

Vote Swapping and Free Speech: Voice, Politics, and Choice

By John M. Rushing*

I. Introduction

The advent of the Internet has created a world of new opportunities for commerce and communication. The Internet is virtually revolutionizing the way people live. Today e-mail is more common than paper mail, a buyer can shop online without going to a store, a person can make friends without ever leaving home, and the best libraries in the world are only a mouse-click away.

Despite these new opportunities, the Internet raises unique and challenging legal problems. These problems pervade Internet access and use, ranging from jurisdictional disputes involving choice of law to free speech concerns. There is no area of Internet activity that is unaffected. One new area of concern is Internet political speech organized to promote vote trading.

During the 2000 presidential election, the Internet was used in new and inventive ways. The 2000 election was the first time that candidates for President fully utilized the Internet. The websites included general information, organizational information, candidate messages tailored to the cookie profile of the accessing computer, and campaign fundraising activity.¹ However, the use of the Internet was not limited to the two major parties. The Nader presidential campaign made use of the Internet, as did other smaller campaigns.

Not only was the 2000 election a website-savvy election, but it was also one of the closest in United States history. Early on, both parties realized that the election would be a close race. A chief concern of the Gore campaign was that Nader's efforts to garner votes would take away liberal Democratic supporters in a close race. Gore had seen this scenario play out in 1992 when Bill Clinton was elected President with only forty-three percent of the vote.² In the 1992 election, third-party candidate Ross Perot cost Republican George Bush the election by securing votes that would otherwise have been part of the Republican

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1. Ben White, *On Politics: Electrons as Electors? Probably Not Yet*, WASH. POST, Apr. 16, 2000, at A10.

2. William Ratliff, *Cautious Eyes on Clinton*, WASH. TIMES, Dec. 31, 1992, at G1.

base. Gore, realizing that this scenario was playing itself out in liberal circles, sought to limit Nader's impact.

Late in the summer of 2000, many liberal Democrats appeared to support Nader. In swing states a vote for Nader could have been the deciding factor in Gore's loss. Many Nader supporters, however, would have rather seen Gore elected President than Bush. Voting for Gore, though, meant that Nader would not receive enough support to win the five percent of the popular vote necessary to receive federal funding in the next election. Voting for Nader would likely cost Gore the election. At this time, University of Wisconsin at Madison doctoral candidate Jeff Cardille posted the idea of vote swapping on the Web.³ His idea was simple: Gore voters in secure Bush states would trade their votes with Nader voters in swing states. By doing so, two goals could be met: Al Gore would become President and Ralph Nader would get the five percent of the national vote needed for matching federal funds in the next election.

Mr. Cardille did not set up a site dedicated to vote swapping,⁴ but his plan spread quickly in cyberspace. Soon after he posted the idea, many sites sprang up that allowed voters to swap their votes. It looked as if Gore might prevail despite the presence of a third-party candidate, and he owed it all to the Internet. If former President Bush had developed such a way to combat losing voters to Ross Perot's third-party campaign, Al Gore may have never been Vice President.

The use of the Internet offered a solution to the third-party problem by connecting voters with similar political interests. Voters were no longer isolated in their states; the Internet enabled voters to connect across state lines. Voters were now finding a way to manipulate their votes from state to state, thereby influencing the outcome of the election. During the 2000 presidential elections, the State of California attempted to shut down vote swapping websites. The state's action raises interesting legal questions concerning the exercise of political expression. Political speech is central to the democratic process; therefore, any regulation of such speech must be done within the confines of First Amendment jurisprudence. This essay examines the statute used by the State of California to stop vote swapping and argues that the statute is too broad to survive First Amendment analysis. Part II demonstrates the overbreadth of the California statute through a discussion of four areas of voting—vote buying, family voting, political voting, and vote swapping. Part III then analyzes the risk of fraud as a ground for eliminating vote swapping, arguing that fraud does not present a compelling reason for the state to put an end to this practice.

3. Lynda Gledhill, *California Shuts Down Vote-Trader Web Site*, S.F. CHRON., Oct. 31, 2000, at A3.

4. *Id.* at A3.

Finally, Part IV of this essay will argue that the electoral college does not present a compelling reason for the state to stop vote swapping

II. VOTE SWAPPING WEBSITES AND THE CALIFORNIA STATUTE

A. An Explanation of Vote Swapping Websites

Vote swapping websites do not actually swap votes. Rather, the site enables the exchange of information between voters by creating a database of voters who may be interested in swapping their votes. The site gathers information about the voter's state of residence, preferred candidate, preferred major party candidate, and the voter's e-mail address. The database then matches voters who share preferences with others to enable vote swapping. The website sends an e-mail containing the other voter's e-mail address to each voter. Any political discussion between the voters occurs without the involvement of the website. Like many other political websites, vote swapping sites include informational pages with links to government websites that describe the electoral college and to news websites presenting election predictions. There are pages that answer frequently asked questions and a page that sets out privacy policies. Finally, the websites make clear that any agreement to swap votes is not an enforceable agreement or a contract of any kind.⁵

B. California's Grounds for Shutting Down Vote Swapping Websites

In the October 31, 2000 edition of the *San Francisco Chronicle*, California Secretary of State Bill Jones stated his reasons for shutting down vote trading websites, explaining that any inducement to vote a certain way is illegal under California law.⁶ In essence, trading anything of value for a vote is illegal. Jones based his legal theory on the California Election Code § 18521.⁷ The code sets forth that,

[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

5. First Amended Complaint, *Porter v. Jones*, (No. 00-11700 RJK (Mcx))(C.D. Cal. 2000). See also attached exhibit.

6. Lynda Gledhill, *California Shuts Down Vote-Trader Web Site*, S.F. CHRON., Oct. 31, 2000, at A3.

7. American Civil Liberties Union, *ACLU Seeks Permanent Court Order on Issue of Online Voter Matching*, www.aclu.org/news/2000/n110200.html (last visited April 9, 2001).

consideration, office, place, or employment for himself or any other person 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.
- B) Remained away from the polls.
- C) Refrained or agreed to refrain from voting.
- D) Induced any other person to:
 - 1) Remain away from the polls.
 - 2) Refrain from voting.
 - 3) Vote or refrain from voting for any particular person or measure.⁸

Under Jones's theory, trading votes is a form of inducement that falls under the prohibitions of this statute. The Secretary of State said that "valuable consideration" was an improper way to get someone to vote.⁹ William Wood, Chief Counsel for the California Secretary of State's office, stated that, "In this case the valuable consideration would be the vote itself. The vote is an inalienable, fundamental legal concept throughout the country. Certainly in California, we take that very seriously."¹⁰ The statute uses the words "contract" and "induce." It is illegal to contract with others to vote a specific way or to induce others to vote a specific way. It is also illegal to contract with others to refrain from voting or to induce others to refrain from voting.

Under California law, a contract to vote or refrain from voting will not be enforced. Therefore, the weight of the statute must rest upon the word "induce" and its idea of a quid pro quo.¹¹

C. First Amendment Law and the California Statute

The application of the California statute at issue implicates three First Amendment concerns: regulation of political speech, the regulation of speech in a public forum, and the control of speech that is not content neutral. The statute prohibits a person from "directly or through any other person. . . . induc[ing] any other person to . . . vote or refrain from voting" The statute's focus on inducement in the voting context

8. CAL. ELEC. CODE § 18521 (2000).

9. Lynda Gledhill, *California Shuts Down Vote-Trader Web Site*, S.F. CHRON., Oct. 31, 2000, at A3.

10. *Id.* at A3.

11. BLACK'S LAW DICTIONARY defines "inducement" in the following way: "The act or process of enticing or persuading another to take a certain course of action . . . the benefit or advantage that causes the promisor to enter into the contract." BLACK'S LAW DICTIONARY 312 (6th ed. 1990).

serves as a restriction on political speech. In the vote swapping context, the speech engaged in is also political. One of the primary purposes of the First Amendment is to protect political speech: “Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”¹² The Supreme Court has stated that “speech concerning public affairs is more than self-expression; it is the essence of self-government.”¹³

California applied the statute in order to stop political speech from occurring in vote swapping websites. Like a city park, these web sites are open to anyone who has the inclination to visit them. Thus, they are a public forum. “[U]se of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”¹⁴ The state can regulate speech in a public forum if it interferes with other important activities in the forum. The Supreme Court has held that “the government may regulate the time, place, and manner of expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication.”¹⁵

The California statute not only regulates political speech and speech in a public forum, but it does so in a way that is not content-neutral. The California statute is concerned only with expression that induces action in the voting context, in other words political speech. There is no mention of other forms of speech, for example, the statute does not apply to commercial speech. The statute, therefore, is not content neutral. A content based regulation of political speech in a public forum is valid only if it can survive strict scrutiny.¹⁶ The state must show that the regulation in question is necessary to serve a compelling state interest and is narrowly tailored to that end. The Supreme Court made clear in *Buckley v. Valeo* that

discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.¹⁷

12. *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

13. *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

14. *Hague v. CIO*, 307 U.S. 496, 515 (1939).

15. *Burson v. Freeman*, 504 U.S. 191, 197 (1992). See also *United States v. Grace*, 461 U.S. 171, 177 (1983).

16. *Carey v. Brown*, 447 U.S. 455, 461-62 (1980).

17. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam).

Any truncation of the right of political speech must be carefully reviewed.

In enacting the statute, the State of California signaled that it views vote swapping as a form of voter inducement. The state's interest in stopping voter inducement is the basis upon which California endeavored to shut down vote swapping websites. There are, however, different forms of voter inducement. The following section will examine some of the different possibilities in this area.

D. The California Statute and Voter Inducement

There are several ways of interpreting the California statute. One interpretation would make illegal all ways of inducing votes. Such an interpretation is uncharitable because it would stop a candidate from making a campaign promise in the hope of winning votes. It is unlikely that the California Legislature intended to make traditional methods of campaigning illegal. Therefore, if the statute prohibits all forms of voter inducement, it is unlikely that the statute is narrowly tailored.

1. Vote-Buying

Section 18521 makes illegal the inducement of anyone to vote or refrain from voting by “[a]gree[ing], or contract[ing] for, before, during or after an election, any money, gift, loan, or other valuable consideration, office, place, or employment for himself or any other person”¹⁸ The statute appears aimed at curbing attempts to buy votes. Vote-buying, induces a person to vote a specific way or to refrain from voting by giving that person something of value in return. The question, then, is whether vote-buying involves a unique form of inducement that justifies the states’ control of speech. The inducement of vote buying creates unique negative externalities that adversely affect the democratic process.

The principle of “one person, one vote” set out in *Baker v. Carr* is a guiding principle of election law.¹⁹ The Court in *Baker* considered whether apportionment had to be equal between congressional districts. The court held that unequal apportionment was a violation of the right to vote and implemented the principle of “one person, one vote.”²⁰ This principle also operates in the context of vote inducement. If individuals were allowed to offer votes for sale or to buy votes, then the individual

18. CAL. ELEC. CODE § 18521 (2000).

19. 369 U.S. 186 (1960).

20. *Id.*

buying the vote would have more than one vote, violating the sense of fairness and the principle of “one person, one vote.”

Buying a vote violates the concept of a single vote for a single person because it gives a greater political voice to those in a position to pay for votes. A democracy, by its very nature, insulates the poor from the will of the rich because all people are equal in the voting booth. Buying votes undermines the singularity and individual nature of the vote.

Buying votes also cheapens the democratic process by opening it directly to a financial market. To be sure, freedom of speech creates a marketplace. This marketplace, however, is one of ideas and not of dollars. In political debates, we choose among different ideas, with the winner decided by the majority of the votes cast. Vote-buying is problematic because it places the emphasis of the political debate on the financial market value of a vote instead of upon the value of the ideas and candidates who propose them.

Because the California statute is not content-neutral, the state must have a compelling interest in controlling the speech, and the statute must be narrowly tailored to that end.²¹ The state has a compelling interest in limiting negative externalities that undermine the democratic process. Furthermore, the California statute seems to advance the state’s interest by making illegal voter inducement in the vote buying context. The question remains, however, as to whether the statute is narrowly tailored. Before answering this question, it is necessary to explore further types of inducement that the statute will reach.

2. Family Voting

A second type of voter inducement that may be suspect under the California statute is family voting. Many times, husbands and wives have politically disparate views and therefore try to influence each other’s vote. When it becomes apparent that neither will change his/her stance and that a stalemate has been reached, the two, realizing that their votes cancel each other out, both agree to stay away from the polls. Such behavior is rational if both spouses are supporters of major party candidates who have a good chance of winning.

The statute precludes anyone from keeping another person from voting through any type of inducement. In the family voting context, the promise not to vote induces a reciprocal promise from the other spouse. If the California statute were to be enforced literally, spouses who stay

21. *Perry Educ. Ass’n. v. Perry Local Educators’ Ass’n.*, 460 U.S. 37, 45 (1983).

away from the polls because they think that their divergent votes cancel each other out have committed a crime.

Family voting, however, does not create negative externalities and is easily distinguishable from vote buying in two ways. First, vote buying calls into question the integrity of our political system by placing a dollar value on a vote. Family voting does not do this. There is no financial market force working in the relationship between companions. Rather, the spouses stay away from the polls because they realize their divergent votes make voting a futile act in the first place.

Second, vote buying gives more political voice to those in a position to buy votes and therefore cuts against the principle of “one person, one vote.” Family voting, on the other hand, does not. The amount of political voice is the same in the family voting context. Both spouses have a legal right to vote, and their decisions not to vote does not shift their voice to another voter, as in the vote buying scenario. Each person has a vote that he may or may not choose to exercise. “One person, one vote” is preserved even when spouses choose not to exercise their right to vote.

The California statute prohibits all voter inducement, including family voting. In vote buying, the compelling state interest is maintaining the integrity of the democratic process. Family voting, unlike vote buying, does not damage the democratic process, nor does there seem to be a readily apparent state interest in controlling this type of political speech. The California statute, however, reaches family voting and is, therefore, too broadly written. The statute should be at least limited to those situations where an individual seeks to keep someone else from voting, either through buying that person’s vote or through threats or intimidation.²²

3. Political Voting

The political process requires politicians to compete with each other for voters. In the best of races, the competition is framed by a debate about what ideas the country should use to meet its challenges. Politicians suggest different policies that are refined during the campaign. On election day, the voters pick their candidate and the winning policy. Before election day, however, politicians do and say what is necessary to win voters, making promises that are explicitly designed and tested to induce votes. For example, a candidate promises

22. Although threats and intimidation do not fall under the vote buying category, they could be seen as a form of voter inducement. The focus of this paper is not broad enough to explore all forms of voter inducement. Threats and intimidation are only mentioned for completeness because they create negative externalities of a different sort. American democracy is based on the concept of voice in the voting booth without reprisal. Threats and intimidation chill voting speech with their promise of reprisal.

to work hard to shore up the social security trust fund by putting it in a "lock box." The candidate makes this promise in order to induce senior citizens to vote for him. The quid pro quo is clear.

Under a literal interpretation, the California statute could be applied to political voting because the politician induces voters to vote for him through his promise. It would be a strange law that shuts down the way politics has been conducted throughout the history of our country. Furthermore, it would be hard to conceive of a political race, no matter how controlled or sedate, that did not have candidates who were trying to win votes.²³ Although it is unlikely that the California legislature intended the statute to damage the political process, the statute reaches this process and is applicable to the inducement in political promises.

Unlike vote buying, the actions of politicians do not run counter to the principles set out in *Baker v. Carr*.²⁴ The political quid pro quo offered by politicians in no way limits or takes the vote of any citizen. Finally, unlike vote buying, the quid pro quo of political promises does not create any financial market for votes. Unlike vote buying, the integrity of the democratic process is maintained.

The politician's actions and promises, however, *do* add to the richness of the marketplace of ideas, allowing for a deeper discussion and a more vigorous exercise of free speech. Such is the foundation of American political life. Nevertheless, the California statute reaches this form of voter inducement. As pointed out, none of the negative externalities present in vote buying are of concern in political voting. The state does not seem to have a compelling interest in controlling this form of political speech. The statute reaches all forms of inducement, including political voting. The fact that the California statute reaches political voting demonstrates its lack of narrow tailoring.

4. Vote Swapping

Vote swapping is a phenomenon enabled by the advent of the Internet. Before the creation of the Internet, there was no way for dissatisfied voters to swap their votes because these voters in different states could not locate or communicate with each other as effectively.²⁵

23. A campaign conducted only by written brochures would still have an inherent quid pro quo. Any time candidates take positions in a campaign there is the promise of "vote for me and I will do X." The candidate's platform is a method for inducing votes.

24. 369 U.S. 186 (1962).

25. This author could find no reference to vote swapping in legal cases or news services before the 2000 election. Vote swapping may have occurred in earlier times via the telephone or mail, but never on the scale of the 2000 election.

As discussed above, vote swapping websites do not actually swap votes. Rather, the site sets out the idea of vote swapping and creates a forum in which voters can locate each other in order to talk about politics. Even if vote swapping were illegal, it does not follow that a website designed to allow individuals to contact each other with the purpose of discussing the way they will vote, and why, should be illegal. Changing the way one intends to vote because of the online exchange is an example of the persuasive power of political speech.

Discussing one's political preferences with another voter from a different state might provide legitimate reasons to change one's vote. In the same way that a person might change his vote when hearing that his preferred candidate's policies will hurt his friend, the free speech exercise of vote swapping allows for a deeper consideration of the candidate for whom one wishes to vote.

Likewise, the consideration of whether a third-party candidate will gain five percent of the popular vote and the consideration of whether a specific candidate will win the electoral vote are legitimate concerns to be weighed by every voter. The Democratic voter in California who knows that Gore will carry the state may not fully agree with the Green Party's positions, but nevertheless wish Nader to gain the five percent needed for federal matching funds. Likewise, the Green Party voter in Iowa may not fully agree with or embrace the Democratic party's positions, but electing Al Gore for President instead of George Bush may matter to him. Before the Internet, both voters were left to wonder if the tensions they felt about a third-party candidate gaining federal funding and a liberal candidate being elected could be eased. These voters had to make a calculated choice between their ideals and who they thought could win. The Internet has given these voters a forum in which to meet each other and to discuss their concerns, thereby finding a solution to their shared dilemma without compromising their ideals or the political reality in which they must live.

Vote swapping is a form of voter inducement. Vote swapping involves a quid pro quo, but this phenomenon is equally present in political campaigns and in relationships where spouses decide not to vote because their votes will cancel out each other. The California statute could be applied to all of the aforementioned forms of voter inducement even though not all forms create negative externalities that justify the state in controlling speech. This fact demonstrates that the statute is not narrowly tailored.

With vote buying, the quid pro quo becomes dangerous to society because it undermines the value and the integrity of the democratic process. Vote swapping does neither. After swapping votes, each individual has only one vote to cast. "One person, one vote" is preserved. Furthermore, vote swapping websites are not designed to create a financial market. The voters are trading valued assets—the

actual vote that they will cast—but the trade is for a vote and not for money or other like consideration.²⁶ The only incentive to swap votes is political. The lack of a monetary incentive is an important aspect of vote swapping that distinguishes it from vote buying or selling.

In fact, vote swapping websites create a “cyber-space marketplace of ideas” where people can contact each other and discuss their political preferences and choices. In this respect, vote swapping is similar to a group of friends sitting around discussing politics, their preferred candidate, and reasons for their choice. The online nature of the conversation does not change its substance.

Literally read, the California statute could reach *all* of the previously mentioned forms of voter inducement. All of the forms involve a quid pro quo that could induce a voter to vote or to refrain from voting. Only the inducement in vote buying, however, creates a compelling reason for the state to limit speech. The California statute is over broad. The statute should not bar all forms of inducement of political speech. Rather, it should apply to those situations where voter inducement creates negative externalities that undermine the democratic process. Although vote swapping does not create negative externalities that justify the state’s limitation of speech, there may be other considerations which make vote swapping less appealing.

III. VOTER FRAUD

A. Voter Fraud and the First Amendment

Vote swapping may not create the negative externalities that vote buying does, but vote swapping is not without its problems. One challenge that vote swapping presents is the possibility of voter fraud. It is possible that two voters could agree to swap votes and that only one voter would keep his end of the bargain. For example, the Nader supporter in Iowa agrees to vote for Gore so that the Gore supporter in California will vote for Nader. It could be the case that the California voter changes his mind in the voting booth and votes for Gore. Worse yet, the California voter may have never intended to keep his end of the bargain. Either way, the Iowa voter is taken advantage of, and Gore gets two votes instead of one. Vote swapping may, therefore, create incentives for the major parties to defraud third-party voters in order to increase their overall vote.

26. For example, one could buy votes with a promise of land or employment.

The government has a legitimate interest in stopping voter fraud. The key question is how any proposed law would achieve this objective. The Supreme Court stated that:

[The] state has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process. To survive strict scrutiny, however, a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest.²⁷

The statute reaches all forms of voter inducement, regardless of whether the form is susceptible to voter fraud or any other compelling interest. Thus, the statute is overbroad.

Furthermore, were the state to create a different statute focused on chilling vote swapping in order to prevent voter fraud, such a statute would not be content-neutral. The problem with a statute that prohibits vote swapping on the basis of stopping fraud is that not all swaps will be fraudulent. The statute would necessarily be restricting non-fraudulent exercises of political expression in order to reach fraudulent ones. Consequently, the statute would not be narrowly tailored. The state might argue that the risk of fraud is so great, and the number of legitimate swaps so small, that it is justified in stopping vote swapping altogether. However, the state would have to show some evidence of this justification, and unless vote swapping websites are allowed to stay up during the next few elections, there will be no such evidence to support this argument.²⁸

B. Voter Fraud and Market Analysis

Finally, if fraud became a major problem, vote swapping would decrease. Information about the fraud would be disseminated on the

27. *Burson v. Freeman*, 504 U.S. 191, 199 (1992).

28. It should be noted that the risk of fraud is also present in the family voting context. In family voting, there is nothing to stop one spouse from going to the polls despite their agreement. Yet, family voting seems innocuous, and the application of the California statute would be inappropriate. Moreover, there is a relationship of trust and familiarity, a community, that exists in the family voting context, making fraud less likely. However, relationships also develop on the Internet. People spend time corresponding with cyberspace companions, and trust often develops. Moreover, the Internet is not without community. People who frequent chat rooms are well aware of the existence of an online community. It is, therefore, debatable whether or not trust in the family voting context is more reliable than trust in vote swapping. A critic will point out that the risk in family voting and vote swapping is different because in family voting each spouse could check to see if the other voted. It is not possible for vote swappers to check to see if the other party voted because the participants are not in the same voting district. If voting records were online, the vote swappers could check the voting records of the district where their vote swapping partner was to vote. In both cases, however, there is no way to know for whom the person voted. The point is that, whether or not the risk is quantifiable, it is present in both forms of inducement.

Internet, and voters in the online world would become aware of it.²⁹ The rational self-interest of the voters would curtail vote swapping without the need for government intervention. The point of swapping votes is to achieve a mutually beneficial situation for both voters. If this situation did not occur due to fraud, then vote swapping would stop.

IV. THE ELECTORAL COLLEGE

A. Background

Rarely has an American President been elected without winning the popular vote. It did happen, however, in the 2000 Presidential Election. Third-party candidate Ralph Nader may be one reason why the race was so close.

It was previously argued that the California statute should not preclude vote swapping because it is an exercise of free speech that does not undermine the integrity of our democratic process, either by creating a financial market for votes or by violating the principle of “one person, one vote.” There may be, nevertheless, a compelling governmental interest in stopping vote swapping because of the peculiarities of the electoral college system.

The Constitution of the United States requires that Presidential elections be conducted by electoral vote. The Constitution states in article II, § 1 that in elections for President, the winner will be determined by the majority of the electoral college.³⁰ The electoral college is made up of electors from each state. The number of electors in each state is apportioned according to population.³¹ The electors are expected to cast their votes for President in accord with the majority of the popular vote in the state they serve.³²

Without the electoral college, candidates would only campaign in states with large populations, in order to save money, be time efficient,

29. Because of the secret ballot, the actual identity of the person committing fraud could not be ascertained. Therefore, any specific individual who swaps his vote would not know if he were doing so because of fraudulent inducement. It could be roughly determined what percentage of the votes that were agreed to be swapped were indeed swapped. This information could be determined by comparing the number of votes for a third-party in a given precinct to the list of vote swappers in that precinct kept by the vote swapping websites. Once the number of usual third-party voters in a given precinct was subtracted, the remainder would be the rough estimation of votes swapped. If the number of listed votes to be swapped did not roughly equate with the remainder of third-party votes (taking into account margins of error for higher voter turnout), then the rough percentage of vote swapping fraud could be determined.

30. U.S. CONST. art. II, § 1, cl. 12.

31. *Id.*

32. Not all states require this by law. The states of Maine and Nebraska allow the electoral college of their state to be split, not enforcing a winner take all scenario. See William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 J. Legis. 145, 193 n. 98 (1996).

and win the majority of the popular vote. Small, sparsely populated states would likely be ignored, but they would still be governed by the President, a President who ignored their political voice. In order to prevent this scenario, the founders required that the President be elected by a majority of the electoral vote and not by a majority of the popular vote.

B. The Electoral College and Voter Intent

The constitutional requirement of the electoral college may be a challenge to vote swapping websites. During a federal election, vote swapping must occur between voters of different states.³³ In essence, vote swapping is a way of gaming the electoral college. The obvious problem is that, if voters from different states swap votes, then the will of the voters in a particular state is attributed to a different state. For example, if a voter in Iowa intends to vote for Nader while a voter in California intends to vote for Gore, and the two voters swap their votes, then, in some sense, the vote for Nader in California and the vote for Gore in Iowa are not reflective of the will of the voters in those states. Even though the California voter cast a ballot for Nader, it is also true that the vote was a proxy for the Iowa voter's intent to vote for Nader. Likewise, it is true that the Iowa voter cast a ballot for Gore, but only as a proxy for the California voter who had the initial intent of voting for Gore. Therefore, the votes cast were not for whom the respective voters of each state wanted. The electors of each state, however, are charged to carry out the will of the voters in their respective state. In the above scenario, the electors of California are being influenced and perhaps are carrying out the will of the Iowa voters and vice versa. In light of this scenario, the state could claim that it can stop vote swapping because it has a compelling interest in maintaining the integrity of the electoral college. The question is whether the votes cast in the electoral college are adversely affected by vote swapping.

There are several ways to parse this question. Because the number of individuals swapping votes is so low in comparison to the aggregate vote, one could argue that there is little chance that the candidate who wins a particular state did so because of vote swapping. Therefore, the electoral college of a particular state will not be adversely affected. This argument is specious because vote swapping is designed to be used in close elections where third-party candidates will hurt the chances of a particular major-party candidate. The entire point of vote swapping is

33. If vote swapping occurred intrastate, then the electoral college vote of the state could not be gamed. A Nader voter in California trading votes with a Gore voter in California does not change the electoral or popular vote outcome in the state. In this situation, the voters should just keep their individual votes.

that it can make a difference in close elections and therefore would affect the way the electors of a state vote.

It could also be argued that the validity of the votes cast in any state should not be determined by an analysis of the intent of the voter. The intent of the voter can only be determined by the ballot cast. If the vote is cast, and the ballot is clearly marked, then intent should not be considered. Put a different way, the ballot itself is the only indication of voter intent. If voter intent is operative in an analysis of vote swapping, then it is difficult to argue that vote swapping creates a conflict with the electoral college count of a state because voter intent is clear.

A different way of analyzing the situation is to assume that vote swapping itself is a valid reason to change one's vote. As previously argued, swapping one's vote with someone else in order to achieve a specific electoral and popular vote outcome is a valid reason for voting a specific way. Many times it is not possible to achieve one's ideal goals. In these situations, one is forced to decide between compromising one's ideal outcome in order to achieve a lesser but still desirable outcome.³⁴ These second order goods are valid choices. Such situations are commonplace, and our democratic process is no exception. If the swapped vote were to be considered suspect, then so would other votes. For example, a Libertarian voter who knows that the Libertarian candidate will not win may vote for another party as a compromise choice. The Libertarian's compromise vote is still a valid and countable vote with significance to the electoral college of a state. In short, the reasons for voting a particular way are individual and private, and our voting system does not explore these subjective motivations. Rather, the system is designed to recognize validly cast ballots and not the motives behind them. The only exception to this rule exists in the case of unclear ballots or in the buying of votes.

One might also argue that the inherent risk of fraud in vote swapping makes the voter's choice to swap his vote all the more reflective of his intent. As in family voting, there is some risk of fraud in vote swapping. This risk forces the voter to make a carefully weighed decision. The voter must balance the risk with the reward that vote swapping promises, namely, that of electing a compromise candidate to the office of the President, while gaining a greater percentage of the popular vote for a third-party candidate. The fact that the voter swaps her vote and votes for a compromise candidate is evidence of her intent to vote for the candidate. The risk of vote swapping validates the legitimacy of the voter's choice. If the voter's choice is clearly marked on the ballot, then the electoral college of the state should count that vote like any other.

34. I will call these lesser but still desirable choices "second order goods."

The electoral college of a particular state is justified in accepting the swapped vote of the state as a valid reflection of the will of the state. One need only look at the Florida recount in the last Presidential election to realize that the election system makes an inquiry into voter intent difficult. That inquiry centers around properly marked ballots. While there may still be some debate about what constitutes a properly marked ballot, it is certain that the ballot is the only indication of voter intent. Therefore, for the aforementioned reasons, if a ballot is clearly marked, it should count as a valid vote in the state. The fact that the ballot may have been cast because of vote swapping should make no more difference to the electoral college than the fact that a Libertarian voter may vote for a compromise candidate instead of for the Libertarian candidate. When these arguments are taken into account, it is doubtful that the electoral college tenders a compelling state interest for ending vote swapping.

C. The Electoral College and State Election Law

The constitutional requirement of the electoral college raises one final concern about vote swapping. The Constitution requires an electoral college but leaves the specifics of election law up to the states.³⁵ If a state were trying to protect its electors from being “polluted” by swapped votes, could it pass a law prohibiting vote swapping? In this example, the state’s interest is the “purity” of its electoral college. The state wishes the college to be insulated from the will of voters outside the state. Is this a compelling interest? Possibly, but the interest is hardly as compelling as fraud. Furthermore, the above arguments suggest that even in a vote swapping scenario, the will of the voter who casts the swapped ballot is being carried out in the voter’s state of residence; consequently, the electoral college of the state is exercising the voter’s will by acting on her ballot. These arguments support the conclusion that there is no sufficiently compelling state interest at issue. If the state interest is compelling, however, the law must be narrowly tailored. A complete restriction on vote swapping is a very harsh remedy for the state interest. Arguably, vote swapping does not affect the electoral college any more than any other compromise vote. The “purity” of the electoral college may not be a compelling reason to limit speech. Given the uncertainty of the effect of vote swapping on the electoral college, it seems unlikely that a total ban on vote swapping would survive this level of constitutional inquiry.

35. U.S.CONST. amend. XII.

The unique problem with this hypothetical situation is that it raises questions of federalism. If the state has the constitutional right to determine its election laws, and an individual has a First Amendment right to swap votes, which right takes precedence?

The Fourteenth Amendment of the Constitution incorporated the First Amendment and applied it to the states. Thus, the government cannot limit speech at will; any such limitation must be done in accordance with First Amendment jurisprudence. Sometimes a state cannot comply with the demands of the law. In such a case, the state is unable to restrict the speech it finds troubling. The fact that a state has the constitutional right to make laws in no way alters this fact. The constitutional right of a state to act is always within the framework of the Fourteenth Amendment. For example, the state cannot make a law abridging the right of African-Americans to vote. The state has the power to make laws, but only in a constitutional framework. In the present case, the fact that the state has the constitutional power to determine its election laws does not mean that the election laws are outside of the scope and reach of the Fourteenth Amendment. Were this the case, then states could ignore the Fourteenth Amendment and act without constitutional restriction.

V. Conclusion

Vote swapping is a controversial exercise of speech because it threatens the political status quo by making room for third-party candidates. Supporters of third-party candidates are free to pursue both their pragmatic and ideal political ends. As a result, third-party candidates are more likely to gain enough of the popular vote to be eligible for federal matching funds.

This essay set out the grounds upon which the state of California intended to shut down vote swapping websites. I have argued that vote swapping does not create negative externalities sufficient to justify the government's limitation of this form of speech. Vote swapping is different from vote buying because it does not create a financial value for a vote or violate the "one person, one vote" principle. Furthermore, vote swapping employs a form of inducement similar to family voting or political voting.

While it is true that vote swapping creates the possibility for voter fraud, the degree of that risk is unclear. Family voting and vote swapping run a risk of fraud, but both have common elements of trust and familiarity that protect against fraud. Finally, if fraud were to become a problem in the vote swapping context, the rational self-interest of the voters would curtail the swapping without governmental

intervention. Consequently, there is no compelling state interest to shut down vote swapping websites based on voter fraud.

Finally, vote swapping may have an impact on the electoral college, but that impact is not enough to justify curtailing this form of political speech. The potential impact on the electoral college outcome is a valid reason for changing one's vote. People often choose compromise candidates after first considering other candidates. Vote swapping is no different in this respect. If the ballot is clearly marked, then the intent of the voter is clear, and the vote should be taken into account by the electoral college of the state. Any inquiry into the subjective motivations of the voter for reasons other than fraud, intimidation, or vote buying is irrelevant.

Vote swapping is a new form of speech which has the potential to change the political discussion in our country. It should be considered a protected form of speech because vote swapping lacks negative externalities sufficient for government intervention. The richness of political discussion in the marketplace of ideas only makes our democracy stronger. Vote swapping will allow this discussion to expand and grow, creating new possibilities to consider in the exercise of one's vote. Choice increases, and our democracy benefits.