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Richard L. Hasen

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SYMPOSIUM

INTERNET VOTING AND DEMOCRACY

INTRODUCTION

*Richard L. Hasen**

Until very recently, Internet voting was something of a novelty. On January 3, 2000, over 200,000 consumers cast votes on the Ty Company website on the following significant public policy question: Should the Ty Company continue to make Beanie Babies? Voters answered in the affirmative with a ninety-one percent "yes" vote. Perhaps most incredibly, they anted up fifty cents per vote for the privilege of voting in the election, raising over \$100,000 for charity.¹

Only two months later, however, Internet voting took a more serious turn. In March 2000, the Arizona Democratic Party held the first binding primary election that allowed voters the choice of casting a legal vote over the Internet.² It is one thing to have a vote

* Professor and William M. Rains Fellow, Loyola Law School. B.A., 1986, University of California, Berkeley. M.A., 1988, J.D., 1991, Ph.D. (Political Science), 1992, University of California, Los Angeles. Authors of the articles and commentaries in this written Symposium presented their thoughts initially at a live Symposium held at Loyola Law School on October 26, 2000. The Honorable Bill Jones, California Secretary of State, appeared at the live Symposium as well. Thanks to the conference participants for a lively and productive discussion and to the Loyola Law School administration and staff for support. I especially wish to thank Dean David Burcham of Loyola, who was enthusiastic about this project from the beginning and provided guidance along the way, and Maria Mancera, the Symposium's administrative coordinator, who worked tirelessly yet cheerfully to insure a successful event. Thanks also to the editors and staff of the *Loyola of Los Angeles Law Review*, a co-sponsor of this Symposium, and to Caroline Djang for research assistance.

1. See *Consumers Vote for More Beanie Babies*, N.Y. TIMES, Jan. 3, 2000, at C2. The Ty Company matched contributions three-to-one, thereby raising the total charitable contribution to nearly \$420,000. See *id.*

2. Professors Alvarez and Nagler discuss in detail the Arizona experiment

about beanie babies; it is another to design a system that would be viewed as legitimate by voters and be legally binding.

One of the central premises of this Symposium is that Internet voting is coming. Although technical questions of implementation remain, the trend is clearly to allow such voting at least as an option, and possibly as the only way with which to cast a vote.³

Even as Internet voting appears inevitable, few people seem to have considered the implications of Internet voting for American democracy.⁴ Instead, the focus of most discussion appears to be about Internet security and fraud. When I talk to my students or people on the street about Internet voting, I hear a great divergence of opinion. Some see it as the best thing since sliced bread, a convenient way to cast a vote and a sure way to energize voters, especially young voters. Skeptics express concern about security over the Internet and the possibility of vote fraud.

Concerns about security and fraud are legitimate, but they are not the focus of this Symposium. Symposium participants have assumed that the technical problems will eventually be solved, or be no greater than problems with traditional elections.⁵ The focus instead is on the bigger picture: the role that Internet voting might play in American democracy. That is, assume that the security problems have been solved. Would Internet voting then be a good thing?

in R. Michael Alvarez & Jonathan Nagler, *The Likely Consequences of Internet Voting for Political Representation*, 34 LOY. L.A. L. REV. 1115 (2001).

3. See BILL JONES, CAL. INTERNET VOTING TASK FORCE, A REPORT ON THE FEASIBILITY OF INTERNET VOTING: JANUARY, 2000, available at <http://www.ss.ca.gov/executive/ivote/home.htm> (discussing California's plans to gradually implement Internet voting).

4. For some thoughtful exceptions, see ELECTIONS IN CYBERSPACE: TOWARD A NEW ERA IN AMERICAN POLITICS (Anthony Corrado & Charles M. Firestone eds., 1996); Symposium, *The Future of Internet Voting* (Jan. 20, 2000), at <http://www.brook.edu/comm/transcripts/20000120.htm> (transcript and archived webset) (Co-Sponsored by The Brookings Institution and Cisco Systems, Inc.).

5. A few weeks after the Symposium, the United States got a first-hand look at the technical problems related to traditional voting mechanisms as presidential candidates George W. Bush and Al Gore battled over recounting votes for President in Florida. For a chronology, see WASH. POST, DEADLOCK: THE INSIDE STORY OF AMERICA'S CLOSEST ELECTION (2001); N.Y. TIMES, 36 DAYS: THE COMPLETE CHRONICLE OF THE 2000 PRESIDENTIAL ELECTION CRISIS (2001). No doubt the Florida debacle has hastened the move in this country toward Internet voting.

As the Symposium articles and commentaries indicate, a large number of significant questions remain regarding the effect of Internet voting on American democracy. Will the digital divide have political consequences if it persists? Will Americans reorganize themselves online into new political forces? Will the nature of campaigning and campaign financing change? Will the vote mean something different if people vote in the privacy of their own home?

On the last point, consider political scientist Rick Valelly's suggestion that "e-voting will transform voting, an inherently public activity, into a private one," and that we will no longer be reminded, as we are when we go to the voting booth, that "we are all equal members of a political community."⁶ Is he right? If so, Internet voting may have inegalitarian political consequences, even apart from the digital divide: People may become even more self-interested voters.

In thinking about these larger questions, there are limits to our knowledge. We do not yet have a rich history of Internet voting in this or any other country from which we can cull empirical data. The most we can do is rely upon the little empirical data that we have on Internet voting and data related to other changes in the nature of the franchise that in one way or another resemble Internet voting, like Oregon's vote-by-mail experiment.⁷

But one thing I know from my experience in studying changes in election law is that we must be aware of unintended consequences. To give one example, from the 1880s to the early 1900s, states began adopting the secret, or Australian, ballot. Before this time, each party printed up ballots with the party's candidates listed and gave those ballots to party members to cast.⁸

No doubt, part of the impetus for passing laws establishing the secret ballot was to provide voters with the ability to vote their conscience. An unforeseen consequence of the move to the secret ballot, however, was a decline in turnout in gubernatorial races of about seven percent.⁹

6. Rick Valelly, *Voting Alone: The Case Against Virtual Ballot Boxes*, NEW REPUBLIC, Sept. 13 & 20, 1999, at 21.

7. See *infra* note 12.

8. See generally *Burson v. Freeman*, 504 U.S. 191, 200-02 (1992) (describing the history and development of voting mechanisms).

9. See Jac C. Heckelman, *Bribing Voters Without Verification*, 35 SOC. SCI. J. 435, 436 (1998).

Election law scholars disagree over the reason for the decline in turnout at this time. Some attribute the decline to the elimination of effective bribery. Those party-printed ballots were color-coded, so party officials could verify how a voter voted and pay that voter accordingly.¹⁰ Other scholars argue that the move to the secret ballot discriminated against African American voters, who because of their prior condition of slavery were less likely to be able to read the government-prepared secret ballot.¹¹ The secret ballot also discriminated against poor, illiterate White voters. In either event, turnout decline was something that few of the populist or progressive reformers advocating use of the secret ballot would have expected or desired.

We do not know what consequences Internet voting may have on voter turnout. Perhaps turnout will increase. It may increase because Internet voting, being easier for some people, decreases the costs of voting. But it also might increase turnout because it again will be easier to bribe people to vote in a particular way. The briber stands over the recipient of the bribe and watches her cast the Internet vote. Then money is turned over. Will that happen? Early evidence from Oregon, which has moved to all vote-by-mail elections, suggests few reports of such bribes.¹² But we will have to wait and see what develops.

10. See Jac C. Heckelman, *Revisiting the Relationship Between Secret Ballots and Turnout*, 28 AM. POL. Q. 194, 195-96 (2000).

11. See *id.* (citing J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910*, at 51-52 (1974)); see also SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY 191-92* (1998) (noting that the secret ballots "demanded not merely literacy, but fluency in the English language").

12. For an initial look at vote-by-mail in Oregon, see Priscilla L. Southwell & Justin Burchett, *Vote-by-Mail in the State of Oregon*, 34 WILLAMETTE L. REV. 345, 351-52 (1998). The authors note little evidence of fraud or coercion. See *id.* But see Larry Sabato & Glenn R. Simpson, *Vote Fraud!*, CAMPAIGNS & ELECTIONS, June 1996, at 22, 29 ("A progressive state with a history of clean elections, Oregon was not a likely site for voting irregularities in any event. But it is easy to imagine the potential for electoral mischief in states with less squeaky-clean traditions or careful procedures. Mail-in balloting exponentially increases the chances for fraud.").

Turnout instead may decline. As I have argued elsewhere,¹³ decline in American turnout since 1960 may be explained by the fact that we know fewer people at the voting booth and therefore we face less social stigma if we fail to vote. If we vote in complete privacy through Internet voting, many of us may choose not to vote at all. Internet voting then may decrease turnout.

I doubt that anyone advocating Internet voting is doing so to facilitate the possibility of bribery or to possibly decrease voter turnout. As with all election laws, however, only time will tell how the political system adapts to changes in the methods of voting. And we cannot forget that political operatives will try to manipulate whatever methods are adopted for partisan advantage.

Thus, this Symposium is concerned about the mechanics of voting, but only insofar as the mechanics affect the substance of our democracy. After reading the articles and commentaries below, I expect you will be convinced, as I have, that our thinking about the substance of our democracy has been advanced in four major ways.

First, as Professor Frank Michelman explains, thoughts about Internet voting prompt an examination of normative questions underlying the value of the vote in American democracy.¹⁴ Professor Michelman, along with commentators Professors Cain¹⁵ and Nockleby,¹⁶ consider the role of voting in our democracy, especially as our democracy enters the digital age.

Second, political consultant Dick Morris proposes that the Internet may transform candidates' methods of campaigning and elected officials' methods of governance.¹⁷ Professors Garrett¹⁸ and Schwartz¹⁹ conjure up some alternative—and less optimistic—

13. See Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2147-51 (1996).

14. See Frank I. Michelman, *Why Voting?*, 34 LOY. L.A. L. REV. 985 (2001).

15. See Bruce E. Cain, *The Internet in the (Dis)service of Democracy?*, 34 LOY. L.A. L. REV. 1005 (2001).

16. See John T. Nockleby, *Why Internet Voting?*, 34 LOY. L.A. L. REV. 1023 (2001).

17. See Dick Morris, *Direct Democracy and the Internet*, 34 LOY. L.A. L. REV. 1033 (2001).

18. See Elizabeth Garrett, *Political Intermediaries and the Internet "Revolution"*, 34 LOY. L.A. L. REV. 1055 (2001).

19. See Paul M. Schwartz, *Vote.com and Internet Politics: A Comment on*

scenarios, but all agree that Internet voting will affect both campaigning and governing.

Third, Professors Moglen and Karlan believe that the Internet may lead communities of interest to organize over the Internet, ultimately minimizing the role of geographically-oriented politics.²⁰ They suggest provocatively that the Internet may herald the arrival of more proportional representation plans in the United States.²¹

Finally, Professors Alvarez and Nagler examine the effect that Internet voting may have on political representation.²² They caution that, at least in the near term, Internet voting may favor wealthier and better educated voters.²³ The digital divide therefore may have real political ramifications.

Professor Kang,²⁴ attorney Stephen Pershing,²⁵ and Professor Volokh²⁶ consider these last two papers together and offer differing views on the digital divide and the possibility that the Internet will transform politics in some fundamental ways.

Not surprisingly, the participants in this Symposium failed to reach consensus on the role of Internet voting in American democracy. That was never the goal. The real goal, to focus attention on the substantive issues that will arise from Internet voting, has been met. I hope that the thoughts expressed in this volume will aid policymakers, lawyers, and American citizens in considering whether the move to Internet voting is worthwhile and what steps may be taken to avoid any negative consequences that may accompany its use.

Dick Morris's Vision of Internet Democracy, 34 LOY. L.A. L. REV. 1071 (2001).

20. See Eben Moglen & Pamela S. Karlan, *The Soul of a New Political Machine: The Online, the Color Line and Electronic Democracy*, 34 LOY. L.A. L. REV. 1089 (2001).

21. See *id.* at 1113-14.

22. See Alvarez & Nagler, *supra* note 2.

23. See *id.* at 1121.

24. See Jerry Kang, *E-Racing E-Lectons*, 34 LOY. L.A. L. REV. 1155 (2001).

25. See Stephen Pershing, *The Voting Rights Act in the Internet Age: An Equal Access Theory for Interesting Times*, 34 LOY. L.A. L. REV. 1171 (2001).

26. See Eugene Volokh, *How Might Cyberspace Change American Politics?*, 34 LOY. L.A. L. REV. 1213 (2001).