

NOTE

SWAP MEET: INTRODUCING THE FRAMERS TO NADER'S TRADERS THROUGH *PORTER V. BOWEN*

Eric J. Finkelstein†

INTRODUCTION	1212
I. AN OVERVIEW OF VOTE SWAPPING	1214
A. Vote Swapping Generally	1214
B. Vote Buying and Selling	1216
C. Vote Pairing in Politics	1218
II. PORTER V. BOWEN	1220
A. Factual and Procedural Background	1220
B. Vote Swapping and the First Amendment	1221
C. The Legality of Secretary Jones's Actions	1222
D. The Ninth Circuit's Discussion of the Electoral College	1224
III. WOULD THE FRAMERS HAVE APPROVED OF VOTE SWAPPING?	1224
A. Historical Development of the Electoral College System	1224
B. The Original Goal or Ideology Behind the Electoral College	1227
1. <i>Arguments that the Original Goal Was to Foster Direct Election by the People</i>	1228
2. <i>Arguments that the Original Goal Was to Appoint Independent Electors</i>	1229
3. <i>Arguments that the Electoral College was a Compromise, Intended to Evolve</i>	1230
4. <i>The Electoral College Was Most Likely a Compromise</i>	1232
C. Where Does Vote Swapping Fit In?	1232
1. <i>If the Original Ideology Behind the Electoral College Were Direct Election by the People</i>	1233

† B.S., Industrial and Labor Relations, Cornell University, 2006; J.D. Candidate, Cornell Law School, 2009; Executive Editor, *Cornell Law Review*, Volume 94. The author would like to thank Professor Michael Kang, Jonah Fecteau, Emily Green, Brendan Mahan, Ashley Miller, Michael Page, Jennifer Roberts, Owen Roth, Kate Rykken, and Michael Zuckerman for their comments, Sue Pado for her help, and his family and friends for their support.

2.	<i>If the Original Goal Were to have Independent Electors Make the Choice</i>	1234
3.	<i>If the Electoral College Were Simply a Compromise</i>	1235
D.	Considering Counterarguments	1236
1.	<i>Originalists Should Look to Ideology of the Framers, Not Solely the Constitution's Text</i>	1236
2.	<i>The Constitution Does Not Prescribe a Method of Choosing Electors</i>	1238
3.	<i>Any Federalist Purpose the Electoral College May Have Had Is Now Obsolete</i>	1239
	CONCLUSION	1241

The electoral college has been entirely divested of its original functions, without a change of a letter of the law. Instead of possessing discretionary powers, it has become as mechanical in its operation as a typewriter. The case is conclusive evidence of the ability of public opinion to modify the actual constitution to any extent required.

HENRY JONES FORD¹

By engaging with each other to vote strategically, voters are asserting control over presidential elections—putting it back in the hands of citizens, where it belongs.

VOTEPAIR.ORG²

INTRODUCTION

In *The Federalist No. 68*, Alexander Hamilton opines that “if the manner of [electing the President] be not perfect, it is at least excellent. It unites in an eminent degree all the advantages, the union of which was to be desired.”³ Hamilton continues by extolling the virtues of what Americans have come to call the Electoral College; a system he believed the Framers designed to allow the people to “operate in the choice,” but also to allow the “immediate election [of the President] to be made by men most capable of analyzing [sic] the qualities adapted to the station, and acting under circumstances favourable [sic] to deliberation and to a judicious combination of all the reasons and inducements, that were proper to govern their choice.”⁴ Although these goals are admirable and thoughtfully constructed, whether the Framers intended the goals to be strict guidelines⁵ or

¹ HENRY JONES FORD, *THE RISE AND GROWTH OF AMERICAN POLITICS: A SKETCH OF CONSTITUTIONAL DEVELOPMENT* 161 (Da Capo Press, 2d prtg. 1967) (1898).

² VotePair.org, Frequently Asked Questions (FAQs), <http://www.votepair.org/faq.php> (last visited July 31, 2008).

³ *THE FEDERALIST NO. 68*, at 363 (Alexander Hamilton) (J.R. Pole ed., 2005).

⁴ *Id.*

⁵ See ROBERT W. BENNETT, *TAMING THE ELECTORAL COLLEGE* 15 (2006) (“[T]he electors were meant basically to be independent decision makers rising above political consid-

merely starting points from which the infant United States could evolve is unclear.⁶ Though many have attempted to answer this question over the years⁷—mostly in discussions of whether the Electoral College should be abolished altogether—the purpose of the Electoral College has again become relevant, but for a wholly different reason.

The Internet has had a profound effect on the electoral process in the United States, from spreading a candidate's message⁸ to fundraising from the masses.⁹ But in no way has the Internet threatened to affect the outcome of an election so directly as it has through vote swapping,¹⁰ where a voter who believes a presidential candidate will win her state "swaps" votes with a voter who supports a third-party candidate in a so-called "swing" state.¹¹ The implication is that the candidate that both voters want to win—and expect can win—gets a vote where it will make the most difference, while giving a third-party candidate a vote that both indicates support and helps provide federal funding for future elections.¹² Several state governments have challenged this procedure,¹³ but in August 2007 the United States Court of Appeals for the Ninth Circuit decided in *Porter v. Bowen*¹⁴ that vote swapping is a protected activity under the First Amendment.¹⁵

The vote-swapping controversy is unlikely to end with *Porter v. Bowen*. Although other circuits—and potentially the Supreme Court—might adopt the Ninth Circuit's analysis, there is no guarantee that they will see vote swapping as a First Amendment question or decide the case in quite the same way.¹⁶ Would the Framers—who

erations in a search for the best available executive for the nation . . ."); LUCIUS WILMERDING, JR., *THE ELECTORAL COLLEGE* 22 (1958) ("Without asserting that they were meant to be the automata which they eventually became, mere agents without discretion, we must look upon [the electors] as a medium for ascertaining the public will.").

⁶ ROBERT M. HARDAWAY, *THE ELECTORAL COLLEGE AND THE CONSTITUTION: THE CASE FOR PRESERVING FEDERALISM* 85 (1994) ("It was doubtless envisioned that the entire process of electing electors and determining their characteristics would be an evolutionary one.").

⁷ See LAWRENCE D. LONGLEY & NEAL R. PEIRCE, *THE ELECTORAL COLLEGE PRIMER* 2000, at 17 (1999) ("A recurring theme in discussions about the electoral college is 'the intentions of the founding fathers' concerning the manner of the election of the president.").

⁸ See Tim Cramm, *The Designated Nonpublic Forum: Remediating the Forbes Mistake*, 67 ALB. L. REV. 89, 113 (2003) ("With the growth of the Internet, fringe candidates have found it much easier to get their messages out to the electorate . . .") (citation omitted).

⁹ See Glen Justice, *Kerry Kept Money Coming with Internet as His A.T.M.*, N.Y. TIMES, Nov. 6, 2004, at A12.

¹⁰ Many have used the terms "vote pairing" or "vote trading" to describe the same phenomenon. For simplicity's sake, I will use only the term "vote swapping" in this Note.

¹¹ See John M. Rushing, *Vote Swapping and Free Speech: Voice, Politics, and Choice*, 7 TEX. F. ON C.L. & C.R. 73, 74 (2002).

¹² See *id.*

¹³ See *infra* Part II.

¹⁴ 496 F.3d 1009 (9th Cir. 2007).

¹⁵ See *id.* at 1027.

¹⁶ For example, a court could attempt to decide a vote swapping case analogously to *MGM v. Grokster*, 545 U.S. 913 (2005), in which the Supreme Court said that "one who

could not have contemplated the advent of the Internet—have approved of the use of vote swapping in presidential elections? An answer could go a long way toward creating a consensus on this critical issue¹⁷ because the Framers' intent should be a main concern in considering constitutional questions of this nature.¹⁸

This Note argues that regardless of the Framers' original understanding of the Electoral College, they would approve of Internet vote swapping today. Part I of this Note examines the growth and development of vote swapping over the last decade. Part II analyzes the Ninth Circuit's decision in *Porter v. Bowen*. Part III offers an overview and history of the Electoral College and contends that the use of vote swapping is either a logical extension of the structure the Framers created or a permissible evolution of the election process.

I

AN OVERVIEW OF VOTE SWAPPING

A. Vote Swapping Generally

Most voters have a simple choice to make on Election Day; generally, a voter will choose the candidate that she believes meshes best with her political views and pull that candidate's lever¹⁹ in the voting booth. Some voters, however, grapple with a more complicated decision because their preferred candidate—a third-party candidate—does not have a realistic chance of winning the election. Third-party candidates suffer this fate because the two-party system that prevails in the United States usually affords only two candidates a practical chance to win each Presidential contest.²⁰ Unsurprisingly, voters that

distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." *Grokster*, 545 U.S. at 936–37. A court could analogously hold that one who distributes a device—here, a website—with the object of promoting its use to subvert a constitutional provision, as shown by clear expression or other affirmative steps taken to foster this subversion, is liable for the resulting acts of subversion by third parties.

¹⁷ See LONGLEY & PEIRCE, *supra* note 7 ("It is not at all inappropriate . . . to consider how this group of intelligent and well-meaning men sought to create a mechanism for selecting their nation's leader . . .").

¹⁸ See David Lyons, *Substance, Process, and Outcome in Constitutional Theory*, 72 CORNELL L. REV. 745, 760 (1987) ("When judges are called upon to interpret the Constitution, their job is to figure out what, in fact, it means. They must consider the actual text, the original intentions that informed that text, and subsequent history."); cf. Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 328, 347 (2000) (noting that value-laden criteria must be used in the process of constitutional interpretation).

¹⁹ Or press the button, or check the box, or punch the chad . . .

²⁰ Strategic voting occurs when voters choose a specific candidate because they do not believe that their preferred candidate can win. Mark J. Randazza, *Breaking Duverger's Law is not Illegal: Strategic Voting, the Internet and the 2000 Presidential Election*, 2001 U.C.L.A. J.L. TECH 6 (2001), http://www.lawtechjournal.com/articles/2001/06_011004_randazza.php. Duverger's Law claims that a two-party system will naturally develop in a plurality election

prefer a third-party candidate also generally prefer one of the major party candidates over the other,²¹ and in certain states their votes may be tremendously important to their preferred major-party candidate's chances of winning the election.²² So, how do third-party voters decide what to do on election day? It is important to note that this is not only a moral decision, but a practical one as well—in order for a third party to receive federal funding for the subsequent presidential election, the party's candidate must receive five percent of the popular vote.²³ Prior to the 2000 election, unless these voters made a private arrangement through some other means,²⁴ they had to make a difficult decision: either support their preferred candidate or settle for the lesser of two perceived evils.

In October 2000, Steve Yoder, a technical writer from Washington, D.C., introduced VoteExchange.org, a website through which swing-state supporters of Green Party candidate Ralph Nader could swap their votes with supporters of Democratic Party candidate Al Gore in states where Gore had a sizeable lead.²⁵ Later that month, American University Law Professor Jamin Raskin penned an article for *Slate* magazine that outlined the vote-swapping idea and encouraged the proliferation of such websites.²⁶ Following publication of the article, VoteExchange.org arranged approximately 500 swaps in one week, VoteSwap2000.com arranged a total of approximately 5,000 swaps, and VoteTrader.org coordinated 15,000 exchanges.²⁷

system as a result of this strategic voting. See MAURICE DUVERGER, PARTY POLITICS AND PRESSURE GROUPS: A COMPARATIVE INTRODUCTION 23–32 (David Wagoner trans., Thomas Y. Crowell Co. 1972) (1966); Randazza, *supra*. The result is dubbed a Duvergerian equilibrium, which describes the two-party system in place in the United States today. See Randazza, *supra*.

²¹ See VotePair.org, *supra* note 2 (“It’s in the very nature of democratic politics that we often end up not voting for the person we agree with the most in order to advance our most important collective objectives.”).

²² See *id.* (“The [2000] race [was] razor-close. In 2000, the shift of just a few thousand votes in Florida (the victory margin was 537 votes), New Mexico (365 votes), or Iowa (4,144 votes) could have made all the difference.”).

²³ See FEC, PUBLIC FUNDING OF PRESIDENTIAL ELECTIONS (updated Feb. 2008), <http://www.fec.gov/pages/brochures/pubfund.shtml>.

²⁴ No evidence suggests that vote swapping arrangements occurred prior to the 2000 election, but it does not seem possible to prove that at least some people had not tried this (with or without the use of the Internet) prior to 2000.

²⁵ See Marc J. Randazza, *The Constitutionality of Online Vote Swapping*, 34 LOY. L.A. L. REV. 1297, 1304–05 (2001). This initial vote swapping push was not limited to those on the political left; conservatives “got into the act as well.” See *id.*

²⁶ Jamin Raskin, *Nader’s Traders: How to Save Al Gore’s Bacon by Swapping Votes on the Internet*, SLATE, Oct. 25, 2000, <http://www.slate.com/id/91933>.

²⁷ Randazza, *supra* note 25, at 1304–05.

The idea is extraordinarily simple: Voter A, who prefers the third-party candidate but is located in a “swing” state,²⁸ logs on to the website, enters her personal information, including location and preferred candidate, and the website matches her up with Voter B, who supports Voter A’s preferred mainstream candidate but is located in a “safe” state.²⁹ Later, each voter receives an e-mail from the website telling them with whom they have been matched and, as long as the participants honor their pledges, the swap is consummated on Election Day.³⁰ The voters never know whether their counterparts actually voted as agreed upon. As such, the terms “vote swapping” and “vote trading” are misnomers: “Pledges are exchanged, not ballots.”³¹ Some have called this lack of certitude a “major flaw” in vote swapping,³² but there is no practical way to overcome this “flaw,” and it has probably reduced the number of legal challenges that vote swapping has faced.³³

Questions of whether vote swapping is legal, moral, or both³⁴ abound. The Secretaries of State of California and Oregon took action by sending cease-and-desist letters to the proprietors of vote-swapping websites, threatening them with prosecution if they failed to shut down their vote-swapping mechanisms.³⁵ The California controversy culminated with the Ninth Circuit’s decision in *Porter v. Bowen*.³⁶

B. Vote Buying and Selling

Much of the concern related to the legality of vote swapping is because of its similarity to the illegal practice of buying and selling

²⁸ According to VotePair.org, a “swing state” is “a state that, according to the polls, has no clear majority or plurality favoring either of the two major-party presidential candidates.” VotePair.org, *supra* note 2.

²⁹ See *id.* VotePair.org defines a “safe state” as “one that, according to polls, has a clear majority favoring one of the two major-party presidential candidates.” *Id.*

³⁰ See *id.*

³¹ Scott Duke Harris, *Ballot Busters: The Archaic Mechanism Used to Elect U.S. Presidents is Under Assault by People Who Meet on the Internet and Pledge to Swap Votes in Next Year’s Election*, L.A. TIMES MAGAZINE, Nov. 2, 2003, at 17.

³² Amy K. Stewart, *Discouraged Voters Swap Selections*, DESERET MORNING NEWS, Jan. 7, 2008, <http://deseretnews.com/article/1,5143,695241922,00.html> (“Matthew Burbank, associate professor of political science at the University of Utah, points to a major flaw in vote swapping: ‘It’s trusting someone to do something that you absolutely cannot verify. There is no way to know that person didn’t vote for whoever they wanted.’”).

³³ See *infra* Part II.

³⁴ See Deborah J. Matties, *The First Amendment, The California Secretary of State, and Nader Trader Websites*, 18 COMMUNICATIONS LAWYER 4, 32, 34 (Winter 2001) (“Regardless of how vote swapping sites are judged by the court under the Constitution, many citizens will object to the idea of swapping votes on the ground that such action is immoral, irresponsible, and subversive of the electoral system.”).

³⁵ Randazza, *supra* note 25, at 1311–12.

³⁶ 496 F.3d 1009 (9th Cir. 2007).

votes.³⁷ While no statutes specifically prohibit vote swapping per se, various state and federal statutes prohibit the exchange of votes for money or other items of value.³⁸ The interpretation of these statutes—whether a pledged vote is an “item of value”—has played a large role in several states’ reactions to vote-swapping websites.³⁹

The federal vote-buying statute prohibits citizens from “pay[ing] or offer[ing] to pay or accept[ing] payment either for registration to vote or for voting,” punishable by a fine of “not more than \$10,000,” or imprisonment for “not more than five years, or both.”⁴⁰ This statute and its interpretive case law make clear⁴¹ that it is illegal to pay someone to vote or register to vote. Whether the vote buying scheme affects the outcome of the election is irrelevant.⁴² Although legislative history indicates that legislators did not intend the law to be limited to exchanges involving money, courts have generally held that the definition of “payment” “does not extend beyond the receipt of benefits of a pecuniary nature.”⁴³ The United States Department of Justice has agreed with this stance. A department spokesman commented that vote swapping was not a violation of the federal vote-buying statute because the websites provided only a “clearing house,” ““there [was] no pecuniary exchange, and it [was] an agreement amongst private parties.’”⁴⁴

That statement did not stop state officials from taking action based on similarly worded state statutes. On October 30, 2000, California Secretary of State Bill Jones sent a cease-and-desist letter to the founders of VoteSwap2000.com, informing them that they were “engaged in criminal activity in the State of California,” by violating two sections of the California Elections Code, which prohibit the ex-

³⁷ See *id.* at 1016.

³⁸ See *infra* notes 40, 45.

³⁹ See *Porter*, 496 F.3d at 1016 (discussing the decisions of several Secretaries of State to apply vote-buying statutes to websites facilitating vote swapping).

⁴⁰ 42 U.S.C. 1973i(c) (2000).

⁴¹ See, e.g., *Brown v. Hartilage*, 456 U.S. 45, 55 (holding that vote buying can be prohibited “without trenching on any right of association protected by the First Amendment”). In the *Brown* opinion, the court also stated that because 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.* at 54–55, but this comment is likely dicta because the holding of the case dealt only with the ability of a political candidate to make campaign promises that financially affected taxpayers, see *id.* at 45.

⁴² See, e.g., *United States v. Carmichael*, 685 F.2d 903, 907–08 (4th Cir. 1982) (“[I]t is not necessary for the government to prove that vote-buying activities actually affected a federal contest. Rather, a violation of § 1973i(c) is established when the evidence shows that a defendant bought or offered to buy a vote . . .”).

⁴³ *Randazza*, *supra* note 25, at 1322.

⁴⁴ *Id.* at 1321 (citation omitted).

change of a vote for a “valuable consideration” but do not mention vote-for-vote exchanges.⁴⁵

Whether or not vote swapping is rendered illegal by a statute like the California Elections Code depends on the definition of “valuable consideration” or “a thing of value.”⁴⁶ Commentators tend to agree that the “legal basis for the threat [of the Secretary of State] was flimsy.”⁴⁷ According to Raskin, “The whole point of such laws is to prevent people from creating a financial market in votes. . . . [I]f vote-buying and -selling are read to criminalize vote-trading, then much of what we thought was First Amendment-protected electoral and legislative politics becomes criminal.”⁴⁸ Raskin believes that vote swapping should be considered the equivalent of two people having a conversation, each attempting to convince the other to vote for their preferred candidate, and each changing their minds in the end.⁴⁹ Clearly, this characterization differs fundamentally from giving or receiving money in exchange for a vote.

C. Vote Pairing in Politics

It is also unlikely that vote swapping is an inherently unethical activity because, according to Raskin, “Vote-trading is the *lingua franca*

⁴⁵ See CAL. ELEC. CODE § 18521 (West 2003) (“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, 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.”); *id.* § 18,522 (“Neither a person nor a controlled committee 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.”). Judge Kleinfeld, however, makes a compelling first-year contracts argument in his dissent from the Ninth Circuit’s denial of rehearing en banc, citing the Second Restatement of Contracts and concluding that “a promise is consideration whether it involves cash or not.” *Porter v. Bowen*, 518 F.3d 1181, 1183 (9th Cir. 2008) (denial of rehearing en banc); see RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981). In addition, Judge Kleinfeld notes that “[o]f course, the buyer of the vote may be cheated by secret nonperformance of the promise he bought, and have no legal remedy, but a promise is good consideration even if the promise is unenforceable” *Porter*, 518 F.3d at 1183; see RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981). As a result, Judge Kleinfeld concludes that vote swapping constitutes vote buying. See *Porter*, 518 F.3d at 1185–86.

⁴⁶ These definitional issues were addressed in a similar challenge by Oregon’s Secretary of State. See OR. REV. STAT. § 260.665 (2007); Randazza, *supra* note 25, at 1316.

⁴⁷ JAMIN B. RASKIN, *OVERRULING DEMOCRACY: THE SUPREME COURT VS. THE AMERICAN PEOPLE* 51 (2003); see Randazza, *supra* note 25, at 1315 (“[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.”). But see Rushing, *supra* note 11, at 83 (“Literally read, the California statute could reach [vote swapping]. . . . Only the inducement in vote buying, however, creates a compelling reason for the state to limit speech.”).

⁴⁸ RASKIN, *supra* note 47, at 51.

⁴⁹ See *id.* at 51–52.

of real-world local politics, where groups, clubs, factions, and coalitions sit down and form slates with an exchange of promises: you get your constituents to support my guys for council member and state legislature and we'll deliver you our votes for Mayor and Congress."⁵⁰ Raskin notes that "legislative logrolling is the standard mode of business in Congress and the states,"⁵¹ and members of Congress use vote "pairs" and other similar mechanisms all the time. For example, in the House of Representatives "voting pairs" are informal agreements between members of the House that help to "nullify the effect of absences on recorded votes."⁵² Specifically, "[i]f a Member expects to be absent for a vote, he may 'pair off' with another Member who would vote on the other side of the question, but who agrees not to vote."⁵³ Prior to their abolishment in 1999, these unofficial arrangements were also called "special" or "dead" pairs.⁵⁴ On the other hand, "live pairs," which still exist today, involve a

Member who is absent during a vote on the House floor arranging with a Member on the opposite side of a specific question who is present during a vote . . . announc[ing] that the Member who is present is forming a 'Pair' with the absent Member, thus allowing the absent Member to have recorded how he would have voted had he been present.⁵⁵

While these mechanisms do not necessarily change the votes as they would have been cast if all persons were present, the fact that Congressional votes are subject to agreements and deals of this nature, combined with additional behind-the-scenes deal-making that occurs with each Congressional vote, suggests that vote swapping between citizens should not be treated as an inherently unethical or activity. Although two different sets of law govern vote swapping and Congressional vote pairing,⁵⁶ if, as a society, we find vote pairing ethically acceptable, there seems to be little reason not to find vote swapping ethically acceptable as well.

⁵⁰ *Id.* at 51.

⁵¹ *Id.*

⁵² House Roll Call Votes, <http://thomas.loc.gov/home/votes/votehelp.html> (last visited July 31, 2008).

⁵³ *Id.*

⁵⁴ Pairing in Congressional Voting: The House, <http://www.rules.house.gov/Archives/98-970.pdf>.

⁵⁵ *Id.*

⁵⁶ See *supra* Part I.B (explaining the law governing vote buying and vote swapping).

II

PORTER V. BOWEN⁵⁷

A. Factual and Procedural Background

After receiving a cease-and-desist letter from California Secretary of State Bill Jones in October 2000, the owners of VoteSwap2000.com “disabled their website’s vote-swapping mechanism, barred Internet users outside California from accessing the website, posted a notice on the website about what had happened, and e-mailed all people who had been matched about the potential illegality of vote swapping.”⁵⁸ While the owners of Votexchange2000.com did not receive a letter—likely because Jones did not know about the website—they also shut down their website once they heard about the correspondence.⁵⁹ This threat of prosecution was both a “stressful and frightening” experience for the website owners.⁶⁰

Secretary of State Jones apparently did not believe that all vote-swapping sites were illegal. The Secretary of State’s office found that a website called WinWinCampaign.org was operating legally because it only matched people who were considering a trade, and, believing that the website only fostered communication, the office did not threaten its owners with prosecution.⁶¹

On November 2, 2000, five days before the 2000 presidential election, the owners of VoteSwap2000.com, along with two Nader supporters who wanted to use the vote-swapping mechanism, filed suit in the United States District Court for the Central District of California, seeking damages as well as declaratory and injunctive relief.⁶² The district court denied their application for a temporary restraining order as moot and dismissed the claims for damages.⁶³ The Ninth Circuit reversed and remanded, holding that the case was not moot and that it was ripe for decision.⁶⁴

On remand, the district court granted summary judgment for the Secretary of State on plaintiffs’ claims for prospective relief because, according to the court, the case had since become moot in light of a letter sent to then-California Speaker of the Assembly Herb Wesson

⁵⁷ 496 F.3d 1009 (9th Cir. 2007).

⁵⁸ *Id.* at 1015.

⁵⁹ *See id.*

⁶⁰ *Id.*

⁶¹ *See* Porter v. Jones, 319 F.3d 483, 488 (9th Cir. 2003), *appealed after remand sub nom.* Porter v. Bowen, 496 F.3d 1009 (9th Cir. 2007).

⁶² *See* Porter, 496 F.3d at 1015–16.

⁶³ *See id.* at 1016 (dismissing the damages claims because “they had failed to satisfy the heightened pleading standard for constitutional tort actions, and stayed their claims for prospective relief under the abstention doctrine of *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941)”).

⁶⁴ *Id.*

from then–Secretary of State Kevin Shelley.⁶⁵ In the letter, Shelley said that he would “‘not seek to prevent the operation of websites such as VoteSwap2000.com and votexchange2000.com’” until the legislature came forward with clarifications of the constitutional issues surrounding the vote-swapping controversy.⁶⁶ The district court said that it would be “inappropriate” to grant an injunction because of the lack of a present prohibition on the activities of the plaintiffs.⁶⁷ In addition, the district court granted summary judgment on the claims for damages on the ground of qualified immunity. The plaintiffs again appealed to the Ninth Circuit, which rendered the most recent decision.⁶⁸

B. Vote Swapping and the First Amendment

Before considering the vote-swapping issue, the Ninth Circuit disposed of the claim that the aforementioned letter to Secretary of State Shelley rendered the case moot. According to the court, “the Secretary fail[ed] to carry the ‘heavy burden’ of establishing that it is ‘absolutely clear’ that California will not threaten to prosecute the owners [of the websites] if they create vote-swapping websites in the future.”⁶⁹ The court reasoned that the letter was not binding and that Shelley was no longer the California Secretary of State.⁷⁰

Moving to the merits, the court first considered whether the actions of Secretary of State Jones “burdened any constitutionally protected speech or conduct.”⁷¹ The court reasoned that since the websites included “useful information,” such as e-mail addresses of potential swappers, data about each state’s election process, and also expressed a “reasonably clear message of support for third-party candidates,” the “vote-swapping mechanisms themselves” are entitled to “at least some First Amendment protection.”⁷²

Next, the court considered the communications between the vote swappers that the websites enabled and found that “[i]t [was] reasonable to assume that the users’ ensuing messages would have concerned their political preferences and, if the users reached a meeting of the minds, resulted in agreements to swap votes on election day.”⁷³ Citing *Mills v. Alabama*, the court held that this kind of communication is

⁶⁵ *Id.*

⁶⁶ *Id.* (quoting Kevin Shelley).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 1017.

⁷⁰ *Id.*

⁷¹ *Id.* at 1018.

⁷² *Id.* at 1018–19.

⁷³ *Id.* at 1019.

“clearly protected by the First Amendment.”⁷⁴ In addition, “[a]ny agreements that paired users may have reached about swapping votes were also constitutionally protected” because the agreements involved the political opinions of voters.⁷⁵ The court also held that vote swapping “plainly differ[s]” from vote buying because the illegal practice “conveys no message other than the parties’ willingness to exchange votes for money,” whereas vote swapping conveys a political message.⁷⁶

C. The Legality of Secretary Jones’s Actions

Because the Ninth Circuit determined that the First Amendment protects vote swapping, *United States v. O’Brien*⁷⁷ required the court to subject Jones’s actions to intermediate scrutiny under the framework set out in that case.⁷⁸ According to *O’Brien*, a court should uphold a government action that burdens expressive conduct when (1) “it is within the constitutional power of the Government”; (2) “it furthers an important or substantial governmental interest”; (3) “the governmental interest is unrelated to the suppression of free expression”; and (4) “the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”⁷⁹

With respect to the first prong, the court found that “California’s police power plainly authorizes state officials to send cease-and-desist letters to websites that are believed to be in violation of an otherwise valid statute and to prosecute the websites’ owners for their offenses”; therefore, Jones had the constitutional authority to send the letters.⁸⁰ As for the second prong, the court determined that two of California’s reasons for sending the cease-and-desist letter, preventing corruption and preventing fraud, were “weighty government interests.”⁸¹ The court avoided the third justification, preventing the subversion of the Electoral College, saying that whether it was an important government interest was unclear but also irrelevant to its eventual holding.⁸² Further, the court said that the third prong was “easily satisfied” because the three justifications were “conceptually distinct from the abridge-

⁷⁴ *Id.* at 1020 (“[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.”) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)); *see id.* at 1019–20.

⁷⁵ *Id.* at 1020.

⁷⁶ *Id.*

⁷⁷ 391 U.S. 367 (1968).

⁷⁸ *See Porter*, 496 F.3d at 1021.

⁷⁹ *O’Brien*, 391 U.S. at 377.

⁸⁰ *Porter*, 496 F.3d at 1022.

⁸¹ *Id.* at 1022.

⁸² *Id.*

ment of speech” and because the letters did not appear to be politically motivated.⁸³

The court analyzed the three interests put forth by the Secretary independently in order to determine the applicability of the fourth prong. First, the court determined that the cease-and-desist letters did not further the state’s anti-corruption interest because the websites did not encourage the trading of votes for money.⁸⁴ The fraud interest was another story, however. The court found that “at least three kinds of fraud could have been perpetrated” through the use of the websites: people could lie about the state that they live in; people could use the website several times, thus trading their one vote for several other votes; or people could misrepresent their voting intention and the candidate that they support.⁸⁵ As a result, the court concluded, sending the cease-and-desist letter served the anti-fraud interest because potential users could no longer perpetrate the fraud if the websites were no longer in operation.⁸⁶ However, the fourth prong was still not satisfied with respect to the fraud interest because the burden on the activity was greater than necessary to further the government’s interest.⁸⁷ The court reasoned that it did not appear that any fraud had actually taken place; the websites warned that fraud was possible and advised users to be on the lookout for it; the manner in which the swaps were consummated reduced the opportunities for fraud; and the Secretary failed to establish that no less restrictive means to combat possible fraud were available.⁸⁸ Finally, the court found that the state’s interest in preventing the subversion of the Electoral College was not furthered by the cease-and-desist letter.⁸⁹

As a result of this analysis, the court held that the threatened prosecution was unconstitutional and in violation of the First Amendment.⁹⁰ However, the court did affirm the lower court’s decision as to

⁸³ *Id.* at 1023.

⁸⁴ *Id.* The court defined the corruption interest “to encompass only the prevention of illicit financial transactions such as the buying of votes or the contribution of large sums of money to legislators in exchange for political support.” *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 1023–24.

⁸⁸ *Id.* at 1024.

⁸⁹ *Id.* at 1025. This will be analyzed in more detail *infra* Part II.D.

⁹⁰ *See id.* In Judge Kleinfeld’s dissent to the Ninth Circuit’s denial of rehearing en banc, he disagrees with this result and sets up a simple, but compelling, syllogism: First, he notes that vote buying is not protected by the First Amendment, citing *Brown v. Hartilage*. *See* *Porter v. Bowen*, 518 F.3d 1181, 1182 (9th Cir. 2008) (denial of rehearing en banc). Second, he concludes that vote-swapping agreements constitute vote buying. *See supra* note 45; *Porter*, 518 F.3d at 1182. Therefore, he concludes that vote-swapping agreements are not protected by the First Amendment. *See Porter*, 518 F.3d at 1182. In addition, Judge Kleinfeld notes that the Supreme Court has repeatedly recognized that a government may restrict the right to participate in elections to those who reside within the state. *Id.* at 1184; *see, e.g., Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68–69 (“[A] government unit

qualified immunity because “the constitutionality of halting vote swapping was not clearly established in 2000.”⁹¹

D. The Ninth Circuit’s Discussion of the Electoral College

In the course of explaining why the state’s interest in preventing the subversion of the electoral college was not furthered by the cease-and-desist letter, the Ninth Circuit, whether it realized it or not, touched on a very fundamental and unique point:

[I]f all the Nader supporters had swapped their votes with Gore supporters in safe states, then Gore—who was preferred by 51 percent of the state’s voters to Bush—would have prevailed. Such an outcome *would not have represented a subversion of the Electoral College, which would have continued to operate precisely as set forth in the Constitution.* It also would not have undermined the state’s electoral system, which would have still allocated all of the state’s electoral votes to the candidate who received a plurality of the state’s popular vote. All that the vote swapping would have done would have been to offset the anomalies that its advocates believe can result when more than two candidates face off in winner-take-all systems.⁹²

This excerpt seems to suggest that the Electoral College not only allows for vote swapping, but likely encourages it, because it gives the people the opportunity to correct “anomalies” that occur in the electoral system by allowing the system to adapt over time. The voters could not have undermined the “constitutionally prescribed arrangement” for selecting the President or the system created by their state legislatures to select the state’s electors because the websites did not give voters the opportunity to physically vote in a state in which they were not registered.⁹³ This assertion is the foundation of the remainder of this Note. If the Ninth Circuit’s opinion on this particular point is correct, then the Framers of the Constitution would have approved of the use of vote swapping because the original goal of—or ideology behind—the Electoral College system is undisturbed when two voters in different states engage in vote swapping.

III

WOULD THE FRAMERS HAVE APPROVED OF VOTE SWAPPING?

A. Historical Development of the Electoral College System

The story of the Electoral College begins in Philadelphia, where the Constitutional Convention met from May 25 until September 17,

may legitimately restrict the right to participate in its political processes to those who reside within its borders.”).

⁹¹ *Id.* at 1027.

⁹² *Id.* at 1025 (emphasis added).

⁹³ *See id.*

1787.⁹⁴ During the summer of 1787, delegates from large states and small states squabbled over two plans for congressional representation: the New Jersey Plan, which called for equal representation for each state, and the Virginia Plan, which called for representation based on population.⁹⁵ After much dissension, the delegates compromised with the Connecticut Plan, which provided for the bicameral congressional structure that America knows today.⁹⁶

Following this compromise, the discussion turned to the method of electing the President,⁹⁷ “the most difficult [subject] of all on which [they had] to decide.”⁹⁸ Both the Virginia and New Jersey Plans advocated that Congress select the President, but the Convention failed to adopt either.⁹⁹ The Convention debate soon turned to arguments between those that desired a role for Congress in presidential elections and those that “wanted an independent and energetic executive” that was not “subservient to the legislature.”¹⁰⁰

Although some factions at the Convention strongly supported a nationwide popular vote,¹⁰¹ for many reasons, the idea of a national vote was doomed from the beginning. States imposed different voting qualifications upon their electorates, and southern states insisted that their presidential vote be weighted to reflect their slave populations.¹⁰² Other obstacles included the belief that a nationwide popular vote could create an executive with excessive power,¹⁰³ the view of representatives of less-populous states that a nationwide vote could not usually affect the election of a President from a highly populated area,¹⁰⁴ and some delegates’ “lack of confidence in the knowledge and judgment of the people.”¹⁰⁵

94 LONGLEY & PEIRCE, *supra* note 7, at 17.

95 *See id.* at 18.

96 *See id.*

97 *See id.*

98 WILMERDING, *supra* note 5, at 3 (quoting James Wilson).

99 BENNETT, *supra* note 5, at 12.

100 *See id.*

101 *See id.*

102 *See id.* The Southern slave states advocated counting slaves as full citizens in census calculation in order to take advantage of the political power that could come with a higher population. *See* RASKIN, *supra* note 47, at 57. The Northern, non-slave states opposed this, leading to the “three-fifths” compromise. *See id.*

103 BENNETT, *supra* note 5, at 12.

104 *Id.* at 12.

105 MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 166 (1913). *But see* Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President*, 73 J. AM. HIST. 35, 40–41 (1986) (arguing that the delegates were not worried about the knowledge or judgment of the citizens, but rather the fact that “[t]he vast expanse of the United States, the difficulty of communication, and the unfamiliarity of the general populace with national personalities—all militated against an informed choice”).

The Convention established a Grand Committee to examine several possible methods of electing the President.¹⁰⁶ The committee discussed congressional election of the President and direct election by the people but sought alternatives because of anticipated objections to both of those possibilities.¹⁰⁷ Ultimately, the Committee members turned to a compromise suggested earlier in the Convention by Pennsylvania's James Wilson: an "intermediate elector" plan with an electoral college, which was "the second choice of many delegates, though it was the first choice of [a] few."¹⁰⁸ Committee members saw this system as a way to "distance the selection of the executive from the legislature itself, while making use of the national legislative apportionment scheme as the basis for allocating voting power."¹⁰⁹ Although the Electoral College plan advanced by the Committee provided that the Senate would decide the election if no candidate received a majority of Electoral College votes,¹¹⁰ the version the Convention eventually embraced bestowed the task of breaking a deadlock on the House of Representatives,¹¹¹ probably because the Convention had already allocated a large degree of power to the Senate.¹¹² Some commentators have also deemed the allocation of the tiebreaker a bow to the small states because each state was to have only one vote in a contingency House election.¹¹³

The Electoral College system, as adopted by the delegates of the Convention and ratified by the states,¹¹⁴ has undergone numerous changes. The most obvious modification, the Twelfth Amendment, "is perhaps most remarkable for what it did not change."¹¹⁵ The Amendment separated Electoral College balloting for President and

¹⁰⁶ WILMERDING, *supra* note 5, at 13–14. This Committee of eleven was composed of one member of each state delegation present at the Convention. *Id.* at 13. At least six of the Committee members had expressed a preference for direct election by the people. *Id.* at 14.

¹⁰⁷ See LONGLEY & PEIRCE, *supra* note 7, at 18–19.

¹⁰⁸ NEIL R. PEIRCE, *THE PEOPLE'S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT VOTE-ALTERNATIVE* 43 (1968).

¹⁰⁹ BENNETT *supra* note 5, at 13.

¹¹⁰ LONGLEY & PEIRCE, *supra* note 7, at 19.

¹¹¹ See *id.* at 18–19.

¹¹² See *id.* at 210 n.7.

¹¹³ See WILMERDING, *supra* note 5, at 17–18. The members of the Convention thought that the electors were unlikely to come to a definitive choice and believed that the House would ultimately choose the president most of the time. See *id.* at 17. As a result, they thought the manner of election in the House a very important aspect of the Electoral College system. *Id.* at 17–18 (explaining that although the House was substituted for the Senate, "to maintain the equality of suffrage enjoyed by the several states in the Senate, the vote in the House was to be taken by states and not by heads, the representation from each state having one vote").

¹¹⁴ See U.S. CONST. art. II, § 1.

¹¹⁵ BENNETT, *supra* note 5, at 23.

Vice President,¹¹⁶ directly responding to the problems encountered in the 1800 election.¹¹⁷ It did not, however, eliminate the office of elector, even though “[b]y that time it was clear that electors were . . . often casting their votes pursuant to prior commitment, rather than exercising any real discretion informed by discussion among electors.”¹¹⁸

Other changes stemming from “custom, state law, and political necessity” have had a more significant impact.¹¹⁹ The growth and advancement of political parties was directly responsible for rendering the “free elector” obsolete.¹²⁰ A political party could not allow electors to “play the role of statesmen” because it became too risky, and “[t]hus was born the role of elector as a faceless component of a state-by-state counting device.”¹²¹ Political parties were also responsible for the fading idea that the House of Representatives was to be the usual selector of the President;¹²² “[t]he House contingency procedure became . . . not an integral part of the presidential selection process, but an emergency step to be taken when normal procedures break down.”¹²³ Finally, while the Constitution does not mandate how the states choose their electors, most states quickly adopted a popular election system¹²⁴ that assigned Electoral College votes on a “winner-take-all” basis.¹²⁵

B. The Original Goal or Ideology Behind the Electoral College

When considering whether vote swapping is consistent with the spirit of the Electoral College mechanism prescribed by the Framers—although some consider the original goal irrelevant in the grand scheme because the Electoral College has changed and evolved significantly since the Constitutional Convention—it is critically important

¹¹⁶ See U.S. CONST. amend XII.

¹¹⁷ See BENNETT, *supra* note 5, at 22–23. In the 1800 presidential election, there was an Electoral College tie and the election was thrown into the House of Representatives. *Id.* Making matters especially complicated, the tie was between Thomas Jefferson and Aaron Burr, both members of the same congressional caucus. *Id.* Because Article II states that the electors must choose two candidates and that the person with the highest number of votes becomes President and the second highest Vice President, it was possible, as occurred in 1800, for two candidates from the same party to have the *same* majority. See *id.*

¹¹⁸ *Id.* at 23.

¹¹⁹ LONGLEY & PEIRCE, *supra* note 7, at 23.

¹²⁰ See *id.*

¹²¹ *Id.*

¹²² See *id.* at 19.

¹²³ *Id.* at 24–25.

¹²⁴ See *id.* at 25 (noting that “the expansion of the electorate, the popularization of democratic ideals, and unfortunate experiences with legislative politics . . . combined to create an uneven, uncertain, but inevitable movement to popular selection of electors”).

¹²⁵ *Id.* at 25. Most states allocate their electoral votes in this way because they would wield less political power than other states if they did not do so. See *id.* at 26.

to look to the system's original goal. Scholars disagree as to the nature of the Framers' original goal in constructing the Electoral College system; some scholars believe that the ideology behind the system was to foster and simplify a procedure of direct election by the people,¹²⁶ while others believe that the Framers specifically wanted to have independent electors select the President.¹²⁷ A third, more amorphous group simply believes that the Electoral College was a compromise generated by the difficulty of coming up with an acceptable plan.¹²⁸

These conflicting viewpoints raise two questions: Who is right? And does it even matter in considering whether the Framers would approve of vote swapping?

1. *Arguments that the Original Goal was to Foster Direct Election by the People*

Although he explains that "it was doubtless envisioned that the entire process of electing electors and determining their characteristics would be an evolutionary one," Robert M. Hardaway appears to feel that the likely original goal of the Electoral College was to allow the people to directly elect the President.¹²⁹ Lucius Wilmerding agrees, saying, "It is clear . . . that the framers wanted and expected the popular principle to operate in the election of the President."¹³⁰ Although the specific reasoning for this sentiment is difficult to uncover, these scholars argue that a system of completely independent electors "cannot be attributed to the Founders as a whole nor to their intention in establishing the electoral college."¹³¹ Indeed, says Wilmerding, "The electoral system was the invention, not of that part of the Federal Convention which distrusted the people, but of that part which trusted them."¹³²

Scholars on the popular-election side of the issue tend to base their deductions on the words of the Framers during and after the Convention. James Madison, at the Virginia Ratifying Convention, explained to the Convention members that the decision was to be left to the "people at large"¹³³ and during the First Congress said that the President was to be "'appointed at present by the suffrages of three

¹²⁶ See Part III.B.1.

¹²⁷ See Part III.B.2.

¹²⁸ See Part III.B.3.

¹²⁹ See HARDAWAY, *supra* note 6, at 85–86. Hardaway also speaks of "Myths and folklore, such as that the framers intended that an elite group of privileged electors would make a choice independent of the will of the people." *Id.* at 9.

¹³⁰ WILMERDING, *supra* note 5, at 21.

¹³¹ JUDITH BEST, THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT: A DEFENSE OF THE ELECTORAL COLLEGE 35 (1975).

¹³² WILMERDING, *supra* note 5, at 171.

¹³³ WILMERDING, *supra* note 5, at 19.

million people.’”¹³⁴ Although in *The Federalist No. 68* Hamilton appears to take the view that the Framers intended that independent electors select the President,¹³⁵ he states in *The Federalist No. 77* that the Electors were to be “persons immediately chosen *by the people*.”¹³⁶ While this statement does not reveal his personal feelings about the original goal, it does show that his sentiments in *No. 68* did not necessarily represent his complete viewpoint.¹³⁷

According to Martin Diamond, to determine the ideology behind the Electoral College:

[W]e have first to get something out of our heads, namely, the widespread notion that the intention behind the Electoral College was undemocratic, that the main aim was to remove the election from the people and place it in the hands of wise, autonomous, detached electors who, without reference to the popular will, would choose the man they deemed best for the job.¹³⁸

Although Diamond expresses several compromise-related reasons for the establishment of the Electoral College system,¹³⁹ he also believes that “the system of electors also had to be devised because most of the delegates to the Convention feared, not democracy itself, but only that a straightforward national election was ‘impracticable’ in a country as large as the United States, given the poor internal communications it then had.”¹⁴⁰

2. *Arguments that the Original Goal Was to Appoint Independent Electors*

Other commentators respond that those who argue the Electoral College was intended to affect a popular vote “have had little to say about what the electors *were* to do.”¹⁴¹ Harshly, Bennett states that “[i]f these commentators really mean to assert that electors were originally intended not to exercise independent choice, but rather to parrot choices previously made by the electorate in the fashion that

¹³⁴ *Id.* (quoting James Madison).

¹³⁵ See *THE FEDERALIST NO. 68* (Alexander Hamilton) (J.R. Pole ed., 2005).

¹³⁶ *THE FEDERALIST NO. 77*, at 410 (Alexander Hamilton) (J.R. Pole ed., 2005) (emphasis added).

¹³⁷ Other politicians not directly involved with the creation of the Electoral College read the newly ratified Constitution in a similar manner. Senator Samuel Smith opined that “the intention of the convention was that the election of the chief officers of the government should come as immediately from the people as was practicable.” WILMERDING, *supra* note 5, at 20 (citing 13 *ANNALS OF CONG.* 88 (1803)). Senator Timothy Pickering of Massachusetts said that he “believed it to be the intention of the Constitution, that the people should elect” the President. *Id.* (citing 13 *ANNALS OF CONG.* 123 (1803)).

¹³⁸ MARTIN DIAMOND, *THE ELECTORAL COLLEGE & THE AMERICAN IDEA OF DEMOCRACY* 3 (1977).

¹³⁹ See *id.*; *infra* Part III.B.3.

¹⁴⁰ DIAMOND, *supra* note 138, at 4 (citation omitted).

¹⁴¹ BENNETT, *supra* note 5, at 15.

electors most typically do today, the basis for any such claim is hard to fathom.”¹⁴² Furthermore, Bennett argues that the reliance on the Framers’ words is a “fragile basis” on which to determine the original goal of the Electoral College.¹⁴³ Specifically,

Reference to the “people” was frequently employed at the time not to characterize direct popular choice—or even indirect—but rather for all manner of decision-making outlets in the new system, where ultimate sovereignty was presumed to reside with the “people,” in contrast to the “sovereignty” of the English monarch.¹⁴⁴

Bennett also argues that those at the convention favoring direct election were only a small minority of participants and points out that the system that was eventually adopted did not *require* popular election, although it could have done so.¹⁴⁵

Supreme Court justices have chimed in on this issue as well. In the earliest decision to comment on the matter, *McPherson v. Blacker*, the Court said that it was “doubtless . . . supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the chief executive.”¹⁴⁶ In a concurring opinion in *Williams v. Rhodes*, Justice Harlan opined that “[t]he [Electoral] College was created to permit the most knowledgeable members of the community to choose the executive of a nation whose continental dimensions were thought to preclude an informed choice by the citizenry at large.”¹⁴⁷

3. *Arguments that the Electoral College Was a Compromise, Intended to Evolve*

According to John P. Roche, “The vital aspect of the Electoral College was that it got the Convention over the hurdle and protected

¹⁴² *Id.*

¹⁴³ *See id.* at 16.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* Many other scholars have also taken this view. For example, Thomas Cooley said in 1892 that “[i]t was supposed that by this complicated system of election the highest wisdom of the country would be best expressed in the choice finally made; each state selecting its most trusted citizens for electors, and these being left entirely free in the exercise of their judgment as to the persons most worthy to be elevated to the two offices respectively.” Thomas M. Cooley, *Methods of Appointing Presidential Electors*, 1 MICH. L.J. 1, 1 (1892).

¹⁴⁶ 146 U.S. 1, 36 (1892).

¹⁴⁷ 393 U.S. 23, 43–44 (1968) (Harlan, J., concurring). In addition, the majority opinion in *Ray v. Blair* opines that “[t]he intention of the Founders was that those electors should exercise their judgment in voting for President and Vice-President. Therefore this requirement of a pledge is a restriction in substance, if not in form, that interferes with the constitutional duty to select the proper persons to head the nation, according to the best judgment of the elector.” 343 U.S. 214, 225 (1952). Additionally, Justice Jackson, dissenting in *Ray*, said that one should consider the Electors “free agents, to exercise an independent and nonpartisan judgment as to the men best qualified for the Nation’s highest offices.” *Id.* at 232 (Jackson, J., dissenting).

everybody's interests. The future was left to cope with the problem of what to do with this Rube Goldberg mechanism."¹⁴⁸ Those in Roche's camp believe that the Electoral College was merely a compromise created with the sole purpose of evolving into a more workable system.¹⁴⁹ While this group of scholars might be the largest, it is also the hardest to define because it appears that at least to a certain extent all scholars—likely correctly—believe that the Electoral College was somewhat of a compromise.¹⁵⁰

William T. Gossett writes, "What really moved the delegates to accept the electoral system, with little enthusiasm and no unanimity of conviction, were certain practical considerations, dictated not by political ideals but by the social realities of the time—realities that no longer exist."¹⁵¹ According to Longley and Peirce:

Among these realities were: (1) the pressure on the delegates at the Constitutional Convention to reach agreement, (2) the lack of immediate concern about the operation of the electoral college,¹⁵² and (3) a major—and soon to be disproved—assumption about the likely dispersion of support for various presidential candidates.¹⁵³

In addition to these considerations, Diamond said that "the electors were not devised as an undemocratic substitute for the popular will, but rather as a nationalizing substitute for the state legislatures."¹⁵⁴ More specifically, the Electoral College was "the product of the give-and-take and the compromises between the large and the small states"¹⁵⁵

¹⁴⁸ John P. Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AMER. POL. SCI. REV. 799, 811 (1961); see Rube Goldberg Biography, www.rubegoldberg.com/aboutRube.php (last visited July 31, 2008).

¹⁴⁹ See Slonim, *supra* note 105, at 57 (arguing that the creation of the Electoral College was not "as Roche would have it, simply the product of a last-minute accident of history").

¹⁵⁰ See, e.g., DIAMOND, *supra* note 138, at 3 (describing the compromise that resulted in the electoral college); FARRAND, *supra* note 105, at 166 (same); LONGLEY & PEIRCE, *supra* note 7, at 20 (discussing the "realities" that motivated the delegates to the Constitutional Convention to compromise).

¹⁵¹ William T. Gossett, *Electing the President: New Hope for an Old Ideal*, 53 A.B.A. J. 1103, 1103 (1967).

¹⁵² See LONGLEY & PEIRCE, *supra* note 7, at 21 ("A second reason why the electoral college plan quickly gained support lay in the belief held by most delegates that any problems that might arise in this method of electing the president would not be immediate: they all knew that George Washington was going to be chosen president no matter what the electoral system Being the practical men they were, the delegates sought to put off until a later time what could be postponed and considered then.")

¹⁵³ LONGLEY & PEIRCE, *supra* note 7, at 20.

¹⁵⁴ DIAMOND, *supra* note 138, at 3.

¹⁵⁵ *Id.* According to Diamond, the Electoral College was created as a result of the different voting schemes in use in the different states. "That is, the electoral system would take care of the discrepancies between state voting population and total population of the states until . . . slavery would be eliminated and suffrage discrepancies gradually disappeared." *Id.* at 5.

4. *The Electoral College Was Most Likely a Compromise*

Although reasonable minds could and do differ, it appears that the Electoral College system was largely borne of compromise.¹⁵⁶ This is relatively clear from the convincing arguments made by the scholars in the first two categories, arguments that are completely at odds with each other.¹⁵⁷ In other words, it appears that both “sides” at the Constitutional Convention seemed to believe that they “won” the debate, when really the Framers created a system that was amenable to both sides at the time—a *compromise*. Although there are certainly proponents on all sides of the issue, a significant amount of jockeying at the Constitutional Convention clearly occurred, which led to a more convoluted system than anyone at the start of the Convention likely imagined would result.

The conclusion that the Electoral College was a compromise is fairly inescapable. Simply, half of these scholars cannot possibly be incorrect because a substantial amount of evidence on each side exists.¹⁵⁸ In essence, “[the Electoral College] seems to have reconciled contrariety of views by leaving it to the state legislatures to appoint directly by joint ballot or concurrent separate action, or through popular election by districts or by general ticket, or as otherwise might be directed.”¹⁵⁹

C. Where Does Vote Swapping Fit In?

The next step is to determine whether the ideology behind the Electoral College is relevant to the issue of vote swapping—if the Framers would have supported vote-swapping efforts regardless of whether they supported direct election or independent electors, then the actual ideology is of no moment. Intuitively, it seems that those who believe that the original goal of the Electoral College was to provide for a direct election by the people would support vote-swapping efforts. On the other hand, it seems that those who believe that the original goal of the Electoral College was to provide for independent electors would likely oppose any kind of vote-swapping mechanism—but this may not necessarily be true.

¹⁵⁶ See LONGLEY & PEIRCE, *supra* note 7, at 19 (“With the convention striving for consensus on its proposed constitution, these strenuous objections to both congressional election and direct-vote plans meant that some alternate plan would have to be found.”).

¹⁵⁷ See *supra* Part III.B.1–2.

¹⁵⁸ See *id.*

¹⁵⁹ *McPherson v. Blacker*, 146 U.S. 1, 28 (1892).

1. *If the Original Ideology Behind the Electoral College Were Direct Election by the People*

If the ideology behind the Electoral College supported direct election of the President by the people then vote swapping should clearly be acceptable to the Framers as a permissible evolution of the system. Because the system was designed to evolve—indeed, it was modified in the Twelfth Amendment—the Framers likely would have supported the democratic use of creativity and ingenuity to achieve a result that the majority of the people in a state prefer. According to Hardaway, today’s Electoral College is the “result of 200 years of evolution and trial and error, made possible by the flexibility the Constitution so wisely provided.”¹⁶⁰ As applied to the vote-swapping controversy, one can conclude that this evolution is not complete: vote swapping could be the next step.

If the Framers’ actually preferred a direct election by the people, but they were merely afraid of the logistical nightmare that might have accompanied such an election procedure at the time,¹⁶¹ they would likely have no problem with the idea of vote swapping because the results of an election in which vote swapping is used are more likely to resemble the results of a truly national election. If this is the case, vote swapping is merely a subversion of a system that no longer serves its intended purpose. Although, logistically, it would still be difficult to have a national election today,¹⁶² the challenges that a national election would face today pale in comparison to those that would have come up in the Framers’ era.¹⁶³ As a result, if the intent behind the Electoral College was to have a direct election, it would support the idea of switching to a national election and ridding the process of the Electoral College entirely.¹⁶⁴ Vote swapping could be a first step toward this goal because “subversion” of the electoral process in this way actually results in a more national election result.

¹⁶⁰ HARDAWAY, *supra* note 6, at 87.

¹⁶¹ See DIAMOND, *supra* note 138, at 4.

¹⁶² A national election would likely require a unification of voting procedures and voting guidelines. See BENNETT, *supra* note 5, at 161–64.

¹⁶³ See DIAMOND, *supra* note 138, at 4.

¹⁶⁴ See Garrett Epps, *Let’s Abolish the Electoral College*, SALON, Oct. 12, 2007, http://www.salon.com/opinion/feature/2007/10/12/electoral_college/index_np.html (“We scrapped the Framers’ system more than a century ago. We no longer permit individuals to own slaves, for example (13th Amendment); we no longer permit states to maintain old-South-style semi-dictatorships or skew their legislative apportionment (14th Amendment) or to bar voting by racial minorities (15th) or by women (19th) or by those who don’t pay their poll tax (24th) or by young adults (26th). Senators are elected by the people, not state legislatures (17th). Why should we tolerate a system that lets state legislatures decide how states pick their electors, as Article II does?”).

2. *If the Original Goal Were to Have Independent Electors Make the Choice*

If the goal of the Electoral College were to give independent electors the ability to choose the President, the subversion of this specific element of the process would seem, on the surface, to violate the Framers' ideology because vote swapping would compromise the selection of the independently thinking electors. After the dust settles, however, one could still come to the same result as above—even if the ideology behind the Electoral College were to have independent electors, vote swapping does not directly affect this procedure in any way. As the Ninth Circuit stated in *Porter v. Bowen*, vote swapping does not change how the Electoral College, as outlined in the Constitution, operates—it only changes how the electors are selected.¹⁶⁵ If the political parties and state statutes allowed it,¹⁶⁶ the electors could, even with vote swapping in effect, make an independent choice.

In addition, the idea of independent electors was essentially abandoned from the beginning, and the Electoral College is still used today in largely the same way that the Framers structured it.¹⁶⁷ More specifically, as soon as the states decided to use a winner-take-all popular election system and the two-party system emerged,¹⁶⁸ the idea that the electors would be “free agents” became obsolete. When the system was modified by the Twelfth Amendment in 1804, no one attempted to reinstitute the Electoral College's supposed original intent.¹⁶⁹ From this, we may be able to assume that the system was created with the intention that it evolve—indeed, the Framers' contemporaries saw no problem with its evolution—and vote swapping over the Internet is just the next step. While this does not necessarily show that an independent elector-fueled ideology would have supported vote swapping, it does show that an evolutionary electoral system would leave room for the eventual use of vote swapping.

The supposed reasons for the use of independent electors vary, but the sentiment is thought to be based on a lack of trust in the

¹⁶⁵ 496 F.3d. 1009, 1025 (9th Cir. 2007).

¹⁶⁶ According to most scholars, even in states in which electors are forced to pledge or take an oath to vote for the candidate that their party nominates, the pledges or oaths are technically unenforceable. See LONGLEY & PEIRCE, *supra* note 7, at 116. (“If an elector chooses to incur party and community wrath by violating his trust and voting for someone other than his party's candidate, it is doubtful if there is any practical remedy,” writes James C. Kirby, Jr., an expert on electoral college law.”). The Supreme Court has never directly addressed this question. See *id.*

¹⁶⁷ See LONGLEY & PEIRCE, *supra* note 7, at 23.

¹⁶⁸ See *id.*

¹⁶⁹ See BENNETT, *supra* note 5, at 23.

citizenry or distrust in democracy generally.¹⁷⁰ This is not necessarily to say that the Framers believed that the electorate was not intelligent. What is more likely is that the Framers believed that the citizens at large did not possess the information—or, more accurately, the kind of information—that the Framers believed necessary to elect a proper President.¹⁷¹ With primitive communication and with the country in its infancy, it would not be surprising or disturbing to find that the Framers did not believe that the people were equipped to choose one person to lead the country.¹⁷² Today, however, although people may disagree on priorities or what it takes to lead, there is no shortage of information about the candidates, the relative advantages or disadvantages of one kind of leadership over another, and what it takes to be a successful President.¹⁷³ As a result, the concerns that may have led the Framers toward a system of independent electors is likely obsolete, meaning that even those convention-goers who staunchly believed in the independent elector could now support the idea of vote swapping.

3. *If the Electoral College Were Simply a Compromise*

If the Framers created the Electoral College as a compromise between two competing points of view, one still arrives at the same result. According to Slonim, allowing the people to directly select the President was too national a choice for some, but allowing the legislature to select the President clashed with republican principles.¹⁷⁴ As a result, the Framers reached a compromise that satisfied both groups, but the compromise was no more than a way of “blending national and federal elements.”¹⁷⁵

The Framers would see vote swapping as an acceptable—and therefore constitutional—phenomenon because the states determined how to choose the electors. If the states chose, they could indi-

¹⁷⁰ See Cooley, *supra* note 145, at 1; Epps, *supra* note 164. *But see* WILMERDING, *supra* note 5, at 171 (arguing that “it is very doubtful that these Electors were ever intended to act a part wholly independent of the people”).

¹⁷¹ See LONGLEY & PEIRCE, *supra* note 7, at 19; *see also* Williams v. Rhodes, 393 U.S. 23, 43–44 (1968) (Harlan, J., concurring) (implying that the continental dimensions of the United States at the time precluded the citizenry from obtaining the information necessary to make an informed choice).

¹⁷² See LONGLEY & PEIRCE, *supra* note 7, at 19 (“[T]he lack of awareness and knowledge of candidates by the people, with unforeseen consequences resulting from the scattering of votes by the electorates in the various states among favorite sons they knew best.”). They could have easily thought that the people in the southern states might not know what it takes to lead in the north and vice-versa.

¹⁷³ The rise of the Internet and high ratings for 24-hour cable news channels seem to support this point.

¹⁷⁴ See Slonim, *supra* note 105, at 57 (explaining that George Mason opposed the direct election of the President because he thought the country was too large and “the difficulty of communication did not permit informed selection of a national candidate”).

¹⁷⁵ *Id.* at 58.

vidually change the process of selecting electors to a non-winner-take-all system or take the elections away from the voters altogether.¹⁷⁶ Under this theory, there was no ideological backdrop for the Electoral College, and so it cannot be subverted by the act of vote swapping. The Framers were simply concerned with arriving at the most accurate and fair result. If the Electoral College system were not generating the most accurate representation of the will of the people, the Framers would likely want the people to modify it to generate the most accurate outcome. By allowing the states and the people to modify the Electoral College, the Framers seemed to accept the idea that the Electoral College was malleable and not the venerable institution that some scholars seem to believe that it was.¹⁷⁷

D. Considering Counterarguments

From the above, it appears likely that the Framers' ideology would allow them to accept vote swapping as a satisfactory evolution of the Electoral College system regardless of the original ideology behind its creation. However, there are several counterarguments that must be addressed. First, originalists may argue that vote swapping is unconstitutional because the text of the Constitution does not mention it.¹⁷⁸ Second, some scholars believe that the process surrounding the Electoral College should not evolve because it is necessary to sustain federalism.¹⁷⁹

1. *Originalists Should Look to Ideology of the Framers, Not Solely the Constitution's Text*

Generally, when interpreting an obsolete term, an interpreter will determine its historical meaning and then "translate that meaning into modern English."¹⁸⁰ A "new originalist" or an originalist practicing "strict textualism" will look for the original meaning of a constitutional provision and not the subjective intent of the Framers.¹⁸¹ Other originalists might look to the original subjective intent of the Framers, but stop there, and not allow the ideology of the Framers to determine what the constitutional provision truly means.¹⁸² Barnett also references the "moderate textualist" who "'takes account of the

¹⁷⁶ See LONGLEY & PEIRCE, *supra* note 7, at 25.

¹⁷⁷ See DIAMOND, *supra* note 138, at 3.

¹⁷⁸ See *infra* Part III.D.1-2.

¹⁷⁹ See *infra* Part III.D.3.

¹⁸⁰ Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1797 (1997).

¹⁸¹ See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 622 (1999).

¹⁸² See *id.*

open-textured quality of language and reads the language of provisions in their social and linguistic contexts.’”¹⁸³

An originalist might argue that vote swapping would be unacceptable to the Framers because it is not mentioned in the Constitution, the Internet did not exist at the time of the Constitutional Convention, and the modes of communication available at the time were not conducive to anything like vote swapping.¹⁸⁴ This argument is unpersuasive in this context, however, because more effective methods of constitutional interpretation look at the ideology of the Framers and not only the text that they created. Indeed, as Justice William Brennan said in 1985, “the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.”¹⁸⁵

To determine the original goal of the Electoral College, employing some kind of textual interpretation may be helpful but only in conjunction with the idea that “[t]he Constitution is not the work of an omniscient deity who foresaw all future developments and chose only those words that were indispensable for all circumstances.”¹⁸⁶ Instead of attempting to interpret what the Framers said at the time of the Constitutional Convention, one should attempt to determine their ideology—what the Framers would believe, if anything, if they were here today. This is not necessarily meant to endorse the “notion of the living constitution,”¹⁸⁷ but to promote the interpretation of ideology instead of the strict interpretation of text.¹⁸⁸ In other words, an

¹⁸³ *Id.* at 624 (quoting Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 223 (1980)) (“A moderate intentionalist applies a provision consistent with the adopters’ intent at a relatively high level of generality, consistent with what is sometimes called the ‘purpose of the provision.’ Where the strict intentionalist tries to determine the adopters’ actual subjective purposes, the moderate intentionalist attempts to understand what the adopters’ purposes might plausibly have been, an aim far more readily achieved than a precise understanding of the adopters’ intentions.”).

¹⁸⁴ See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 45 (Amy Gutmann ed., 1997) (“Sometimes (though not very often) there will be disagreement [between originalists] regarding the original meaning [of a constitutional provision]; and sometimes there will be disagreement as to how that original meaning applies to new and unforeseen phenomena. How, for example, does the First Amendment guarantee of ‘the freedom of speech’ apply to new technologies that did not exist when the guarantee was created—to sound trucks, or to government-licensed over-the-air television?”).

¹⁸⁵ JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 15 (2007).

¹⁸⁶ Dorf, *supra* note 18, at 340; see Lyons, *supra* note 18, at 760.

¹⁸⁷ Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 658 (1989).

¹⁸⁸ In the Second Amendment context, if the mindset in the eighteenth and nineteenth centuries were that everyone should have the right to have weapons because everyone always has the right to defend themselves, then these interpreters would agree with one another. If the mindset, however, was that everyone should have the right to have weapons because of a concern about an oppressive federal government, then the interpreters would likely disagree, because the ideological interpreter would likely feel that the

interpreter concentrating solely on text and an interpreter looking at ideology and text would agree that “since X meant X then, X means X now.” To the textual interpreter, however, X is a word (and is unchanging regardless of the current time period), whereas to the ideological interpreter, X may be a mindset that can be applied to different time periods and different facts.

Similar to the segregation context, in which *Bolling v. Sharpe*¹⁸⁹ and *Brown v. Board of Education*¹⁹⁰ reexamined the meaning of prior law in light of modern values, the original goal of the Electoral College should be interpreted and applied in light of the modern political, technological, and social landscape.¹⁹¹

2. *The Constitution Does Not Prescribe a Method of Choosing Electors*

An originalist should not object to vote swapping because the Constitution does not prescribe a method for selecting electors—it was left up to the states.¹⁹² Indeed, Article II of the U.S. Constitution states that the legislature of each state has the power to select its electors in any way that it chooses.¹⁹³ In an October 2007 speech at Cornell University, retired Supreme Court Justice Sandra Day O’Connor said:

We have a very odd system in this country—an Electoral College system[.] We don’t allow people to vote in presidential elections for the candidates. They vote for electors, who then meet and decide how the electors are going to cast their votes. And it is up to each [state] to decide whether it’s a winner take all for the Electoral Col-

people of the United States today, rather than use weapons, are more likely to use the Internet and the media to express their outrage at the federal government. *Cf.* Dorf, *supra* note 18, at 347 (arguing that “we cannot rule out the individual right view of the Second Amendment on textual grounds alone. The champions of the individual right view are entitled to have their arguments heard.” He notes, however, “that [this] does not mean that they are entitled to have their arguments accepted, unless, as judged by the admittedly somewhat value-laden criteria of constitutional interpretation, the arguments are convincing.”). This argument applies equally to the Electoral College because a textual interpreter could, seeing no mention of the use of vote swapping or technology in the Constitution, argue that vote swapping is invalid for that reason. However, an ideology interpreter would argue that the ideology of the framers at the time was to have the most fair and accurate election possible at the time. Today, the most fair and accurate election might involve vote swapping, especially in light of Justice O’Connor’s comments. *See infra* note 194 and accompanying text.

¹⁸⁹ 347 U.S. 497 (1954).

¹⁹⁰ 347 U.S. 483 (1954).

¹⁹¹ Dorf, *supra* note 18, at 326–27 (“*Bolling* and *Brown* stand for the proposition that the meaning of a constitutional provision need not be fixed by the concrete intentions, expectations, or understandings of its adopters.”) (citing *Bolling*, 347 U.S. at 500 and *Brown*, 347 U.S. at 489, 492).

¹⁹² *See* BENNETT, *supra* note 5, at 17.

¹⁹³ U.S. CONST. art. II, § 1. The fact that all states use a popular election and that most states use a winner-take-all system does not change the fact that the Constitution does not force them to do so.

lege votes. . . . [Changing this] would require a change in the constitutional structure, and I suspect the nation isn't ready to do that.¹⁹⁴

Since the Framers did not anticipate a two-party system,¹⁹⁵ they could not have contemplated the eventual perceived need for vote swapping. By allowing the states to choose the electors however they wished, the Framers clearly expected subtle modifications to the system and were confident in the state legislature's ability to decide how it wanted to assign its electors.¹⁹⁶ Because, as Justice O'Connor says, it does not appear that Congress will attempt to eliminate the Electoral College anytime soon—and it seems impossible in today's political landscape—vote swapping may be the most practical way to give effect to the actual voting intent of the people. Most importantly, however, vote swapping does not violate the provisions in the Constitution that outline the procedure for electing the president—it merely uses those provisions in a different way.

3. *Any Federalist Purpose the Electoral College May Have Had Is Now Obsolete*

Although some believe that the Electoral College is an element of federalism instituted by the Framers in order to “balanc[e] the interests of small and large states, encourage[] stability, discourage[] fraud, and force[] candidates to wage national campaigns,”¹⁹⁷ others believe that today's Electoral College “now serves neither a clear federalism purpose nor any other purpose that significantly mirrors the Framers' original design.”¹⁹⁸

Supporters of the idea that injecting federalism was a part of the purpose of the Electoral College tend to believe that the winner-take-all system that most states employ is critical to the Electoral College's function “because it encourages candidates to concentrate on states as integrated units, rather than simply as convenient vehicles for accumulating votes.”¹⁹⁹ Further, “[d]efenders [of this view] often claim that the electoral college forces candidates to adopt a national focus

¹⁹⁴ Justice Sandra Day O'Connor, U.S. Supreme Court, The Importance of an Independent Judiciary, Milton Konvitz Memorial Lecture at Cornell University (Oct. 23, 2007), <http://www.cornell.edu/video/details.cfm?vidID=110&display=preferences>.

¹⁹⁵ See LONGLEY & PEIRCE, *supra* note 7, at 24.

¹⁹⁶ It would appear that if a state legislature decided that vote swapping was a large “problem” and wanted to do something about it, it could simply vote to change the assignment of electors to the more primitive system of allowing the legislature itself to choose the electors. Of course, the citizens of that state would likely not be pleased with that change.

¹⁹⁷ Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526, 2526 (2001).

¹⁹⁸ *Id.* at 2542.

¹⁹⁹ BENNETT, *supra* note 5, at 59.

rather than more parochial local ones.”²⁰⁰ What is difficult to understand, however, is how this sentiment connects to the view that the Electoral College promotes federalism—since the Electoral College system outlined in the Constitution does not mandate a winner-take-all system.²⁰¹ Indeed, it does not even mandate that the people actually vote for the electors.²⁰²

The Framers did not contemplate the modern two-party system.²⁰³ One of the possible justifications for the Electoral College (at least with respect to the independent-electors view) was to avoid too many regional candidates and allow the more worldly and intelligent electors to choose the national candidate that they felt most worthy of the Presidency.²⁰⁴ The Framers seemed to be at least somewhat concerned with the idea that a national election could produce “regional candidates,” allowing the big states to dominate the small states.²⁰⁵ Although this “domination” has not occurred under the Electoral College per se, the “regionalism” in recent years has been inescapably clear. Democratic candidates have been overwhelmingly more successful in the northeast and west, and the Republican candidates dominate the south and central areas of the country.²⁰⁶ The few “swing” states—Florida and Ohio, for example—are the only places where candidates engage in significant electoral battles.²⁰⁷

The federalist justification of the Electoral College, if one ever existed, is now obsolete. Additionally, even if this federalist purpose were still viable, whether it is actually desirable is debatable. According to Bennett, “the electoral college introduces a state-centered element in presidential selection, thus arguably compromising the national focus of the presidency.”²⁰⁸ In addition, because the Electoral College seems to shift some voting power to the smaller and less populous states,²⁰⁹ the system favors the voters who live in those states.²¹⁰ As a result, preserving federalist elements of the Electoral College system is an unpersuasive argument for limiting vote swapping.

²⁰⁰ *Id.*

²⁰¹ U.S. CONST. art. II, § 1.

²⁰² *Id.*

²⁰³ See LONGLEY & PEIRCE, *supra* note 7, at 24.

²⁰⁴ See *supra* Part III.B.2.

²⁰⁵ See BENNETT, *supra* note 5, at 59–60.

²⁰⁶ This was true, for example, in the 2004 election. See Election Results 2004: The Presidency, http://www.nytimes.com/packages/html/politics/2004_ELECTION_RESULTS_GRAPHIC/.

²⁰⁷ See David Gringer, Note, *Why the National Popular Vote Plan is the Wrong Way to Abolish the Electoral College*, 108 COLUM. L. REV. 182, 222 (2008).

²⁰⁸ BENNETT, *supra* note 5, at 60.

²⁰⁹ See *id.* at 61.

²¹⁰ See *id.* at 60.

CONCLUSION

If the original goal of the Electoral College was to facilitate a direct election by the people, then vote swapping would have been acceptable to the Framers because the result of an election that includes swaps is a more accurate representation of the will of the people. Even if, however, the original intent of the Electoral College was to have an independent panel of electors, one could also conclude that vote swapping would have been acceptable to the Framers because the electors that the states choose could still have an independent voice if the political parties and state laws allowed them to do so, and because the use of independent electors was essentially abandoned from the start. If the Electoral College were actually a compromise between two competing points of view, one still comes to the same conclusion because the Framers expected the system to change over time.

Additionally, any originalist arguments are unpersuasive because one should look at the ideology of the Framers and not only the actual text of the Constitution. In addition, these arguments are unpersuasive because the Constitution specifically left the selection of electors to the states, meaning that vote swapping does not transgress the Constitution in any way. Further, any federalist purpose that the Electoral College once had is now obsolete. From these premises, one can reason that the Framers created the Electoral College with the intent that it evolve; vote swapping is just the next step in that evolution.

As a result, an actual determination of the ideology of the Framers is largely irrelevant when considering whether vote swapping should be allowed. At least two of the three ideologies lead to the conclusion that the Framers would support vote swapping, and the independent-electors view could lead to that conclusion as well. Thus, it appears that the Ninth Circuit's comment regarding the subversion of the Electoral College in *Porter v. Bowen* was correct.²¹¹ The vote-swapping websites do not actually subvert the Electoral College process in any way, and the Framers expected the Electoral College system to evolve. Therefore, vote swapping results from the people doing what they have to do to "offset the anomalies" and achieve the result they collectively deem most accurate.²¹²

Vote swapping is likely to only occur during Presidential elections in which there is a strong third-party candidate who represents a third-party aiming for funding in the next election and where there is a hotly contested race between the two major-party candidates.²¹³ Al-

²¹¹ 496 F.3d. 1009, 1023 (2007).

²¹² *Id.* at 1025.

²¹³ See Rushing, *supra* note 11. Although vote swapping has only directly affected the political atmosphere on the left side of the political arena, it appears that in the 2008

though vote swapping did take place during the 2000 and 2004 elections, there is no guarantee that it will take place in all future elections. Eventually, however, it is likely that a large amount of vote swapping could affect the outcome of an election, and at that point, the analysis above will be useful. Until then, the Supreme Court is unlikely to become involved in such a dispute because, although the affect of such a decision could have a broad effect on the future of presidential elections in the United States, a litigant is unlikely to attempt to bring such a suit without an actual contested election behind it. As the decision in *Bush v. Gore* made clear,²¹⁴ however, Supreme Court decisions directly affecting the outcome of presidential elections tend to become politicized and technical issues are lost in the crossfire.²¹⁵

As we look toward the 2008 election and beyond, it may become apparent that, as some believe, the Electoral College system is a “loaded gun pointed directly at the heart of our democracy.”²¹⁶ The question will be whether vote swapping is a shield or, rather, a silencer.

election the opposite may occur. At the time of the publication of this Note, there does not appear to be a particularly strong third-party effort on the left—Ralph Nader is running as an independent candidate. However, Republican Congressman Bob Barr is running for president on the ticket of the Libertarian Party, which most believe will take some votes from Sen. John McCain (R-Ariz.) in the upcoming presidential election. Some have speculated that members of the Republican and Libertarian parties will attempt vote swapping so as to boost Barr’s popular vote count but still deliver the electoral college for McCain. See Chuck Muth, *Muth’s Truths*, “Raising the Barr,” <http://conservablogs.com/muthstruths/2008/04/03/raising-the-barr/>.

²¹⁴ 531 U.S. 98 (2000).

²¹⁵ See TOOBIN, *supra* note 185, at 141 (“Random chance—a freakishly close vote in the single decisive state—gave the Supreme Court the chance to resolve the 2000 presidential election. The character of the justices themselves turned that opportunity into one of the lowest moments in the Court’s history. The struggle following the election of 2000 took thirty-six days, and the Court was directly involved for twenty-one of them. Yet, over this brief period, the justices displayed all of their worst traits—among them vanity, overconfidence, impatience, arrogance, and simple political partisanship. These three weeks taint an otherwise largely admirable legacy. The justices did almost everything wrong. They embarrassed themselves and the Supreme Court.”).

²¹⁶ Epps, *supra* note 164 (“Because of the electoral system, every presidential election is a moment of danger for the Republic.”).