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Volume 34
Number 3 *Symposium: Internet Voting and
Democracy*

Article 3

4-1-2001

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Recommended Citation

Bruce E. Cain, *The Internet in the (Dis)Service of Democracy*, 34 Loy. L.A. L. Rev. 1005 (2001).
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THE INTERNET IN THE (DIS)SERVICE OF DEMOCRACY?

*Bruce E. Cain**

I. INTRODUCTION

Internet technology is neither inherently democratic nor tyrannical. By facilitating the exchange of information and ideas between citizens and their governments, the Internet could be used to promote a more informed and participatory electorate. However, a totalitarian government could just as easily develop it to monitor the habits, thoughts, and activities of its citizens more efficiently than ever before. Whether the Internet eventually serves either democratic or antidemocratic purposes will depend upon the institutions and norms that govern and protect Internet users and communities. Frank Michelman's essay begins to erect the necessary normative framework by posing fundamental questions about voting in general and, more specifically, about public decision making by means of the Internet. He asks why we rely on formal voting to make public choices and whether it would be a good thing to facilitate and supplement majority rule with Internet technology.¹

Internet voting can be defined as making decisions about issues or candidates by means of the computer. At a minimum, it could mean replacing election day paper ballots with touch screens linked to a central computer that would automatically tabulate results. But others have more ambitious visions. Entrepreneurs like Dick Morris believe that the Internet can and should transform democratic practices in important ways.² Since Internet voting would be less costly

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1. See Frank Michelman, *Why Voting?*, 34 *LOY. L.A. L. REV.* 985, 985-86 (2001).

2. See Dick Morris, *Direct Democracy and the Internet*, 34 *LOY. L.A. L. REV.* 1033, 1051-52 (2001).

and bureaucratic to administer, it might be possible to vote more often and on more things at little additional expense to the state and its citizens. Instead of waiting two to six years to register approval or disapproval about particular candidates and policies, Internet technology could become the vehicle for constant referenda and citizen consultations. Voting would not have to be an occasional activity, and the norm of majority rule could be used more extensively in public decisionmaking. In short, Internet technology could give us a more recurring expression of majority preferences in American governance.

Do we want this? That is the central question I want to take up. Just because it is technically feasible does not mean that it is democratically desirable. Internet democracy needs to be placed in a normative framework. Professor Michelman constructs the highest reaches of that framework, but neglects the essential intermediate theory that will ultimately determine whether the Internet is necessarily an instrument of populist ends or the means for improving representative government. Moreover, I will argue that there are what Professor Michelman calls "substantive" reasons for believing that formal voting on designated days and in periodic intervals still has a democratic function, even if replaced by constant Internet referenda at minimal cost.³ Lastly, I will argue that another important aspect of the Internet's effect on democracy is the role that it plays in preference formation. Here, too, we need to find norms and institutions that promote serious deliberative discussion and the exchange of credible information.

II. THE CASE FOR VOTING

When answering questions about the role of voting in a democracy, it is possible, as Professor Michelman reminds us, to answer at several different analytical levels.⁴ At the most practical level, for a society to be governed in an orderly fashion, it must make periodic choices about leaders and policies. In a democracy, those in office must submit themselves, at specified intervals, to the risk of being

3. See Michelman, *supra* note 1, at 988 (distinguishing between "two quite distinct ways of conceiving of rule by the majority . . . 'substantive' and 'procedural'").

4. See *id.*

replaced by others. From a purely procedural point of view, there are potentially innumerable neutral and fair ways to do this. A nationally televised coin flip, for instance, would be both neutral and fair and accomplish the purpose of making a definitive choice between two or more candidates or policies. As extraordinary as this might initially sound, some scholars have been attracted to these chance-based decision mechanisms. On the topic of redistricting, for instance, some reform proponents have suggested that line-drawing commissions should randomly drop members in order to break ties, or that computers should be programmed to randomly draw new district lines.⁵ Also, in the context of the term limits and incumbency advantage debate, some have suggested replacing elections with lotteries and filling legislatures with people who have been chosen by chance to represent the public.⁶

As Professor Michelman states, purely procedural arguments can be intuitively very appealing. One does not have to deal with the messiness of substantive justice—i.e., the many different fairness standards that people possess and the unavoidable complexity of measuring the effects that choices have upon society. As long as there is prior agreement to the rules by either an implicit or explicit contract, the rules will be perceived as fair if they are impartially administered. From this perspective, formal voting, if it is open to all citizens who meet minimal standards of competence and qualification, is simply one of many potentially fair mechanisms for making collective choices. Why, we might ask, is it privileged in democracies over the others?

The reason, of course, has to do with the meaning of democracy and the felt need for substantive justifications for collective decisions. Flipping a coin or choosing by lottery is procedurally fair, but it does not guarantee popular (in every sense of the word) outcomes. To understand why we prefer popular outcomes, Professor Michelman, and others before him, must rely upon what he calls “substantive conception[s] of rule.”⁷ Democratic choices must be neutral and

5. See DAVID BUTLER & BRUCE CAIN, *CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES* 147 (1992).

6. See Akhil Reed Amar, Note, *Choosing Representatives by Lottery Voting*, 93 *YALE L.J.* 1283, 1292 (1984).

7. Michelman, *supra* note 1, at 989.

fair, but they also have to be popular in the sense that they express the will of the electorate. Why?

There are several common answers in democratic theory. One answer is sociological—collective decisions that are preferred by the many to the few are generally perceived as more legitimate. Because a democratic choice is the most “popular” choice, more people will feel that they have authorized the final decision. This justification is sociological in the sense that it depends upon two empirical assertions: first, that more people will support a choice that is decided by majority rule, and second, that a decision will be perceived as more legitimate when it has more support. That is a start, but from an ethical point of view, it seems rather shallow to prefer outcomes on the basis of popularity and perceived legitimacy alone. What if the popular choice is the “wrong” choice in some consequentialist or deontological sense? Do we still prefer popular outcomes because they seem more legitimate?

The answer that most would give is no: We also believe that popular outcomes are more likely to be the right outcomes. One can arrive at the conclusion in any number of ways. The utilitarian answer would be that voting approximates the calculus of total social utility.⁸ The majority’s choice is the sum of the greatest aggregate utility when everyone’s preferences are treated as equal. Clearly, this highly simplified calculus ignores such analytic problems as whether people might vary in the intensities of their interests⁹ and the arbitrary way that voting outcomes are shaped by voting rules, i.e., the lesson of social choice theory.¹⁰ But discounting these difficulties for the moment, voting outcome can be defended plausibly as the best simple approximation of the greatest good to the greatest number.

It is also possible to arrive at a justification for majority rule voting by more deontological reasoning.¹¹ Moral outcomes are those

8. See generally J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM FOR AND AGAINST 9-27 (1973) (outlining the systems of utilitarian theory).

9. See generally ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 90-119 (1956) (discussing the “problem of intensity[,] . . . the degree to which one wants or prefers some alternative”).

10. See KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 11-21 (2d ed. 1963).

11. See DENNIS F. THOMPSON, POLITICAL ETHICS AND PUBLIC OFFICE 96-

that serve the good. They are more general than particular, favoring an individual or a group over others. By making decisions in public, respecting individual autonomy, and by requiring that people give good reasons for the choices that they make, a society is more likely to make moral choices. Since democracies require openness and guarantee people the freedom to make uncoerced choices, they are more likely than other forms of government to produce moral decisions. In short, according to this line of reasoning, democracies are preferred because moral outcomes are preferred.

III. THE CASE FOR FORMAL VOTING AND THE ROLE OF INTERMEDIATE THEORY

The argument thus far explains the preference in modern democracies for majority rule with equal vote shares over other procedurally fair ways of making social decisions. But it does not address the justification for formal election day voting. Assuming the problems of the digital divide can be solved in the near future—a large assumption to be sure—it is not difficult to imagine a world in which it would be technically feasible to vote more frequently and informally on public matters. Is this clearly a superior system to the current one?

The current system of voting has three distinguishing features: formality, periodicity, and secrecy. Formality refers to the fact that there is a set time and place for voting that is prescribed by law. Also, the qualifications for voting are closely monitored by local and state officials. Would-be voters must meet certain minimal residence, citizenship, and age requirements in order to vote.¹² In some places, voters can be excluded on the basis of their criminal record.¹³ Formality also includes the actual voting systems that people use and the rules for counting or disqualifying their votes. The point of formality is to prevent voter fraud that might occur when there is no system of checking the qualification of electors and the validity of their ballots. The recent experience with vote counting in Florida for the 2000 presidential race demonstrated the importance that bureaucratic rules can have on close outcomes. In ways that most

122 (1987).

12. See 42 U.S.C. § 1971 (1994).

13. See *id.*

Americans did not appreciate before November 7, 2000, the stringency or laxity with which these rules are applied can have important effects on the final count.¹⁴

Periodicity refers to the fact that formal voting occurs in regular intervals rather than continuously. In the U.S. presidential system, the timing of the vote is fixed and does not depend upon political or strategic conditions. In parliamentary systems, the date of the election is fixed within some outer bound, but the government determines the specific day. The latter system recognizes that the effective ability to govern might not necessarily correspond with pre-set intervals. The former induces greater apparent stability and lessens the tactical advantage a governing party might derive by choosing to run under the best conditions. Having a formal election day creates a stimulus for citizens to pay attention to politics and to inform themselves well enough to make decisions once inside the voting booth. Political science voting models have long noted that the costs of voting will usually swamp the perceived likelihood of casting the decisive vote, the 2000 presidential vote being the exception, and hence, civic socialization plays an important role in getting people to vote.¹⁵ The constant reminders that voting is important and the public event-like quality of formal voting are intended to create a sense of duty that ensures that the voting is as free as possible from selection biases.

The last feature of the current system is secrecy. The secret ballot emerged as an important method of protecting the integrity of ballots. If voting choices are known, then voters are vulnerable to bribes and intimidation. Contracts between bribers and the bribed are harder to enforce when the actions cannot be verified. That is not

14. The events of the presidential balloting surprised many political scientists. There had been no real scholarship on "butterfly" ballots or the accuracy of manual versus automatic recount procedures. The fact that different types of ballots and standards of counting can affect the final outcome is important and will, no doubt, get much more study in the months to come.

15. For the original idea that voting might not be rational, see ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 36-50 (1957). This idea was further developed in William H. Riker & Peter C. Ordeshook, *A Theory of the Calculus of Voting*, 62 AM. POL. SCI. REV. 25 (1968). Subsequently, there has been voluminous literature on the subject. For good recent summaries, see, for example, INFORMATION, PARTICIPATION, AND CHOICE (Bernard Grofman ed., 1993), and JAMES S. FISHKIN, THE VOICE OF THE PEOPLE 84-89 (1995).

to say that quid pro quo exchanges are not prevalent in secret ballot systems, but rather that they tend to occur at the highly aggregated level of groups or communities where candidates can observe certain sociological and geographic trends in the voting results. Or, we find quid pro quo trades between individuals and groups that make campaign finance donations because donation information is public and hence contracts can be enforced, so to speak.¹⁶ In recent years as the laws on absentee ballots have loosened, the rate of absentee balloting has increased dramatically.¹⁷ This has raised such troubling questions as whether the person who requests the absentee ballot is the person who actually casts the ballot and whether people who vote early are exposed to all the information they need in order to make informed choices.

What then do we gain and lose by moving to Internet voting? Clearly, the answer depends upon how we use the computer. In the most minimal conception, the computer screen simply replaces the punched or marked ballot, and the other features of formality, periodicity, and secrecy are preserved. Assuming that the computer can be programmed in ways that prevent fraud and allow after-the-fact ballot verification and recounting—America's new pastime—this does not represent much of a revolutionary step. If, however, we take advantage of any of the Internet's features, as opposed to mere computerization, then we could be talking about a more dramatic change. For instance, a more expansive vision might include voting at home over the Internet on a daily basis on all sorts of local, state, and federal matters. At the extreme, some might even believe that Internet voting becomes the new technological equivalent of constant referenda, eliminating or at least more tightly constraining representative democracy.

Hence, the most radical view alters periodicity in the sense that voters would not have to wait for long intervals of time to express their views or to change their representatives. Formality might

16. For elaboration on this point, see Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111.

17. See Priscilla L. Southwell & Justin Burchett, *Vote-By-Mail in the State of Oregon*, 34 WILLAMETTE L. REV. 345, 349 (1998); Dave Hogan, *National Democrats Reject Oregon's Mail Primary Plan*, OREGONIAN, Mar. 20, 1999, at A4; Jenifer Warren, *California Election Chief Predicts Big Voter Turnout*, L.A. TIMES, Nov. 2, 2000, at A20.

lessen some in the sense that verification could be done with some sort of visual scan, and there would not have to be the large and expensive apparatuses of many polling places and poll workers. Secrecy might be problematic in the sense described earlier, i.e., that technology would have to be devised to keep voter choices anonymous and to keep those who would monitor the behavior of others from hacking the system.

Are these developments good or bad for democracy? Answering this question, I would contend, requires an intermediate theory of democracy. By intermediate, I mean a theory that inhabits a level between the high theory of broad democratic goals and the low theory of actual institutional design. If democracy is a majority choice, then the next intermediate question is the choice of what? In a representative democracy, the choice that the voters make is between two or more candidates who would be their representative. Voters are the principals choosing the agents who will make choices for them.¹⁸ Voters need only know enough about their agents to sense whether they are acting generally in their interests.¹⁹ The degree to which the representative is faithful to voters' momentary preferences or their long-term interests determines whether they are acting as delegates or trustees.²⁰

The position defending a purely representative intermediate theory will be called the "republican" viewpoint. Extrapolating from this perspective, the Internet becomes a tool by which voters learn about the activities of, and communicate with, their representatives. To illustrate, constituency service could be facilitated by e-mail, the franking privilege could be moved from expensive snail mail to candidates' websites, and constituent group targeted e-mail lists and candidates could hold Internet chat forums to get a better sense of what is on the constituents' minds. So conceived, the Internet becomes complementary to representative democracy rather than a threat to it.

18. See HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 201 (1967); see also DANIEL S. KLEINBERGER, *AGENCY AND PARTNERSHIP* 3 (1995) (describing the nature of the agency relationship).

19. See ARTHUR LUPA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW* 79-93 (1998); PITKIN, *supra* note 18, at 224.

20. See PITKIN, *supra* note 18, at 205.

The opposing view is “populist,” seeking to maximize citizen opportunities for direct democracy.²¹ Representatives, it is claimed, cannot be trusted to implement the people’s will.²² As agents possessing asymmetric knowledge and monopoly control of power, they will inevitably abuse power, shirk their responsibilities, and exact rents from those whom they allegedly represent. Populists believe that the answer to this problem is to put power back into the hands of the people by allowing them to make more choices by means of referenda and initiatives.²³ Hence, from this perspective, the Internet is a tool for expanding citizen control over government decisions, allowing constituents to bypass the problematic mediation of representative democracy. Every eligible citizen would use the Internet to inform themselves about issues and to engage in regular referenda, recall, and initiatives.

How might it work? Consider the following example. If enough people believed that there should be an expansion of the fishing season, they could circulate a petition on the Internet, and within days and without the substantial costs to the petition gatherers, they could gather enough signatures to qualify for a vote. Given the ease of the transactions, one might even modify the periodicity condition and allow any initiative to be voted on immediately upon qualification over some specified period, e.g., seven days. Assuming guarantees against fraud and intimidation, i.e., some minimum amount of formality and complete secrecy, an initiative such as this could be enacted as law at the completion of the vote. As there are currently in many states, the process could even build protections against destructive legislative amendments within some specified period of time or by setting a voting rule with a very high threshold.

The third paradigm can be termed “progressive.”²⁴ It blends the other two, preserving the representative system but using direct democracy as a supplement and occasional check on the legislature. Combining the two competing systems compensates for the inherent

21. See DAHL, *supra* note 9, at 34.

22. See *id.*

23. See Cain, *supra* note 16, at 123.

24. The term “progressive” has been used by contemporary political scientists to mean belief in expert representative government supplemented by reforms such as direct democracy or generous term limits. See Robert Kurfurst, *Term-Limit Logic: Paradigms and Paradoxes*, 29 *POLITY* 119, 120-22 (1996).

and characteristic weaknesses of both. Principal-agent problems in representative government are real. Sometimes, elected officials for self-interest reasons will not give voters what they want. The best example of this is term limits. Leaving aside the merits of such limitations, it is revealing that they have been passed primarily in the states that provide for the popular initiative and almost nowhere else.²⁵ Given the implications of term limits for legislative careers, it asks too much of human nature to expect representatives to limit themselves, even for periods that would not threaten legislative expertise, leadership, and efficiency.²⁶ Given the problems of self-regulation, it makes sense for representative systems to have options that bypass legislative approval when necessary.

At the same time, the drawbacks of extensive direct democracy are also predictable and consequential. First, there are the possibilities of information overload and decision fatigue. The former refers to the problem that even with the technical capability of accessing more information than ever through the Internet, there is still the formidable cognitive problem of processing and analyzing all of it. Political junkies and professional analysts aside, the average person "with a life" may not want to allocate all the hours necessary to make these decisions. And even if they did, they might not have enough background to decide the most technical issues. The tendency would be for people to participate in only the decisions they understood and that clearly and directly affected their lives. But this self-selection bias could distort the overall calculus of social utility.²⁷ Lastly, there is evidence in vote-heavy democracies of voter fatigue as measured by lower than average rates of participation and higher than average ballot drop-off rates.²⁸ A dramatic expansion of Internet voting might exacerbate that problem.

25. See Keon S. Chi & Drew Leatherby, *State Legislative Term Limits*, SOLUTIONS, Feb. 1998, at 6.

26. See generally Bruce E. Cain & Marc A. Levin, *Term Limits*, ANN. REV. POL. SCI., 1999, at 163 (discussing four schools of thought that consider the desirability of term limits based on their effects, i.e., turnover rate increases, special election increases, and redistribution of power).

27. Policies that confer concentrated benefits and diffuse costs will be advantaged when beneficiaries turn out at higher rates than non-beneficiaries.

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

The second drawback of pure direct democracy is the cognitive screen issue. The theory of representative democracy is that elected officials and their staff take on the task of informing themselves about the issues, leaving voters only the periodic decision of whether to retain or remove the representative. Voters might dutifully inform themselves of all that the representative has said and done before and during the campaign, or they might simply rely on perceptions of character, party labels, or general ideology to make their decisions. These cognitive cues provide a less costly way of being a responsible citizen.²⁹ The shift to direct democracy removes many of the traditional filters and cues, and opens up opportunities for new ones. I will return to this problem in more detail later, but I believe that there might be a decline in the “common knowledge” of society under an Internet-dependent world, and this might introduce either biases or more random noise into the public decision-making process.

Lastly, the pure direct democracy model bypasses the checks in the current system that were designed to protect minority viewpoints and produce more deliberative and stable collective choices. The division of power between the legislature and the executive, and supermajority organizational rules employed by Congress and many state legislatures, to cite two examples, serve to check a transient majority and force compromises with minority voices in the legislature.³⁰ When voters can make choices directly and impose them on the political system without checks, it could potentially diminish the deliberation in the system, lessen the prospects of compromise, and weaken minority protections.³¹

29. See generally Elizabeth Garrett, *The Law and Economics of “Informed Voter” Ballot Notations*, 85 VA. L. REV. 1533, 1534 (1999) (discussing voters’ proclivity to vote on certain voting cues such as incumbency or party affiliation due to their limited attention to political matters).

30. See BRUCE I. OPPENHEIMER, *NEW BOOK OF KNOWLEDGE: CONGRESS OF THE UNITED STATES* (Grolier, Inc. ed., 2000), available at <http://gi.grolier.com/presidents/nbk/side/congus.html>. See generally KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAW MAKING* (1998) (examining the “pivotal politics theory” which hypothesizes that in collective choice settings, a specific decision-maker is determinative of the outcome).

31. See Bruce E. Cain & Ken Miller, *The Populist Legacy*, in *DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA* (L. Sabato ed., forthcoming 2001).

Given these problems, a “progressive” approach to Internet voting might utilize Internet voting in a more restrained manner. Instead of constantly polling to see what the public thinks at any one point in time and how it might have changed over some very short period of time, the Internet could be used to implement in a less costly manner Jim Fishkin’s ideas of deliberative polling.³² In the place of constant initiatives, recalls, and referenda serving the purposes of plebiscitary democracy, these same devices could be designed to produce a more sustained, persistent decision in what Professor Michelman calls the “hybrid substantive majoritarianism.”³³

In short, the challenge for those who would preserve representative government is to ensure that Internet democracy does not become synonymous with populist or plebiscitary democracy. It will likely be the instinctive choice of well-intentioned reformers. But, as I stated at the beginning of this paper, direct democracy is not inherently implied by the technology *per se*.³⁴ Any number of intermediate democratic theories and structures are compatible with the Internet *per se*. There is no populist inevitability in the expansion of Internet usage. The key change that the Internet could potentially bring to formal voting would be the radical alteration of periodicity. Formality and secrecy, the other features of the current voting system, are more likely to be retained in an Internet-run polity. Any legitimate voting system would still need to retain formal protection against fraud, e.g., verification of identity, minimal qualifications of eligibility, and secrecy. But the Internet can significantly lower voting costs, making it technologically possible to dramatically expand majoritarian decision-making. Populists represent one end of the periodicity continuum and republicans the other. The most promising

32. See JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY* 43, 169-75 (1995) (discussing the benefits of taking opinions from citizens meeting together and deliberating on common problems, rather than from isolated citizens).

33. Michelman, *supra* note 1, at 991.

34. I do acknowledge that the culture of the Internet is nonhierarchical, cooperative, and freewheeling, and that direct democracy will likely be more appealing to those who are immersed in the Internet. Every power structure creates winners and losers with respect to power, and, clearly, there will be a new group of Web entrepreneurs who will profit from the role the Internet will play in government.

route, I would argue, is the middle ground of progressivism that takes advantage of the new decision-making flexibility but remains within a framework that preserves representative government.

IV. PREFERENCE FORMATION IN AN INTERNET-DRIVEN POLITICAL WORLD

The last issue I want to address is the way that the Internet might affect opinion formation and the dissemination of political information in the future. To begin, I will concede two obvious points of optimism. First, the Internet will drastically increase the volume of information citizens can access. Second, in a free society, more information is better than less. Theoretically, citizens can become better informed if they so choose, and governmental transparency can increase if voters avail themselves of all the resources on the Internet.

Even assuming these points to be true, it is still important to worry about the quality of the information citizens will be getting and their abilities to process it in a deliberative manner. In economic markets, preferences are determined by self-interest and taste, and there is little reason to worry about whether or not they are acquired deliberatively. In politics, however, there is a minimum baseline requirement of some deliberation—to ensure regard and concern for longer-term interests.³⁵ This is true even in a Madisonian system that in most respects makes extremely realistic, i.e., egoistic, assumptions about human behavior.³⁶

It is therefore incumbent upon democratic institutional designers to worry about ethical norms, as well as formal rules, and about the front end of democratic choice, i.e., how people come to form opinions, as much as the back end, i.e., how preferences are aggregated into a social choice. The most carefully designed aggregation

35. See FISHKIN, *supra* note 32, at 142 (discussing the American traditional value of deliberation and avoidance of tyranny).

36. See Peter M. Shane, *Commentary, Back to the Future of the American State: Overruling Buckley v. Valeo and Other Madisonian Steps*, 57 U. PITT. L. REV. 443, 445 (1996) (defining Madisonian government as one in which “permanent and aggregate interests of the community” are determined through a deliberate process that is free . . . from the effects ‘of passion, or of interest’) (quoting THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rositer ed., 1961)).

mechanism will fail if the preferences are irrational, self-defeating, excessively short term, or contradictory. Rules can aggregate preferences fairly, but if there is garbage going in, it will aggregate into garbage going out.

My first concern about the increasing use of the Internet as a means of political action and information is that it will increase the contemporary trend towards segmentation of political information. In the earlier postwar period, U.S. citizens relied heavily on the three major networks, the radio, and print media for information about politics. The proliferation of cable and the Internet has multiplied dramatically the sources of information. In many respects, that is a good thing. The more sources, the greater the access, and the less any one source will be able to inflict its biases on the public. The problem, however, is that it creates different types of information and diminishes the common knowledge of the citizenry. In the age of the television clicker, civic slackers can avoid political communications without getting up from their couches. Hardcore ideologues can find channels that cater to their prejudices much as the partisan press did in an earlier era.

Perhaps the best example of the political meaning of this development occurred in the recent presidential election. Those who read about the first presidential debate in the print media were given a detailed treatment of the substantive differences between the two presidential candidates, George W. Bush and Al Gore. Those who received their political information primarily from the local television news channels were presented with a more visual sampling of the debate, which focused on the candidates' physical gestures and manners. The immediate reaction—reflected in the polls—was that the debate was most likely a draw, but as the local television stations and cable political news shows replayed the infamous “Al Gore sighs” over and over, public opinion began to turn towards Bush. Without saying that one perspective or the other is the correct one, I only mean to point out that Marshall McLuhan may have been right thirty years ago when he declared that the “medium is the message.”³⁷

37. MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 7-21 (MIT Press 1994) (1964).

The Web seems to be increasing the tendency for segmented information. The answer is not to burn the computers and return to an earlier homogeneity. Rather, the challenge is to find ways to reach those who might otherwise remove themselves from the political dialogue and to expose people to the widest set of viewpoints as possible. For television broadcasting, it means a norm of political fairness that encourages stations to balance discussion with opposing viewpoints whenever possible, a task that will be difficult given the proliferation of talk shows and pundits. Perhaps, there also needs to be comparable doctrines of balance for political websites that are funded or subsidized with public money.

The second concern I have with Internet-based information is the decline in norms of verification. In a slower era dominated by the print media, the press corps had norms about checking facts. Reputable papers required that reporters had several sources before they ran with stories that might be potentially harmful to individuals or groups. But as television has increasingly become the medium of preference, newspapers have abandoned the old norms in order to keep up with the action. Television stations then recycle the newspapers' stories.³⁸ The Internet has only quickened the pace of reporting. Matt Drudge broke several stories during the impeachment crisis before the established media. His willingness to publish stories that could not be verified in traditional ways opened the door for other media to do the same if for no other reason than to report what Drudge was alleging.³⁹ Clearly, the rise of Internet reporting presents a serious problem for those who would prefer to act responsibly.⁴⁰

38. See generally Luckland H. Bloom, Jr., *Proof of Fault in Media Defamation Litigation*, 38 VAND. L. REV. 247, 373 (1985) (discussing media requirements for due care).

39. See John Hiscock, *The Daily Drudgery: Matt Drudge, The Cyber-scourge who has been Beating the Mainstream Media at Their Own Muckraking Game, Puts His Poison Pen to Paper with The Drudge Manifesto, A Metaphorical 'Middle Finger to the Establishment'*, NAT'L POST, Oct. 14, 2000, at 1.

40. The conflict between the increasing demand for speedy versus accurate reporting was clearly demonstrated in the rush to call the Florida presidential election result before the western part of the state had closed its polls. The networks have refused to accept statistical evidence that making an early call can affect the outcome of an election. See John E. Jackson, *Election Night Re-*

Lastly, there is a concern that decisions in an Internet-driven world might not have the appropriate markers for when decisions are fundamental and when they are routine. Some public decisions are more basic than others: They involve irreversible effects, major rule changes, or widespread fiscal effects. Traditionally, in a democracy, we distinguish between constitutional and normal political decisions, and mark them with different procedures and thresholds for action. Hence, when a decision is of major constitutional significance, both the states and the Federal Constitution require that the measure pass by supermajority votes in several bodies before being enacted.⁴¹ Some states even require that the measure be passed in consecutive sessions.⁴² One problematic development in states with liberal initiative laws is that these processes can be bypassed with a simple majority vote on an initiative constitutional amendment.⁴³ If the courts do not enforce the distinction between revision and mere amendment, the markings can break down, as they arguably have in California.⁴⁴

Internet democracy, as conceived by Morris and others, will likely follow the path of the popular initiative, and we will lose the markings that force more deliberative choice and consensus building on fundamental issues. This does not have to be our destiny, but the normative case needs to be made clearly and early. Professor Michelman has rightly asked us to consider the reasons behind formal voting before we move into the brave new world of Internet democracy.⁴⁵ I would add to this request that constitutional scholars should think of the intermediate issues as well. The framework within which we make choices is critical in determining not only

porting and Voter Turnout, 27 AM. J. POL. SCI. 615, 615 (1983). The problem is compounded when the early call they make also happens to be wrong. See Steve McClellan et al., *Networks on the Defensive*, BROADCASTING & CABLE, Nov. 20, 2000, at 8.

41. See, e.g., U.S. CONST. art. V.

42. See Bruce E. Cain et al., *Constitutional Change: Is it Too Easy to Amend Our State Constitution?*, in CONSTITUTIONAL REFORM IN CALIFORNIA: MAKING STATE GOVERNMENT MORE EFFECTIVE AND RESPONSIVE 265, 273 (Bruce E. Cain & Roger G. Noll eds., 1995).

43. See *id.* at 283.

44. See Cain & Miller, *supra* note 31.

45. See Michelman, *supra* note 1.

the kind of democracy we will have, but also the quality of the decisions that democracy will make.

