

WHY INTERNET VOTING?

*John T. Nockleby**

This Symposium should pay tribute to those people in other lands who have marched in the streets demanding respect for their right to vote. In the recent election in the old Yugoslavia, people took to the streets when the outcome of their vote almost certainly went against their reluctant-to-leave ruler Slobodan Milosevic.¹ Particularly in the United States, where many seem to take for granted the right to vote, television images of people demanding to be heard through their vote may teach us something about our own system. Perhaps influenced by such powerful images, Frank Michelman asks us to reflect on the normative question, “Why Vote?” He asks the foundational question that the fiery Belgrade marchers posed with their feet and voices: “What is that practice . . . good for, or right for?”²

It is especially fitting to focus on Michelman’s normative question in light of the disputed November 2000 United States general election. As all now know, George W. Bush has been sworn in as President when he did not receive a majority of nationwide votes cast, and when he may not even have won the disputed state of Florida. The question that mattered to the ultimate arbiters of the Florida election, the five members of the United States Supreme Court who decided *Bush v. Gore*,³ was not “who won” a *majority* of the votes

* Visiting Professor of Law, Harvard Law School. Professor of Law, Loyola Law School.

1. On September 24, 2000, Vojislav Kostunica defeated Milosevic in a general election in what is now known as the Federal Republic of Yugoslavia. Milosevic refused to step down, citing irregularities and ballot problems. Hundreds of thousands of people began conducting daily marches, demanding that he relinquish power. On October 5, 2000, Milosevic finally stepped down. See Tim Judah, “Goodbye to Yugoslavia?”, N.Y. REV. BKS., Feb. 8, 2001, at 44-46.

2. Frank I. Michelman, *Why Voting?*, 34 LOY. L.A. L. REV. 985, 995 (2001).

3. *Bush v. Gore*, 121 S. Ct. 525 (2000).

cast in the Florida election. Rather, it was whether the manual recounts ordered by the Florida Supreme Court satisfied the Court majority's interpretation of the Equal Protection Clause.⁴

In reflecting on Michelman's normative question in a symposium devoted to the subject of Internet voting, I will join in making the assumption that our technologists can provide an Internet voting system that is secure, authentic, confidential, and reliable.⁵ I note that the technological issues are not simple, but for today let us assume our technicians can fix the technological holes without fixing the election. Let us assume away all the viruses, cookies, bugs, worms and other lovely creatures inhabiting hackerdom. Let us even put aside the inevitable crashes of computers, the tallies that do not quite add, and the phenomena of the shadow government that makes its residence in the beliefs of many that we are dupes of the Trilateral Commission, or some other government or power. Undoubtedly, powerful forces will devote enormous resources towards cracking the cryptographic codes that will shield the final Internet tally from corruption, but I want to put this concern aside as well. Let us even set aside the very real risk that substantive outcomes could be *perceived* as fraudulent, even if they are not in fact corrupted. This reality exists because people know how easy it is to create an online identity and the possibility that some bright twelve-year-old soul will figure out how to fashion one hundred separate online identities to maximize her voting power. After all, when one's very existence in

4. The view that the Supreme Court interpretation departed from conventional constitutional voting rights analysis in order to elect George Bush is widely held among law professors. My Loyola Law School colleague, Richard Hasen, wrote a compelling description of that conventional jurisprudence, and the Supreme Court's mindless, result-oriented departure from it. See Richard L. Hasen, 29 FLA. ST. U. L. REV. (forthcoming 2001); see also Ronald Dworkin, *A Badly Flawed Election*, N.Y. REV. BKS., Jan. 11, 2001, at 53-55 (stating that the election ended "not with a national affirmation of democratic principle but by the fiat of the five conservative Supreme Court justices"). Even conservative legal scholars have not attempted to justify *Bush v. Gore* on the merits, but rather because "in the end" having the Supreme Court decide the election was better than allowing the outcome to be decided in the House of Representatives as the Constitution provides. See Richard Posner, 2000 SUP. CT. REV. (forthcoming 2001).

5. I address related issues of privacy in a forthcoming article tentatively titled "Privacy and Technology: Circa 2001" (forthcoming 2001).

cyberspace is ultimately reducible to the computer code of “zeros” and “ones,” it does not take an *Enemy of the State*⁶ scenario to imagine how that code can be broken.

Therefore, I will put aside the technological hurdles towards achieving a valid and legitimate vote count because I want to raise a foundational question that parallels Michelman’s query “Why voting?” I ask “Why *Internet* voting?” My ambition in this analysis on Professor Michelman’s paper is modest: I would like merely to ask some questions—three to be precise—that reflect on the normative question Professor Michelman raises.

I. WILL INTERNET VOTING ENHANCE EQUALITY?

I want to sidle up to my first question by quoting Michelman on why we value “a constitutional practice of . . . political decision making by procedurally constructed, occasional, popular, and legislative majorities.”⁷ Michelman says voting satisfies a morally respectable impulse for pure procedural justice in politics.⁸ In other words, majoritarian voting is procedurally fair because it respects our intuitions about human dignity and autonomy.⁹ “One person, one vote,” to invoke the classic rallying cry, carries bite because it expresses citizens’ equal political standing.¹⁰ For Michelman, the “good” of voting, apart from the necessity-of-reaching-finality concerns that seem to take a back seat, is the respect for one another’s equal standing accorded by the voting booth.

My first question is: Does (or will) Internet voting enhance equality? I see two ways in which Internet voting might enhance equality of citizenship. However, as will be seen, I do not think either of these satisfies anything other than a desire for *formal* political equality. First, Internet voting removes some of the physical and time barriers that disable many from voting. Presumably, any device that removes artificial barriers to voting can be thought of as equality

6. *ENEMY OF THE STATE* (Buena Vista Pictures 1998) (depicting a lawyer who becomes the target of a high-tech government conspiracy).

7. Michelman, *supra* note 2, at 997.

8. *See id.*

9. *See id.*

10. *E.g.*, *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (quoting *Gray v. Sanders*, 372 U.S. 368 (1963)).

enhancing. Internet voting is especially beneficial to someone who cannot vote because they are elderly, disabled, must work twelve hours a day, or has child care problems. This, of course, assumes that Internet voting is an additional mechanism of voting (and not a substitute for other methods of voting).

Second, Internet voting might increase the legitimacy of those votes that are taken. By increasing participation from thirty or forty percent to perhaps an optimistic fifty or sixty percent, those votes that *are* taken may resonate even more deeply with any of the normative reasons Michelman so effortlessly canvasses.

But, these two reasons do not meet the challenge Michelman poses to the promoter of Internet voting. These two attributes of Internet voting enhance formal equality, not substantive economic or social equality. Many people do not vote because they consider the system to be stacked against them. For these people, and perhaps for many of those who do vote, providing for majoritarian voting is a way to *legitimate* political outcomes.

One might therefore add to Michelman's list of rationales something clearly on his mind: legitimation. To the question "Why do we provide for voting," one answer is because voting legitimates through a formally recognized constitutional procedure the outcomes of social and economic inequality. Because we vote under conditions of formal equality, the actual conditions of economic and social inequality can be justified or obscured.

I want to distinguish "legitimacy" from "legitimation." I use legitimation in the sense Habermas uses the term: Any majoritarian voting scheme can be challenged as illegitimate by a nonparticipant or disqualified person, such as an alien.¹¹ Legitimacy can be achieved through a formal process that all have agreed, in advance, to participate in. Absent consent, or some other manifestation of participation where conditions of substantive inequality persist, as they do in this society, one function majoritarian voting serves is legitimation, though not necessarily legitimacy, of those who exercise political power.

No one is likely to object to greater citizen participation in the vote, at least not in a setting such as this, in which, as Michelman

11. See JURGEN HABERMAS, LEGITIMATION CRISIS 95-102 (1973).

notes, voting is assumed to be a good thing. These two formal enhancements offered by Internet voting are not responsive to Michelman's questions because they assume voting is a good, or right, but of course they do not answer the normative question: Why do we vote at all?

One might imagine different responses to this question. For some, the Internet has become a mechanism for achieving a different kind of community. Many scholars have written about the opportunities on the Internet for "communities" of interest: from cooks, dog owners and gardeners, to online stock discussion groups, libertarians and environmentalists. The Internet enhances participants' capacities for social and political coalition-building that overcome some of the inefficiencies of contemporary life. The ability to list one's own group or interest, post pages of dialogue or diatribe, join with others of like mind, and respond to others' postings, are all enabled by the Web. But these suggestions reflect the use of the Internet as a medium of political discourse and organization, and not necessarily Internet voting.

Extrapolating from these diverse groupings enabled by the Internet, however, Eben Moglen and Pamela Karlan suggest that the Internet might allow us to think of alternative ways of voting. Grouping people who are not geographically constrained, they suggest, might lead people to think in terms of voting schemes whose "districts" are not geographically centered.¹² To the extent that coalition building on the Web helps us think about non-geographic groupings for voting of the sort envisioned by Moglen and Karlan, Internet voting may indeed offer potential for a transformative practice that provides an alternative to simple majoritarianism confined to geographic boundaries. If some of their ideas could be put into practice, then Internet voting may itself enhance substantive, not just formal equality.

II. WILL INTERNET VOTING RESULT IN BETTER DECISIONS?

The second question I would pose about Internet voting builds

12. See Eben Moglen & Pamela S. Karlan, *The Soul of a New Political Machine: The Online, the Color Line and Electronic Democracy*, 34 *LOY. L.A. L. REV.* 1089, 1092-93 (2001).

from Michelman's observation that democracy is an ideal for a citizenry compromised of "politically reasonable persons."¹³ I would ask us to consider whether Internet voting can help us make better decisions.

I admit to being skeptical that Internet voting can help us make better decisions. My skepticism stems from two sources. Here I want to consider Dick Morris's idea that Internet voting will transform our society from a republic with regular, time-spaced voting on important questions, to a "direct democracy" whereby citizens can regularly express their votes on all kinds of questions.¹⁴ Morris offers a populist vision—a system whereby political leaders regularly conduct votes or polls seeking "consent." He says that Web sites can easily conduct nonbinding referenda on questions of the day, and thereby inform their leaders of the peoples' opinions.¹⁵ Morris, of course, anticipates that wondrous day when technology grants us costless access to voting mechanisms, and enables politicians to conduct repeated plebiscites.

From Morris's reverie, one imagines something like a daily tracking poll that "leaders" can consult, whether or not the "votes" actually count for some result. Morris claims that Internet voting of this kind will increase voter participation and interest in politics, and enhance the standing of representatives who are more closely tied to the opinions of the people.¹⁶

My problem with Morris's neopopulist vision is best expressed by the phrase "the only problem with socialism is that it takes too many evenings."¹⁷ Likewise, the problem with Morris's version of Internet voting is that it takes too many evenings. It simply requires too much of the citizenry to expect people to commit to learning what they need to know to become intelligent voters on multitudinous questions. Voters cannot become experts on all questions, and a system that asks them to do so will lead only to what the political

13. Michelman, *supra* note 2, at 1002.

14. See Dick Morris, *Direct Democracy and the Internet*, 34 LOY. L.A. L. REV. 1033, 1033-34 (2001). Dick Morris is President of Vote.com and formerly served as President Clinton's pollster.

15. See *id.*

16. See *id.* at 1034.

17. A phrase often attributed to Oscar Wilde.

scientists call “decision fatigue.”¹⁸ Maybe it is true, as Michelman says, that voting respects the autonomy and equality of us as equal citizens.¹⁹ Nevertheless, repeated voting on many kinds of questions, great and small, hardly respects anything so far as I can tell. Expecting participants to “vote” on all matters of issues might reduce the significance of voting to the point that people might justly wonder, indeed, “why vote?”

Thus, a proponent of a system of Internet voting should anticipate the technological ease of the system, and be prepared to address a fundamental question about what *types* of questions should be put to a vote. Should the legislature conduct a referendum on how many years a person convicted of aggravated assault be imprisoned? Or on how much money should be budgeted for the governor’s office? Or on whether to forbid utilities from raising in-state electricity rates? Not all questions should be put to voters, even if our technological advancements eventually enable such voting schemes to be conducted in a manner that is costless. The question is, assuming our Internet technologies will enable all questions to be put to a vote, what types of issues *should be* put to a vote? What types of issues would, in fact, if put to a vote, respect our “intuitions of human dignity and autonomy?”²⁰

III. HOW WILL INTERNET VOTING ENHANCE DELIBERATIVE DEMOCRACY?

But this leads to a related question: How will Internet voting affect or enhance, not democracy, but deliberative democracy? In a society where politics is about flash and image, and whose populace seems to have little patience for deliberation, or even thought, about hard issues of the day, is it even imaginable that Internet voting could *enhance* deliberation? I think the risk is in the other direction: The risk is that Internet voting might very well remove the symbolism of the event, and remove us even further from the sorts of contact with others that encourages deliberation.

18. Bruce E. Cain, *The Internet in the (Dis)Service of Democracy?*, 34 LOY. L.A. L. REV. 1005, 1014 (2001).

19. See Michelman, *supra* note 2, at 998-99.

20. *Id.* at 999.

When we want to mark occasions, we take time to reflect. Those moments of passage in individual lives—birth, adoption, marriage, graduation, and awards—are marked with ceremony and reflection, ordinarily in the presence of others. I, for one, will not mourn the passing of the neighborhood polling booth, but at least that event—voting—was marked by a deliberate decision to participate. And, by making voting a ritual, maybe we encourage reflection and deliberation, if not in the polling booth, perhaps in the drive or walk to the polling station.

What does Internet voting offer to enhance deliberation? Not much, I fear. The likelihood is that our fiber optically connected computers will be located in our homes, away from the polls. Such private “connections” may speed our decisions, and may even increase voter participation. But those technologies will not help us make better decisions, for good decisions on important questions require judgment informed by contestation and deliberation. Nor will Internet voting likely enable us to meet with others in a way that subjects our “intuitions”—or knee jerk reactions to political imagery—to alternative views.

The problem is that Internet voting runs in the other direction. Because of the ease and simplicity of the technology, voting in this fashion readily lends itself to uninformed, nondeliberative decision-making—i.e., impulsive voting. That, at least, is one of the risks. Like Michelman, I see the *possibility* of redefining voting constituencies, as suggested by Moglen and Karlan, as imaginative but certainly not necessary to satisfy contemporary norms about voting. So, are we left with, at best, Election Day (or Week) on the Web, with results announced two minutes after the “polls” are closed? If so, Internet voting boils down merely to a more efficient device for collecting and tabulating ballots. On this view, Internet voting is just a more efficient mechanism of data processing.

The other sources of my skepticism about Internet voting stem from a nagging worry about technology itself—about how technology infiltrates much of social life without adding to the human good. Albert Borgmann, for example, tells us that technology and the techniques that accompany it share certain characteristics.²¹

21. See ALBERT BORGMANN, HOLDING ON TO REALITY: THE NATURE OF

Technologies tend toward immediate, unreflective results. Accompanying speed and efficiency is a structure that emphasizes instantaneous rewards. Television, for example, promotes passivity and flippancy, not thoughtfulness.

In addition, technologies tend to separate people, distancing them from immediate surroundings and making their immediate communities more alien. Many eat dinners in front of the television instead of conversing. But at least the television put us in a common room. The Internet has taken us away from the family room and into our own separate worlds. Even e-mail connects us, if at all, on the basis of some feature other than geographic proximity. Some may see this disconnection from our immediate political, social, economic, and geographic surroundings as a virtue. I am not so sure.

I do not know if the removal of geographic barriers that the rise of Internet voting permits is a good or bad thing. But, I do know that proposals suggesting that political communities be formed without ones next-door neighbor or with others in ones community, can only make us more separated from, and thus less attuned to, the suffering in our own backyard. That, at least, is the risk posed by an Internet voting scheme that is not geographically based.

INFORMATION AT THE TURN OF THE MILLENNIUM 1-6 (1999); *see also* DONALD MACKENZIE, *KNOWING MACHINES: ESSAYS ON TECHNICAL CHANGE* (1996) (discussing Karl Marx's writings on technology, the social shaping of technology, and explanations of technological change); FRANK WEBSTER, *THEORIES OF THE INFORMATION SOCIETY* (1995) (discussing different opinions on how the "information age" affects social, economic, and political relationships); LANGDON WINNER, *AUTONOMOUS TECHNOLOGY: TECHNICS-OUT-OF-CONTROL AS A THEME IN POLITICAL THOUGHT* (1987) (discussing the emerging role of technology-related questions in political and social inquiries and one conclusion that technology is at the core of what is most troublesome in the condition of our society).