IS THE INTERNET A VIABLE THREAT TO REPRESENTATIVE DEMOCRACY?

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ABSTRACT

The Internet, despite its relatively recent advent, is critical to millions of Americans' way of life. Although the Internet arguably opens new opportunities for citizens to become more directly involved in their government, some scholars fear this direct involvement poses a risk to one of the Constitution's most precious ideals: representative democracy. This iBrief explores whether the constitutional notion of representation is vulnerable to the Internet's capacity to open new vistas for a more direct democracy by analyzing statistics and theories about why voters in the United States do or do not vote and by examining the inherent qualities of the Internet itself. This iBrief concludes that the Constitution will adapt to the Internet and the Internet to the Constitution, such that even if there are advances in direct democracy, representative democracy will not be unduly threatened.

INTRODUCTION

¶1 In the spring of 2000, I was walking down a sand path in the middle of an ancient desert oasis near the Egyptian-Libyan border when I noticed a makeshift sign advertising Internet services. Stooping under a grass awning, I peeked into the small circular room only to discover a young Egyptian entrepreneur renting his computer's Internet connection. It was, I thought, a mirage. Even though I was thirsting for email access, it hardly seemed possible that this oasis to which airplanes could not fly and to which only one road was built just ten years prior could be an epicenter of technological entrepreneurship. Yet, there I was, surrounded by an expansive desert, asking to check my email.

¶2 In retrospect, checking email in a desert oasis is not so surprising, but at the time it was exhilarating because for me it was a first. Not only

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was the Internet changing the way people communicated, but it was also influencing the types of economic opportunities available to them. Pundits and scholars alike were raving about its possibilities, even as the world entered an uncertain new millennium. One possible outgrowth of the Internet being considered was its capacity to facilitate voting. This idea was not isolated within the United States; other democratic countries also were contemplating how the Internet might encourage and enable voting.[2] In the United States, however, a tension was arising between those who saw the Internet as a panacea for enhancing individual political participation[3] and others who viewed the Internet – particularly the Internet's impact upon voting – as an anathema to constitutional representative democracy.[4]

¶3 Since the genesis of this debate, no substantial Internet voting revolution has occurred in the United States. While there have been a number of Internet polls and occasions for Internet users to express their opinions about various public policies, American voters generally must still appear at the voting booth on Election Day to register a vote for their preferred political candidate. The present status quo, however, does not necessarily suggest that voting for political representatives, as well as for political issues, over the Internet will never occur widely. It certainly does not mean the Internet is completely irrelevant within the context of American democracy. On the contrary, it is clear that the Internet is here to stay and will continue to play an active role in American democracy. Because the Internet is a permanent societal feature, it is necessary to ask whether the Internet stands to threaten—or even, perhaps, render irrelevant—a constitutional understanding of representative democracy.

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[2] *See* Michael Odell Walker, Note, *Don't Show Them Where to Click and Vote: An Assessment of Electioneering Law in the United States as a Consideration in Implementing Internet Voting Regimes*, 91 KY. L.J. 715, 728 (2002-2003).

[3] *See* Bryan Mercurio, *Democracy in Decline: Can Internet Voting Save the Electoral Process?*, 22 J. MARSHALL J. COMPUTER & INFO. L. 409, 411 (2004) ("Internet voting has the capacity to enhance the electoral process in numerous ways, such as preventing over-votes, reducing invalid votes, assisting non-English speakers with voting, allowing disabled Americans to vote without assistance, increasing participation in the electoral process, and eliminating the tons of waste generated from unused ballot papers.").

[4] *See* Marci A. Hamilton, *The People: The Least Accountable Branch*, 4 U. CHI. L. SCH. ROUNDTABLE 1, 1 (1996-1997) ("Despite the Founders' appreciation for and deference to representative decision-making as a bulwark against tyranny, the growing use and influence of the Internet and initiative lawmaking combined with an overly willing subscription to the primacy of self-rule have clouded our respect for the vital importance of representative democracy.").

I. THE U.S. CONSTITUTION, DEMOCRACY, AND ACCOMMODATIONS FOR TECHNOLOGICAL PROGRESS

¶4 The U.S. Constitution is lauded by liberals and conservatives alike for its durability and its flexibility.[5] It is a document providing the legal and structural backbone of the United States Government and has remained fundamental over the years largely because of its adaptability to change.[6] Since the Constitutional Convention of 1787, change has manifested itself in myriad technological ways. There have been advances in—or inventions of—military weaponry, automobiles, airplanes, television, space travel, computers, the Internet, and more. Even though American society is much different today than in 1787, the Constitution, despite all these dramatic technological developments, has remained largely intact and stable.

¶5 As with other previous technological advances, the Internet may require review and new interpretation of the Constitution. One of the features of the Constitution that may need reexamination is voting. It is undisputed that the Constitution explicitly vests power within the electorate (or voting members of society) when it guarantees a "republican form of government" for every state.[7] In doing so, the Constitution ensures that members of the electorate within each state retain a measure of control over the political affairs of their federal government by preserving for them an opportunity to vote for representatives. What is less clear is how the Internet actually affects these voting rights. The Internet may possibly enhance voting rights by making voting easier, and it may possibly expand them by allowing individual voters to have a more specific say in the kind of policies and laws made by their government. This latter expansion of voting rights moves voters from merely electing representatives to direct participation in political decision-making.

¶6 Does the potential of direct voter involvement and easier voting techniques threaten the constitutional idea of representative democracy? In a purely representative democracy, the electorate has control over who represents them. They elect certain legislators,[8] and they help elect the president.[9] These legislative and executive representatives are in turn accountable to the electorate for their actions on behalf of them. In a direct democracy, the people vote not only for representatives but also for the policies and laws themselves, an idea originating from an ancient Greek

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[5] About.com, Scalia on the Constitution, http://usgovinfo.about.com/library/weekly/aa022701a.htm (last visited Dec. 15, 2007).
[6] *Id.*
[7] *See* U.S. CONST. art. IV, § 4.
[8] *See* U.S. CONST. art. I, § 1.
[9] *See* U.S. CONST. amend. XII.

understanding of democracy.[10] Although the United States historically has been viewed as a representative democracy, there have been some incorporations of direct democracy at least at the state level. Several states, for example, have supported direct voter participation in the form of state initiatives.[11] As a result, while "[t]here is no direct democracy at all at the federal level in America,"[12] some argue that "the era of pure representative democracy is coming slowly to an end."[13] Whether the Internet will cement representative democracy's purported end in the United States is a matter of debate and may be best measured by examining Americans' primary portal to active participation in their democracy: *voting*.

II. VOTING IN THE UNITED STATES

¶7 Voting is the most fundamental way individuals may influence their government within any democracy. Despite the importance of voting, it is widely recognized that American voters are among the least likely to vote of any voters in any of the other major democratic countries.[14] Only five of nineteen national elections between 1960 and 1996 elicited voter turnouts of

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[10] *See* Dan Hunter, *ICANN and the Concept of Democratic Deficit*, 36 LOY. L. A. L. REV. 1149, 1160 (Spring 2003) ("Aristotle's original conception of a democracy was of a direct democracy, with the by-now familiar requirement that all citizens vote on all substantive issues and all citizens would be obliged to serve within the Athenian Senate."); *see also* Maimon Schwarzschild, *Popular Initiatives and American Federalism, or, Putting Direct Democracy in Its Place*, 13 J. CONTEMP. LEGAL ISSUES 531, 531 (2004) ("There is the positive, almost idyllic picture, which might be set in ancient Greece: the Birth of Democracy, the assembly of citizens under the acropolis, Pericles' oration, Aeschylus' furies tamed by self-government and the rule of law . . . . It is the hopeful vision of direct democracy: free and equal citizens governing themselves, open politics openly arrived at, public decisions that are truly of, by, and for the people.").

[11] *See* Rebekah K. Browder, Comment, *Internet Voting with Initiatives and Referendums: Stumbling Towards Direct Democracy*, 29 SEATTLE U. L. REV. 485, 492 (Winter 2005) ("The western states of Washington, Oregon, California, Colorado, and Arizona depend a great deal on the initiative process.").

[12] Schwarzschild, *supra* note 10, at 541.

[13] Karen McCullagh, *E-Democracy: Potential for Political Revolution?*, 11 INT'L J.L. & INFO. TECH. 149, 154 (Summer 2003).

[14] *See* WILLIAM CROTTY ET AL., POLITICAL PARTICIPATION AND AMERICAN DEMOCRACY 1 (William Crotty ed., 1991) ("[T]he United States has the weakest levels of political participation, as measured by the vote, of any major industrial democracy."); *see also* Sharon Kyle, *US and Local Voter Turnout: Nearly Lowest in World's Democracies*, CALIFORNIA PROGRESS REPORT, Feb. 19, 2007, http://www.californiaprogressreport.com/2007/02/us_and_local_vo.html.

over 55%.[15] Some scholars believe the Internet is beginning to revolutionize these numbers, securing a consistently high voter turnout, while others believe that the Internet's potential impact upon democracy is much less significant. Examining voter turnout percentages and theories is one way to determine the Internet's influence on American democracy thus far, as well as its potential for revolutionary change in the future.

A. Voting Statistics

¶8 Voting behavior in the United States has never been wholly consistent. Even though voters came to the polls in high percentages some years, there were other years where few voters in comparison have recorded their vote. An analysis of voting figures in the United States from 1964 to 1996 shows that only in federal elections held in 1960, 1964 and 1968 did more than 60% of the voting age population ("VAP") actually vote.[16] After 1968, no single election year garnered more than 55.21% of VAP participation[17] until the 2004 federal election year.[18] Before 2004, the first federal election year where the Internet could even be considered a factor was 1996,[19] and that year only 49.08% of the VAP showed up at the polls.[20] During the 2000 and 2004 federal election years, however, these figures rose to approximately 51% and 55% respectively,[21] possibly indicating a correlation between Internet technology and voting behavior.

¶9 These figures from the 2000 and 2004 elections nonetheless do not provide indisputable evidence that the Internet is causing an elevated voter turnout. For instance, statistics reveal that those election years seeing a higher voter turnout—1960, 1964, 1968, 1996, 2000, and 2004—were all

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[15] *See* Federal Election Commission, National Voter Turnout in Federal Elections: 1960-1996, http://www.fec.gov/pages/htmlto5.htm (last visited Dec. 15, 2007).
[16] *Id.*
[17] *Id.*
[18] FactMonster.com, National Voter Turnout in Federal Elections: 1960-2004, http://www.factmonster.com/ipka/A0781453.html (last visited Dec. 15, 2007).
[19] *See* F. Christopher Arterton, *Foreword to* DAVID M. ANDERSON ET AL., THE CIVIC WEB: ONLINE POLITICS AND DEMOCRATIC VALUES at vii – viii (David M. Anderson & Michael Cornfield eds., 2003) ("In 1996, only 4 percent of the public went online to retrieve news about the campaign. This increased to 7 percent by 1998 and 16 percent in 2000."); *see also* David A. Dulio, Donald L. Goff & James A. Thurber, *Untangled Web: Internet Use During the 1998 Election*, AM. POL. SCI. ONLINE, Mar. 1999, http://spa.american.edu/ccps/getpdf.php?table=Publications&ID=58 ("During the 1996 election cycle, candidates for public office began to use the Internet as a campaign tool.").
[20] Federal Election Commission, *supra* note 15.
[21] Factmonster.com, *supra* note 18.

presidential election years and thus potentially more attractive to nominally-interested voters irrespective of the Internet's availability. In the1994 non-presidential federal election year, slightly less than 39% of the total American VAP voted;[22] four years later only 36% of VAP arrived at the polls and in 2002 only 37% participated.[23] These midterm-election voter turnout statistics do little to advance the theory that the Internet is enhancing voter turnout across the board. Indeed, they instead provide a counter-theory that voters, regardless of whether they had access to the Internet, were simply more inclined to participate in presidential elections than in midterm ones.

¶10 Another difficulty with understanding the figures from the 2000 and 2004 elections is that they do not account for the striking increases or decreases in voter turnout seen in certain states. For example, in the 2004 presidential elections, Minnesota experienced a 73.04% VAP turnout compared with a 66.40% VAP turnout during the 2000 presidential elections.[24] Michael P. McDonald, an expert in election studies, argues that the reason for Minnesota's positive 8.4 percentage point jump in VAP turnout between the 2000 and 2004 elections is that Minnesota was identified as "a battleground state, in which voters were targeted for mobilization efforts orchestrated by the campaigns and their loosely affiliated 527 organizations . . . ."[25] Therefore, the identification of states as battleground or non-battleground frontiers may account for why the turnout in other states did not grow as markedly. Hawaii's VAP turnout increased only 3.6 percentage points in 2004, and that same year Vermont's VAP turnout only increased a meager 0.8 percentage points.[26] However, these low voter turnout increases do not necessarily mean the overall voter turnout was low in these states. Vermont's low increase in turnout may have more to do with its already high VAP turnout percentage of 64.9% in 2004 (compared with the national VAP turnout average that year of 55.27%).[27] McDonald nevertheless asserts that "[c]ompetition and mobilization efforts targeted to win competitive states appear to play a significant role in higher levels of voter participation."[28]

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[22] Federal Election Commission, *supra* note 15.
[23] Factmonster.com, *supra* note 18.
[24] United States Election Project, Turnout 1980-2006, http://elections.gmu.edu/Turnout%201980-2006.xls (last visited Dec. 15, 2007).
[25] Michael P. McDonald, *Up, Up and Away! Voter Participation in the 2004 Presidential Election* , 2 THE FORUM, issue 4, art. 4, at 2 (2004), available at http://www.bepress.com/forum/vol2/iss4/art4 (last visited Dec. 15, 2007).
[26] *Id.*
[27] *See* United States Election Project, *supra* note 24.
[28] McDonald, *supra* note 25, at 2.

¶11 Battleground states are not the only states showing measurable increases in voter turnout. A few non-battlegrounds states also experienced sharp increases in VAP turnout during some election years:

> Although turnout rates were generally higher in the battleground states, the largest increase in turnout from the 2000 election occurred in a non-battleground state, South Dakota (68.4%, +10.1). Non-battleground states like South Dakota that had a fiercely contested Senate race, such as Kentucky (58.1, +5.8), North Carolina (58.0, +7.3), and South Carolina (52.8, +5.9), all had increases above the average for non-battleground states. The exception was Alaska (70.5, +2.4), which could not improve much upon its already high 2000 turnout rate.[29]

While non-battleground states in 2000 did not receive the same national attention as battleground states, it may be inferred here that non-battleground states with important state and local elections may expect an increase in VAP turnout, sometimes significantly so.

¶12 The Internet may also be a factor in the VAP turnout increases in these non-battleground states, as these increases all occurred in 2000 when the Internet was used frequently by both voters and politicians. That same year presidential candidate Senator John McCain raised "about $2 million online in the week after the New Hampshire primary"[30] at a rate of "$10,000 *per hour*,"[31] ultimately accumulating $6.4 million in contributions through the Internet.[32] Although McCain's online campaigning success suggests an important role for the Internet, the voter turnout statistics seem affected by more than just the Internet during the same time. Given these overlapping influences on voter behavior, it is necessary to analyze not only these voting statistics but also further theoretical bases for VAP participation.

B. Voting Theories

¶13 A number of voting theories describe what it takes to bring voters to the polls. These theories provide insight into whether the Internet has the potential for leading a revolution in voter turnout. When combined with the

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[29] *Id.* at 3.
[30] Nicholas Thompson, *Machined Politics: How the Internet is Really, Truly—Seriously!—Going to Change Elections*, WASHINGTON MONTHLY (May 2002), http://www.washingtonmonthly.com/features/2001/0205.thompson.html.
[31] Peter Levine, *Online Campaigning and the Public Interest*, *in* THE CIVIC WEB: ONLINE POLITICS AND DEMOCRATIC VALUES 55 (David M. Anderson et al. eds., 2003).
[32] *Id.*

statistics on turnout, they provide a more comprehensive and complete picture of the forces at work in American voting.

¶14 In the earlier history of the United States, the percentage of the VAP was significantly lower than it is now. Initially, white landowning men were the only persons allowed to vote.[33] Over time, however, limitations on voting began to be relaxed. Black landowning men were eventually permitted to vote,[34] then women,[35] and then persons between the ages of 18 and 21.[36] Each of these advances in suffrage was codified in the Constitution, making voting a matter of right for a much larger proportion of the population. Two groups of persons who remain unable to vote are felons and aliens. Alien non-citizens are not allowed to register,[37] and felons, even if they were once registered, are required by most states to revoke their voting rights.[38] If the limitations on aliens and felons were relaxed, voter turnout might increase. This result, however, is far from conclusive; even if more people are allowed to vote, it is not necessarily

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[33] Nathan V. Gemmiti, Note, *Porsche or Pinto? The Impact of the "Motor Voter Registration Act" on Black Political Participation*, 18 B.C. THIRD WORLD L.J. 71, 71 (Winter 1998) ("The framers of the Constitution wrote the words, 'We the People,' to create a country founded on the principles of freedom, democracy, and equality. Ironically, these ideals co-existed within a political structure that excluded from the right to self-government anyone who was not a white landowning male.").

[34] *See id.* ("The creative contradiction of 'all men are created equal,' did not begin to erode until the ratification of the Fifteenth Amendment in 1870, when Black men in America were given the right to vote.").

[35] *See* U.S. CONST. amend. XIX.

[36] *See* U.S. CONST. amend. XXVI.

[37] Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW & INEQ. 271, 282 (Summer 2000) (". . . 1928 marked the first national election 'in which no alien in any state had the right to vote' in national, state or local elections.").

[38] Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL. 159, 170-1 (Fall 2001) ("(1) Only two New England States—Maine and Vermont—allow all felons to vote. (2) Twenty-eight States prohibit felons who are on probation from voting. (3) Thirty-two States prohibit felons who are on parole from voting. (4) The States that prohibit all felons from voting—whether in prison, on probation, on parole, or having fully served their sentences—are: Alabama, Arizona, (for a second felony), Delaware (for five years), Florida, Iowa, Kentucky, Maryland (for a second felony), Mississippi, Nevada, Virginia, and Wyoming. In addition, Washington prohibits all felons with pre-1984 convictions from voting, and Tennessee prohibits all felons with pre-1986 convictions from voting . . . . (5) Furthermore, . . . Texas, Arkansas, Louisiana, North Carolina, South Carolina, and Georgia all allow felons to vote, so long as they are no longer in prison, on parole, or on probation. In fact, Louisiana allows felons on probation or parole to vote.").

true they will vote. A larger number of persons eligible to vote simply does not guarantee a more substantial percentage of the VAP voting.

¶15 One overarching theory on voting suggests that voters only come to the polls when they perceive the benefits of voting outweighing the costs.[39] Costs may include whether a voter can (a) make it to an appropriate voting location, (b) manageably vote before or after work, (c) afford to lose wages if voting requires him or her to miss work, and (d) anticipate that the issues at stake will affect them personally.[40]

¶16 An additional cost to a number of voters is registration. In some democratic countries voter registration is mandatory,[41] which at the time of an election ensures that it is easier—or less costly—for individual voters to submit their vote because they do not have to first register. In the United States, voter registration is voluntary. The Motor Voter Act of 1993 aimed to make voluntary registration easier by "require[ing] states to provide all eligible citizens the opportunity to register when they applied for or

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[39] DAVID HILL, AMERICAN VOTER TURNOUT: AN INSTITUTIONAL PERSPECTIVE 21 (2006) ("First posited by Anthony Downs in *An Economic Theory of Democracy* (1957), the theory can be expressed by the following formula: $R = (PB)–C$. Where R is the total utility, or benefit, that a citizen receives from the act of voting; B is the benefit the citizen receives from his preferred candidate winning the election instead of the less preferred candidate; P is the citizen's expectation that her vote will be decisive in determining the outcome of the election; and C is the cost of the act of voting to the citizen. . . . The core argument of the theory is that voters must calculate before casting a ballot the overall benefit they expect to receive from voting versus the costs of voting.").

[40] *Id.* at 22 (Additional "costs are registration (in the United States and France), the actual time it takes to vote, and the time and effort expended to acquire information concerning the candidates, parties, and issues involved in the election.").

[41] *See* U.N. Human Rights Comm., Int'l Covenant on Civil and Political Rights, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant*, Second Periodic Report (Brazil), ¶ 331, U.N. Doc. CCPR/C/BRA/2004/2 (April 11, 2005), available at http://www.unhchr.ch/tbs/doc.nsf/0/1cfb93fe59fa789ec125703c0046a987/$FILE/G0541019.pdf (last visited Dec. 15, 2007) ("The Brazilian Federal Constitution proclaims, additionally, mandatory voter registration and voting for individuals over the age of eighteen and voluntary voter registration and voting for the illiterate and persons over the age of seventy and minors over the age of sixteen and under the age of eighteen (article 14, paragraph 1, subsections I and II)."); *see also Mexico State Polls Stir Speculation about Presidential Race*, CNN, Jul. 2, 1999, http://www.cnn.com/WORLD/americas/9907/02/mexico.elections/index.html?eref=sitesearch ("[T]he [Mexican] government recently instituted mandatory voter registration and photo identification.").

renewed a driver's license."[42] This federal law, however, has not had a marked impact on voter turnout.[43] In contrast, state laws permitting voters to register on Election Day affected turnout numbers positively.[44] These trends suggest voters often do not think about voting or make their decision to vote until the day of an election.

¶17 Another issue raised by scholars is that some democratic countries go even further than mandatory registration by requiring mandatory voting;[45] if a person in these countries does not vote then they may have to offer an explanation, pay a fine, face possible imprisonment, suffer the loss of civil rights, or encounter restrictions on finding jobs or placing one's child into daycare.[46] The costs of noncompliance are high. The United States' voter-turnout statistics, then, must be considered in light of its own voluntary-voting system and other democratic countries' mandatory-voting requirements. That the United States gives its registered voters the choice of whether to vote contributes to a lower turnout, but it could be argued that those who do voluntarily choose to vote are more committed, if not more thoughtful, voters.

¶18 Even for thoughtful voters, however, the United States electoral system can become overwhelming. Voter fatigue, some argue, is a significant problem. For example, American voters have the opportunity to vote in federal elections every two years. Other democratic countries may

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[42] CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS 35 (John L. Moore et al., eds., 4th ed., v. I, 2001).

[43] *See id.* ("But the motor-voter law had neither the negative results that critics feared nor the positive impact that supporters hoped . . . . In spite of the increased number of registered voters, election turnout continued to decline slightly in the late 1990s, although there was a small increase in the elections of 2000.").

[44] *See id.* at 36 ("Several states, though, have adopted election-day registration on their own, including Minnesota. In 1998, when Reform Party candidate Jesse Ventura closed fast to win the Minnesota governorship, more than 330,000 citizens registered to vote on election day (which represented 16 percent of the ballots cast).").

[45] *See* International Institute for Democracy and Electoral Assistance | Compulsory Voting, http://www.idea.int/vt/compulsory_voting.cfm (last visited Dec. 15, 2007) (Countries making voting compulsory are Argentina, Australia, Austria (Vorarlberg), Belgium, Bolivia, Brazil, Chile, Costa Rica, Cyprus, Dominican Republic, Ecuador, Egypt, Fiji, France (Senate only), Gabon, Greece, Guatemala, Honduras, Italy, Liechtenstein, Luxembourg, Mexico, Nauru, Netherlands, Paraguay, Peru, Philippines, Singapore, Switzerland (Schaffhausen), Thailand, Turkey, and Uruguay.).

[46] *Id.*

only hold one comprehensive election every four[47] or five years.[48] Because there are congressional elections every two years in the United States, these U.S. voters are faced with more choices about who to vote for and when and where to vote. Voter fatigue may also result from having to make more voting decisions each election. While all voters in the United States may vote for representatives, some states (as discussed above) also introduced a form of direct voting called state initiatives.[49] These initiatives enabled voters in California, for instance, to cast votes not only for their representatives but also on whether to "shore up levees, repair and expand freeways, and build schools and affordable housing."[50] These many choices take time and effort, just as it takes time and effort to go out and vote and learn about the various issues and platforms of each candidate. Many voters may simply see the cost of learning about the issues and the candidates' platforms as too high because the process is so time consuming.[51] Spending time educating oneself about each election often diminishes already constrained, valuable time taking care of one's children, parents, homework, professional responsibilities, community commitments, etc. Particularly in the United States, where time is commonly viewed as a commodity, voters may have a propensity to weigh the costs associated with voting against what they perceive as voting's minimal benefits.

¶19 The cost of time in keeping up with all the assorted issues, candidates, and elections is compounded when voters do not believe that their individual political participation matters. Particularly in a representative democratic society, voters may see voting as a futile exercise.[52] Their individual vote may not seem to matter both in terms of

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[47] *See* Manuel Álvarez-Rivera, Election Resources on the Internet: Federal Elections in Brazil, http://www.electionresources.org/br/index_en.html. Brazil is an example of a democratic country holding legislative and executive elections only every four years. *Id.*

[48] *See* Election Guide | Country Profile: Uganda, http://www.electionguide.org/country.php?ID=222 (Uganda is an example of a democratic country holding elections only every five years.).

[49] *See* Browder, *supra* note 11.

[50] Evan Halper, *Initiative Could Undermine State Bond Issues*, L.A. TIMES, Oct. 18, 2006, at B1, *available at* http://www.thetransitcoalition.us/newspdf/lat20061018a.pdf (last visited Dec. 15, 2007).

[51] *See* Richard Davis, THE WEB OF POLITICS: THE INTERNET'S IMPACT ON THE AMERICAN POLITICAL SYSTEM 181 (1999) ("Yet, the reality is people do not give that kind of attention and energy to politics. They do not spend time studying politics. Nor will they do so[.]").

[52] HILL, supra note 39, at 21 ("[T]he separation of powers works to convince citizens that government does not respond to citizen demands. Consequently many believe that voting in elections makes no difference in the policy outputs of government and choose to stay home on Election Day.").

electing a particular candidate and in terms of ensuring that certain issues are protected or advanced.[53] Of course, the presidential election of 2000 underscored the importance of individual votes,[54] and more recently the senatorial race held in Virginia during the 2006 midterm elections was won by only a few thousand votes.[55] Instances where a small number of votes change election outcomes, however, are generally rare, and most voters likely understand that. Typically, votes are only turned into something powerful for change when they are combined with a larger voting bloc.[56] Voters who are a part of civic groups, religious bodies, or other social organizations can have an important overall effect on election results. When groups are mobilized, they may be influenced by "hot" issues such as abortion, gay marriage, and the war in Iraq because these issues affect voters' personal values. Such personal sentiments in turn may cause voters to align with other like-believers who wish to vote for or against a particular candidate in the context of purely representative elections, or for or against a particular issue in the context of initiative-style direct democracy. The fact that an opposing candidate or party holds views that threaten one's own can offer a powerful incentive to register and make it to the voting booth.

¶20 Of the theories analyzing voting behavior, most account for some kind of cost-benefit analysis made by the voter. Whether voters will perceive the Internet as a new technology having the capacity to break down

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[53] *Id.*

[54] *See* Election 2000 National Results, CNN, http://www.cnn.com/ELECTION/2000/results/ (last visited Dec. 15, 2007) (President Bush won this election by approximately 500,000 votes, a slim margin in a national election.).

[55] *See* Election 2006 Virginia Results, CNN, http://www.cnn.com/ELECTION/2006/pages/results/states/VA/ (last visited Dec. 15, 2007) (Senator James Webb beat incumbent George Allen by slightly more than 7,000 votes.).

[56] *See* James Thomas Tucker, *Affirmative Action and [Mis]representation: Part I—Reclaiming the Civil Rights Vision of the Right to Vote*, 43 HOW. L.J. 343, 380 (Spring 2000) ("Ultimately, the transformative value of the right to vote [is] an important bridge between an individual right to belong to the community and a group right to participate equally in the political process. One black who visited Mississippi after the passage of the Voting Rights Act captured the transformation from defenseless disenfranchised individuals to a powerful group of voters by observing, '[i]t is so good to realize that we are casting aside the feelings of inferiority and realizing what a strong people we are.' Dr. King made a similar observation by noting that '[a]ssailed by a sense of futility, Negroes resist participating in empty ritual.' On the other hand, 'when the Negro citizen learns that united and organized pressure can achieve measurable results, he will make his influence felt. Out of this conscious act, the political power of the aroused minority will be enhanced and consolidated.'").

costly barriers to voting is yet to be determined and requires an analysis of the Internet itself.

III. THE INTERNET AND DEMOCRACY

¶21 The Internet is one of the most powerful technologies ever created and arguably may be as transformative as, for example, the revolutionary technologies of air travel and television. All three mediums have revolutionized the way people communicate with one another, spanning across races, cultures, ages, gender, religious preferences, and nationalities. The Internet is used worldwide. While not everyone has access to the Internet, it is becoming more and more available with fewer and fewer people able to avoid exposure to it. With the influence of the Internet growing, it is important to evaluate whether the Internet's inherent attributes—that is, its strengths and weaknesses—lend it to threatening a constitutional understanding of representative democracy.

A. Internet's Strengths

¶22 The Internet is an incredible technological tool possessing the capacity to contribute to democracy in valuable ways. One of the Internet's strengths is its power to connect individuals who share similar interests. Couples meet through Internet-dating services, students communicate with one another though public forums such as Facebook.com,[57] and professionals arrange cross-continent virtual meetings, share critical company information, and email business documents all through the Internet. This power to bring individuals together also manifests itself within political communities. Online political conversations may take place in chat rooms, over instant messenger, or through email networks. Websites are specifically designed to serve as a medium for regularly updated information about particular issues and candidates.[58] By providing a means for persons of like ideals and values to come together across the country or simply across the county, the Internet already is a vital tool.

¶23 Another chief strength of the Internet is its unparalleled speed. Internet websites like Google.com that sift and compartmentalize information into distinct categories can help curious voters research candidates' political platforms, personal life, and goals. Voters interested in contributing financially to a candidate may now save time by doing so over

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[57] Facebook.com is a popular social-networking website. Facebook.com, http://www.facebook.com (last visited Dec. 15, 2007).

[58] For examples of regularly-updated political websites, please see the campaign websites of two 2008 U.S. Presidential candidates, Hillary Clinton, http://www.hillaryclinton.com (last visited Dec. 15, 2007), and Rudolph Giuliani, http://www.joinrudy2008.com (last visited Dec. 15, 2007).

the Internet.[59] And as soon as new developments arise in a political race or in local, national, or global politics, a voter has access to information about these developments within minutes. Empowered by quick access to news, research engines, and general election information, voters have tools to more shrewdly analyze their choices and cast their vote.

¶24 If the Internet were to be used as a conduit for voting, then voters additionally could save time and hassle by avoiding the traditional voting booth and by recording a vote in the comfort of their home. Such easy access to the "voting booth" might enable or encourage more people to vote, increasing voter-turnout statistics. The costs of time and energy to the voter could be significantly mitigated.

¶25 All of these qualities also may make it possible for active voters to have a more personal stake in the outcome of elections. By providing online connections and community, speedy information, and simple voting access, voters arguably would be able to vote with a greater sense of political participation, knowledge, and ease. These inherent strengths could quite possibly generate higher voting turnout and an opportunity for individual citizens to participate actively in their federal government in a way never before envisioned by the Constitution. As with every strength, however, there are corresponding weaknesses, and these inherent weaknesses similarly should be evaluated to determine the overall impact of the Internet upon voter turnout, and ultimately, upon representative democracy.

B. Internet's Weaknesses

¶26 In addition to being susceptible to transferring viruses and being used by malevolent hackers, the Internet also has additional inherent weaknesses and limitations critical to understanding whether the Internet actually threatens representative democracy. One obvious weakness of the Internet is that, while it can bring communities together, it ultimately is a solitary tool.[60] Individuals who "meet" online, for example, cannot use the Internet to see one another in the flesh, aside from video links and emailed digital photos. These online relationships therefore can only move so far

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[59] U.S. Presidential candidates Mitt Romney, http://www.mittromney.com/homepage (last visited Dec. 15, 2007), and Barak Obama, http://www.barackobama.com/index.php (last visited Dec. 15, 2007), have links on the homepages of their websites that enable visitors to make online contributions.

[60] RICHARD DAVIS ET. AL., THE WEB OF POLITICS: THE INTERNET'S IMPACT ON THE AMERICAN POLITICAL SYSTEM 176 (1999) ("The Internet may be another step toward greater atomization. One hundred years ago, people received political information by attending rallies and standing in the public square to hear speeches by candidates or political activists.").

without a face-to-face encounter. Similarly, although a voter may meet other voters with similar ideals, and although a voter may collect reams of information on different candidates and issues, that voter currently must still make the effort to leave his or her house and vote in person. Even if the government approved Internet voting, there would remain an obligation for voters to point and click. It is possible, if not likely, that not all voters would take the time to visit an election page and vote even if possible to do so from the comfort of their homes.

¶27 Along these lines the Internet may or may not have the capacity to transform a voter's own apathy. Even if, as some argue, the Internet is being used more frequently by potential voters as a forum to learn about the various issues and candidates,[61] it still requires an active person to read that information, consider it, and then act upon it. The Internet makes it easier to access this information, but it does not ensure that the information will be acted upon.

¶28 What may be most limiting about the Internet is what scholars have called the "digital divide."[62] The digital divide is an invisible chasm sitting between those in society who have the means to own—or at least have access to—a computer, Blackberry, or mobile phone with Internet connectivity and those who do not.[63] Poorer and less-educated voters may not as readily have access to these technologies, exacerbating the divide between rich and poor persons. The digital divide theory suggests that even if voting were allowed online, the majority of people using the Internet to cast a vote would be those with the education and means to do so. Indeed, the wealthy and educated white population currently enjoys the most

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[61] John Kennedy, *Internet Can Curb Voter Apathy, Claims Lobbyist*, SILICONREPUBLIC.COM, http://www.siliconrepublic.com/news/news.nv?storyid=single6975 ("`There is evidence that less people are reading newspapers and watching TV. Increasingly people are going online to keep up with their news.'") (quoting Irish Internet lobbyist Damian Mulley).

[62] STEVE DAVIS, LARRY ELIN & GRANT REEHER, CLICK ON DEMOCRACY: THE INTERNET'S POWER TO CHANGE POLITICAL APATHY INTO CIVIC ACTION 33 (2002) ("The most serious problem inherent in the political use of the Internet is the digital divide – a class system based on computer ownership, Internet access, and computer literacy that corresponds with wealth and divides the country roughly in half.").

[63] *Id.*; *see also* Anthony G. Wilhelm, *Civic Participation and Technology Inequality: The 'Killer Application' is Education*, *in* THE CIVIC WEB: ONLINE POLITICS AND DEMOCRATIC VALUES 116 (David M. Anderson et al. eds., 2003) ("Gaps in Internet access along educational lines continue to grow and define the digital divide, not only between college graduates and those without a high school diploma but also between college graduates and high school graduates.").

Internet access.[64] This does not mean that the government could not put Internet voting into community centers, but placing the Internet at the center of communities does not alleviate some of the pressures inherent in voting right now, especially given that it is the poorer voters who suffer most when, for example, they miss work to vote.[65]

¶29 Another weakness of the Internet is its pervasiveness and the consequent difficulty in regulating it. Voting in its current form is more easily regulated because only the people who arrive at the voting booth may have their votes counted. An entirely electronic, Internet-based voting system would require tremendous regulation in order to avoid problems of voters voting twice, votes not being recorded, or third parties harassing a voter. Currently, voters are required to vote privately, but this privacy would be very difficult to enforce if a person could vote within her own residence. The federal government thus far has tried to distance itself from too much interference with—and regulation of—the Internet. Allowing online voting could require the government to become more involved in regulating not only voting but also the Internet. Exhaustive regulation, which likely would require more expenditure of taxpayer money, could in turn place upon voters a weightier tax burden.

C. Do the Internet's Strengths Outweigh Its Weaknesses?

¶30 The Internet's strengths are formidable. Its ability to bring people together with similar interests and to provide quick information both have the potential of helping the political process. Also, if the Internet were used to vote, it could simplify and speed the way votes are gathered and counted in the United States. The Internet, however, may not in itself have the ability to transform voting because the digital divide between the wealthy and non-wealthy may limit the ability of poorer voters to cast their vote. While poorer voters already face significant hurdles in voting under the current system, these problems are not necessarily going to go away with Internet voting. Poorer voters also are much less likely to gain significant information from the Internet or share in online communities, because their time is consumed with more urgent tasks sometimes important for survival. Even voters who have Internet access may not vote due to their own apathy and disinterest.

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[64] DAVIS ET. AL., *supra* note 60, at 33 ("Studies have shown conclusively that affluent and educated whites dominate the online population in disproportion to the general population.").

[65] This is because poor voters are often paid an hourly wage rather than a fixed salary; when they leave work to vote, they are unable to earn their hourly income.

¶31 Even though the Internet is being used more frequently by politicians and voters today than it was a decade ago, the effects of the Internet on voting are difficult to measure. The statistics and theories suggest the Internet may not have as important an effect on voting as some think it could. Voting is one of the most fundamental roles for a citizen in a democracy, so, without being able to fully determine the impact the Internet has on voting, it is difficult to measure the Internet's overall impact on democracy. Despite this lack of clarity, the next and final section will explore the Internet's ultimate relationship with the Constitution's conception of representative democracy.

IV. THE INTERNET AND THE CONSTITUTION

¶32 The Constitution gives the electorate the responsibility of voting for representatives who will act as their agents within the federal government. The Internet, however, may pose a threat to representative democracy because of its potential capacity to stimulate a more direct democracy. Despite this potential threat, the Internet has not undermined the representative character of democracy in the United States. Not only do the voting statistics mentioned above suggest the Internet has not unduly enhanced or harmed voter participation,[66] but also voter participation theories offer a number of viable, alternative reasons for voters' decision to vote.[67] Even if voters could vote directly online, the inherent qualities of the Internet itself make it not ideally suited to sparking a comprehensive revolution in voter turnout; thus, it is hard to imagine that, based upon these qualities, the Internet would have the capacity to be an intractable threat to representative democracy.

¶33 Concerns about whether the Internet will somehow erode representative democracy and the Constitution, then, are probably overstated. Even though the United States has shifted from a style of democracy more staunchly committed to representative democracy to one more open to forms of direct democracy, the Internet in itself is not enough to tip the scales against the Constitution's commitment to representation.

¶34 The Internet nonetheless does reinforce norms and attitudes already prevalent in the United States. Individualism and self actualization, for instance, are at the heart of the way the Internet works, how it has evolved, and probably where it is going in the future. The Internet has spawned so many modern-day "Horatio Algers" and individual mega-success stories that "many high-tech entrepreneurs—successful and not so successful—are examining their lives as measured against upstarts who have made it

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[66] *See* discussion *supra* Section II.A.
[67] *See* discussion *supra* Section II.B.

bigger."[68] With young entrepreneurs like Google's Larry Page and Sergey Brin holding billions in stock options,[69] and with YouTube's Jawed Karim (and friends) selling their website for $1.65 billion earlier in 2007,[70] one in fact must struggle not to envy these individuals' timing, opportunities, and permanent place in Internet lore. More specifically, these stories reinforce the notion that each of us, if we have the right kind of dream and desire, can make an individual impact on the world. And why shouldn't we dream this way? Tufts University graduate Pierre Omidyar, for example, has taken the billions he has earned from the invention, establishment, and overwhelming success of his web sensation eBay and poured it into microfinance education and projects throughout the developing world,[71] and I sometimes still wonder what the young oasis entrepreneur I met in 2000 is doing with the earnings garnered from his Internet business.

¶35 The Internet is a powerful tool, and it does have the potential to influence and shape society. Indeed, it is already doing so by providing a forum for defining the attitudes of many voters, changing the campaign strategies of some politicians, and undoing a few of the traditional barriers formerly preventing individuals from active involvement in national and international politics. Although it remains true that "all politics are local," the definition of "local" has expanded with the advent and growth of the Internet.

¶36 The Constitution and representative democracy, therefore, have been and will continue to be challenged by the Internet. Elected representatives not only will have to accommodate a VAP that through the Internet has access to more instant information about their lives and work, but, in the midst of this added popular scrutiny, they also will have to consider whether and how to regulate the Internet. Part of the responsibility of regulation may include the extent to which they allow for an expansion of the definition of democracy in the United States to include facets of direct democracy. As the Internet becomes more a way of life in the United States, and as more people have access to it, there may be more opportunities for citizens to have a direct vote on particular initiatives, policies, and rules. This involvement, however, will necessarily be limited

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[68] Katie Hafner, *In Web World, Rich Now Envy the Superich*, N.Y. TIMES, Nov. 21, 2006, http://www.nytimes.com/2006/11/21/technology/21envy.html.

[69] *See* Paul R. La Monica, *Google Chiefs Agree to Work for $1*, CNNMONEY.COM, Apr. 8, 2005, http://money.cnn.com/2005/04/08/technology/google_salary.

[70] Miguel Helft, *With YouTube, Student Hits Jackpot Again*, N.Y. TIMES, Oct. 12, 2006, http://www.nytimes.com/2006/10/12/technology/12tube.html?ex=1318305600&en=c8ffdcca26ec29b1&ei=5088&partner=rssnyt&emc=rss.

[71] Connie Bruck, *Millions for Millions*, NEW YORKER, Oct. 30, 2006, at 62-73.

by the Constitution which assuredly protects—and will continue to protect—the overall rubric of representation.

CONCLUSION

¶37 Based upon an analysis of voting trends, statistics, and theories and upon an analysis of the Internet's inherent strengths and weaknesses, the Internet does not pose a significant threat to representative democracy. It is likely that the Internet will continue to place a reasonable amount of pressure upon the Constitution, forcing representatives and courts to decide how to adapt the lasting principles of the Constitution to modern technology, and perhaps more importantly, how to adapt new technology to the breadth and depth of the Constitution's freedoms and limitations. The Constitution, however, is durable enough to undergo these new developments without jeopardizing the tradition of voter representation.