed out of hand; perhaps there *is* a sense in which international participation can be collectively meaningful for states. A competing ideology—the notion that states comprise a global community, indeed, a “Family of Nations”¹⁸³—has long been present in international legal thought, enjoying varying degrees of ascendancy at different points in history.¹⁸⁴ In recent de-

177. See Sandel, *supra* note 147, at 109.

178. Some have questioned whether global republican citizenship is possible even for individuals. See, e.g., Waldemar Hanasz, *Toward Global Republican Citizenship?*, 23 *SOC. PHIL. & POL'Y* 282 (2006).

179. Louis Henkin, for example, defined “autonomy” as “[t]he essential quality of statehood in a state system.” LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 11 (1995).

180. Under the voluntarist conception, an international legal norm has no force against a state that has rejected it; to proceed otherwise would be to infringe upon the state’s sovereignty. This view is closely bound up both with legal positivism and with the Westphalian notion of sovereign equality; its most familiar modern articulation is found in the 1927 *S.S. Lotus* decision of the Permanent Court of International Justice, in which the Court authoritatively declared that “[t]he rules of law binding upon States . . . emanate from their own free will.” *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

181. Alfred Verdross, *Jus Dispositivum and Jus cogens in International Law*, 60 *AM. J. INT’L L.* 55, 55 (1966).

182. As a descriptive matter, it is fairly clear that this view no longer prevails in international law. The concept of *jus cogens*, discussed in the text that follows, allows for the nullification of a consensual agreement between states if the agreement violates a “peremptory norm.”

183. This phrase was popularized by Lassa Oppenheim. See, e.g., LASSA OPPENHEIM & RONALD FRANCIS ROXBURGH, 1 *INTERNATIONAL LAW: A TREATISE* 36, 134, 264 (1920).

184. In this vein, Dino Kritsiotis has identified what he calls “an extraordinary wealth of allusions to ‘community’ in both classic and modern scholarship.” Dino Kritsiotis, *Imagining the International Community*, 13 *EUR. J. INT’L L.* 961, 964 (2002).

cares, as globalization has weakened the assumptions upon which state autonomy rests,¹⁸⁵ the notion of international “community” has enjoyed a particular resurgence.¹⁸⁶

Even admitting that complex interdependence among states is not, in itself, evidence of an incipient community,¹⁸⁷ the increasing prominence of universally-shared challenges, such as global climate change, and rhetorically-universal goals, such as international development, attests to a certain commonality of interests and identity.¹⁸⁸

From an economic perspective, the flow of aid through multilateral organizations accounts for roughly forty percent of all foreign development assistance from wealthy nations each year, or about \$54 billion;¹⁸⁹ rich states are expected to dedicate 0.7 percent of their annual GNP to official development aid.¹⁹⁰ While these figures are miniscule compared to the amount of redistribution achieved through taxation in most developed domestic systems, they are not insignificant, either.

From a legal perspective, the development of erga omnes norms—obligations owed to the community of states as a whole, as compared to those

185. The voluntarist approach is rooted in an atomistic conception of international relations in which states interact (if at all) on a bilateral basis; it presumes that the actions of individual states do not affect the entire community. Thus, it was from this understanding that Emer de Vattel could assert that “[e]ach sovereign state claims, and actually possesses an absolute independence on all the others.” EMER DE VATTEL, *THE LAW OF NATIONS* xiii (Joseph Chitty trans., 1866) (1758). In today’s globalized world, Vattel’s pronouncement no longer rings true. See, e.g., Vera Gowlland-Debbas, *The Functions of the United Nations Security Council in the International Legal System*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS* 277, 282 (Michael Byers ed., 2000) (“Yet there is undoubtedly an emerging trend that juxtaposes alongside the traditional conceptual legal framework based largely on a network of bilateral and contractual relations between atomistic States, one that is based on objective community interests.”).

186. For example, in his Declaration in the *Nuclear Weapons Advisory Opinion*, ICJ President Bedjaoui wrote, “The resolutely positivist voluntarist approach of international law still current at the beginning of the century . . . has been replaced by an objective conception of international law, a law more readily seeking to . . . respond to the social necessities of States *organized as a community*.” Declaration of President Bedjaoui, *Legality of the Threat or Use of Nuclear Weapons* (Req. for Advisory Op.) 1996 I.C.J. 226, 270–71 (Jul. 8) (emphasis added). Similarly, British Prime Minister Tony Blair told an audience in 1999, “Just as within domestic politics, the notion of community—the belief that partnership and cooperation are essential to advance self-interest—is coming into its own; so it needs to find its own international echo.” Tony Blair, UK Prime Minister, Remarks at the Economic Club of Chicago (Apr. 22, 1999).

187. See, e.g., Chris Brown, *International Political Theory and the Idea of World Community*, in *INTERNATIONAL RELATIONS THEORY TODAY* 90, 93–94 (Ken Booth & Steve Smith eds., 1995) (“It cannot be assumed that the trend toward a complexly interdependent world will, of its own accord, create community . . . [T]he ‘something further’ required is the moral impulse which creates a sense of common interests and identity.”).

188. It is worth noting that global administrative law developed in response precisely to this interdependence; see Benedict Kingsbury, Nico Krisch & Richard Stewart, *The Emergence of Global Administrative Law*, 68 *LAW & CONTEMP. PROBS.* 15, 16 (2005) (“Underlying the emergence of global administrative law is the vast increase in the reach and forms of transgovernmental regulation and administration designed to address the consequences of globalized interdependence . . .”).

189. Org. for Econ. Cooperation and Dev., *2012 DAC Report on Multilateral Aid*, at 8, DCD/DAC(2012)33 (July 20, 2012).

190. See, e.g., International Development Strategy for the Second United Nations Development Decade, G.A. Res. 2626 (XXV), ¶ 43, U.N. Doc. A/RES/25/2626 (Oct. 24, 1970).

owed only to treaty partners—reinforces the proposition regarding states' collective participation in governance; such norms "are the concern of all States."¹⁹¹ As Vera Gowlland-Debbas notes, "The expression 'international community,' although attributed different meanings, has . . . served to galvanize the concept of fundamental obligations owed to it."¹⁹² Similarly, the legal concept of *jus cogens* necessarily suggests the existence of international community, insofar as its justifications rest on a shared conception, however thin, of international public policy (*ordre public*).¹⁹³ The drafting history of VCLT Article 53, which first introduced *jus cogens* into a multilateral treaty, clearly evinces states' understanding that to admit the possibility of nullifying a consensual agreement on grounds of illegality "presupposes the existence of an international public order."¹⁹⁴

Indeed, the emergence of majority voting rules is noteworthy in itself. It was long the case that international law contained no process for "the imposition of legally binding rules upon a dissenting State or minority of States";¹⁹⁵ instead, unanimity was the norm. The introduction of majority voting rules in postwar international organizations was thus viewed by many

191. *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5).

192. Gowlland-Debbas, *supra* note 185, at 282–83.

193. See ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 10–11 (2006) ("[P]eremptory norms operate as a public order protecting the legal system from incompatible laws, acts, and transactions It seems that the general concept of public order most suitably reflects the basic characteristics of international *jus cogens*."); see also, e.g., Georg Schwarzenberger, *International Jus Cogens?*, 43 TEX. L. REV. 455, 456 (1964) (equating the concepts of *jus cogens*, international public policy, and international public order).

194. *Second report on the law of treaties*, by Sir Humphrey Waldock, *Special Rapporteur*, [1963] 1 U.N.Y.B. Int'l L. Comm'n 36, 52, U.N. Doc. A/CN.4/SER.A/1963/ADD.1; see also U.N. Conf. L. Treaties OR, 1st Sess., 52d mtg. at 295–296, U.N. Doc. A/CONF.39/C.1/SR.52 (May 4, 1968) (Mr. Yasseen (Iraq) noting that "[o]ne effect [of *jus cogens*] was to limit the scope of the contractual autonomy of States; that limitation had some analogy with that which domestic law imposed on private persons, with respect to freedom of contract, in the interests of public policy"); *id.* at 298 (Mr. Ogundere (Nigeria) "said that the idea of minimum concepts which could not be derogated from by parties *inter se* had developed from the norm of the law of nature, later known in the Digests as *jus publicum*, in contrast to *jus dispositivum* from which the parties might derogate by agreement *inter se*. *Jus publicum* was rooted in municipal law and in its later developed form became known as 'public policy', or *ordre public*."); *id.*, 53d mtg. at 301 (May 6, 1968) ("With regard to the peremptory rules of international law or *jus cogens*, the Colombian delegation believed that in principle the entire world recognized the existence of a public international order consisting of rules from which States could not derogate. The question arose, however, who would define that brief code of peremptory rules and decide whether a new rule of that kind had emerged."); *id.* at 305 (Mr. Sinclair (United Kingdom) "believed that peremptory norms, representing the higher international morality and the international public order of the future, should themselves be codified. It was unsatisfactory to leave it solely to the ambivalent processes whereby customary international law gradually emerged to determine the existence of those higher rules."); *id.*, 55th mtg. at 317 (May 7, 1968) (Mr. Amado (Brazil) stated that "in drafting article 50 [later VCLT article 53], the International Law Commission had for the first time proposed a rule in which no individual interest of two or more States was involved and which was concerned with the over-all interests of the international community. The individual and reciprocal rights and duties of contracting parties were subjected to the supreme and unanimously recognized interests of the international community.").

195. L. OPPENHEIM, 1 INTERNATIONAL LAW 239 (H. Lauterpacht ed., 7th ed. 1948).

scholars of the time as an affront to the existing legal order.¹⁹⁶ Notwithstanding this initial opposition, however, the model has gained tentative acceptance over time and the legality of majority voting procedures is now largely taken for granted.¹⁹⁷

These developments all serve to illustrate a shift—at least rhetorical, if not substantive—in the way we conceptualize the relationships among states. From the pluralist order of the pre-Charter period, which “provided a structure of coexistence”¹⁹⁸ while prioritizing states’ “freedom to promote their own ends subject to minimal constraints,”¹⁹⁹ international relations are arguably moving toward a more solidarist order, in which “a range of internationally agreed core principles . . . may underpin some notion of a world common good.”²⁰⁰ Of course, realists will insist that this trend is illusory—that self-interest still prevails, might makes right, and anarchy is the universal condition.²⁰¹ The purpose here is not to convince the skeptics (as a vast literature is already devoted to that task);²⁰² the aim is merely to suggest that community is *plausible*, and to highlight the sorts of changes that would

196. See, e.g., Herbert Weinschel, *The Doctrine of the Equality of States and its Recent Modifications*, 45 AM. J. INT'L L. 417, 428 (1951) (maintaining that binding majority voting rules are incompatible with the equality of states); Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 YALE L.J. 207, 209 (1944) (noting that “most of the writers on international law” reason “that international treaties are binding merely upon the contracting States, and that the decision of an international agency is not binding upon a State which is not represented in the agency or whose representative has voted against the decision, thus excluding the majority vote principle from the realm of international law”). But see Kelsen, *supra*, at 211 (“[I]t is a misuse of the concept of sovereignty to maintain that it is incompatible with the sovereignty of the States to establish an agency endowed with the competence to bind by a majority vote States represented or not represented in the law-making body.”). For an earlier perspective, see EDWIN DEWITT DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* 316 (1920) (“It is commonly assumed that the traditional notion of political equality is inconsistent with any provision whereby a majority may bind the minority in an international organization.”).

197. The acceptance of majority voting procedures is evinced by the very prevalence of voting within international organizations.

198. Andrew Hurrell, *International Law and the Changing Constitution of International Society*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS* 327, 336 (Michael Byers ed., 2000).

199. *Id.*

200. *Id.* at 337.

201. Cf. Gowlland-Debbas, *supra* note 185, at 285–86 (“To insist . . . that the international legal system does not contain institutions that mirror the role of public authorities endowed with a monopoly of physical force within the analogy of domestic law is to close one’s eyes to the actual functions performed at the international level.”).

202. The “international constitutionalist” view is especially strong among German legal scholars. See, e.g., Christian Tomuschat, *Die internationale Gemeinschaft*, 33 ARCHIV DES VOLKERRECHTS 1 (1995); Hermann Mosler, *The International Society as a Legal Community*, 140 RECUEIL DES COURS 11 (1974); Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529 (1998). Of course, there are jurists of other nationalities who also subscribe to this view. See, e.g., RODGER A. PAYNE & NAYEF H. SAMHAT, *DEMOCRATIZING GLOBAL POLITICS: DISCOURSE NORMS, INTERNATIONAL REGIMES, AND POLITICAL COMMUNITY* 27–50 (2004) (arguing that certain international regimes are in the process of becoming legitimate political communities); Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 MAX PLANCK Y.B. UNITED NATIONS L. 1, 2 (1997) (demonstrating substantial scholarly agreement with the claims of international constitutionalism).

strengthen the foundations of the citizenship rationale at the international level.²⁰³

Yet to assert that states together form a rudimentary community, such that participation therein can be collectively meaningful, is to make only half of the citizenship argument; for the rationale to hold force, it must also be the case that such participation is unacceptably distorted when it is bought and sold. In this regard, international vote buying appears similar to its domestic analogue. Unless one holds a strictly instrumental view of enfranchisement,²⁰⁴ participation in the international community, like participation in self-governance domestically, is a right conferred by the collective upon individual states *for that purpose*, that is, to participate. At least in aspiration, the Charter-era international order is a political community of inclusion and involvement.²⁰⁵ When a state's discretion—as embodied in its vote—is commodified, it becomes something fundamentally different; selling one's vote is not the same as voting. In this sense, then, we might understand vote buying as being at odds with the normative underpinnings of the international governance system.

A note of qualification is in order: the point here is that under certain visions of the international system, the citizenship rationale *can* apply to states—not that it always *will* apply. On the whole, to the extent that the citizenship rationale retains any persuasive power at the international level, it is likely to be stronger in some contexts than in others. First, not all international voting will take place in the framework of a “community.” The United Nations, of course, is the paradigmatic example of community among states; Thomas Franck has equated the two.²⁰⁶ The attainment of U.N. membership—like accession to world citizenship—is surely a symbolic moment for any newly independent state.²⁰⁷ Yet, other international

203. More than a decade ago, Bruno Simma and Andreas Paulus argued that the international order was “in the broad middle ground between the classical ‘international’ and a more broadly communitarian concept.” See Bruno Simma & Andreas L. Paulus, *The ‘International Community’: Facing the Challenge of Globalization*, 9 EUR. J. INT’L L. 266, 274 (1998). Their use of the term “international communitarianism” is especially relevant to the citizenship rationale because it parallels the communitarian ideal that makes citizenship such a powerful consideration for thinkers like Michael Sandel. See *id.* at 271 n.18.

204. According to such a view, “[p]olitical participation is valued instrumentally as a means to defend or further interests formed and defined outside of politics. In a strictly instrumental valuation of political participation, the experience of participation itself neither contains any positive value nor affects the content of anyone’s or any group’s interests and ends.” Frank Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 451 (1989).

205. At the close of the San Francisco U.N. Conference in 1945, U.S. President Truman emphasized that the U.N. Charter itself was “proof that Nations, like men, can state their differences, can face them, and then can find common ground on which to stand.” This, he said, was “the essence of democracy” and “the essence of keeping the peace in the future.” Harry S. Truman, U.S. President, Closing Address (June 26, 1945), in *THE CHARTER OF THE UNITED NATIONS, WITH ADDRESSES SELECTED FROM THE PROCEEDINGS OF THE UNITED NATIONS CONFERENCE, SAN FRANCISCO, APRIL–JUNE, 1945* (1945) at 168 [hereinafter *Closing Address of President Truman*].

206. See THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 224 (1990).

207. For example, upon Estonia’s joining the United Nations, after the collapse of the Soviet Union in 1991, Arnold Ruutel, Chairman of the Supreme Council of Estonia, noted that his country was re-

organizations may be communities of their own in greater or lesser degree. For example, the cultural, historical, and economic cohesion of the European Union undoubtedly exceeds that of the United Nations; conversely, one might query whether the International Coffee Organization conceives of itself as a community at all.

Second, the notion that participation rights have been *entrusted* to individuals by the community at large is especially compelling where a limited group of states purports to act for the rest.²⁰⁸ At the domestic level, this idea manifests itself unequivocally in prohibitions against bribery, that is, vote selling by public officials.²⁰⁹ While international law may not recognize comparable duties of accountability among states, there is at least a moral intuition that those who possess authority to decide the fates of others owe an obligation to exercise their discretion responsibly. This refrain is indeed heard often from powerful states, however hypocritically they might behave in practice, and it seems to be a normatively appealing (if rarely realized) ideal.²¹⁰

To summarize, the citizenship rationale is most persuasive where international relations approximate genuine political community. Of course, community itself is a matter of perception; it requires a society “welded together by a *sense* of community.”²¹¹ There must be certain shared norms and understandings—a notion of a common good—in the maintenance of which all participants bear some responsibility.²¹² That is not to say that states must share the same views or desire the same ends; they must simply acknowledge a process of collective self-governance in which participation itself carries meaning and value. And where members of a limited group act on behalf of a broader group, the duties accompanying participation are even weightier. Of course, there are many who dispute the existence of true community at

claiming its “rightful place as a full-fledged member of the international community of nation-States.” *Seven States Join UN; Membership Now 166*, U.N. CHRON., Dec. 1991.

208. Such is the case in the U.N. Security Council, for example, where U.N. members have “agree[d] that in carrying out its duties . . . the Security Council acts on their behalf.” U.N. Charter art. 24, para. 1.

209. See *supra* Part III.B.1.

210. See, e.g., *Address by U.S. Secretary of State Edward R. Stettinius, Jr.*, in *THE CHARTER OF THE UNITED NATIONS, WITH ADDRESSES SELECTED FROM THE PROCEEDINGS OF THE UNITED NATIONS CONFERENCE, SAN FRANCISCO, APRIL–JUNE, 1945* (1945) at 15–16 (“To build only on the collaboration and interests of the major nations would be to deny the community of interest of all nations. We have sought instead to insure that the strength of the major nations will be used both justly and effectively for the common welfare—under the law of a world charter in which all peaceful nations are joined together.”); 1 HARRY S. TRUMAN, *MEMOIRS* 291 (1955) (stating in his address to the closing session of the San Francisco Conference that the United States and other great powers “have no right to dominate the world. It is rather the duty of these powerful nations to assume the responsibility of leadership toward a world of peace”). For a thoughtful discussion of this rhetorical-ideological theme in international relations, with many more examples, see Inis L. Claude, Jr., *The Common Defense and Great-Power Responsibilities*, 101 POL. SCI. Q. 719 (1986).

211. Georges Abi-Saab, *Whither the International Community?*, 9 EUR. J. INT’L L. 248, 249 (1998) (emphasis added).

212. See *id.* at 251 (“In other words, community is based on a premise or an essential presumption, which is the existence of a community of interests or of values.”).

the international level, whether as a single “international community” or as plural communities of states.²¹³ Nonetheless, to the extent that the skeptics can be refuted—and, moreover, to the extent that states *aspire* to community—the citizenship rationale provides a plausible argument against international vote buying.

B. *Equality*

Like the “one person, one vote” principle at the domestic level, the international arena’s “one country, one vote” default rule manifests a strong commitment to formal equality.²¹⁴ However, the concept of sovereign equality among states cannot obviate the dramatic inequalities that exist in reality. Disparities in wealth, size, population, military capability, and cultural influence are enormous; consider, for example, that the GDP of the United States is nearly half a million times larger than that of Tuvalu²¹⁵ or that China is more than forty thousand times more populous than San Marino.²¹⁶ If the international system seeks to uphold formal equality in the face of such differences in wealth and power, it would seem that the equality rationale against vote buying—which embodies the concern that the poor will be more likely to sell their votes, and will thus be systematically disenfranchised—would hold force at the international level as well.

At the outset, however, it is worth inquiring why (and, indeed, whether) equality among states is valuable. Though sovereign equality has featured in international legal theory since roughly the seventeenth century,²¹⁷ it is only since the mid-nineteenth century, and in particular the Hague Conferences

213. This view is held, at a minimum, by those who ascribe to the realist school of international relations theory. For a concise overview of realist theory, which is also discussed briefly *infra* Part IV.D, see John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT’L SEC. 3, 9–14 (1995). Mearsheimer observes that “cooperation among states . . . is constrained by the dominating logic of security competition, which no amount of cooperation can eliminate.” *Id.* at 9.

214. See *supra* Part II.

215. See *The World Factbook*, CENTRAL INTELLIGENCE AGENCY, available at <https://www.cia.gov/library/publications/the-world-factbook/fields/2195.html>.

216. See China Population Clock, available at <http://www.chinability.com/China%20population%20clock.htm>; Giampaolo Lanzieri, Population in Europe 2007, Eurostat Doc. 81/2008, available at http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-08-081/EN/KS-SF-08-081-EN.PDF.

217. The notion of sovereign equality coalesced in the seventeenth century from various strands of natural law thought, most notably in the writings of Pufendorf, Wolff, and Vattel. See generally SAMUEL PUFENDORF, OF THE LAW OF NATURE AND NATIONS (William Percivale trans., 1710) (1672); CHRISTIAN WOLFF, JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM (Joseph H. Drake trans., 1934) (1764); EMER DE VATTEL, THE LAW OF NATIONS (Joseph Chitty trans., 1867) (1758). These scholars maintained that all states were equal by nature and that factual inequalities in wealth and power were irrelevant to states’ legal status. See, e.g., WOLFF, *supra*, at 128. This conclusion followed from the premise that all *persons* are equal in a state of nature; thus, because states persist in such a condition, all states are likewise endowed by nature with equal rights and obligations. See, e.g., VATTEL, *supra*, at lxii–lxiii. As Vattel famously asserted, “A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.” VATTEL, *supra*, at lxii. Yet the scope of equality that these early writers espoused was much more limited than the political equality (for example, equal voting rights) that we normally associate with the concept of sovereign equality at present. Rather, in its early meaning, equality meant merely “equality before the law”—the notion that “whatever is lawful for one nation is

of 1899 and 1907, that sovereign equality has come to connote equal participation in the international community.²¹⁸ Many commentators have since then disparaged the concept as disconnected from reality, insofar as it gives minor states a disproportionate degree of formal influence.²¹⁹ That the “one country, one vote” principle does not mirror the states’ factual capacity to exert influence in the international sphere has led realist critics to label sovereign equality “a fiction, and a very absurd fiction at that.”²²⁰

But there are other reasons, even apart from realist considerations, to challenge the formal equality of states. Most notably, with the rise of human rights and the concurrent recognition of individuals as subjects of international law, a system that deviates so far from a “one *person*, one vote” principle seems normatively untenable. After all, we condemn domestic vote buying in part because we affirm the equality of all persons; to transpose the equality rationale to the international sphere requires abandoning that commitment in favor of state equality. In fact, to the degree that states’ overall wealth is correlated with population, vote buying may actually correct for the effects of sovereign equality’s “non-proportionality.” That is, if large states—even comparatively underdeveloped ones—are more likely to have greater *overall* resources with which to buy votes, then vote buying may be a means for them to achieve more influence.

Nonetheless, from other perspectives, formal equality among states may have redeeming virtues. First, because powerful players inevitably shape the rules in countless extralegal ways, wealthy and well-armed states already wield disproportionate influence (relative to population) over the interna-

equally lawful for any other; and whatever is unjustifiable in the one is equally so in the other.” VATEL, *supra*, at lxii.

218. See DICKINSON, *supra* note 196, at 282, 285 (noting earlier rules of equal participation at the Copenhagen Conference of 1857, the Conferences of Geneva in 1864 and 1868, the Brussels Conferences of 1874 and 1889, and the Madrid Conference of 1880, but maintaining that “[t]he most far-reaching application of equal representation in a true international assembly occurred at the beginning of the twentieth century in the Peace Conferences at The Hague For the first time in history practically all the independent states of the earth participated in an international conference on the basis of complete equality of representation.”).

219. For example, a 1907 editorial in *The London Times* insisted that the Second Hague Conference—one of the first truly wide-scale attempts at equal participation—“was predestined to fail, because the convocation of such a body at all was based upon a gross violation of the ‘law of facts.’” The editorial continued: “The only principle upon which all these powers could be induced to send delegates to [the Conference] was the legal and diplomatic convention that all sovereign States are equal. For certain purposes that convention is useful, but, on the face of it, it is a fiction, and a very absurd fiction at that. Everybody knows that all sovereign States are not equal. The differences between them in population, in territory, in wealth, in armed strength, in their habits of thought, in their conceptions of law and right—in all that goes to make up civilization—are amongst the most obvious and insistent of facts.” Editorial, *The Hague Fiasco*, LONDON TIMES, Oct. 19, 1907, at 9C. At times, the international community has paid tribute to such “insistent facts,” that much is clear, for instance, in the design of the U.N. Security Council (which has itself been denounced by proponents of equality as unfair. See Jo Adetunji, *Turkey Calls for UN Security Council Reform Over Failure to Pressure Syria*, GUARDIAN (Oct. 13, 2012), available at <http://www.guardian.co.uk/world/2012/oct/13/turkey-un-security-council-reform-syria>) or in the weighted voting systems of the international financial institutions. See also *supra* note 83.

220. *Id.* But compare the views of some positivists, for whom equality has been considered a necessary corollary of sovereignty. See, e.g., Kelsen, *supra* note 196, at 207.

tional order. The erosion of formal equality, rather than opening the door to population-proportionate representation, could instead amplify these existing inequalities of resources and influence. As Benedict Kingsbury observes, “Th[e] conceptual scheme [of sovereign equality] serves, if very unevenly, as a counter to the vast inequalities that might otherwise be expected to feature in the formal structure of the legal system.”²²¹

Perhaps as decisively, sovereign equality deserves a degree of deference simply because it is so influential. The commitment to a system of sovereign, formally equal states “represents one of the defining ideas of twentieth century international relations”;²²² the U.N. Charter, after all, enshrines it as the organization’s first principle.²²³ In Kingsbury’s words, “On it have been built the modern mainstream projects for a working system of international law.”²²⁴ International law’s adherence to formal equality is thus unlikely to be abandoned any time soon.

Proceeding, then, on the assumption that formal equality among states is important, the next inquiry is whether international vote buying undermines such equality. That is, could an equality rationale serve to justify a vote-buying prohibition?

For those who adhere to the stronger, absolutist version of the equality argument, which insists upon the affirmative representation of all citizens (and classes) in public life, vote buying is plainly illicit. When a state sells its vote, its formal influence inevitably goes unexercised; the very act of vote buying entails a loss of representation. The following discussion therefore focuses on the paternalist-consequentialist version of the equality rationale, which requires much more attention.

Unlike the citizenship argument, which holds that selling one’s vote is inherently wrong, the consequentialist strand of the equality rationale would prohibit vote buying to protect poor states from acting in their own perceived (but apparently mistaken) self-interest. Whether this equality justification is convincing thus depends largely on whether we believe that the harm to poor states is indeed significant relative to the material benefit they would receive.²²⁵

In this vein, some features of the international voting system may mitigate the inequality effects of vote buying. First, the fact that there are relatively few states in the international system (as compared with citizens in a

221. Benedict Kingsbury, *Sovereignty and Inequality*, 9 EUR. J. INT’L L. 599, 600 (1998).

222. *Id.* at 603.

223. U.N. Charter art. 2, para. 1 (“The Organization is based on the principle of the sovereign equality of all its Members.”).

224. Kingsbury, *supra* note 221, at 603.

225. This is presumably the worry expressed by an Australian official when he characterized Russia’s vote buying tactics toward Tuvalu, a small Pacific island state, as “exploitation.” See Flitton, *supra* note 73 (“What we are seeing here is really the exploitation of one of the smallest countries in the world,” said Labor’s Richard Marles, parliamentary secretary for Pacific island affairs in the federal government.”).

polity) diminishes the collective action problems that characterize vote buying in the domestic electoral context. If vote selling states were to coordinate with one another—and thereby command an appropriate price for their votes—the transactions could result in a substantial wealth transfer. Assuming, as the equality rationale does, that the poor are more likely to sell their votes than the rich, the redistributive effects of vote buying from wealthy states to less-developed states might in fact be salutary. Indeed, many impoverished Pacific island states have managed to prop up their economies and finance infrastructure development through the practice of routinely selling their votes.²²⁶

Second, because much of international voting takes place with reference to specific issues—for example, voting on a particular U.N. General Assembly resolution, or deciding whether to recognize a particular state—states should be able to discriminate effectively between decisions that matter to them and those that do not. In this sense, international vote buying is less likely to result in wholesale disenfranchisement than in the domestic electoral context, where a person who sells his vote is trading away his voice with regard to a wide range of issues. That equality concerns should prohibit landlocked Chad from selling its vote on the U.N. Declaration of Principles Governing the Sea-Bed and the Ocean Floor, for example, seems far-fetched.²²⁷

Third, and more cynically, one might argue that poor states should be entitled to sell their votes precisely because rich and powerful states would ultimately impose their preferences anyway, regardless of voting. This view would hold that formal equality is meaningless except, perhaps, insofar as it requires the strong to “pay off” the weak in the process of arriving at the same inevitable outcome.²²⁸ Admittedly, there are certain types of results that cannot be achieved unilaterally: while NATO countries could circumvent the U.N. Security Council to intervene in Serbia, for example, no amount of unilateral action will win international recognition for Kosovo’s independence; state recognition, by its very nature, requires broad acceptance. The same could be said of several other types of outcomes that are closely tied to international voting, for example, the issuance of U.N. General Assembly resolutions or the election of members to U.N. subsidiary bodies. Nevertheless, the notion that vote selling brings little “additional”

226. See Vitcek, *supra* note 72.

227. See generally Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, G.A. Res. 2749 (XXV), U.N. Doc. A/RES/25/2749 (Dec. 17, 1970). Note that the emphasis here is on *equality* concerns—there may of course be *other* reasons to prohibit Chad from selling its vote in these circumstances.

228. The question then arises why rich and powerful states would bother to buy the votes of poor states if they do not feel constrained by the outcome of voting in the first place. One might respond that a favorable vote has symbolic value—after all, the “democratic charade” is a longstanding practice in many authoritarian regimes domestically—but one must wonder, then, how much vote-selling states could command for their votes if it were widely acknowledged that voting is itself worthless.

disenfranchisement for an already-marginalized state surely challenges the credibility of the equality rationale.

Yet, notwithstanding the three arguments above, there are also strong reasons to believe the inequality effects of vote buying may be equally or even more pernicious among states internationally than among citizens domestically. To begin, the internal dynamics of state decisionmaking may produce especially powerful incentives to prioritize short-term benefits over long-term costs. In a country struggling with poverty and budgetary shortfalls, a leader seeking to maintain domestic support would likely find it more attractive to sell the state's vote for an immediate infusion of aid than to retain the state's input on an international decision or norm that may not have effects for years or even decades.²²⁹ Of course, not all international decisions will have delayed consequences; some produce effects immediately. However, much of international law crystallizes over time; nonbinding declarations become customary norms, decisions set precedents for the future, and multilateral treaties often come into force only upon attaining the requisite number of ratifications. In this context, there exists a substantial risk that vote buying might induce poor states to gravely compromise their long-term interests.

Furthermore, the types of legal safeguards that protect individuals in democratic countries (even if the rich dominate policymaking) are mostly absent as to states in the international arena. There is, after all, no bill of rights or charter of fundamental rights for states.²³⁰ In this sense, the fear that wealth could completely "buy out" the interests of impoverished states—assuming these states do indeed choose to sell their votes—should be even more acute with regard to international vote buying than domestic vote buying. Admittedly, one might argue that *jus cogens* norms provide some baseline protections in the vein of "fundamental rights," but such rules prohibit only the most egregious acts—for example, slavery and genocide—and largely serve to protect individuals, not states. The only peremptory norm that would protect states *qua* states is the prohibition on the aggressive use of force, but this ban is frequently ignored and can be circumvented by gaining Security Council authorization.²³¹

Finally, because most international voting is conducted publicly,²³² there is a conceivable danger that vote buying will, in an expressive sense, inflict harm on the very idea of sovereign equality among states. If a certain group

229. Even well-intentioned decisionmakers are, from a psychological perspective, inclined to discount the future excessively. Yet this is true for individual voters as well; indeed, if a government is truly uninfluenced by the immediate demands of staying in power, a state's slow-moving bureaucratic apparatus may be more "rational" in this regard than an individual voter.

230. For an extremely thoughtful discussion concerning the functional similarities between rights and votes, see Daryl Levinson, *Rights and Votes* (unpublished manuscript) (on file with author).

231. See, e.g., *supra* Part I.A.1.

232. The most notable exceptions are U.N. elections to the Security Council, Human Rights Council, and other subsidiary bodies; these elections are conducted by secret ballot. See *supra* Part I.A.3.

of poor states is repeatedly perceived as being “bought” by wealthier and more powerful interests, one could imagine that the international order might come to view these states as “second-class citizens.” Such reputational effects could be damaging not only to the vote-selling states themselves (in the sense of being treated dismissively on matters of policy or law),²³³ but also to the international community’s normative commitment to the formal equality of its members.²³⁴

To sum up, the equality rationale against vote buying should be applied to the international sphere only with great caution. The rationale’s fundamental commitment at the domestic level—that is, the equality of all *persons*—risks gross distortion when equality is invoked on behalf of states. To many, this fact will likely eviscerate the persuasive force of equality as an argument against international vote buying altogether.

For adherents of sovereign equality—and, as noted, there may be compelling reasons why the convention is desirable—the strength of the equality argument is debatable. For those who take the strongest view of equality and believe that all states, however small or underdeveloped, should be *affirmatively represented* in international decisionmaking, vote buying is unequivocally harmful. For those who worry only that vote buying leaves poor states *undercompensated*, the picture is less clear. Like all of the consequentialist arguments against vote buying, its persuasive force ultimately hinges on empirical realities (that is, does vote buying indeed produce the bad effects that we fear it might?). Some considerations suggest vote buying may be very harmful to poor states; others suggest it may not be. In any case, where voting takes place amid drastic resource differentials, the potential effects of vote buying on poor states should at least merit close attention to guard against exploitation.

C. Efficiency

The efficiency rationale against vote buying, which predicts that vote buying would result in less overall preference satisfaction than a prohibition, depends a great deal on context. Even in the domestic realm, there are some

233. The notion of reputational harm must be employed with caution. Actions that may damage a state’s reputation in one sense may actually enhance it in another sense, so it is important to specify the *sort* of reputational harm that might be suffered. For a thoughtful exploration of the malleability of “reputation” in international relations, see Rachel Brewster, *Unpacking the State’s Reputation*, 50 HARV. INT’L L.J. 231 (2009).

234. It is clear who is most likely to be “bought out” by wealthier interests: states that are both poor and small. The mockery that followed Nauru’s recognition of Abkhazia and South Ossetia—a decision Nauru made “to much hilarity” in the eyes of its international audience—is typical of attitudes toward vote-selling states: “From the 1990s the microstate dabbled in offshore banking, was accused of being a haven for money laundering and for several years provided a home to a group of Afghan refugees whom Australia was prepared to pay not to keep. All these ventures ran out of steam, until the government hit on a more durable revenue-earning scheme: converting UN membership into cash.” Thomas de Waal, *The Caucasian Wars Go Pacific*, NAT’L INT., Sept. 22, 2010, available at <http://nationalinterest.org/commentary/the-caucasian-wars-go-pacific-4116>.

situations in which vote buying may increase, rather than decrease, aggregate voter preference satisfaction by enabling “gains through trade.” Where vote buying would be *inefficient*, the problem usually arises because vote-sellers have difficulty organizing themselves to bargain collectively or because the exchanges produce negative effects for absent third parties. Should we expect vote buying to produce inefficient results for the international community?

To recall, at the domestic level, the efficiency rationale rests upon a model of democratic decisionmaking that simply aggregates the preferences of individual voters. Efficiency arguments hold weight in the electoral context because elections are plausibly about giving voters what they want; by contrast, such arguments are misplaced in the judicial context: the law does not care how badly each party wants to win. In other words, efficiency is relevant only where the decisions in question can properly be based on *preferences* rather than *judgments*. This is no less true internationally.

Thus, there is a substantial subset of decisions for which efficiency is simply not an appropriate basis for assessing international vote buying. That is, many choices implicate international law, and these require a concomitant exercise of judgment. Perhaps the strongest illustration concerns decisions that call the international community to pronounce upon the legal rights of individual states. When rights are implicated, it is no justification that the majority of other states might prefer to violate those rights; efficiency is not (or, rather, ought not be) dispositive. This point is especially worth noting in the international context because of the types of decisions that are taken by voting—for example, whether or not to authorize the use of force against a particular state.

Consider, for example, the case of Iraq. A significant chorus of commentators has suggested that U.S. concern over oil supplies, not weapons of mass destruction, in fact motivated the 2003 invasion.²³⁵ The worry was reportedly that Saddam Hussein might try to cripple the West by blocking Middle East oil shipments,²³⁶ but for the sake of illustration, imagine instead that Saddam’s misbehavior was not at issue—that the United States and other countries merely wanted to appropriate Iraq’s resources for themselves. Under an efficiency-driven model of international decisionmaking, invasion and redistribution would be permissible if the overall benefits to the world community outweighed the costs (including those to Iraq). Of course, this approach is emphatically *not* the one enumerated in the U.N. Charter, where, apart from cases of self-defense, the use of force against another state is justified only if that state poses a “threat to international peace and secur-

235. See, e.g., Richard Adams, *Invasion of Iraq was Driven by Oil, Says Greenspan*, *GUARDIAN* (Sept. 17, 2007), available at <http://www.guardian.co.uk/world/2007/sep/17/iraq.oil>.

236. *Id.* Even the hypothetical proposed here has enjoyed some support as an account of reality. See, e.g., Greg Palast, *Secret US Plans for Iraq’s Oil*, *BBC NEWSNIGHT* (Mar. 17, 2005, 3:41 PM), <http://news.bbc.co.uk/2/hi/programmes/newsnight/4354269.stm>.

ity.”²³⁷ The “threat” requirement thus safeguards states’ sovereignty and territorial integrity—that is, their rights—against the interests of others.

Indeed, this “rights protection” rationale provides one of the normative underpinnings of global administrative law, with its emphasis on reasoning and accountability. Benedict Kingsbury and others have suggested specifically that “tools of administrative law would protect states’ rights” and serve “to ensure that administrative actors do not overstep their powers vis-à-vis third states.”²³⁸ We must therefore be cautious about applying efficiency analysis to cases where a different decisionmaking framework may be more suitable.

To be clear, the argument here is not that *voting* is necessarily inappropriate for resolving questions of judgment; it is merely that *efficiency* (in the sense of preference satisfaction) is a misplaced concern in such contexts. In fact, a large literature is devoted to the phenomenon of judgment aggregation, the technique in which epistemic problems are addressed by pooling the judgments (that is, votes) of individuals.²³⁹ Condorcet’s jury theorem is the most familiar of such models.²⁴⁰ But the fact that voting may indeed be an acceptable way to resolve certain questions of judgment does not justify the practice of vote buying: successful judgment aggregation generally requires that each individual exercise his or her judgment *independently*—a condition that is violated when some parties attempt to influence how others vote.²⁴¹

Even with regard to properly preference-based decisions, there is reason to doubt that the international community prioritizes efficiency in the sense of preference maximization. The system’s supermajority requirements—for example, for voting on multilateral treaty texts,²⁴² or on important questions in the U.N. General Assembly²⁴³—and the veto power conferred on the five

237. This formulation is the catchphrase used in most U.N. Security Council Resolutions authorizing use of force. See, e.g., S.C. Res. 1973, Preamble, ¶ 4, U.N. Doc. S/RES/1973 (Mar. 17, 2011), (authorizing “all necessary measures” to be taken for the protection of civilians in Libya). The relevant language of the U.N. Charter is found in Art. 39, which authorizes the Security Council to “determine the existence of any threat to the peace, breach of the peace, or act of aggression” and to decide upon appropriate responsive action, including the invocation of Art. 42. U.N. Charter art. 39.

238. Kingsbury et al., *supra* note 188, at 47.

239. I am grateful to Adrian Vermeule for raising this point.

240. See MARQUIS DE CONDORCET, *ESSAI SUR L’APPLICATION DE L’ANALYSE À LA PROBABILITÉ DES DECISIONS RENDUES À LA PLURALITÉ DES VOIX* (1785).

241. In fact, the independence criterion is violated much more easily than this: the receipt of common information alone suggests that votes will be correlated. While some work has been done on the possibility of successful judgment aggregation without the independence criterion, see Krishna K. Ladha, *The Condorcet Jury Theorem, Free Speech, and Correlated Votes*, 36 AM. J. POL. SCI. 617 (1992), the theorem’s assumptions are still unlikely ever to be replicated in reality, at least in the context of international voting. There is a theoretical possibility that vote buying could increase the probability of correct group outcomes if vote buyers possessed an epistemic advantage over vote sellers; however, assuming (as we must) that all states are voting sincerely, the same end could probably be achieved simply through information-sharing, rather than vote buying.

242. See VCLT, *supra* note 82, at 335.

243. U.N. Charter art. 18, para. 2; see *supra* Part I.A.2.

permanent members of the U.N. Security Council²⁴⁴ mean that, in many cases, a minority will be able to frustrate the preferences of the majority. From an efficiency perspective, these arrangements are inherently sub-optimal, at least in the immediate term.²⁴⁵ From a normative perspective, if efficiency is not an overriding goal of the system, then inefficiency may not be a problem; indeed, all discussion of “efficiency” seems slightly absurd in a system wherein we count the utility of *states* rather than of *persons*.²⁴⁶

Nevertheless, it is useful to consider how efficiency concerns might play out at the international level. First, as noted in the section above, many states simply do not have a strong stake in some international decisions.²⁴⁷ Indeed, various historically prevalent modes of international decisionmaking have implicitly acknowledged this fact by according greater input to “specially affected” states²⁴⁸ or (more controversially) to the great powers.²⁴⁹ Most current voting systems, however, feature equal and universal suffrage, at least within the relevant institution.²⁵⁰ Thus, where large differences exist in the intensity of states’ preferences regarding a particular decision, vote buying might tend to be welfare-enhancing.

Second, as was also noted earlier, the relatively small size of the international community means that collective action problems are significantly diminished as compared to domestic electoral voting, where millions of citizens (as opposed to 193 states) may cast a ballot. Again, this fact suggests that vote buying among states would tend to increase efficiency, rather than diminish it. In fact, it is critical to emphasize that if the international system does unreservedly seek to maximize efficiency in the sense of preference satisfaction, the best approach may be to bring the entire vote market “above ground”—that is, not only to permit vote buying, but actually to facilitate it. Theoretically, a free and open vote market would enable information sharing, collective bargaining, and access to capital in a way that

244. See U.N. Charter art. 27, para. 3.

245. Supermajority rules produce a status quo bias, which may be desirable from a system design perspective if parties value stability over the longer term.

246. To recall Part IV.B, a similar argument could be made against the equality rationale, insofar as we might challenge the international system’s adherence to the norm of sovereign equality itself. However, in the context of the equality argument, the emphasis was on the relative poverty and wealth of states. There is no necessary relation between population and (per capita) wealth (there are big, poor states as well as small, rich states), but population and overall wealth are likely to be correlated. If the aspiration is toward counting the preferences of persons, then vote buying would be one tool—admittedly an imperfect one—to achieve that end. Veto power itself serves a similar function if the veto is possessed by the most populous states.

247. The example given earlier was the case of landlocked countries with regard to maritime norms.

248. See, e.g., *North Sea Continental Shelf (Germany v. Netherlands, Germany v. Denmark)*, 1969 I.C.J. 3, 43 (Feb. 20) (stating that a convention cannot quickly give rise to a customary rule of international law unless “[s]tates whose interests were specially affected” are participants in the convention).

249. I refer here mainly to the system of “concert diplomacy” that prevailed in Europe during the century immediately preceding World War I. See HENRY KISSINGER, *DIPLOMACY* 78–102 (1994) for a brief and engaging overview of the great powers’ mode of operating during that period.

250. See *supra* Parts II & IV.B, which discuss the emergence and application of the “one country, one vote” principle.

could mitigate, if not entirely eliminate, efficiency concerns (and some equality concerns as well).

At present, however, we might believe for several reasons that states lack full and equal access to the market for votes—and this supposition, in turn, raises concerns about inefficiency. Vote buying and selling occurs informally; less influential states may not possess the diplomatic connections necessary to participate in this “grey market.” After all, it is easy to imagine the President of the United States expecting his Angolan counterpart to pick up the phone when the White House calls, but it is much more difficult to imagine the reverse. More significantly, many states simply cannot afford to buy votes, even when their interests are strongly implicated. This reality harks back to the equality rationale against vote buying discussed earlier: not only are poor states more likely to sell their own votes, they are also unable to purchase the votes of others.

The major efficiency-related worry with regard to vote buying thus comes from the possibility that an exchange between states could impose costs on another state not involved in the bargain—that is, that vote buying will produce negative externalities. Of course, in theory, externalities can be either positive or negative. In practice, whether or not vote buying would produce “better” outcomes, on balance, for the world as a whole depends on the extent to which the preferences of the vote buyers are aligned with those of the affected third parties. This is ultimately an empirical question.

Divorced from any specific context, the best that can be said for the efficiency argument against vote buying is therefore that it is equivocal, if not wholly unpersuasive. Yet, it is important to reemphasize that the efficiency debate properly encompasses only a subset of international decisionmaking. Even if vote buying were beneficial in the aggregate, that conjecture would supply an argument only for a *limited* system of vote buying—that is, one in which preference-based decisions alone were affected. A *fully* unregulated market, such as the one that exists currently, influences preference-based and judgment-based decisions alike, and therefore exceeds whatever normative support efficiency considerations might afford.

D. Reason-Giving

At the domestic level, the reason-giving argument against vote buying deplores the fact that buying and selling one’s political “voice” circumvents the deliberative and justificatory aspects of decisionmaking. Because an individual need not *give reasons* for her transactions in the market—rather, mutual agreement is sufficient for an exchange—vote buying both stifles debate and weakens the normative force of shared values or rules to which appeals would otherwise be made. The question, of course, is whether these considerations are relevant and persuasive for states.

As with the other rationales, any attempt at transposing reason-giving to the international sphere requires discussion of some underlying assumptions. Most fundamental here is whether states are capable of engaging in deliberative discourse in the way that individual citizens are. For proponents of deliberative decisionmaking, the imperative to give reasons depends to a substantial extent on the belief that *persuasion* is possible; after all, there is little point in deliberation if every voter's position is fixed immutably at the outset. When the voters are human beings, the potential for persuasion seems intuitively plausible.²⁵¹ When the voters are states, however, the issue is far less straightforward. Indeed, competing international relations theories offer diametrically opposed views as to whether states are receptive to noncoercive forms of influence at all. The question whether deliberative reason-giving is important in the international context is thus crucially linked to our basic views about how states behave.

To oversimplify considerably, international relations theorists divide roughly into two camps: rationalists and constructivists.²⁵² On one side, rationalist schools take states' interests as exogenous—that is, as given. Emphasizing “military-economic power and global material structure” as the main drivers of state behavior, rationalists view the international order as a realm of bargaining and strategic gamesmanship.²⁵³ Because states' interests are supposedly impervious to influences within the international system, rationalists harbor deep skepticism about the efficacy of reasoned argumentation (indeed, in many cases, about the efficacy of international law itself). It is therefore no surprise that realism, the strongest form of rationalist theory, “stresses the ability of states, absent a common international sovereign, to coerce or bribe their counterparts.”²⁵⁴ For realists, vote buying is a self-evident way of influencing states' *positions* without attempting the futile task of changing states' underlying *preferences*.

Thus, from the rationalist perspective, deliberative reason-giving is obviously of meager value in the international context, except perhaps as an information-eliciting mechanism.²⁵⁵ Yet international law is largely premised (implicitly, at least) on a very different view of international relations—the constructivist view—and it is on this view that the reason-

251. Admittedly, there is some theoretical work that questions this assumption. Rational choice theory, for instance, takes individual human preferences as fixed just as rationalist international relations theory takes state preferences as fixed.

252. I follow the lead of Ryan Goodman and Derek Jinks in dividing international relations theories into these two groups. See Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 631 (2004).

253. *Id.*

254. Jeffrey W. Legro & Andrew Moravcsik, *Is Anybody Still a Realist?*, 24 INT'L SECURITY 5, 17 (1999).

255. One of the major differences between the institutionalist school and the realist school is that the former finds value in international institutions' purported ability to facilitate information-sharing and to establish focal points for coordination. See, e.g., Robert O. Keohane & Lisa L. Martin, *The Promise of Institutional Theory*, 20 INT'L SECURITY 39, 42 (1995).

giving rationale against vote buying gains relevance. In contrast to the rationalists, constructivists argue that states' preferences are endogenous to the system, because "shared ideas and knowledge"²⁵⁶ form the crucial "building blocks of international reality."²⁵⁷ Instead of focusing exclusively on coercion, constructivists direct their attention "at communication, especially at persuasive messages, which attempt, by definition, to change actor preferences and to challenge current or create new collective meaning."²⁵⁸ It is not power alone, but also "the power of the better argument" that is meant to influence states' behavior.²⁵⁹

Whether astute or naive, the constructivist leaning is obvious in the design of international legal institutions. The very purpose of many international organizations is to provide a forum for discussion, deliberation, and coordination; indeed, the deliberative function of the U.N. General Assembly is so strong that it is sometimes pejoratively called "the talking shop of nations."²⁶⁰ In the words of U.S. President Truman, it was a main endeavor in San Francisco in 1945 to "set up an effective agency for constant and thorough interchange of thought and ideas."²⁶¹ Similarly, the Organization of American States has been described as a "political forum that brings together nations . . . to converse in a respectful and permanent way."²⁶² What these images evoke is a mode of interaction rooted in arguing, not merely in bargaining.

Interestingly, even in the context of treaty negotiations—a paradigmatic example of international bargaining—scholars have found that recourse to principled argumentation is in fact pervasive.²⁶³ Of course, the field of ac-

256. Rodger A. Payne, *Persuasion, Frames and Norm Construction*, 7 EUR. J. INT'L REL. 37, 37 (2001).

257. JOHN GERARD RUGGIE, *CONSTRUCTING THE WORLD POLITY* 33 (1998). Or, to put it more technically: constructivists posit "a cognitive, intersubjective conception of process in which identities and interests are endogenous to interaction . . ." Alexander Wendt, *Anarchy is What States Make of it: The Social Construction of Power Politics*, 46 INT'L ORG. 391, 394 (1992). The point was made most succinctly by Wendt, the pioneer of constructivist theory, in his reply to the realists: "Anarchy is what states make of it." See *id.* at 395.

258. Payne, *supra* note 256, at 38.

259. As Ian Johnstone makes clear, see Johnstone, *infra* note 264, this conception draws heavily from Jürgen Habermas's theory of communicative action, which understands rationality as "how speaking and acting subjects acquire and use knowledge." 1 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 8 (1984). In the international vein, Abram and Antonia Chayes have argued that "a discursive process of explanation, justification, and persuasion is a central attribute of international affairs." ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 127 (1995).

260. See, e.g., Ban Ki-moon, *More Than Just Talk*, INT'L HERALD TRIB. (June 17, 2008), available at <http://www.un.org/sg/articles/articleFull.asp?TID=80&Type=Op-Ed&h=0>. Admittedly, perhaps one might argue that it is a good thing if vote buying enables states to purchase consensus and thereby move from debate to action.

261. *Closing Address of President Truman*, *supra* note 205, at 170.

262. Press Release, Secretary General of the Organization of American States, OAS Secretary General Emphasizes Dialogue as Tool for Maintaining Unity in the Region (Nov. 22, 2010), available at http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-449/10.

263. See Cornelia Ulbert & Thomas Risse, *Deliberately Changing the Discourse: What Does Make Arguing Effective?*, 40 ACTA POLITICA 351, 352 (2005) ("Multilateral diplomatic negotiations constitute 'hard cases' for arguing, since deliberation as such is not the purpose of such talks, but to accomplish certain

ceptable arguments is quite broad in the treaty negotiation context; any shared value is a possible ground for agreement. In settings where the normative framework is more developed, justificatory discourse will be more focused and more uniform. Ian Johnstone's careful analysis of the U.N. Security Council's debates over Kosovo in 1998 and 1999 demonstrates this phenomenon well.²⁶⁴ Observing that all of the participating member states, including the permanent five, repeatedly invoked international law to explain and justify their positions, Johnstone argues that "legal discourse within an interpretive community occurs even in that highly political setting."²⁶⁵

As the U.N. Security Council example suggests, the reason-giving imperative is strongest when legal norms or principles purport to govern the decision at hand. Of course, to invoke the idea of norm-adherence leads directly to the concept of "legality" in international relations, and further to the perennial "law/politics" debate that accompanies it.²⁶⁶ For present purposes, I will suggest only that while the law/politics line remains hazy, it is clear that international law has been expanding dramatically. At least formally, rules, standards, and established principles increasingly constrain decision-making by "laying down the conditions that determine which legally relevant facts are to be attributed legal consequences."²⁶⁷ One function of reason-giving is thus to ensure that the "right reasons" are, in fact, guiding states' choices.

A prime illustration of this "legalization" trend can be found in the recent growth of global administrative law. The project of global administrative law—which has emerged in response to a perceived "accountability deficit" in the exercise of international power²⁶⁸—is largely dedicated to identifying "the mechanisms, principles, practices, and supporting social understandings" that will ensure international administrative bodies "meet adequate standards of transparency, participation, reasoned decision, and legality."²⁶⁹ As to reason-giving specifically, "[t]he requirement of reasons for

goals including the maximization of interests of the negotiating partners. Interestingly enough, though, we found that arguing and reason-giving are all-pervasive during all phases of international negotiations.").

264. Ian Johnstone, *Security Council Deliberations: The Power of the Better Argument*, 14 EUR. J. INT'L L. 437, 466–75 (2003). See also *id.* at 475 ("[T]he mere fact that legal arguments were advanced by all members, including the most powerful, suggests that the normative framework provided by the Charter and subsequent developments is sufficiently robust to warrant an effort to justify positions on legal grounds.").

265. *Id.* at 439. For Johnstone's normative argument in favor of greater deliberation in the U.N. Security Council, see Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, 102 AM. J. INT'L L. 275 (2008).

266. On the notion of "legalization" in the international sphere, see Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 415 (2000) ("Dispute settlement mechanisms . . . are least legalized when the process involves political bargaining between parties who can accept or reject proposals without legal justification.").

267. Gowlland-Debbas, *supra* note 185, at 280.

268. Kingsbury et al., *supra* note 188, at 16.

269. *Id.* at 17.

administrative decisions, including responses to the major arguments made by the parties or commenters, has been extended from domestic law into some global and regional institutions.”²⁷⁰

Admittedly, much of global administrative law is meant to strengthen accountability to the center in cases where authority has been delegated to subsidiary bodies;²⁷¹ international vote buying among states may not seem initially to fit this paradigm because, at least in the pluralist conception, states *are* the “legitimizing center.”²⁷² This does not mean that accountability is irrelevant, however. States have together established norms and procedures that are meant to limit the scope of their own discretion; recall, for example, the requirement that U.N. member states are to consider candidates’ human rights records when electing members to the HRC.²⁷³ Even though balloting is secret, the very existence of standards suggests that some choices are “better” than others.

If we accept that political deliberation and norm-based justification are at least sometimes an important facet of international decisionmaking, the detrimental effects of vote buying among states become fairly obvious. As to states that are selling their votes, the practice of vote buying silences dissent; states are effectively “bought off” from voicing their true positions. Conversely, on the purchasers’ side, vote buying relieves states of their burden of persuasion; they need not actually convince others on the merits. The overall dynamic, then, is potentially to reduce the quality of international decisions. If John Stuart Mill was correct when he argued that right opinions are enhanced by the expression of *all* viewpoints,²⁷⁴ the result of vote buying is inevitably an impoverished discourse and, ultimately, poorer outcomes.²⁷⁵ Such outcomes themselves may also be less durable, in the sense that vote buying undermines the achievement of true consensus. Note that these results are problematic even for purely “political” questions, not merely for legal ones. As we move along the spectrum from “politics” to “law,” vote buying becomes even more troubling. A discourse conducted like a market-

270. *Id.* at 38–39. Kingsbury et al. cite as a particularly striking example “the Security Council’s decision to require, at least internally, some kind of justification by the proposing country before an individual is included in the lists of those whose assets are to be frozen” pursuant to anti-terrorism resolutions. *Id.*

271. *See id.* at 44–45.

272. *See id.* at 43.

273. *See supra* Part I.A.3.

274. *See* JOHN STUART MILL, ON LIBERTY 33 (2d ed. 1859) (“But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.”).

275. As implied *supra* Part IV.C on efficiency, deliberation is not the only means by which to decide questions of the common good; judgment aggregation provides an alternative avenue for reaching such decisions. Nonetheless, as explained earlier, vote buying violates the independence criterion contained in most judgment aggregation models and is thus problematic under an aggregative conception of decision-making as well as under a deliberative one.

place bargain is one in which all normative elements have been stripped away, leaving raw interests to predominate completely over principled considerations. In the case of law-governed questions, vote buying severs the substantive link between the facts, the law, and the outcome—the very link that justificatory reason-giving is meant to protect.

A final systemic consideration—one that resonates in political and legal contexts alike—is that the development of international law itself depends, to some extent, on reason-giving. As particular reasons gain acceptance in the discourse among states—that is, as they become convincing—they flesh out the body of international legal norms and provide signposts for future debates. Consider, for example, the 1947 testimony of U.S. Secretary of State John Foster Dulles regarding the U.N. Security Council: “The Security Council is not merely an executor of international law,” he declared.²⁷⁶ “To an extent it may be a maker of law in the sense that its acts may be the precedents which develop unwritten law.”²⁷⁷ Presumably it is not only the acts themselves, but also the *reasons given* to justify those acts that would shape the development of international norms. Thus, for those who advocate the expansion and deepening of international law, vote buying will likely be considered an unwelcome circumvention of that process.

In summary, if we accept the basic international relations premises upon which international law is founded, then the reason-giving rationale has persuasive force whenever the “common good” is implicated. Where agreed norms purport to govern a decision, vote buying is especially harmful because it undercuts the disciplining function of justificatory reason-giving. In this vein, the reason-giving rationale supplies a strong argument against vote buying in contexts that have a “judicial” or “administrative” character. Yet reason-giving can also be important even in more “political” contexts such as international law-making. Insofar as deliberation is a central facet of collective decisionmaking, vote buying impairs persuasive argumentation and the open exchange of viewpoints among states. In this sense, too, the reason-giving rationale supplies a plausible ground on which to oppose international vote buying.

E. System Integrity

Lastly, the system integrity rationale is concerned with the negative effects that vote buying may have on public perceptions and, consequently, on

276. *The Veto: Statement by John Foster Dulles (United States) before the First Committee of the General Assembly, November 17, 1947*, Review of the United Nations Charter: A Collection of Documents, S. Doc. No. 87, 83d Cong., 2d Sess., Jan. 7, 1954, at 565. Dulles continued: “Today international law is not sufficiently adequate or sufficiently precise to provide a clear answer to many problems that may confront the Security Council. Under these circumstances, its decisions may reflect considerations of policy and of expediency, as well as the views of individual members as to what they think the law ought to be.” *Id.*

277. *Id.* See also Johnstone, *supra* note 264, at 452 (“[M]uch [Security] Council practice in the areas of peacekeeping, peace-building and peace enforcement gives content to the norms and, on occasion, pushes the boundaries of what is deemed legally acceptable.”).

the stability and integrity of the governmental system. It does not explain why vote buying is wrong per se; rather, given that vote buying is (already) viewed as immoral or illegitimate, it provides an additional justification to prohibit the practice.

Overall, it seems indisputable that system integrity is an important value for the international system, just as it is for the domestic sphere. What is arguable is the degree to which vote buying actually damages the legitimacy of international institutions. On one hand, most of us have *some* feeling—perhaps imported from the domestic context—that vote buying is wrong. On the other hand, the law influences our perception of what is legitimate or illegitimate. The fact that international vote buying among states is currently permitted ratifies (to some degree, at least) its practice; yet, if a prohibition were introduced, we might come to view international vote buying with greater opprobrium.²⁷⁸

In any event, the relative fragility of the international order suggests that *if* vote buying is considered corrupt, the risk of serious damage to the system may be significant. Indeed, system integrity is especially important in the international context given the system's lack of a sovereign enforcer; adherence depends largely on the "compliance pull" of the norms themselves, and on acceptance of the lawmaking process.²⁷⁹ Precisely because international norms are not "laws properly so called" in the Austinian sense,²⁸⁰ their perceived legitimacy is all the more crucial to ensuring obedience.

Granted, this line of reasoning should not be exaggerated. One could argue conversely that international law is simply a more "flexible" regime than domestic systems; it has, after all, a demonstrated ability to tolerate significant noncompliance without being fatally undermined. And perceptions of illegitimacy may themselves be highly context dependent, or even outcome dependent. It is possible, at least, that states might hypothetically accord more respect to "good" outcomes wrongly conceived than "bad" outcomes rightly attained. If this were the case, however, it would suggest some preexisting flaw in the decisionmaking process. From a system integrity perspective, then, the best remedy would not be to tolerate vote buying, but rather to reform the system.

Perhaps the greatest integrity-related harm from vote buying currently emanates from the lack of transparency concerning the practice. As long as international law neither condemns nor explicitly ratifies vote buying among states, vote buying will subsist in an uncertain middle ground—legal but suspect, routine but hidden. Indeed, it is the clandestine nature of

278. One concern, then, would arise with regard to enforcement; if vote buying were internationally prohibited but still widely practiced, a legal norm against vote buying might do *greater* harm to the system's legitimacy than if the practice were permitted and widely condoned.

279. See generally FRANCK, *supra* note 206.

280. See JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 138–40 (1832) (defining "laws properly so called" as commands of a determinate sovereign accompanied by legal sanction in case of disobedience).

most vote buying that makes it difficult to ascertain how detrimental its real-world effects actually are.

Thus, from the standpoint of integrity, either an enforceable prohibition *or* a transparent and legitimated open market would arguably be preferable to the status quo. Of course, both of these alternatives are aspirational and uncertain: there is no guarantee that a prohibition would be enforceable, and we cannot be sure that an open market would enjoy widespread legitimation. An unenforceable prohibition or an open market that flouts, rather than reflects, international opinion might be more harmful than the system that exists now. Yet the inadequacy of the status quo suggests that international legal scholars (and others) should at least *begin a discussion* about vote buying. There can be no progress toward understanding and addressing the practice of vote buying if it remains unexamined.

V. AN INTERNATIONAL LEGAL PROHIBITION?

The domestic analogy cannot offer definitive answers. It can only help sharpen our intuitions about which factors should matter when we ask whether vote buying is a flaw or merely a feature of the international order. Ultimately, vote buying emerges from the discussion above as neither wholly malign nor entirely unproblematic; rather, we are left with a series of contingent generalizations.

To summarize, the domestic analogy suggests that vote buying is more objectionable when it takes place within a political community or, even more so, within an agency relationship; when sovereign equality matters, but large wealth or power differences exist; where there is a high likelihood of coordination problems and negative effects on third parties; when the decisions concern matters of judgment, or public deliberation is deemed important to norm formation; or where payoffs are hidden from public scrutiny and legitimation. Conversely, vote buying is less objectionable—perhaps even desirable—when these factors are not present. Of course, how many of these features need be present or absent and in what degree is a value judgment. None of the international voting contexts examined earlier in this Article is an “all” or “nothing” case.

A. *Challenges of Application*

To be sure, the domestic voting contexts outlined in Part III.A are not entirely clear-cut either. But domestic voting is simpler in at least one key regard: it takes place in settings that are institutionally well-delineated. If the international community, like the domestic sphere, were populated by private citizens, elected legislators, administrative officials, and judges, the analogies from bribery and election fraud to international vote buying would be fairly straightforward. The difficulty, however, is that on the interna-

tional stage, states are never purely citizens, lawmakers, executives, or adjudicators; they are all of them at once.²⁸¹ Parsing out when and how states perform these respective roles is a complicated endeavor, permeated with legitimate disagreement.²⁸² For example, is the U.N. Security Council a world executive, a world legislator, or a world judge?²⁸³ The suggestion here is that it acts as all three, depending on the circumstance. This conceptual difficulty may go some distance in explaining why international law has not yet attempted to confront the issue of vote buying.

To reconsider the various types of international vote buying in light of citizenship, equality, efficiency, reason-giving, and system integrity inevitably raises hard (but now-familiar) questions: What is the nature of a particular international institution? How does it function? How *should* it function? The U.N. Security Council can serve as an illustrative example of these difficulties. Thomas Franck has noted that the Security Council serves a “jurying function”²⁸⁴; its members are entrusted with primary authority to interpret and apply the U.N. Charter regarding disputed questions. Recall, then, Pamela Karlan’s suggestion that, “If voting is a public function, not solely a private right, then the voter, like the juror, has no right to sell the power entrusted or delegated to her.”²⁸⁵ On Franck’s view of the Security Council, the citizenship rationale against vote buying has appeal. Yet, on the other side are those who argue that “security was set above justice” when the Security Council was conceived and that its primary role is merely to serve the interests of stability.²⁸⁶ In Hans Kelsen’s words, the purpose of U.N. Security Council enforcement action “is not: to maintain or restore the law, but to maintain, or restore peace, which is not necessarily identical with the law.”²⁸⁷ These sorts of disagreements—fundamentally different views about the role an institution ought to serve—are beyond the purview of this Article, but I raise them here to illustrate the debates that must precede or accompany application of the Article’s normative framework.

281. See, e.g., Kritsiotis, *supra* note 184, at 973 (identifying the functional roles of members of the international community as being those of “legislators, addressees, and adjudicators”).

282. See, e.g., Richard A. Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT’L L. 782 (1966); N. G. Onuf, *Professor Falk on the Quasi-Legislative Competence of the General Assembly*, 64 AM. J. INT’L L. 349 (1970); Oscar Schachter, *The Quasi-Judicial Role of the Security Council and the General Assembly*, 58 AM. J. INT’L L. 960 (1964); Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT’L L. 901 (2002); Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT’L L. 175 (2005); see also Johnstone, *supra* note 265.

283. See, e.g., Simon Chesterman, *The UN Security Council and the Rule of Law* (NYU Pub. L. and Legal Theory Working Papers, Working Paper No. 103, 2008) (observing that the Security Council acts in each of these three capacities).

284. Thomas M. Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 4 SING. J. INT’L & COMP. L. 362, 374 (2000).

285. Karlan, *supra* note 127, at 1711. Cf. Verdross, *supra* note 181, at 59 (“All states, it is true, can in principle renounce their rights. But there is one exception, for a state cannot waive the rights necessary for it to fulfill its international obligations.”).

286. Clyde Eagleton, *The Jurisdiction of the Security Council over Disputes*, 40 AM. J. INT’L L. 513, 513 (1946).

287. HANS KELSEN, *LAW OF THE UNITED NATIONS* 294 (1964).

B. *Limits of the Domestic Analogy*

The domestic analogy also has internal limitations. Certain important considerations cannot be addressed through the domestic analogy at all, because they stem from features unique to the international system. Indeed, there are at least three crucial features that do not exist domestically, but which are endemic to the international order. Those who find the domestic rationales against vote buying persuasive in the international context (or in particular international contexts) must address these challenges as well.

The first difficulty relates to interdependence and conflicts of interest among states. As noted above, states perform many different roles at the same time. They are simultaneously legislators, administrators, and adjudicators; it is far-fetched (and probably unwise) to expect them to isolate these roles from one another. Thus, the Security Council may act as a jury, but the jurors sometimes have a stake in the verdict. Up to this point in the Article, vote buying has been treated as if benefits are bias-producing; but what if, instead, they are bias-reducing? For example, in 2010, the United States offered guaranteed oil supplies to China so that China, which is heavily dependent on Iranian crude, would vote for Iran sanctions in the Security Council.²⁸⁸ Should this offer, which was designed to mitigate a conflict of interest, be prohibited?²⁸⁹ If we believe it should not be, then any hypothetical norm against vote buying would need to account for such situations. Inducements that bear a substantial nexus to the decision at issue might fall outside the bounds of the prohibition, leaving only unrelated or “extraneous” payments to qualify as impermissible vote buying. Drawing the line between these two spheres would be a challenging and necessarily subjective exercise.

The second difficulty concerns the *withholding* of benefits. After Yemen voted against the United States’ Gulf War resolution in the Security Council in 1991, then-Secretary of State James Baker allegedly told the Yemeni ambassador it was “the most expensive ‘no’ vote [he’d] ever cast” and, nearly overnight, the United States cut its entire aid budget for Yemen.²⁹⁰ This is not vote buying in the strict sense, but the distinction is purely formal. Realistically, a donor country’s threat to cease delivering benefits unless the recipient votes in a certain manner is likely to be as effective—if not more so—than offering the same benefits in exchange for the same vote. Indeed, all relevant aid disbursements would be prospective at the time of the voting agreement (a donor presumably cannot take back what has already been disbursed), so the threat and the promise are practically equivalent. This would

288. See David Osborne, *China Offered Oil for Sanctions Deal Over Iran*, INDEPENDENT, Apr. 14, 2010. The deal is even alleged to include limited drilling rights in the Gulf region.

289. Interestingly, the U.N. Charter stipulates that if a Security Council member is a party to a dispute, it cannot vote during the council’s deliberations on Chapter VI issues; however, it *can* vote on Chapter VII issues. U.N. Charter art. 27(3).

290. See Colum Lynch, *Security Council Seat Tied to Aid*, WASH. POST, Nov. 1, 2006.

imply that any norm against vote buying should prohibit both. Nevertheless, the idea that a donor could be required to continue providing assistance to an unfriendly recipient would understandably face strong resistance. Moreover, such a norm might deter donors from pledging aid in the first place—an obviously undesirable outcome. This is a problem that merits further attention by anyone advocating a vote-buying prohibition.

Third and finally, there is the question of international democracy itself: What if we are afraid of what an un-manipulated process might produce? What if we cannot trust the international community to make good decisions? The peril embedded in a democratic international order is that not all states are themselves democracies; Kim Jong-un's North Korea holds an equal vote with Sweden. It may be the case presently that most international vote buying is "benevolent"—that vote-buying states are in fact purchasing good outcomes for the international community. Indeed, this is what Ofer Eldar suggests is happening and why he disfavors a prohibition against vote buying.²⁹¹ This concern, for those who hold it, renders all five of the domestic rationales against vote buying irrelevant. Yet, it also suggests that the entire Charter-era system of international decisionmaking is misguided. To permit vote buying on this basis is to advocate a charade: a "managed democracy" where citizens vote, but the elections are rigged. The intellectually honest response to such skepticism is not to tolerate vote buying, but to eliminate (or drastically alter) the voting system altogether.

VI. CONCLUSION

This Article is meant to encourage an informed legal debate over international vote buying, not to take a conclusive position. It has sought to highlight a serious and underappreciated feature of the international system, and to demonstrate that the normative quandaries which accompany international vote buying are more complicated than they might seem on first reflection. To this end, this Article has provided a new normative framework for analysis—one that draws on the insights of domestic voting systems, but which also cautions that such insights are sometimes inapplicable or misleading.

Yet the scope of this Article is necessarily limited. Many crucial questions—most fundamentally, those concerning what, if anything, ought to be *done* about international vote buying—remain for future scholarship to address.

Indeed, there are many possible alternatives to the present situation. The question of reform is not a binary one ("to ban or not to ban"), but rather presents a continuum between outright prohibition and institutionalized fa-

291. See Eldar, *supra* note 13, at 9.

cilitation. Between these two poles, there is a range of options, including regulation, soft norms, and monitoring.

Initially, it should be acknowledged that various features of international voting currently enable or incentivize vote buying. Public balloting, where it exists, allows vote buying states to verify easily that their agreements were honored. Sovereign equality pushes populous, wealthy, and powerful states to seek influence more commensurate with their factual status. One approach toward reform might therefore seek to refashion some of the structures that make vote buying so attractive—or even seemingly necessary—to those states that now engage in the practice.

Assuming, however, that we are committed to the current architecture of international governance, there are still a number of possible strategies for change.

One option would be to completely ban vote buying (or particular forms of vote buying) among states, whether by multilateral treaty, ICJ decision, or articulation of a *jus cogens* norm. To be sure, there are many who would oppose such a move. Strong and wealthy states stand to lose a means of influence, while poor states stand to lose a source of income. Yet even from a systems perspective, there are reasons to question whether a vote-buying prohibition would be counterproductive. If the norm were wholly unenforceable, the market for votes might persist, merely exacerbating perceptions of illegitimacy and fueling exploitation by undermining poor states' ability to bargain. Conversely, if it were wholly successful, vote buying might simply be replaced by more pernicious forms of coercion, rather than persuasion. These concerns do not *necessarily* suggest that a prohibition is inadvisable—only that there are reasons why even opponents of vote buying might oppose the implementation of a norm against it. In any case, it is crucial that such a norm be structured in a way that is incentive-compatible with states' participation in international law and governance institutions in the first place. This is a key avenue for further study.

A related, but more tailored option would be regulation—a limited set of prohibitions that would seek to curtail vote buying only in certain circumstances. For example, we might disallow vote buying between states of vastly asymmetrical wealth or power, or prohibit secret transactions, or set minimum (or maximum) purchase prices for various types of voting decisions. The idea would be to target only those circumstances that are most likely to produce troubling effects such as exploitation or negative externalities. Although a concrete regulatory proposal is likewise a topic for another article, the point is to highlight broadly here the variety of legal possibilities available.

An alternative and perhaps more plausible approach for those who oppose vote buying would be to rely on public opprobrium and the formation of soft norms. Many well-known movements that ultimately ripened into multilateral treaties originated at the grassroots level. The campaign to ban

landmines is perhaps the most famous of these. After determining which types of conduct are most objectionable, opponents of vote buying might create standards or principles that would serve as guidelines for state behavior. Such soft norms might, in turn, encourage NGOs to give greater scrutiny to illicit vote buying and to impose reputational costs on offending states. Of course, like the prohibition or regulation options, public shaming would run the risk of merely driving discouraged behavior underground. But soft norms might nonetheless be a viable step toward broader debate and greater transparency.

An even less coercive approach would be a system based on monitoring and transparency. With such a tactic, vote buying would be the object of scrutiny, but not opprobrium. Like campaign finance disclosure rules in the domestic sphere, a monitoring approach could give the international community important information to assess states' positions on matters of shared importance merely by illuminating the transactions that influence those positions. While some might deem this sort of judgment-free stance an inadequate response to vote buying, it may prove the best and only option in the case of sustained disagreement over vote buying's normative merits. Future work might therefore consider the development of standards for disclosure and mechanisms to facilitate monitoring.

Finally, at the polar opposite of prohibition lies the option of completely legitimating and institutionalizing the market for states' votes. This approach would naturally draw support from principled defenders of vote buying, but its appeal could conceivably also extend to those who would consider a well-functioning vote market to be the "least bad option" for reform. For the latter group, the choice to legitimate and institutionalize vote buying would represent a compromise position—a concession to reality, grounded in a view that the ill-effects of vote buying would be better remedied through successful efforts at marketization than by (inevitably) unsuccessful attempts to curtail the practice.

Whatever approach international legal scholars, practitioners, and states might ultimately adopt, the debate over international vote buying is long overdue. The voting structures that govern international decisionmaking were established through painstaking effort, negotiation, and compromise—and yet the legal vacuum that surrounds vote buying may well result from inattention, rather than deliberate choice. Surely this, if not vote buying itself, is an unfortunate reality. This Article represents a modest attempt to fill the void, and hopes that others will follow.