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Eben Moglen
Columbia Law School, moglen@law.columbia.edu

Pamela S. Karlan
Stanford Law School

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THE SOUL OF A NEW POLITICAL MACHINE: THE ONLINE, THE COLOR LINE AND ELECTRONIC DEMOCRACY

Eben Moglen* and Pamela S. Karlan**

As W.E.B. Du Bois predicted, the problem for American democracy in the twentieth century was the problem of the color line.[1] The color line is still the thorniest aspect of the political thicket, becoming more perplexing, if in some ways less stark, as society becomes increasingly multiracial and multiethnic.[2]

How might being online affect the color line? Much of the speculation up to this point has focused pretty narrowly on the "digital divide"—the gap between white and minority access to the Internet.[3] The digital divide means that minority citizens have less access to web-based sources of political information and may be less able to use voting techniques, such as online voting, that require a computer.[4]

But there's not much particularly new or interesting here. Socioeconomic disparities and differential access to "politically salient resources" have always affected the political prospects of minority voters. Consider, for example, the effects of the "literacy divide." In the nineteenth century the introduction of the secret ballot had the effect—

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1. *See* W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 1 (1903).

2. *See* Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 871-73 (1995); Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 102-03.

3. *See* Nat'l Telecomm. & Info. Admin., U.S. Dep't of Commerce, *Falling Through the Net: Defining the Digital Divide* (1999), *available at* http://www.ntia.doc.gov/ntiahome/fttn99/part1.hmtl; Nat'l Telecomm. & Info. Admin., U.S. Dep't of Commerce, *Falling Through the Net: Toward Digital Inclusion* (2000), *available at* http://www.ntia.doc.gov/ntiahome/fttn00/falling.htm.

4. *See supra* note 3.

and arguably the purpose—of disenfranchising numbers of freedmen because they could not read and fill out officially issued ballots.[5] In the twentieth century, literacy tests disenfranchised a disproportionate number of minority citizens, and English-language-only ballot materials deterred or prevented many others from voting.[6] Today, the literacy divide means that many citizens, particularly minorities, continue to lack effective access to information about candidates or issues; moreover, less educated voters may often cast uninformed votes because they cannot understand ballot pamphlets.[7] As the recent debacle in Florida showed, ballot spoilage rates are often higher in areas with concentrations of less well-educated minority voters. Finally, since educational levels are highly correlated with socioeconomic status, if minority voters are less educated than their white or Anglo counterparts, socioeconomic disparities will often produce ·distinctive political interests. These differences will be reflected in racially polarized voting and the defeat of minority-preferred candidates in white-majority districts.[8]

Or, in a more narrowly mechanical vein, what about the little noticed—at least outside the voting rights community—"vehicle divide"? The difference in access to an automobile is surprisingly important to political participation in rural areas: it can make it extremely difficult

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5. *See* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 189-93 (1998) [hereinafter THE LAW OF DEMOCRACY]; J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910, at 51-52 (1974).

6. *See, e.g.,* Katzenbach v. Morgan, 384 U.S. 641 (1966). The Voting Rights Act was amended both to bring jurisdictions with substantial numbers of non-English speaking citizens within the special preclearance provisions of section 5 of the Act and to require bilingual ballot materials precisely to overcome these problems. *See* 42 U.S.C. § 1973b(f)(1) (1994).

7. *See* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1516-18 (1990); David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 33-34 (1995).

8. *See, e.g.,* Gingles v. Edmisten, 590 F. Supp. 345, 362 (E.D.N.C. 1984) (noting that the "lower socio-economic status [of black North Carolinians] gives rise to special group interests centered upon those factors" while "[a]t the same time, it operates to hinder the group's ability to participate effectively in the political process and to elect representatives of its choice as a means of seeking government's awareness of and attention to those interests"), *aff'd*, 478 U.S. 30 (1986).

for minority voters to get to the polls and cast ballots.[9] Many of the same voters who won't be able to vote online already don't vote because they find it too difficult to get to the voting booth. In reality, online voting is essentially just a way of casting a ballot without going to a polling place, and thus there is little reason to think it will not have the same context-dependent effects as other forms of absentee voting.[10]

Seeing online voting as the most important application of the Internet to the political process is like treating "pheasant raising, the apprehending of poachers, ways to control vermin, and other chores and duties of the professional gamekeeper" as the most important lessons to be learned from *Lady Chatterley's Lover*.[11] The current focus on online voting and the digital divide is simultaneously too concrete and too abstract. It is too concrete in how it thinks about the Internet: essentially as a mechanism for recording votes, rather than as a social practice that helps to shape our understanding of "community." But it is too abstract in how it thinks about democracy: It asks questions about the relationship between the Internet and "the public sphere" or "free participation in democratic deliberation,"[12] rather than asking how the Internet might change specific aspects of the political system.

In this Essay, we want to suggest two ways in which people's experience with the Internet may affect how they think politics ought to be organized, and to consider the consequences for the political aspirations of minority communities. First, the notion of "virtual communities"—that is, communities that affiliate along nongeographic lines—

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9. *See, e.g.,* Hall v. Holder, 757 F. Supp. 1560, 1562-63 (M.D. Ga. 1991) (finding that "[t]he depressed socio-economic status of black residents, including particularly the lack of public or private transportation [and] telephones . . . hinders the ability of and deters black residents . . . from running for public office, voting and otherwise participating in the political process"), *rev'd on other grounds,* 955 F.2d 1563 (11th Cir. 1992), *rev'd on other grounds,* 512 U.S. 874 (1993); Jeffers v. Clinton, 730 F. Supp. 196, 211-16 (E.D. Ark. 1989) (three-judge court) (same), *aff'd,* 498 U.S. 1019 (1991).

10. For a discussion of the varying impact of absentee voting, see LANI GUINIER, LIFT EVERY VOICE 186-96 (1998).

11. In 1959, *Field and Stream* ran a now-legendary tongue in cheek review that treated the book as a "fictional account of the day-by-day life of an English gamekeeper . . . of considerable interest to out-door-minded readers." *Best of the Best,* FIELD & STREAM, Oct. 1995, at 148.

12. We take these phrases from Richard Rorty's description in ANTHONY G. WILHELM, DEMOCRACY IN THE DIGITAL AGE: CHALLENGES TO POLITICAL LIFE IN CYBERSPACE 6 (2000).

may provide new support for alternatives to traditional geographic districting practices. As Americans become more comfortable with the idea that people can belong to voluntarily created, overlapping, fluid, nongeographically defined communities, which may be as important as the physical communities in which they live, they may become more interested in election methods that recognize such communities. This possibility offers new political opportunities to minority voters, especially Asian Americans and Hispanics, as well as to nonracially defined minority groups. At the same time, however, the Internet may give added strength to the appeal of "unmediated expression"—that is, the ability of individuals to express their preferences directly, rather than through institutional filters. This may further fuel pressures for direct, rather than representative, democracy. This possibility poses new threats to minority rights, which are often better protected through a less purely majoritarian, less populist process.

I. ALT.VOTING AND VIRTUAL DISTRICTS

An important feature that democratic politics and life in the Internet society share is that unnoticed "institutional forms and legal structures"[13] sharply constrain choices that individuals *think* they are making freely. In this section, we want to focus on perhaps the most central and pervasive institutional arrangement of American politics: the use of geographically defined districts to select representatives to bodies such as state legislatures, city councils, and school boards.

"Geographic boundaries have served traditionally, and perhaps intuitively, as the most common basis" for representation because "there is a spatial dimension to human organization."[14] But one of the central features of the Internet is that it demonstrates quite concretely the possibility of organizing human beings in nonspatial ways, and that it allows human beings to organize themselves, rather than having an organizational structure imposed on them by a central authority. As individuals grow comfortable with the idea that important communities may be entirely nongeographic and that individuals may affiliate for important purposes along dimensions that have little or nothing to do

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13. THE LAW OF DEMOCRACY, *supra* note 5, at 1; Pamela S. Karlan, *A Bigger Picture, in* REFLECTING ALL OF US: THE CASE FOR PROPORTIONAL REPRESENTATION 73, 73 (Robert Richie & Steven Hill eds., 1999).

14. ELAINE SPITZ, MAJORITY RULE 56 (1984).

with where they live, they may become both more skeptical of a purely geographic way of defining political constituencies and more open to election systems that allow voters to affiliate along dimensions other than residence.

Before we get to the ways in which Internet-spawned thoughtways might influence people's views of alternative political arrangements, we want to highlight three aspects of districting that map onto analogous issues involving the Internet. First, districting is a kludgy solution to a very real problem. The problem is one of ensuring, in a heterogeneous electorate, that diverse interests are represented. If every voter is permitted to vote for every legislator—the situation in an at-large election—then the majority may well control the outcome for every seat. Moreover, unless there are fluid, shifting majority coalitions, the elected representatives may permanently ignore minority interests. In the eighteenth and early nineteenth centuries, when the American political structure was taking form, the best available technology for ensuring that different interests would be represented legislatively was the requirement that legislatures be chosen from geographic subdistricts.[15] This solution made sense because many interests were correlated with geography and some were actually causally related. Moreover, given the state of communications technology, political discussion and information was best conducted on a local level, and until the end of viva voce voting, elections themselves required physical proximity. Even if the solution was not ideal—since geography imperfectly tracked voters' interests—it was the only one available. More explicitly interest-focused methods of aggregating votes, such as cumulative voting and single-transferable voting, were first proposed in the mid-nineteenth century. Thus, for example, Senator Charles Buckalew of Pennsylvania was one of the leading proponents of districting requirements in the 1840s, but he later explained that he would have supported proportional representation instead had he known about the systems that were just then being introduced.

> What was the idea of [requiring districts]? . . . The idea
> was to break up the political community, and allow the

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15. For a discussion of the history of territorial districting in the United States, see THE LAW OF DEMOCRACY, *supra* note 5, at 769-73; ROSEMARIE ZAGARRI, THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES, 1776-1850 (1988).

> different political interests which compose it, . . . to be rep-
> resented in the Legislature of the State. Unfortunately,
> when that arrangement was made . . . , this just, equal, al-
> most perfect system of voting [cumulative voting], . . . was
> unknown; it had not then been announced abroad or consid-
> ered here, and we did what best we could.[16]

The contingency of the American—actually Anglo-American—
solution is illustrated by the fact that more modern democracies adopt a
very different solution to the problem of ensuring a representative leg-
islature.[17]   While post-war and late-twentieth-century democracies
around the world often adopt American-style protections of individual
rights through explicit constitutional protections and judicial review,
not a single emerging democracy in Eastern and Central Europe, Asia,
or Africa has adopted the United States' exclusive use of winner-take-
all, geographically defined single-member districts to elect its national
legislature.[18]

This pattern of initial enthusiasm for an apparently simple solu-
tion—transparent to the naive participant, but giving way to subsequent
improved understanding—affects the technology of communication as
well as the technology of representation. The computer on which you
are reading this paper, for example, most likely uses Microsoft Win-
dows, a degenerate version of a model of human-machine interaction
originally created at the Xerox Corporation's Palo Alto Research Cen-
ter more than two decades ago.[19] Its goal was to reduce the linguistic
element in such interactions, making it unnecessary for the user to
know any "computer language" to operate a computer. The result was
the expenditure of much processing power on aspects of computer op-
eration—icons, pull-down menus, and other substitutes for the user's
naming for herself what she wants to do—that provided no additional

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16. CHARLES R. BUCKALEW, PROPORTIONAL REPRESENTATION 62-63
(1872).
17. *See* Richard Briffault, *Lani Guinier and the Dilemmas of American
Democracy*, 95 COLUM. L. REV. 418, 428 (1995).
18. *See* THE LAW OF DEMOCRACY, *supra* note 5, at 714-18.
19. *See* Eben Moglen, *Anarchism Triumphant: Free Software and the
Death of Copyright*, 4 FIRST MONDAY 8 (Aug. 2, 1999), *at*
http://moglen.law.columbia.edu/my_pubs/anarchism.html (discussing the rela-
tionship between the history of computer programming and recent develop-
ments affecting the legal and technological structure of society).

functionality and rendered computers much less flexible for experienced users. These experienced users had to continue using the same time-consuming "point and grunt" approach intended for nervous novices. Leaving aside the particularly low quality of the form in which that design philosophy eventually reached the millions of beginning computer users, who could hardly be expected to understand how relatively poorly Microsoft's products functioned (no, Virginia, computers do not have to crash several times a day while performing ordinary tasks) the idea of non-linguistic interaction as the appropriate model for human-machine communication has less and less appeal to a generation of users who have grown up with computers from an early age and have never felt the techno-anxieties that bedeviled their parents.

Second, although districting is a kludgy solution, it is a sticky one. The fact that flaws with geographic districting are widely recognized does not make it easy to achieve reform. The incumbent politicians who constitute the legislature have no real incentive to change the system that put them into office. The two major political parties benefit in a host of ways from a system of geographically defined single-member districts. Duverger's Law makes it highly unlikely that a competitive third party can emerge.[20] Moreover, the legal regime makes it quite easy to engage in bipartisan gerrymandering[21] that makes it more likely that legislators will leave office through death than through electoral defeat.[22]

The history of technology recurrently reveals the same stickiness of initially misjudged solutions. For example, the typewriter keyboard on which we are writing famously incorporates a poor distribution of letters—placing important ones such as the "A" awkwardly within reach of only our weakest finger—for reasons related to the design of early and long-forgotten typewriting equipment.[23] Similarly, the structure of the network of networks called the Internet—and in its

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20. *See* DOUGLAS J. AMY, REAL CHOICES/NEW VOICES 83-84 (1993); THE LAW OF DEMOCRACY, *supra* note 5, at 713-17 (discussing Duverger's Law).

21. *See* Gaffney v. Cummings, 412 U.S. 735 (1973) (upholding bipartisan gerrymandering against attack under the Equal Protection Clause).

22. *See* Center for Voting and Democracy, *Dubious Democracy 2000, at* http://www.fairvote.org/reports/1999/index.html (last visited Feb. 6, 2001).

23. *See generally Consider QWERTY... the Typewriter Keyboard... the Universal User Interface, at* http://home.earthlink.net/~dcrehr/whyqwert.html (last visited Feb. 7, 2001) (explaining the history behind the Qwerty keyboard).

very "districting" mechanisms to boot—shows the same process at work.

Every computer connected to the Internet is assigned, either temporarily or permanently, a unique "Internet Protocol" or IP address.[24] When the protocol was originally designed in the 1970s, the addresses were 32-bit binary numbers broken into 8-bit subgroups, which were then treated, like postal ZIP codes, as markers of fixed geographic positions on the Internet.[25] For example, all addresses at Columbia University began with 128.59, while those at Stanford University begin with 171.64.[26] Initially the assumption was that each such address corresponded to a single permanently located computer at a known fixed location, so that hypothetically, all computers with addresses 128.59.176 would be located on the sixth floor of Columbia Law School's main building. But as the population of the network increasingly included vast numbers of mobile devices, from portable computers to wireless personal organizers, the utility in mapping IP addresses to physical locations disappeared, while the apparently very large number of unique addresses available—4,294,967,296—became all too exhaustible.[27] Even the "dynamic" assignment and reuse of such addresses, breaking the physical relationship between address and location, is no longer sufficient as the total number of computers and other devices attached to the network at any given moment accelerates through the billion mark on an exponential growth curve.[28] The entire addressing scheme must soon be changed, requiring significant modification to the software of every single computer and other network-connected device on the planet, a daunting undertaking to be sure.[29]

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24. *See* Russ Smith, *IP Address: Your Internet Identity, at* http://www.ntia. doc.gov/ntiahome/privacy/files/smith.htm (Mar. 29, 1997).

25. *See id.*

26. *See Data Sheet for External Database Vendors, at* http:// www.columbia.edu/cu/libraries/inside/lso/vendor.data.html (last revision Nov. 1, 2000); *IP Address Changes at Stanford, at* http://www.stanford.edu/ group/networking/NetConsult/ipchange/indexold.html (last revised Jan. 8, 1999).

27. This is merely the theoretical maximum number of addresses. In practice, because the preexisting allocation of address blocks reserves large numbers of addresses, the limit is substantially smaller.

28. *See* David L. Wilson, *Wanted: More Addresses, at* http:// www.phillynews.com/tech.life/net31.html (last visited Feb. 3, 2000).

29. The conversion of the Internet addressing system occurs through the

Third, districting places voters in the position of passive consumers. The popular image is that citizens go to the polls every few years to pick who will represent them. But the reality of districting, particularly today, is that representatives pick constituents more than constituents pick representatives.[30] Once a decade, politicians go to the legislative backrooms and choose the people who will elect them. This is accomplished "[t]hrough the process of redistricting, [where] incumbent office holders and their political agents choose what configuration of voters best suits their political agenda."[31] Through the artful placement of district lines, politicians determine which voters are likely to elect candidates and which will serve as "filler people," whose votes are consistently cast for losing candidates or wasted on candidates who would have won anyway. Politicians decide which of a voter's myriad characteristics will be reflected in his or her district's complexion.

The Internet also increasingly shows the outcome of political skullduggery: the appearance of populism disguising the success of the few in controlling the many. In an epoch of particularly florid political corruption, where bribery has again been legalized under the euphemisms of "soft money" and "campaign contributions," media organizations have sought to bring the Internet under their control by reducing the technology's power for equalizing communication opportunities, recreating in the telecommunications structure of the Internet the "broadcaster-consumer" model previously imposed on

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gradual adoption of the Internet Protocol Version 6, which replaces the currently-adopted Version 4. Addresses such as those described in the text, which limit the size of the network to a theoretical limit of some 4 billion computers, are replaced by an addressing system theoretically capable of connecting a number of computers represented by the number 3 followed by 38 zeros, which will self-evidently never be exhausted. Description of the IP v6 protocol, discussing some of the technical changes necessary to adopt it, can be found in the IP v6 Protocol Specification, RFC-1883, a pervasive document available in thousands of places around the net. *See Internet Protocol, Version 6 (IPv6) Specification* (Dec. 1995), *available at* http://info.broker.isi.edu/innotes/rfc/files/rfc1883.txt.

30. *See* T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588 (1993); Briffault, *supra* note 17, at 431.

31. Aleinikoff & Issacharoff, *supra* note 30, at 588; *see also* Briffault, *supra* note 17, at 431.

the electromagnetic spectrum, in which a few dominant voices speak and the rest of society merely listens.[32]

But despite the traditionalism, stickiness and convenient manipulability of geographic districting, life in the Internet society accustoms us to a much-reduced respect for its factual predicates. As we spend greater and more meaningful portions of our lives in computer-mediated communications with other people, three pervasive changes occur: location doesn't matter, our interests determine our communities, and we don't have to use our feet to vote with them.

First, in the Internet society, everyone is adjacent to everyone else. Email, instant messaging, Internet phone, and all the other media of person-to-person communication function without the slightest regard for physical location. During any given day we are at least as likely to communicate with people on other continents as we are to communicate with people in other parts of our county, or to shop with merchants in other time zones as we are to shop in other neighborhoods of our town. Locality ceases to have a normative significance: our neighborhood pub is less likely to contain our friends than a chat room, the local merchant who charges more than the seller on the Internet is more likely to gain our resentment than our business, and the sagacity of our local doctor is under constant challenge from the flood of medical information that we can find for ourselves online. Being close by is nothing special because everyone is close by. An accessible Congressman is one who gives us a quick substantive answer to our email, not someone who comes back to the district for the weekend and hangs around the mall that we no longer shop at.

Replacing the normative value of the local is the power of affinity. The network's media allow us to locate others who share our interests and concerns with ease. Thus, we increasingly occupy the locality of the like-minded. Nor is our locality in these terms singular: We are simultaneously part of communities of sea kayakers, gamelon musicians, ex-Bahai atheists, melanoma survivors, lukewarm libertarians (not yet ready to eliminate public libraries and slightly queasy about do-it-yourself howitzer construction) and shiatsu fanciers. A conclave of the people who share all our affinities would be more depopulated

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32. *See* Eben Moglen, *The Invisible Barbecue*, 97 COLUM. L. REV. 945 (1997).

than a New Hampshire village meeting on a blizzard evening—in fact, it is almost guaranteed to be a solo event. But each of the communities comprising our social context will be vibrant, noisy, and disputatious.

The increasing importance of affinity at the expense of locality brings also a decrease in stability. Entry and exit from network communities is simpler than packing up to move, or even than facing the embarrassment of meeting casually at the supermarket the former friends with whom one no longer cares to dine. The model of easy transition becomes part of the background social expectation: our coalitions, organizations, and factions are simple to form and equally uncomplicated to dissolve.

As geographic proximity assumes less importance in individuals' sense of community, and as people become more connected with one another along dimensions other than physical proximity, they may become more skeptical of the idea that political representation ought to be organized invariably along geographical lines. In fact, it is eminently possible to construct a voting system that allows for the full representation of nongeographic as well as geographic communities. It is possible to construct a voting system that essentially allows individuals to district themselves, that is, to join together with other voters along the dimensions *they* individually consider meaningful. If geographic, or geographically correlated, interests seem important to them, they can continue to affiliate along those lines. But if other interests—such as policy-related beliefs, ethnicity, gender, or socioeconomic status—are more central to their political identity, they can coalesce around them instead. Moreover, in every election, each voter has a choice of how to identify himself; he can change his affiliation without waiting for decennial reapportionment or depending on incumbent politicians to relocate him.[33]

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33. There is a rich and growing body of literature on alternative voting systems. For some representative works from the legal and political science literature that among them probably cite most of the other relevant work, see AMY, *supra* note 20; LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994); THE LAW OF DEMOCRACY, *supra* note 5, at 713-84; Edward Still, *Alternatives to Single-Member Districts, in* MINORITY VOTE DILUTION 249 (Chandler Davidson ed., Howard Univ. Press 1989) (1984); Briffault, *supra* note 17, at 432-44; Richard L. Engstrom, *Modified Multi-Seat Election Systems as Remedies for Minority Vote Dilution*, 21 STETSON L. REV. 743 (1992); Pamela S. Karlan, *Maps and*

For purposes of illustration, we will describe two leading alternatives to geographically based districting. Each avoids the winner-take-all problem of traditional at-large elections, essentially allowing like-minded voters to create what cyber-speakers might describe as "virtual districts."

In a cumulative voting system, each voter is given as many votes to cast as there are seats to be filled in the election. The difference comes in how the voter can use her votes. Rather than being limited to casting one vote for each of the candidates she supports, a voter can "cumulate" her votes behind a smaller number of candidates whom she supports intensely. For example, in an election to fill five seats on a county commission, each voter would have five votes. A voter could support five separate candidates. But she could also decide to "plump" all five votes behind a single favorite candidate or could give three votes to her favorite candidate and two to her second-favored candidate. Cumulative voting allows voters to express intensity of preference: a voter can decide to support a slate with mild support for an array of candidates or can support fewer candidates—perhaps even just one—intensely.

In a preference voting or single transferable vote system,[34] each voter ranks the candidates, putting a "1" beside the name of his first-choice candidate, a "2" beside the name of his second-choice candidate, and so on, for as many candidates as he wishes. Then, using a tallying system that is hard to describe, but transparent to the voter,[35] votes are allocated in a way that maximizes the effectiveness of each voter's ballot.[36]

Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation, 24 HARV. C.R.-C.L. L. REV. 173, 221-36 (1989); Steven J. Mulroy, *Alternative Ways Out: A Remedial Road Map for the Use of Alternative Electoral Systems as Voting Rights Act Remedies*, 77 N.C. L. REV. 1867 (1999); Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 251-60 (1995).

34. *See* Robert Richie, *Full Representation: The Future of Proportional Election Systems*, 87 NAT'L CIVIC REV. 85, 86 (1998) (discussing the various terms used to describe this voting system).

35. Similar to the IP-addressing system we discussed. *See supra* note 24.

36. In the first pass, each candidate who reaches the "Droop quota"—expressed as the total number of votes cast divided by the number of seats to be filled plus one—wins a seat. If all seats are not then filled, the "excess" votes of winning candidates—that is, the number of votes they received above the Droop quota—are reassigned to other candidates based on the second-choice

The mathematical property of each of these voting systems is that they permit any group that reaches the "threshold of exclusion" to elect a candidate of its choice. The threshold of exclusion for each of these systems is expressed by the following formula:

1/1 + number of seats to be filled

Thus, in our example, the threshold of exclusion would be 1/6 or 16.66 percent of the electorate. Any group of voters that is larger than 16.66 percent is assured that it can elect a member of the commission, regardless of where the group's members live or what traits define the group.[37]

Preference or cumulative voting should appeal to individuals who have come to think of themselves as members of cohesive, politically salient communities that define themselves in voluntary, nongeographic terms. Ironically, precisely because of the digital divide, the group of citizens most likely to start thinking of politics in this way is a group who has not been involved up until now in the debate over alternative voting systems: namely, upper-middle-class, relatively well educated, white Anglos. This may help to redirect and revive a debate that until now has focused largely on the potential role of alternative voting systems with respect to racial minorities. If Derrick Bell's interest-convergence hypothesis—that the legal system is more likely to adopt a conception of minority rights if that conception

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selections of voters whose first-choice candidate was elected. In a second pass, any additional candidates who reach the Droop quota are seated. If there are no such candidates, the candidate with the lowest number of votes is eliminated, and her votes are reassigned to the second-choice candidates on ballots listing her first. This process of reassigning votes "downwards" and "upwards" continues until all the seats are filled. For descriptions of this process, see AMY, *supra* note 20, at 230-31; Engstrom, *supra* note 33, at 766.

37. In a cumulative system, the group would have to plump its votes to ensure that it could elect a candidate.

In either system, it is quite possible that a group will elect a candidate even if it is smaller than the threshold of exclusion. If the remainder of the electorate is fractured, even a smaller group might be successful. The threshold of exclusion simply indicates the size a group must be in a worst-case scenario.

also promotes majority interests[38]—is right, then Internet-generated insights about politics may help to reduce the political divide.

Section 2 of the Voting Rights Act of 1965, as amended in 1982, forbids state and local governments from using election methods that deny minority voters an equal opportunity to elect representatives of their choice.[39] In the decade following the 1982 amendments, plaintiffs and the United States Department of Justice forced literally thousands of jurisdictions to adopt districting plans that created majority-minority single-member districts. These districts enabled minority voters to elect their preferred candidates even in jurisdictions where politics was racially polarized. Starting in the mid-1980s, scholars and voting rights activists also began to propose alternatives to single-member geographically based districts in jurisdictions where it was impossible to draw single-member districts that fairly reflected minority citizens' voting strength because they were not sufficiently concentrated in particular neighborhoods.[40] In addition, they argued that such alternatives might help to reduce racial polarization within the political process by increasing the opportunities for cross-racial coalitions, even in jurisdictions where racial bloc voting persisted:

> Many of these alternative voting systems might be able to dampen separatist forces by opening up politics to more fluid and diverse groups. . . .
>
> . . . .
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> . . . By allowing voters to form winning coalitions with like-minded citizens regardless of residence, alternative systems encourage the development of individual candidate-, interest-, and issue-oriented alliances. The more fluid the groups, the more likely individual white blocs will find it to their

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38. For applications of this idea to the area of voting rights, see DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 73 (1987); Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1416-17 (1991); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1124 (1991).

39. *See* 42 U.S.C. § 1973 (1994).

40. *See* Daniel R. Ortiz, Note, *Alternative Voting Systems as Remedies for Unlawful At-Large Systems*, 92 YALE L.J. 144 (1982); Still, *supra* note 33. Karlan, *supra* note 33, discusses the results of litigation under the Voting Rights Act seeking such remedies.

advantage to build biracial coalitions. Even if *most* white voters continue to be unwilling to support nonwhite candidates, *some* white voters will and since biracial coalitions can attract their white supporters from anywhere, rather than being forced to find all their members in particular neighborhoods, they are more likely to succeed. Moreover, because these alternative systems do not create "safe seats" and "filler people," as the once-in-a-decade reapportionment battles do, they do not create semipermanent winners and losers along racial lines.[41]

In the 1990s, alternative remedies became appealing for an additional reason, as the Supreme Court, in its "wrongful districting" decisions,[42] struck down a number of majority-black and majority-Hispanic

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41. Karlan, *supra* note 2, at 103, 106; *see also* Lani Guinier, *[E]Racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109, 133 (1995) (discussing how alternative systems might dampen polarization).

42. *See* Shaw v. Reno, 509 U.S. 630 (1993); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Hunt, 517 U.S. 899 (1996); Bush v. Vera, 517 U.S. 952 (1996). In addition to spurring a deluge of litigation, *Shaw v. Reno* and its progeny have generated a wealth of scholarship. *See, e.g.*, J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 366-455 (1999); Aleinikoff & Issacharoff, *supra* note 30; James U. Blacksher, *Dred Scott's Unwon Freedom: The Redistricting Cases As Badges of Slavery*, 39 HOW. L.J. 633 (1996); James F. Blumstein, Shaw v. Reno *in Doctrinal Context*, 26 RUTGERS L.J. 517 (1995); Katherine Inglis Butler, *Affirmative Racial Gerrymandering: Rhetoric and Reality*, 26 CUMB. L. REV. 313 (1996); John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607 (1998); John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576 (1997); Bernard Grofman & Lisa Handley, *1990s Issues in Voting Rights*, 65 MISS. L.J. 205 (1995); Samuel Issacharoff and Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276 (1998); Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731 (1998); Pamela S. Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 HOUS. L. REV. 289 (1997); Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-*Shaw *Era*, 26 CUMB. L. REV. 287 (1996); Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201 (1996); Daniel Hays Lowenstein, *You Don't Have to Be Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779 (1998); Earl M. Maltz, *Political Questions and Representational Politics: A Comment on* Shaw v. Reno, 26 RUTGERS L.J. 711 (1995); Paul L. McKaskle, *The Voting Rights Act and the "Conscientious Redistricter,"* 30 U.S.F. L. REV. 1 (1995); Richard H. Pildes & Richard G. Niemi, *Ex-*

congressional districts on equal protection grounds. The Court held
that the districts reflected excessive race consciousness. The Court lo-
cated the constitutionally cognizable injury in these cases[43] in the
"simple command" at "the heart of the Constitution's guarantee of
equal protection . . . that the Government must treat citizens 'as indi-
viduals.'"[44] Of course, "redistricting stabs at the heart of the Four-
teenth Amendment every time. *Every* reapportionment involves treat-
ing voters as members of a few, crudely defined groups rather than
treating them as individuals with unique constellations of attributes and
concerns."[45] Despite the Court's language, the wrongful districting
cases did not cast a cloud over districting altogether; indeed, the Court
has repeatedly permitted partisan political gerrymanders that produced
grotesquely shaped districts.[46] The major consequence of the wrongful
districting cases is to make it harder for minority voters than for all
other groups to achieve representation through single-member districts
since the Court imposes a more stringent geographic compactness re-
quirement on majority-minority districts.[47]

Alternative voting systems "avoid governments assigning voters
to particular districts on the basis of . . . race";[48] instead, they allow in-
dividual voters to decide for themselves whether to affiliate with other

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*pressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-
District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483 (1993); Rich-
ard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359 (1995); Richard
H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106
YALE L.J. 2505 (1997); Melissa L. Saunders, *Reconsidering* Shaw: *The
Miranda of Race-Conscious Districting*, 109 YALE L.J. 1603 (2000).

43. An injury whose existence we strongly doubt. *See* Issacharoff & Kar-
lan, *supra* note 42, at 2281.

44. *Miller*, 515 U.S. at 911.

45. Issacharoff & Karlan, *supra* note 42, at 2292.

46. *See* Badham v. Eu, 694 F. Supp. 664 (N.D. Cal. 1988) (three-judge
court), *aff'd*, 488 U.S. 1024 (1989); Davis v. Bandemer, 478 U.S. 109 (1986).
One of the ironies of the post-*Shaw v. Reno* litigation is the number of plans
that were first attacked, and upheld, under the equal protection clause in politi-
cal gerrymandering cases, only to be struck down as impermissible racial ger-
rymandering. *Compare, e.g.*, Pope v. Blue, 809 F. Supp. 392 (W.D.N.C. 1992)
(three-judge court), *aff'd*, 506 U.S. 801 (1992), *with* Shaw v. Hunt, 861 F.
Supp. 408 (E.D.N.C. 1994) (three-judge court), *rev'd*, 517 U.S. 899 (1996).

47. *See* Karlan, *Just Politics?*, *supra* note 42, at 308-10; Mulroy, *supra* note
33, at 1876; Briffault, *supra* note 17, at 431.

48. Karlan, *supra* note 2, at 104.

voters who share their racial identity.[49] Thus, alternative voting systems, while they may not always be as effective as single-member districting in ensuring that minority voters can elect their preferred candidates,[50] may be a more judicially palatable way of providing such representation, since they do not demand race-conscious governmental action.

At least so far, however, courts have essentially refused to impose alternative remedies.[51] Moreover, the uproar over Lani Guinier's abortive nomination to head the Civil Rights Division[52] painted these alternative systems as undemocratic or ironically as excessively race-based. Perhaps these systems will be viewed in a new light if more people start to wonder why political representation is organized in an exclusively geographical fashion in a world in which more and more of people's interactions occur within nongeographically organized communities.

II. E-PLURIBUS UNUM? THE INTERNET AND DIRECT DEMOCRACY

Though the tendency is to write about "the Internet" primarily as though it were either a thing or a place—"cyberspace" or "the information superhighway"—the Internet is actually the name of a social condition. In the Internet society, every individual is actually or

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49. *See* James U. Blacksher, *Subversive Speech in the Trial of Socrates and the Redistricting Cases*, 1 STAN. AGORA: AN ONLINE J. OF LEGAL PERSP. 1 (last visited Feb. 7, 2001), *at* http://www.law.stanford.edu/agora/issue1/index. html; Karlan & Levinson, *supra* note 42, at 1218-19.

50. Success in alternative systems depends on voter turnout; there are no "safe" seats.

51. *See, e.g.*, Harper v. City of Chicago Heights, 223 F.3d 593, 601 (7th Cir. 2000) (reversing the district court's imposition of cumulative voting); Cousin v. Sundquist, 145 F.3d 818, 829 (6th Cir. 1998) (same); Cane v. Worcester County, 35 F.3d 921, 929 (4th Cir. 1994) (same); *see also* Nipper v. Smith, 39 F.3d 1494, 1545-46 (11th Cir. 1994) (rejecting plaintiffs' proposal of cumulative voting); McGhee v. Granville County, 860 F.2d 110, 121 (4th Cir. 1988) (reversing district court's imposition of limited voting, another alternative system).

52. For very different accounts of this episode, see Mary Ann Glendon, *What's Wrong with the Elite Law Schools*, WALL ST. J., June 8, 1993, at A16; GUINIER, *supra* note 10; Pamela S. Karlan, *Democracy and Dis-Appointment*, 93 MICH. L. REV. 1273 (1995); Robert Post, *Lani Guinier, Joseph Biden, and the Vocation of Legal Scholarship*, 11 CONST. COMMENT. 185 (1994).

potentially connected to every other individual without intermediary.[53] Throughout our social lives—in culture, exchange, religion, and government—the result is the phenomenon of disintermediation as middlemen of all sorts find themselves increasingly unnecessary.

Disintermediation takes several distinct forms. One aspect, currently creating enormous ferment in the area of intellectual property, is the replacement of mediated by direct distribution. Direct distribution allows digital goods effectively to reach the ultimate consumer without passing through the hands of industrialists whose task is to make, move, and sell the physical units in which cultural goods were previously packaged. Instead, the writer or musician, be it Stephen King or Public Enemy, reemerges as an artisanal producer who, in the Internet society, nonetheless effortlessly reaches a global audience.

But disintermediation also works in reverse, eliminating intermediaries whose primary task was aggregation rather than distribution. Pull media tend to replace push media, so that people find the music they want online rather on the radio, and the major television networks that lived by aggregating eyeballs for the soap, beer, and razor makers collect fewer eyeballs to vend to the advertisers. Broadcasting declines, narrowcasting is in.[54]

Disintermediation affects the quality of products as well as the structures of distribution. Publishing moves towards "print on demand," as the seasonal list and the bookstore's inventory both fail as mechanisms for the aggregation of readers' preferences. Soon the blue jeans companies will take customers' measurements online, manufacture the jeans to the numbers, and deliver by overnight air. The concept of clothing size, a product of mass manufacture of military uniforms in the American Civil War, ceases to aggregate bodies into a primitive population histogram, and each of us wears clothing made to measure, as though returning to the artisanal past. "Business hours" cease to exist for the disciplined grouping of our daily activities; to our

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53. Metaphors of spatialization particularly infect lawyers' thinking because of their concern with issues of jurisdiction and choice of law, which their intellectual tradition associates with physical territory. Such ways of speech become ways of thought, to everyone's disadvantage. *See* Eben Moglen, *How Not to Think About the Internet, in* THE INVISIBLE BARBECUE (forthcoming 2002).

54. *See* DICK MORRIS, VOTE.COM 89-92 (1999).

delight we shop online late at night, just as to our chagrin we discover that there is no longer any way to leave the office.

So one central appeal of the Internet is the ability to do things instantly, and with as few barriers as possible between the emotion and the response, the conception and the creation. If you want to read T.S. Eliot's *The Hollow Men* at five o'clock in the morning or without having to trek to the library or the bookstore, or leave your house at all, just get it from the Internet. Immediate, unmediated access is a good thing: anything that falls between the idea and the reality casts a shadow. The ability to shop online from merchants around the world, to build a community with like-minded but physically distant individuals without any central intervention, or to communicate one's ideas to a vast audience without having to buy space in USA Today or on MSNBC, can contribute powerfully to one's ability to construct one's own life. But governing a complex heterogeneous society is a very different sort of activity. In the political arena, the fact that mediating institutions often make action more difficult or costly, or that mediating institutions alter or subdue our preferences, often turns out to be a benefit rather than a problem.

Most of the people who consider the Internet's role in governance view it from a cyber-populist perspective: the Internet can increase citizen participation, not merely by making it easier to vote but, more importantly, by increasing the array of voting opportunities.[55] They see the Internet as an engine for a robust form of direct democracy. The standard Internet-based pitch for direct democracy goes something like this. First, the Internet will enable citizens to become far better informed about public issues.[56] Citizens have access to more sources of information overall, and perhaps they can process that information in more useful ways. The decreased—essentially trivial—cost of communication makes it possible to disseminate good ideas even if those ideas are not initially backed by a large amount of money.[57] Second, these better informed citizens can easily vote online from their home, office, wireless modem-equipped laptop or Palm Pilot while taking an

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55. *See, e.g.*, Cal. Internet Voting Task Force, Cal. Sec'y of State Bill Jones, *A Report on the Feasibility of Internet Voting*, *at* http://www.ss.ca.gov/executive/ivote/final_report.htm (Jan. 2000).

56. *See* MORRIS, *supra* note 54, at 58.

57. *See* Moglen, *supra* note 32, at 950-51.

adventure vacation. Last, now that we're all so well-informed and capable of voting with very low opportunity costs—no need to trek to a polling place—we should be capable of deciding important issues of public policy through direct voting, rather than leaving these questions up to a cadre of elected professional politicians.

Even on its own terms, of course, this account has problems. What does it mean to say that it is easier to become well-informed? It's rather expensive, actually, not so much in financial terms—on this, the Internet partisans are right, since it costs very little to gain access to literally millions of information providers—but rather in terms of time and comprehension. Anyone who wants to increase the opportunities for direct democracy should be forced to read through the current official voter information pamphlets in California: more than a hundred pages of densely written statutory text for the two dozen or so propositions already on the ballot. Surely, the minimum that can be expected is knowing the text of a proposition on which one is voting, but even that task seems beyond the competence or interest of most of the eligible electorate.[58]

The Internet will do very little to combat this problem. Anyone with a life will find it impossible to check out all the websites with relevant information on an important public issue. For example, there are hundreds of websites dealing with the question of direct democracy and the Internet. Which ones are accurate? Which ones are constructed by people with a hidden agenda whom we would mistrust if we understood their political goals?

So what will voters do? Three responses seem particularly likely. The first is not voting on an issue at all unless one feels sufficiently well-informed. This response may leave the field to the less conscientious elements of the electorate or may result in disproportionate influence for single-issue voters who care about that issue. Second, one could vote essentially at random or according to some rule largely unrelated to the merits of specific measures. Consider, for example, the

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58. It would also be fair to say that taking the time to inform oneself on voting issues seems beyond the competence or interest of many congresspeople much of the time. Nonetheless, representatives often have access to well-informed staff members—intermediaries—who can perform this job for them. For reasons we discuss in a moment, pure direct democracy in the Internet age may deprive individuals of similarly useful intermediaries.

well-documented phenomenon that people tend to vote "no" when they don't understand a ballot proposition—a consideration that might be thought of as essentially conservative or risk-averse, until one realizes that framers of ballot language are aware of this point and draft propositions to take advantage of this tendency. Third, voters may spend their scarce comprehension effort looking for shorthand clues that tell them how to vote—for example, looking to see which groups support or oppose a particular measure. This last response seems the most reasonable, and indeed is what most of our colleagues say they do with respect to most ballot measures. Note, however, that it reintroduces the idea of relying on mediating institutions. Those institutions may be different in the Internet world, but they are as useful, or even more useful, precisely because the costs of sending communications through the Internet are so reduced. Few people get very much handwritten, first-class spam. The arguments in a handwritten letter from someone you know personally are far easier to evaluate than the arguments on a website posted by someone who is often unknown and unknowable. In deciding how to vote, then, citizens should rely on information generated over the Internet only to the extent that the information is reliable. But, reliability may be a function of its being provided by "brand-name" intermediaries: the political parties, large media outlets, long-established interest groups, and the like.[59]

But there's a much bigger problem with direct democracy. Even if voters felt that they were well-informed, direct democracy would still pose major problems for responsible governance. Contrary to one particularly otiose website devoted to direct democracy, representative democracy was *not*

> originally devised to get around the practical problem of transportation in a large democracy; specifically, that all of the people in a nation could not economically vote on a great number of issues, simply because they could not all be physically present to debate and cast a ballot in one location.[60]

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59. *See* Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627, 1629 (1999).

60. *Direct Democracy Online Project, at* http://www.crosswinds.net/omaha/~citizen/ (last modified Dec. 11, 1998). For a more thoughtful discussion of the theory of representation in early national America, see ZAGARRI,

The problem that concerned the Founding Fathers was a very different one: the potential for destabilizing and oppressive factional politics. Consider *The Federalist No. 10*'s account of pure democracy:

> [A] pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.[61]

Indeed, Madison's account makes it quite clear that what the Direct Democracy Online Project sees as a practical problem was one of the very mechanisms that the Framers thought could brake or dissipate faction: a large republic was far less likely than a small democracy to oppress weaker and unpopular parties in part because of communications difficulties. "[W]here there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary."[62]

There is no reason to think those dangers of majority oppression have abated in the intervening two centuries. If anything, the tremendous growth in the government's scope and power might make us more wary. Indeed, it is precisely a series of mediating institutions, beginning with representative government, that enables minorities to participate effectively in self-governance. What Julian Eule called the constitutional filtering of majority will[63] is a defining feature of the American constitutional order.

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supra note 15.

    61. THE FEDERALIST NO. 10, at 58 (James Madison) (The Modern Library 1941).

    62. *Id.* at 61.

    63. Eule, *supra* note 7, at 1522.

Madison's insights have been borne out most powerfully when it comes to the interests of racial minorities. We are hard pressed to think of a single occasion on which a plebiscite has gone beyond the protections already given either through the legislative process or through judicial enforcement of constitutional rights. From the Akron ordinance[64] struck down in *Hunter v. Erickson*[65] that required fair housing measures to be approved by popular referendum before going into effect through California's Proposition 209,[66] there has been a consistent history of direct democracy rejecting anti-discrimination measures. The same pattern seems to be repeating itself with regard to anti-discrimination provisions involving sexual orientation: legislative, executive, and judicial protections are far more likely to be overridden by plebiscites than the other way around. And this is not always a product of actual popular sentiment as much as it is the product of the framing of ballot measures.

By contrast, minorities, particularly racial minorities, are likely to benefit from mediated politics in which they have elected at least some representatives responsive to their distinctive needs or they participate as critical elements of longer-term multiple-issue coalitions such as political parties. First, representative bodies are relatively intimate groups—at the local level they rarely contain more than two dozen members.[67] Thus, minority representatives will have the opportunity to know representatives from non-minority districts well, something that their geographically, economically, or socially isolated constituents may be less able to accomplish. If anything, the digital divide makes this kind of representative government especially important. Small groups often operate under a different dynamic than do larger ones.[68]

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64. AKRON, OHIO, ORDINANCE NO. 873-1964 (1964), *amended by* AKRON, OHIO, ORDINANCE NO. 926-1964 (1964).

65. 393 U.S. 385 (1969).

66. CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION 94 (Nov. 5, 1996) (enacted as CAL. CONST. art. 1, § 31). Proposition 209 bans all race- and gender-conscious affirmative action by the state and local governments.

67. The average number of members on city councils is 6.48. *See The City Council: Structure and Character*, 1982 MUN. Y.B. 182. Even in the largest cities (those with populations over one million), the average council had less than two dozen members.

68. *See* WILLIAM H. RIKER, THE THEORY OF POLITICAL COALITIONS 51 (1962) (explaining that people in small groups are unlikely to see situations as zero sum and are more likely to place a high subjective utility on avoiding fu-

An African American or Hispanic legislator may be able to build bridges to other members of a legislative committee or a school board, particularly when a body's members come to have shared values and ongoing relationships. Precisely because legislators can gain increasing influence over time, as they gain reputations and move into leadership positions, minority representatives may have opportunities for influence that private citizens lack.

Second, the fact that legislators have far more voting opportunities than would the citizenry under any conceivable form of direct democracy also makes representative democracy potentially more responsive to minority interests. Legislative coalition-building, or logrolling, depends on there being a series of linked votes, rather than a stream of discrete, one-shot elections.[69] The fact that voting in legislative bodies, unlike voting in general elections, is not anonymous furthers this process of accommodation.[70] It forces representatives to be accountable for their votes in ways that it would be hard, if not impossible, to impose on private citizens.[71]

Finally, voting within legislative bodies occurs in an institutional setting that increases the possibilities for deliberation through debates, amendment processes and mark-ups, and hearings in which representatives participate actively. We do not want to claim too much for the legislative process: the last days of many state legislatures' annual sessions, for example, have all the frenzy of online auctions. But at least there is an ongoing connection among legislators, and some level of understanding that legislative proposals are interrelated. A legislator who voted to freeze taxes knows that his vote on H.B. 12 may preclude voting for a budget that appropriates more than the tax base will

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ture animosity than are people in larger, more anonymous groups).

69. *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 120-24 (1962) (discussing the importance of votes on different issues being taken over time for theory of collective choice).

70. *See id.* at 134. One thing that exit polling data from the late 1980s revealed is that voters—protected, of course, by the anonymity of the voting booth—often outright lie about their votes on issues of racial salience. In both the New York mayoral race involving David Dinkins and the Virginia gubernatorial race involving Douglas Wilder, exit polls were markedly inaccurate because voters claimed they were voting for African American candidates when in fact they had voted for white ones. *See* Sheryl McCarthy, *What Voters "Don't Tell" Pollsters*, NEWSDAY, Oct. 27, 1993, at 30.

71. *See* Karlan, *supra* note 33, at 218.

generate. Minority groups may have a greater chance of being heard in the more formal legislative process than they have in an unmediated free-for-all forum.

Internet voting, then, may often produce outcomes that are quick, certain, and wrong. Ironically, representative government may be even *more* desirable in the age of the Internet precisely because it's sometimes slow and creaky. It may perform its traditional braking function with respect to a new source of what Madison described as factional passion: immediate access and expression, without an opportunity for reflection.

III. NOT THE FIREHOUSE NEXT TIME: MINORITIES AND THE POLITICAL PROCESS IN THE INTERNET SOCIETY

So what of the color line in the age of the online? In a political environment less concerned with the geographic basis of representation, districting should matter less, and alternatives to American patterns of district representation should grow more palatable. Problems that have compelled much attention since 1965 should grow easier to solve, even as they grow less important. But increasing sympathy for an experimentation with disintermediated democracy will raise new problems for those who have been traditionally dis- and under-enfranchised.

As one of us pointed out some years ago, the Supreme Court and some other legal commentators have conflated three different ideas within the phrase "the right to vote."[72] Voting, electing, and governing are different processes as to each of which the problem of America has been the problem of color. Conversation about the Internet in politics, too, would benefit from a careful attention to the different meanings of "the right to vote." Those concerned with the "digital divide" are concerned with vote casting. The problems they identify, which relate to access, are both trivial and transitory and hence deserve less attention than the amount they are currently given. With respect to electing candidates, the transition to the Internet society is more likely to be positive than negative, both enhancing the prospect of adopting solutions long since identified and abating the sterile and contentious warfare

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72. *See* Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705 (1993).

over the perceived ugliness of polygons into which the Supreme Court has obtusely led us all in recent years. But when it comes to governing, arguably the most important and least legally affected component of the long-deferred dream of political equality, news from the Internet may be bleaker than we have all been hoping to hear.