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COMMENTS

THE E-VOTE: A PROPOSAL FOR AN INTERACTIVE FEDERAL GOVERNMENT

I. INTRODUCTION

The right to vote is one that Americans hold precious.[1] In the 1700's, the original Colonies fought a war with England over the right of self-representation.[2] In the 1860's, the United States divided and fought a bloody civil war over slavery and the rights of African-Americans.[3] At

1. THE FEDERALIST PAPERS No. 52 (James Madison).

> The definition of the right of suffrage is very justly regarded as a fundamental article of a republican government. It was incumbent on the convention, therefore, to define and establish this right in the Constitution. To have left it open for the occasional regulation of Congress, would have been improper . . . .

Id. The Constitution provides for the members of the House of Representatives to be elected by the people of the several states. U.S. CONST. art. 1, § 1. Additionally, six of our twenty-seven constitutional amendments discuss the right to vote. U.S. CONST. amend. VII (governing method of counting presidential electoral votes); U.S. CONST. amend. XIV (granting citizenship to all persons born in the United States, including the protection of all privileges and immunities and including sanctions against states who deprive male inhabitants of the right to vote); U.S. CONST. amend. XV (protecting the voting rights of all citizens, including freed slaves); U.S. CONST. amend. XIX (granting the right to vote to women); U.S. CONST. amend. XXIV (protecting the right to vote in primary elections against poll taxes); and U.S. CONST. amend. XXVI (granting the right to vote to those eighteen years of age or older).

2. THE DECLARATION OF INDEPENDENCE (U.S. 1776). In discussing the offenses against the colonies by the king of Great Britain, the Declaration lists the king's refusal to pass laws for the accommodation of large districts unless the people of those districts would relinquish their right of representation in the legislature, "a right inestimable to them, [and] formidable to tyrants only." *Id.* Additionally, the charges included the reasoning "for imposing taxes on us without our consent" and dissolving the legislative bodies, returning the legislative powers to the people at large for their exercise. *Id.*

3. DANIEL A. FARBER, ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 13-14 (2d ed. 1998). Slavery was abolished by the 13th Amendment which was passed in 1865 at the end of the Civil War. *Id.* The 14th Amendment, ratified in 1868, overruled the *Dred Scott* case and federal rights were guaranteed to all citizens by the Due Process Clause and the requirement of equal protection of the laws. *Id.* The 15th Amendment, ratified in 1870, prohibited racial discrimination in access to voting. *Id.*

the dawn of the 20th Century, the Suffragettes campaigned long and hard to legalize women's right to vote.[4] From the birth of our country to the present era, voting for or against the individuals who seek to represent us has been considered one of the most basic rights guaranteed by our democratic society. It is the instrument by which we influence our government.[5] Our country has been instrumental in the creation of democracies in foreign countries throughout the world.[6] How can it be, then, that in recent years, Americans in greater and greater numbers have declined or refused to exercise the very right that was so hard earned?[7]

The multitude of reasons for the lack of participation in our national elections may be as great as the variety of individuals in our society.[8] However, some general election-related issues affect all Americans. As the population of our country increases, the number of constituents rep-

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4. WINSTON E. LANGLEY & VIVIEN E COX, WOMEN'S RIGHTS IN THE UNITED STATES 82 (1994). The Declaration of Sentiments, signed in Seneca Falls, New York, in 1848, marked the beginning of the women's rights movement in America. *Id.* The first federal women's suffrage amendment was introduced into Congress in 1868. *Id.* at 220. After forty-two years of continuous campaigns, the Nineteenth Amendment to the Constitution was approved in the spring of 1919 and it was ratified to the Constitution by thirty-six states in August of 1920. *Id.* Its wording was essentially the same as when it was originally introduced to Congress in 1868. *Id.* at 221.

5. Reynolds v. Sims, 377 U.S. 533, 555 (1964).

> The right to vote freely for the candidate of one's choice is the essence of a democratic society and any restrictions on that right strike at the heart of a democratic government. And the right to suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Id.

6. *See* MARCUS RASKIN, VISION AND REVISIONS: REFLECTIONS ON CULTURE AND DEMOCRACY AT THE END OF THE CENTURY 157-59 (1995). The United States was instrumental in the creation of the United Nations (UN). *Id.* One of the essential purposes of the UN is the protection of human rights. *Id.* In its Declaration on Human Rights, the UN stated that it believes democracy and freedom to be the greatest tool for the protection of human rights and peace worldwide. *Id.*

7. WARREN E. MILLER & J. MERRILL SHANKS, THE NEW AMERICAN VOTER 39-40 (1996). There has been decline in voter turnout in presidential elections over three decades that was halted only in 1992. *Id.* In 1992, 55 percent of the voting age population voted in the presidential election, but in 1996, that percentage had again dropped below any presidential election in the previous forty years. *Id.* Federal Election Commission, *National Voter Turnout in Federal Elections: 1960-1996* (visited Feb. 2, 1999) <http://www.fec.gov/pages/htmlto5.htm>; International Institute for Democracy and Electoral Assistance, *Voter Turnout from 1945-1997: North America & the Caribbean* (visited Feb. 8, 1999) <http://www.int-idea.se/voter_turnout/northamerica/usa.html>.

8. *See generally* MILLER & MERRILL SHANKS, *supra* note 7. This book compiles and analyzes all of the variables affecting voter choice and voter turnout in the 1900's. *Id.* The theory furthered is that no one attribute or event affects all voters equally, a combination of demographic, economic, historical and political events affect the decisions of voters individually and as discrete demographic groups. *Id.*

resented by each Congressperson also increases.[9] Politics, especially in national elections, has become a game only the rich can play due to the resources required to finance a national election.[10] Additionally, candidates increasingly rely on the media to communicate with the public,[11] and this reliance can produce inaccurate and inefficient communication.[12] Although, once revered as leaders and role models, politicians no longer set a positive example, as scandal after scandal exposes behavior motivated by personal greed, lust, and power.[13] While the power of our country has grown, the voice of the people has become enmeshed in well-

9. U.S. CENSUS BUREAU, POPULATION DIVISION, 1990 CENSUS OF POPULATION AND HOUSING, APPORTIONMENT OF THE U.S. HOUSE OF REPRESENTATIVES I-1 (last modified Mar. 22, 1999) <http://www.census.gov/population/www/censusdata/apportn.pdf>. In 1911, Congress fixed the size of the House at 433, with a provision to add one seat for both Arizona and New Mexico when they became states. *Id.* The total members in the House have remained at 435 ever since, except for a temporary increase to 437 at the time of the admission of Alaska and Hawaii as States. *Id.* In 1990, the population of the United States (not including the population for the District of Columbia) was 249,022,783, or slightly over half a million citizens for each representative. *Id.*

10. Federal Election Commission, *Congressional Fundraising and Spending Up Again in 1996* (visited Feb. 27, 1999) <http://www.fec.gov/press/canye96.htm>. Twenty-six hundred and five Congressional candidates raised a total of $790.5 million and spent $765.3 million in the 1995-1996 elections. *Id.* Of that, $790.5 million dollars, over 200 million was contributed to the candidates by political action committees ("PAC's"). *Id.* Ironically, the PAC's accounted for 31% of the total contributions for races in the House of Representatives and only 16% of the contributions for races in the Senate. *Id.* The winning candidates, less than ten percent of the total number of candidates, spent over $325 million of the total dollars spent. *Id.*

11. SUZANNE GARMENT, SCANDAL 7 (1991). Since President Kennedy's term in office, the press and the courts have grown in power, together with ideologically based interest groups. *Id.* Institutional authority and party loyalty have decreased while the power of the press as used to challenge authority has grown. *Id.* This has produced a new type of politician, one who is more dependent on the media and less dependent on his or her political party. *Id.*

12. *See* GARMENT, *supra* note 11, at 60. President Reagan's national security adviser, Richard V. Allen, was fired before being cleared of the charges that he had taken $1,000 from a group of Japanese journalists who had interviewed Nancy Reagan. *Id.* The press broke the story that Richard Allen had taken the money for arranging for the Japanese to interview Mrs. Reagan. *Id.* The truth, when it was finally revealed, turned out to be that the Japanese journalists had given him the money and Richard Allen had placed it in a locked file cabinet for safekeeping until he could turn it in to the treasury, which was the proper procedure. *Id.* He then moved his office and forgot about the money, leaving it in the locked cabinet. *Id.* By the time the truth surfaced, Allen's reputation had already been crucified by the press and he was fired. *Id.* at 60-63.

13. *See* GARMENT *supra* note 11, at 3. Between Watergate and the year 1991, more than 400 senior federal officials and candidates for federal office were publicly accused in the national press of personal wrongdoing. *Id.* This list does not include any office below the level of deputy assistant secretary in the executive branch, or senior aides for Congress, and includes only judges for the federal judiciary, and does not include charges that lived and died within a campaign, except for the office of president. *Id.* at 3, n.4.

funded special interest groups.[14]

In a representative political system, democracy is intended to provide a government that reflects the voice and needs of the people.[15] The people express their approval or disapproval of the decisions their elected officials have made by voting for or against those officials.[16] If a particular segment of the public abstains from voting, the government will not reflect their opinion.[17] If the government cannot hear the people, how can it represent the people?[18] The majority of citizens in this country, both those who vote and those who do not, believe the federal government cannot or does not want to hear the many and varied voices of the people.[19]

The proposal set forth in this Comment is grounded upon the theory that our federal government could govern more efficiently, and be more responsive to and representative of the people if legislators communi-

14. National Legal Center for the Public Interest, *Capitol Hill*, 19 No. 11 JUD./LEGIS. WATCH REP. 2 (Nov. 1998). In 1998, special interests reported spending $1.17 billion to lobby Congress. *Id.* The total number of lobbyists were reported at 14,484, or 27 lobbyists for each member of Congress. *Id.*

15. THE FEDERALIST PAPERS NO. 14, at 89 (James Madison) (M. Walter Dunne 1901). The distinction between a true democracy and a republic is that "in a democracy, the people meet and exercise the government in person; in a republic they assemble and administer it by their representatives and agents." *Id.*

16. THE FEDERALIST PAPERS NO. 39, at 260 (James Madison) (M. Walter Dunne 1901). "The House of Representatives will derive its powers from the people of America; and the people will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular State." *Id.* The Senate is described as deriving its powers from the states, because in the original Constitution Senators were elected by the Senates of the individual states. *Id.* The executive power is said to be derived from a compound force of combined federal and national features. *Id.*

17. THE FEDERALIST PAPERS NO. 53, at 367 (James Madison) (M. Walter Dunne 1901). "No man can be a competent legislator who does not add to an upright intention and a sound judgment a certain degree of knowledge of the subjects on which he is to legislate." *Id.*

18. THE DECLARATION OF INDEPENDENCE (U.S. 1776). "Governments are instituted among Men, deriving their powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it . . . ." *Id.*

19. KEVIN P. PHILLIPS, ARROGANT CAPITAL 7 (1994). In January 1994, a Gallup Poll showed fewer than twenty percent of Americans trusted in Washington to do what is right all or most of the time. *Id.* Another poll, taken by Mellman, Lazarus, Lake for U.S. News & World Report showed that in December, 1993, fifty-seven percent of Americans believed that lobbyists and special interest groups controlled Washington. *Id.*; Justice Gerald Kogan & Deborah A. Kearney, *Election Reform-Striving for a More Open and Equitable Process*, 72 FLA. B.J. 57 (Oct. 1998). In public hearings held by the Florida Constitution Revision Commission, citizen after citizen testified as to the "disproportionate role that money plays in our elections and the general feeling of disenfranchisement. It became clear that . . . there is a perception on the part of many citizens that they have little voice in their government and are overpowered by big money, lobbyists, and special interests." *Id.*

cated directly with the people they were elected to represent. The principles underlying this proposal are the same as those espoused by our founding fathers during the creation of our constitution and federal system. These principals may also be seen in the recent innovations of several state governments.

The Internet is a new form of communication, the uniqueness of which provides us with a means to revive our democratic government.[20] The Internet makes global communication between organizations, individuals and government easy, affordable, instantaneous and practical.[21] Prior to the advent of the Internet, the only way to effectively reach the public with any sort of speed was through the broadcast or print media.[22] Today, any person with a connection to the Internet can publish or

20. ALAN FREEDMAN, THE COMPUTER DESKTOP ENCYCLOPEDIA 444 (1996). The Internet is composed of over 100,000 interconnected computer networks in over seven countries. *Id.* These networks are academic, government, military or commercial. *Id.* Users of the Internet have access to information, both published and unpublished for every subject known to mankind. *Id.* The central backbone of the Internet was originally a series of high-speed links between major supercomputers and educational and research institutions both within the United States and worldwide. *Id.* In 1995, commercial Internet service providers began to employ their own backbones. *Id.* Smaller providers hook into these backbones to provide lines to their subscribers. *Id.* at 444-5. There are over ten million hosts, or main computers that directly support the Internet. *Id.*; *see also* Reno v. ACLU, 521 U.S. 844, 850 (1997). The Internet is an international network of computers, a complicated chain of computers that are connected to one another either directly or by means of telephone lines which has become "a unique and wholly new medium of worldwide human communication." *Id.* The Internet is the outgrowth of a United States military program called "ARPANET" which was developed by the Advanced Research Project Agency to enable computers controlled by the military, defense contractors and universities conducting defense research to communicate with each other through redundant channels allowing for communication between these computers even if some part or parts of the network were damaged. *Id.* Thus, providing communications for the defense department in the eventuality of war. *Id.* Today, the ARPANET no longer exists, but it provided the blueprint for interlinked civilian networks which allow tens of millions of people to communicate with each other and to access vast amounts of information from anywhere in the world. *Id.* at 850.

21. *Reno*, 521 U.S. at 850. The only requirements for participation on the Internet are a computer with a modem, a device that allows the computer to communicate with other computers over telephone lines, an account with an Internet provider or a direct link to the Internet and local telephone service. *Id.* Individuals can obtain access to the Internet directly from Internet hosts or indirectly as from an entity with a host affiliation. *Id.* Most colleges and universities act as hosts and provide access for their faculty and students; many corporations also act as Internet hosts through their own computer network and, likewise, provide access to their employees; many public schools and libraries provide free access; and "computer coffee shops" have become popular, where access can be had for a small hourly fee. *Id.* There are several national companies which provide private access to the Internet as "online services" including, the Microsoft Network, America OnLine, Compuserve, and Prodigy. *Id.* In 1996, the number of host computers had risen from about 300 in 1981 to 9,400,000, and the users numbered approximately 40 million. *Id.*

22. *See* Henry H. Perritt, Jr., *Cyberspace and State Sovereignty*, 3 J. INT'L LEGAL STUD. 155, 157 (1997). In his article detailing the threat of the Internet to individual state sover-

receive information to or from the World Wide Web with the touch of a button.[23] The information on the Web is accessed by millions of people who are communicating from their homes or jobs, every day.[24]

This Comment proposes a plan which would expand every American's voice in our national government by using the Internet to allow individual citizens to propose legislation directly to the lawmakers in Washington, D.C., and permit a popular (electronic) vote on federal legislation prior to its enactment by the President.[25] It begins by discussing our historical heritage as it relates to this proposition: the Constitution and the legislature, the history of elections and voting in the United States, the media's influence upon national elections, the principles of direct democracy, and the evolution of the Internet. This Comment will detail the essential elements of the proposal to institutionalize the use of the Internet as a forum for national debate, citizen initiatives and referendums. This Comment will then analyze the proposed governmental changes, the obstacles to these changes, both legal and practical, and the reasoning behind the proposed changes. This Comment will also review the changes the Internet has already effected in our government, at both the state and federal levels, and discuss the changes, which are likely to occur in the future. Finally, this Comment concludes that using the Internet to allow every American to directly communicate with our federal government will re-enfranchise the people and bring a much-needed rebirth of individual involvement and an infusion of new ideas to the government.

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eignty, Perritt outlines the ways in which each major communication discovery has affected "mass political action." *Id.* at 159. Radio was first used for political purposes by Franklin Roosevelt, Hitler, Churchill and Mussolini. *Id.* Television added visuals to the power of radio broadcasting and has affected the world's perceptions of many international situations including the Viet Nam War, the fall of the Soviet Union, the violence in Tiananmen Square, and the violence in Bosnia. *Id.* at 157, 159.

23. FREEDMAN, *supra* note 20, at 970. The World Wide Web is an Internet service that links documents or Web pages by providing hypertext links from server to server. *Id.* A user may jump from document to document no matter where either document is stored on the Internet. *Id.* It was developed at the European Center for Nuclear Research in Geneva to link research material in different locations. *Id.* World Wide Web programs, or Web browsers, such as Netscape and Mosaic, allow users to browse the Web. *Id.* A home page or Web page is created for each server with links to other documents on the Internet. *Id.*

24. *See Reno*, 521 U.S. at 850. It is estimated that the number of users on the Internet will reach 200 million in 1999. *Id.*; *see also* Polly Sprenger, *The Multinational Net*, WIRED NEWS, Mar. 10, 1999 (visited Apr. 5, 1999) <http://www.wired.com/news/news/politics/story/18365.html>. The total number of users on the Internet is 180 to 182 million. *Id.* The number of non-English speaking users has grown from ten percent of all users in 1995, to fifty percent of all users. *Id.* The total number of users has risen from 40 million in 1995 to 180 to 182 million. *Id.*

25. *See generally*, Pamela A. Stone, *Electronic Ballot Boxes: Legal Obstacles to Voting Over the Internet*, 29 MCGEORGE L. REV. 953 (1998) (providing a general overview of the legal obstacles to changing the mechanics of our elections to electronic voting).

II. BACKGROUND

A. HISTORICAL BACKGROUND

> [W]e may define a republic to be, or at least bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people .... It is essential to such a government that it be derived from the great body of society ....
>
> —James Madison[26]

Our founding fathers created our government as a representative or republican form of government.[27] The House of Representatives embodied the voice of the people at the local level,[28] while the Senate represented the voice of the people as a state.[29] This bi-cameral political system was supposed to ensure that every citizen of the United States would be represented by people whom they had a voice in electing.[30] The apportionment of the House of Representatives on the basis of the local population was an essential principle in the creation of our Constitution.[31] The reasoning was that by basing the number of Representatives

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26. THE FEDERALIST PAPERS, No. 39, at 257 (James Madison) (M. Walter Dunne 1901) (addressing the question of whether the form of government adopted by the Constitution would be strictly republican).

27. *Id.* at 256. No other form of government "would be reconcilable with the genius of America." *Id.* THE FEDERALIST PAPERS, No. 14 at 89 (James Madison) (M. Walter Dunne 1901). The distinction between a republic and a democracy is, "[i]n a democracy, the people meet and exercise the government in person; in a republic, they assemble and administer it by their representatives and agents." *Id.*

28. THE FEDERALIST PAPERS, No. 52 at 359 (James Madison) (M. Walter Dunne 1901). James Madison stated that it was "particularly essential" that the legislative branch of the government have "an immediate dependence on, and an intimate sympathy with the people" stating that "it is essential to liberty that the government in general, should have a common interest with the people ...." *Id.*

29. THE FEDERALIST PAPERS, No. 42 (Hamilton or Madison). The Senate was created to represent each state equally as a governmental compromise between the less populated states and the more populus. *Id.* The duties of the Senate thus correspond to a more national view of the good of the country rather than the good of individual locales as in the House of Representatives. *Id.*

30. 2 DEBATE ON THE CONSTITUTION 1049, 1057, 1070 (Library Classics of the United States 1993). The Constitutional Convention worked from May 29, 1787 to September 17, 1787, drafting our Constitution. *Id.* It was then submitted to the states for ratification. *Id.* On July 2, 1788, Congress received the New Hampshire act of ratification, being the ninth and final requisite state to approve the Constitution. *Id.* During the drafting and ratification periods, the Constitution was hotly debated. *Id.*

31. Ratification of the Constitution by the Convention of the State of New York, 2 DEBATE ON THE CONSTITUTION 536. Stating as follows:

> We the delegates of the people of the state of New York ... do declare and make known, [t]hat all power is originally vested in and consequently derived from the people, and that government is instituted by them for their common interest, protection and security .... That the powers of government may be reassumed by the people, whensoever it shall become necessary to their happiness ....

Id.

on the local population of the states, by making the House the most numerous branch of the legislature, and by forcing frequent re-elections for Representatives, the members of the House of Representatives would have much closer ties with the people than other elected officials, such as Senators or members of the Judicial or Executive branches. In theory, the apportionment of the House of Representatives allows every person equal representation.[32]

B. Voting and Apportionment

No right is more essential to the citizens of a democratic republic than the right to vote for the officials who govern on their behalf.[33] Suffrage has been the subject of more constitutional amendments than any other topic.[34] The right to vote is guaranteed by Article I, Section 1 of the Constitution.[35] This right has been extended by various Amendments to all adult citizens, regardless of race or sex.[36] Through this right, we, as individuals and in groups, can control the actions of those to whom we grant the power to govern.[37] According to James Madison, in

32. U.S. Const., art. 1, § 2, cl. 3. Representatives and direct taxes are apportioned among the states according to the population of each state as determined by the decennial census. *Id.*

33. *See* Reynolds v. Sims, 377 U.S. 533, 555 (1964). The Constitution of the United States protects the right of all qualified citizens to vote in state and federal elections. *Id.* This has been made clear by a long line of decisions by the Supreme Court in cases involving attempts to deny or restrict the right of suffrage. *See, e.g.*, Lane v. Wilson, 307 U.S. 268 (1939) (stating the right to vote can neither be denied outright nor destroyed by alteration of ballots); United States v. Mosley, 238 U.S. 383, 386 (1915) (stating that it is "as equally unquestionable that the right to have one's vote counted is as open to protection . . . as the right to put a ballot in a box"); Guinn v. United States, 238 U.S. 347 (1915); *Ex parte* Yarbrough, 110 U.S. 651 (1884) (recognizing that all qualified voters have a constitutionally protected right to vote, and to have their votes counted). *See also* United States v. Saylor, 322 U.S. 385 (1944) (stating the right to vote cannot be diluted by ballot stuffing); United States v. Classic, 313 U.S. 299, 315 (1941); *Ex parte* Siebold, 100 U.S. 371 (1879). In *Classic,* the court stated that "[o]bviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted . . . ." *Classic*, 313 U.S. at 315. *See also* Gomillion v. Lightfoot, 364 U.S. 339 (1960) (racially based gerrymandering, and the conducting of white primaries), Nixon v. Herndon, 273 U.S. 536 (1927); Nixon v. Condon, 286 U.S. 73 (1932); Smith v. Allwright, 321 U.S. 649 (1944); Terry v. Adams, 345 U.S. 461 (1953) (holding in denying to some citizens their right to vote, some laws have been held to be constitutionally impermissible).

34. *See supra* notes 1, 3, 4 (outlining the voting rights granted to discreet groups of Americans in each of the constitutional amendments).

35. U.S. Const. art. 1, § 1.

36. *See supra* notes 1, 3, 4 (discussing of the expansion of the right to vote through the various constitutional amendments).

37. *Reynolds*, 377 U.S. at 562.

> Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative government, and our legislatures are those instruments of government elected di-

order to ensure accurate representation of the people, the members of the House of Representatives have an "immediate dependency on, and an intimate sympathy with, the people."[38]

The Constitution gives to the states the right to dictate the time, place and manner of federal elections to the states, but reserves for the Congress the right to alter the regulations regarding elections.[39] The courts have protected the right to vote in numerous cases in which an individual or group was denied this right through discriminatory state regulations or practices.[40] In addition to striking laws that prevent citizens from exercising their right to vote, the Supreme Court has held that states must draw legislative districts according to population, so that each citizen's right to vote is not diluted.[41] All of these protections would

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rectly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.

Id.

38. THE FEDERALIST PAPERS, No. 52, at 360 (James Madison) (M. Walter Dunne 1901). "As it is essential to liberty that the government in general should have a common interest with the people, so it is essential that the branch of it under consideration should have an immediate dependence on, and an intimate sympathy with the people." *Id.*

39. U.S. CONST. art. 1, § 4, cl. 1. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators." *Id.*

40. See WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW CASES AND MATERIALS 1150 (10th ed. 1997), for a discussion of The Voting Rights Act of 1965, 42 U.S.C. § 1973. This Act suspended the use of literacy tests in jurisdictions which required them on November 1, 1964, and where less than half of the voting age population participated in the 1964 presidential election. *Id.* The Act dictated that any electoral changes made in these jurisdictions be pre-cleared by the Attorney General before taking place. *Id.* The 1970 amendment to the Voting Rights Act made literacy tests for voting illegal nationwide, this provision was made permanent in 1975. *Id.*

41. *See id.* at 928 (discussing the important cases involving legislative redistricting). *See, e.g.*, Miller v. Johnson, 515 U.S. 900 (1995) (discussing permissive and impermissive use of race in apportionment); Davis v. Bandemer, 478 U.S. 109 (1986) (holding that a political gerrymandering case is justiciable, but that a threshold showing of discriminatory vote dilution is required to show an equal protection violation); Karcher v. Daggett, 462 U.S. 725 (1983) (invalidating an apportionment plan with a deviation of less than one percent on the basis that it was not a good faith effort to equalize the districts where another plan could have eliminated the differences altogether); Brown v. Thompson, 462 U.S. 835 (1983) (allowing requirement of one representative per county was permissible because the state has an interest in maintaining county representation in the legislature which is not outweighed by the equal population principle); Mahan v. Howell, 410 U.S. 315 (1973) (reversing a court mandated apportionment plan by using the rational basis test to analyze the State of Virginia's original plan which had a 16.4 percentage variation); Gaffney v. Cummings, 412 U.S. 735 (1973) (holding neither minor deviations from mathematical equality or apportionment plan based on 'political fairness' were reasons for invalidating plan); Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964) (holding that an individual's right to vote could not be denied by a popular vote under the Equal Protection Clause); Reynolds v. Sims, 377 U.S. 533 (1964) (holding that the Equal Protec-

suggest that elections have become fairer and the government more representative of the entire population of the country during the past two hundred years, but this may not be accurate.[42]

Originally, the Constitution established a maximum ratio of one delegate to the House of Representatives for every 30,000 persons, with a minimum of one per state.[43] Today, however, the number of Representatives elected to the House has been capped at 435,[44] even though the population of the country is over 270 million and rising.[45] Consequently, the number of citizens now represented by each Congressperson is over 500,000.[46] When our country was created, there was no need for safe-

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tion clause requires both houses of a state legislature to be apportioned on a population basis).

42. U.S. CONST., amendment XV, § 1. The right to vote was first expanded to Universal Male Suffrage in 1870. *Id.* "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude." *Id.*

43. U.S. CONST. art. 1, § 2, cl. 3. "The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative . . . ." *Id.*

44. U.S. CENSUS BUREAU, POPULATION DIVISION, 1990 CENSUS OF POPULATION AND HOUSING, APPORTIONMENT OF THE U.S. HOUSE OF REPRESENTATIVES I-1 (last modified Mar. 22, 1999) <http://www.census.gov/population/www/censusdata/apportn.pdf>. The number of Representatives was fixed at 433 in 1911, with a provision for one seat each for Arizona and New Mexico when they became states (U.S. Statutes at Large, 37 Stat. 13, 14 (1911)). The House size has remained at 435 members since that date, except for a temporary increase to 437 at the time of admission of Alaska and Hawaii as states. THE FEDERALIST PAPERS, No. 55 at 378 (James Madison)(M. Walter Dunne 1901). James Madison prophetically discussed the dangers involved in deciding on the number of Representatives in the House of Representatives, which would adequately represent the people in 1788. *Id.* He listed four specific dangers: first, that the number of representatives would be too small to represent the public interest safely; second, that the representatives would not be familiar through their own knowledge of the circumstances of their constituents; third, that the Representatives would come from a class of people who sympathize the least with the desires of the people and would elevate the few at the expense of the many; and fourth, that the number will become more and more disproportionate with the increase in population because the number of representatives involved in an efficient government is limited. *Id.*

45. *Id.* U.S. CENSUS BUREAU, POPULATION DIVISION, RESIDENT POPULATION PROJECTIONS OF THE UNITED STATES: MIDDLE, LOW, AND HIGH SERIES, 1996-2050 (Mar. 1996) (visited Feb. 2, 1999) <http://www.census/gov/population/projections/nation/npaltsrs.txt>. The projected resident population of the United States for 1999 is between 269,861,000 and 274,865,000, or, approximately, 272,330,000, according a projection based on the 1990 Census, as enumerated, from the U.S. Bureau of the Census. *Id.*

46. *See* U.S. CENSUS BUREAU, POPULATION DIVISION, 1990 CENSUS, APPORTIONMENT OF THE U.S. HOUSE OF REPRESENTATIVES I-4 (visited Feb. 2, 1999) <http://www.census.gov/population/www/censusdata/methodof.html>. In 1990 the ratio of population to Representative was 572,466. The current ratio based on the projected U.S. population for 1999 by the U.S. Bureau of the Census exceeds 600,000. The apportionment of Representatives is always based on "The actual Enumeration" of the "respective [n]umbers" of the "several [s]tates," as required by Article 1, Section 2 of the United States Constitution. U.S. CONST. art. 1, § 2. U.S. CENSUS BUREAU, POPULATION DIVISION, COMPUTING APPORTIONMENT (last

guards greater than those contained in the Constitution. The population of our country was small enough that every representative could be intimately familiar with the people he represented. Today, the work of our federal legislators has grown to such an extent that they require large staffs to assist them.[47] A direct connection to the people they represent would give each legislator an invaluable tool to further their duties as lawmakers.

Regardless of the political party, people generally feel that elected officials protect their personal interests,[48] are not honest with their constituents, and pay more attention to party politics, big business and special interest groups than to the average person.[49] Many believe the views and interests of the common people are rarely heard in Washington.[50] As a result, at least one out of every two American citizens of voting age does not participate in local or national elections.[51] As a prac-

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modified Jan. 29, 1999) <http://www.census.gov/population/www/censusdata/methodof.html>. Because the size of the House is fixed before the apportionment of Representatives is determined, apportionment is computed using a complicated method called the "Equal Proportions Method". *Id.* The formula for this method involves multiplying the total population for each state by a "multiplier" which is calculated according to the following formula: n represents the number of seats a state would have if it gained a seat 1/sqrt. of n(n-1). *Id.*

47. *See* Reinventing America, *News: Congress to Examine Its Own Spending*, Jan. 3, 1997 (visited Feb. 28, 1999) <http://www/crossover.com/reus/Cmp33.html>. Each Congressman spends an average of 2.6 million dollars each year, the large portion of which goes to staffing. *Id.*

48. CBS News Poll, *President Clinton: Scandal*, The Polling Report (visited Feb. 13, 1999) <http://www.PollingReport.com/impeapol.html>. In a CBS News Poll taken on February 12, 1999, 78% of the Americans polled stated that they believed that the whole impeachment process (regarding the recent impeachment charges against President Clinton) were mostly about politics rather than the investigation of possible crimes. *Id.*

49. Federal Election Commission, *Congressional Fundraising and Spending Up Again in 1996* (visited Feb. 27, 1999) <http://www.fec.gov/press/canye96.htm>. Twenty-six hundred and five Congressional candidates raised a total of $790.5 million and spent $765.3 million in the 1995-1996 elections. *Id.* Of that, $790.5 million dollars, over $200 million was contributed to the candidates by political action committees (PAC's). *Id.* Ironically, the PAC's accounted for 31% of the total contributions for races in the House of Representatives and only 16% of the contributions for races in the Senate. *Id.* The winning candidates, less than ten percent of the total number of candidates, spent over $325 million of the total dollars spent. *Id.*

50. *See* PHILLIPS, *supra* note 19.

51. Federal Election Commission, *National Voter Turnout In Federal Elections: 1960-1996* (visited Feb. 27, 1999) <http://www.fec.gov/pages/htmlto5.htm>. In 1996, 49.08% of the voting age population voted in the presidential election. *Id.*; *see* International Institute for Democracy and Electoral Assistance, *supra* note 7; LYNNE M. CASPER AND LORETTA E. BASS, U.S. DEPARTMENT OF COMMERCE, ECONOMICS AND STATISTICS ADMINISTRATION, Voting and Registration in the Election of November 1996, t.1 (July 1998). The total number of Americans of voting age in 1996 was 193,651,000. *Id.* In 1996, 54.2 percent of the total adults participated in the national election, the lowest percentage of participating voters in at least thirty years. *Id.*

tical matter, the power to introduce legislation lies with political action committees, lobbyists, and special interest groups, entities that frequently do not represent the views of the people.[52] Because the population is so large and the number of representatives and senators so small, and because of the time and money required to be elected to a federal office,[53] a gulf has grown between the men and women who make the laws of this country and the people who pay for and abide by those laws.

C. The Influence of the Media on Elections

The First Amendment protects the freedom of the press against governmental interference, in most instances.[54] This protection was granted so that the press might "fulfill its essential role in our democracy."[55] Free speech has taken precedence over other rights and interests including: an individual's right to privacy,[56] the government's interest in national security,[57] and a state's interest in fair election reporting.[58] The press has been vigorously protected because it is an "important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities . . . ."[59]

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52. *See* National Legal Center for the Public Interest, *supra* note 14 (reporting in 1998, special interests reported spending $1.17 billion to lobby Congress and the total number of lobbyists were reported at 14,484, or 27 lobbyists for each member of Congress).

53. *See* Federal Election Commission, *supra* note 10 (reporting special interest groups donated 31 percent of the total campaign funds for the House and 16 percent for the Senate).

54. U.S. Const., amend. I. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." *Id.* The word "press" has been interpreted to include television and radio, but different standards of free speech have been used to apply to broadcast media. *Id.*

55. New York Times v. United States, 403 U.S. 713, 717 (1971) (J. Black, concurring) (arguing that the protection of the press would allow the press to expose corruption and deception in government and so inform the people).

56. *See* Cox Broadcasting v. Cohn, 420 U.S. 469 (1975); Florida Star v. B.J.F., 491 U.S. 524 (1989). State laws prohibiting the names of rape victims from being published were held as invalid by the Supreme Court. *Id. See, e.g.*, Globe Newspaper Co. v. Superior Court for the County of Norfolk, 457 U.S. 596 (1982). The Supreme Court also invalidated a state statute prohibiting the press from being present in the courtroom when a minor victim in a sex-offense trial testified holding that absent a compelling governmental interest, the press cannot be denied access to criminal proceedings. *Id.*

57. N.Y. Times v. U.S., 403 U.S. at 714. In *New York Times v. United States*, the Supreme Court held that the government was powerless to prevent the New York Times and the Washington Post from publishing the contents of a study regarding the United States' decision making policy in Viet Nam even though it contained information which has been classified by the military for security reasons. *Id.*

58. *See* Miami Herald v. Tornillo, 418 U.S. 241 (1974) (invalidating state laws requiring newspapers to grant equal rebuttal space to political candidates in response to criticism expounded by the paper).

59. New York Times v. Sullivan, 376 U.S. 254, 269 (1964).

With the popularization of television,[60] every newsworthy event is broadcast into the living rooms of every American who owns a set.[61] At first, the events broadcast were monumental ones such as presidential debates[62] or the arrival of the first man on the moon.[63] As time progressed, broadcasts included increasingly intimate details of the personal lives of our elected officials, from pictures of then President Gerald

> The general proposition that freedom of expression upon public questions has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic is a fundamental principle of our constitutional system.' 'It is a prized American privilege to speak one's mind, although not always with good taste, on all public institutions,' . . . The First Amendment, said Judge Learned Hand, 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly, but we have staked upon it our all.'

Id. at 270 (citations omitted).

60. *TheCentury.com: Americans Embrace Television Culture*, (visited Mar. 14, 1999) <http://abcnews.go.com/century/feature/tvevents_990311.html>. Television was around in the 1930's, but it did not become affordable until after World War II. *Id.* In 1948, television caught the nation's attention. *Id.* In October, 1945, Gimbel's Department Store in Philadelphia held a demonstration of television. *Id.*; *Advertising Age-History of TV Advertising*, (visited Mar. 14, 1999) <http://www.madisononline.com/faqanswers/tvhistory/history40s.html>. More than 25,000 people attended during the three week demonstration. *Id.* "In the early days of broadcasting, Congress recognized the tremendous potential of the new medium. 'The future possibilities and potentialities of wireless communication, from a commercial, education, social, and political standpoint are inconceivable. Its power for good or evil can not be over estimated.'" Robyn R. Polashuk, *Protecting the Public Debate: The Validity of the Fairness Doctrine in Ballot Initiative Elections*, 41 UCLA L. REV. 391, 392 (1993) (quoting minority view of Ewin L. Davis, Regulation of Radio Communications, H.R. Rep. No. 404, 69th Cong., 1st Sess. 6 (1926)). Today, the same thing might be said about the Internet.

61. *See* Polashuk, *supra* note 60, at 423. Congress, in developing the broadcasting system, recognized that the airwaves were a public resource, which they were licensing for exclusive private use. *Id.*

62. *TheCentury.com: Americans Embrace Television Culture*, (visited Mar. 4, 1999) <http://abcnews.go.com/century/feature/tvevents_990311.html>. [hereinafter *The Century*]. The first ever televised presidential debates were between Richard Nixon and John F. Kennedy in 1960. *Id.* Both candidates were young, but Nixon appeared nervous, while Kennedy was tan and confident. *Id.* Interestingly, in polls taken following the debates, the majority of people who watched the debates on television thought that Kennedy had won, while a majority of people who had listened to the debates on the radio thought that Nixon had won. *Id.* Many political analysts credit Kennedy's appearance for giving him the margin of victory over Nixon as he won by only a slim majority. *Id.*

63. *Id.* Billions of people watched the first moon landing live, seeing Neil Armstrong descend the stairway of the lunar module and utter, "One small step for man, one giant leap for mankind." Neil Armstrong. *Id.*

Ford tripping on a ski slope,[64] to details of the extra-marital affairs of both elected officials and candidates for public office.[65] Shortly after its arrival, it became apparent that television had the power to affect history.[66] It is more than just an interesting fact that the outcome of the first televised presidential debate differed depending on whether the listener heard it on the radio or watched it on television.[67] For better or worse, the pictures created by television broadcasts of public officials and candidates are generally the ones the public remembers the best. Unfortunately, the images of politicians seen by the public are often one sided or completely false, as the news media competes to have the biggest and most eyebrow raising stories and scandals get attention.

D. DIRECT DEMOCRACY

Direct democracy is the ability of citizens to enact or veto legislation by popular vote or initiative.[68] Presently, forty-nine states and numerous foreign countries have some form of direct democracy,[69] but under

64. Richard Restak, *Quarantine Klutzes: They're Killing Us With Their Clumsiness*, THE WASHINGTON POST, Dec. 29, 1985, at 5. Gerald Ford was probably the most famous example of a klutz. *Id.*

65. Joseph Perkins, *Clinton in Crisis*, THE SAN DIEGO UNION-TRIBUNE, Jan. 30, 1998, 1998 WL 3989774 (discussing Bill and Hillary Clinton's refusal to admit the facts of his affair with Monica Lewinsky); Mark Shields, *Next Presidential Candidate Will Have to Pass The 'Adultery Test'*, SEATTLE POST INTELLIGENCER, Jan. 11, 1999, 1999 WL 6579635 (discussing the effects of the backlash of President Clinton's sleazy behavior on the Republican candidates who are being asked if they have ever committed adultery prior to running for office. if they have, they should stay home say GOP party leaders.); Associated Press, *Rep. Mac Collins Decides Not to Run for Governor*, Feb. 17, 1998, 1998 WL 7387433 (reporting Georgia Representative decides not to run for governor following his admission to a 10-year extra-marital affair).

66. Perritt, Jr., *supra* note 22, at 161. Television broadcasting is more powerful than radio because it provides us with pictures, as well as sound. *Id.* Television is used to impact rule making in national markets through political advertising and as an enforcement tool through public service ads. *Id.*

67. *See TheCentury, supra* note 62.

68. THOMAS E. CRONIN, DIRECT DEMOCRACY 2 (1989). An *initiative* is a procedure wherein voters propose a legislative measure or constitutional amendment by filing a petition bearing a required number of valid signatures and which is then voted on as a referendum. *Id.* An additional principal of direct democracy is recall, wherein an elected official is recalled following an action, which his constituents disapprove of. *Id.* A *referendum* puts a proposed or existing law before the voters for their approval or rejection. *Id.* A *popular* or *petition referendum* refers an already enacted statute to the voters before it can go into effect. The word referendum is frequently confused with the term initiative because it is frequently used in a generic way to describe all ballot measure. *Id.*

69. *See* Lynn A. Baker, *Governing by Initiative: Constitutional Change and Direct Democracy*, 66 U. COLO. L. REV. 143 (1995) (forty-nine states constitutional amendments must be approved by the majority of the people of those voting in a popular vote); DAVID D. SCHMIDT, CITIZEN LAWMAKERS 11 (1989) (twenty-two states and the District of Columbia allow for initiatives on their state ballots: Alaska, Arizona, Arkansas, California, Colorado,

the U.S. Constitution the power to legislate is vested solely in Congress, and there is no provision for popular referenda.[70] By contrast, in recent years, the use of ballot initiatives to pass new laws has greatly increased in states such as Colorado, California, Oregon, and Arizona.[71]

Many states in this country provide for the introduction of new legislation or constitutional amendments by citizen petition and allow enactment by a popular vote,[72] but the United States is much larger in population than any entity which currently employs a system of direct democracy. This Comment proposes combining our current representative government with the concept of popularly-enacted referenda for certain legislation, to allow the opinion of the people to be directly reflected in governmental affairs without greatly disturbing our current legislative system.[73]

Florida, Idaho, Illinois, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, and Washington); *see* CRONIN, *supra* note 68 at 4. Australia, France, Italy, Ireland, Britain, Poland, Spain, the Scandinavian Nations, Canada, Greece, Ghana, and the Philippines have all used referenda. *Id.* at 4, 160. Switzerland has had a popular constitutional initiative since 1848, and a popular legislative initiative since 1874. *Id.* at 161. In fact, the United States, while recommending the use of referendum and initiative to other countries to settle political questions, remains one of the few democracies without a nationwide initiative and referendum. *Id.* at 162; *see also* Polashuk, *supra* note 60, at 401. Counties and municipalities often use ballot measures to enact laws and issue bonds. *Id.* Switzerland has had the right to amend their federal constitution by national Initiative since 1891 and the right of national Referendum, the right to approve or reject laws passed by their national parliament, since 1875. *Id.* In the 1970s and 1980s, the Swiss placed 65 initiatives on the national ballot and 13 constitutional amendments. *Id. See* DAVID D. SCHMIDT, CITIZEN LAWMAKERS 171-2 (1989). Italy has had the power to repeal legislation by national vote since 1947. *Id.* Additionally, in the 1980's political groups in Australia, West Germany and the Netherlands petitioned for national Initiative procedures in their respective national governments. *Id.* at 172-4.

70. U.S. CONST. art I, § 1. "All legislative powers herein shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." *Id.*

71. *See* Polashuk, *supra* note 60, at 401. Additionally, campaign spending for initiatives has increased, particularly by corporate entities. *Id.* In 1992, more than a dozen states had ballot initiatives approved requiring term limits for Congress. *Id.* In the 1980's, in California more ballot initiatives were approved than in the 1940's, 50's, 60's and 70's combined. *Id.* at 402-3; *see also,* CRONIN, *supra* note 68, at 162. In 1987, sixty-six percent of Americans polled in a Gallup Poll indicated that citizens should be allowed to vote directly on some state and local laws and a large number of people who were not registered to vote said that they would vote in state and national elections if they were allowed to vote on a proposed legislation on election day. *Id.* A majority of Americans favor the idea of a national referendum. *Id.* Congressman Richard Gebhardt, discussed American voters' distrust that their politicians will respond to their legitimate needs, indicating that Americans would participate in greater numbers on election day if they had a better way to make themselves heard. *Id.* at 5.

72. *See* CRONIN, *supra* note 68, at 11.

73. CRONIN, *supra* note 68, at 164. This is not a new idea. In 1892, Nathan Cree authored, *Direct Legislation by the People*, and therein proposed a two-step method for per-

E. THE INTERNET

As the world's most recent and pervasive form of mass communication,[74] the Internet provides users with access to a wealth of information located on an international network of interconnected computers.[75] For a small fee,[76] using a computer connected by a modem to a telephone line,[77] anyone can obtain the latest information on almost any subject from molecular biology[78] to astrological discoveries.[79] In the United States, over forty million people are connected to the Internet and over seventy million people are connected worldwide.[80] Among the reasons for the sudden popularity of this forum are its efficiency and its af-

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mitting voters to enact national laws. *Id.* The first step was to be a national election wherein a law was proposed to the public. *Id.* A majority vote on the legislation would require Congress to pass a bill proposing the enactment of such a law. *Id.* The law would then be submitted to the "electors of the several states" for approval or rejection, rather than to the President. *Id.*

74. See *supra* note 19 (discussing the origins of the Internet).

75. *See Reno*, 521 U.S. at 849. Anyone with Internet access may take utilize a number of communication and retrieval methods. *Id.* The most prevalent of which are electronic mail, or "e-mail," "chat rooms," where a group of people may communicate as if on a conference telephone call, the "World Wide Web," which is a collection of documents stored on host computers or "servers" of the Internet which can be retrieved or searched by Internet users, "mail exploders" or mailing list services, and "news groups" where a user signs up to receive information about a particular subject. *Id.* Information on virtually any subject is available on the Internet. *Id.*; *see also* Perritt, Jr., *supra* note 22 at 160. The Internet is a method for connection to computer systems, not a corporation or administrative arrangement. *Id.* The World Wide Web is a method of organizing information that is then distributed over the Internet. *Id.*

76. AMERICAN LIBRARY ASSOCIATION, LIBRARY AND RESOURCE CENTER (LARC) FACT SHEET NUMBER 26 (visited Feb. 1998) <http://www.ala.org/library/fact26.html>. Additionally, most public libraries offer Internet access to their patrons. *Id.* In 1997, 72.3 percent of all public libraries in the United States were connected to the Internet and 60.4 percent of all libraries offer Internet access to the public, an increase from 27.8 percent in 1996. *Id.* Among those libraries serving populations of 100,000 or more, 98.1 percent are connected to the Internet and 75.3 percent offer Internet access directly to patrons. *Id.*

77. FREEDMAN, *supra* note 20, at 550. A modem is a device that adapts a computer to a telephone line. *Id.* It convert's digital pulses from the computer into audio frequencies for the telephone system and converts the audio signals received from the telephone system into digital pulses for the computer to receive. *Id.* The modem also dials the telephone line, answers calls and controls the speed of the transmission. *Id*

78. Infoseek, <http://infoseek.go.com/Titles?/tag'tt.amercular£iology&query'&MT&SearchE'infoseek> (copy on file with author). A search of the Internet for the term "molecular biology" using the Infoseek Web browser on Mar. 15, 1999, turned up 2,808,010 hits. *Id.*

79. *See* Mars Pathfinder Web Page, (visited Mar. 2, 1999) <http://mars.jpl.nasa.gov/default.html>. In 1997, the findings of the mars probe were broadcast over the Internet as they were received. *Id.*

80. *See Reno*, 521 U.S. at 849. In 1996, it was estimated that there were 40 million users of the Internet in the United States alone and over 70 million worldwide. *Id.*; *see also* FREEDMAN, *supra*, note 20, at 445. The Internet has gone commercial, millions and millions of users are joining the ranks of the World Wide Web daily. *Id.* A rule of thumb is ten

fordability.[81] The Internet is a great equalizer; with a little practice anyone can use it. Using the Internet requires neither an advanced education nor large sums of money. Additionally, because the computer does the communication, there can be no discrimination on the basis of race, creed or color. In cyberspace,[82] everyone is represented by computer codes that include only that information which the operator chooses to reveal.[83] All of these factors make the Internet an excellent resource for participatory democracy.

Means of communication on the Internet are varied and include the World Wide Web,[84] e-mail,[85] newsgroups,[86] and chat groups.[87] What is common to all of these methods is the two-way and instantaneous nature of the communication.[88] Individuals transmit information as quickly

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times the number of host computers. *Id.* This would make the number round one billion users. *Id.*

81. *See* Perritt, Jr., *supra* note 22, at 161. The Internet is accessible and unique because it has extremely low barriers to entry. *Id.* A new Internet enterprise does not require the building of a radio transmitter or for new cable to be paid because the Internet uses the existing physical communications infrastructures. *Id.* In order to become an Internet publisher, one must have a personal computer, which costs around $2,000 and an Internet service provider, at around $12.95 per month. *Id.* A new Internet service provider requires around $50,000 for labor and a high bandwidth connection between the terminal server and the larger Internet. *Id.*

82. PC Webopaedia, *Cyberspace* (last modified May 12, 1998) <http://webopedia.internet.com/TERM/c/cyberspace.html>. Cyberspace is the non-physical world created by computer systems. *Id.* For example, the Internet creates a cyberspace within which people can communicate with one another directly or indirectly, do research, or just browse. *Id.* Files, pictures and mail messages are all objects within cyberspace. *Id.* The only way to physically touch cyberspace is through using a keyboard or a mouse. *Id.*

83. *See* Craig Bicknell, *Credit Card Fraud Bedevils Web*, WIRED NEWS, Apr. 2, 1999 (last modified Apr. 6, 1999) <http:www.wired.com/news/news/business/story/18904.html> Many business which retail items over the Web have been plagued by credit card fraud. *Id.* The very factors which make it attractive to buy products over the Internet, ease of browsing, ease of paying by credit card, are the very elements which are allowing unsuspecting businesses to be defrauded by fake credit card purchasers. *Id.*; *see also* John C. Coffee, Jr. *Brave New World?: The Impact(s) of the Internet on Modern Securities Regulation*, 52 Bus. Law. 1195, 1223-4 (1997). Fraud in "chat rooms" has already been illustrated by a person anonymously fabricating lies regarding businesses to inflate the value of stocks. *Id.*

84. *See Reno,* 521 U.S. at 849 (describing the World Wide Web as a specific portion of the Internet where information may be published and browsed by users).

85. *Id.* (analogizing E-mail, or electronic mail as the Internet function equal to first class mail).

86. *Id.* (defining Newsgroups as groups of people who sign up to receive new items related to certain topics sent to their mailbox automatically).

87. *Id.* (defining chat groups as a function of the Internet which allows multiple people to communicate in real time, simultaneously).

88. D. James Nahikian, Comment, *Learning to Love "The Ultimate Peripheral"—Virtual Vices Like "Cyberprostitution" Suggest a New Paradigm to Regulate Online Expression*, 14 J. MARSHALL J. COMP. & INFO. L. 779 (1996). An amusing study of the possibilities and complications of real time communication.

and efficiently as large organizations do. Anyone who has an Internet connection can communicate with millions of people at the same time.

In Congress, the awesome possibilities inherent in this powerful medium are just beginning to be realized and addressed. Congress' first attempt to control the content of the Internet was the Communications Decency Act of 1996 ("CDA").[89] This Act was invalidated by the Supreme Court shortly after it was enacted, however, and Congress continues to grapple with Internet related issues at present.[90]

F. Overview of the Proposal

In the past few years, there has been much discussion about the possible regulation of the Internet, its commercialization, and the commerce it has generated.[91] This Comment proposes to use the Internet as a device to allow citizens to communicate with the federal government and, possibly, as a means to reintroduce the principles of direct democracy to our government. With the initiation of a system of electronic voting, Americans would be able to vote on legislation after Congress passed it before it became law. Prior to voting on the legislation, Americans would be able to educate themselves about the subject matter of the proposed statutes by using the Internet. The system would also allow voters to introduce legislation directly to Congress electronically. The reasons for this proposal have already been set forth. The goal sought is to involve

89. 47 U.S.C. §§ 223(a-e). The Communications Decency Act of 1996 ("CDA") prohibited the "knowing transmission of obscene or indecent messages to any recipient under 18 years of age" by mandating criminal punishment for any person who uses interstate or international telecommunications to transmit "any comment, request, suggestion proposal, image, or other communication which is obscene or indecent knowing that the recipient is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication . . . ." *Id.; see Reno*, 521 U.S. at 848. Section 223(d) proscribed the display of "patently offensive" messages, as measured by contemporary community standards, by a method that made the messages "available to a person under 18 years of age." *Id.* at 849.

90. *See Reno*, 521 U.S. at 844. In 1997, the Supreme Court found sections 223(a) and 223(d) of the CDA to be unconstitutionally over broad because they placed an "unacceptably heavy burden on protected speech." *Id.* In its opinion, the Court held that "223(a) and 223(d) violated the First Amendment protection of free speech because it did not protect a valid governmental interest in the least restrictive manner. *Id.* at 844-850.

91. *See* Jeffrey G. Raphelson, *Old Laws, New Laws, and Technology: A Summary of Some Laws Affecting the Use of the Internet*, 77 MICH. B.J. 1202 (1998). For a general overview of the laws affecting the use of the Internet, and a discussion of the commercialism of the Internet, see David A. Gottardo, *Commercialism and the Downfall of Internet Self-Governance: An Application of Antitrust Law*, 16 J. MARSHALL J. COMP. & INFO. L. 125 (1997). For a discussion of the commerce which is taking place over the Internet, see Reuters, *New Record for Online Trading*, WIRED NEWS, Apr. 5, 1999 (last updated Apr. 6, 1999) <http://www.wired.com/news/news/business/story/18963.html>.

the people of our country in the activities of our government and to make the government more responsive to the people.

1. *The E-Vote: National Referenda, Initiatives and Elections*

Currently, legislation is proposed in either the House or the Senate, where the bill is discussed, debated, drafted and re-drafted before being voted upon.[92] If passed, the legislative proposal is then transmitted to the opposite house where it is again discussed, debated and (possibly) re-drafted before again being voted upon.[93] The legislation is then forwarded to the President who may sign the bill into law or veto it.[94] A presidential veto returns the bill to Congress, which may override the veto with a two-thirds majority vote.[95] The system is intended to allow for both the voice of the people and the voice of the individual states to control the laws that are enacted.[96]

Under the instant proposal, Congress would draft proposed legislation and receive public citizen initiatives. Congress would continue to debate and rework all proposed legislation, as it does now, but citizens could also participate in the deliberative process through electronic debate. Following the passage of a bill by the House and Senate, citizens would be able to exercise their approval/disapproval power regarding the bill before the President considered it. Like a presidential veto, a citizen's veto would cause the measure to be returned to Congress.

The reason for instituting a public vote after Congressional approval but before the President acts is two-fold. First, by drafting and debating proposed laws, Congress plays an important role in the creation of enforceable statutes in accordance with our Constitution. Drafting enforceable statutes requires expertise, which much of the general public does not possess. Second, the power to decide what laws should be passed would be left to Congress, and only those laws which survive congressional scrutiny would be presented to the public. The responsibility for drafting law would remain with professional lawmakers, and the public vote would only affect legislation passed by Congress if a majority of all registered voters voted against it. The political power of the President and Congress would remain essentially the same as they are now. The public vote or veto would simply be an extra step in the legislative process.

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92. U.S. CONST. art I, §§ 1, 7, cl. 1, 8, and 18.

93. *Id.*

94. *Id.* § 7, cl. 2. The Presentment Clause, "Every Bill which shall have passed the House of Representatives and the Senate, shall, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections . . . ." U.S. CONST. art I, § 7, cl. 2.

95. *Id.* § 7, cl. 2-3.

96. THE FEDERALIST PAPERS No. 39 (James Madison).

2. *Electronic Propositions and Debate*

In addition to a national referendum on legislation passed by Congress, this proposal allows new legislation to be proposed to Congress by any citizen who can show a minimum amount of support for the proposition. This process is also known as a public initiative.[97] All public propositions could be published on a special Web page where citizens would be allowed to indicate their support by signing an electronic petition.[98] If the number of petitioners reached a required number, for instance, one-half or one-third of all registered voters in the country, the proposition would be submitted to Congress. Once submitted to Congress, it would go through the usual legislative enactment process, *including* discussion, debate, drafting, redrafting and vote in both houses *and* the proposed requirement of a popular vote following ratification in both Houses. Allowing people to propose legislation via the Internet would provide an inexpensive method of petitioning Congress directly and, thus, even the playing field for all citizens. The contest to propose legislation would no longer revolve around which special interest group could spend more money.[99]

This proposal would also provide a voice for individuals in the legislative debate process. Using Internet forums, which allow many people to communicate together simultaneously, Americans could transmit their opinions directly to their elected officials, and the officials could reply in kind.[100] Interactive public debate would require scheduling and pre-registering participants so discussion would be efficient and effective. Pre-registration is necessary because the Internet is a worldwide network and the debate should be limited to participation by those in the United States. One way to accomplish this would be to identify the participants prior to the debate, give each of them a password or pin number and then hold the debate at a secure site, allowing only those registered entrance to participate.[101]

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97. *See* CRONIN, *supra* note 68, at 184. Cronin also sets forth the argument that a national initiative might be a better tool as an information to Congress, rather than a binding legislative tool. *Id.*

98. Search of World Wide Web, Alta Vista (Mar. 30, 1999) <http://altavista.com>. Electronic petitions are popular tools of the Internet. *Id.* A search for "electronic petition" turned up 439,440 web pages with the words electronic and petition in their title. *Id.*

99. *See* National Legal Center for the Public Interest, *supra* note 14 (reporting in 1998, special interests spent $1.17 billion to lobby Congress and the total number of lobbyists were reported at 14,484, or 27 lobbyists for each member of Congress).

100. *See Reno,* 521 U.S. at 849-50; American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 164-7 (1997) (explaining the various functions of the Internet including chat groups where groups of people can communicate simultaneously).

101. Shea v. Reno, 930 F. Supp. 916, 934 (S.D.N.Y. 1996). Many software programs linked to the Internet require identification of the user via password or some other identification for use. *Id.* The court in *Shea v. Reno* discussed the application of identification

III. ANALYSIS

Voting statistics show, the citizens of the United States are dissatisfied with our representative government.[102] Currently, Americans are limited to communicating with their representatives by voting on Election Day and by writing letters voicing their opinions.[103] In 1996, fewer Americans voted in the presidential election than in any presidential election in the previous fifty years.[104] The cost of a campaign for national office is so exorbitant that the only people who can run for office are those with resources far greater than the average American.[105] In 1999, the fear voiced by Thomas Jefferson, and refuted by James Madison in 1789, that our country would become a place where the governing few come from a different class than the many has become a reality.[106]

This proposal addresses the problem of the high cost of running for office, under-involvement of the American people in elections and the problem of communicating efficiently with our representatives in national office. This proposal seeks to involve the public in the process of government by making it easy to participate. It also seeks to address public disillusionment with the government by giving the people actual power to educe change while at the same time maintaining our national government's essential characteristics. Any proposed change to our political system must confront two main issues: does this change violate the Guarantee Clause contained in the Constitution;[107] and, does this

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software to provide age verification to prevent minors from viewing obscene materials over the Internet. *Id.* In that case, it was shown that identification can cost the provider from sixty cents to more than one dollar for each transaction. *Id.* This cost includes the cost of establishing and maintaining a registration system and either maintaining an independent verification system or the cost of hiring an independent verification system. *Id.*

102. *See* PHILLIPS, *supra* note 19.

103. *See* U.S. Senate website (visited Feb. 14, 1999) <http://www.senate.gov> (copy on file with author); *Sending Mail to Senator Durbin,* Dick Durbin's Homepage (visited Feb. 14, 1999) <http://www.senate.gov/~durbin/ContactDurbin/email.htm> (copy on file with author). Some Senators, such as Dick Durbin of Illinois do accept e-mail, but there is no formal policy requiring them to do so. *Id.*

104. *See* Federal Election Commission, *supra* note 51.

105. *See* Federal Election Commission, *supra* note 10.

106. THE FEDERALIST PAPERS, NO. 39, at 257 (James Madison) (M. Walter Dunne 1901). "[O]therwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic." *Id.*; *see* U.S. Census Bureau, *supra* note 9 (listing more than 500,000 constituents for each Representative). In 1997, each member of Congress received a base salary of $133,600. *Id.* However, this amount was reduced to $116,000 per member by Congress' own budget cuts; William Shunn, *Penitent Congress Reduces Own Budget* (Jan. 10, 1997) <http://www.crossover.com/reus/Cmp33.html#penitent_Congress_Reduces_Own_Budget>.

107. U.S. CONST. art. IV, § 4.

change violate the Separation of Powers principle also contained in the Constitution?[108]

A. The Guarantee Clause and the Introduction of Initiatives and Referenda in California and Oregon

The power of the people to govern directly by initiative and referendum has been a part of both the California and Oregon State governments for almost a century.[109] The original California provision, which allows citizens to propose legislation, was derived from the Oregon provision, which was adopted in 1902.[110] Shortly after the initiative measure was added to the Oregon Constitution, the constitutionality of popular initiatives was challenged in federal court and the measure survived.[111] Later, the California provision was also opposed and it, too, passed constitutional scrutiny.[112]

The specific challenge to the Oregon Amendment was that it violated the Guarantee Clause of the United States Constitution. This clause states: "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."[113] The U.S. Supreme Court held

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108. INS v. Chadha, 462 U.S. 919, 945, (1983). "Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive branch in the legislative process . . . . The very structure of the articles delegating and separating powers under Arts. I, II, and III exemplify the concept of the separation of powers." *Id.*

109. Hans A. Linde, *Introduction to Taking Oregon's Initiative Toward a New Century*, 34 Willamette L. Rev. 391, 392 n.1 (1998). The initiative began in the United States after a decade of Populist efforts led to the organization of the National Direct Legislation League in 1896. *Id.* South Dakota was the first state to authorize statewide initiatives and referrals. *Id.* Initiatives were proposed in Oregon in 1899 and ratified by the voters in 1902. *Id.* It was passed in California in 1911. *Id.*; Ernest L. Graves, *The Guarantee Clause in California: State Constitutional Limits on Initiatives Changing the California Constitution*, 31 Loy. L.A. L. Rev. 1305, 1310 (1998). The initiative is an American Institution. *Id.*; Stefan Kapsch & Peter Steinberger, Essay, *The Impact on Legislative Committees and Legislative Processes on the Use of the Initiative in the American West*, 34 Willamette L. Rev. 689, 690 n.7 (1998); Cronin, *supra* note 68, at 51.

110. O.R.S. Const. art. IV, § 1(2), (3); "The people reserve to themselves the initiative power, which is to propose laws and amendments to the Constitution and enact or reject them at an election independently of the Legislative Assembly." *Id.* § 1(2)(a); additionally, "the people reserve to themselves the referendum power, which is to approve or reject at an election any Act, or part thereof, of the Legislative Assembly . . . ." *Id.* § 1(3)(a); *see also* Cal. Const. art. IV, § 1; art. II, §§ 8-10.

111. Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (challenging an initiative which provided that telephone and telegraph companies would be taxed at a rate of two percent of the gross annual income derived from intra-state business).

112. *See* In re Pfahler, 150 Cal. 71, 88 P. 270 (1906).

113. U.S. Const. art. IV, § 4; *see* Minor v. Happersett, 88 U.S. (21 Wall.) 162. 175-76 (1874) (concluding that the term "Republican" contained in Art. IV, sec. 4, meant representative government).

that the challenge to Oregon's initiative process was a non-justiciable political question and left the question of the constitutionality of the amendment to the state of Oregon.[114] The Oregon Supreme Court was also asked to decide whether Oregon's 1902 Initiative and Referendum Amendment violated the Guarantee Clause[115] in *Kadderly v. Portland*.[116] In that case, the court held the Guarantee Clause protected against the abandonment of a republican form of government, but the addition of initiatives and referendums to the legislative process did not alter the republican form.[117] Following the enactment of the California amendment instituting voter initiatives, the California Supreme Court was asked to analyze the constitutionality of the direct democracy measures.[118] The California court upheld the amendment, finding the people of a state may "reserve the supervisory control as to general state legislation afforded by the initiative and referendum."[119]

The addition of initiatives and referenda to the federal system should be analyzed as they were by the courts in Oregon and California. The power of the government is derived from the people.[120] The Constitution created a federal government, which could be changed by the will of the people.[121] This proposal adds a step to the federal law making procedure, but does not change our form of government. Congress would still remain responsible for representing the interests of the people through the drafting, discussion, and enacting of statutes. All laws, whether proposed by the legislature or by the people, would be subject to the legislative process. Therefore, because this proposal does not contravene our republican form of government, it does not violate the Guarantee Clause.

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114. *Pacific States Tel. & Tel. Co.*, 223 U.S. at 151; *see also* Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (announcing the political question doctrine by holding that it would not use the Guarantee Clause to decide the correctness of admission of a state into the Union, as it was a political question). The non-justiciability political question rule stated by the Court in Luther was reformulated in *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims* 177 U.S. 533, 583 (1964), thus opening the door for the justiciability of some Guarantee Clause claims even where a political question is involved, providing that the political question is not the only issue and there is no absence of measurable judicial standards; *see* Graves, *supra* note 109, at 1311 n.30.

115. U.S. CONST. art. IV, § 4.

116. Kadderly v. Portland, 74 P. 710 (Or. 1903).

117. *Id.* at 720 (discussing the Guarantee Clause as prohibiting only an "anti-republican form of government and the amendment enacting initiatives and referenda as the people simply reserving to themselves "a larger share of legislative power").

118. *In re* Pfahler, 88 P. 270 (1906).

119. *Id.* at 273.

120. *See supra* text accompanying note 26.

121. *See* Ratification of the Constitution, *supra* note 31.

B. The Separation of Powers Doctrine and the Line Item Veto Act

In 1996, Congress passed the Line Item Veto Act, which allowed the President to veto one or more portions of all spending bills without canceling the entire bill.[122] The Supreme Court held, in *Clinton v. City of New York*, that this law violated the Constitution by altering the balance between the President and Congress.[123] The Court stated that, although Congress had the power to delegate some of its duties under the Constitution, Congress could not alter the relationship between the President and Congress because the public had a vested right in the legislative process as outlined in the Constitution. Unless the people gave Congress the right to change that scheme through constitutional amendment, the legislative process could not be changed.[124]

The proposal outlined in this Comment adds the power of the people directly into our legislative process.[125] Under this proposal, none of the powers of our three branches of government would be changed or diminished.[126] Congress retains its power to propose, draft and enact legislation,[127] the Presidential power to veto legislation or sign it into law continues,[128] and the Supreme Court sits in review over the constitutionality of all laws.[129] In addition to the existing powers of the federal government, the public would have immediate access to legislative information, the power to propose legislation directly to Congress, the

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122. 2 U.S.C. § 691.

123. Clinton v. City of New York, 524 U.S. 417, 429-30 (1998) (holding that there is no provision in the Constitution which authorizes the President to enact, amend or repeal statutes, and the specific provisions of the Constitution grant to the President specific powers under the Presentment Clause which the Line Item Veto Act would contradict).

124. *Id.* at 2109-10 (J. Kennedy, concurring).

125. U.S. Const. art I, § 1. "All legislative powers herein shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." *Id.*

126. *See* Buckley v. Valeo, 424 U.S. 1, 120 (1976). It was the intent of the framers to create three separate and distinct branches of government. *Id.*; *see also*, The Federalist Papers No. 47, at 332 (James Madison) (M. Walter Dunne). "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor." *Id.* (quoting Montinesquieu's discussion of the separation of powers).

127. U.S. Const. art I, §§ 1, 7, cl. 1, 8, cl. 18.

128. *Id.* § 7, cl. 2-3. Every Bill, Order, Resolution, or Vote which gains a concurrence of both the House and the Senate shall be presented to the President of the United States who shall either approve, reject or ignore the action. *Id.* If rejected, the measure is returned to the House in which it originated together with the written objections of the President. *Id.* The Congress may then attempt pass the Bill or other such Order directly into law by means of a two-thirds vote in both houses. *Id.* If the President does not sign or return a Bill within ten days of presentment, the Bill shall become law as if he had signed it. *Id.*

129. U.S. Const. art III, §§ 1-2; Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

opportunity to debate legislation with members of Congress, and the ability to veto legislation enacted by Congress. A public veto would only affect situations where a majority of all registered voters voted against a measure that had been passed by Congress.[130] Therefore, because this Proposal would not alter the balance between the three branches of government by taking powers from one branch and granting them to another as did the Line Item Veto, it would not violate the people's right to a separation of powers.

C. Communication Issues

1. *Electronic Debate*

The First Amendment protects most forms of public speech from governmental regulation as to content.[131] The rationale underlying the First Amendment's protection of speech is to provide a check on governmental tyranny and to create a forum for those who wish to oppose or criticize the government.[132] Electronic debate between legislators and their constituents using a new form of communication, the Internet, as envisioned by this proposal, would educate and inform Congress about the opinions and ideas of average Americans. This type of non-commercial political speech should be afforded the highest constitutional protection as it would provide a direct link between the public and the government.

Electronic debate would allow Americans to communicate with their elected representatives about legislation, local political problems and events. The people could speak to their Congressmen about what they need, what they want, and give their Congressmen feedback about the government. There is no better forum for public discussion about government than a direct connection to the governmental officials empowered to make changes.

2. *The Popular Referendum as Advice to Congress*

It is apparent that the addition of a popular referendum would add an extra step to a system of government that is already complicated. Additionally, any change to our federal system would face steep political opposition. Therefore, it may be necessary for the popular vote to be ap-

130. The Supreme Court has held in the case of Clinton v. City of New York, 118 S.Ct. 2091, 2103, that the Constitution controls how legislation is passed and repealed. Stating, "there is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes," the Supreme Court held that the Line Item Veto Act, 2 U.S.C. § 691, was violative of the Constitution and, accordingly, invalid. *Id.* The Court specifically reasoned that the Act violated Art. I, § 7, cl. 2, the Presentment Clause of the Constitution. *Id.*

131. U.S. Const. amend. I.

132. *See* Jefferson, *supra* note 18.

plied in a limited fashion rather than wholesale.[133] There are several ways in which this national referendum power of the public might be limited. One would be to limit the subject matter of the laws that could be put on a national ballot, such as exempting matters of national security or budget.[134] Another method would be to use the public referendum as an advisory referendum.[135] This would involve polling the public in a non-binding ballot, which would act as advice to Congress.[136] Congress could discover the public's opinion about proposed legislation before voting on it. While this plan does not give the public any real actual congressional power, it would be much easier to support and implement, as the plan would not affect the power granted to Congress by the Constitution. Making popular referendums over the Internet non-binding would also reduce the effects of any possible security problems caused by the anonymous nature of the Internet.

D. Practical Considerations

1. *Security*

One of the primary issues relating to a network-based voting system is security. How could a system allow people to vote electronically, but, at the same time prevent people from voting more than once, and screen out people who are not eligible to vote from voting, or keep hackers from invading the entire system? Additionally, is it possible to identify voters for security purposes while calculating their votes anonymously? Without assurances on these points an electronic system would be worthless.

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133. *See* Cronin, *supra* note 68, at 163-76 (discussing the history of proposals for a national referendum). Politicians have debated the idea of a direct democracy versus our representative government since 1787. *Id.*

134. *See id.* at 163. In the late 1970's Senator James Abourezk and Congressman James Jones proposed a national initiative system which was limited against the possibilities of amending the Constitution, calling up troops or declaring war. *Id.* This movement, called "Initiative America" was endorsed by 55 members of Congress and instigated the first Senate hearings on the subject of national initiative and referendum. *Id.* It was endorsed by over 200 candidates in the 1978 political campaign, which was slightly more than one-quarter of the total candidates. *Id.* at 172.

135. *Id.* at 176. "[T]he advisory referendum is a strange hybrid of direct and representative democracy: it utilizes the electorate but noes not actually give voters the power to make law. It is not really direct democracy as much as it is a government-administered advisory poll on a certain issue." *Id.* Advisory referenda have been used by individual states, including Illinois, some cities and several other Western democracies. *Id.* In 1895, Winnetka, Illinois adopted a variety of advisory referendum. *Id.* The candidates for City Council pledged that they would refer issues to the voters when a minimum number of petitions were submitted. *Id.* The candidates also pledged that they would vote in accordance with the voters' wishes according to the advisory referendum. *Id.* This system became known as the Winnetka System and spread to several midwestern cities, including Detroit. *Id.* at 176-177.

136. *Id.*

Technology provides us with the answers to both of these issues. Encryption software, or computer programs designed to scramble and code messages at one end of a transmission and decode them at the other end, is now highly sophisticated.[137] In fact, encryption technology has become so powerful, the U. S. government has prohibited the export of certain encryption technology and has attempted to force the software manufacturers to give the government the keys to the software before exporting it.[138] Every day, many transactions involving stocks, transfer of funds, and commercial transactions take place over the Internet.[139] These transactions remain private through the use of encryption technology. The same technology could be used to create a secure system for communications between the government and the populus.

2. *Access*

In order for electronic voting to truly augment our federal government, every citizen would need access to the Internet. The Public already has access to the Internet for research and education as many public libraries and schools maintain Internet connections and allow public use of those connections.[140] Voting via the Internet would, in all probability, provide more people with access to the polls because voting could be done in individual's homes or at their places of business.[141] The inconvenience of traveling to a local library or public school to vote would be no more than what most people experience now because most polling places are in local schools and government buildings. As exemplified by the proliferation of "motor voter" statutes, making it easier to vote is a key to involving more people in the electoral process.

According to the U.S. Census Bureau, many Americans are either simply too busy to vote or cannot get to the polling place during polling hours.[142] Thus, allowing the public to register and to vote where it is most convenient for them, i.e., in their homes or on the job would increase the number of people who participate in elections. A greater in-

137. *See* David L. Sobel, et al., The Electronic Privacy Information Center, *Cryptography and Liberty: An International Survey of Encryption Policy*, 16 J. MARSHALL J. COMP. & INFO. L. 475, 477 (1998).

138. *Id.*

139. *Id.*

140. *See* AMERICAN LIBRARY ASSOCIATION, *supra* note 76.

141. *See* FREEDMAN, *supra* note 20.

142. Lynne M Casper & Loretta E. Bass, U.S. CENSUS BUREAU, REPORTED REASON FOR NOT VOTING AMONG THOSE WHO REPORTED REGISTERING BUT NOT VOTING, BY RACE, GENDER, AGE, AND EDUCATION: NOVEMBER 1996 P20-504, t.3 (July 1998). Twenty-one point five percent of all registered voters who did not vote said that they were too busy to get to the polls. *Id.* Another fifteen percent did not vote because they could not get to the polls because of transportation or because they were not in their hometown on the day of the election. *Id.*

volvement in elections would, ideally, better dictate the actions of legislators who are sent to Washington.[143] In order for our country to have a truly representative government, the people must vote.

E. FREEDOM OF INFORMATION

In order for the public to directly participate in the affairs of the government, they need to be informed about what the legislators are doing. Much of the information necessary to educate Americans about governmental affairs is available on the Internet.[144] Today, any U.S. citizen located anywhere in the World has instant access to a wealth of governmental information, including proposed legislation,[145] passed legislation,[146] the United States Code,[147] decisions of the federal courts, and

143. *See* THE FEDERALIST PAPERS, *supra* note 38.

144. 5 U.S.C. § 552 (as amended by Pub. L. 104-231, §§ 3 to 11, Oct. 2, 1996, 110 Stat. 3049 to 3054). In 1996, Congress passed the Electronic Freedom of Information Improvement Act, amending 5 U.S.C. § 552 in several pertinent parts. *Id.* This amendment to the Freedom of Information Act required that all government agencies of the Executive branch of the government be required to provide any information required under the Act in an electronic format and to provide for database searches of their records upon request. § 552 (a)(2)(D)-(E), (a)(3)(B)-(D). *Id.* Today, all of these departments and agencies have Web pages on the Internet, many of which respond to "search" commands. Library of Congress, *Thomas* (visited Mar. 1, 1999) <http://thomas.loc.gov>. Although Congress is exempted from the Electronic Freedom of Information Act, and is not required by law to publish any information by computer, "Thomas", a searchable database of all United States' legislative information, available for use by the public over the Internet was introduced in 1996, by then Speaker of the House, Newt Gingrich. 141 CONG. REC. S10878, 104th Cong., 1st Sess. (1995). U.S. Library of Congress, *Thomas,* (visited Mar. 1, 1999) <http://www.thomas.loc.gov>. "Thomas" is a service of the Library of Congress and provides an electronic archival database of Congressional Bills, debate, speeches, and votes. Basically all of the information contained in the Congressional Record and more is accessible by computer through "Thomas". *Id.*

145. U.S. Library of Congress, *About Thomas* (visited Mar. 1, 1999) <http://thomas.loc.gov/home/abt_thom.html>. Thomas provides both a quick search the text of current Bills (106th Congress, 1999 - 2000) and a Bill text search function which will search any Bill from the 101st – 106th Congress (1989 - 2000). *Id.* Thomas also provides Bill summary and status for all Bills and amendment from the 93rd through the 106th Congresses (1973 - 2000). *Id.* This listing includes the sponsor(s), official, short and popular titles, floor/executive actions, detailed history, references to the Congressional Record, links to committee information about the bill, links to the full text of the law, after enactment. *Id.*

146. *Id.* Thomas lists all of the public laws by number (93rd through 106th Congresses), the votes of the House and the Senate on every bill, 101st Congress, 2nd session through 106th Congress for House Roll Call Votes and 101st Congress, 1st session through 106th Congress for Senate Roll Call Votes. *Id.* Thomas also includes a full text version of the daily edition of the *Congressional Record* from 1989 - 2000. *Id.*

147. U.S. Government Printing Office, *Home Page* (visited Mar. 1, 1999) <http://www.access.gpo.gov/index.html>. The full text of all federal laws is accessible on the Government Printing Office Web site. *Id.* U.S. Library of Congress, *About Thomas* (visited Mar. 1, 1999) <http://thomas.loc.gov/home/abt_thom.html>. The federal laws printed by the government printing office are accessed through Thomas, the Congressional data base. *Id.*

presidential information, including the impeachment hearings,[148] and transcripts of the State of the Union Addresses.[149] All of the members of the House of Representatives and Senate have individual web pages in addition to the pages of their individual houses and committees. Under the 1996 amendments to the Freedom of Information Act, some of this information is required to be made public via computer telecommunications device.[150] Many people are already educating themselves about all matters government and political.[151]

While many states have open government and make use of the Internet in conjunction with governmental functions, Florida has one of, if not the best, informationally interactive governments. In 1990, Florida amended its constitution to require what state law had already mandated, open government.[152] In Florida, the public has a constitutional right to know what occurs in legislative meetings, including all committee and subcommittee meetings of each house and joint conference committee meetings.[153] In Florida, the public also has a right to "inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except as otherwise authorized . . . ."[154] Florida has taken this requirement to heart. All of minutes of the public meetings of the state legislature are available on their Web site.[155]

148. U.S. Library of Congress, *Thomas* (visited Mar. 1, 1999) <http://thomas.loc.gov>. Information regarding the Presidential impeachment proceedings is available from "Thomas" because they are Congressional hearings. *Id.*

149. The White House, *Home Page* (visited Mar. 1, 1999) <http://www.whitehouse.gov>; and the National Archives and Records Administration, *Weekly Compilation of Presidential Documents* (visited Mar. 1, 1999) <http://www.access.gpo.gov/nara/nara003.html>. All of the Presidential speeches and a wealth of other information about the President, the Vice President, the First Lady, and the Second Lady, all of their official activities is available at the White House Web Page. *Id.*

150. 5 U.S.C. § 552(f)(1). The Federal Freedom of Information only applies to the executive branch of the government and the agencies of the executive branch, therefore the amendments to the Act requiring information to be made available electronically only apply to the executive branch. *Id. See generally,* Jeffrey Norgle, *Revising the Freedom of Information Act for the Information Age: The Electronic Freedom of Information Act*, 14 J. MARSHALL J. COMPUTER & INFO. L. 817 (1996).

151. A prime example of this is the thousands of web pages both governmental and private devoted to the Clinton Impeachment Hearings, whatever anyone wanted to know about the impeachment, they went to the Internet and found out exactly what was said and by whom.

152. *See* Patricia A. Gleason & Joslyn Wilson, *The Florida Constitution's Open Government Amendments: Article I, Section 24 and Article III, Section 4(E) C Let the Sunshine In!*, 18 NOVA L. REV. 973, 974 (1994).

153. *Id.*

154. FLA. CONST. art. I, § 24

155. *See* Legislative Date Center, Florida State Legislature in cooperation with Florida State University (visited Apr. 5, 1999) <http://www.leg.state.fl.us>.

In 1996, access to governmental information by computer was required under the Freedom of Information Act.[156] The increased access has allowed all Americans to educate themselves about the business of the government. This potentially empowers all Americans to make educated decisions regarding their elected representatives and about the legislation which is being enacted by Congress. However, the Freedom of Information Act does not govern information published by Congress. Therefore, despite the current access to legislative information provided by the Library of Congress, there is no requirement mandating that legislative information be published anywhere.

Many Senators and Representatives allow their constituents to communicate with them through e-mail, however, the practice is not required or standardized. In order for communication between Congresspersons and their constituents to be effective, the representative would need to be able to identify the sender, because an e-mail address may be anonymous or misleading.[157] If an elected official is going to put credence in a message, identity of the sender must be reliably confirmable.[158] To provide for mandated e-mail communication with constituents, Congress could simply modify the federal administrative regulations to require all Senators and Representatives to accept e-mail communication from their constituents, but allow that the e-mail may be disregarded if no identifying address is included.

F. Summary of Proposed Legislation

1. *Electronic Voting*

Our federal system of enacting laws could be changed to provide a step where the public is allowed to vote for or against legislation passed by Congress. The public vote would occur after a bill passed both the House and the Senate, but before the President signed the bill into law. If the majority of the voters did not vote for or against the bill, or the number of votes against the measure do not amount to a majority of all voters, the bill would be sent to the President for signature or veto. If a bill were vetoed by a majority of all voters voting against it, it would be

156. 5 U.S.C. § 552. In 1996, the Freedom of Information Act was amended to require all public information required to be published by agencies of the federal government to be accessible by the public via computer transmission. *Id.*

157. *See* American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 165 (1997). Many Internet "user names are pseudonyms, known as 'handles' and provide users with a distinct online identity and preserve anonymity." *Id.* A single user may have an unlimited number of user names. "The user name and e-mail address are the only indicators of a user's identity; generally speaking, neither datum discloses a party's age or geographic location." *Id.*

158. *See Senator Dick Durbin's Homepage* (visited Mar. 5, 1999) <http://www.senate.gov/~durbin/ContactDurbin/email.html>. Most Senators who allow e-mail request a street address be submitted in the communication. *Id.*

returned to Congress who would then have an opportunity to override the public veto with a two-thirds majority in both houses. This procedure would be the same as the procedure employed when the President vetoes an enactment.[159]

2. *Electronic Initiatives*

In addition to a popular electronic veto of legislation passed by Congress, this proposal allows for initiatives drafted by ordinary citizens to be introduced into Congress after the proposal receives a minimum number of signatures on an electronic petition.[160] This would treat individuals and special interest groups equally in Washington, in contrast to the current system that gives preference to those people and groups with the most money. Under this proposal, any American could promote his political ideas on the Internet, garner support via electronic petition, and present a bill to Congress after it has obtained a minimum level of support. At that point, the bill would undergo the same process as bills introduced by members of Congress and could be discarded by either house. This would allow new ideas to reach Congress, but would leave the fine tuning of new legislation to elected representatives.

3. *Elections*

Once a federal electronic voting system is established, it could also be used during federal elections. This would provide voters with a more accessible and flexible form of voting, and, hopefully, induce greater numbers of Americans to participate in the electoral process. Obviously, the idea is to encourage Americans to participate in the election process so that the government can represent all of the American people.

4. *Electronic Debate*

Another avenue of communication with Congress made possible by the Internet is public debate. A formal process would be initiated to allow the public to discuss proposed legislation and problems affecting the people of our country locally and nationally. Any interested person could directly discuss with Congress their thoughts and ideas about new legislation. Additionally, this process would expose Congress to a wealth of information, education, and a variety of viewpoints.

IV. CONCLUSION

The problems solved by an "interactive" government are numerous. The American public who now feels powerless to affect the lawmaking in

159. U.S. CONST. art I, § 7, cl. 2-3.
160. *Id.*

our country would be given a means to directly influence the government. The lawmakers would be able to make informed decisions regarding the interests of the people. Citizens could be educated regarding all sides of the issues with regard to legislation by providing access to House and Senate debate and committee reports daily. This public involvement in the governing of our Country would revive the intentions of the framers of the Constitution. Thomas Jefferson, James Madison and Alexander Hamilton could not have imagined revolutionary technology such as the Internet at the time they participated in writing the Constitution. Each of the four measures suggested by this proposal attack the problem of involving the public of the United States with the federal government. The use of the Internet through electronic voting on legislation, initiatives, elections and debate gives the public the power to communicate their ideas and desires to their representatives directly and efficiently, and the ability to make decisions collectively about the laws that are enacted. This would bring the voice of the people back into our federal government.

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