
ONLINE VOTE SWAPPING: ENABLING HIGH-TECH POLITICAL COALITIONS OR BORDER RUFFIAN TAKEOVERS?

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I. Introduction

The 2016 United States Presidential Election marked the fifth time in history that the winner of the Electoral College failed to win the popular vote.² In fact, the winning candidate, President Donald Trump, achieved the dubious distinction of losing the popular vote by the widest margin of any candidate in American history.³ President Trump launched the Presidential Advisory Commission on Election Integrity to investigate the election fraud that supposedly contributed to his underwhelming victory.⁴

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² See D’Angelo Gore, *Presidents Winning Without Popular Vote*, FACTCHECK (Dec. 23, 2016), archived at <https://perma.cc/QQV3-R9LQ> (listing U.S. presidents to be elected despite losing the popular vote: John Quincy Adams in 1824, Rutherford Hayes in 1876, Benjamin Harrison in 1888, George W. Bush in 2000, and Donald Trump in 2016).

³ See Alvin Chang, *Trump Will Be the 4th President to Win the Electoral College After Getting Fewer Votes than His Opponent*, VOX (Dec. 19, 2016), archived at <https://perma.cc/XTM4-9YG9> (comparing Mr. Trump losing the popular vote by 2.1% but still receiving 306 electoral votes, which is more than his opponent, Hillary Clinton, received).

⁴ See STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 186 (Crown Pub. Group, 2018) (identifying the purpose of President Trump’s Voter Commission as “voter suppression” because it publicized stories of voter fraud from across the country, encouraged or facilitated state-level voter roll purges, cross-checked local voter records to uncover cases of double registration, and established a Homeland Security database to identify noncitizens on voter rolls). The risk is that the number of mistakes will vastly exceed the number of illegal registrations because many people have the same name and birthdate. *Id.*; Michael Tackett & Michael Wines, *Trump Disbands Commission on Voter Fraud*, N.Y. TIMES, Jan. 4, 2018, at A1 (explaining how Mr. Trump established the Commission after repeatedly claiming that widespread voter fraud explained how Hillary Clinton received about 2.9 million more votes than he received in the 2016 Presidential Election).

In January 2018, that Commission was shuttered without issuing a report identifying any widespread voter fraud by domestic parties.⁵ But before the issue of fraud in the 2016 Presidential Election is submitted to history, it is worth analyzing a questionable form of political activity that a growing number of voters are participating in: online vote swapping.⁶ Enabled by widespread internet accessibility and the rising popularity of social media, what was once an obscure legislative practice is being adopted by a growing number of voters in presidential elections who are dissatisfied with both the Electoral College and federal and state election laws.⁷

With its strange terminology, dubious justifications, and questionable results, it is unsurprising that the Electoral College is unpopular among voters.⁸ Critics argue that the vote counting method employed by the Electoral College creates incentives for voters in “non-competitive states” to abstain from voting while voters in “competitive states” possess a disproportionate influence over the outcome of the presidential election.⁹ Some advocates for online vote swapping assert that allowing citizens to swap votes may neutralize this systemic disincentive to vote.¹⁰ After perusing the paltry voter turnout figures in recent presidential elections, such advocates may have a point.¹¹

⁵ See Tackett & Wines, *supra* note 4 (describing states’ resistance to commission requesting voter information, such as names, addresses, dates of birth, political affiliations, the last four digits of Social Security numbers, voting history, records of felony convictions, and voter registration in other states). “[N]o state has uncovered significant evidence to support the president’s claim, and election officials, including many Republicans, have strongly rejected it.” *Id.*

⁶ See Zachary Crockett, *Third-party Voters Are “Trading Votes” with Clinton Voters to Defeat Trump*, VOX (Nov. 3, 2016), archived at <https://perma.cc/R87H-MWNM> (reporting that roughly 35,000 people across the United States brokered verbal candidate swap agreements leading up to the 2000 Presidential Election); see also *Special Counsel’s Office*, U.S. DEP’T OF JUSTICE (July 23, 2018), archived at <https://perma.cc/FWQ4-S5KZ> (detailing ongoing Special Counsel cases related to foreign interference in the 2016 Presidential election).

⁷ See Jesse Sisgold, *Vote Swapping over the Internet: Free Speech or Voter Corruption?*, 24 HASTINGS COMM. & ENT. L.J. 149, 151 (2001) (stating vote swapping websites estimated 2.8 million hits leading up to the 2000 Presidential Election).

⁸ See Andrew Prokop, *Why the Electoral College is the Absolute Worst, Explained*, VOX (Dec. 19, 2016), archived at <https://perma.cc/T8RA-3DHR> (Describing candidates’ historical strategy for winning a presidential election includes ignoring “every noncompetitive state — meaning the vast majority of the country — and pour their resources into the few that tend to swing back and forth between Republicans and Democrats”); see also Lydia Saad, *Americans Call for Term Limits, End to Electoral College*, GALLUP (Jan. 18, 2013), archived at <https://perma.cc/6BR4-D33J>

This Note argues for the reevaluation of the legal status of online vote swapping in the wake of its use in the 2016 Presidential Election. First, it will discuss the legal basis for voting rights in the United States in order to frame the argument that follows concerning the right to vote.¹² Second, it offers a brief history of voter fraud in the United States to demonstrate that it is a practice “as old and venerable as the Constitution itself.”¹³ Third, it places the practice of online vote swapping within the broader movement toward Electronic Democracy (“E-Democracy”), as political rights and institutions are expanded into the digital context.¹⁴ Fourth, it analyzes the Ninth Circuit Court of Appeals’ opinion in *Porter v. Bowen*, the lone case that stands for the

(reporting that polls show a consistent public dissatisfaction with the Electoral College). When asked if they supported abolishing the Electoral College, in 1968, 80% of Americans polled supported it, in 1980, 67% supported it, in 2013, 63% supported the proposal. *Id.*

⁹ See Prokop, *supra* note 8 (explaining a negative consequence of the Electoral College: votes are “‘wasted,’ at least in terms of the presidential race, because it makes no difference whether Clinton wins California by 4 million votes, 400,000 votes, or 40 votes — in any scenario, she gets its 55 electors”). “Meanwhile, states like Florida and Ohio get the power to tip the outcome just because they happen to be closely divided politically.” *Id.*

¹⁰ See Marc John Randazza, *The Other Election Controversy of Y2K: Core First Amendment Values and High-Tech Political Coalitions*, 82 WASH. U. L. Q. 143, 163 (2004) (arguing that online vote swapping allows voters to express their sincere political preferences in an election); see also Crockett, *supra* note 6 (defending the use of online vote swapping computer application as “indicative of a growing movement to break the two-party system in the United States — to introduce a more inclusive, representative model, with a more popular vote”).

¹¹ See Drew DeSilver, *U.S. Trails Most Developed Countries in Voter Turnout*, PEW RES. CTR. (May 15, 2017), archived at <https://perma.cc/G4U2-M87E> (reporting that 55.7% of the U.S. voting-age population cast ballots in the 2016 Presidential Election). Further, there were 245.5 million Americans aged 18 and older in November 2016, about 157.6 million of whom reported being registered to vote. *Id.* “Just over 137.5 million people told the census they voted last year, somewhat higher than the actual number of votes tallied (136.8 million, according to figures compiled by the Clerk of the U.S. House of Representatives, though that figure includes more than 170,000 blank, spoiled or otherwise null ballots).” *Id.*

¹² See *infra* II. History, A. The Electoral College: An American Anomaly, B. Election Statutes: The Federal Election Defense Strategy

¹³ See *infra* II. History, C. History of Election Fraud

¹⁴ See *infra* II. History, D. The E-Democracy Movement

proposition that vote swapping is legal.¹⁵ Finally, it explores the underlying rationales for prohibiting vote-buying, of which online vote swapping is a variant, through the work of renowned elections law scholar Richard Hasen.¹⁶

Using Judge Kleinfeld's dissent in *Porter v. Bowen*, and Hasen's justifications for prohibiting vote buying, this Note argues that at least some online vote swapping websites violate 52 U.S.C.S. § 10307 and state election fraud statutes and undermine the operation of the Electoral College.¹⁷ This Note focuses on websites that, to varying degrees, broker vote swaps by pairing citizens interested in swapping their votes who have no pre-existing connection to each other.

II. History

The Constitution does not include an explicit right to vote.¹⁸ Instead, it conditions state participation in the federal government on each state guaranteeing a "Republican Form of Government."¹⁹ Therefore, administration of elections and voter qualifications are governed by state law.²⁰ However, the Fifteenth, Twenty-Sixth, and Twenty-Seventh amendments limit states' adoption of voter qualifications.²¹

¹⁵ See *infra* III. Premise, B. (1.) *Porter v. Bowen*; III. Premise, B. (2.) *Porter v. Bowen* (Kleinfeld, A., dissenting).

¹⁶ See *infra* III. Argument, Why Ban Vote swapping

¹⁷ See discussion *infra* IV. Analysis; *Porter v. Bowen*, 518 F.3d 1181 (9th Cir. 2008) (Kleinfeld, C.J., dissenting).

¹⁸ See Jonathan Soros & Mark Schmitt, *The Missing Right: A Constitutional Right to Vote*, 28 DEMOCRACY J. (Spring 2013) (arguing for a constitutional amendment explicitly guaranteeing citizens' voting rights to prevent widespread disenfranchisement of citizens).

¹⁹ See U.S. CONST. art. IV, § 4 (guaranteeing each state a "Republican Form of Government," safeguarded by federal action against "Invasion" and "domestic Violence").

²⁰ See MICHAEL R. DIMINO, SR., ET AL., UNDERSTANDING ELECTION LAW AND VOTING RIGHTS 3 (Carolina Academic Press, LLC, ed., 2d ed. 2016) (theorizing the issue of voter qualifications is a state issue limited by voter qualifications espoused in the federal constitution).

²¹ See U.S. CONST. amend. XV, § 1 (Prohibiting voting restrictions due to citizen's "race, color, or previous condition of servitude"); U.S. CONST. amend. XIX (prohibiting voting restrictions based on voter's sex); U.S. CONST. amend. XXVI, § 1 (barring denial of voting rights for citizens under eighteen years of age); U.S. CONST. amend. XXI, § 1 (precluding denial of voting rights due to "failure to pay poll tax or other tax"); U.S. CONST. amend. XVII (mandating the Senate "shall be composed of two Senators from each State, elected by the people thereof, for six

A. *The Electoral College: An American Anomaly*

The Constitution's Electoral College is a unique system for electing a President.²² The number of electors assigned to each state is determined by formula: one elector for each two senators, plus one elector for each member of the state's delegation to the House of Representatives.²³ In 1845, Congress established a uniform national election date: the first Tuesday following the first Monday of November.²⁴ Most states host their delegation of electors in a statewide convention held after the general election for the presidency, when the actual vote for president is held.²⁵

years; and each Senator shall have one vote"). "The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures." *Id.*

²² See Presidential Election and Vacancies, 3 U.S.C §§ 01-21 (1948) (establishing Electoral College under heading "Presidential Elections and Vacancies"); see also LEVITSKY & ZIBLATT, *supra* note 4, at 40 (attributing credit for Electoral College to Alexander Hamilton's Federalist 68, which proposed a deliberative body of qualified men to select the executive). "Men with 'talents for low intrigue, and the little arts of popularity' would be filtered out." *Id.* "The Electoral College thus became our original gatekeeper." *Id.*

²³ See U.S. CONST. art. II, § 1 (discussing the running of the executive branch of government); see also GEORGE C. EDWARDS III, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA 13 (Yale Univ. Press ed., 2d ed. 2011) (explaining that, today, there are 538 members of the Electoral College; 435 corresponding with the number of house member, 100 senators, and 3 additional members representing the District of Columbia under the Constitution's XXIIIth amendment).

²⁴ See EDWARDS, *supra* note 23, at 18-19 (explaining the chosen date is reflective of America's history as an agrarian society since it is after the autumn harvest, gives electors one day of travel after the Sabbath and acknowledges that November 1 is All Saints' Day for Catholics).

²⁵ See U.S. CONST. art. II, § 1 (regarding the power given to the executive branch); see also *Electoral College*, HISTORY (Aug. 31, 2018), archived at <https://perma.cc/K42X-7E84> (explaining thirty-four states follow this convention). Moreover, ten states delegate state party central committees to make nominations. *Id.*; see also LEVITSKY & ZIBLATT, *supra* note 4, at 48-49 (tracing establishment of the modern presidential primary system to the 1968 Democratic National Convention, where Hubert Humphrey won the nomination for president without competing in a single primary). "Following Humphrey's defeat in the 1968 Presidential Election, the Democratic Party created the McGovern-Fraser Commission." *Id.* at 49-50. "The Commission's final report, published in 1971, cited an old adage: 'The cure for the ills of democracy is more democracy.'" *Id.* at 50. The two major parties adopted the final report's recommendations prior to the

On election day, voters in most states fill out a “short ballot,” which only displays the political candidates’ names—not the name of the elector who ultimately casts a vote on their behalf.²⁶ It gets even more bizarre: each ballot cast in a presidential election is actually cast for an elector.²⁷ Therefore, using the “short ballot” allows voters to mistakenly assume that their votes are cast directly for a presidential candidate and not for a nameless elector.²⁸

Since the ratification of the Twelfth Amendment, which changed the way the president and vice president are elected, states have adopted various measures to prevent electors from voting for a presidential candidate who did not win the statewide election.²⁹ An elector who ignores the people and votes based on their sincere belief is called a “faithless elector.”³⁰ To avoid the menace of the “faithless

1972 Presidential Election, which included a slate of state-level primaries and caucuses. *Id.*

²⁶ See EDWARDS, *supra* note 23, at 19 (explaining that by 1992, forty-two states and the District of Columbia prescribed it by law). Today, the names of both the presidential candidates and the electors appear on ballots in only six states. *Id.*

²⁷ See EDWARDS, *supra* note 23, at 19 (explaining that the use of “short ballot” conceals the mechanics of the voting process). “Unless voters are well versed politically, they have no way of knowing that they are actually voting for presidential electors rather than directly for president and vice president.” *Id.*

²⁸ See Meta S. Brown, *Voter Data: What’s Public, What’s Private*, FORBES (Dec. 28, 2015), archived at <https://perma.cc/5UJF-TCQC> (explaining how a citizen’s vote is not public information, just the fact that they voted); see also EDWARDS, *supra* note 23, at 19 (explaining adoption of “presidential short ballot” fueled by apparent desire to simplify the voting process by presenting voters with the names of each party’s presidential and vice presidential candidates). One beneficial result of the short ballot is that it reduces voter confusion and mitigates spoiled votes. *Id.*

²⁹ See *Faithless Elector State Law*, FAIRVOTE (July 31, 2018), archived at <https://perma.cc/KFP3-ZNQX> (listing the thirty states, plus the District of Columbia, that require electors to vote for a pledged candidate: twenty-one impose no penalty for electors who fail to vote for pledged candidate, five states impose some punishment for an elector’s deviant vote, and six states cancel a deviant vote and the elector is replaced).

³⁰ See EDWARDS, *supra* note 23, at 50 (comparing original design of members of the Electoral College as free agents able to vote for the candidate reflecting their personal preference to the group of “party puppets” who automatically cast their vote for the candidate who won their state). Supreme Court Justice Robert H. Jackson once opined: “Electors, although often personally eminent, independent and respectable, officially become voluntary party lackeys and intellectual nonentities to whose memory we might justly paraphrase a tuneful satire: ‘They always voted at their party’s call / And never thought of thinking for themselves at all.’” *Id.* As for faithless electors, “[v]irtually no one even attempts to justify the votes of faithless

elector,” nearly every state follows a winner-take-all system, whereby the party that receives the most votes in a general statewide election receives all of a state’s electoral votes.³¹ In theory, a winner-take-all system should neutralize the unpredictability that “faithless electors” pose to the election system because it should remove the electors’ choice in the matter.³² Such efforts to bind electors’ votes to the results of statewide elections raised vexing constitutional questions because the Constitution’s express language prescribes that electors use ballot votes to elect the president, which has been interpreted to mean that electors ought to be afforded some discretion when executing their duties.³³

Historically, the process of selecting members of the Electoral College has been neither transparent nor meritocratic.³⁴ Often, the only qualification an elector must possess is they not be an elected official at the time of the selection.³⁵ Because of this relatively low standard, seats in the Electoral College usually get awarded to members of a dominant political party.³⁶

electors.” *Id.* at 59. “Their behavior is the ultimate betrayal and violation of political equality.” *Id.*

³¹ See EDWARDS, *supra* note 23, at 42 (explaining “winner-take-all” (or unit-vote) system, the electoral votes allocated to a state based largely on its population are awarded as a bloc to the plurality winner of the state). “In effect, the system assigns to the winner the votes of the people who voted *against* him or her.” *Id.* “All states except Maine and Nebraska have adopted this system.” *Id.*

³² See EDWARDS, *supra* note 23, at 51-52 (describing a number of laws enacted by states to bind electors to state election results, including requirements to make electors take an oath or pledge or instructions for electors to vote for the winning ticket).

³³ See *Ray v. Blair*, 343 U.S. 214, 231 (1952) (upholding as constitutional the Democratic Party of Alabama’s rule that candidates for elector pledge to support the presidential and vice presidential candidates of the party’s national convention as a condition to being certified as an elector in the state Democratic Primary).

³⁴ See EDWARDS, *supra* note 23, at 16 (quoting a senate committee in 1874: “The appointment of these electors is thus placed absolutely and wholly within the legislature...and it is, no doubt, competent for the legislature to authorize the Governor, or the Supreme Court of the State, or any other agent of its will, to appoint these electors.”).

³⁵ See U.S. CONST. art. II, § 1 (directing each state “to appoint electors who may not be a currently-serving Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector”).

³⁶ See EDWARDS, *supra* note 23, at 15 (offering a party member’s explanation for his selection as an elector: “[M]y finest credentials were that every year I contributed what money I could to the party.”).

In its operation, the Electoral College creates two different types of states in any presidential election: swing states and safe states.³⁷ This simple distinction reflects two problems: first, the Electoral College imposes a structural incentive on voters to not vote in presidential elections if a voter is registered to vote in a safe state.³⁸ This odd incentive structure means that the Electoral College values votes cast in swing states more than votes cast in safe states.³⁹ Second, because a state's electoral vote count is based on the size of its congressional delegation, votes cast in the least populous states count more than votes cast in more populous states.⁴⁰ This latter inequity is revealed most profoundly when the Electoral College results seem to undermine democracy and a winning presidential candidate loses the popular vote yet wins the Electoral College.⁴¹ In total, the Electoral

³⁷ See EDWARDS, *supra* note 23, at 139 (observing that states must be “in play,” in order for a candidate to advertise they are in the general election and make the state a competitive swing state). Moreover, candidates allocate proportionately more campaign stops and advertisements to competitive and large states. *Id.* at 127-28. See also Prokop, *supra* note 8 (acknowledging that candidates focus nearly all their resources on the few swing states during the general election and ignore noncompetitive states).

³⁸ See Prokop, *supra* note 8 (observing that every vote cast for the winning candidate beyond the number needed to capture victory is, in effect, “wasted”).

³⁹ See EDWARDS, *supra* note 23, at 193 (noting that the Electoral College actually distorts the campaign such that candidates ignore many states and devote their resources to a few competitive states because it would make no sense to allocate scarce resources to states they either cannot win or are certain to win). In the latter case, the Electoral College also renders the size of the candidate's victory irrelevant. *Id.*

⁴⁰ See *Population v. Electoral Votes*, FAIRVOTE (Mar. 14, 2018), archived at <https://perma.cc/FVF9-WUUC> (explaining that since electoral votes are determined by a state's congressional delegation and the national census, the number of state residents per electoral vote varies widely from state to state). For example, in 2008, on average a state was awarded one electoral vote for every 565,166 people. *Id.* But Wyoming had three electoral votes and only 532,668 citizens— that breaks down to one electoral vote to every 177,556 people. *Id.* That means Wyomingites have a 3.18 times as much clout in the Electoral College as an average American, or 318%. *Id.* The top five states with the most per-citizen voting power round out to Washington D.C. (284%), Vermont (273%), North Dakota (264%), Alaska (247%). *Id.*

⁴¹ See Drew DeSilver, *Trump's Victory Another Example of How Electoral College Wins Are Bigger than Popular Vote Ones*, PEW RES. CTR. (July 31, 2018), archived at <https://perma.cc/VN9T-KSF4> (observing “the very nature of the way the U.S. picks its presidents tends to create a disconnect between the outcome in the Electoral College and the popular vote”).

College produced this result in five of the fifty-eight presidential elections in history, or about 8.6% of the time.⁴²

It is easy to question why such an idiosyncratic, arguably undemocratic institution was ever adopted, much less how it survived into the present day.⁴³ The most plausible explanation for its adoption seems to be one of political necessity.⁴⁴ With their time short, and the Constitutional Convention split between dueling proposals for how to elect the president, it is likely that the Framers compromised between the most popular proposals for the sake of unity.⁴⁵ Yet its peculiarities have not gone unnoticed nor unchallenged: in 1969, the House of Representatives passed an ill-fated resolution that would have abolished the Electoral College and instituted a direct election for the

⁴² See *id.* (counting the 2016 Presidential Election as the fifth time in U.S. history, and the second time this century that the American political system produced this outcome).

⁴³ See *Time to End the Electoral College*, N.Y.TIMES (Dec. 20, 2016), archived at <https://perma.cc/PW9N-W4SG> (attacking the Electoral College as a “living symbol” of America’s history of slavery because the slave-owning southern states would have been disadvantaged by any system of direct election). Second, Clinton beat Mr. Trump by more than 2.8 million votes, or 2.1% of the electorate, which is a wider margin than 10 winning candidates. *Id.* Third, small state privilege is reflected in troubling math: a Wyoming resident’s vote counts 3.6 times as much as a Californian’s. *Id.* Lastly, about 138 million Americans voted in 2016, but Mr. Trump secured his Electoral College victory thanks to fewer than 80,000 votes across three states: Michigan, Pennsylvania and Wisconsin. *Id.* See also EDWARDS, *supra* note 23, at 112 (arguing that the Electoral College was invented and ratified by the Framers because factions within the Constitutional Convention were deadlocked between other proposed systems, such as direct election or selection by Congress). “The chief virtue of the Electoral College was that it replicated other compromises the Constitutional Convention had already made: large states were allocated the most electors; and small states received a disproportionate number of electors (replicating the senate).” *Id.* What did not replicate the rest of the Constitution was the decision to accord smaller states greatly disproportionate power when the House selects the president. *Id.*

⁴⁴ See EDWARDS, *supra* note 23, at 112-13 (highlighting that “John Roche, put it pointedly: the Electoral College ‘was merely a jerry-rigged improvisation which has subsequently been endowed with a high theoretical content. The future was left to cope with the problem of what to do with this Rube Goldberg mechanism.’”).

⁴⁵ See EDWARDS, *supra* note 23, at 111 (arguing “[t]he electoral college was not the result of a coherent design based on clear political principles but, rather, a complex compromise that reflected the interests of different states and the search for consensus”); see also LEVITSKY & ZIBLATT, *supra* note 4, at 40 (explaining the original operation of the Electoral College dramatically changed with the introduction of political parties into national politics). “Parties, then, became the stewards of American democracy.” *Id.* at 41.

presidency.⁴⁶ Recently, another proposal, The National Popular Vote Interstate Compact, has gained traction among states.⁴⁷ If adopted, it would require members of the Electoral College to vote for the presidential candidate who won the national popular vote.⁴⁸

B. Election Statutes: The Federal Election Defense Strategy

The Federal Constitution's Article I and II delegates authority to Congress to administer federal elections and to states to administer state elections.⁴⁹ Federal jurisdiction can be triggered in a mixed election if candidates to both federal and state office appear on the same ballot.⁵⁰ To vote in a federal election, a person must be at least

⁴⁶ See *Electoral College Fast Facts*, HIST., ART & ARCHIVES: U. S. HOUSE OF REPRESENTATIVES (Feb. 25, 2018), archived at <https://perma.cc/3JV7-NFWK> (“During the 91st Congress (1969–1971), [the] House of Representatives passed H.J. Res. 681 which adopted the direct election of a President and Vice President, requiring a run off when no candidate received more than 40 percent of the vote.”). “The resolution passed the House in 1969, but failed to pass the Senate.” *Id.*

⁴⁷ See *Status of National Popular Vote Bill in Each State*, NAT'L POPULAR VOTE (July 31, 2016), archived at <https://perma.cc/D2KK-AH2J> (listing twelve states that enacted National Popular Vote Interstate Compact into law).

⁴⁸ See *Agreement Among the States to Elect the President by Popular Vote*, NAT'L POPULAR VOTE (Apr. 2, 2018), archived at <https://perma.cc/M8UQ-Z4QF> (explaining the interstate pact has been “enacted by 12 jurisdictions possessing 172 electoral votes”—64% of the 270 electoral votes necessary to activate it).

⁴⁹ See U.S. CONST. art. I, § 4 (granting broad authority congressional authority to regulate federal elections); 18 U.S.C. § 597 (1999) (imposing a fine or imprisonment on anyone who “makes or offers to make an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate,” as well as on anyone who “solicits, accepts, or receives any such expenditures in consideration of his vote or the withholding of his vote”).

⁵⁰ See *United States v. McCranie*, 169 F.3d 723, 726-27 (11th Cir. 1999) (holding that a Federal District Court had jurisdiction to try McCranie and Jones for voter fraud in violation of § 1973i(c) and (e), now § 10307, despite the presence of uncontested federal races on the same ballot with contested state and local races); *United States v. Mason*, 673 F.2d 737, 739 (4th Cir. 1982) ([T]he statute [§ 10307] unconditionally proscribes payment or offers of payment for voting, whether in a purely federal election or a mixed federal/state election.”). “There is no requirement that the payment or offer of payment be made specifically on behalf of a federal candidate or that a special intent to influence a federal race exist.” *Id.*; *United States v. Simms*, 508 F. Supp. 1179, 1188 (W.D. La. 1979) (“[T]o protect the integrity of the federal election, s 1973i(c) [cognate § 10307] must reach activity that affects either partially or primarily state elections.”).

eighteen years of age; a United States citizen; and meet any qualification imposed by the state where the person resides.⁵¹

To regulate federal elections, Congress enacted 52 U.S.C.S. § 10307 (“§ 10307”), which penalizes a person with a fine or jail time if that person “knowingly or willingly...pays or offers to pay or accepts payment...for voting.”⁵² To prosecute a person for violating § 10307, the government is not required to prove a defendant’s specific intent or that actual corruption (i.e. vote buying) necessarily took place—just that the defendant’s activity exposed the election to the risk of fraud.⁵³ In *United States v. Carmichael*, the Fourth Circuit held a defendant violated § 10307 by just offering to buy a vote because exposing federal election to the mere risk of corruption triggers the statute’s protections.⁵⁴ Further, in *United States v. Bowman*, the Fifth Circuit upheld a defendant’s conviction under § 10307 because “the fact that the person making the payment did not intend to influence the federal election does not change the reality of the threat; the payment itself, not the purpose for which it is made, is the harm and the gist of the offense.”⁵⁵

⁵¹ See U.S. Election Assistance Commission, A VOTER’S GUIDE TO FED. ELECTIONS, (2008), archived at <https://perma.cc/6MJF-3CWM> (listing voter qualifications in order to vote in federal elections).

⁵² See Voting Rights Act, 52 U.S.C. § 10307 (2015) (“[Prohibiting persons from] knowingly or willfully pay[ing] or offer[ing] to pay or accept[ing] payment either for registration to vote or for voting ” and he or she “shall be fined not more than \$10,000 or imprisoned not more than five years, or both.”); see also *United States v. Lewin*, 467 F.2d 1132, 1136 (7th Cir. 1972) (holding § 10307 predecessor statute does not prohibit civic groups or employers from encouraging people to register to vote because the statute uses the word “pay”).

⁵³ See Randazza, *supra* note 10, at 207 (explaining the jurisdiction of 42 U.S.C. § 1973i(c) was transferred to 52 U.S.C § 10307).

⁵⁴ See *United States v. Thomas*, 510 F.3d 714, 724 (7th Cir. 2007) (upholding election fraud conviction, in part, because Defendant stated on Election Day “we paid everybody” and “everybody schooled me on my little money thing and [from] now on I take care of my own money thing,” which are statements not susceptible to an innocent explanation); *United States v. Carmichael*, 685 F.2d 903, 905 (4th Cir. 1982) (affirming convictions of two defendants for extensive vote-buying operation in the 1980 democratic primary in Dillon County, South Carolina).

⁵⁵ See *United States v. Malmay*, 671 F.2d 869, 875 (5th Cir. 1982) (quoting: “Even without a specific intent requirement there is danger in a myopic view of the paid voter process.”). “When it occurs [vote buying] voters are brought to the polls who otherwise might not have voted at all.” *Id.* “Aside from being ready instruments of further manipulation, their presence distorts the total, leaves to chance the federal candidates who might-or might not-receive their vote, distorts the results, and is, therefore, repugnant to the integrity of the elective process.” *Id.*; *United States v.*

Under § 10307, the definition of “payment” is not necessarily limited to the payment of money for votes.⁵⁶ Courts interpret § 10307’s legislative purpose expansively so that “payment” includes “anything of value.”⁵⁷ Indeed, a non-monetary payment could qualify as a “payment.”⁵⁸ Therefore, courts interpret “payment” to mean any benefit of a “pecuniary value or given directly to an individual voter in exchange for his individual vote.”⁵⁹

C. The Origins of Election Fraud

While many American citizens read newspaper headlines reporting on widespread election fraud overseas, election fraud is also a “venerable Anglo-American tradition predating in North America the founding of the United States, and extending in England well back into parliamentary history.”⁶⁰ Indeed, Americans may be shocked to learn that candidates elected to office into the Eighteenth Century frequently won elections by treating their peers to food and drink in

Bowman, 636 F.2d 1003, 1012 (5th Cir. 1981) (affirming conviction of defendant for paying, conspiring to pay, and aiding and abetting other people to pay to vote in the 1978 general election to Congress for the Fourth Congressional District of Louisiana).

⁵⁶ See *United States v. Garcia*, 719 F.2d 99, 101 (5th Cir. 1983) (holding that welfare food vouchers issued in dollar amounts fell within the definition of “payment” as used in § 1973i(c)). “The only significant difference between these vouchers and cash is that these vouchers were item-specific and could only be redeemed for the designated good or service.” *Id.*

⁵⁷ See *id.* (quoting sponsoring senator to §1973i(c) defining scope of term “payment” as “the amendment [that] would provide a penalty for anyone offering or accepting money or something of value in exchange for registering or voting”).

⁵⁸ See *id.* at 102 (“[W]hile a food voucher may not be valuable to the person who issues it, it has the same significance as cash to the person receiving it.”). “And since the intent of Congress was to prohibit the direct offer or giving to an individual voter of an item of pecuniary value in order to obtain his or her vote, an assessment of the monetary worth of an item from the perspective of the voter receiving the item, and not the person offering it, accords with the legislative intent of the statute.” *Id.*

⁵⁹ See *id.* (“We therefore find that Congress did not intend to restrict the term “payment” in § 1973i(c) to offers of money, and that the term was intended to include items of pecuniary value offered or given directly to an individual voter in exchange for his individual vote, such as the welfare food vouchers present here.”).

⁶⁰ See James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 232 (1990) (discussing bribery as the most common electoral abuse in Anglo-American tradition of democratic governance).

“heroic quantities.”⁶¹ For example, when James Madison ran for office in 1777, he remarked that his arguments were enhanced “by the corrupting influence of spirituous liquors, and other treats.”⁶² This strategy marked a development in Madison’s politicking: earlier in his career, he was soundly defeated when he decided to not treat voters.⁶³ Where food and drink did not sway voters, candidates sometimes resorted to outright violence and physical coercion.⁶⁴ Until the 1870’s, instances of violent electoral fraud were relatively isolated and small-scale, then Reconstruction-era politics introduced novel legal mechanisms for disenfranchising former slaves across the former Confederate southern states.⁶⁵ During this period, states developed a variety of measures that legally and practically excluded black voters from voting.⁶⁶ Under these regimes, successful voter registration did

⁶¹ See *id.* (introducing concept of “treating” voters). In eighteenth-century England, political campaigns were “transformed...into contests between the candidates to provide the most whiskey to eligible voters.” *Id.*

⁶² See *id.* (noting in an election in York, England in 1774, voters mobbed a candidate who had not provided enough food and drink in their estimation).

⁶³ See *id.* at 232 n.169 (quipping: “[H]is abstinence being represented as the effect of pride and parsimony.”).

⁶⁴ See *Commonwealth v. Hoxey*, 16 Mass. 385, 385 (1820) (discussing that the voter attempted on numerous occasions to physically seize the ballot box to prevent the reelection of a candidate); see also *Commonwealth v. Silsbee*, 9 Mass. 417, 417 (1812) (alleging instances of multiple voting in 1811 election in Salem, MA); see also Gardner, *supra* note 60, at 233 (retelling election of Francis Preston in 1794 congress during which Preston posted soldiers outside of polling centers who refused to let supporters of his opponents vote). “A challenge in Congress by the loser was rejected and Preston was seated, partly on the grounds that his election was considered to be relatively clean by contemporary southern standards.” *Id.*

⁶⁵ See *Ex parte Yarborough*, 110 U.S. 651, 655 (1884) (asserting that intimidating an individual of African descent in an effort to prevent him from voting in a congressional election violates the Fifteenth Amendment); *United States v. Cruikshank*, 92 U.S. 542, 548-49 (1875) (defining a cause of action in hindering or preventing a citizen from “their free exercise and enjoyment of rights and privileges”); *United States v. Amsden*, 6 F. 819, 823-24 (D. Ind. 1881) (explaining that the Fifteenth Amendment does not confer the right to vote in local state elections); see also LEVITSKY & ZIBLATT, *supra* note 4, at 90 (“Between 1885 and 1908, all eleven post-Confederate states reformed their constitutions and electoral laws to disenfranchise African Americans.”). “To comply with the letter of the law as stipulated in the Fifteenth Amendment, no mention of race could be made in efforts to restrict voting rights, so states introduced purportedly ‘neutral’ poll taxes, property requirements, literacy tests, and complex written ballots.” *Id.*

⁶⁶ See *Louisiana v. United States*, 380 U.S. 145, 155-56 (1965) (striking down a literacy test as a qualification to vote); *United States v. Mississippi*, 380 U.S. 128, 143-44 (1965) (describing different methods used to legally prevent black citizens

not guarantee the vote to black citizens, as they were the victims of violence by armed paramilitary groups before, during, and after elections.⁶⁷ Those black citizens who braved these obstacles sometimes arrived at polling centers to find that their names were erased from voter lists.⁶⁸

Some scholars argue that election fraud includes efforts at voter suppression perpetrated by the states through the enactment of voter identification laws, which have been found to suppress voter turnouts across all demographics, but disproportionately among racial and ethnic minorities.⁶⁹ Small-scale voter fraud includes vote-buying,

from voting in Mississippi); *United States v. Duke*, 332 F.2d 759, 763 (5th Cir. 1964) (highlighting differences in access to voting between white and black voters); *United States v. Manning*, 205 F. Supp. 172, 173 (W.D. La. 1962) (stating that the East Carroll Parish Registrar of Voters discriminated against black people through the use of a voter identification requirement); *United States v. Penton*, 212 F. Supp. 193, 200 (M.D. Ala. 1962) (finding that black voter registration applications were disproportionately denied without good cause under Alabama's citizenship test); *United States v. Ass'n of Citizens Councils*, 196 F. Supp. 908, 911 (W.D. La. 1961) (determining that voter identification requirements discriminated against black voters); *United States v. Raines*, 189 F. Supp. 121, 127 (M.D. Ga. 1960) (differentiating the effects of the respective literacy tests given to white and black voters); see also LEVITSKY & ZIBLATT, *supra* note 4, at 89 (noting that with the ratification of the Fifteenth Amendment to the United States Constitution, "[n]ationwide, the percentage of black men who were eligible to vote increased from 0.5% in 1866 to 80.5% two years later").

⁶⁷ See Russell Brooker, *Voting Rights for Blacks and Poor Whites in the Jim Crow South*, AM.'s BLACK HOLOCAUST MUSEUM (Feb. 16, 2018), archived at <https://perma.cc/2D68-UJL3> (listing eight ways black voters were denied the franchise: violence, literacy tests, property tests, grandfather clauses, all-white primary elections, purges of voter rolls, vote denied to citizens with criminal record, and adoption of poll taxes); see also LEVITSKY & ZIBLATT, *supra* note 4, at 92 (quoting: "Black [voter] turnout in the South fell from 61 percent in 1880 to just 2 percent in 1912.").

⁶⁸ See *United States v. Wilder*, 222 F. Supp. 749, 750 (W.D. La. 1963) (removing names from voter rolls); see also *Ass'n of Citizens Councils*, *supra* note 66, at 910 (erasing names from voter list).

⁶⁹ See LEVITSKY & ZIBLATT, *supra* note 4, at 184 (condemning modern arguments in favor of enacting state voter identification laws because "the levels of such fraud in this country are low"); see also Chris Coons & Nicole Austin-Hillery, *The Threat to American Elections You Don't Know About but Should*, TIME (June 30, 2017), archived at <https://perma.cc/FK4F-V4AT> (defining the largest threat to modern elections as voter identification laws that disenfranchise otherwise qualified voters through the implementation of additional registration requirements); see also Michael Wines, *Wisconsin Strict ID Law Discouraged Voters, Study Finds*, N.Y. TIMES (Sept. 25, 2017), archived at <https://perma.cc/6ZNC-AC4L> (summarizing a report estimating that Wisconsin's new voter identification law kept

bribery, casting fraudulent ballots, impersonation of voters, and instances of multiple voting.⁷⁰ In one notable instance, a group of local elected officials in Illinois conspired to select a candidate for state senate without holding an election.⁷¹ It did not work.⁷²

While much is unknown at this time, it is probably safe to say that the 2016 Presidential Election expanded the definition of election fraud to include interference by foreign entities through the internet.⁷³ Future political efforts could enact a package of reforms that would fortify future elections from such efforts, thereby safeguarding the legitimacy of America's democratic form of governance.⁷⁴ Before these new measures can be agreed on, the American public must

at least 17,000 registered voters from voting in the 2016 Presidential Election); *see also Voter ID*, BRENNAN CTR. FOR JUSTICE (Oct. 15, 2012), *archived at* <https://perma.cc/3K3C-QVYE> (asserting that as many as 11% of American citizens do not have government-issued photo identification and would be barred from voting under modern voter identification laws).

⁷⁰ *See* United States v. Gradwell, 243 U.S. 476, 478 (1917) (analyzing voter bribery); Blitz v. United States, 153 U.S. 308, 312-13 (1894) (impersonating voters); United States v. Campbell, 845 F.2d 782, 789 (8th Cir. 1988) (holding candidate for re-election to county judgeship engaged in numerous instances of vote-buying); Welch v. McKenzie, 592 F. Supp. 1549, 1556 (S.D. Miss. 1984), *aff'd*, 765 F.2d 1311 (5th Cir. 1985) (analyzing fraudulent ballots); United States v. McBosley, 29 F. 897, 899 (D. Ind. 1886) (discussing voter bribery).

⁷¹ *See* Smith v. Cherry, 489 F.2d 1098, 1100 (7th Cir. 1973) (describing a sham candidate). Due to redistricting, the lines for Illinois's twelfth senatorial district were redrawn to contain the residence of the state senator for the thirteenth senatorial district. *Id.* The Committeemen convinced the incumbent state senator for the twelfth to run in the primary election, win, then bow out of the race in the general election, thus, allowing the committee to select a candidate. *Id.* The scheme worked but the candidate who lost the primary sued and the federal court vacated the election results. *Id.*

⁷² *See* Cherry, *supra* note 71, at 1103 (reversing and remanding lower court decision to hear case on merits).

⁷³ *See* Rick M. Robinson, *Cybersecurity Lessons from the 2016 Presidential Election*, SECURITYINTELLIGENCE (Nov. 18, 2016), *archived at* <https://perma.cc/LQK7-WHYW> (quoting: "The 2016 Presidential Election put the spotlight on cybersecurity in a way that no one could have imagined ahead of time."). ⁷⁴ *See* Lawrence Norden & Wilfred U. Codrington III, *American's Voting Machines at Risk—An Update*, BRENNAN CTR. FOR JUST. (Mar. 8, 2018), *archived at* <https://perma.cc/D5EU-43AN> (proposing congressional measures to update elections systems, including federal grants to replace "antiquated, paperless equipment and conduct post-election audits to detect hacking or error").

grapple with reports of foreign entities attempting to tamper with the 2018 congressional mid-term elections.⁷⁵

D. The E-Democracy Movement

Over the past twenty years, the widespread acceptance of internet-based communications into everyday life has revolutionized the way information is stored and consumed.⁷⁶ For instance, the shift from analog to digital information means that information travels with more “liquidity.”⁷⁷ While information travels at unprecedented speeds across the internet, the application of this technology to politics has reshaped how information is disseminated, how coalitions are formed, and how politicians interact with their constituencies.⁷⁸

⁷⁵ See *Democratic Sen. McCaskill Confirms Russian Hacking Attempt*, L.A. TIMES (July 26, 2018), archived at <https://perma.cc/G653-WAEE> (reporting then-United States senator from Missouri confirmed an unsuccessful attempt by Russia’s GRU to hack her senate office computers); see also Evan Osnos, *Why the 2018 Midterms Are So Vulnerable to Hackers*, NEW YORKER (Dec. 28, 2017), archived at <https://perma.cc/8KZL-7RXG> (anticipating likely Russian state “active measures” to interfere in 2018 mid-term elections); see also Sue Halpern, *America Continues to Ignore the Risks of Election Hacking*, NEW YORKER (Apr. 18, 2018), archived at <https://perma.cc/3ZQN-LWN7> (calling for more than \$380 million in congressional appropriations to fortify America’s election systems because outdated voting machines are susceptible to hacking). “Significantly, hackers were not responsible when, in November, 2016, voters in found that Shelby County, Tennessee, pulled the lever for Hillary Clinton and found that they had chosen Donald Trump.” *Id.* See also Fahmida Y. Rashid, *Types of Phishing Attacks and How to Identify Them*, CSO (Aug. 1, 2018), archived at <https://perma.cc/F8TX-CQEC> (cataloguing various phishing strategies deployed by hackers).

⁷⁶ See Keith J. Bybee, *Open Secret: Why the Supreme Court Has Nothing to Fear from the Internet*, 88 CHI.-KENT L. REV. 309, 309 (2013) (explaining in 2002 the amount of digitally recorded information matched the amount of analog recorded information for the first time in history). “[F]ive years later, digital information accounted for 94% of all the recorded information on the planet.” *Id.*

⁷⁷ See *id.* (“The immense and rapidly growing body of digital data is distinguished by one dominant characteristic: liquidity.”). “[I]ninitely reproducible, frictionlessly mobile’ digital information flows far more quickly and continuously than its analog predecessor ever could.” *Id.*

⁷⁸ See *New Report Outlines How Congress and Citizens Interact on Social Media*, CONG. MGMT. FOUND. (Oct. 14, 2015), archived at <https://perma.cc/2CEU-E33P> (reporting 84% of congressional staffers polled believe that senators and representatives are more inclined to use social media now to interact with their constituencies than in the past).

The late nineties hailed the arrival of the World Wide Web, dubbed “Web 1.0.”⁷⁹ This new technology, while revolutionary, only intensified democratic norms of governance without fundamentally changing them.⁸⁰ For example, Web 1.0 limited users to viewing static online content that was not interactive, like news websites or menus posted online by restaurants.⁸¹ This changed when “Web 2.0” arrived, which enabled users to view interactive online content and even convene in virtual communities to generate their own content, such as Wikipedia and social media websites, like Facebook.⁸² As Web 2.0 enabled users to digitize more of their everyday activities, theorists began applying pre-existing legal concepts to defend such activity in

⁷⁹ See Allen Sanders, *The Road to E-democracy*, THE ECONOMIST (Feb. 14, 2008), archived at <https://perma.cc/7TX5-43W4> (distinguishing Web 1.0 as the online world largely mimicking the offline world). “E-mails replace letters; websites make publishing speedier and more effective; data are stored on the user’s computer.” *Id.*

⁸⁰ See *id.* (characterizing the benefits of Web 1.0 as somewhat neutral: “The internet has provided citizens with vastly more information about their elected representatives [b]ut the effects tend to cancel each other out.”).

⁸¹ See Jonathan Strickland, *Is There a Web 1.0?*, HOWSTUFFWORKS (Mar. 13, 2018), archived at <https://perma.cc/DXQ8-NCVC> (describing Web 1.0 sites as “static,” not “interactive,” and “applications are proprietary”).

⁸² See Tim O’Reilly, *What is Web 2.0*, O’REILLY (Sept. 30, 2005) archived at <https://perma.cc/548E-SZQM> (identifying the foundation of Web 2.0 as concept of collective intelligence). This is predicated on the idea that new content by users is similar to “synapses [that] form in the brain with associations becoming stronger through repetition and intensity, [and where] the web of connections grows organically as an output of the collective activity of all web users.” *Id.* Wikipedia.com, the online encyclopedia curated by community of web users, is the prime example of this approach. *Id.* “But all this has been overtaken by ‘Web 2.0,’ shorthand for the interactivity brought by wikis (pages that anyone can edit) and blogs (on which anyone can comment).” *Id.* “Data are accessed through the internet; programs are opened in browser windows rather than loaded from the hard disc; instant messages, often attached to social-networking sites such as Facebook, replace e-mail.” *Id.* “Web 2.0 also means free video-sharing on sites such as YouTube and free phone calls between computers.” *Id.* “These developments allow information to be shared far more effectively, at almost no cost.” *Id.* “That gives great hope to the proponents of e-democracy.” *Id.*

this digital space.⁸³ The proper scope and recognition of citizens' rights in these digital spaces is one of the great debates of the modern age.⁸⁴ The "E-Democracy" movement seeks to harness this shift toward digitization to promote democratic institutions.⁸⁵ The movement is premised on the belief that online technology can foster more inclusive political communities than exist offline.⁸⁶ This concept is indebted to Jürgen Habermas's⁸⁷ concept of the "public sphere," which, Habermas argues, arose in America and Europe in the eighteenth and nineteenth centuries.⁸⁸ Habermas credits the "public

⁸³ See *Social Media Fact Sheet*, PEW RES. CTR.: INTERNET AND TECH. (Feb. 5, 2018), archived at <https://perma.cc/3W68-T2HS> (reporting that from 2005 to 2011, the number of adult Americans who reported using at least one social media platform rose from 5% to 69%); see also O'Reilly, *supra* note 82 (arguing that in addition to embracing "collective intelligence," development of RSS technology (Really Simple Syndication) transformed online journals into blogs by allowing users to subscribe to websites and receive alerts once new content is added); *contra* Jonathan Strickland, *How Web 2.0 Works*, HOWSTUFFWORKS (Mar. 2018) archived at <https://perma.cc/548E-SZQM> (stating there is little consensus on a unified definition of "Web 2.0").

⁸⁴ See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) ("A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more."). "The Court has sought to protect the right to speak in this spatial context." *Id.* "While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear." *Id.* "It is cyberspace—the 'vast democratic forums of the Internet.'" *Id.*

⁸⁵ See Andrew Chadwick, *E-Democracy*, ENCYCLOPEDIA BRITANNICA (Mar. 12, 2013), archived at <https://perma.cc/7KAB-D58T> (describing theory: "some of the traditional limits to citizenship in contemporary liberal-democratic polities—problems of scale, scarcity of time, decline of community, and lack of opportunities for policy deliberation—can be overcome by new forms of online communication.").

⁸⁶ See *id.* (expanding the concept of large-scale participatory democracy first developed in the 1960s).

⁸⁷ See James Bohman, *Jürgen Habermas*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Mar. 14, 2018), archived at <https://perma.cc/4WDB-P59Y> (describing Habermas as "one of the most influential philosophers in the world"). "His extensive written work addresses topics stretching from social-political theory to aesthetics, epistemology and language to philosophy of religion, and his ideas have significantly influenced not only philosophy but also political-legal thought, sociology, communication studies, argumentation theory and rhetoric, developmental psychology and theology." *Id.*

⁸⁸ See Jürgen Habermas, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* 32 (The MIT Press, trans., 1991) (explaining the "Public Sphere" as arising from "salons, and coffee houses" during the Enlightenment). According to Habermas, the public and private spheres were one during the Middle Ages, when monarchs embodied the state before an audience of spectators, however, in the 18th

sphere” as the driving force behind the transition from feudal society to republican governments.⁸⁹ Moreover, his work argues for an “idealized autonomous sphere” in which citizens may engage in debate free from the corrupting influence of corporate and state actors.⁹⁰ The E-Democracy movement strives to re-create the “public sphere” and revitalize democratic institutions through the internet.⁹¹

1. Tactical Voting

When a voter casts a ballot that does not reflect her sincere preference (i.e. the candidate she actually wants to be elected) to increase the expected value of her vote for an election outcome, this is called “tactical voting,” or “strategic voting.”⁹² Elections in the United States follow plurality voting, meaning voters only select their top choice as opposed to ranking the field of candidates from, say, one to three.⁹³ While this system simplifies the voting process for voters, it is vulnerable to the “spoiler effect,” which is when a non-winning candidate appears on a ballot and draws votes away from one of the

Century, with the adoption of capitalist modes of production and the establishment of long-distance travel, international trade markets fostered the use of “reason” in what Habermas characterizes as “rational-critical public debate” between societies. *Id.*

⁸⁹ See *id.* (expanding on this new debate convention which checked domination of the state by calling into question the illegitimate use of political power by lords and monarchs). Ensuing public debates challenged monarchs’ legitimation of power and culminated in the adoption of constitutional governments in Europe and the United States in the late eighteenth and early nineteenth centuries. *Id.* at 136.

⁹⁰ See Chadwick, *supra* note 85 (“[Concept] is an idealized autonomous sphere of communication in which citizens can freely engage in reasoned debate away from the controlling influence of the state, large media corporations, and structures of social inequality.”). “[E]-democracy updates this by focusing on how political discourse is mediated.” *Id.*

⁹¹ See Chadwick, *supra* note 85 (clarifying that E-democracy focuses on how political discourses are mediated). “The Internet emerged as a communication medium uniquely suited to providing multiple arenas for public debate that are relatively spontaneous, flexible, and, above all, self-governed.” *Id.*

⁹² See *Tactical Voting Basics*, THE CTR. FOR ELECTION SCI. (Mar. 13, 2018), archived at <https://perma.cc/F57B-USBX> (offering a common example of tactical voting, such as “when supporters of a minor party candidate vote for their favorite major party candidate, based on the impression that the minor party candidate is unlikely to win”).

⁹³ See *The Spoiler Effect*, THE CTR. FOR ELECTION SCI. (Mar. 17, 2018), archived at <https://perma.cc/3F5M-BAYA> (“[The] most typical scenarios of the ‘spoiler effect’ involve plurality voting, or choose-one method.”).

candidates, thereby influencing which candidate ultimately wins the election.⁹⁴ Put differently, some argue that a plurality voting system does a poor job of measuring public support for candidates to political office because it only registers voters' first choice, as opposed to voters second and third preferences, or the least objectionable candidates, which makes plurality voting systems susceptible to the "spoiler effect."⁹⁵

III. Premise

Online vote swapping is a type of tactical voting and is intended to undermine the effects of the Electoral College, states' winner-take-all policies of awarding all of their electoral votes to one candidate, and plurality voting on elections.⁹⁶ Swapping votes online for a presidential election is simple: one voter must be eligible to vote in a swing state and at least one voter must be eligible to vote in a safe state.⁹⁷ Moreover, the voter in the safe state must support one of the two major party candidates (e.g. Republican or Democratic) and the

⁹⁴ See *id.* ("Plurality is extremely vulnerable to the 'spoiler effect' so that even candidates with little support can act as spoilers."); see also David E. Rosenbaum, *The 2004 Campaign: The Independent; Relax, Nader Advises Alarmed Democrats, but the 2000 Math Counsels Otherwise*, N.Y. TIMES (Feb. 24, 2004) archived at <https://perma.cc/QL4Q-7QUH> (offering substantial evidence that Ralph Nader's third party campaign for president in 2000 sapped votes away from runner-up Al Gore, thus, making Nader a spoiler). "In Florida, Mr. Nader received 97,488 votes, 1.6 percent of the total, and Mr. Bush carried the state by 537 votes." *Id.* Had Mr. Gore won Florida, he would have become president. *Id.*

⁹⁵ See Randazza, *supra* note 10, at 161 ("The simple-majority and single-ballot (SMSB) system, such as that in the United States, has an inherent flaw in gauging the actual preferences of the electorate.").

⁹⁶ See DIMINO, *supra* note 20, at 211 ("Vote trading thus benefits third-party candidates and favorites because it mitigates the spoiler effect."). "It undermines the Electoral College, however, by allowing a state's election to be affected by the preferences of voters in other states. *Id.* at 211; see also Crockett, *supra* note 6 (confessing: "I wanted my voice to be heard, but I also knew there was a risk of Trump being elected if I voted for my candidate in a swing state...[s]o I decided to trade.")).

⁹⁷ See Crockett, *supra* note 6 (demonstrating likely trade scenario in 2016 Presidential Election between Clinton supporter in California— where Clinton was a 99.9% favorite to win— and a third-party supporter in a swing state, like Ohio, Pennsylvania, or Florida).

voter in the swing state must support a third-party candidate (e.g. Green or Libertarian).⁹⁸

Generally, vote swappers are paired in one of two ways: they can meet offline through social connections or they can meet through a website.⁹⁹ If vote swapping were relegated to offline meetings only, the practice would remain small-scale.¹⁰⁰ It is the latter method of meeting, that uses the internet to pair interested swappers anonymously *en masse*, that enables many people to participate in vote swaps who would not otherwise do so.¹⁰¹ Once two interested vote swappers establish contact, they negotiate the terms of the swap in private with the goal of inducing the other party to vote for the candidate whom the other party sincerely wants to win the presidential election.¹⁰²

The primary benefit each party receives from these private arrangements is a higher probability that each online vote swapper's

⁹⁸ See Crockett, *supra* note 6 (laying out likely trade scenario between Clinton voters in "safe" states with swing state voters who supported third-party presidential candidates Jill Stein, Gary Johnson, and Evan McMullin).

⁹⁹ See Crockett, *supra* note 6 (initiating the #NeverTrump App which asks the user a series of questions about their political preference and location, then grants the user access to a chatroom of potential swap mates); see also Randazza, *supra* note 10, at 157 (stating voters can meet a swapper offline who they may know or by using a website that pairs them with a stranger).

¹⁰⁰ See Brad Worley, *Nader's Traders vs. State Regulators: Examining the Controversy over Internet Vote Swapping in the 2000 Presidential Election*, 2 N.C. J.L. & TECH. 32, 40-41 (2001) (expressing awe at the response his article received, Jamie Raskin wrote that he was "astonished by the power of the Internet to get an idea [vote swapping] out like that"); see also Marc J. Randazza, *The Constitutionality of Online Vote Swapping*, 34 LOY. OF L.A. L. REV. 1297, 1300 (2001) ("[The] massive communicative power of the Internet makes it a super-broadcasting tool that allows anyone to jump into the political fray, regardless of economic means.").

¹⁰¹ See Worley, *supra* note 100, at 60-61 (distinguishing website models for facilitating vote swaps between the encouragement model, the bulletin board model, and the automatic brokering model). While each pose their own issues, the popular automatic brokering model, whereby the website steps in and pairs voters based on their information, is the model that Worley concludes to be the most constitutionally questionable. *Id.* at 62-64.

¹⁰² See *In Their Own Words: Why Voters Support—and Have Concerns About—Clinton and Trump*, PEW RES. CTR. (Sep. 21, 2016), archived at <https://perma.cc/3MEL-R7TZ> (reporting that when voters were asked to say in their own words "what is the main reason you support . . .," 33% of Mr. Trump supporters selected "He is not Clinton" and 32% of Clinton supporters selected "She is not Trump"). In other words, opposition to the other candidate was the most popular reason cited by supporters for both candidates in the poll. *Id.*

least preferred presidential candidate is not elected.¹⁰³ For the voter in the safe state who supports a major party candidate, procuring a vote for their candidate in a swing state increases their preferred candidate's chances of winning.¹⁰⁴ On the other side, the voter in a swing state who supports a third party candidate receives a different package of benefits: the candidate they least prefer to win the election does not benefit from the "spoiler effect" and the third party candidate they sincerely support still receives a vote, which increases the likelihood the third party will qualify for federal funding in future elections.¹⁰⁵

A. Nader's Traders: A Foolproof Vote Swapping Plan

If the 2000 Presidential Election is remembered for recounts, "hanging chads," and *Bush v. Gore*,¹⁰⁶ it should also be remembered for the introduction of online vote swapping.¹⁰⁷ Following the election, one website estimated that nascent vote swapping websites facilitated

¹⁰³ See *Porter v. Bowen*, 496 F.3d 1009, 1020 (9th Cir. 2007) [hereinafter *Porter I*] (distinguishing vote swapping from vote buying because, unlike the latter, the former "is not an 'illegal exchange for private profit' since the only benefit a vote swapper can receive is a marginally higher probability that his preferred electoral outcome will come to pass"); see also Crockett, *supra* note 6 ("On Election Day, it is understood that Nicholas will vote for Clinton and Alex will vote for Stein."). "In some states, a ballot selfie can serve as proof." *Id.*

¹⁰⁴ See Randazza, *supra* note 10, at 206-207 (explaining third party candidates are eligible for federal campaign funding only if their party receives a threshold number of votes in the previous election equal to 5% or more of the total number of votes cast).

¹⁰⁵ See DIMINO, *supra* note 20, at 210-11 (explaining the incentives for vote swappers during the 2000 Presidential Election: "Nader supporters in close states were willing to trade their votes and vote for Democratic candidate Al Gore, while Gore supporters in blow-out states were willing to trade their votes and vote for Nader.").

¹⁰⁶ See *Bush v. Gore*, 531 U.S. 98, 100-01 (2000) (upholding the constitutional validity of Florida's vote recount procedures, which resulted in candidate George W. Bush winning the Electoral College in the 2000 Presidential Election); see also Carter M. Yang, *Presidency Hinges on Tiny Bits of Paper*, ABC NEWS (Nov. 12, 2000), archived at <https://perma.cc/FU7Z-JVWC> (defining the term "chad"). "It is the tiny scored portion of a paper ballot that voters punch out using a small stylus to indicate their preference for a candidate." *Id.* "If a chad is punched completely out of the card, counting machines register each hole as a vote." *Id.* "But sometimes the tiny pieces of paper stay partially or completely stuck to the ballots — which may make it impossible for machines to read them." *Id.*

¹⁰⁷ See Randazza, *supra* note 10, at 146-47 (tracing the genesis of online vote swapping to the 2000 Presidential Election to "when some members of the Texas Democratic Party, resigned to the fact that Texas was firmly in George W. Bush's column, proposed trading their votes with Nader supporters in swing states").

16,024 vote swaps and registered 2.8 million total page views.¹⁰⁸ In Florida, the state that proved pivotal to the outcome of the election,¹⁰⁹ Votetrader.org estimated that 1,412 probable Nader voters made online pledges to vote for Gore.¹¹⁰ While this effort to help Gore fell short by just 537 votes, it demonstrated that online vote swapping could, in theory, flip a pivotal swing state in a future election.¹¹¹

Constitutional law professor Jamin Raskin is probably the most identifiable public figure who supports online vote swapping.¹¹² Raskin analogized the online vote swapping to the longstanding practice of “pairing” or “legislative logrolling” that is common in legislative bodies across the United States, including in the U.S. Senate.¹¹³ Raskin defended the practice as a legal political activity protected under the First Amendment, and even urged interested voters to log onto several vote swapping websites to help Al Gore win the election.¹¹⁴ Raskin’s articles brought national attention to these vote

¹⁰⁸ See Worley, *supra* note 100, at 46-47 (explaining that “WinWin Campaign logged the most hits (1,338,259) and participants (10,251)”).

¹⁰⁹ See Bush, *supra* note 106, at 100-01 (upholding the constitutional validity of Florida’s vote recount procedures, which resulted in candidate George W. Bush’s victory in the 2000 Presidential Election).

¹¹⁰ See Worley, *supra* note 100, at 47 (“Other sites reporting at least 5,000 vote swapping participants were Voteexchange.com (9,698), Winchell’s Nader Trader (6,325) and Voteswap2000.com (5,000).”).

¹¹¹ See 2000 Official Presidential General Election Results, FED. ELECTIONS COMM’N (Dec. 2001), archived at <https://perma.cc/UR4P-XZ5Z> (reporting candidate Al Gore’s campaign lost by 4 electoral votes nationally). Gore lost the state of Florida to George W. Bush by just 537 votes. *Id.*

¹¹² See Jamin Raskin, *Nader’s Traders*, SLATE (Oct. 25, 2000), archived at <https://perma.cc/W3JT-YPTH> (likening vote swapping in presidential elections to the well-established practice of “pairing” whereby senators on opposite sides of issues match up their votes if they are going to be absent for a vote to voting in the 2000 Presidential Election).

¹¹³ See Worley, *supra* note 100, at 37 (quoting Raskin who argues: “[I]t is the highest form of democratic politics” to swap one’s vote and Americans should “join forces through the Internet and become professors of the Electoral College rather than dropouts from it.”).

¹¹⁴ See Raskin, *supra* note 112 (“Since no one is bound by their statements, it would not even amount to vote-trading, which is itself a perfectly permissible and ordinary activity.”). “Indeed, vote-trading is the essence of legislative logrolling in Washington: You vote yes on my highway bill, and I will vote yes on your tax bill.” *Id.* “We compromise to arrive at mutually workable solutions.” *Id.* *Contra* Randazza, *supra* note 10, at 147 (conveying some critics called online vote swapping “electoral Napster”).

swapping websites.¹¹⁵ California, Arizona, Minnesota, and New York declared vote swapping to be a violation of state election laws.¹¹⁶ Other states took the opposite approach: Maine, Nebraska, and Oregon declared vote swapping to be legal.¹¹⁷

Generally, vote swapping websites offer resources to users through three models: 1) the encouragement model; 2) the bulletin board model; and 3) the automatic brokering model.¹¹⁸ The websites employing the encouragement model never drew criticism from states because these websites only provided users with information about vote swapping and left users to connect offline.¹¹⁹ Websites employing the bulletin board model provided their users with information and forums that users could use to meet online and negotiate trades.¹²⁰ Websites employing the automatic brokering model pair interested online vote swappers based on the personal information users provide to the website either by connecting users directly or by providing users with email addresses of potential swap partners.¹²¹ Most of the legal controversy over online vote swapping focuses on this model because these websites act as third party brokers to these vote swap agreements by pairing interested parties who would not otherwise meet and trade votes.¹²²

¹¹⁵ See Worley, *supra* note 100, at 37-40 (explaining prior to Raskin's Slate article, Voteswap2000.com arranged 500 swaps in one week). After the Raskin article, "VoteSwap2000 arranged 500 trades in 24 hours, and in its short life matched 5,000 voters." *Id.* "Votexchange2000.com claimed they registered 'a few thousand people.'" *Id.*

¹¹⁶ See Worley, *supra* note 100, at 43 (listing Arizona, Minnesota, and New York).

¹¹⁷ See Worley, *supra* note 100, at 43 (naming Maine, Nebraska, and Oregon).

¹¹⁸ See Worley, *supra* note 100, at 45 (noting that some websites employed a hybrid model that borrowed from two or more of these models, such as "WinWin" Campaign.).

¹¹⁹ See Worley, *supra* note 100, at 60 (pointing to the encouragement model and the bulletin board model). Moreover, New York targeted sites using the automatic brokering model and categorized websites using variants of the other models as "free speech" sites. *Id.* at 64. Websites employing this model include Nader Trader, Green for Gore. *Id.*

¹²⁰ See Worley, *supra* note 100, at 35 (concluding voteexchange.org as operating the encouragement model).

¹²¹ See Worley, *supra* note 100, at 62 (noting that each state that took legal action against vote swap websites did so against sites operating the automatic brokering model).

¹²² See Worley, *supra* note 100, at 63 ("Because these sites act as active facilitators of vote swapping, the operators run the risk of being co-ventures with their users.").

B. *The Ninth Circuit Takes on Online Vote Swapping*

Online vote swapping is legal based on the Ninth Circuit Court of Appeals decision in *Porter v. Bowen*.¹²³ On October 30, 2000, the owner of Voteswap2000.com received a cease-and-desist letter from California Secretary of State Bill Jones¹²⁴ (“Jones”) accusing the website of violating California’s Election Codes §§ 18521 and 18522.¹²⁵ After receiving Jones’s letter, Swap suspended its operations and another vote swapping website, Voteexchange2000.com voluntarily shut down.¹²⁶ Both websites employed the automatic brokering model.¹²⁷ Voteexchange2000.com voluntarily shut down.¹²⁶ Both websites employed the automatic brokering model.¹²⁷

¹²³ See Sarah Lai Stirland, *Internet Vote-Swapping Legal, Says 9th Circuit*, WIRED (Aug. 6, 2007), archived at <https://perma.cc/KD86-6YZF> (“A three-judge panel ruled Monday that the First Amendment interests of a Web site established in 2000 to organize the process between voters in different states outweighs state government’s concerns about fraud and corruption.”).

¹²⁴ See William Leon Jones, *Full Biography for Bill Jones*, SMART VOTER (Mar. 15, 2018), archived at <https://perma.cc/FUR2-8B9N> (describing Jones as an affiliated Republican who “aggressively implemented significant administrative and legislative reforms” in order “to ensure the integrity of California’s Elections system as California secretary of state”).

¹²⁵ See *Porter v. Jones*, 319 F.3d 483, 486 (9th Cir. 2003) (explaining that Jones received a cease and desist letter from the Secretary of State’s Office threatening to prosecute them under California election code § 18521 and § 18522 for brokering the exchange of votes); see also CAL. ELEC. CODE § 18521 (West 2011) (quoting: “A person shall not directly or through any other person receive, agree, or contract for, before, during or after an election, any money, gift, loan, or other valuable consideration,... because he or any other person: (a) Voted, agreed to vote, refrained from voting, or agreed to refrain from voting for any particular person or measure; (d) Induced any other person to: (3) Vote or refrain from voting for any particular person or measure.”); CAL. ELEC. CODE § 18522 (West 2011):

Neither a person . . . shall directly or through any other person or controlled committee pay, lend, or contribute, or offer or promise to pay, lend, or contribute, any money or other valuable consideration to or for any voter or to or for any other person to: (a) Induce any voter to: . . . (2) Vote or refrain from voting at an election for any particular person or measure . . . (b) Reward any voter for having . . . (2) Voted for any particular person or measure.

Id.

The website owners, along with eligible voters who claim they would have used the vote swapping websites, filed suit in The United States District Court for the Central District of California alleging the Jones letter's threat of prosecution for running vote swapping websites infringed their First Amendment rights.¹²⁸ Federal District Court Judge Robert J. Kelleher held the plaintiff's claims were moot and stayed the claims for damages under the *Pullman* abstention doctrine.¹²⁹ On appeal, Ninth Circuit Court of Appeals reversed and remanded the case with Circuit Judge Richard Paez holding the District Court's invocation of the *Pullman* abstention doctrine was improper.¹³⁰ The United States District Court for the Central District of California again found plaintiff's claims to be moot.¹³¹ On appeal, Circuit Court Judge Raymond C. Fisher reached the merits of the case

¹²⁶ See *Porter I*, 496 F.3d at 1015 (citing the cease and desist letter in relevant part: "Your website specifically offers to broker the exchange of votes throughout the United States of America."). "This activity is corruption of the voting process in violation of Elections Code sections 18521 and 18522 as well as Penal Code section 182, criminal conspiracy . . . The right to free and fair elections is a cornerstone of American democracy." *Id.* "Any person or entity that tries to exchange votes or brokers the exchange of votes will be pursued with the utmost vigor As the Chief Elections Officer of the State of California, I demand that you end this activity immediately." *Id.* "If you continue, you and anyone knowingly working with you may be criminally prosecuted to the fullest extent of the law." *Id.*

¹²⁷ See *id.* (Quoting the letter further: "No action was taken against websites that advocated vote swapping but did not actually include vote swapping mechanisms."). "Websites that were the subject of complaints were reviewed by the Secretary of State 'on a case-by-case basis, with each review process being very fact intensive.'" *Id.*

¹²⁸ See *id.* (noting the plaintiffs included one person from California and another from Massachusetts who argued that they would have used the websites if they were in operation).

¹²⁹ See *Porter I*, 496 F.3d at 1013 (restating that federal district court twice held the case to be moot).

¹³⁰ See *Porter*, 319 F.3d at 425 (stating: "We reverse the district court's stay of Plaintiff's claims under *Pullman* abstention because there are no special circumstances here that would indicate that we may disregard or general unwillingness to abstain in First Amendment cases when abstention itself could result in chilling the very First Amendment rights that plaintiffs seek to protect by suit.").

¹³¹ See *Porter I*, 496 F.3d at 1013 ("[The] district court twice found this case to be moot—most recently because of an informal letter from former Secretary of State Kevin Shelley to the California legislature asking for clarification of the state election code provisions.").

(“Porter I”), holding the websites’ online vote swap mechanisms engaged in protected First Amendment speech.¹³² But this is not the last word on the matter.¹³³

1. Porter I: A New Way to Build Political Coalitions?

Writing for the majority, Circuit Court Judge Raymond C. Fisher held that the plaintiffs possessed a First Amendment interest in the swap mechanisms, the communications enabled by those mechanisms, and any private agreements based on those communications because a vote-for-vote swap is not “valuable consideration” and, therefore is not illegal.¹³⁴ The Court’s reasoning relies on *Brown v. Hartlage* (“*Brown*”),¹³⁵ in which the Supreme Court of the United States rejected the application of a state election fraud statute prohibiting the exchange of votes for “money or other things of value.”¹³⁶ At issue in the case was a promise a candidate seeking a local elected office made to voters on the campaign trail to

¹³² See *Porter I*, 496 F.3d at 1019-20 (concluding that it is reasonable to assume that once paired, users would have exchanged messages concerning political preference, then negotiated until they brokered an agreement and this process is protected by First Amendment).

¹³³ See *Porter v. Bowen*, 518 F.3d 1181, 1181 (9th Cir, 2008) [hereinafter *Porter II*] (denying rehearing *en banc*).

¹³⁴ See *Porter I*, 496 F.3d at 1020 (“Whether or not one agrees with these voters’ tactics, such efforts, when conducted honestly and without money changing hands, are at the heart of the liberty safeguarded by the First Amendment.”); see also CAL. ELEC. CODE § 18521, *supra* note 125 (receiving “valuable consideration” for vote triggers the statute’s jurisdiction); CAL. ELEC. CODE § 18522, *supra* note 125 (showing that statute prohibits citizens from receiving “valuable consideration” for a vote); *contra* DIMINO, *supra* note 20, at 211 (“One might question whether there is any principled difference between vote-trading and vote-buying.”).

¹³⁵ See *Brown v. Hartlage*, 456 U.S. 45, 58-59 (1982) (holding a candidate’s promise to confer some ultimate benefit on voters by promising to lower his salary as a public servant if elected is protected by the First Amendment and does not violate a state election fraud statute).

¹³⁶ See *Porter II*, 518 F.3d at 1182-83 (Kleinfeld, A., dissenting) (quoting *Brown v. Hartlage*, 456 U.S. 45 (1982)) (Quoting: “No body politic worthy of being called a democracy entrusts the selection of leaders to a process of auction or barter.”). Further, “[a]nd as a State may prohibit the giving of money or other things of value to a voter in exchange for his support, it may also declare unlawful an agreement embodying the intention to make such an exchange.” *Id.*

reduce local officials' salaries if he were elected.¹³⁷ The Court held the candidate's pledge to be constitutional because the kind of promise the candidate made was "universally acknowledged to be legitimate" even though it amounted to a commitment to enrich voters if the promise were performed.¹³⁸ The pledge was merely a promise to govern in a particular way, not to give voters something privately in exchange for their votes.¹³⁹

To support the constitutionality of online vote swapping, Judge Fisher's majority opinion reasoned that online vote swapping is more similar to the candidate's promise in *Brown* to take a pay cut if elected than to unprotected vote buying.¹⁴⁰ Similar to the promise in *Brown*, Judge Fisher framed online vote swapping as a promise to confer some ultimate benefit on another voter that is not for *private* profit because the only benefit an online vote swapper can receive is "a marginally higher probability that his preferred electoral outcome will come to pass."¹⁴¹

¹³⁷ See *Brown*, 456 U.S. at 47 (stating terms of the candidate's pledge). "We abhor the commissioners' outrageous salaries. And to prove the strength of our convictions, one of our first official acts as county commissioners will be to lower our salary to a more realistic level. We will lower our salaries, saving the taxpayers \$36,000 during our first term of office, by \$3,000 each year." *Id.*

¹³⁸ See *Porter II*, 518 F.3d at 1185 (Kleinfeld, A., dissenting) (expressing surprise that this case is the authority relied on by the majority opinion). "This is the authority the panel relies on for its view that the First Amendment shields solicitations for vote swapping agreements." *Id.*

¹³⁹ See *Porter II*, 518 F.3d at 1185 (Kleinfeld, A., dissenting) (distinguishing between benefits received from public channels as opposed to private channels).

¹⁴⁰ See *Porter I*, 496 F.3d at 1020 (announcing that "[v]ote swapping, however, is more akin to the candidate's pledge in *Brown* to take a pay cut if elected, which the Court concluded was constitutionally protected, than to unprotected vote buying").

¹⁴¹ See *Brown*, 456 U.S. at 54-55 (holding state election statute language could bar exchange of non-monetary consideration for vote); but see *Porter I*, *supra* note 103, at 1020 (reasoning that vote swapping cannot be the type of illegal exchange for private profit because the only benefit derived from such arrangements is a higher probability that one party's candidate of choice will win the election).

2. Porter II: Flooding Swing States?

The state of California petitioned the Ninth Circuit Court of Appeals' to rehear the *Porter I* case *en banc*.¹⁴² Even though the court denied the motion, Circuit Court Judge Andrew Kleinfeld filed a dissenting opinion questioning the *Porter I* decision ("*Porter II*").¹⁴³

To Judge Kleinfeld, the *Porter I* court's rationale for extending First Amendment protections to online vote swap agreements was flawed because the benefits vote swappers derive from their private arrangements are "valuable consideration" sufficient to trigger California's Election Codes §§ 18521 and 18522.¹⁴⁴

According to Judge Kleinfeld, the *Porter I* court failed to recognize the critical distinction the Supreme Court made in *Brown* between the channels through which citizens could receive benefits for their votes.¹⁴⁵ First, the benefit a voter receives from casting their ballot for a political candidate and the benefit derived from a private arrangement with another citizen are fundamentally different.¹⁴⁶ Accordingly, personal benefits that citizens receive by casting their ballots for a candidates are legal if the benefit is achieved through "the normal processes of government and not through some private arrangement."¹⁴⁷ To Judge Kleinfeld, if a citizen receives a benefit for

¹⁴² See *Porter II*, 518 F.3d at 1181 (Kleinfeld, A., dissenting) (requesting a vote on whether to rehear the case, the matter failed to receive a majority of the votes of the no recused active judges in favor of an *en banc* consideration).

¹⁴³ See *Porter II*, 518 F.3d at 1181 (Kleinfeld, A., dissenting) (noting the dissenting opinion was joined by two judges in filing his dissent).

¹⁴⁴ See *Porter II*, 518 F.3d at 1182 (Kleinfeld, A., dissenting) (summarizing his argument in a syllogism: "(1) Vote buying is not protected by the First Amendment; (2) vote swap agreements are vote buying; so (3) vote swapping agreements are not protected by the First Amendment."); see also CAL. ELEC. CODE § 18521, *supra* note 125 (receiving "valuable consideration" for vote triggers the statute's jurisdiction); CAL. ELEC. CODE § 18522, *supra* note 125 (prohibiting citizens from receiving "valuable consideration" for a vote).

¹⁴⁵ See *Porter II*, 518 F.3d at 1182 (Kleinfeld, A., dissenting) ("[*Brown* court's language] goes beyond the simple money for vote exchange, to exclude from First Amendment protection agreements for exchanges, and agreements for things of value other than money").

¹⁴⁶ See *Porter II*, 518 F.3d at 1183 (Kleinfeld, A., dissenting) ("[What] the Court held to be unprotected is what we have in this case: a scheme to facilitate the exchange of something valuable, a promise, in exchange for a vote.").

¹⁴⁷ See *Porter II*, 518 F.3d at 1185 (Kleinfeld, A., dissenting) (distinguishing a benefit through "normal process of government" includes, for example, the enactment of tax policy).

her vote from a private arrangement, then that exchange of value would constitute outright vote buying.¹⁴⁸

Next, Judge Kleinfeld argued that, as a technical matter, vote swapping agreements have all the elements of a contract.¹⁴⁹ The court in *Porter I* treated the vote swapping website's users' negotiations as political speech even though the Supreme Court held in *Brown* that not all agreements expressed through speech are protected under the First Amendment.¹⁵⁰ A promise can be consideration even if the promise is unenforceable, and even if it is "not binding or against public policy."¹⁵¹

Lastly, Judge Kleinfeld noted that legal online vote swapping undermined the system of ordered liberty established by the Constitution.¹⁵² For example, vote swapping undermines the state-by-state elections system established under the Constitution by Article

¹⁴⁸ See *Porter II*, 518 F.3d at 1183 (Kleinfeld, A., dissenting) ("The difference between the vote swapping scheme here and more traditional vote buying is that instead of one side to the transaction buying the vote and the other selling it, both are buying and both are selling.").

¹⁴⁹ See *Porter II*, 518 F.3d at 1183 (Kleinfeld, A., dissenting) ("The exchange of promises is an ordinary means of making a contract, whether legal or illegal, and no one has doubted for centuries that promises form consideration for contracts."), ¹⁵⁰ See *Brown*, 456 U.S. at 55 ("The fact that an agreement necessarily takes the form of words does not confer upon it, or upon the underlying conduct, the constitutional immunities that the First Amendment extends to speech.").

¹⁵¹ See RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST., 1981) ("Consideration may consist of a performance or of a return promise."). "Consideration by way of performance may be a specified act of forbearance, or any one of several specified acts or forbearances of which the offeree is given the choice, or such conduct as will produce a specified result." *Id.* "Or either the offeror or the offeree may request as consideration the creation, modification or destruction of a purely intangible legal relation." *Id.* "Not infrequently the consideration bargained for is an act with the added requirement that a certain legal result shall be produced." *Id.*; RESTATEMENT (SECOND) OF CONTRACTS § 78 (AM. LAW INST., 1981) (acknowledging how the "fact that a rule of law renders a promise voidable or unenforceable does not prevent it from being consideration"). "A promise may be unenforceable by reason of lack of consideration or public policy, or because of a statute relating to remedies, such as the Statute of Frauds, or because of the traditional immunity of the sovereign from suit." *Id.* "In such cases a return promise may or may not be unenforceable on the same or other grounds." *Id.* But the fact that a promise is unenforceable does not mean that the return promise lacks consideration." *Id.*

¹⁵² See *Porter II*, 518 F.3d at 1183 (Kleinfeld, A., dissenting) (summarizing policy reasons for excluding from First Amendment protections online vote swapping, including undermining federal electoral system and contravening case precedent).

Two, Section One and the Twelfth Amendment.¹⁵³ Judge Kleinfeld recalled the sectarian bloodshed that preceded the outbreak of the Civil War, in places like “Bleeding Kansas.”¹⁵⁴ Just as bands of border ruffians crossed into Kansas from Missouri to cast fraudulent ballots in support of a pro-slavery government, here, Kleinfeld warned that the *Porter I* decision incentivized a new form of statewide election fraud as citizens residing in safe states could flood swing state elections with offers to swap votes *en masse*.¹⁵⁵

*C. Trump Traders: More Sophisticated Online Swap
Agreements Signify an Emerging Market in Votes?*

Buoyed by the Ninth Circuit’s decision in *Porter II* legalizing vote swapping websites, at least five online vote swapping websites operated during the 2016 Presidential Election.¹⁵⁶ These websites claimed they paired tens of thousands of voters in private swap agreements across the country, but successful swaps cannot be confirmed.¹⁵⁷

¹⁵³ See *Porter II*, 518 F.3d at 1184 (Kleinfeld, A., dissenting) (“[S]tate-by- state voting is the system for which they provide.”). “The First Amendment does not prevent state prosecution of those who subvert it by making arrangements effectively to cast votes in other states.” *Id.*

¹⁵⁴ See *Porter II*, 518 F.3d at 1184 (Kleinfeld, A., dissenting) (quoting: “Voting fraud by Missourians crossing the border to vote for slavery in the Kansas Territory, terrorism by proslavery and antislavery guerrillas, and two competing state legislatures, led contemporary observers to write of ‘the anarchy and terrorism resulting from massive voting fraud in ‘Bleeding Kansas’ by proslavery voters from Missouri crossing the border to counter pro-abolition voters from New England.”).

¹⁵⁵ See *Porter II*, 518 F.3d at 1185-86 (Kleinfeld, A., dissenting) (“If people in one state want people in another state to vote a particular way, they can go there and ring doorbells, send them letters, buy advertisements on their media, publicize arguments on the internet, and otherwise explain to them why they ought to vote a particular way.”). “But they do not have a constitutional right to buy their votes, with money or promises.” *Id.*

¹⁵⁶ See *Trump Traders*, TRUMPTRADERS.ORG (Nov. 15, 2017), *archived at* <https://perma.cc/4GA6-QJLP> (analyzing individuals that signed up to vote for Trump); see also *What is a VotePact?*, VOTE PACT (Nov. 15, 2017), *archived at* <https://perma.cc/YD98-DXDZ> (discussing how people form a pact to vote for a certain candidate such as through social media); see also *#Nevertrump* (Nov. 15, 2017), *archived at* <https://perma.cc/2DLB-CNF4> (highlighting the movement to vote against Trump); see also *Balanced Rebellion*, FACEBOOK (Nov. 15, 2017), *archived at* <https://perma.cc/K5E4-F2X7> (showing videos suggesting a stance against government).

Trump Traders stands out among its online vote swapping website brethren because it presented a new twist on the automatic brokering model.¹⁵⁸ Trump Traders' pairing system can execute more complicated online vote swap arrangements by matching a single voter in a swing state with multiple voters who reside in safe states.¹⁵⁹

D. Hasen's Arguments for Prohibiting Vote Buying and Its Variants

Election law scholar Richard Hasen posited three underlying justifications for why vote buying is criminalized in American elections.¹⁶⁰ To Hasen, each of the rationales provides independent support for an outright ban on vote-buying or activities substantially similar to it, including vote swaps.¹⁶¹

First, vote buying is criminalized because the Constitution is interpreted to apply principles of equality to political markets for votes but not to economic markets.¹⁶² This rationale assumed that, if allowed, a poor citizen would have an incentive to sell their vote to wealthy citizens due to "the declining marginal utility of money," which posits that a small sum of money has more value to a poor

¹⁵⁷ See *Balanced Rebellion*, *supra* note 156 (30,819 successful matches made, covering 61,638 people); see also *Trump Traders*, *supra* note 156 (45,000+ voters signed up to trade including 5,000+ in Florida alone); see also *What is a VotePact?*, *supra* note 156 (encouraging users to swap votes using Facebook as a forum).

¹⁵⁸ See *Trade Votes to Defeat Trump*, TRUMPTRADERS.ORG (Nov 15, 2017), archived at <https://perma.cc/6BQC-PP86> (explaining how Trump Traders operates). "2x 3rd-party votes in a safe state for 1x Clinton vote in a swing state." *Id.*

¹⁵⁹ See *id.* ("Trump Traders is connecting third-party supporters in swing states with Clinton supporters in safe states, uniting millions of Americans across party lines who agree that Donald Trump must be defeated."). "Vote trades will shift votes for candidates like Gary Johnson, Jill Stein, and Evan McMullin into safe states, and votes for Hillary Clinton into battleground states like Ohio, Florida, and Pennsylvania." *Id.*

¹⁶⁰ See Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323, 1323 (2000) (describing how equality, efficiency, and inalienability are three reasons that justify banning core vote buying).

¹⁶¹ See *id.* at 1336 ("[L]ike the other two arguments, [inalienability] could alone support a ban on vote buying.").

¹⁶² See *id.* at 1330 (highlighting that how "[e]ven if the poor would be willing to accept money in return for giving up the right to vote, egalitarians object to the sale, believing that rich and poor should have equal influence over political outcomes").

person than to a rich person.¹⁶³ Accordingly, documented prosecutions of vote buying usually involve small sums of money.¹⁶⁴ Plus, a single vote's value is probably low because it's unlikely that a single vote would be decisive in deciding an election.¹⁶⁵

Second, vote buying is prohibited for efficiency's sake.¹⁶⁶ While hindering the alienability of a commodity, like a vote, may appear to be inefficient, Hasen argues that vote buying risks overlooking "negative externalities"-- or burdens imposed on third parties-- by the execution of these transactions.¹⁶⁷ For example, vote buying could incentivize political candidates to "rent-seek."¹⁶⁸ An activity is categorized as "rent-seeking" if it increases a party's wealth without creating new wealth, usually through the political arena.¹⁶⁹ Examples include bribing officials or lobbying governments for subsidies or even enforcing restrictive licensing schemes that limit the number of practitioners in an occupation.¹⁷⁰ Such dodgy activities create societies that are inefficient and unequal.¹⁷¹

¹⁶³ See *id.* at 1329 ("[P]eople get greater value out of initial dollars than later dollars."). "Economists call this principle the 'declining marginal utility of money.'" *Id.*

¹⁶⁴ See *id.* at 1329 (attributing observation to Pamela Karlan's work). "In the Dodge County case, the closest real-world example I have found of a competitive vote-buying market in the United States, votes were sold for \$20 to \$40 per vote." *Id.*

¹⁶⁵ See Hasen, *supra* note 160, at 1329 (detailing how the votes likely will not influence the election).

¹⁶⁶ See Hasen, *supra* note 160, at 1331-32 ("An efficiency analysis puts aside equality questions and instead asks whether the ban on vote buying increases or decreases overall social wealth (regardless of its distribution).").

¹⁶⁷ See Hasen, *supra* note 160, at 1332 ("[A] rule of 'one person, one vote' does not allow people to register the intensity of their preferences for or against a candidate or ballot issue in an election, money seems a useful way to express intensity of preference.").

¹⁶⁸ See Hasen, *supra* note 160, at 1333 (depicting how "'rent seeking' is inefficient"). "We block the seemingly efficient vote-buying transaction between Bob and Sarah because it has negative externalities." *Id.*

¹⁶⁹ See David R. Henderson, *Rent Seeking*, LIBR. OF ECON. AND LIBERTY (2018), archived at <https://perma.cc/B2DS-Z68S> (defining "rent seeking" as when people "try to obtain benefits for themselves through the political arena").

Hasen's third rationale rejects the commodification of votes altogether.¹⁷² Because individual citizens do not own their votes, the political community that confers the vote to the individual citizen is able to restrict the sale of its votes.¹⁷³

IV. Analysis

Questions concerning the exercise of basic civil rights in the "vast democratic forums of the Internet" must be addressed.¹⁷⁴ Arguments for online vote swapping blur the reasoning between activities protected by the First Amendment and violations of federal and state election fraud statutes.¹⁷⁵ In the years since the Ninth Circuit decided *Porter I*, online vote swapping websites innovated and diversified, concocting new swap mechanisms that make the process easier and even broker agreements between three or more voters at a

¹⁷⁰ See *id.* ("[Rent-seekers] do so by getting a subsidy for a good they produce or for being in a particular class of people, by getting a tariff on a good they produce, or by getting a special regulation that hampers their competitors."). "Elderly people, for example, often seek higher Social Security payments; steel producers often seek restrictions on imports of steel; and licensed electricians and doctors often lobby to keep regulations in place that restrict competition from unlicensed electricians or doctors." *Id.*

¹⁷¹ See *id.* (crediting Gordon Tullock for coining the term "rent-seeking" and identifying disadvantages associated with the concept). "Tullock's insight was that expenditures on lobbying for privileges are costly and that these expenditures, therefore, dissipate some of the gains to the beneficiaries and cause inefficiency." *Id.*

¹⁷² See Hasen, *supra* note 160, at 1335 ("[The] inalienability argument is based upon a moral judgment that votes should not be salable or transferable.").

¹⁷³ See Hasen, *supra* note 160, at 1336 ("If votes were freely tradable, we would have a different conception of what voting is for - about the values that it embodies - and this changed conception would have corrosive effects on politics.").

¹⁷⁴ See Packingham *supra* note 84, at 1735 ("A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more."); see also Chadwick, *supra* note 85 (applying Habermas's work to the internet as "an idealized autonomous sphere of communication in which citizens can freely engage in reasoned debate away from the controlling influence of the state, large media corporations, and structures of social inequality").

¹⁷⁵ See Randazza, *supra* note 10, at 153 ("If the First Amendment means anything, it means that Americans have the right to speak freely in a public forum on matters of political importance.").

time.¹⁷⁶ Meanwhile, vote swappers are disrupting the operation of the Electoral College by influencing statewide elections in jurisdictions where they are not legally qualified to vote.¹⁷⁷ Lastly, the acceptance of online vote swapping necessarily embraces the principle of vote buying, which is universally recognized as illegal in the United States.¹⁷⁸ For these reasons, online vote swapping should not be legal.

A. *Straddling the Line in Porter*

Brown was factually distinguishable from *Porter* because a political candidate's promise to voters is meaningfully different from private parties swapping votes.¹⁷⁹ In *Brown*, the Supreme Court distinguished between the benefit a voter receives from her own vote and the benefit a voter receives from a private arrangement with another citizen to vote in a specific way.¹⁸⁰ If the benefit a voter receives is from her own vote, then it is derived from "the normal processes of government and not through some private arrangement," and, therefore is legal.¹⁸¹ But if the benefit a voter receives is from a private arrangement, then *Brown* held that a state government may ban

¹⁷⁶ See *Trump Traders*, *supra* note 158 ("[Advertising] 2x 3rd-party votes in a safe state for 1x Clinton vote in a swing state.").

¹⁷⁷ See *Porter II*, 518 F.3d at 1184 (Kleinfeld, A., dissenting) (invoking image of online vote swappers as "invasion of 'border ruffians'" into statewide elections); see also *Crockett*, *supra* note 6 (defending the use of online vote swapping computer applications as "indicative of a growing movement to break the two-party system in the United States — to introduce a more inclusive, representative model, with a more popular vote"); see also *Randazza*, *supra* note 10, at 164 (defending online vote swapping because it allows voters to express their sincere political preferences in an election); see also *Trump Traders*, *supra* note 156 (facilitating swap agreements between one third party supporter in swing states with more than one major candidate voter in a noncompetitive state); see also *The Spoiler Effect*, *supra* note 93 (identifying the "spoiler effect" as occurring most often in election systems with "plurality voting, or choose-one method").

¹⁷⁸ See *DIMINO*, *supra* note 20, at 210-11 (comparing the benefits that accrue to a citizen in a vote-for-vote swap and a vote-for-cash swap and concluding that there is no appreciable difference).

¹⁷⁹ See *Porter II*, 518 F.3d at 1182 (Kleinfeld, A., dissenting) ("[*Brown v. Hartlage*] is the only case relied upon by the panel, [and] says the opposite of what the panel decision uses it for.").

¹⁸⁰ See *Porter II*, 518 F.3d at 1185 (Kleinfeld, A., dissenting) (explaining "normal processes of government" entails governing in a specific way).

¹⁸¹ See *Porter II*, 518 F.3d at 1185 (Kleinfeld, A., dissenting) (detailing that the "normal process of government" includes, for example, the enactment of tax policy).

the exchange of a vote for “money or other things of value.”¹⁸² Vote swap agreements are brokered between private citizens, therefore, the *Porter I* court arrived at the opposite conclusion than the Supreme Court arrived at in *Brown*.¹⁸³

Unlike the vote swap mechanisms at issue in *Porter*, websites like Trump Trader, through the complexity of their swap agreements, may “automate the fraud” presented by online vote swapping if the websites are not authenticating user information.¹⁸⁴ With numerous voters coordinating their efforts to influence a single vote in a swing state, Judge Kleinfeld’s warnings of border state ruffians storming into statewide elections and fraudulently casting ballots becomes more plausible with the *Porter I* decision.¹⁸⁵

¹⁸² See *Brown*, 456 U.S. at 56 (qualifying the distinction: “It remains to determine the standards by which we might distinguish between those ‘private arrangements’ that are inconsistent with democratic government, and those candidate assurances that promote the representative foundation of our political system.”). “We hesitate before attempting to formulate some test of constitutional legitimacy: the precise nature of the promise, the conditions upon which it is given, the circumstances under which it is made, the size of the audience, the nature and size of the group to be benefited, all might, in some instance and to varying extents, bear upon the constitutional assessment.” *Id.* “But acknowledging the difficulty of rendering a concise formulation, or recognizing the possibility of borderline cases, does not disable us from identifying cases far from any troublesome border.” *Id.*; see also *Porter II*, 518 F.3d at 1183 (Kleinfeld, A., dissenting) (“[W]hat the Court held to be unprotected is what we have in this case: a scheme to facilitate the exchange of something valuable, a promise, in exchange for a vote.”). “The difference between the vote swapping scheme here and more traditional vote buying is that instead of one side to the transaction buying the vote and the other selling it, both are buying and both are selling.” *Id.*

¹⁸³ See *Porter II*, 518 F.3d at 1185 (Kleinfeld, A., dissenting) (“This is the authority the panel relies on for its view that the First Amendment shields solicitations for vote swapping agreements.”).

¹⁸⁴ See *Porter I*, 496 F.3d at 1013-14 (“[V]oteswap2000.com did not seek to verify any person’s state (or even country) of residence, nor could the website prevent people from being dishonest about their voting intentions or swapping votes multiple times by entering multiple e-mail addresses.”). “There was no way to ‘automate’ the fraud, that is, to agree to trade votes without first making e-mail contact and offering specific representations (even if bogus) to the other party about the fraudster’s identity, location and voting intentions.” *Id.* at 1024; see also *Trump Traders*, *supra* note 156 (requiring only an email address to sign up); see also Rashid, *supra* note 75 (cataloguing myriad of phishing strategies).

¹⁸⁵ See *Porter II*, 518 F.3d at 1184 (Kleinfeld, A., dissenting) (invoking image of online vote swappers as “invasion of ‘border ruffians’” into statewide elections).

B. A Vote Should Be “Valuable Consideration”

Arguments in support of online vote swapping rest on contradictory premises: the underlying agreements represent an exchange of promises between parties who value their votes, yet the private arrangements are unenforceable because there is no detriment suffered in the event of nonperformance by either party.¹⁸⁶ A vote-for-vote exchange in which each party promises to vote for the other party’s preferred candidate should be considered “valuable consideration.”¹⁸⁷

Randazza argues that vote-for-vote exchanges lack “valuable consideration” because either party is free to withdraw from the arrangement at any time with their right to vote intact regardless of whether the other party performs under the agreement.¹⁸⁸ The peculiar nature of the exchanged for promises implicates First Amendment rights that, according to Randazza, make the private agreements between voters unenforceable.¹⁸⁹

These arguments define “detriment” arising from nonperformance or breach with the nonperforming party’s interest in mind.¹⁹⁰ Such nonperformance preserves the nonperformer’s right to vote while leaving the other parties to perform under the terms of the

¹⁸⁶ See Worley, *supra* note 100, at 65 (asking: “How can a promise of such value to the Constitution and society as a whole possibly fail to meet the ‘valuable consideration’ standard?”).

¹⁸⁷ See *Porter II*, 518 F.3d at 1183 (Kleinfeld, A., dissenting) (stating: “The exchange of promises is an ordinary means of making a contract, whether legal or illegal, and no one has doubted for centuries that promises form consideration for contracts.”); see also CAL. ELEC. CODE § 18521, *supra* note 125 (receiving “valuable consideration” for vote triggers the statute’s jurisdiction); CAL. ELEC. CODE § 18522, *supra* note 125 (similarly, statute prohibits citizen from receiving “valuable consideration” for a vote); *contra* Randazza, *supra* note 10, at 178-79 (focusing analysis on the lack of detriment if a party to agreement does not perform and characterizing the nature of exchange as “gratuitous consideration”).

¹⁸⁸ See Randazza, *supra* note 10, at 179 (“The promises made in the arrangement of an online vote swap did not change these rights.”). “When voters agreed to swap their votes, they retained all of their rights to vote or refrain from voting, or to vote for whichever candidate they chose.” *Id.*

¹⁸⁹ See Randazza, *supra* note 10, at 179 (“[T]he acts of vote swappers were no more than exchanges of mere gratuitous consideration, and the website operators were working outside the scope of the statute.”).

¹⁹⁰ See Randazza, *supra* note 10, at 179 (“When voters agreed to swap their votes, they retained all of their rights to vote or refrain from voting, or to vote for whichever candidate they chose.”). “Their pledge was unenforceable, and they were free to withdraw at any time without detriment.” *Id.*

agreement and cast ballots for the nonperformer's candidate of choice—not her own.¹⁹¹ This uncertainty is intensified by the lack of transparency throughout the voting process: there is no way of confirming if the parties to vote swap agreements actually vote as they promised (or even vote at all).¹⁹² For these reasons, votes constitute “valuable consideration” in vote swapping agreements and fall within the jurisdiction of state election statutes.¹⁹³

The federal election fraud statute, § 10307, does not require prosecutors to prove a defendant's specific intent in order to obtain a conviction because “the payment itself, not the purpose for which it is made, is the harm and the gist of the offense.”¹⁹⁴ The statute safeguards federal elections from the mere suspicion of fraud because the activities being regulated—voting and elections—are vital to the operation of the United States government.¹⁹⁵ Using the § 10307 as a model, the exchange of mutual promises to vote for a specific candidate should fall within the scope of California's Election Code §§ 1852's statutory language “valuable consideration.”¹⁹⁶

¹⁹¹ See *Porter I*, 496 F.3d at 1018 (concluding the website swap mechanisms, the communications, and vote swaps that the mechanisms enabled between paired users constituted protected speech because each express reasonably clear support for a political candidate without considering any detriment that may result if a party does not perform).

¹⁹² See *Brown*, *supra* note 28 (highlighting that only the fact that a citizen voted is public record, not how they voted).

¹⁹³ See *Porter II*, 518 F.3d at 1182 (Kleinfeld, A., dissenting) (summarizing argument as a syllogism: “(1) Vote buying is not protected by the First Amendment; (2) vote swap agreements are vote buying; so (3) vote swapping agreements are not protected by the First Amendment.”); see also CAL. ELEC. CODE § 18521, *supra* note 125 (receiving “valuable consideration” for vote triggers the statute's jurisdiction); CAL. ELEC. CODE § 18522, *supra* note 125 (comparing that similarly, statute prohibits citizen from receiving “valuable consideration” for a vote).

¹⁹⁴ See *Bowman*, *supra* note 55, at 1012 (“The language of the statute is clear; no specific intent to interfere with the federal races on a ballot containing federal, state, and local races is required.”). “The only way to prevent corruption in federal elections with any reasonable possibility of success, indeed, the means that Congress has chosen, is to foreclose all chances of exposure by prohibiting corrupt practices anytime a federal candidate is on the ballot.” *Id.*

¹⁹⁵ See *Bowman*, *supra* note 55, at 1012 (“[F]ederal and state elections held on the same day and with all candidates listed on one ballot, it is impossible to isolate a threat to the integrity of the state electoral process from a threat to the integrity of the federal contest.”).

¹⁹⁶ See 52 U.S.C. § 10307, *supra* note 52 (including language barring exchange of a voter when a voter “offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than \$10,000 or imprisoned not more than five

C. *Trump Traders & Hasen*

Any of Hasen's rationales on its own justifies prohibiting vote buying or its progeny, online vote swapping.¹⁹⁷ The acceptance of online vote swapping necessarily embraces the principle of vote buying, which is universally recognized as illegal in the United States.¹⁹⁸

1. Vote Swapping Violates the Principle of Political Equality.

If allowed, poor citizens would have an incentive to sell their votes for small sums to wealthy citizens because a dollar is worth more to a poor person than to a rich person.¹⁹⁹ The Electoral College distorts the relative value of votes between citizens who live in different states because the Framers of the Constitution did not intend to elect the president by a national popular vote.²⁰⁰ Therefore, the Electoral College over-values votes cast in swing states and in the least populous states.²⁰¹

years, or both"); *see also* CAL. ELEC. CODE § 18521, *supra* note 125 (receiving "valuable consideration" for vote triggers the statute's jurisdiction); CAL. ELEC. CODE § 18522, *supra* note 125 (proscribing a citizen from exchanging a vote for "any money or other valuable consideration").

¹⁹⁷ *See* Hasen, *supra* note 160, at 1326-27 (applying arguments against vote-buying to examples of vote swapping, such as legislative logrolling and judicial vote trading). "[L]ike the other two arguments, could alone support a ban on vote buying." *Id.* at 1327.

¹⁹⁸ *See Porter II*, 518 F.3d at 1182 (Kleinfeld, A., dissenting) ("[There is] not much precedent on point, because few have had the chutzpah to argue that buying promises to vote for someone, or arranging for them, would be constitutionally protected."); *see also* DIMINO, *supra* note 20, at 211 (asserting how someone "might question whether there is any principled difference between vote-trading and vote- buying").

¹⁹⁹ *See* Hasen, *supra* note 160, at 1329 ("[Poor] people get greater value out of initial dollars than later dollars."). "Economists call this principle the "declining marginal utility of money." *Id.*

²⁰⁰ *See* EDWARDS, *supra* note 23, at 112-13 (quoting: "John Roche, put it pointedly: the Electoral College 'was merely a jerry-rigged improvisation which has subsequently been endowed with a high theoretical content. The future . . . was left to cope with the problem of what to do with this Rube Goldberg mechanism.'").

²⁰¹ *See Trump Traders*, *supra* note 156 (exhorting voters to swap votes to avoid the candidate who is "the worst possible outcome," for the country instead of voting for the best candidate according to each voter).

Because the Electoral College distorts the relative value of votes, a third party voter who resides in a swing state can be thought of as wealthy and major party voter who resides in a safe state as poor. Under this analogy, then Hasen's prohibition on vote buying should apply with equal force to vote swapping because vote swapping enables wealthy voters in swing states to bargain their single vote for more power and influence by leveraging it for numerous poor votes in an online vote swap.²⁰² Therefore, vote swapping poses the same problem as vote-buying because both violate the principle of equality in political markets by providing a mechanism of exchange by which wealthy voters exert more influence over the electoral process than their counterparts, even though both wealthy and voters and poor voters are putative equals.²⁰³

2. Vote Swapping Undermines the Operation of the Electoral College.

In the 2016 Presidential Election, Hillary Clinton beat Donald Trump by six million votes in large states, such as California and New York, so under *Porter I*'s analysis, a significant number of Clinton voters ought to have swapped their votes with voters in competitive small states because these votes for Clinton were essentially "wasted" by the Electoral College.²⁰⁴ Much like how vote buying violates the principle of equality between voters in political markets, vote swapping presents similar concerns in presidential elections.²⁰⁵

²⁰² See Hasen, *supra* note 160, at 1329 (quoting: "The reason is intuitive: a dollar is worth more to a poor person than to a rich person because people get greater value out of initial dollars than later dollars."). "Economists call this principle the "declining marginal utility of money." *Id.*

²⁰³ See Sisgold, *supra* note 7, at 165 ("[M]any less fortunate individuals lack the technological literacy or Internet savvy necessary to match and exchange information over a computer.").

²⁰⁴ See Prokop, *supra* note 8 ("Millions of votes in safe states end up being 'wasted,' at least in terms of the presidential race, because it makes no difference whether Clinton wins California by 4 million votes, 400,000 votes, or 40 votes — in any scenario, she gets its 55 electors."). "Meanwhile, states like Florida and Ohio get the power to tip the outcome just because they happen to be closely divided politically." *Id.* Every vote cast for the winning candidate beyond the number needed to capture victory is, in effect, "wasted." *Id.*

²⁰⁵ See EDWARDS, *supra* note 23, at 112-13 (quoting: "John Roche, put it pointedly: the Electoral College 'was merely a jerry-rigged improvisation which has subsequently been endowed with a high theoretical content.'"); see also Hasen, *supra* note 160, at 1329 ("[T]he declining marginal utility of money" is affirmed by

By disrupting the operation of the Electoral College, online vote swapping passes “negative externalities” onto other voters by manipulating presidential election results.²⁰⁶ Vote swapping websites entice voters into swapping their votes by highlighting the inequity of the Electoral College and promoting the assembly of voters into online coalitions to prevent the election of the most disagreeable candidate.²⁰⁷ Yet the same results could be achieved by adopting similar proposals by either eliminating the popular state-level winner-take-all policy of awarding all every electoral vote to the candidate who won the statewide election or by adopting The National Popular Vote Interstate Compact.²⁰⁸

3. A Vote Should Not Be Alienable.

Votes belong to the political community as a whole and are, therefore, not alienable by individual voters.²⁰⁹ Federal, state, and local governments impose restrictions on citizens’ rights to vote in specific jurisdictions, which reflects communal interests in every vote cast in elections.²¹⁰ Article Two, Section One of the Constitution and the Twelfth Amendment established a state-by-state elections system and each state restricts the right to vote to citizens who meet residency

evidence that votes were sold for only \$20 to \$40 per vote in competitive vote-buying market in the United States.”).

²⁰⁶ See Hasen, *supra* note 160, at 1331-32 (arguing that vote buying arguably leads to a decline in overall social wealth because those who buy votes will do so in order to capture influence in government).

²⁰⁷ See *Trump Traders*, *supra* note 156 (“[E]ven [if] a few thousand third-party supporters in Ohio, Florida, and Pennsylvania swap their vote to another state, it could be the difference between a Clinton or Trump presidency.”). “Third-party voters in these swing states are likely to determine the outcome of the Presidential election.” *Id.*

²⁰⁸ See *Agreement Among the States to Elect the President by Popular Vote*, *supra* note 48 (“The shortcomings of the current system of electing the President stem from state winner-take-all statutes i.e., state laws that award all of a state’s electoral votes to the candidate receiving the most popular votes in each *separate* state.”). Furthermore, “‘Battleground’ states receive 7% more federal grants than ‘spectator’ states, twice as many presidential disaster declarations, more Superfund enforcement exemptions, and more No Child Left Behind law exemptions.” *Id.*

²⁰⁹ See Hasen, *supra* note 160, at 1335 (“[I]f votes were freely tradable, we would have a different conception of what voting is for—about the values that it embodies—and this changed conception would have corrosive effects on politics.”).

²¹⁰ See Hasen, *supra* note 160, at 1335 (basing the argument on “a moral judgment that votes should not be salable or transferable”)

requirements.²¹¹ If ownership of a vote is vested in all qualified citizens and the political communities hosting the election, then a vote is not freely alienable without the assent of all interested owners.²¹² Without any mechanism for securing the community's interest in the election, online vote swapping should be illegal because a swapped vote cannot be legitimately cast.²¹³

V. Conclusion

Online vote swaps between citizens residing in different states violate federal and state elections fraud laws. The appeal of online vote swapping is at least partially attributable to a sense of frustration with old political institutions, such as the Electoral College. Online vote swapping in public elections embraces a principle—voters may derive benefits from agreements brokered with private parties—that if accepted, necessarily embraces vote-buying, a particularly invidious type of election fraud. For this reason, election law should prohibit all activities related to vote buying. Widespread concern over the security of American elections could prove to be fertile ground for calls to revisit current election laws and policies. While the movement towards E-Democracy is underway, online vote swapping illustrates the dangers of projecting a fundamental right into the digital space without regard for pre-existing laws.

²¹¹ See *Porter II*, 518 F.3d at 1184 (Kleinfeld, A., dissenting) (“[A] state-by- state voting is the system for which they provided.”). “The First Amendment does not prevent state prosecution of those who subvert it by making arrangements effectively to cast votes in other states.” *Id.* See also Hasen, *supra* note 160, at 1336 (“[A]n anti-commodification norm of voting, driven by the inalienability of votes, serves the instrumental purpose of promoting public-regarding voting.”). “This purpose is separate and distinct from both equality and efficiency arguments against vote buying, and, like the other two arguments, could alone support a ban on vote buying.” *Id.* “To the extent that the inalienability argument rests on this instrumentalist concern over how people should make their voting decisions, it is vulnerable to attack by those rejecting the need to assure public-regarding voting.” *Id.* at 1337.

²¹² See Hasen, *supra* note 160, at 1336 (qualifying support for argument because it is unclear if there is an empirical assumption that voters are not supposed to cast ballot based on narrow self-interest).

²¹³ See Hasen, *supra* note 160, at 1337 (“[T]he extent that the inalienability argument rests on this instrumentalist concern over how people should make their voting decisions, it is vulnerable to attack by those rejecting the need to assure public-regarding voting.”).