

POLITICAL VOTE BUYING STATUTES: TEXTUAL LIMITS, ENFORCEMENT CHALLENGES, AND THE NEED FOR REFORM

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INTRODUCTION

Vote buying—the exchange of money or goods for a voter’s support—is viewed as reprehensible and corrupt, yet openly survives in some nominating caucuses and conventions. Although vote buying is banned on both the state and federal level, some vote buying laws apply to primary and general elections only. On the federal level, and in select states, “non-election” forums, meaning nominating caucuses and conventions, remain excluded. “Non-election” vote buying, however, creates the same policy problems as in elections.

This Note argues for the extension of currently inadequate federal and state vote buying laws to fully cover these “non-election” nominating events. Part I details the history of vote buying laws in the United States and the development of statutes which prohibit vote buying in elections, but exempt identical “non-election” conduct. Part II finds election and “non-election” vote buying substantively indistinguishable, and concludes that both logic and public policy favor an end to differential treatment. Part III recommends amending deficient federal and state vote buying laws to eliminate “non-election” exceptions.

I.

AN OVERVIEW OF VOTE BUYING LAWS

A. *The Development of Vote Buying Laws*

Today, the federal government and all fifty states ban vote buying in primary and general elections.¹ These laws prohibit mone-

1. See Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323, 1324 n.1 (2000), for a list of the federal laws and fifty state laws banning vote buying.

tary and in-kind payments, including cigarettes and food vouchers.² Vote buying in “non-election” events is, however, often exempt.³

Vote buying statutes arose from a discomfort with the practice of paying voters to support election candidates. While “[m]odern society views vote buying with opprobrium,”⁴ Professor Richard Hasen of Loyola Law School, a noted voting law expert, writes,

[V]ote buying has a long, if ignoble, history in the United States. Though vote buying probably has been around as long as voting, James Gardner traces the prevalence of the practice in the United States back to eighteenth-century England, where “treating,” that is “‘treating the voters to food and drink in heroic quantities’ in order to gain their favor,” was an evidently universal practice: “The practice . . . transformed election campaigns into contests between the candidates to provide the most whiskey to eligible voters.”⁵

In the United States, vote buying became associated with corrupt political machines. Organizations, including New York’s Tammany Hall, organized massive vote buying efforts to purchase elections.⁶ Progressive reformers believed these practices inappropriately tainted elections, encouraging voters to cast their ballot based on a direct monetary bribe, rather than who was the best candidate.⁷

2. CRAIG C. DONSANTO & NANCY L. SIMMONS, U.S. DEP’T OF JUSTICE, FEDERAL PROSECUTION OF ELECTION OFFENSES 47–48 (7th ed. rev. 2007), available at <http://www.usdoj.gov/criminal/pin/docs/electbook-rvs0807.pdf>; see also *United States v. Cole*, 41 F.3d 303, 306 (7th Cir. 1994) (affirming the defendant’s conviction for election fraud for giving beer and cigarettes to voters); *United States v. Garcia*, 719 F.2d 99, 101–02 (5th Cir. 1983) (holding that Congress intended the restriction on “payments” for votes to include “items of pecuniary value” like welfare food vouchers).

3. See, e.g., Scott Shepard, *For Democrats, Iowa Caucuses Are Cloaked in Intrigue*, COX NEWS SERV., Dec. 31, 2007, http://www.coxwashington.com/hp/content/reporters/stories/2007/12/31/CAUCUS_MANEUVERS31_COX.html (describing a campaign training video that encourages the use of fresh baked bread to woo undecided voters at the Iowa caucuses).

4. Hasen, *supra* note 1, at 1328.

5. *Id.* at 1327 (footnotes omitted) (quoting James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 232 (1990)).

6. Justin S. Teff, *Lopez Torres and Judicial Selection in New York: An Argument For Merit-Based Appointment to the State Supreme Court*, 71 ALB. L. REV. 475, 493–95 (2008).

7. See Allison R. Hayward, *Revisiting the Fable of Reform*, 45 HARV. J. ON LEGIS. 421, 429–31 (2008). Hayward writes, “In 1890, the corrupt uses of money in New York and elsewhere were more obvious and acute. Money (from a variety of sources) bought votes—directly through the bribery of voters, and less directly through the employment of certain ‘workers’ and ‘counters’ and the larding of registration rolls with false names. Among other reforms, reformers sought a ‘secret ballot’ that would deny the vote-buyer proof that the voter had voted as promised. Even so, a variety of

In 1965, Congress enacted 42 U.S.C. § 1973i(c), the current federal vote buying ban, after prior laws had been struck down on jurisdictional grounds.⁸ This statute, along with state statutes like it, prohibits payments made in connection with supporting, or refusing to support, a particular candidate.⁹ Some statutes focus on “payments” connected with voting. The federal statute states that whoever “pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than \$10,000 or imprisoned not more than five years, or both.”¹⁰ New York’s law penalizes anyone who:

Pays, lends or contributes, or offers or promises to pay, lend or contribute any money or other valuable consideration to or for any voter, or to or for any other person, to induce such voter or other person to vote or refrain from voting at any election, or to induce any voter or other person to vote or refrain from voting at such election for any particular person or persons¹¹

California’s law prohibits payments to induce voters to cast a vote for a particular person, “[r]efrain from voting at any election,” or “[r]emain away from the polls at an election.”¹² Other laws take a broader approach, penalizing attempts to “corrupt” or “influence” a vote. Florida’s law bans “bribery” and “other corruption” that interferes with “the free exercise” of the “right to vote.”¹³ Texas’ law prohibits “influenc[ing] or attempt[ing] to influence a voter not to vote or to vote in a particular manner.”¹⁴

These federal and state statutes apply to a wide variety of payments. According to the Department of Justice, a vote buying bribe is anything “having monetary value, including cash, liquor, lottery

corrupt election-day activities persisted.” *Id.* at 429. She later notes, “Generally, at this time New York state-level reformers wanted to deprive the political machines of the tools necessary to retain control. Some reformers focused on the purchase of votes and voter bribery, and called for ‘secret ballot’ reform to ensure that these corrupt agreements were not verifiable.” *Id.* at 431 (citations omitted).

8. DONSANTO & SIMMONS, *supra* note 2, at 22 (“Federal attention to election fraud was further limited by case law holding that primary elections were not part of the official election process, *Newberry v. United States*, 256 U.S. 232 (1918), and by cases like *United States v. Bathgate*, 246 U.S. 220 (1918), which read the entire subject of vote buying out of federal criminal law, even when it was directed at federal contests.”).

9. 42 U.S.C. § 1973i(c) (2001). *See generally* DONSANTO & SIMMONS, *supra* note 2, at 41–49.

10. 42 U.S.C. § 1973i(c).

11. N.Y. ELEC. LAW § 17-142(1) (Consol. 1986).

12. CAL. ELEC. CODE § 18522(a)(1)–(3) (West 2003).

13. FLA. STAT. ANN. § 104.061(1) (West 2008).

14. TEX. PENAL CODE ANN. § 36.03(a)(2) (Vernon 2003).

chances, and welfare benefits such as food stamps.”¹⁵ The defendant in *United States v. Garcia* was convicted after “issuing vouchers for food, clothing, prescriptions and medical services” to voters who voted absentee for particular local candidates,¹⁶ while the defendant in *United States v. Cole* was convicted of vote buying after offering cigarettes and beer to voters who allowed him to complete their absentee ballots.¹⁷ State prosecutors have also pursued in-kind payments. For example, in *Trushin v. State*, a lawyer was successfully prosecuted for offering legal services in exchange for pledges to vote for certain judicial candidates in a runoff election.¹⁸

While federal law prohibits a wide variety of payments, it exempts some classified as “facilitation benefits”¹⁹ because they are thought to facilitate voting without illicit influence. Permissible conduct includes giving a voter a “ride to the polls or a stamp to mail an absentee ballot.”²⁰ Facilitation payments are considered incentives to participate, rather than bribes for support.²¹

B. *The Persistence of the “Non-Election” Exception*

Despite extensive state and federal vote buying laws, vote buying endures in nominating caucuses and conventions. In the early 20th century these were the primary methods for nominating candidates.²² Because they were perceived as “corrupt and insular”²³ methods, progressive reformers introduced direct primary elections with secret ballots to democratize the nomination process.²⁴ Yet, caucuses and conventions continued and remained havens for party influence.²⁵ As neither reformers nor party leaders were entirely successful, a hybrid

15. DONSANTO & SIMMONS, *supra* note 2, at 47 (citing *United States v. Garcia*, 719 F.2d 99, 102 (5th Cir. 1983)).

16. *United States v. Garcia*, 719 F.2d 99, 100 (5th Cir. 1983).

17. *United States v. Cole*, 41 F.3d 303, 306 (7th Cir. 1994).

18. *Trushin v. State*, 425 So. 2d 1126, 1127–28 (Fla. 1982).

19. DONSANTO & SIMMONS, *supra* note 2, at 30.

20. *Id.*

21. *Id.*

22. Lauren Hancock, Note, *The Life of the Party: Analyzing Political Parties’ First Amendment Associational Rights when the Primary Election Process Is Construed Along a Continuum*, 88 MINN. L. REV. 159, 164–65 (2003).

23. Alan Martinson, *La Follette’s Folly: A Critique of Party Associational Rights in Presidential Nomination Politics*, 42 U. MICH. J.L. REFORM 185, 188–89 (2008).

24. *Id.* at 188–89; *see also* Hancock, *supra* note 22, at 164–66.

25. *See* Trevor Potter & Marianne H. Viray, *Barriers to Participation*, 36 U. MICH. J.L. REFORM 547, 549–50 (2003) (“Some states resisted moving from caucuses to direct primary elections, and some have devised ingenious methods to retain party influence.”).

system of election and “non-election” methods is currently used.²⁶ These “non-election” forums continue to grant party leaders great power. In caucuses, party members often vote in public, monitored by powerful officials.²⁷ In conventions, appointed or elected delegates choose nominees through public balloting.²⁸

In presidential nominating caucuses, small in-kind payments are customarily used to influence voters. For example, during the 2008 Iowa Caucuses, former Senator John Edwards’s campaign released a campaign training video, in which “a cartoon precinct campaign named Joe leaves for the caucus with a calculator, Edwards signs and fresh bread. The narrator explains: ‘His homemade bread is perfectly positioned. Everyone can see it and smell it, especially the undecideds.’”²⁹

Vote buying also continues in nominating conventions. For example, in nominating conventions, party leaders control large voting blocs, and encourage payments from potential nominees in exchange for support. New York State judicial nominating conventions are filled with vote buying.³⁰ In 2007, an investigation by the Kings County District Attorney revealed that County Democratic Party Leader Clarence Norman Jr. sold his support to judicial nominees for thousands of dollars paid to Norman’s “favored campaign consultants.”³¹ Chosen candidates were then ensured victory in his heavily Democratic county.³² In 2005, New York State Supreme Court Judge Thomas J. Spargo was accused of paying \$5,000 to two judicial convention delegates while “trying to bribe voters with food, gasoline and coupons.”³³ Yet, neither Spargo nor the judges who paid Norman for support were

26. See *id.* for examples of these state hybrid nominating procedures.

27. See, e.g., *Iowa Caucuses 101: Arcane Rules Have Effect on Outcome*, CNN POLITICS.COM, Jan. 3, 2008, <http://www.cnn.com/2008/POLITICS/01/03/iowa.caucuses.101/>.

28. See e.g., DEMOCRATIC NAT’L COMM., CALL FOR THE 2008 DEMOCRATIC NATIONAL CONVENTION 18 (2007), available at http://s3.amazonaws.com/apache.3cdn.net/c313170ef991f2ce12_iqm6iyofq.pdf.

29. Shepard, *supra* note 3.

30. See Wayne Barrett, *The Sales of Justice*, VILL. VOICE (New York, N.Y.), Jan. 9, 2007, at 19 (detailing the pervasiveness of judgeship buying in Brooklyn and the relationship between the Brooklyn Democratic Party and the judges they nominate). See generally Steve Zeidman, *To Elect or Not Elect: A Case Study of Judicial Selection in New York City 1977–2002*, 37 U. MICH. J.L. REFORM 791, 800–02 (2004).

31. Anemona Hartocollis, *Party’s Ex-Boss in Brooklyn Is Convicted*, N.Y. TIMES, Feb. 24, 2007, at B1 (“In Brooklyn, Democrats are so dominant that for a candidate, winning the Democratic nomination is tantamount to winning election.”).

32. *Id.*

33. Michele Morgan Bolton, *Secrecy to Cloak Judge’s Hearing*, TIMES UNION (Albany, N.Y.), May 9, 2005, at B1 (detailing vote buying allegations against a New York State judge without any pending or expected criminal prosecution).

prosecuted for vote buying.³⁴ During the Norman investigation, the District Attorney “looked at hundreds of allegations” that “judgeships could be bought,” but no *vote buying* judges were indicted in connection with Norman’s *vote selling* scheme.³⁵ While Spargo was eventually removed from office by the New York State Commission on Judicial Conduct, it was for the solicitation of money from lawyers appearing before him, rather than his vote buying.³⁶ Despite a lifetime ban from the judiciary, he continues to practice law.³⁷

C. *How Vote Buying Laws Enable the “Non-Election” Exception*

Current laws enable “non-election” vote buying. Many statutes appear to exempt “non-election” activities altogether, while courts have long deferred to internal party processes. Taken together, these developments demonstrate the extreme difficulty of using existing methods to curb “non-election” vote buying.

Statutory construction limits vote buying statutes to elections through express references to elections and constraining language, such as “vote” and “polls.” Federal law criminalizes “payment either for registration to vote or for voting,” and is also explicitly restricted to “general, special, or primary elections.”³⁸ California’s statute requires conduct involving “voter[s],” and repeatedly refers to “election[s]” and “polls.”³⁹ Delaware’s law makes it illegal for anyone to “receive [] . . . or pay [] . . . money . . . for giving or withholding . . . a vote at any general election in this State.”⁴⁰ Florida’s law states, “No person shall directly or indirectly give or promise anything of value to another intending thereby to buy that person’s or another’s vote or to corruptly influence that person or another in casting his or her vote.”⁴¹ Massachusetts’ law bars payments to “influence [a voter’s] vote or to induce [a voter] to withhold his vote.”⁴² Nevada’s law refers to payments “to influence any elector in giving his vote or to deter him from

34. *Id.*; Hartocollis, *supra* note 31.

35. Nancie Katz, *Judge Who Bribed Party Boss Retires*, N.Y. DAILY NEWS, Oct. 24, 2007, at 3.

36. Elizabeth Stull, *N.Y. State Commission on Judicial Conduct Annual Report Released*, DAILY RECORD (Rochester, N.Y.), Nov. 21, 2007, at 1.

37. See Bob Gardinier, *Official in Stephentown Indicted*, TIMES UNION (Albany, N.Y.), Feb. 16, 2008, at B1 (noting Spargo’s representation of an indicted public official).

38. 42 U.S.C. § 1973i(c) (2001).

39. CAL. ELEC. CODE § 18522 (West 2003).

40. DEL. CODE ANN. tit. 15, § 4940(a) (2007).

41. FLA. STAT. ANN. § 104.061(2) (West 2008).

42. MASS. GEN. LAWS ANN. ch. 56, § 32 (West 2007).

giving it.”⁴³ New York’s law applies to “voter[s],” voting at the “polls,” and voting “at any election.”⁴⁴ South Carolina’s law applies “at any election, general, special or primary” and prohibits exchanging “money” for a “vote.”⁴⁵ Finally, Texas’ law criminalizes influencing “a voter not to vote or to vote in a particular manner.”⁴⁶

These terms’ plain meaning limit the underlying laws’ jurisdiction to elections. As noted, many statutes are either directly limited to “elections” or focus on “votes” at “polls,” words associated with elections. Merriam-Webster’s Collegiate Dictionary defines “vote” as “the total number of such expressions of opinion made known at a single time (as at an election)” and “poll” as “the place where votes are cast or recorded” or “the period of time during which votes may be cast at an election.”⁴⁷

Recent case law highlights the potential ambiguity of these terms, but also demonstrates that liberal readings are confined to a narrow set of circumstances, inapplicable to vote buying laws. In *Morse v. Republican Party of Virginia*, a plurality of the Supreme Court relied on the legislative history of Section 5 of the Voting Rights Act to read “elections” as including party conventions under its provisions.⁴⁸ In *LaRouche v. Fowler*, however, the District of Columbia District Court refused to extend *Morse*’s reasoning to the Democratic National Committee’s convention delegate selection rules.⁴⁹ The Court noted that the *Morse* interpretation was related to the “Voting Rights Act preclearance requirement, intended to enforce the guarantees of the Fifteenth Amendment.”⁵⁰ Federal vote buying law is, however, outside the purview of Section 5 and governed by its own, independent, legislative history. In *United States v. Olinger*, the Seventh Circuit held that § 1973i(c)’s text should instead be read strictly, even

43. NEV. REV. STAT. § 293.700 (2007).

44. N.Y. ELEC. LAW § 17-142 (Consol. 1986).

45. S.C. CODE ANN. § 7-25-60 (1977).

46. TEX. PENAL CODE ANN. § 36.03(2) (Vernon 2003).

47. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1430, 960 (11th ed. 2003).

48. *Morse v. Republican Party of Va.*, 517 U.S. 186, 204–06 (1996) (plurality opinion). Justice Stevens read congressional intent as giving to the definition of “voting” the “broadest possible scope.” *Id.* at 204 (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 566–67 (1969)).

49. *LaRouche v. Fowler*, 77 F. Supp. 2d 80, 82–83, 90 (D.D.C. 1999). The court held, “we cannot ‘lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.’” *Id.* at 90 (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

50. *See id.* at 89.

though it was officially codified as part of the Voting Rights Act.⁵¹ The Court rejected a claim that Congress intended § 1973i(c) to be “broad in scope” and “comprehensive.”⁵² Instead it looked to the plain meaning of the statute’s text.⁵³ Given this precedent and the distinct histories of state vote buying laws, Justice Thomas’ dissent in *Morse*, advocating for a plain meaning interpretation of “election,” should govern: “Congress obviously knows how to cover nominating conventions when it wants to. After all, if there is a field in which Congress has expertise, it is elections.”⁵⁴

Attempts to broadly interpret these laws are further undermined by longstanding judicial deference to internal party nominating procedures. Courts are often unwilling to police nominating activities seen as internal, including party members choosing other members for party posts, such as chair of a state party or delegate to a judicial nominating convention.⁵⁵ Recently, in *New York State Board of Elections v. Lopez Torres* the Supreme Court embraced this position while rejecting a challenge to New York State’s judicial nominating system.⁵⁶ Despite evidence the state’s scheme was inherently corrupt,⁵⁷

51. *United States v. Olinger*, 759 F.2d 1293, 1298–1300 (7th Cir. 1985). Other cases have notably not included caucuses and conventions within the definition of “election” under § 1973i(c). See *United States v. Slone*, 411 F.3d 643, 647 (6th Cir. 2005) (“Section 1973i(c) refers to ‘general elections,’ ‘special elections,’ and ‘primary elections’”); *United States v. McCranie*, 169 F.3d 723, 726 (11th Cir. 1999) (holding that § 1973i(c) “plainly prohibit[s] voting fraud ‘in any general, special, or primary elections’”). As of the date of publication of this Note, no search of any electronic case law database, including Westlaw and LexisNexis, has produced any opinion in which a court has specifically considered whether caucuses and conventions fall within the scope of 42 U.S.C. § 1973i(c).

52. *Olinger*, 759 F.2d at 1298 (“We can only conclude that the words ‘comprehensive’ and ‘broad in scope,’ as used by members of the House Minority in 1965, bear no more than an oblique relation to the precise meaning of § 1973i(c).”).

53. *Id.* at 1299.

54. *Morse v. Republican Party of Va.*, 517 U.S. 186, 278 (1996) (Thomas, J., dissenting).

55. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574–75 (2000) (“Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party ‘select[s] a standard bearer who best represents the party’s ideologies and preferences.’”); *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124 (1981) (“A political party’s choice among the various ways of determining the makeup of a State’s delegation to the party’s national convention is protected by the Constitution. And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.”).

56. *N.Y. State Bd. of Elections v. Lopez Torres*, 128 S. Ct. 791, 798–99 (2008).

57. Brief for Charles J. Hynes, District Attorney for Kings County, New York as Amicus Curiae Supporting Respondents, at 10, *N.Y. State Bd. of Elections v. Lopez Torres*, 128 S. Ct. 791 (2008) (No. 06-766), available at <http://www.wilmerhale.com/>

the Court in *Lopez Torres* acknowledged that “[p]arty conventions, with their attendant ‘smoke-filled rooms’ and domination by party leaders, have long been an accepted manner of selecting party candidates,” and refused to overturn New York’s convention system.⁵⁸

II.

WHY VOTE BUYING PROHIBITIONS SHOULD APPLY TO NON-ELECTION ACTIVITY

No logical reason exists for exempting “non-election” activity from vote buying law, as the relevant conduct is functionally indistinguishable. Primaries, caucuses and conventions are all steps in the process of choosing candidates for a general election. Payments in all settings inappropriately influence voter choices. Yet, payments for primary votes are prosecuted, while those offered for caucus and convention support are not.⁵⁹ These distinctions must be eliminated to accomplish the law’s goal, as interpreted by the Department of Justice, that “the selection of the nation’s leaders should not degenerate into a spending contest, with the victor being the candidate who can pay the most voters.”⁶⁰

Richard L. Hasen cites three policy arguments, equality, efficiency and inalienability, as traditionally mentioned in favor of vote buying bans.⁶¹ Historically, these have justified election vote buying bans. When applied to “non-election” activities, they favor prohibiting caucus and convention vote buying as well.

*Equality.*⁶² Equality arguments maintain that the poor are more likely than the rich to sell their votes, diminishing their power to enact

files/upload/lopeztorres_amicus.pdf (detailing how “party leaders’ control over nominations to the King County Supreme Court have fostered corruption in the nomination process and corruption on the bench”) (last visited Mar. 17, 2009).

58. *Lopez Torres*, 128 S. Ct. at 799; see also Carol DeMare, *Judicial Nod Still a Party Affair; U.S. Supreme Court Affirms Political Picks of Judge Candidates in State*, TIMES UNION (Albany, N.Y.), Jan. 17, 2008, at A1 (“Attorneys for the lead plaintiff—Brooklyn Surrogate’s Court Judge Margarita Lopez Torres, who challenged the system after she ran afoul of Democratic bosses and was denied a state Supreme Court candidacy—blasted the ruling. ‘New York has compiled an 87-year record of anti-democratic exclusion, unaccountability and corruption in judicial selection,’ said New York attorney Kent Yalowitz. ‘These problems will not go away because of the U.S. Supreme Court’s decision.’”).

59. For example, in *United States v. Garcia*, the defendants were convicted of vote buying in a primary election. *United States v. Garcia*, 719 F.2d 99, 100 (1983). In contrast, Judge Thomas J. Spargo was not prosecuted for buying the votes of convention delegates. See *supra* note 32 and accompanying text.

60. DONSANTO & SIMMONS, *supra* note 2, at 47.

61. Hasen, *supra* note 1, at 1329–37.

62. *Id.* at 1329–31.

public policies. Allowing the rich to buy caucus and convention support disproportionately disenfranchises poor voters. As fewer votes are cast in caucuses and conventions than in primaries, purchased “non-election” votes have a greater impact. Wealthy vote buyers then have a greater influence, and poor voters cannot compete.

*Efficiency.*⁶³ Efficiency arguments claim vote buying allows candidates to gain rewards without increasing social wealth. According to Hasen, “those who buy votes will do so in order to capture government subsidies,”⁶⁴ preempting investment in efficient, i.e. socially productive, activities. This behavior is called “rent seeking.”⁶⁵ “Non-election” events present the same “rent seeking” opportunities as primaries. Caucus, convention and primary candidates pursue the same offices. They have the same opportunities and motives for corruption, and their vote buying similarly diminishes social wealth. Indeed, because caucus and convention goes vote publicly, inefficiency may be more pronounced for “non-election” vote buying. “Non-election” vote buyers can publicly witness balloting, ensuring a vote buying bribe turns into a favorable vote. Correspondingly, although offering meals to caucusers may seem *de minimis*, tolerating vote buying in an open atmosphere encourages spending contests and greater inefficiency. While the aforementioned Edwards supporters offered fresh baked bread,⁶⁶ Hillary Rodham Clinton’s rival campaign spent \$95,000 on sandwich platters to encourage supporters to caucus.⁶⁷

One state where “non-election” rent seeking is particularly ingrained is New York. Although an entrenched political culture contributes to continued vote buying, as discussed above, the inapplicability of state and federal vote buying laws undoubtedly exacerbates the situation. New York judicial candidates operate in an environment where vote buying is considered appropriate. Brooklyn District Attorney Charles J. Hynes noted in his *amicus* brief in the *Lopez Torres* case that “as the public record demonstrates, corruption in judicial politics has a long history paralleling the long history of the judicial district convention system,” and that paying for judgeships was considered customary by many leading officials.⁶⁸ Local New York politician Alan Fleishman concurred: “You have to be connected to get on the bench Are there payoffs? There’s always been that

63. *Id.* at 1331–35.

64. *Id.* at 1332–33.

65. *Id.* at 1333–34.

66. See *supra* note 29 and accompanying text.

67. Geoff Earle, *Deli Pigout a Clinton Gut Bu\$ter*, N.Y. POST, Feb. 22, 2008, at 6.

68. Brief for Charles J. Hynes, *supra* note 57, at 19.

buzz in the court community.”⁶⁹ Absent a new indication that vote buying is unacceptable, this attitude will likely persist.⁷⁰

*Inalienability.*⁷¹ Inalienability arguments reason that votes are based on duties related to a community’s life and that vote buying is therefore “wrong.”⁷² By placing names on general election ballots, caucuses, conventions and primaries implicate the same concerns: civic participation and the selection of political leaders. Because these “moral or political duties” support a vote buying ban in elections, they should in “non-election” settings as well.⁷³

III.

POLICY RECOMMENDATIONS

Because functional similarities and public policy favor the extension of vote buying laws to “non-election” settings, federal and state statutes should be amended to unambiguously cover all nominating methods. Modifications should address judicial respect for political parties, textual limitations and “facilitation” exemptions. These changes will give prosecutors the legal authority to pursue *all* types of vote buying, signaling to politicians that “non-election” payments are unacceptable.

Legislatures can, and should, amend vote buying statutes to cover caucus and convention nominating procedures. Federal and state laws already regulate party primaries.⁷⁴ The Supreme Court recognized this when assessing New York’s convention system, stating:

The State gives the party a role in the election process—as New York has done here by giving certain parties the right to have their candidates appear with party endorsement on the general-election ballot. . . . [Then] the State acquires a legitimate governmental in-

69. Tom Hays, *Scandal Shakes Up Brooklyn Law Courts; Some of the Judges Get an Unfamiliar Taste of Justice*, OAKLAND TRIB., Aug. 4, 2003, at 1.

70. See e.g., Tom Robbins, *Judicial Fever in Brooklyn*, VILLAGE VOICE (New York, N.Y.), Apr. 30, 2003, at 24 (“Judicial appointments are one of the last strongholds of patronage in New York. Thanks to inter-party cooperation between Democrats and Republicans who divide the available judgeships between them and then cross-designate each other’s candidates, the positions amount to virtual lifetime sinecures. In addition there are hundreds of clerks and law secretaries to be selected, posts with similar levels of job security and benefits. It is because of these basic political facts of life that no serious effort has ever been made to reform the way the state’s top judges are selected.”).

71. Hasen, *supra* note 1, at 1335–37.

72. *Id.* at 1335.

73. See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1854 (1987).

74. See, e.g., 42 U.S.C. § 1973i(c) (2001); S.C. CODE ANN. § 7-25-60 (1977).

terest in assuring the fairness of the party's nominating process, enabling it to prescribe what that process must be.⁷⁵

Legislatures are clearly empowered to regulate caucuses and conventions in the same way as elections. Since both give parties a role in choosing general election candidates, states have the necessary "legitimate governmental interest" in assuring fairness.

Further, legislatures should correct textual limitations to enable enforcement. Vote buying bans should be extended to all procedures affecting the selection of general election candidates. Statutes should be amended to specifically include phrasing that applies the prohibition to "all methods of nominating candidates for a general election position." This language widens prosecutorial authority to explicitly reach "non-election" settings and notify exempt actors. In addition, the definitions of key statutory terms should be modified to ensure application by the judiciary. Statutes relying on election language should define relevant terms to include "non-election" activities, adding that they cover: "elections, caucuses, conventions and other methods of selecting candidates for a general election." This strong language is necessary to prevent the possibility of a narrow judicial reading.

Finally, the definition of "payment" in legislation should be extended to cover additional types of activity. Once vote buying statutes are written to apply to "non-election" situations, other possible loopholes should be preemptively closed. This will enable uniform enforcement and discourage legal challenges by innovative party lawyers. Specifically, the statutory definition of "paying" should be expanded to include in-kind transactions in all voting settings. Although prosecutors have vigorously targeted in-kind as well as monetary payments,⁷⁶ these cases rely on judicial interpretation of the term "payment,"⁷⁷ rather than well-defined statutory text. Vote buying statutes should be amended so "payments" encompass all vote buying permutations, including those indigenous to "non-election" settings, like meals for caucus attendees. Such provisions should focus on the

75. N.Y. State Bd. of Elections v. Lopez Torres, 128 S. Ct. 791, 797–98 (2008).

76. DONSANTO & SIMMONS, *supra* note 2, at 47 ("The bribe may be anything having monetary value, including cash, liquor, lottery chances, and welfare benefits such as food stamps.").

77. *See, e.g.*, United States v. Garcia, 719 F.2d 99, 101 (1983) ("While we agree that the definition of 'payment' as used in § 1973i(c) does not necessarily extend beyond the transfer of money or a monetary equivalent when exchanged for a vote, we cannot find that a 'payment' in the form of a welfare food voucher exceeds the ordinary meaning of the word or renders the intended scope of the statute unconstitutionally vague or indefinite.").

intended target of vote buying statutes: support exchanged for purely personal gain. To prevent confusion with legislative horse-trading that many view as legitimate,⁷⁸ for example, a vote exchanged for supporting a program, definitions should focus on private payments. A convention delegate could support a candidate in exchange for a *public* train station in his or her district, but could not seek a *personal* payment from a candidate.

Existing “facilitation” exceptions, like those in the federal statute, should be changed so that “non-election” and election payments are treated identically. Language should clearly state that a non-election payment may only be characterized as a “facilitation” payment if it would be in a traditional election (i.e. rides to polls). This prevents potential “non-election” abuses. For instance, as discussed above, one could hypothetically claim that the nature of the Iowa caucuses allowed for facilitation with meals: unlike elections, where votes are cast in private, the communal setting of the caucuses might require an additional incentive to participate. Yet, even if election and non-election settings are distinguished, the practical effect is the same: a voter is openly compensated by a particular candidate, potentially influencing his or her vote. This is the very condition that vote buying laws prevent, as Justice Brennan stated in *Brown v. Hartlage*, “a State may surely prohibit a candidate from buying votes. No body politic worthy of being called a democracy entrusts the selection of leaders to a process of auction or barter.”⁷⁹ Thus, legislative amendments should foreclose potential attempts to broaden the facilitation exception.

CONCLUSION

Vote buying is recognized as a threat to fair and representative elections, but current laws allow “non-election” vote buying to continue. Although vote buying in elections has been vigorously prosecuted, conventions and caucuses continue to provide a safe haven for would-be vote buyers. Current laws must be revised so prosecutors can target vote buying in all nominating methods.

78. See Richard A. Epstein, *Modern Republicanism—or the Flight from Substance*, 97 *YALE L.J.* 1633, 1639 (1988).

79. *Brown v. Hartlage*, 456 U.S. 45, 54 (1982).

