"Don't Show Them Where to Click and Vote:" An Assessment of Electioneering Law in the United States as a Consideration in Implementing Internet Voting Regimes

Michael Odell Walker
University of Kentucky

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“Don’t Show Them Where to Click and Vote:” An Assessment of Electioneering Law in the United States as a Consideration in Implementing Internet Voting Regimes

BY MICHAEL ODELL WALKER*

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APPENDIX I—TABLE OF ELECTIONEERING LAWS IN THE UNITED
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"The Internet, in short, is a new political medium that has only begun to
fulfill its potential."

—Ryan P. Winkler

"This is in no way an experiment, . . . [t]his is the beginning of the future,
at least we hope so."

—Byron Quann, Senior Marketing Vice President of election.com

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1 Ryan P. Winkler, Preserving the Potential for Politics Online: The Internet’s Challenge to Federal Election Law, 84 MINN. L. REV. 1867, 1897-98 (2000).
"There are many possibilities for voting abuse that can be created as a consequence of using the Internet as a voting medium, and many of these may require regulation or new legislation."
—Internet Policy Institute

INTRODUCTION

The year 2000 saw many milestones in American election history. Most remember the months-long imbroglio following the 2000 presidential election and its effect on future election administration. Months before the bitter saga of *Bush v. Gore*, however, another milestone in election history occurred in the 2000 Arizona Democratic Primary. There, from March 7 to 10, voters had the opportunity to cast their ballots online. Internet voting made its mark on the American electoral landscape. In a year that raised many questions about voting systems came an example of one potential reform method. Internet voting, like the *Bush v. Gore* saga, promises to have a significant effect on future election administration. Federal, state, local, and even foreign governments are looking to Internet voting as a means to replace or supplement current electoral systems. As more governments adopt Internet-based voting, situations similar to the following hypothetical situations involving Voter in State X are likely to arise:

**Situation 1:** Voter, a resident of State X, which recently introduced Internet-based voting, turns on his computer and goes online. By his desk he has a card with his Internet voting Personal Identification Number ("PIN"). This PIN, distributed by State X’s election official’s office, allows him to log onto State X’s Internet voting website, www.statexelection.gov, and to fill out and submit his “virtual ballot.” Before logging on to the site, Voter checks his e-mail. He receives an e-mail from Candidate’s U.S. Senate campaign that briefly reminds him to vote (for Candidate) and

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6 "Internet voting" is a term used by the author to cover a broad range of terms including Internet-voting, Internet-based voting, online voting, or web voting.
7 This website is entirely fabricated, and is not an active link to any website that the author has found.
provides a hyperlink to www.statexelection.gov. Voter, rationally wanting to save time by not entering the website address for State X's election website, clicks on the link to vote.

Situation 2: Voter opens his web browser to a home page such as Yahoo!, MSN, or Excite. Candidate's campaign placed a flashing banner ad with a picture of the smiling Candidate pointing at Voter and reminding him to vote. Flashing next to candidate are the words, "Click here to vote," which hyperlinks Voter to www.statexelection.gov. Again, Voter clicks on the banner ad to save the time of typing in a website address.

Situation 3: Voter goes into a chat room on election day. While chatting, he goes into a discussion regarding the current senate race. Volunteer, a volunteer for Candidate's U.S. Senate campaign, engages Voter in a conversation, explaining why Candidate is a better choice than his opponent, Incumbent. After chatting with Volunteer, Voter thanks her. She leaves a final message saying, "Don't forget to vote for Candidate. Go to www.statexelection.gov to vote for Candidate." Again, Voter clicks on the link to save the time of typing in a website address.

Internet voting, like any other systemic change in government administration, raises questions of policy and law. Scholars addressed the issues surrounding Internet voting before the famed Arizona Democratic Primary, examining issues such as the mechanics of Internet voting.

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8 According to an online glossary of Internet terms, "[h]yperlinks are the easy-to-spot underlined words or phrases you click in World Wide Web documents to jump to another screen or page." C/Net Glossary, at http://www.cnet.com/Resources/Info/Glossary/Terms/hyperlink.html (last visited Jan. 12, 2003).

9 See Webopedia, at http://www.webopedia.com/TERM/b/banner.html. (last visited Jan. 12, 2003) (defining a banner or banner ad as "a typically rectangular advertisement placed on a Web site either above, below or on the sides of the Web site’s main content and . . . linked to the advertiser’s own Web site. In the early days of the Internet, banners were ads with text and graphic images. Today, with technologies such as Flash, banners have gotten much more complex and can be ads with text, animated graphics and sound. Most commerce-related Web sites use banner ads.").


security concerns in Internet voting systems, and the effect of the "digital divide" on empowering those voters without access to the Internet. Few scholars, however, have addressed another inevitable issue surrounding the adoption of Internet voting systems: the application of current electioneering laws to an Internet voting regime. If a voter casts a ballot online, does their computer turn into a polling place, subjecting it to the state’s electioneering laws? Do actions on the Internet, such as placing banner ads, sending out e-mails on behalf of a campaign, or providing links to an Internet voting site constitute the same type of behavior as electioneering at the polls? Legislatures that plan on adopting Internet voting regimes and courts that will have to hear challenges to Internet voting will eventually have to consider this issue in their work.

This Note examines electioneering issues surrounding Internet voting by assessing the current status of electioneering laws in the United States and applying that body of law to Internet voting. Part I, Background: The Evolution of Internet Voting in the United States, provides a description of the mechanics of Internet voting and a brief history of Internet voting initiatives in the United States. Part II, An Overview of Electioneering Law in the United States Today, provides a brief history and discusses the purpose of electioneering laws in the United States. It also provides a current summary of electioneering laws in force and summarizes the United States Supreme Court’s treatment of such laws. Part III, The Application of Current Electioneering Law to Internet Voting Regimes, addresses the two questions posed above: 1) whether Internet voting turns each personal computer used to vote online into a polling place; and 2) whether certain online communications, such as those in the three hypothetical situations

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12 See id. at 979.
13 See id. at 963.
14 See discussion infra Part II.A.
15 Some scholars have touched on this issue, but none have never fully examined it. See Pamela A. Stone, Comment, Electronic Ballot Boxes: Legal Obstacles to Voting Over the Internet, 29 McGeorge L. Rev. 953, 966-69 (1998) (analyzing specifically the issue of an "electronic ballot" providing a link to a candidate’s website or, alternatively, to a statement by/about the candidate—a reverse of the situation provided in the introduction to this Note); Eugene Volokh, How Might Cyberspace Change American Politics?, 34 Loy. L.A. L. Rev. 1213, 1216 (2001).
16 See infra notes 21-86 and accompanying text.
17 See infra notes 87-116 and accompanying text.
18 See infra notes 117-52 and accompanying text.
above, constitute electioneering.\textsuperscript{19} Finally, Part III analyzes how courts might treat online electioneering laws adopted by a jurisdiction.\textsuperscript{20} An appendix is also provided, which contains a table of electioneering statutes in the United States. This Note is aimed toward those policymakers and judges who may one day tackle these issues.

I. BACKGROUND:
THE EVOLUTION OF INTERNET VOTING IN THE UNITED STATES

A. Internet Voting Defined and the Mechanics of Internet Voting

The concept of an Internet voting system is quite simple. Internet voting is “the casting of a secure and secret electronic ballot that is transmitted to election officials using the Internet.”\textsuperscript{21} The process of voting over the Internet is similar to that described in the hypothetical situations above, where individuals wishing to vote using a personal computer can access an Internet voting website. Once on the website, they enter some type of information, such as a social security number or a PIN provided by the election administrator. Once the server running the Internet voting program recognizes the individual, it shows a “virtual ballot” containing the list of candidates and/or ballot measures in the current election. The voters select the candidates of their choice and click a “button”\textsuperscript{22} that tells the computer to transmit the voters’ choices to the server. The server automatically tabulates the votes sent to it by different voters. Companies such as Election.com, iBallot, Safevote, Votenet, and VoteHere manufacture and sell Internet voting software programs to governments, corporations, and private organizations.\textsuperscript{23}

According to the Internet Policy Institute, which conducted a National Science Foundation-sponsored study on the viability of Internet-based

\textsuperscript{19}See infra notes 153-56 and accompanying text.
\textsuperscript{20}See infra notes 157-86 and accompanying text.
\textsuperscript{22}In graphical user interface systems, a well-defined area within the interface that is clicked to select a command. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000).
voting, there are three types of Internet voting systems, defined by the location where an individual votes: 1) "poll site" voting, in which a computer with access to the Internet-voting site is provided at a polling place and is still under the physical control of election officials; 2) "kiosk voting," where a terminal ready for Internet-based voting is placed in a public forum such as a mall, library or school, but the voting machinery and physical environment where the voting terminal sits remain under the control of election officials; and 3) "remote voting," in which a voter "casts ballots from virtually any location that is [Internet-accessible]."

B. A Brief History of Internet Voting: Internet Voting Initiatives Before the 2000 Arizona Democratic Primary

Internet voting in public elections is still in its infancy, with major developments occurring only within the last decade. This Section explores the history of Internet voting from early state experiments to the 2000 Arizona Democratic Primary.

1. Early Internet Voting Initiatives

Before the 2000 Arizona Democratic Primary, the federal government and some state governments were either testing Internet voting or conducting studies on the issue. Private organizations, including unions, non-profit organizations, and corporations were already using Internet voting in binding elections. Some states and counties had experimented with Internet voting. Two Iowa counties ran a mock Internet election in November 1999. In January 2000, the Alaska Republican Party used Internet voting to conduct a straw poll for presidential candidates. The National Science Foundation provided a grant to the Internet Policy Institute and the University of Maryland to conduct a workshop on Internet voting issues. The IPI Report found that "[r]emote Internet voting systems

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24 IPI REPORT, supra note 3, at 1.
25 Id. at 1.
26 Id.
27 Id. at 2.
29 Id.
30 Id.
31 C.D. Mote, Jr., Preface to IPI REPORT, supra note 3, at i.
pose significant risk to the integrity of the voting process, and should not be fielded for use in public elections until substantial technical and social science issues are addressed."\(^{32}\) The IPI Report, however, suggested that "remote Internet voting may be appropriate in the near-term for special populations, such as the military and their dependents based overseas."\(^{33}\) The Washington Secretary of State's Office issued a report on Internet voting in June 1998.\(^{34}\) The report examined the current structure of Washington's voting system, described the types of Internet voting systems available, and addressed some of the technical and social issues surrounding Internet voting without taking any position on whether to adopt an Internet voting system. The California Secretary of State's Office also commissioned a task force on Internet voting.\(^{35}\) Its findings, issued in January 2000, came to a conclusion that was similar to the IPI Report: California should take a path of "evolutionary rather than revolutionary" change, slowly implementing Internet voting from polling place sites to the eventually adopting remote Internet voting systems.\(^{36}\) Meanwhile, the Arizona Democratic Party was already undertaking steps to fully test a remote Internet voting system.

2. The 2000 Arizona Democratic Primary

The 2000 Arizona Democratic Primary was the first binding government election to incorporate an Internet component. The Arizona Democratic Party hired Election.com (an election software company) and Verisign (a company specializing in digital signatures) to provide the software for the primary election.\(^{37}\) All registered Democrats in Arizona were eligible to vote. If a party member wanted to participate online, they filled out a request form, signed it, and sent it to party headquarters. Once staff at headquarters received the application, they verified the signature with that on the member's voter registration form and sent the voter a PIN.

\(^{32}\) IPI REPORT, supra note 3, at 2, 34 (emphasis omitted).

\(^{33}\) Id. at 34 n.31.


\(^{35}\) See CALIFORNIA INTERNET VOTING TASK FORCE, supra note 21.

\(^{36}\) Id.

instructions detailing how to vote, and an application to receive a mail ballot.\textsuperscript{38} From March 7-10, party members who registered for the Internet vote could vote from their homes or other remote computers by accessing the Arizona Democratic Party’s website or by logging on to election.com to access the party’s Internet voting site.\textsuperscript{39} On election day, voters could vote via the Internet only at one of the 124 official Democratic polling sites throughout the state.\textsuperscript{40} To vote, a voter had to answer a series of questions for verification. First, a voter had to “verify their identity, [PIN], U.S. citizenship, age, and lack of felony conviction or participation in another party’s primary.”\textsuperscript{41} Second, the voter had to confirm his identity.\textsuperscript{42} Third, the voter had to answer randomly-generated “challenge questions” based on his registration information, such as place of birth or date of birth.\textsuperscript{43} Finally, the voter could choose his candidate for president: Bill Bradley or Al Gore. After choosing a candidate, the voter’s choices were transmitted to an undisclosed server maintained by Election.com that tallied the votes.\textsuperscript{44} The result of the test was promising; there were no security glitches in the system. However, the Voting Integrity Project (“VIP”), a Virginia-based policy group, sued the Arizona Democratic Party on behalf of two minority voters.\textsuperscript{45} The VIP alleged that the Arizona Democratic Party violated the Voting Rights Act of 1965\textsuperscript{46} by giving those who had access to the Internet four more days to vote than those who only voted using absentee ballots or polling places to vote.\textsuperscript{47} The Justice Department also intervened in the suit.\textsuperscript{48} However, the suit eventually settled in 2001.\textsuperscript{49}

\textsuperscript{38} Gibson, \textit{supra} note 28, at 575.
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} Solop, \textit{supra} note 37, at 4.
\textsuperscript{41} \textit{Gore Rolls Up Delegates in Unique Arizona Internet Primary}, \textit{supra} note 2.
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{Id.}
\textsuperscript{44} Gibson, \textit{supra} note 28, at 575.
\textsuperscript{47} See Ben White, \textit{Online Balloting: A Question of Fairness; Justice Department Challenges Arizona’s Use of Voting by Computer in Primary}, WASH. POST, Mar. 19, 2000, at A09.
\textsuperscript{48} \textit{Id.}
C. From the 2000 Arizona Democratic Primary to the Present: Current Internet Voting Initiatives in the United States and Abroad

Since the 2000 Arizona Democratic Primary, the federal government, state and local governments, academic institutions, and even foreign governments have conducted Internet votes or have conducted studies on the issue. This section explores some of those initiatives.

1. Federal and State Initiatives

The federal and state governments continue to explore the possibility of adopting Internet voting. This section describes recent legislation, pilot projects, and other initiatives taken by the federal government and by the states.

The United States Congress addressed the issue of Internet voting recently with the passage of the Help America Vote Act of 2002.50 This Act provides funding to states to improve federal election administration and election technology.51 It also established the Election Assistance Commission, charged with: 1) serving as a national clearinghouse on federal election administration and reform;52 2) developing voluntary voting system guidelines;53 3) testing and certifying voting system hardware and software;54 and 4) conducting studies on federal election administration.55 Section 245 of the Act charges the commission to “conduct a thorough study of issues and challenges, specifically to include the potential for election fraud, presented by incorporating communications and Internet technologies in the Federal, State, and local electoral process[es].”56

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51 Id. § 101.
52 Id. § 202.
53 Id.
54 Id.
55 Id.
56 Id. § 245(a)(1) (codified as amended at 42 U.S.C. § 15385). The statute also outlines what the Commission shall specifically study:
(2) Issues to be studied—The Commission may include in the study conducted under paragraph (1) an examination of—
(A) the appropriate security measures required and minimum standards for certification of systems or technologies in order to minimize the potential for fraud in voting or in the registration of qualified citizens to register and vote;
The Federal Election Commission, which establishes the National Voting Systems Standards ("VSS"), has solicited public comments on revisions to the VSS over the past three years.\(^5\) When it issued its new VSS in April 2002, it took a position disfavoring the creation of national standards for Internet voting.\(^8\) In the overview of the standards, it referred to the report of the Internet Policy Institute and concluded that "controls cannot be developed at the present time to make remote Internet voting

(B) the possible methods, such as Internet or other communications technologies, that may be utilized in the electoral process, including the use of those technologies to register voters and enable citizens to vote online . . .;

(C) the impact that new communications or Internet technology systems for use in the electoral process could have on voter participation rates, voter education, public accessibility, potential external influences during the elections process, voter privacy and anonymity, and other issues related to the conduct and administration of elections;

(D) whether other aspects of the electoral process, such as public availability of candidate information and citizen communication with candidates, could benefit from the increased use of online or Internet technologies;

(E) the requirements for authorization of collection, storage, and processing of electronically generated and transmitted digital messages to permit any eligible person to register to vote or vote in an election, including applying for and casting an absentee ballot;

(F) the implementation cost of an online or Internet voting or voter registration system and the costs of elections after implementation (including a comparison of total cost savings for the administration of the electoral process by using Internet technologies or systems);

(G) identification of current and foreseeable online and Internet technologies for use in the registration of voters, for voting, or for the purpose of reducing election fraud, currently available or in use by election authorities;

(H) the means by which to ensure and achieve equity of access to online or Internet voting or voter registration systems and address the fairness of such systems to all citizens; and

(I) the impact of technology on the speed, timeliness, and accuracy of vote counts in Federal, State, and local elections.

Id. § 245(a)(2)(A)-(I).


sufficiently risk-resistant to be confidently used by election officials and the voting public." Consequently, the new VSS contain no provisions for Internet voting systems in general elections. However, the Federal Election Commission ("FEC") stated that the VSS "do not prohibit the development and use of these systems for special populations such as military and civilian government employees based outside of the United States." The FEC also encouraged "pilot tests and demonstration projects in accordance with applicable state regulations." Notably, the FEC also considered poll site Internet voting the equivalent of direct recording electronic ("DRE") voting systems, subject to the same VSS.

The Department of Defense's Federal Voting Assistance Program, which administers the Uniformed and Overseas Citizens Absentee Voting Act, conducted a pilot Internet voting registration and voting program for military personnel from eleven counties in Florida, South Carolina, Texas, and Utah. The pilot program allowed these voters, using Microsoft Windows 95 or 98 and Netscape Navigator, to register for an absentee ballot or to vote instantly over the Internet. Eighty-four citizens voted using this system.

Maricopa County, Arizona, as well as two counties in California, conducted an online voting trial for the 2000 presidential election. Some state governments tested Internet voting on a smaller scale. Other state governments passed legislation to study, and in some cases, adopt over time, an Internet voting regime. Since the 2000 election, state legislatures have filed over 1500 bills related to elections and election reform.

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59 Id. at 6.
60 Id.
61 Id.
62 Id.
66 Id. at 1.3.
67 Id. at Executive Summary.
68 Ann Harrison, Online Voting Moves Closer to Acceptance, COMPUTERWORLD, Oct. 30, 2000, at 70.
Legislatures in California, Colorado, Georgia, Minnesota, New Jersey, New York, and Washington have proposed or enacted legislation to allow exploration of voting online or implementing online voting in the future.

2. Initiatives By Academic Organizations

Though few legal commentators have addressed the issue of electioneering law in relation to Internet voting, many have addressed other legal issues arising from the phenomenon of Internet voting. Scholars have addressed the security issues of Internet-based voting, potential disenfranchisement issues associated with Internet-based voting, and the effect of Internet voting on voter turnout. For instance, Caltech and MIT collaborated on a study on the reliability of current voting systems and made recommendations for future voting systems; the Georgia Tech Research Institute has started conducting research on the technical and social issues surrounding Internet voting, and the Loyola of Los Angeles Law School presented a symposium on the Internet and Democracy. Other scholars have addressed the issue of online campaigning and how such activities should be valued under current campaign financing laws.

71 Id.
73 Gibson, supra note 28, at 567.
75 Id.
76 Gibson, supra note 28, at 567.
77 *See* Caltech-MIT/Voting Technology Project, at http://www.vote.caltech.edu/ (last visited Apr. 11, 2003).
80 *See* Winkler, supra note 1.
3. Foreign Initiatives

There have also been Internet voting initiatives outside the United States. Canada’s New Democratic Party included an Internet voting component as part of its leadership election at its annual convention.\(^1\) The British government funded Internet voting trials for local elections taking place in May, 2002. Voters had the option to cast their ballots from a computer or from a mobile phone.\(^2\) The Swiss government conducted its first test of Internet voting in the Geneva suburb of Anieres.\(^3\) The Irish government initiated a test Internet vote using polling place stations.\(^4\) Estonia plans to introduce online voting for its 2004 general election.\(^5\) France has also examined the issue of implementing online voting.\(^6\)

II. AN OVERVIEW OF ELECTIONEERING LAWS IN THE UNITED STATES TODAY

Over the years, state election systems have evolved from voice-voting in public to casting ballots in private voting booths and statutory oversight of election administration has evolved from allowing parties to provide ballots to mandating government-designed and provided ballots and prohibiting many types of campaigning activities in and around the voting booth. This Section briefly examines the history of these electioneering laws and their current status in the United States.


\(^{85}\) Id.

\(^{86}\) Id.
A. The Purpose and History of Electioneering Statutes

The Oxford English Dictionary defines electioneering as “[t]he art or practice of managing elections; canvassing on behalf of candidates for membership in representative assemblies.” Another definition of electioneering is “an attempt on the part of an individual or candidate to persuade or influence eligible voters to vote for a particular candidate, party or proposition.”

Each state has some type of statute that prohibits electioneering around a voting booth or polling place. Some states even have statutes prohibiting

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87 3 OXFORD ENGLISH DICTIONARY 75 (2d ed. 1933).
88 26 AM. JUR. 2D ELECTIONS § 467 (2002).
89 See, e.g., ALA. CODE § 17-7-18 (2002); ALASKA STAT. § 15.15.170 (Michie 2002); ARIZ. REV. STAT. § 16-515 (2002); Ark. CODE ANN. § 7-1-103(9) (Michie 1987); CAL. ELEC. CODE § 18370-71 (West 2002); COLO. REV. STAT. ANN. § 1-13-714, 31-10-1521 (West 2002) (regarding municipal elections); CONN. GEN. STAT. § 9-236 (2002); DEL. CODE ANN. tit. 15, § 3626 (2001); District of Columbia—D.C. CODE ANN. § 1-1001.10(b)(2)(A) (2002); FLA. STAT. ch. 102.031(3)(c) (2002); Ga. CODE ANN. § 21-2-414 (2002); Haw. REV. STAT. § 11-32 (2002); Idaho—IDAHO CODE § 18-2318 (Michie 2002); Ill. COMP. STAT. ANN. 5/19-2.2 (West 2002); Ind. CODE ANN. § 3-14-3-16 (West 2002); Iowa—IOWA CODE ANN. § 49.107(1) (West 2001); KAN. STAT. ANN. § 25-2430 (2001); Ky. REV. STAT. ANN. § 117.235 (Michie 2002); La. REV. STAT. ANN. § 18.1462 (West 2002); ME. REV. STAT. ANN. tit. 21-A, § 682 (West 2001); Md. CODE ANN., ELEC. CODE § 16-206 (2002); Mass. GEN. LAWS ANN. ch. 54, § 65 (West 2002); Mich. COMP. LAWS ANN. § 168.931(k) (West 2002); Minn. STAT. § 204C.06(1) (2002); Miss. CODE ANN. § 23-15-895 (2002); Mo. ANN. STAT. § 115.637(18) (West 2002); Mont. CODE ANN. § 13-35-211 (2002); Neb. REV. STAT. § 32-1524 (2002); Nev. REV. STAT. ANN. 293.361 (Michie 2002); N.H. REV. STAT. ANN. § 659:43(II) (2002); N.J. STAT. ANN. §§ 19:34-6, 19:34-15 (West 2002); N.M. STAT. ANN. §§ 1-20-16, 3-8-77, 73-14-31.3 (Michie 2002); N.Y. ELEC. LAW § 8-104 (McKinney 2002); N.C. GEN. STAT. § 163-166.4 (2002); N.D. CENT. CODE § 16.1-10-06 (2002); OH. CODE ANN. §§ 3501.30, 3501.35 (West 2001); Okla. STAT. ANN. tit. 7-108, § 16-111 (West 2002); OREG. REV. STAT. § 260.695(2) (2001); PA. STAT. ANN. tit. 25, § 3060 (West 2002); R.I. GEN. LAWS § 17-19-49 (2002); and R.I. GEN. LAWS § 17-23-13 (2002) (applying specifically to the use of sound equipment); S.C. CODE ANN. § 7-25-180 (Law. Co-op. 2002); S.D. CODIFIED LAWS
electioneering around a voter who is casting an absentee ballot. All state statutes define electioneering by either: 1) describing behaviors that constitute electioneering; or 2) if not using the term “electioneering,” listing behaviors and actions prohibited in and around the polling place or where an individual casts an absentee ballot. State statutes prohibiting electioneering around polling places establish a “campaign restriction zone” surrounding the polling place.

As the appendix illustrates, state electioneering statutes define electioneering in varying degrees of specificity. Some states, such as Wisconsin, define electioneering broadly and thus regulate a wide range of behaviors. Other states define specific behaviors prohibited in or around the polling place. Some of these behaviors include: displaying signs or materials such as buttons; distributing materials such as handbills, campaign flyers, cards or other literature; soliciting signatures for petitions; discussing the candidates or issues; using a loudspeaker to discuss candidates or issues; or soliciting contributions. The following statute from Kansas provides a good example of the type of activities that electioneering statutes prohibit:

Electioneering is knowingly attempting to persuade or influence eligible voters to vote for or against a particular candidate, party or question submitted. Electioneering includes wearing, exhibiting or distributing

§ 12-18-3 (Michie 2002); Tennessee—TENN. CODE ANN. § 2-7-111(a)-(b)(1) (1994); Texas—TEX. ELEC. CODE ANN. § 61.003, 85.036 (Vernon 2001); Utah—UTAH CODE ANN. § 20A-3-501 (2002); Vermont—VT. STAT. ANN. tit. 17, § 2508 (2002); Virginia—VA. CODE ANN. § 24.2-604 (Michie 2000); Washington—WASH. REV. CODE ANN. § 29.51.020 (West 2002); West Virginia—W. VA. CODE ANN. § 3-9-9 (Michie 2002); Wisconsin—WIS. STAT. ANN. § 12.03 (West 2002); Wyoming—WYO. STAT. ANN. § 22-26-113 (Michie 2002); see also Appendix, infra pp. 747-68, List of State Electioneering Statutes and the Campaign Restriction Zones They Establish.

90 See, e.g., California—CAL. ELEC. CODE § 18371(a) (West 2002); Louisiana—LA. REV. STAT. ANN. § 18.1334 (West 2002) (applying specifically to nursing home administrators).

91 These include statutes regarding the polling place and areas where individuals cast absentee ballots. For a list of behaviors and activities prohibited by these statutes, see infra Part III.

92 See supra note 89.

93 See WIS. STAT. ANN. § 12.03(4) ("[e]lectioneering" means any activity which is intended to influence voting in an election).

94 See, e.g., Appendix infra.
labels, signs, posters, stickers or other materials that clearly identify a candidate in the election or clearly indicate support or opposition to a question submitted for election within any polling place on election day or advance voting site during the time period allowed by law for casting a ballot by advance voting or within a radius of 250 feet from the entrance thereof.95

Regardless of their definition of electioneering, the point of these statutes is clear: Campaigning stops at the boundary of the campaign restriction zone. These areas, which range in size from the area inside the building containing the polling place96 to the entire area of a voting district,97 create zones where no one may engage in electioneering. Some states impose criminal penalties for electioneering in these zones.98 Statutes restricting electioneering around an absentee voter typically do not have a restricted zone other than the immediate presence of the voter.99

Electioneering statutes are not exclusive to the states. As a result of the Bipartisan Campaign Reform Act of 2002,100 federal law now contains its own definition of electioneering. The United States Code defines an “electioneering communication” as:

[A]ny broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office . . . [which] is targeted to the relevant electorate . . . or [if the previous definition in the paragraph] is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term “electioneering communication” means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a specific candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.101

95 KAN. STAT. ANN. § 25-2430(a) (2001).
98 See, e.g., CAL. ELEC. CODE § 18371(a) (West 2002).
99 See, e.g., id. § 18371(b) (forbidding electioneering “in the residence or immediate presence of the voter”).
What brought these statutes into being? The campaign-restriction zones that exist in each state are part of an election apparatus known as the Australian Ballot System, designed "to secure the independence of the elector by requiring the exercise of his or her right of franchise in absolute secrecy." The system contains two distinct features. First, it has a closed voting booth in which the voter marks a ballot in private. This ensures the "secrecy of voting." This means that the system uses a closed ballot box or voting booth by which voters make their choices. Second, the system has "an official ballot containing the names of all candidates, printed and distributed under state or municipal authority." A quick review of ballot history provides some insight as to why states moved from allowing public voice voting to the secret ballot boxes that Americans utilize today.

The Australian Ballot System evolved over the years in response to previous voting systems that were highly prone to fraud and corruption. Early voting systems utilized the *viva voce*, or voice voting, method of electing officials. A citizen stood in person and proclaimed to those around him which candidate he chose for an office. This system was often prone to corruption. Voters coming to the polls might be influenced through physical intimidation or bribery by individuals working for a candidate. For example, electors in early Virginia might receive an "imbibable," a gift of whiskey or other alcohol, from the candidate for whom they voted.

Next in the development of election administration was the advent of the paper ballot. Paper ballots, usually supplied by the candidates or political parties, listed the names of candidates for office, were often printed with ornate designs, and sometimes even contained propaganda. The purpose of using paper ballots was less to ensure the secrecy of a vote than to provide convenience to voters who could not travel to the polls. Like the voice vote system, the early paper ballot was subject to corruption and fraud. Agents of campaigns still stood by the polls to intimidate or bribe voters as had occurred during voice voting. A new type of fraud emerged when forgers printed ballots to look like the ballot for one party yet contain a list of candidates for an opposing party.

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102 26 AM. JUR. 2D Elections § 299 (2002).
103 *Id.*
104 *Id.*
105 *Id.*
106 *Id.*
107 *Id.*
108 *Id.*
109 *See id.*
110 *Id.* at 56.
The next development in the ballot evolution was the Australian Ballot System. Around 1888, the Australian Ballot first appeared in Louisville, Kentucky, about 1888, but "Massachusetts was the first state to adopt the Australian Ballot statewide" that same year.112 Its three traits were "officiality, consolidation, and secrecy."113 The ballot was official because the government (usually state) designed, printed, and distributed the ballot.114 It was consolidated because it listed all candidates for office from all parties.115 It was secret because voting occurred in a voting booth outside of the eyes and presence of others. As Professor Jerrold Rusk notes, "[t]he new system thus offered the voter an impartial, multiple-choice instrument, upon which he was allowed to deliberate and make a decision in the privacy of the polling booth. The intimidating party aura which so permeated the voting situation under the old system had been effectively dispelled."116

B. The Status of Electioneering Law in the United States Today: Laws in Force and United States Supreme Court Treatment of Electioneering Laws

All states prohibit electioneering in and around the voting booth. These laws, once challenged as unconstitutional, now enjoy a high degree of approval by the Supreme Court. The following case surveys electioneering statutes today and explains why the Court approves of them.

1. Burson v. Freeman and the Supreme Court's Acceptance of Electioneering Statutes and Campaign Restriction Zones

The Supreme Court upheld the concept of restrictive zones in Burson v. Freeman.118 At issue in Burson was the constitutionality of the campaign

111 Id. at 57.
113 Rusk, supra note 112, at 1221.
114 Id.
115 Id.
116 Id.
restriction zone established by Tennessee's electioneering statute,\textsuperscript{119} which prohibited "the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or a position" within the building in which the polling place was located and one hundred feet from the entrance to that building.\textsuperscript{120} Any violation of the statute was a misdemeanor under Tennessee law.\textsuperscript{121}

The respondent, treasurer for a Nashville City Council candidate, filed a facial constitutional challenge to Tennessee's electioneering statute and the statute providing criminal penalties for violation of the electioneering statute in the Davidson County Chancery Court.\textsuperscript{122} She sought a declaratory judgment that the statutes violated the United States and Tennessee Constitutions, as well as an injunction against the electioneering statute's enforcement.\textsuperscript{123} The chancery court found that the statute:

[W]as a content-neutral and reasonable time, place, and manner restriction . . . that . . . served a compelling state interest in protecting voters from interference, harassment, and intimidation during the voting process; and that there was an alternative channel for respondent to exercise her free speech rights outside the 100-foot boundary.\textsuperscript{124}

On appeal, the Tennessee Supreme Court reversed the chancery court's decision in a four-to-one vote.\textsuperscript{125} The court "held that § 2-7-111(b) was content based 'because [1] it regulate[d] specific subject matter, the solicitation of votes and the display or distribution of campaign materials and [2] [it regulated] a certain category of speakers, campaign workers.'\textsuperscript{126} The court also held that it would not uphold the statute unless "(i) the burden placed on free speech rights is justified by a compelling state interest and (ii) the means chosen bear a substantial relation to that interest and are the least intrusive to achieve the State's goals."\textsuperscript{127} The court agreed that the state had shown a compelling interest in prohibiting voter solicitation and campaign material distribution in the polling place; but it

\begin{itemize}
  \item \textsuperscript{119} Tenn. Code Ann. § 2-7-111(b) (Supp. 1991).
  \item \textsuperscript{120} Burson, 504 U.S. at 193-94 (citing Tenn. Code Ann. § 2-7-111(b) (Supp. 1991)).
  \item \textsuperscript{121} Id. at 194 (citing Tenn. Code Ann. § 2-19-119 (1990)).
  \item \textsuperscript{122} Id.
  \item \textsuperscript{123} Id.
  \item \textsuperscript{124} Id. at 194-95.
  \item \textsuperscript{125} Id. at 195.
  \item \textsuperscript{126} Id. (quoting Freeman v. Burson, 802 S.W.2d 210, 213 (Tenn. 1990)).
  \item \textsuperscript{127} Id.
did not find that the state had shown a compelling interest in restricting such practices in the area around the polling place. The court found that the one hundred foot restriction was not sufficiently narrowly tailored to protect the compelling interest, nor was it the least restrictive means to protect that interest.

A plurality of the United States Supreme Court reversed the Tennessee Supreme Court’s holding and found that the electioneering statute did not violate the First Amendment. The Court held that the state, as recognized administrator of elections, had asserted that the exercise of free speech rights conflicted with another fundamental right—the right to cast a ballot free from intimidation and fraud. Long history, substantial consensus, and simple common sense showed the Court that some sort of restricted zone around polling places is necessary to protect that fundamental right. Given the conflict between these two rights, the Court held that requiring solicitors to stand one hundred feet from the entrances to polling places did not constitute an unconstitutional compromise.

The Supreme Court began its analysis by noting that Tennessee’s statute implicated “three central concerns” in First Amendment law: (1) “regulation of political speech”; (2) “regulation of speech in a public forum”; and (3) “regulation based on the content of speech.” The Court held the Tennessee statute to be “a facially content-based restriction on political speech in a public forum [that] must be subjected to exacting scrutiny.” It held that the “State must show that the ‘regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.’” The electioneering statute, in the plurality’s view, asserted two compelling interests: (1) protecting the right to vote for the candidate of the voter’s choice by “protecting voters from confusion and undue influence;” and (2) protecting the integrity of an election process by “ensuring that an individual’s right to vote is not undermined by fraud in the election process.” The Court recognized that election history

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128 Id.
129 Id.
130 Id.
131 Id.
132 Id. at 196.
133 Id.
134 Id.
135 Id. at 198 (citation omitted).
136 Id. (citations omitted).
137 Id. at 199.
138 Id.
reflected a need of restricted zones to effect a compelling interest in preserving the integrity of the election:

In sum, an examination of the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud. After an unsuccessful experiment with an unofficial ballot system, all 50 States, together with numerous other Western democracies, settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments. We find that this widespread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States’ compelling interests in preventing voter intimidation and election fraud.\(^{139}\)

The plurality opinion outlined the history of the evolution of balloting systems and electioneering law regimes in the United States and recognized a necessity to protect the state’s interest in protecting voters from undue influence and to ensure the integrity of the election process. It examined voting during the colonial period,\(^{140}\) which was a public decision in which voters elected officials by a voice vote or a show of hands.\(^{141}\) The Court noted that this system led to “bribery and intimidation that gradually led to its repeal.”\(^{142}\) Next, the plurality opinion examined the next point of election evolution—the use of the paper ballot, in which individual voters made their own ballots at home and brought them to the polls.\(^{143}\) The Court noted how this system led to influence by political parties, which produced their own ballots to provide to voters.\(^{144}\) This system, the Court observed, led to the same problem of bribery and intimidation as did the voice voting system due to a failure of the law to ensure secrecy in the balloting process.\(^{145}\) It recognized that failures of the voice vote and open ballot system led many states to adopt the Australian Ballot System.\(^{146}\) However, the Court notes, even the adoption of the Australian Ballot System did not

\(^{139}\) *Id.* at 206.

\(^{140}\) See *supra* Part II.A.

\(^{141}\) *Burson*, 504 U.S. at 200.

\(^{142}\) *Id.* (citing *ELDON EVANS, A HISTORY OF THE AUSTRALIAN BALLOT SYSTEM IN THE UNITED STATES* 1-6 (1917); *JOSEPH HARRIS, ELECTION ADMINISTRATION IN THE UNITED STATES* 15-16 (1934); *JERROLD RUSK, THE EFFECT OF THE AUSTRALIAN BALLOT SYSTEM ON SPLIT TICKET VOTING: 1876-1908*, at 8-11 (1968)).

\(^{143}\) *Id.*

\(^{144}\) *Id.*

\(^{145}\) *Id.* at 200-01.

\(^{146}\) *Id.* at 202-03.
completely protect against fraud or intimidation, leading many state and local governments to restrict any one but voters from coming within a specific area of the polling place. After tracking the history of Tennessee's adoption of the Australian Ballot System and campaign-free zone statutes, the Court concluded by recognizing that all fifty states "limit[ed] access to the areas in or around polling places." The Court disagreed with the respondent's argument that the state could protect voters from fraud, intimidation, and interference by using statutes to create a misdemeanor for interfering with an election by violence or intimidation. It found that such statutes "fall short of serving a State's compelling interest because they deal with only the most blatant and specific attempts to impede election" and that many voters would still be subject to less blatant acts of intimidation unnoticed by election officials.

The Court found that the one hundred foot campaign restriction zone around the polls was permissible, but it did not set forth a specific test for determining the proper distance of a "campaign-free" zone. It instead recognized that "at some measurable distance from the polls, . . . governmental regulation of vote solicitation could effectively become an impermissible burden . . . ."

### III. The Application of Current Electioneering Law to Internet Voting Regimes

By adopting an Internet voting system, states allow citizens to vote from anywhere that a computer or other electronic device capable of accessing the Internet exists. Such a decision requires states to consider the application of electioneering law to Internet voting systems. This analysis requires a two-part determination: first, whether current electioneering laws apply to any computer or electronic device used to vote through the Internet voting system; and second, whether communications informing voters about a candidate or ballot issue qualify as electioneering behavior that would require the development of statutes prohibiting that type of communication.

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147 Id. at 203-05.
148 Id.
149 Id.
150 Id. at 206-07 (citations omitted).
151 Id.
152 See id. at 210.
A. Applying Current Electioneering Laws to Internet Voting: Does Internet Voting Turn a Home Computer Into a Polling Place?

As previously noted, all electioneering statutes prohibit certain activities and behaviors in and around the polling place. Polling, by definition, is “the registering or casting of votes.” A polling place, therefore, is a place where an individual casts votes or where the state registers votes. When a citizen casts his vote for a candidate by accessing an Internet voting website, his personal computer might be transformed into an “online polling place,” depending on the jurisdictional definition of a “polling place.” If the state legislature adopting an Internet voting system or a court determining this issue in an action reached this conclusion, then all the provisions of a state’s electioneering statute would apply to the area in and around the computer being used to cast ballots.

Such a conclusion leads to serious practical policy considerations. “Personal computer” as a generic term includes a wide variety of electronic devices. Not only can desktop computers, but laptop computers, Personal Digital Assistants (“PDAs”), and cellular phones can link to the Internet via a wired or wireless connection. Therefore, every electronic device used to vote on an Internet voting system would become an “online polling place.” Imagine a small town, ten miles square, where ten people within each square mile used a computer or other electronic device to vote via the state’s Internet voting system. Each person would likely have a campaign restricted zone surrounding them on election day. If each of the ten people per square mile were spread out, the campaign restriction zone could effectively prohibit campaigning in the entire town. By multiplying that effect throughout a state, one realizes how quickly these electioneering statutes would restrict political speech in a large geographic area.

While this conclusion seems practical for polling place or kiosk Internet voting systems, it does not seem practical for those individuals (or in some cases, families) using their personal computer to cast a ballot. Therefore, it might be better to view Internet voting, at least on an individual level, as akin to casting an absentee ballot, where the individual voter fills out the ballot from some location remote from a polling place and sends it in to the election authority. Policymakers could then draft legislation treating Internet voting like absentee voting, applying a “no electioneering in the presence of a voter” language.

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153 See discussion supra Part II.B.
154 OXFORD ENGLISH DICTIONARY, supra note 87, at 1080.
B. Assessing the Need for “Online Electioneering” Statutes: Does a Candidate Linking the Voter to an Internet Voting Site Qualify as Electioneering?

Another issue state legislatures adopting Internet voting systems must consider is whether activities mentioned in the introductory hypothetical—a banner ad by a candidate linking a voter to a state’s voting website, an e-mail by a campaign to a voter providing a link to a state’s voting website, or an individual manifesting to be a representative for a campaign providing information about a candidate and subsequently providing a link to an Internet voting website—would constitute electioneering. Legislatures and courts confronting this decision would likely use existing statutory or common law definitions of electioneering to determine whether these specific behaviors merit the development of new, Internet voting-specific statutory regimes that limit electioneering on-line.

Traffic on the Internet often involves communication across state lines, thus another issue to consider is whether states have the power under the Tenth Amendment or from Congress to regulate these activities, regardless of whether they deal with state elections. Assuming that states do have the power to issue such regulations, states must next determine whether the activity of linking an individual to a state’s voting website equates to other activities usually prohibited in and around the polling place. State legislatures and courts, if presented with the challenge, might look to the statutory and common law definitions of electioneering. The behaviors listed in previous sections—posting materials, distributing materials, communicating with voters—are those that are regulated by the majority of state electioneering statutes. The hypotheticals at the beginning of this Note each entail these types of restricted behavior. Thus, online electioneering statutes would need to incorporate language prohibiting similar behavior.

The truly compelling question, however, is whether electioneering behavior needs to be prohibited online. An Internet voting website has no

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155 This Note does not go into deep analysis of whether states have the authority under the Tenth Amendment, U.S. CONST. amend. X, or the Commerce Clause, id. art. I, § 8, cl. 3, to exercise this type of regulation. This issue has been broached in the area of Internet Taxation. State legislatures want to collect use taxes, i.e., taxes for buying products online from Internet vendors. A line of cases holds that Congress must give states the power to collect these taxes through Congress or other means. See, e.g., Quill Corp. v. North Dakota By and Through Heitkamp, 504 U.S. 298 (1992).

156 See discussion supra Part III.A.
physical presence in one's computer. It is part of an electronic system that, while manifesting aspects of physical geography, actually has no physical geography. Generally, electioneering statutes seem to focus on one-on-one, in person behavior that might affect a voter's choice. Do activities such as hyperlinking, directing individuals by ad, e-mailing, conversing in a chat room at an Internet voting site equate with being bullied outside the polling place? A voter can easily close the message window containing the link or ad, therefore negating any influence upon their vote. A more likely electioneering-type behavior would be someone hacking into an Internet voting site or causing an ad to pop up on an individual's screen while that individual is accessing the Internet voting site.

State policy makers, after deliberating these issues, might find the need to develop an online electioneering statute. Taking the example of State X, such a statute might look like this:

**State X Election Code xxx, Online Electioneering Prohibited.**

(a) No person shall engage in online electioneering.

(b) "Online electioneering" is the transmittal through the Internet, World Wide Web, or any electronic network which connects two or more computers or other electronic devices that may access the Internet, World Wide Web, or network, any information that

(1) attempts to persuade or influence a voter to vote for or against a particular candidate or issue; and

(2) incorporates as part of the information any hyperlink, text, or graphic directing the voter to State X's voting website.

(c) Forms of transmittal. Forms of transmittal include, but are not limited to:

(1) electronic mail;

(2) instant messages or other forms of simultaneous communication among computers; or

(3) "Pop-up" advertisements, "Banner Advertisements," or any other graphic or text which place electioneering communication in the view of a voter.

(d) This section shall not prohibit any person from sending information regarding a candidate for office, a candidate for office's campaign, or an issue campaign, so long as such information does not direct the voter to State X's voting website.

This rough statute exemplifies what a state might do if it adopted an online electioneering statute.
C. Potential Treatment of "Online Electioneering" Statutes by the Courts

Should states decide to adopt online electioneering statutes, the statutes would be subject to a potential constitutional attack. Since "online electioneering" statutes would likely be similar in language to the law challenged in Burson in that they prohibit political speech, such statutory challenge would set the stage for a "virtual Burson." Since such statutes would also regulate speech on the Internet, courts might also use the line of cases stemming from ACLU v. Reno, the foremost case on Internet speech.

1. The Supreme Court and Internet Speech

The Supreme Court's jurisprudence regarding free speech on the Internet and restrictions on its content is still in its incipient stage. The Court first addressed the issue of political speech on the Internet in Reno v. ACLU. In Reno, forty-eight plaintiffs sued the United States Attorney General and the Department of Justice challenging two provisions to Title V of the Telecommunications Act of 1996, known also as the "Communications Decency Act of 1996" ("CDA"). The first provision, the "indecent transmission" provision, "prohibit[ed] the knowing transmission of obscene or indecent messages to any recipient under 18 years of age." The second provision, the "patently offensive display" provision, "prohibit[ed] the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age."

The Court ruled that the CDA violated the First Amendment, finding that it "lack[ed] the precision that the First Amendment requires when a statute regulates the content of speech." While the CDA prevented minors from accessing potentially harmful speech, the Court found that it "effectively suppress[ed] a large amount of speech that adults have a constitutional right to receive and to address to one another." The Court left the term "obscene" in the "indecent transmission" provision while deleting the term "indecent" from the statute pursuant to its severability.
clause on the ground that obscene speech does not enjoy First Amendment protection.\textsuperscript{165}

The Court announced that in future cases it would hold content-based regulations of speech on the Internet to strict scrutiny:

The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.\textsuperscript{166}

Lower federal courts have used this standard in analyzing proposed state and federal restrictions on speech on the Internet.\textsuperscript{167}

Recently, the Court reiterated this position when it reviewed a challenge brought by many of the \textit{Reno v. ACLU} plaintiffs in \textit{Ashcroft v. ACLU}.\textsuperscript{168} In \textit{Ashcroft}, the plaintiffs challenged the Child Online Protection Act ("COPA"). The Act prohibited an individual from "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, making any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors."\textsuperscript{169}

The plaintiffs filed suit one month prior to the statute's enactment, challenging COPA's constitutionality on the grounds that COPA banned constitutionally protected speech from adults and claimed that the act did not represent the least restrictive means to accomplish a compelling governmental purpose, and was substantially overbroad.\textsuperscript{170} The district court, after issuing a preliminary injunction, found that COPA "constitute[ed] content-based regulation of sexual expression protected by the First Amendment." Under the Supreme Court's previous precedents, the district court held that the statute was "'presumptively invalid' and 'subject to strict scrutiny,'"\textsuperscript{171} and found that the plaintiffs "were likely to establish

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{165}] \textit{Id.} at 883.
\item[\textsuperscript{166}] \textit{Id.} at 885.
\item[\textsuperscript{167}] See, \textit{e.g.}, \textit{ACLU v. Johnson}, 194 F.3d 1149, 1156 (10th Cir. 1999).
\item[\textsuperscript{168}] \textit{Ashcroft v. ACLU}, 535 U.S. 564 (2002).
\item[\textsuperscript{170}] \textit{Id.} at 571.
\item[\textsuperscript{171}] \textit{Id.} at 572 (quoting \textit{ACLU v. Reno}, 31 F. Supp. 2d 473, 493 (E.D. Pa. 1999), \textit{aff'd}, 217 F.2d 162 (3d Cir. 2000)).
\end{itemize}
\end{footnotesize}
at trial that COPA could not withstand such scrutiny because, among other reasons, it was not apparent that COPA was the least restrictive means of preventing minors from accessing 'harmful to minors material.'”

The Third Circuit Court of Appeals affirmed the district court's decision on different grounds, concluding that “COPA’s use of 'contemporary community standards' to identify material that is harmful to minors rendered the statute substantially overbroad.”

The Supreme Court vacated the Third Circuit ruling, finding that Congress' narrowing of the range of content using the *Miller* definition of obscenity was not violative of the First Amendment. The Court commented that Congress, in passing COPA, responded to the Court's objections to the CDA's constitutional overbreadth by: (1) limiting COPA's coverage to matter displayed on the World Wide Web (whereas the CDA applied to all communications over the Internet, including e-mail); (2) limiting COPA's coverage to communications with a commercial purpose; and (3) narrowing the category of restricted communications to material "harmful to minors.”

COPA defines "harmful" material using the three-part obscenity test set forth in *Miller v. California*.

The Court first addressed the respondent's concerns that the use of "contemporary community standards" represented an overbroad means of determining whether material published on the World Wide Web was harmful to minors. The Court reasoned that the Third Circuit had invalidated COPA's community standards requirement because the variance

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172 Id. at 572 (quoting *Reno*, 31 F. Supp. 2d at 497).
173 Id. at 573.
174 Id.
175 Id. at 569-70 (citing 47 U.S.C. § 231(a)(1)).
176 *Miller v. California*, 413 U.S. 15 (1973). The act codified the test in the following language:

any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual of simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

among community standards of obscenity would "effectively force all speakers on the Web to abide by the 'most puritan community's standards.'" Distinguishing COPA from the CDA, the Court noted that it had rejected the CDA's use of community standards in light of the CDA's "unprecedented breadth and vagueness." The Court found that, unlike COPA, the CDA did not further limit the material excluded from its reach because the CDA did not use the second and third prongs of Miller: "[the CDA] neither contained any requirement that restricted material appeal to the prurient interest nor excluded form the scope of its coverage works with serious literary, artistic, political, or scientific value." COPA, in the Court's view, differed from the CDA in that COPA restricted significantly less material and defined material as harmful to minors by using the Miller test. The Court observed that "[w]hen the scope of an obscenity statute’s coverage is sufficiently narrowed by a 'serious value' prong and a 'prurient interest' prong . . ., [a law] requiring a speaker disseminating material to a national audience to observe varying community standards does not violate the First Amendment." The Court remanded the case but upheld the injunction against COPA's enforcement until the court of appeals or district court took further action.

2. Reno, Burson and Online Electioneering Statutes

The Reno and Ashcroft rulings reveal that the Court intends to treat any government restriction of speech on Internet with strict scrutiny, requiring that it either be narrowly tailored to serve a compelling state interest or fall within the exceptions to protected speech. Therefore, any government restriction on Internet voting would arguably require the same scrutiny. Reno, like the Burson line of cases, applies a standard of strict scrutiny to restrictions on political speech, thus the Burson line of cases provides a conceptual framework to judge the constitutionality of online electioneering statutes. The Reno and Burson cases complement each other in that any online electioneering statute challenged in court would most likely be challenged in such a way compelling the application of strict scrutiny. Therefore a state's online electioneering statute would be treated as "a facially content-based restriction on political speech in a public forum"

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177 Ashcroft, 535 U.S. at 577 (quoting Reno, 217 F.3d at 175).
178 Id. at 578.
179 Id.
180 Id.
181 Id. at 580.
182 Id. at 586.
[that] must be subjected to exacting scrutiny. 183 The State would subsequently have to "show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." 184 In the context of online electioneering statutes, the compelling state interests, like those enunciated in Burson, lie in protecting individual voters from confusion and undue influence and in protecting the integrity of the election process. 185

On the issue of protecting a voter from confusion and undue influence on the Internet, a significant distinction arises between a voting booth and an Internet voting site. As the Court acknowledged in Burson, much of its basis for upholding the statute came from the fact that the current Australian Ballot System and electioneering laws in the states developed in reaction to the historical problems of bribery and intimidation of voters at the polls. 186 An Internet voting site, however, provides a significantly different scenario. While a voter may get e-mails linking him to State X's website, along with commentary by Candidate's campaign, all influence disappears once the voter logs onto the voting website. Thus, a strong argument exists that Internet voters are not subject to undue influence or confusion (save for the unlikely situation of someone standing behind their computer terminal threatening them). However, a court might decide that voters are intimidated and subject to confusion or undue influence when they receive a torrent of banner ads, e-mails, or instant messages that direct them to a state Internet voting site.

The second issue to consider is whether online electioneering statutes would be needed to protect the integrity of online elections. If the statute merely prohibits providing a hyperlink to a statute's voting website, it does not necessarily follow that providing the hyperlink will affect the integrity of the Internet voting system or the states' entire voting apparatus. Unlike the traditional regulation of the polls at issue in Burson, the body of law regarding Internet voting and online electioneering statutes is infantile and not had the opportunity to develop. No evidence exists to show that such activities might or might not affect voters or the election process.

Assuming that a court determined that an online electioneering statute asserted a compelling state interest, it must be narrowly tailored to support that interest under Burson and Reno. Again, statutory design and history come into play in a potential court analysis. Since online electioneering

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184 Id. (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).
185 See supra notes 136 and 137.
186 Burson, 504 U.S. at 202.
statutes prohibit political speech on the Internet, they immediately face the presumption against regulation afforded to political or speech in print media. If a state’s online electioneering statute prohibited a narrow range of speech recognized as protected, a court would likely hold the statute constitutionally valid under *Burson* and *Reno*. However, if the statute unduly prohibited a wide range of speech, a court might likely find the statute invalid under those same cases.

Regardless of the online electioneering statute being challenged, two things are clear. First, the body of law regarding Internet voting and online electioneering needs time to develop and will not do so until states implement Internet voting regimes that no historical basis of behavior exists to prove its necessity. Second, given the *Reno* rule, any online electioneering statute that prohibits speech on the Internet is subject to strict scrutiny by a court.

**Conclusion**

The widespread adoption of Internet voting systems by the states is not a matter of *if*, but *when*. As more states try to reform and improve their election systems, they will likely adopt Internet voting regimes. As history has shown, the evolution of election systems brings with it the evolution of electioneering law. States adopting Internet voting systems will have to consider the effect of pre-existing electioneering laws on Internet voting systems, or to develop new statutory regimes. Whether such statutory regimes will survive judicial scrutiny depends on the policy makers drafting these laws, the continued evolution of Internet voting in the statutes, and the judges who will weigh cases dealing with those issues in the future.
This table provides a quick reference to the electioneering statutes in the United States. It provides citation to each state’s electioneering statute, the size of the campaign restriction zone set up by each statute, and the statute’s definition of electioneering.

<table>
<thead>
<tr>
<th>STATE AND STATUTE CITATION</th>
<th>SIZE OF CAMPAIGN RESTRICTION ZONE</th>
<th>DEFINITION OF ELECTIONEERING / BEHAVIOR PROHIBITED IN OR AROUND POLLING PLACE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska ALASKA STAT. § 15.15.170 (Michie 2002)</td>
<td>200 Feet</td>
<td>&quot;[A] person . . . may not attempt to persuade [another] person to vote for or against a candidate, proposition, or questions.&quot; § 15.15.170</td>
</tr>
<tr>
<td>Arizona ARIZ. REV. STAT. § 16-515 (2002)</td>
<td>75 Feet</td>
<td>&quot;No person shall be allowed to remain inside [the campaign restriction zone] while the polls are open.&quot; § 16-515(A)</td>
</tr>
<tr>
<td>Arkansas ARK. CODE ANN. § 7-1-103(9) (Michie 2002)</td>
<td>100 Feet</td>
<td>&quot;[N]o person shall hand out or distribute or offer to hand out or distribute any campaign literature or any literature regarding any candidate or issue on the ballot, solicit signatures on any petition, solicit contributions for any charitable or other purpose, or do any electioneering of any kind whatsoever. . . .&quot; § 7-1-103(9)</td>
</tr>
</tbody>
</table>

187 This Appendix is adapted from Durham, supra note 117.
<table>
<thead>
<tr>
<th>State and Statute Citation</th>
<th>Size of Campaign Restriction Zone</th>
<th>Definition of Electioneering / Behavior Prohibited in or Around Polling Place</th>
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</thead>
<tbody>
<tr>
<td>California</td>
<td>100 Feet</td>
<td>&quot;No person, on election day, or at any time that a voter may be casting a ballot, shall [c]irculate an initiative, referendum, recall, or nomination petition or any other petition, [s]olicit a vote or speak to a voter on the subject of marking his or her ballot, [p]lace a sign relating to voters' qualifications or speak to a voter on the subject of his or her qualifications.&quot; § 18370</td>
</tr>
<tr>
<td>Colorado</td>
<td>100 Feet</td>
<td>&quot;'Electioneering' includes campaigning for or against any candidate who is on the ballot or any ballot issue or ballot question that is on the ballot. 'Electioneering' also includes soliciting signatures for a candidate petition, a recall petition, or a petition to place a ballot issue or ballot question on a subsequent ballot.&quot; § 1-13-714</td>
</tr>
<tr>
<td>Connecticut</td>
<td>75 Feet</td>
<td>&quot;[N]o person shall solicit in behalf of or in opposition to the candidacy of another or himself or in behalf of or in opposition to any question being submitted at the election or referendum, or loiter or peddle or offer any advertising matter, ballot or circular to another person.&quot; § 9-236(a)</td>
</tr>
<tr>
<td>Delaware</td>
<td>50 Feet</td>
<td>&quot;'Electioneering' includes political discussion of issues, candi-</td>
</tr>
<tr>
<td>STATE AND STATUTE CITATION</td>
<td>SIZE OF CAMPAIGN RESTRICTION ZONE</td>
<td>DEFINITION OF ELECTONEERING / BEHAVIOR PROHIBITED IN OR AROUND POLLING PLACE</td>
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<tr>
<td>Delaware cont.</td>
<td></td>
<td>dates, or partisan topics, the wearing of any button, banner, or other object referring to issues, candidates, or partisan topics, the display, distribution or other handling of literature or any writing or drawing referring to issues, candidates or partisan topics, the deliberate projection of sound referring to issues, candidates or partisan topics from loudspeakers or otherwise into the polling place . . .” § 4942(d).</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>50 Feet</td>
<td>“No person shall canvas, electioneer, circulate petitions, post any campaign material or engage in any activity that interferes with the orderly conduct of the election within a polling place . . . .” § 1-1001.10(b)(2)(a)</td>
</tr>
<tr>
<td>Florida</td>
<td>50 Feet</td>
<td>“No person, political committee, committee of continuous existence, or other group or organization may solicit voters . . . .” § 102.031(3)(c)</td>
</tr>
<tr>
<td>FLA. STAT. ch. 102.031(3)(c) (2002)</td>
<td></td>
<td>“‘Solicit’ shall include, but not be limited to, seeking or attempting to seek any vote, fact, opinion, or contribution; distributing or attempting to distribute any political or campaign material, leaflet, or handout; conducting a poll; seeking or attempting to seek a signature on any petition; and selling or attempting to sell any item.” § 102.031(3)(d)</td>
</tr>
<tr>
<td>State and Statute Citation</td>
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</tr>
<tr>
<td><strong>Georgia</strong>&lt;br&gt;Ga. Code. Ann. § 21-2-414 (2002)</td>
<td>250 Feet</td>
<td>“No person shall solicit votes in any manner or by any means or method, nor shall any person distribute any campaign literature, newspaper, booklet, pamphlet, card, sign, or any other written or printed matter of any kind, nor shall any person conduct any exit poll or public opinion poll with voters on primary or election day. . .” § 21-2-214(a)</td>
</tr>
<tr>
<td><strong>Hawaii</strong>&lt;br&gt;Haw. Rev. Stat. § 11-132 (2002)</td>
<td>200 Feet</td>
<td>“Any person, including candidates, carrying on campaign activities within the [campaign restriction zone] during the period of time starting one hour before the polling place opens and ending when the polling place close for the purpose of influencing votes. Campaign activities shall include . . . [a]ny distribution, circulation, carrying, holding, posting, or staking of campaign cards, pamphlets, posters, and other literature . . . [t]he use of public address systems or other public communication media . . . the use of motor caravans or parades . . . the use of entertainment troupes or the free distribution of goods and services.” § 19-6(7)</td>
</tr>
<tr>
<td>STATE AND STATUTE CITATION</td>
<td>SIZE OF CAMPAIGN RESTRICTION ZONE</td>
<td>DEFINITION OF ELECTIONEERING / BEHAVIOR PROHIBITED IN OR AROUND POLLING PLACE</td>
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<tr>
<td>Idaho cont.</td>
<td></td>
<td>cit signatures to any kind of petition . . . or [e]ngage in any practice which interferes with the freedom of voters to exercise their franchise or disrupt[ ] the administration of the polling place.” § 18-2318(1)</td>
</tr>
<tr>
<td>Illinois</td>
<td></td>
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</tr>
<tr>
<td>10 ILL. COMP. STAT. ANN. 5/5-17 (West 2002) (pertaining specifically to precinct registration)</td>
<td>30 Feet</td>
<td>“No judge of election, pollwatcher, or other person shall, at any primary or election, do any electioneering or soliciting of votes or engage in any political discussion . . . interrupt, hinder or oppose any voter while approaching [the voting booth while within the electioneering zone].” § 5/17-29</td>
</tr>
<tr>
<td>10 ILL. COMP. STAT. ANN. 5/6-31 (West 2002) (pertaining specifically to precinct registration)</td>
<td>30 Feet</td>
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</tr>
<tr>
<td>10 ILL. COMP. STAT. ANN. 5/7-41 (West 2002) (pertaining specifically to the voting booth on the day of the primary election)</td>
<td>100 Feet</td>
<td></td>
</tr>
<tr>
<td>10 ILL. COMP. STAT. ANN. 5/17-29 (West 2002) (pertaining specifically to “judge[s] of elections, pollwatcher[s], or other person[s] during any primary or election)</td>
<td>100 Feet</td>
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<tr>
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<tr>
<td><strong>Illinois</strong> cont.</td>
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<tr>
<td>10 ILL. COMP. STAT. ANN. 5/19-2.2 (West 2002)</td>
<td>100 Feet</td>
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<tr>
<td><strong>Indiana</strong></td>
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<tr>
<td>IND. CODE. ANN. § 3-14-3-16 (West 2002)</td>
<td>50 Feet</td>
<td>&quot;'Electioneering' includes expressing support or opposition to any candidate or political party or expressing approval or disapproval of any public question in any manner that could reasonably be expected to convey that support or opposition to another individual.&quot; § 3-14-3-16</td>
</tr>
<tr>
<td>IND. CODE. ANN. § 3-14-4-9 (West 2002) (prohibits electioneering by election officers)</td>
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<tr>
<td><strong>Iowa</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>IOWA CODE ANN. § 49.107(1) (West 2001)</td>
<td>300 Feet</td>
<td>&quot;[No person shall engage in] loitering, congregating, electioneering, posting of signs, treating voters, or soliciting votes . . . .&quot; § 49.107(1)</td>
</tr>
<tr>
<td><strong>Kansas</strong></td>
<td></td>
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</tr>
</tbody>
</table>
| KAN. STAT. ANN. § 25-2430 (2001) | 250 Feet | "Electioneering is knowingly attempting to persuade or influence eligible voters to vote for or against a particular candidate, party or question submitted. Electioneering includes wearing, exhibiting, or distributing labels, signs, posters, stickers or other materials that clearly identify a candidate in the election or clearly indicate support or opposition to a question submitted election . . . . Electioneering shall not include bumper stickers affixed to a motor vehicle that is used to transport voters to a polling place or to an
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<tbody>
<tr>
<td><strong>Kansas cont.</strong></td>
<td></td>
<td>'advance voting site for the purpose of voting.' § 25-2430(a)</td>
</tr>
<tr>
<td><strong>Kentucky</strong></td>
<td>500 Feet</td>
<td>&quot;Electioneering shall include the displaying of signs, the distribution of campaign literature, cards, or handbills, the soliciting of signatures to any petition, or the solicitation of votes for or against any candidate or question on the ballot in any manner, but shall not include exit polling. Nothing contained in this section shall prohibit electioneering conducted within a private residence or establishment other than that in which the polling place is located by persons having an ownership interest in such property.&quot; § 117.235(3).</td>
</tr>
<tr>
<td>KY. REV. STAT. ANN. § 117.235(3) (Michie 2002)</td>
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</tr>
<tr>
<td><strong>Louisiana</strong></td>
<td>Within confines of facility</td>
<td>&quot;[I]n the confinement of polling places or places wherein absentee voting is being conducted or within a radius of six hundred feet of the entrance of any such polling place, except when exercising the right to vote, after having been directed, in writing, by an election commissioner or law enforcement officer to leave the premises or area of a polling place or after</td>
</tr>
<tr>
<td>LA. REV. STAT. ANN. § 18:1462 (West 2002) (applies to absentee voting in nursing homes)</td>
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<tr>
<td>STATE AND STATUTE CITATION</td>
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<tr>
<td>Louisiana cont.</td>
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<td>having been directed, in writing, by a registrar or deputy registrar to leave the place wherein absentee voting is being conducted . . . [to] hand out, place, or display campaign cards, pictures, or other campaign literature of any kind or description whatsoever . . . [to] place or display political signs, pictures, or other forms of political advertising.&quot;</td>
</tr>
</tbody>
</table>
| LA. REV. STAT. ANN. § 18:1334 (West 2002) | 600 Feet                           | "[N]o person may instruct another in the method of marking his ballot . . . influence or attempt to influence another person’s decision regarding a candidate or ballot issue. This limitation does not prohibit a candidate from attending the voting place and orally communicating with voters, as long as the candidate does not attempt to influence their vote. A candidate may not state the name of the office sought or request a person’s vote . . . . This subsection does not apply to pollwatchers who may remain in the voting place outside the guardrail enclosure as long as they do not attempt to influence voters or interfere with their free passage . . . . This subsection does not prohibit media representatives from conducting an exit poll, as long as they do not solicit voters until after they have voted and do not orally communicate with vot-
<table>
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<tbody>
<tr>
<td>Louisiana cont.</td>
<td></td>
<td>ers in a way that influences any person’s vote. ...” § 18:1334</td>
</tr>
<tr>
<td>Maine</td>
<td>250 Feet</td>
<td>“[A] person may not influence or attempt to influence another person’s decision regarding a candidate or ballot issue ... may not display any advertising material, operate any advertising medium, including a sound amplification device, or distribute campaign literature, posters, palm cards, buttons, badges or stickers containing a candidate’s name or otherwise intending to influence the opinion of any voter. ... The term ‘sound amplification device’ includes, but is not limited to, sound trucks, loudspeakers and not limited to, sound trucks, loudspeakers and blowhorns. ... Party workers and others who remain in the voting place outside the guardrail enclosure may not use within the voting place cellular phones, beepers, voice or signal pagers or similar devices that make noise or allow direct audible voice communication within the voting place.” tit. 21-A § 682(1), (3)</td>
</tr>
</tbody>
</table>
| Maryland                  | 100 Feet                          | “A person may not ... [i]nterfere or attempt to interfere with a voter while the voter is inside the polling room ... [i]nduce or attempt to induce a voter to mark the voter’s ballot in a certain way ...
<table>
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<tr>
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</thead>
<tbody>
<tr>
<td>Maryland cont.</td>
<td>[c]anvass, electioneer, or post any campaign material. . . .&quot;</td>
<td>§ 16-206(a)</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>150 Feet</td>
<td>“No person shall be allowed to collect signatures upon petitions, referendum petitions or nomination papers . . . exhibit[ ], circulate[ ], or distribute[ ] any poster, card, handbill, placard, picture or circular intended to influence the action of a voter, or [place any sticker] upon the official ballot.” 54 § 65</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>100 Feet</td>
<td>“A person shall not, while the polls are open on an election day . . ., solicit votes in a polling place.” § 168.931(k)</td>
</tr>
<tr>
<td>Michigan</td>
<td>100 Feet</td>
<td>“No one except an election official or an individual who is waiting to register or to vote shall stand within 100 feet of the entrance to a polling place. The entrance to a polling place is the doorway or point of entry leading into the room or area where voting is occurring . . .” § 204C.06(1)</td>
</tr>
</tbody>
</table>
| Mississippi               | 150 Feet                         | “It shall be unlawful for any candidate for an elective office, or any representative of such candidate, or for any proponent or opponent of any constitutional amendment, local issue or other measure printed on the ballot to
<table>
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<tr>
<th><strong>STATE AND STATUTE CITATION</strong></th>
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</thead>
<tbody>
<tr>
<td>Mississippi cont.</td>
<td></td>
<td>post or distribute cards, posters or other campaign literature within one hundred fifty (150) feet of any entrance of the building wherein any election is being held. It shall be unlawful for any candidate or a representative named by him in writing to appear at any polling place while armed or uniformed, nor shall he display any badge or credentials except as may be issued by the manager of the polling place.”</td>
</tr>
<tr>
<td>Missouri Mo. Ann. Stat. § 115.637(18) (West 2002)</td>
<td>25 Feet</td>
<td>“[No person may engage in] exit polling, surveying, sampling, electioneering, distributing election literature, posting signs or placing vehicles bearing signs with respect to any candidate or question to be voted on at an election on election day . . . or refusing to remove or permit removal from property owned or controlled by him, any such election sign or literature located within [the campaign restriction zone] after request for removal by any person.”</td>
</tr>
</tbody>
</table>
| Montana Mont. Code Ann. § 13-35-211 (2002) | 100 Feet | “A person may not do any electioneering on election day . . . [or do anything] which aids or promotes the success or defeat of any candidate or ballot issue to be voted upon at the election . . . [a] person may not buy, sell, give, wear, or display at or about the polls on an election day any badge, button, or other in-
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<tr>
<td>Montana cont.</td>
<td></td>
<td>Signia which is designed or tends to aid or promote the success or defeat of any candidate or ballot issue to be voted upon at the election . . . [a] person may not solicit from an elector, before or after the elector has marked a ballot and returned it to an election judge, information as to whether the elector intends to vote or has voted for or against a candidate or ballot issue.” §13-35-211</td>
</tr>
<tr>
<td>Nebraska</td>
<td>200 Feet</td>
<td>“No person shall do any electioneering, circulate petitions, or perform any action that involves solicitation on election day. . . .” §32-1524</td>
</tr>
</tbody>
</table>
| Nevada                    | 100 Feet                         | “[E]lectioneering means campaigning for or against a candidate, ballot question, or political party by: (a) Posting signs relating to the support of or opposition to a candidate, ballot question or political party; (b) Distributing literature relating to the support of or opposition to a candidate, ballot question or political party; (c) Using loudspeakers to broadcast information relating to the support of or opposition to a candidate, ballot question or political party; (d) Buying, selling, wearing, or displaying any badge, button or other insignia which is designed or tends to aid or promote the success or defeat of any political party or a
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<tr>
<td>Nevada cont.</td>
<td></td>
<td>candidate or ballot question to be voted upon at that election; (e) Polling or otherwise soliciting from a voter information as to whether the voter intends to vote or had voted for or against a particular political party, candidate, or ballot question; or (f) Soliciting signatures to any kind of petition.”</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>10 Feet</td>
<td>“No person who is a candidate for office or who is representing or working for a candidate shall distribute or post at a polling place any campaign material in the form of a poster, card, handbill, placard, picture, or circular which is intended to influence the action of the voter within the building where the election is being held... or distribute any campaign materials or perform any electioneering activities which affects the safety, welfare, and rights of voters...”</td>
</tr>
<tr>
<td></td>
<td></td>
<td>“‘[E]lectioneer’ shall mean to act in any way specifically designed to influence the vote of a voter on any question or office.”</td>
</tr>
<tr>
<td>New Jersey</td>
<td>100 Feet</td>
<td>“[No] person shall on election day tamper, deface or interfere with any polling booth or obstruct the entrance to any polling place, or ob-</td>
</tr>
<tr>
<td>STATE AND STATUTE CITATION</td>
<td>SIZE OF CAMPAIGN RESTRICTION ZONE</td>
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<tr>
<td>New Jersey cont.</td>
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<td>struct or interfere with any voter, or loiter, or do any electioneering . . . .&quot;</td>
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<tr>
<td></td>
<td></td>
<td>§ 19:34-6</td>
</tr>
<tr>
<td></td>
<td></td>
<td>&quot;[No] person shall distribute or display any circular or printed matter or any suggestion or solicit any support for any candidate, party, or public question . . . .&quot;</td>
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<tr>
<td></td>
<td></td>
<td>§ 19:34-15</td>
</tr>
<tr>
<td>New Mexico</td>
<td>100 Feet</td>
<td>&quot;Electioneering too close to the polling place consists of any form of campaigning on election day . . . and includes the display of signs or distribution of campaign literature.&quot;</td>
</tr>
<tr>
<td>N.M. STAT. ANN. §§ 1-20-16, 3-8-77, 73-14-31.3 (Michie 2002)</td>
<td></td>
<td>§ 1-20-16</td>
</tr>
<tr>
<td>New York</td>
<td>100 Feet</td>
<td>&quot;While the polls are open no person shall do any electioneering within the polling place . . . and no political banner, button, poster or placard shall be allowed in or upon the polling place or within such one hundred foot radial.&quot;</td>
</tr>
<tr>
<td>N.Y. ELEC. LAW § 8-104 (McKinney 2002)</td>
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<td>§ 8-104</td>
</tr>
<tr>
<td>North Carolina</td>
<td>25-50 Feet</td>
<td>&quot;No person or group of persons shall hinder access, harass others, distribute campaign literature, place political advertising, solicit votes, or otherwise engage in election-related activity in the voting place or in a buffer zone which shall be prescribed by the county board of elections around the voting place.&quot;</td>
</tr>
<tr>
<td>N.C. GEN. STAT. § 163-166.4 (2002)</td>
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<td>§ 163-166.4</td>
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<tr>
<td>State and Statute Citation</td>
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<tr>
<td><strong>North Dakota</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>N.D. Cent. Code § 16.1-10-06 (2002)</td>
<td>Unlimited</td>
<td>“Any person asking, soliciting, or in any manner trying to induce or persuade, any voter on an election day to refrain from voting for any candidate or the candidates or ticket of any political party or organization, or any measure submitted to the people...”</td>
</tr>
<tr>
<td>N.D. Cent. Code § 16.1-10-06(2) (2002)*</td>
<td>100 Feet</td>
<td></td>
</tr>
<tr>
<td>*Applies specifically to those trying to enter a polling place “for the purpose of selling, soliciting for sale, advertising for sale, or distributing any merchandise, produce, literature, or serve.”</td>
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<tr>
<td><strong>Ohio</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ohio Rev. Code Ann. §§ 3501.30, 3501.35 (West 2001)</td>
<td>100 Feet</td>
<td>“[N]o person shall loiter or congregate within the area between the polling place and the small flags of the United States placed on the thoroughfares and walkways leading to the polling place; in any manner hinder or delay an elector in reaching or leaving the place fixed for casting his ballot; within such distance give, tender, or exhibit any ballot or ticket to any person other than his own ballot to the judge of election; exhibit any ticket or ballot which he intends to cast; or solicit or in any manner attempt to influence any elector in casting his vote. No person, not an election official, employee, witness, challenger, or...”</td>
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<tr>
<td>Ohio cont.</td>
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<td>Police officer, shall be allowed to enter the polling place during the election, except for the purpose of voting.” § 3501.35</td>
</tr>
<tr>
<td>Oklahoma OKLA. STAT. ANN. tit. 7-108, § 6-111 (West 2002)</td>
<td>300 Feet</td>
<td>“No person shall be allowed to electioneer [and]...[n]o printed material other than that provided by the election board shall be publicly placed or exposed...while an election is in progress.” tit. 7-108, § 6-111</td>
</tr>
<tr>
<td>Oregon OR. REV. STAT. § 260.695(2) (2001)</td>
<td>100 Feet</td>
<td>“No person...shall do any electioneering, including circulating any cards or hand bills, or [collect] signatures to any petition...[or do] any electioneering by public address system...The electioneering need not relate to the election being conducted.” § 260.695(2)</td>
</tr>
<tr>
<td>Pennsylvania PA. STAT. ANN. tit. 25, § 3060 (West 2002)</td>
<td>10 Feet</td>
<td>“No person, when within the polling place, shall electioneer or solicit votes for any political party, political body or candidate, nor shall any written or printed matter be posted up within the said room, except as required by this act.” § 3060(c)</td>
</tr>
</tbody>
</table>
| Rhode Island R.I. GEN. LAWS § 17-19-49 (2002) | 50 Feet | “No poster, paper, circular, or other document designed or tending to aid, injure, or defeat any candidate for public office or any political party on any question submitted to
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<tr>
<td>Rhode Island cont.</td>
<td></td>
<td>the voters shall be distributed or displayed within the voting place or within fifty (50) feet of the entrance or entrances to the building in which voting is conducted at any primary or election. Neither shall any election official display on his or her person within the voting place any political party button, badge, or other device tending to aid, injure, or defeat the candidacy of any person for public office or any question submitted to the voters or to intimidate or influence the voters.”</td>
</tr>
</tbody>
</table>
| R.I. GEN. LAWS § 17-23-13 (2002) (applying specifically to the use of sound equipment) | 500 Feet | § 17-19-49

“No sound equipment advocating the election or defeat of any candidate or the approval or disapproval of any referenda may be allowed within five hundred (500) feet of any polling place.”

§ 17-23-13

<p>| South Carolina | 200 Feet | “It is unlawful on an election day within two hundred feet of any entrance used by the voters to enter the polling place for a person to distribute any type of campaign literature or place any political posters. The poll manager shall use every reasonable means to keep the area within two hundred feet of any such entrance clear of political literature and displays, and the county and municipal law enforcement officers, upon request of a poll |</p>
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<tr>
<td>South Carolina cont.</td>
<td>100 Feet</td>
<td>manager, shall remove or cause to be removed any material within two hundred feet of any such entrance distributed or displayed in violation of this section . . . A candidate may wear within two hundred feet of the polling place a label no larger than four and one-fourth inches by four and one-fourth inches that contains the candidate's name and the office he is seeking. If the candidate enters the polling place, he may not display any of this identification including, but not limited to, campaign stickers or buttons.” § 7-25-180</td>
</tr>
<tr>
<td>South Dakota S.D. CODIFIED LAWS § 12-18-3 (Michie 2002)</td>
<td>100 Feet</td>
<td>“[N]o person may . . . maintain an office or communications center or public address system or display campaign posters, signs or other campaign materials or by any like means solicit any votes for or against any person or political party or position on a question submitted. No person may engage in any practice which interferes with the voter's free access to the polls or disrupts the administration of the polling place, or conduct, on the day of an election, any exit poll or public opinion poll with voters.” § 12-18-3</td>
</tr>
<tr>
<td>Tennessee TENN. CODE ANN. § 2-7-111(a)-(b)(1) (1994)</td>
<td>100 Feet to 300 Feet*</td>
<td>“Within the appropriate boundary as established in subsection (a), and the building in which the polling</td>
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<tr>
<td>Tennessee cont.</td>
<td>*The restricted zone is 100 feet or 300 feet from the polling place, depending upon the city population.</td>
<td>place is located, the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question are prohibited. No campaign posters, signs or other campaign literature may be displayed on or in any building in which a polling place is located. . . .&quot; § 2-7-111(b)(1)</td>
</tr>
<tr>
<td>Texas TEX. ELEC. CODE ANN. § 61.003 (Vernon 2001)</td>
<td>100 Feet</td>
<td>“A person [may not] loiter . . . electioneer for or against any candidate, measure, or political party.” § 61.003</td>
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<td>TEX. ELEC. CODE ANN. § 61.004 (Vernon 2001) (applying specifically to sound equipment)</td>
<td>1000 Feet</td>
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<tr>
<td>Utah UTAH CODE ANN. § 20A-3-501 (2002)</td>
<td>150 Feet</td>
<td>“[E]lectioneering includes any oral, printed, or written attempt to persuade persons to refrain from voting or to vote for or against any candidate or issue. . . .” § 20A-3-501(1)(a)</td>
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<td></td>
<td>“A person may not . . . do any electioneering . . . solicit signatures to . . .&quot;</td>
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<td>Utah cont.</td>
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<td>any kind of petition; or engage in any practice that interferes with the freedom of voters to vote or disrupts the administration of the polling place.”</td>
</tr>
<tr>
<td>Vermont</td>
<td>0 Feet</td>
<td>“Within the building containing a polling place, [no one shall display, place handout, or allow to remain any] campaign literature, stickers, buttons, name stamps, information on write-in candidates or other political materials are [to be] displayed, placed, handed out or allowed to remain; ... within the building containing a polling place, no candidate, election official or other person [shall] distribute[ ] election materials, solicit[ ] voters, or otherwise campaign[ ]; ... on the walks and driveways leading to a building in which a polling place is located, no candidate or other person may physically interfere with the progress of a voter to and from the polling place.”</td>
</tr>
<tr>
<td>Virginia</td>
<td>40 Feet</td>
<td>“During the times the polls are open and ballots are being counted, it shall be unlawful for any person (i) to loiter or congregate within forty feet of any entrance of any polling place; (ii) within such distance to give, tender, or exhibit any ballot, ticket, or other campaign material to any person or to solicit or in any manner attempt to influence any person in casting his vote;</td>
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<tr>
<td><strong>Virginia cont.</strong></td>
<td></td>
<td>or (iii) to hinder or delay a qualified voter in entering or leaving a polling place . . . . It shall be unlawful for any authorized representative, voter, or any other person in the room to (i) hinder or delay a qualified voter; (ii) give, tender, or exhibit any ballot, ticket, or other campaign material to any person; (iii) solicit or in any manner attempt to influence any person in casting his vote; (iv) hinder or delay any officer of election; or (v) otherwise impede the orderly conduct of the election.”</td>
</tr>
<tr>
<td><strong>Washington</strong></td>
<td>300 Feet</td>
<td>“[N]o person may . . . [s]uggest or persuade or attempt to suggest or persuade any voter to vote for or against any candidate or ballot measure; . . . [c]irculate cards or handbills of any kind; . . . [s]olicit signatures to any kind of petition; . . . [e]ngage in any practice which interferes with the freedom of voters to exercise their franchise or [which] disrupts the administration of the polling place; . . . [o]bstruct the doors or entries to a building in which a polling place is located or prevent free access to and from any polling place.”</td>
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</table>
| **West Virginia**          | 300 Feet                         | “No person may do any electioneering nor may any person display or distribute in any manner, or authorize the display or distribution of, any literature, posters or material of
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<tr>
<td>West Virginia cont.</td>
<td>0 Feet</td>
<td>any kind which tends to influence the voting for or against any candidate or any public question on the property of the county courthouse or any annex facilities during the entire period of regular in-person absentee voting.” § 3-3-2(a)</td>
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<td></td>
<td>“No person may do any electioneering on election day within any polling place, or within three hundred feet of the outside entrance to the building housing the polling place. No person may apply for or receive any ballot in any polling place, other than that in which he is entitled to vote, nor may any person examine a ballot which any voter has prepared for voting, or solicit the voter to show the same, nor ask, nor make any arrangement, directly or indirectly, with any voter, to vote an open ballot. No person, except a commissioner of election, may receive from any voter a ballot prepared by him for voting. No voter may receive a ballot from any person other than one of the poll clerks; nor may any person other than a poll clerk deliver a ballot to a commissioner of election to be voted by such commissioner.” § 3-9-9</td>
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<tr>
<td>Wisconsin</td>
<td>200 Feet</td>
<td>“[E]lectioneering’ means any activity which is intended to influence voting at an election.” § 12.03</td>
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<tr>
<td>Wyoming</td>
<td>300 Feet</td>
<td>&quot;Electioneering too close to a polling place on election day consists of any form of campaigning, including the display of campaign signs or distribution of campaign literature, the soliciting of signatures to any petition or the canvassing or polling of voters, except exit polling by news media.&quot; § 22-26-113</td>
</tr>
<tr>
<td>WYO. STAT. ANN. § 22-26-113 (West 2002)</td>
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This Symposium issue is based upon the Order of the Coif Lecture that the University of Kentucky College of Law had the honor of hosting in October, 2002. The honored guest speaker for the Coif Lecture was Professor Johan J. Henning, whose speech was reformatted as the central article for the Symposium; he also provided the impetus for this year’s Symposium: The Law and Social Reform. Professor Henning’s demonstration of the way a country like South Africa can use commercial law to initiate much needed social reform in a society that for so long has differentiated between those who had an opportunity to succeed in the marketplace and those who did not, inspired the use of substantive areas of the law to trigger changes throughout a society. Jennifer R. Metzger, Symposium Editor, and the entire Kentucky Law Journal Editorial Board, would like to give special thanks to Allan Vestal, Dean of the University of Kentucky College of Law, for his pivotal role in the organization of the Order of the Coif Lecture, the valuable contribution to the idea for the Symposium Issue, and for his insightful response in the text of the Symposium itself.