

Articles

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E-Legislating

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ABSTRACT

The United States has been plagued with a deadlocked, “do nothing” Congress for the last several years, but today there is a new game in town. Senator Chris Dodd declared, when he first encountered the full force of e-legislating, “It’s a new day [in Washington] . . . Brace yourselves.”¹ Digital technologies have fundamentally changed the relationship of citizens to their governments. Since e-democracy was first identified in the 1990s, at least four subcategories have emerged. This article debuts the newest member of the e-democracy family: e-legislating—the use of the Internet and social media to influence federal legislation.

The federal legislative process has traditionally been remote for the average citizen. E-legislating attempts to change that dynamic through the use of electronic media campaigns to influence legislators between election cycles. Yet, fundamental problems with the process exist and were illustrated by the use of e-legislating to protest the Stop Online Piracy Act (SOPA) in January 2012. One negative outcome was manipulation of the public through emotional, multi-sensory messages that may have resulted in impulse-based decision-making. Another was a lack of accountability for the citizens who anonymously contacted legislators to influence their votes or who submitted multiple electronic messages regarding the Act. In addition, the SOPA Internet blackout raised a troubling, but perhaps unique concern: SOPA opponents were able to use deprivation to coerce political action. Participating websites deprived citizens of their

¹ Jonathan Weisman, *In Fight Over Piracy Bills, New Economy Rises Against Old*, N.Y. TIMES, Jan. 18, 2012, http://www.nytimes.com/2012/01/19/technology/web-protests-piracy-bill-and-2-key-senators-change-course.html?pagewanted=all&_r=0.

services and were able to divert the users' newfound time into activism in favor of the SOPA opponents.

E-legislating has awe-inspiring potential to empower common citizens and to result in the creation of positive laws that reflect a balance of the will of common citizens with the influence of lobbyists in Congress. However, citizens participating in e-legislating need to be aware that the process can be both obstructive as well as constructive.

INTRODUCTION

On June 6, 2010, twenty-eight-year-old Khaled Mohamed Said was savagely beaten to death by two officers of Egypt's secret police. Two days later, the "Kullena Khaled Said" Facebook page was launched with the message, "We Are All Khaled."² That webpage gave birth to "Revolution 2.0,"³ which then went on to achieve something previously considered impossible: it changed the leadership of Egypt after thirty years of dominance by Hosni Mubarak.⁴

The United States is experiencing a similar, if less bloody, Internet-based revolution. On November 6, 2012, the Presidential campaign for Barack Obama rallied voters with a powerful online presence. Project Narwhal, as it was called, was a sophisticated data platform that gave the Obama campaign an edge in its ability to socially connect with, and then mobilize, Obama supporters to get to the polls.⁵ "Narwhal unified what Obama for America knew about voters,

² WAEL GHONIM, *REVOLUTION 2.0: THE POWER OF THE PEOPLE IS GREATER THAN THE PEOPLE IN POWER: A MEMOIR* 59–60 (2012).

³ GHONIM, *supra* note 2.

⁴ Mubarak, the fourth president of Egypt who served from 1981 to 2011, was ousted after 18 days of coordinated demonstrations in January and February of 2011. On February 11, 2011, Vice President Omar Suleiman announced that Mubarak had resigned as president and transferred authority to the Supreme Council of the Armed Forces. David D. Kirkpatrick et al., *Egypt Erupts in Jubilation as Mubarak Steps Down*, N.Y. TIMES, Feb. 11, 2011, <http://www.nytimes.com/2011/02/12/world/middleeast/12egypt.html>. Ghonim and other Internet activists set the ball rolling with a call to hundreds of thousands of Egyptians to "take to the streets" on January 25, 2011. GHONIM, *supra* note 2, at 139. China, recognizing the potential threats from electronic media organizing, allows "vitriolic criticism" on the Internet but actively censors "[a]ny attempt to [motivate] collective action." Shankar Vedantam, *It's OK to Protest in China, Just don't March* (Sept. 9, 2013), <http://www.npr.org/blogs/alltechconsidered/2013/09/09/219721983/its-ok-to-protest-in-china-just-dont-march>.

⁵ Alexis C. Madrigal, *When the Nerds Go Marching In*, ATLANTIC, Nov. 16, 2012, <http://www.theatlantic.com/technology/archive/2012/11/when-the-nerds-go-marching-in/265325/>.

canvassers, event-goers, and phone-bankers, and it did it in real time.”⁶ The Romney campaign’s answer to Narwhal, Project Orca (its name chosen because orcas are the only known predators of narwhals), crashed on Election Day.⁷ “Mr. Obama’s information technology infrastructure was viewed as state-of-the-art exemplary, whereas everyone from Republican volunteers to Silicon Valley journalists have criticized . . . Mr. Romney’s get-out-the-vote application, . . . widely viewed as having failed on Election Day”⁸

Highly sophisticated, technologically-assisted activism campaigns now target government and private actors on a daily basis and have fundamentally altered the way many decisions are being made.⁹ The ouster of Mubarak in Egypt¹⁰ and President Obama’s reelection illustrate one key area of e-democracy¹¹—the powerful role of the

⁶ Madrigal, *supra* note 5.

⁷ Nate Silver, *In Silicon Valley, Technology Talent Gap Threatens G.O.P. Campaigns*, N.Y. TIMES, Nov. 28, 2012, <http://fivethirtyeight.blogs.nytimes.com/2012/11/28/in-silicon-valley-technology-talent-gap-threatens-g-o-p-campaigns/>.

⁸ Silver, *supra* note 7.

⁹ Social media campaigns target both public and private actors. For example, Change.org states, “With hundreds of people winning campaigns on Change.org, the pace of change is growing unbelievably quickly. Have something you want to change? Click here to start your own petition—and we bet you’ll find that you’re more powerful than you ever imagined.” The GroundHog, *Our Voice Still Matters*, GROUNDUP (Feb. 15, 2012), <http://groundupct.wordpress.com/2012/02/15/our-voice-still-matters/>. The site has collected millions of petition signatures spanning a vast array of topics.

¹⁰ Revolution 2.0 was successful in ousting Hosni Mubarak. Whether Egypt can become a successful and peaceful democracy remains to be seen as unrest continues, such as the November 2012 riots in response to Morsi’s power grab. *See, e.g.*, David D. Kirkpatrick, *Morsi Defends Wide Authority as Turmoil Rises in Egypt*, N.Y. TIMES, Dec. 6, 2012, <http://www.nytimes.com/2012/12/07/world/middleeast/egypt-islamists-secular-opponents-clashes.html?pagewanted=all>. But some argue we need to be patient because “democracy in some parts of the world doesn’t look anything like ours.” Greg Dobbs, *Dobbs: We’re Witnessing the Passage to Democracy in Egypt*, DENVER POST (Feb. 1, 2013, 12:01 AM), http://www.denverpost.com/opinion/ci_22493067/dobbs-were-witnessing-passage-democracy-egypt.

¹¹ E-democracy has been defined as “the use of [electronic] information and communication technologies to engage citizens, support the democratic decision-making processes and strengthen representative democracy.” Ann Macintosh, *Characterizing E-Participation in Policy-Making*, in *Proceedings of the 37th Hawaii International Conference on System Sciences* 1–2 (2004), available at <http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan038449.pdf>.

E-democracy is distinguishable from e-government, which refers to “[t]he delivery of online public services.” William H. Dutton & Malcolm Peltu, Oxford Internet Inst., *Reconfiguring Government–Public Engagements: Enhancing the Communicative Power of Citizens* 1, 8 (2007), available at <http://people.oii.ox.ac.uk/dutton/wp-content/uploads/2007/04/FD9.pdf>.

Internet in choosing leaders. Other e-democracy processes have been discussed in the literature.¹² This article, for the first time, identifies and focuses on another form of e-democracy that is just now emerging: “e-legislating.”¹³

In his second inaugural address, President Obama noted:

You and I, as citizens, have the power to set this country’s course.

You and I, as citizens, have the obligation to shape the debates of our time—not only with the votes we cast, but with the voices we lift in defense of our most ancient values and enduring ideals.¹⁴

The message is not new. Many democratic leaders have opined that they cannot make change without the support of the people. For example, Franklin Delano Roosevelt is famously credited with saying, “I agree with you, I want to do it, now make me do it.”¹⁵ Obama supporters have been frustrated by his inability to implement the change his campaign promised. However, our legislative process requires action not just from the executive branch, but from Congress as well, to enact laws. And sadly, the 112th Congress has gained the dubious reputation of being “the most unproductive session since the

¹² See discussion *infra* Part I.B.

¹³ This Article applies the “e-legislating” label for the phenomenon described here. The term has not been otherwise adopted within e-democracy discussions. However, the European Union (EU) has recognized a similar phenomenon which they label “eParticipation.” A 2010 report describes the process as actions by the European Parliament to “enhanc[e] the participation of citizens and contribut[e] to better legislation and policy-making.” Thanassis Chrissafis & Mechthild Rohen, *European eParticipation Developments*, 2 *EJOURNAL EDEMOCRACY & OPEN GOV’T* 89, 91 (2010), www.jedem.org/article/download/44/35. This process is being initiated through formal actions by the EU government, and thus is distinguishable from e-democracy, which is an effort from the grassroots up. Other authors are also advocating citizen participation in policy-making in the EU—a concept closer to e-democracy as applied here in the U.S. context. See, e.g., Paul Johnston, *Transforming Government’s Policy-Making Processes*, 2 *EJOURNAL EDEMOCRACY & OPEN GOV’T* 162 (2010), <http://www.jedem.org/article/view/43/44> (arguing for more sustained citizen engagement in the policy process); Günther Schefbeck, *Electronic Support for the Legislative Consultation Process: Theoretical Concepts and Practical Requirements*, 2 *EJOURNAL EDEMOCRACY & OPEN GOV’T* 28 (2010), <http://www.jedem.org/article/view/20> (suggesting new electronic tools could facilitate citizen involvement).

¹⁴ Barack Obama, President of the United States, 2013 Inaugural Address (Jan. 21, 2013), available at <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/21/transcript-president-obama-2013-inaugural-address/>.

¹⁵ Tim Price, *Keeping Them Honest: What Politicians Say vs. What We Make Them Do*, NEXT NEW DEAL (Apr. 25, 2012), <http://www.nextnewdeal.net/price-point/keeping-them-honest-what-politicians-say-vs-what-we-make-them-do>.

1940s.”¹⁶ As a long-time believer in the power of community organizing, President Obama has adopted an electronic community answer to Congress’s inaction: e-legislating. In a message to his followers the day he renewed his oath of office, President Obama explicitly stated how he hopes citizens will exert their power—through “Organizing for Action,” a continuation of his election campaign Internet presence to organize “our grassroots movement” to impact legislation that “will be crucial to finishing what we started.”¹⁷

Through the “Organizing for Action” website, President Obama also distinguished citizen roles in elections as opposed to that role in legislating: “Winning an election won’t bring about the change we seek. It’s simply the chance to make that change.”¹⁸ His words emphasize that, even at the highest levels of government, those who have gained power are now asking people to join in this new type of e-democracy to “make them” enact transformative laws through e-legislating.

This Article identifies and critiques the phenomenon of e-legislating. Part I provides the backstory of e-democracy—how it is viewed and how it has been used in contexts other than legislating. Part II sets out what e-legislating is and how citizen input in this context is distinct from traditional law-making processes in the United States. In Part III, the five key attributes of e-legislating will be explored, and Part IV will illustrate how these attributes played out in a recent e-legislating situation. The conclusion highlights the promise and potential for abuse unleashed by this newest tool for shaping our democracy.

I

E-DEMOCRACY

The United States, and the world, is at a flexpoint. The expansion of electronic communication, especially social networking and interactive media,¹⁹ is fundamentally changing the relationship of

¹⁶ Amanda Terkel, *112th Congress Set To Become Most Unproductive Since 1940s*, HUFFINGTON POST (Dec. 28, 2012, 8:00 AM), http://www.huffingtonpost.com/2012/12/28/congress-unproductive_n_2371387.html.

¹⁷ E-mail from Barack Obama, President of the United States, to author (Jan. 21, 2013, 06:15 PM MST) (on file with author).

¹⁸ Video: Michele Obama on Organizing for Action: You In?, <https://my.barackobama.com/page/s/organizing-for-action> (last visited June 30, 2013).

¹⁹ The Internet has no monolithic form. This Article focuses on the overall phenomenon of electronic communication rather than any particular platform. Consequently, the references here are meant to embrace all forms of electronic communication, active and

people to their governments. “[The] government no longer has a monopoly on creating systems for citizen participation. Individuals and groups are realizing their own online communicative power to reconfigure their engagements with government and enhance their capacity to work with others on issues of common interest.”²⁰

E-democracy has been defined as the “use of information and communications technologies and strategies by ‘democratic sectors’ within the political processes.”²¹ As the concept of e-democracy has evolved over time, recognizable subcategories have emerged. Specifically, for purposes of this article, we will address e-electioneering, e-government, e-rulemaking, and e-judicial advocacy. But first, a discussion of the backstory is necessary.

A. *The Internet*

The story of the Internet starts our story of e-democracy. The World Wide Web was invented in 1990, and user participation in viewing websites and exchanging email grew dramatically in the following decades.²² At first, people saw the potential of the Internet to widely disseminate information and to expedite personal communications through email. Soon, however, the Internet’s interactive potential began to unfold.

The introduction of social media such as Facebook in 2004²³ and Twitter in 2006²⁴ brought the communicative powers of the Internet to a higher level with the ability to rapidly reach a mind-numbing number of followers.²⁵ This second, more interactive phase is known

passive, including e-mail, social networking (e.g., Facebook), user-generated content (e.g., YouTube or blogs), mash-ups (e.g., Overmixter), citizen journalism (e.g., OhMyNews), information searching and retrieval (e.g., Google, Yahoo, Bing), or collaborative production (e.g., Wikipedia). Some have labeled these “Web 2.0 application types.” DUTTON & PELTU, *supra* note 11, at 6.

²⁰ DUTTON & PELTU, *supra* note 11, at 8–9.

²¹ Steven Clift, *E-Democracy, E-Governance and Public Net-Work*, PUBLICUS.NET (Sept. 2003), <http://www.publicus.net/articles/edempublicnetwork.html>.

²² See K.G. COFFMAN & A.M. ODLYZKO, AT&T LABS-RES., GROWTH OF THE INTERNET (2001), available at <http://www.dtc.umn.edu/~odlyzko/doc/oft.internet.growth.pdf>; ASA BRIGGS & PETER BURKE, A SOCIAL HISTORY OF THE MEDIA: FROM GUTENBERG TO THE INTERNET (3d ed. 2010).

²³ Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 212 (2008).

²⁴ Boyd & Ellison, *supra* note 23, at 212.

²⁵ In early 2013, President Obama had over 21 million followers on Twitter, and Justin Bieber had 29 million. Leslie A. Gordon, *A Huge Following? Twitter Suit Accuses Businesses of Selling Followers*, A.B.A. J., Jan. 1, 2013, at 10.

as Web 2.0.²⁶ With this 2.0 labeling, Silicon Valley suggested it was just “a new version of some old software.”²⁷ But Web 2.0’s ability to bring “together the small contributions of millions of people and mak[e] them matter . . . [is] really a revolution.”²⁸

It wasn’t long before scholars recognized that e-democracy had the potential to dramatically change the face of democracy worldwide. Initially, scholars found the “bottom-up style of the Internet” to be “unqualifiedly praiseworthy.”²⁹ But about a decade after its inception, a “second generation of scholarship on the Internet” became more critical and encouraged regulation.³⁰ One of the leading voices for regulation was Cass Sunstein in his book *Republic.com*.³¹ Sunstein was especially concerned with the negative impact of the Internet on democracy and free speech.³² Yet, the role of social media continues to grow in our society, and it is unlikely that any significant restrictions will be placed upon the Internet’s ability to provide a political soapbox for all.

As with citizen initiatives, discussed in Part II.C below, that genie is out of the bottle,³³ and no one anticipates a reversal. For example, an increasing number of Americans are using the Internet to interact with government. A 2010 study found that eighty-two percent of American Internet users (representing sixty-one percent of all adults in the country) accessed or received government services online.³⁴

²⁶ Lev Grossman, *You–Yes, You–Are TIME’s Person of the Year*, TIME, Dec. 25, 2006, <http://www.time.com/time/magazine/article/0,9171,1570810,00.html>.

²⁷ Grossman, *supra* note 26.

²⁸ Grossman, *supra* note 26.

²⁹ Thomas S. Ulen, *Democracy on the Line: A Review of Republic.com by Cass Sunstein*, 2001 U. ILL. J.L. TECH & POL’Y 317, 318 (2001) (book review) (citing David Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996)).

³⁰ Ulen, *supra* note 29, at 318.

³¹ CASS SUNSTEIN, *REPUBLIC.COM* (Princeton Univ. Press 2001).

³² Sunstein suggested reforms to address the ability of the Internet to filter information and to create “cybercascades” of like-minded thinkers. In his subsequent book, *REPUBLIC.COM 2.0*, Sunstein further documents the “information cocoons” and “echo chambers” he fears have enflamed hate groups. CASS R. SUNSTEIN, *REPUBLIC.COM 2.0* (Princeton Univ. Press 2009). In both books, Sunstein proposes reforms to recognize the positive potential of the Internet on deliberative democracy. SUNSTEIN, *REPUBLIC.COM*, *supra* note 31; SUNSTEIN, *REPUBLIC.COM 2.0*, *supra*.

³³ K.K. DuVivier, *Out of the Bottle: The Genie of Direct Democracy*, 70 ALB. L. REV. 1045 (2007).

³⁴ Aaron Smith, *Government Online: The Internet Gives Citizens New Paths to Government Services and Information*, PEW INTERNET & AMERICAN LIFE PROJECT 2, 10 (Apr. 27, 2010), <http://pewInternet.org/Reports/2010/Government-Online.aspx> [hereinafter *Government Online*].

Nearly a quarter of those went “online to communicate directly with government agencies and participate in the online debate over government issues and policies.”³⁵

A 2012 study reinforced the notion of the social network as “the new public square”³⁶ when it reported that sixty-six percent of Americans who use social media, such as Facebook and Twitter,—or thirty-nine percent of all American adults—have used those sites for civic or political activities.³⁷ “Minds are not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media.”³⁸ The question now is what the impacts will be.

B. Forms of E-democracy

At least four subsets of e-democracy have emerged since its early stages: e-electioneering, e-government, e-rulemaking, and e-judicial advocacy. While social media groups now solicit citizen input during each of these stages, such input is arguably more appropriate at one end of the spectrum—i.e., voting in elections—and less appropriate at the other—i.e., attempting to allow citizen opinion to influence the objective legal basis for a judicial decision.

First, “e-electioneering,” or the role of digital technologies in electing politicians,³⁹ is illustrated by the Obama campaign story

³⁵ *Government Online*, *supra* note 34, at 31.

³⁶ Bill Sherman, *Your Mayor, Your “Friend”*: *Public Officials, Social Networking, and the Unmapped New Public Square*, 31 PACE L. REV. 95, 102–03 (2011).

³⁷ Lee Rainie, Aaron Smith, Kay Lehman Schlozman, Henry Brady & Sidney Verba, *Social Media and Political Engagement*, PEW INTERNET & AMERICAN LIFE PROJECT 2 (Oct. 19, 2012), <http://pewinternet.org/Reports/2012/Political-engagement.aspx>; *see also* Lee Rainie & Aaron Smith, *Politics on Social Networking Sites*, PEW INTERNET & AMERICAN LIFE PROJECT (Sept. 4, 2012), <http://pewinternet.org/Reports/2012/Politics-on-SNS.aspx>.

³⁸ *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 802–03 (1996) (Kennedy, J., concurring); *cf.* *United States v. Kokinda*, 497 U.S. 720, 737 (1990) (Kennedy, J., concurring). *But see* *United States v. Am. Library Ass’n*, 539 U.S. 194, 206 (2003) (citing *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678 (1998)) (rejecting the view that traditional public forum status extends beyond its historic confines).

³⁹ *See, e.g.*, Jim Macnamara & Gail Kenning, *E-electioneering 2010: Trends in Social Media Use in Australian Political Communication*, ACADEMIA.EDU (2011), http://www.academia.edu/830297/E-electioneering_2010_Trends_in_Social_Media_Use_in_Australian_Political_Communication; Austl. Ctr. for Pub. Commc’n, *E-Electioneering: Use of New Media in the 2007 Australian Federal Election*, UNIV. OF

above. As our democracy envisions and demands active citizen participation at the voting stage, the use of electronic mediums to promote election activities was a logical first stage for e-democracy.

Second, the term “e-government” has been employed to describe the use of electronic resources in delivering government services, primarily in the realm of administrative agencies. The Electronic Government Act of 2002⁴⁰ created security standards and uniform confidentiality safeguards for information technology activities by federal agencies. In his signing statement, President George W. Bush stated, “The Act will also assist in expanding the use of the Internet and computer resources in order to deliver Government services . . . for a citizen-centered, results-oriented, and market-based Government.”⁴¹ The goals of the Act include:

Promot[ing] [the] use of the Internet and other information technologies to provide increased opportunities for citizen participation in Government[;]

Mak[ing] the Federal Government more transparent and accountable[;] [and]

Provid[ing] enhanced access to Government information and services⁴²

As budgets allowed, states also have embraced Internet and computer resources. Similar to the federal use of e-government, the states’ goals initially were for one-way communication of information from a government to its citizens.⁴³ Early evaluations confirm that these sites have primarily been used to provide information rather than for promoting debate or shaping policy.⁴⁴

TECH. SYDNEY (2008), <http://www.fass.uts.edu.au/communication/centres/acpc/docs/e-electioneering-research-report-online.pdf>.

⁴⁰ Electronic Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (2002).

⁴¹ George W. Bush, *Presidential Statement*, E-GOV, <http://georgewbush-whitehouse.archives.gov/omb/egov/g-3-statement.html> (last visited Sept. 23, 2013).

⁴² Electronic Government Act § 2(b)(2), (9), (11).

⁴³ *See, e.g.*, Clift, *supra* note 21 (using the term “representative e-government” to “describe the e-democracy activities of government institutions”). Clift urges use of electronic mediums to increase consultation online and increase accountability and transparency. His explanation talks of shifting from a traditional model of (1) occasional input from citizens between elections; (2) power in the governance infrastructure centered with political leaders who determine broad policy priorities; and (3) government directly or through publicly-funded organizations implementing the policy agenda and law.

⁴⁴ Paul Ferber, Franz Foltz & Rudy Pugliese, *Cyberdemocracy and Online Politics: A New Model of Interactivity*, 27 BULL. SCI., TECH & SOC’Y 391 (2007), available at <http://bst.sagepub.com/content/27/5/391.abstract>.

The third is “e-rulemaking,” the subset of e-democracy that has perhaps received the most scholarly attention.⁴⁵ The “notice and comment” process in administrative rulemaking anticipates and mandates public input. Some have argued that rulemaking represents our government’s “most transparent and participatory decision-making process,”⁴⁶ promising to “enlarge significantly a genuine public sphere in which individual citizens participate directly” in governmental decision-making.⁴⁷ Furthermore, a 2008 ABA report concluded that “comment activity on *regulations.gov* has been increasing at a very encouraging rate.”⁴⁸

However, tensions have arisen about appropriate agency responses to public input through the e-rulemaking process. As an example, in 2003, the National Park Service finalized a rule allowing the use of jet skis in two limited areas of the Assateague National Seashore.⁴⁹

⁴⁵ See David Schlosberg et al., *Deliberation in E-Rulemaking? The Problem of Mass Participation*, in ONLINE DELIBERATION: DESIGN, RESEARCH, AND PRACTICE 133 (Todd Davies & Seeta Peña Gangadharan eds., 2009); COMMITTEE ON THE STATUS AND FUTURE OF FEDERAL E-RULEMAKING, AMERICAN BAR ASSOCIATION, ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING (A REPORT TO CONGRESS AND THE PRESIDENT) (2008), available at <http://ceri.law.cornell.edu/documents/report-web-version.pdf> [hereinafter ABA E-RULEMAKING REPORT]; Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893 (2006); Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943 (2006); Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411 (2005); Cynthia R. Farina, Mary Newhart & Josiah Heidt, *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123 (2012) [hereinafter *Rulemaking vs. Democracy*]; Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395 (2011); Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382 (2011) [hereinafter *Rulemaking in 140 Characters*]; Jeffrey S. Lubbers, *The Transformation of the U.S. Rulemaking Process—for Better or Worse*, 34 OHIO N.U. L. REV. 469 (2008) [hereinafter *Transformation*]; Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of Email*, 79 GEO. WASH. L. REV. 1343 (2011); Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433 (2004); Peter M. Shane, *Turning Gold into EPG: Lessons from Low-Tech Democratic Experimentalism for Electronic Rulemaking and Other Ventures in Cyberdemocracy*, 1 I/S J.L. & POL’Y FOR INFO. SOC’Y 147 (2005); Stuart W. Shulman, *The Case Against Mass E-mails: Perverse Incentives and Low Quality Public Participation in U.S. Federal Rulemaking*, 1 POL’Y & INTERNET 23, 29, apps. C, E, G, K (2009)); Stuart W. Shulman, *Whither Deliberation? Mass E-Mail Campaigns and U.S. Regulatory Rulemaking*, 3 J. E-GOV’T 41 (2006); Stephen Zavestoski, Stuart W. Shulman & David Schlosberg, *Democracy and the Environment on the Internet: Electronic Citizen Participation in Regulatory Rulemaking*, 31 SCI., TECH., & HUM. VALUES 383 (2006).

⁴⁶ Farina, *Rulemaking 2.0*, *supra* note 45, at 402.

⁴⁷ Shane, *supra* note 45, at 148.

⁴⁸ ABA E-RULEMAKING REPORT, *supra* note 45, at 13.

⁴⁹ Assateague Island National Seashore, Personal Watercraft Use, 68 Fed. Reg. 32,371, 32,372 (May 30, 2003).

During the comment period, the Park Service received 7600 comments on the proposed rule. Only 170 of those comments favored allowing the jet skis. Over ninety-five percent (7264 comments) supported a complete ban on jet skis in the area.⁵⁰ In spite of the vast proportion of comments supporting a ban, the Park Service passed the rule anyway.⁵¹ The agency specifically addressed eight public comments, but did not incorporate any suggested changes into the final rule.⁵²

Was the Park Service obligated to take into account the majority's opposition to allowing jet skis, which was expressed by so many of the public comments? What was the point of soliciting these public comments if the agency ignored the input? Should the agency response be different in an administrative e-rulemaking context where the goal is informed and objective decision-making? How does this context differ from the voice of the people in the e-electioneering context, which legitimizes every citizen's vote regardless of the motivation or lack of education about the candidates or their positions? Part III below will flush out these issues further and make a case for treating citizen input through e-legislating somewhere between e-electioneering and e-rulemaking participation.

"E-judicial advocacy" is the last alternative subcategory of e-democracy identified here. In a society that is accustomed to weighing in electronically on just about everything, from which contestants will win on *American Idol* or *Dancing with the Stars*⁵³ to which Thanksgiving turkeys the President should pardon each year,⁵⁴ it is not surprising that Americans are now seeking to use e-democracy to influence judicial decisions.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Mendelson, *supra* note 45, at 1364 (concluding that the agency did not address any of the comments in opposition). Mendelson included this and other stories as evidence that agencies do not consider "value-based" input. *Id.*

⁵³ Daniel Blake, *American Idol 2012 Winner is Phillip Phillips After Record 132M Votes*, THE CHRISTIAN POST (May 23, 2012, 10:01 PM), <http://global.christianpost.com/news/american-idol-2012-winner-is-phillip-phillips-after-record-132-million-votes-75459/>; Gayle Falkenthal, *Winner of the 2012 Dancing with the Stars All-Stars Mirror Ball Trophy Is . . .*, WASH. TIMES, Nov. 27, 2012, <http://communities.washingtontimes.com/neighborhood/tv-den/2012/nov/27/winner-2012-dancing-stars-champion-melissa-won/>.

⁵⁴ Megan Slack, *President Obama Pardons Cobbler, the National Thanksgiving Turkey*, WHITE HOUSE BLOG (Nov. 21, 2012, 4:00 PM), <http://www.whitehouse.gov/blog/2012/11/21/president-obama-pardons-cobbler-national-thanksgiving-turkey>.

American citizens and interest groups sought to influence the Court's 2012 health care decision.⁵⁵ One hundred and thirty-six organizations, an unofficial record, filed amicus briefs with the Court.⁵⁶ Many other advocates sought to convey their opinions about the health care law in less official ways, such as rallies on the courthouse steps,⁵⁷ rants on cable news,⁵⁸ open letters to the Court,⁵⁹ and even regular mail to the Supreme Court.⁶⁰ However, the largest campaigns were those driven by social media.

Interest groups used the Internet to rally both Obamacare supporters and opponents to contact the Justices. The petitions they compiled and delivered attempted to persuade Justices Thomas and Kagan to recuse themselves from hearing the health care case. Over 100,000 petition signatures were submitted to Justice Thomas and 95,000 to Justice Kagan.⁶¹

Other groups tried to influence the decision itself. One such group, FreedomWorks, claims to have gathered over 200,000 online

⁵⁵ Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012); Patient Protection and Affordable Care Act of 2012, Pub. L. No. 111-148, 124 Stat. 119 (2010).

⁵⁶ Greg Stohr, *Record Number of Amicus Briefs Filed in Health Care Cases*, BLOOMBERG (Mar. 15, 2012, 10:55PM), <http://go.bloomberg.com/health-care-supreme-court/2012-03-15/record-number-of-amicus-briefs-filed-in-health-care-cases/>. This record number reflects the extraordinary public interest in the health care decision, but is also consistent with the historical trend of increasing use of amicus briefs. From 1946 to 1955, amicus briefs were filed in twenty-three percent of argued cases. By the 2011–2012 term, that number rose to ninety-five percent. Anthony J. Franze & R. Reeves Anderson, *The Supreme Court's Reliance on Amicus Curiae in the 2011–12 Term*, NAT'L L.J., (Sept. 24, 2012), available at <http://www.arnoldporter.com/resources/documents/Arnold&PorterLLP.TheNationalLawJournal.092412.pdf>.

⁵⁷ Ian Duncan, *Supporters, Opponents Rally Outside Court Before Healthcare Ruling*, ORLANDO SENTINEL (June 28, 2012, 9:59 AM), http://articles.orlandosentinel.com/2012-06-28/news/la-pn-supporters-opponents-congregate-outside-court-as-healthcare-ruling-nears-20120628_1_healthcare-law-oral-arguments-demonstrators.

⁵⁸ E.g., Sean Hannity, *Health Care Reform is "The Most Irresponsible Piece of Domestic Legislation in Our Lifetime"* (Fox News television broadcast Mar. 21, 2010), <http://mediamatters.org/video/2010/03/21/hannity-health-care-reform-is-the-most-irrespon/162009>.

⁵⁹ E.g., Jen Sorensen, *An Open Letter to the Supreme Court About Health Insurance*, KAISER HEALTH NEWS (June 1, 2012), <http://www.kaiserhealthnews.org/cartoons/2012/june/open-letter-to-supreme-court-cartoon.aspx>.

⁶⁰ *Contact Us*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/contact/contactus.aspx> (last visited July 6, 2013). The Justices do not have email addresses at which the public can reach them.

⁶¹ Mike Sacks, *Clarence Thomas Petitioned By 100,000 Progressives to Recuse Himself from Health Care Cases*, HUFFINGTON POST (Feb. 17, 2012, 12:27 PM), http://www.huffingtonpost.com/2012/02/17/clarence-thomas-petition-recuse-health-care_n_1284610.html; *Tell Elena Kagan: "Recuse Yourself from ObamaCare Court Case,"* GRASSFIRE NATION, (last visited July 6, 2013), <http://www.grassfire.com/161/petition.asp>.

signatures for a health care repeal petition that it delivered to the Supreme Court after the close of oral arguments.⁶² The group implied that, thanks to widespread support of its members, it was on the verge of persuading Justice Kennedy to strike down the law.⁶³

Justice Kennedy did indeed vote against the Constitutionality of the healthcare law, though no evidence exists to support a theory that he was at all moved by petitions or other public pressure.⁶⁴ The lack of hard evidence on the efficacy of lobbying judges, however, has not stopped people from attempting to use social media to control judicial outcomes.⁶⁵

The experiences with each of these alternative forms of e-democracy provide guidance for explaining the distinguishing characteristics of e-legislating in Part III below. But first, Part II describes e-legislating and puts it within the context of the traditional process of making federal laws in the United States.

II

CITIZEN INPUT INTO FEDERAL LEGISLATION

In contrast to other subsets of e-democracy described in Part I, this Article focuses on the newest member of the e-democracy family: e-legislating. E-legislating represents a step beyond these other forms of e-democracy in that it involves an effort to use electronic mediums to influence actual statutory lawmaking. To provide context for this new form of e-democracy, this section will examine the historic role of U.S. citizens in creating legislation, describing first the federal legislative process itself, next the right to petition, and then the citizen initiative. Finally, Part II.D concludes with a discussion of the transition of the Obama campaign into Organizing for Action to illustrate e-legislating as a strategy for permitting citizens to have meaningful input in the critical stage of law creation.

⁶² Matt Kibbe, *Obama's Mandate is Doomed*, FREEDOMWORKS (Mar. 29, 2012), <http://www.freedomworks.org/blog/mkibbe/obamas-mandate-is-doomed>.

⁶³ Kibbe, *supra* note 62.

⁶⁴ Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

⁶⁵ E.g., *Petition U.S. Supreme Court for Gay Rights*, FACEBOOK, <https://www.facebook.com/PetitionUsSupremeCourtForGayRights> (last visited July 6, 2013); Zaid Jilani, *20,000 United Republic Members Petition Supreme Court to Overturn Citizens United*, REPUBLIC REPORT (June 8, 2012), <http://www.republicreport.org/2012/20000-united-republic-members-petition-supreme-court-overturn-citizens-united/>.

A. Constitutional Limitations

As the creators of one of the first modern democracies, our Founders struggled to find the proper balance for citizen participation.⁶⁶ They were skeptical of giving citizens direct power to make laws or even vote in many cases because of the failures of democracy in ancient Greece.⁶⁷ James Madison noted in *Federalist No. 10* that a “pure democracy” or “a society consisting of a small number of citizens, who assemble and administer the government in person” was defective because it offered no cure for “the mischiefs of faction.”⁶⁸ The result, concluded Madison, was chaos: “[S]uch democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives, as they have been violent in their deaths.”⁶⁹

As a result of these concerns, the Founders consciously created a “republican form of government,”⁷⁰ which limited the popular vote

⁶⁶ As one scholar has noted, “Government *by* the people represents the maximum, as government *for* the people represents the minimum of the democratic process.” THOMAS GOEBEL, A GOVERNMENT BY THE PEOPLE: DIRECT DEMOCRACY IN AMERICA, 1890–1940, at 1 (2007) (citing T.V. Smith, *The Voice of the People*, 169 ANNALS AM. ACAD. POL. & SOC. SCI. 101, 109 (1933)) (emphasis added).

⁶⁷ See, e.g., THE FEDERALIST NO. 14, at 25 (James Madison) (Doubleday & Co. 2d ed., 1966) (“Being subjects either of an absolute or limited monarchy, [some celebrated authors] have endeavored to heighten the advantages, or palliate the evils of those forms, by placing in comparison the vices and defects of the republican, and by citing as specimens of the latter the turbulent democracies of ancient Greece and modern Italy. Under the confusion of names, it has been an easy task to transfer to a republic observations applicable to a democracy only; and among others, the observation that it can never be established but among a small number of people, living within a small compass of territory.”); see also THE FEDERALIST NO. 10, at 16 (James Madison) (Doubleday & Co. 2d ed., 1966) (“The instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished”); *id.* at 20 (“From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction.”); THE FEDERALIST NO. 21, at 47 (Alexander Hamilton) (Doubleday & Co. 2d ed., 1966) (“Where the whole power of the government is in the hands of the people, there is the less pretense for the use of violent remedies in partial or occasional distempers of the State.”).

⁶⁸ THE FEDERALIST NO. 10, at 51 (James Madison) (J.R. Pole ed., 2005).

⁶⁹ *Id.*

⁷⁰ Article IV, section 4 of the Constitution requires that, “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.” U.S. CONST. art. IV, § 4.

only to election of members of the House of Representatives.⁷¹ For over a century, U.S. citizens had no direct voice in electing their senators.⁷² The President was, and still is, chosen through an Electoral College, selected by state representatives rather than the people directly.⁷³

The process of enacting legislation created further distance between the people and their laws. First, the electorate was limited to an elite cadre of property owners.⁷⁴ Second, as noted above, this

⁷¹ U.S. CONST. art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”).

⁷² U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend XVII (“The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.”). Note how this changed in 1913 with the Seventeenth Amendment, which provided for the popular election of Senators:

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

U.S. CONST. amend. XVII.

⁷³ U.S. CONST. art. II, § 1, cl. 2. This portion of the Constitution provides:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

Id. For the first nine elections, between the years 1789 and 1820, there was no popular vote at all for the President. *Historical Election Results: Electoral College Box Scores 1789–1996*, NAT’L ARCHIVES & RECORDS ADMIN., <http://www.archives.gov/federal-register/electoral-college/scores.html> (last visited July 6, 2013). With the exception of four elections, the candidate with the most popular votes or the most Electoral College votes has won the Presidency. *The Electoral College*, SOCIAL STUDIES FOR KIDS, <http://www.socialstudiesforkids.com/articles/government/theelectoralcollege.htm> (last visited July 6, 2013). In the 1800 election, Thomas Jefferson and Aaron Burr received equal numbers of Electoral College votes, and Jefferson won the election by a vote in the House of Representatives. *Id.* In the election of 1824, Andrew Jackson received the most electoral votes of any candidate. *Id.* He did not receive the required number of electoral votes to win, however. *Id.* A House of Representatives vote decided the election in favor of John Quincy Adams. *Id.* In the 1876 election, Samuel Tilden initially won a greater number of electoral votes, but a Congressional commission awarded Rutherford B. Hayes twenty disputed electoral votes, giving Hayes the 185 votes necessary at the time to win the election. *Id.* Most recently, in 2000, George W. Bush won the presidential election by carrying the Electoral College, even though his opponent Al Gore won the popular vote by more than 500,000 ballots. David Stout, *The Final Tally: Gore’s Lead in the Popular Vote Now Exceeds 500,000*, N.Y. TIMES, Dec. 30, 2000, at A11.

⁷⁴ The franchise to vote has also been expanded. Initially, the vote was “reserved to white English-speaking literate males, a majority of whom belonged to the respectable

limited electorate only voted for members of the House of Representatives. Under the Constitution, the House had no power to implement laws unilaterally. All enactments required approval of the Senate and the signature of the President, neither elected directly by the people. In sum, while a few were allowed to vote in elections, no citizen had a direct vote in the legislative process. This structure was intentional to encourage a “deliberative democracy”⁷⁵:

[The Senate] may be sometimes necessary as a defense to the people against their own temporary errors and delusions. As the cool and deliberate sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail over the views of its rulers; so there are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow mediated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind?⁷⁶

While the system of checks and balances was appealing to the Founders, to others they “were directed at perpetuating unequal social and political relations by frustrating the efforts of the people to

classes.” ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 316 (2000). It now includes most citizens over eighteen years of age including females, minorities, and representatives of all economic groups. See U.S. CONST. amend. XIV, § 2 (declaring all natural born and naturalized persons in United States to be citizens, prohibiting states from abridging citizens’ privileges or denying to any citizens equal protection of the laws, and penalizing states’ representation level in Congress if states deny voting rights to any male citizen twenty-one or older); *id.* amend. XV, § 1 (prohibiting denial or abridgement of voting rights “on account of race, color, or previous condition of servitude”); *id.* amend. XIX (prohibiting denial or abridgement of voting rights “on account of sex”); *id.* amend. XXVI, § 1 (prohibiting denial or abridgement of voting rights of citizens eighteen or older “on account of age”). Some variation exists from state to state about the eligibility of felons to vote. See *Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1942–49 (2002) (indicating that, as of date of article, eight states permanently disenfranchised all felons absent gubernatorial pardon or restoration order, five states permanently disenfranchised large categories of felons, thirty-five states had regimes varying based on number and severity of offenses, and two allowed convicts to vote while incarcerated).

⁷⁵ JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY & AMERICAN NATIONAL GOVERNMENT* (1997); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

⁷⁶ THE FEDERALIST NO. 63 (James Madison) (J.R. Pole ed., 2005), available at <http://constitution.org/fed/federa63.htm>.

liberate themselves from the dominance of particular interests.”⁷⁷ A similar desire to upset the status quo of power that prevents progressive change also drives many current supporters of e-legislating.

B. The Petition Clause

While our Founders established a governing process that remains less democratic than many of its contemporary counterparts around the world,⁷⁸ early citizens of the United States still enjoyed more power to directly influence legislative decisions than we do today. These early citizens could participate in federal lawmaking through a robust use of the Petition Clause.

The Petition Clause is not in the body of the Constitution itself, but it appears in the First Amendment in the Bill of Rights. It guarantees citizens the right “to petition the government for a redress of grievances.”⁷⁹ The Petition Clause echoed the English Bill of Rights of 1689,⁸⁰ which had its origins in chapter sixty-one of the Magna Carta.⁸¹

As the U.S. Supreme Court has explained, “[t]he right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives.”⁸² It includes any non-violent method of encouraging or disapproving of actions by any of the three branches of government, including related departments such as administrative agencies.⁸³ Traditionally, the process for exercising one’s rights under the Clause involved writing letters or gathering multiple signatures on a petition.

In England and colonial America, “petitions were a major source for legislative initiatives.”⁸⁴ Petitioning “enjoyed its apex in America”

⁷⁷ GOEBEL, *supra* note 66, at 54 (2007).

⁷⁸ K.K. DuVivier, *The United States as a Democratic Ideal? International Lessons in Referendum Democracy*, 79 TEMP. L. REV. 821, 823 (2006).

⁷⁹ U.S. CONST. amend. I.

⁸⁰ “[I]t is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal.” 1 W. & M., Sess. 2, c. 2 (1689).

⁸¹ “[I]f we, our justiciary, our bailiffs, or any of our officers, shall in any circumstance fail in the performance of them, towards any person, . . . the said four barons shall repair to us, or our justiciary, if we are out of the realm, and, laying open the grievance, shall petition to have it redressed without delay” MAGNA CARTA, ch. 61 (1215).

⁸² *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011).

⁸³ *Cal. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510–11 (1972).

⁸⁴ Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 750 (1999). The petitioning process “originated more bills in pre-constitutional

in the late eighteenth century,⁸⁵ and by 1795, “[t]he principal part of [Congress’s] time [was] taken up in reading and referring petitions.”⁸⁶ Petitions served as a “tool of democratic mass politics”⁸⁷ and were “the most widespread means for popular participation in the political process.”⁸⁸

Interest groups used petitions to instigate “political dramas and highlight[] legislative deadlocks . . . [that prevented] popularly-initiated deliberation on grievances.”⁸⁹ Citizen petitions voiced public opinion on issues such as whether a National Bank should be created, how the Cherokees should be treated, and whether to criminalize dueling.⁹⁰

America than any other source of legislation.” Stephen Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 144 (1986). For example, in the early 1700s, over half of the statutes in Virginia and Connecticut originated from petitions to the government. *Id.* at 144 n.9. In Virginia, the number of petitions more than doubled in the latter half of the eighteenth century. Norman B. Smith, “*Shall Make No Law Abridging . . .*”: *An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1171–72 (1986) (citing RAYMOND C. BAILEY, POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA 32 (1979)). Similarly, in 1770, Connecticut’s General Assembly acted on over 150 petitions and created only fifteen laws on its own initiative. Higginson, *supra*, at 146; see also STAFF OF H. COMM. ON ENERGY & COMMERCE, 99TH CONG., 2D SESS., PETITIONS, MEMORIALS AND OTHER DOCUMENTS SUBMITTED FOR THE CONSIDERATION OF CONGRESS, MARCH 4, 1789 TO DECEMBER 14, 1795, at 1 n.3 (Comm. Print 1986) [hereinafter PETITIONS, MEMORIALS] (noting major impact of petitions on federal legislation during 1790s).

⁸⁵ Lawson & Seidman, *supra* note 84, at 750–51 (“The practice of petitioning flourished in the fledgling national legislature. In the late eighteenth century, petitioning may well have enjoyed its apex in America, embracing both individual and collective written requests to the executive, legislative, and judicial branches.” (footnote omitted)).

⁸⁶ David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right of Petition*, 9 LAW & HIST. REV. 113, 117 (1991) (quoting Letter from John Fenno, U.S. Senate printer, to Joseph Ward (Dec. 25, 1795)).

⁸⁷ Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2160 (1998).

⁸⁸ PETITIONS, MEMORIALS, *supra* note 84, at 6.

⁸⁹ Mark, *supra* note 87, at 2161.

⁹⁰ Higginson, *supra* note 84, at 156–57 (first two alterations in original). Higginson elaborates:

Indeed, in Congress’ first decades petitions were received and considered, typically by referral to committees. The petition-response mechanism dealt procedurally with such controversial issues as contested election results, the National Bank, the expulsion of Cherokees from Georgia, land distribution, the abolition of dueling, government in the territories, the Alien and Sedition Acts, and the slave trade. Generally, favorable legislation or an adverse report halted further petitioning.

Id. (footnotes omitted); accord Frederick, *supra* note 86, at 130 (citing GILBERT H. BARNES, THE ANTISLAVERY IMPULSE: 1830–1844, at 114 (1933)) (noting that

Although Congress was under no obligation to pass legislation on the basis of petitions, it took the process of reviewing them seriously. Until 1836, Congress had a standard procedure for reading and referring petitions to committees for reports.⁹¹ The review process became unsustainable, however, when Congress was flooded with anti-slavery petitions, and “[w]ith each succeeding resolution condemning [slavery and seeking abolition], the number of petitions multiplied to the point that normal House business became difficult, on occasion impossible.”⁹² To quell the debate, the House changed its internal procedures by passing a “gag rule” in 1836, which required that all anti-slavery petitions be tabled.⁹³

Even though the gag rule was repealed, petitions never regained their status as a serious agenda-setting tool.⁹⁴ Under the 1844 repeal rule, the process for reviewing petitions was changed. Instead of receiving the attention of the entire House of Representatives, petitions were now referred to committees where they would “sleep the sleep of death.”⁹⁵ Thus, the procedure eviscerated the right to petition because “there was little real difference between rejecting petitions and referring them to a committee that refused to issue a report.”⁹⁶

establishment of National Bank, Cherokee expulsion, cessation of Sunday postal service, and other matters of substantial public interest had yielded floods of petitions).

⁹¹ Frederick, *supra* note 86, at 118; Mark, *supra* note 87, at 2160 (noting that “the process reflected the seriousness of petitions”).

⁹² Frederick, *supra* note 86, at 130.

⁹³ 12 REG. DEB. 4052 (1836) (resolving, on May 26, 1836, that the House of Representatives would indefinitely table all petitions regarding slavery or its abolition). This solution was never popular; when proposed previously, it had prompted former President John Quincy Adams, then serving as Representative from Massachusetts, to comment, “Well, sir, you begin with suppressing the right of petition; you must next suppress the right of speech in this House.” 12 REG. DEB. 2002 (1835).

⁹⁴ Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835–37*, 89 NW. U. L. REV. 785, 848–49 (1995). Professor Curtis relates:

To many Congressmen, as Adams put it, the resolution was “a direct violation of the constitution of the United States . . . and the rights of my constituents.” As predicted by many, both in and out of Congress, the gag rule became a cause celebre, and the abolitionists made the most of it. Adams conducted brilliant guerilla warfare against it until it was finally abandoned in 1844.

Id.

⁹⁵ 11 REG. DEB. 1137 (1835) (speech of Rep. John Dickson of New York (quoting *Psalms* 13:3)).

⁹⁶ Frederick, *supra* note 86, at 127. As Representative Slade of Vermont said scornfully of petitions regarding slavery being delayed indefinitely by referral to a committee that would not issue a report, “The sacred right of petition!—that is to say, the ‘sacred right’ of

C. Citizen Initiatives

Most modern democracies allow for some form of direct citizen input into government.⁹⁷ While U.S. citizens have never been given a vote on their federal Constitution,⁹⁸ the states, which had embraced referendums from colonial times,⁹⁹ referred each of their state constitutions to their citizens for ratification.¹⁰⁰ Despite allowing citizen input on ratification, however, the states, in these constitutions, followed the federal government's lead in creating a system of representative democracy that strictly limited their citizens' direct roles in making legislation.¹⁰¹

being 'nailed to the table,' . . . or the 'sacred right' of being gathered . . . into the 'family vault of all the Capulets.'" 12 REG. DEB. 2043 (1835).

⁹⁷ DuVivier, *supra* note 78, at 823 (noting that the United States is one of only five significant democracies in the world that has never held a nationwide electorate vote on some public issue).

⁹⁸ The Federal Constitution was ratified by conventions instead of a general vote. *The Ratification of the Constitution*, NATIONAL ARCHIVES, <http://www.archives.gov/education/lessons/constitution-day/ratification.html> (last visited July 7, 2013).

⁹⁹ Referendums date as far back as the Mayflower Treaty in 1620. Bruno Kaufmann & M. Dane Waters, *Introduction*, in DIRECT DEMOCRACY IN EUROPE: A COMPREHENSIVE REFERENCE GUIDE TO THE INITIATIVE AND REFERENDUM PROCESS IN EUROPE, at xix, xix (Bruno Kaufmann & M. Dane Waters eds., 2004) [hereinafter DIRECT DEMOCRACY IN EUROPE]. Even though the word "referendum" derives from the word "refer" and has been used only for measures that a political entity refers to the people, recent commentators have embraced the term to mean any "mass electorate vote[] on some public issue." David Butler & Austin Ranney, *Practice*, in REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT DEMOCRACY 1, 1 & n.1 (David Butler & Austin Ranney eds., 1994) [hereinafter REFERENDUMS AROUND THE WORLD]. Although the word "plebiscite" seems to more accurately describe any vote of the people, the word has taken on a negative connotation because plebiscites in Germany and other parts of the world were used as ad hoc votes to reinforce the actions of dictators. *Id.* For example, in March of 1936, Hitler's Reichstag was approved by 98.1% of Germans. MAIJA SETÄLÄ, REFERENDUMS AND DEMOCRATIC GOVERNMENT: NORMATIVE THEORY AND THE ANALYSIS OF INSTITUTIONS 1–2 (1999).

¹⁰⁰ All eligible citizens in Connecticut, New Hampshire, and Massachusetts directly decided on their state constitutions by participating in referendums. FREDERIC JESUP STIMSON, POPULAR LAW-MAKING: A STUDY OF THE ORIGIN, HISTORY, AND PRESENT TENDENCIES OF LAW-MAKING BY STATUTE 297 (1910) (noting: "for no constitution, with the exception of that of Virginia, has ever been adopted in any of our States except by the people at an election"). All states after 1910 have also adopted their state constitutions by a popular vote, and even Virginia submitted its constitution to a vote of the people in 1970. *Constitutions of the Several States*, GREEN PAPERS, <http://www.thegreenpapers.com/slg/constitution.phtml> (last visited July 7, 2013).

¹⁰¹ A handful of states granted their citizens the right to instruct their legislators. 1 ANNALS OF CONG. 685–792 (Joseph Gales ed., 1834), *reprinted in* 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1095 (Bernard Schwartz ed., 1971) [hereinafter BILL OF RIGHTS HISTORY] (statement of Rep. Burke of South Carolina). "[T]he constitutions of Massachusetts, Pennsylvania, and North Carolina, all of them recognise [sic], in express

In the late 1890s, citizens began demanding the right to have a more direct voice. The Progressive party platform at this time included the ability of citizens to initiate legislation by gathering signatures.¹⁰² The citizen initiative¹⁰³ was part of a package of reforms introducing more democratic processes as a cure for corruption and inaction by representative governments.¹⁰⁴ Woodrow Wilson called the citizen initiative the “gun behind the door”¹⁰⁵ of the legislatures because it allowed citizens to force legislation when elected officials were “paralyzed by inaction” from incompetence, or more often, from being controlled by moneyed special interests. The citizen initiative was an alternative way of making law that allowed “ordinary citizens to bypass [legislators] beholden to special interests [and] forcefully reminded lawmakers of the will of the majority outside the regular election cycle.”¹⁰⁶ Citizens signed the petition; the measure was placed on the ballot; and if voted up by a majority of citizens, it became law. Thus, the citizen initiative allowed the people

terms, the right of the people to give instruction to their representatives.” *Id.* at 1103. Maryland may also have allowed this right. *Id.*

¹⁰² THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 50–51 (1989).

¹⁰³ For the purposes of this Article, the term “initiative” will generically encompass any direct democracy mechanism that forces a legislature to consider a matter outside the standard representative process. Direct democracy comes in many forms and varies widely from state to state. Some distinguish an “initiative” as a measure that citizens originate by petition from a “referendum,” which is legislation originating from a legislature and referred to the people for a vote. Other terms used to describe the process include “plebiscite,” “proposition,” or “amendment.” *See generally* INITIATIVE & REFERENDUM INST., *A BRIEF HISTORY OF THE INITIATIVE AND REFERENDUM PROCESS IN THE UNITED STATES*, [hereinafter IRI BRIEF HISTORY], available at www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Quick%20Facts/History%20of%20I&R.pdf; K.K. DuVivier, *By Going Wrong All Things Come Right: Using Alternative Initiatives to Improve Citizen Lawmaking*, 63 U. CIN. L. REV. 1185, 1185 n.2 (1995).

¹⁰⁴ *See* GOEBEL, *supra* note 66, at 3–4. In addition to the initiative and referendum process, the Progressive movement sought a number of political reforms, including secret ballots, direct election of United States senators, primary elections, and women’s suffrage. *Id.* at 4.

¹⁰⁵ *Id.* at 55.

¹⁰⁶ IRI BRIEF HISTORY, *supra* note 103, at 2; *see also* Elizabeth Garrett, *Direct Democracy*, in *RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW* 139 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010); Daniel A. Smith & Dustin Fridkin, *Delegating Direct Democracy: Interparty Legislative Competition and the Adoption of the Initiative in the American States*, 102 AM. POLI. SCI. REV. 333 (2008) (noting that when it was introduced, the initiative process allowed strong minority parties to dilute the institutional power of majority parties).

to enact statutes directly and to circumvent legislatures instead of working with them.¹⁰⁷

With South Dakota as the first in 1898,¹⁰⁸ twenty-four states have now adopted some form of statewide process for citizen input in passing legislative, and sometimes constitutional, provisions.¹⁰⁹ Initiative use surged in its early years, declined from the 1940s to 1960s,¹¹⁰ and then re-surged starting in the 1970s.¹¹¹ The momentum continues today.¹¹²

¹⁰⁷ See, e.g., *Beall v. State*, 103 A. 99, 102–03 (Md. 1917) (opining that Maryland and other states amended their constitutions to provide for referendum veto of legislation in order to eliminate alleged control and corruption by “great corporations” and political parties); *State v. Howell*, 181 P. 920, 922 (Wash. 1919) (opining that citizens asserted referendum power due to perception that legislature had become unresponsive to popular will). One New Jersey reformer concluded that “representative government is a failure.” GOEBEL, *supra* note 66, at 36. On another occasion, supporters of direct legislation by the electorate characterized representative government as an “utter failure. It fails in the leaders it develops; it fails in its mechanism. It is cumbersome, uncertain, confused, irresponsible, undemocratic, often farcical and dishonest, and commonly partisan.” *Id.* at 207 n.35 (quoting DIRECT LEGISLATION RECORD I 84 (Nat’l Direct Legislation League, 1984)).

¹⁰⁸ South Dakota is given credit for having the first initiative process in 1898, and Oregon is credited with having the first such initiative on a ballot in 1904. CRONIN, *supra* note 102; DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES (1984); Garrett, *supra* note 106, at 137. The historical average of approval rates for initiatives, from 1904 to 2012, is forty-one percent. INITIATIVE & REFERENDUM INST., ELECTION RESULTS 2012: BREAKTHROUGH WINS FOR MARIJUANA AND SAME SEX MARRIAGE 1 (2012) [hereinafter IRI ELECTION RESULTS 2012], available at <http://www.iandrinstitute.org/BW%202012-3%20Election%20results%20v1.pdf>.

¹⁰⁹ The following states allow some form of initiative: Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming. See THOMAS M. DURBIN, CONG. RESEARCH SERV., Rep. No. 81–63A, INITIATIVE, REFERENDUM AND RECALL: A RESUME OF STATE PROVISIONS (1981); IRI BRIEF HISTORY, *supra* note 103, at 4–5; see also Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL’Y REV. 11, 15 (1997) (“[T]wenty-five states [] have the referendum, twenty-three having some form of the initiative . . .”). For a time, referendums represented a phenomenon largely limited to the West. When Alaska joined the Union in 1959, its constitution included the right for citizens to enact statutes or amend the state constitution by initiative. Florida adopted the statewide initiative in 1968, and Illinois followed suit in 1970. In 1996, Rhode Island became the most recent state to adopt the process. IRI BRIEF HISTORY, *supra* note 103, at 5.

¹¹⁰ See Charles M. Price, *Initiative Qualifying in the States, 1898–1989: Variations in Usage*, 12 FAM. L. & DEMOCRACY REP. 4, 4 (Feb. 1990). Thomas Goebel notes there were 246 ballot propositions in the 1930s, only 146 in the 1940s, and a mere eighty-five in the 1960s. GOEBEL, *supra* note 66, at 186. However, the number has grown steadily since the 1970s. *Id.* at 186–87; see also IRI BRIEF HISTORY, *supra* note 103, at 8 (reporting that initiative use peaked at 293 from 1911 to 1920, but steadily declined in subsequent

In 2012, American citizens in thirty-nine states voted on 186 statewide initiatives and referendums.¹¹³ Forty-eight of these were citizen-initiated measures.¹¹⁴ Historically, Oregon, California, Colorado, North Dakota, and Arizona have used the referendum process most extensively.¹¹⁵ California and Oregon alone accounted for nearly one-third of all qualifying citizen initiatives in the 1980s, and the five high-use states historically accounted for nearly sixty percent of all citizen initiatives.¹¹⁶ Some commentators note that in states with the highest initiative use, all significant amendments to these states' constitutions have originated as citizen-initiated measures.¹¹⁷

Not long after initiative use resurged in the 1970s, commentators began to reassess the process.¹¹⁸ Criticisms sparked proposals for

decades to a low of eighty-seven from 1961 to 1970, largely because of the two World Wars, the Great Depression, and the Korean War).

¹¹¹ Two of the most expansive decades of initiative use occurred during the years of 1981–1990 and 1991–2000, where there were 271 and 389 initiative platforms respectively. IRI BRIEF HISTORY, *supra* note 103, at 8.

¹¹² The 1990–1999 decade and the 2000–2009 decade both resulted in records of over 350 initiatives each. IRI BRIEF HISTORY, *supra* note 103, at 7–8.

¹¹³ IRI ELECTION RESULTS 2012, *supra* note 108, at 1. In contrast, there were 163 in the 2004 November elections. BALLOT INITIATIVE STRATEGY CTR., BALLOT INITIATIVE & REFERENDUM, 2004 ELECTION RESULTS 2, 4 (2004), available at http://bisc.3cdn.net/386f89bb7ca82d0632_drm6iyd0f.pdf. Further, the November 2000 election involved only seventy-six. INITIATIVE & REFERENDUM INST., GENERAL ELECTION POST ELECTION REPORT 7 (2002) [hereinafter IRI POST ELECTION REPORT], available at <http://www.iandri.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Election%20Reports/2002%20General%20Election/2002%20POST-election%20Report%20-%2012-11-02%20-%20State%20by%20State.pdf>.

¹¹⁴ IRI ELECTION RESULTS 2012, *supra* note 108, at 1.

¹¹⁵ Oregon has proposed 325 measures; California, 279; Colorado, 183; North Dakota, 168; and Arizona, 154. IRI BRIEF HISTORY, *supra* note 103, at 8.

¹¹⁶ See Price, *supra* note 110, at 4 (comparing the use of citizen-initiated referendums in the then twenty-three states that allowed this form of referendum).

¹¹⁷ Richard B. Collins, *How Democratic Are Initiatives?*, 72 U. COLO. L. REV. 983, 983 nn.2–3 (2001). Collins based his observations, in part, on data collected by Dennis Polhill. See Dennis Polhill, *Are Coloradans Fit to Make Their Own Laws? A Common-Sense Primer on the Initiative Process*, Issue Paper no. 8-96, INDEP. INST. app. B (Oct. 24, 1996) (summarizing election results on all Colorado ballot issues from 1912 to 1995), http://liberty.i2i.org/files/2011/02/IP_8-96.pdf; see also PHILIP L. DUBOIS & FLOYD FEENEY, LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS 30 (1998); CAL. COMM'N ON CAMPAIGN FIN., DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT (1992); Hans A. Linde, *Taking Oregon's Initiative Toward a New Century*, 34 WILLAMETTE L. REV. 391, 391–98 (1998).

¹¹⁸ MAGLEBY, *supra* note 108, at 5; see, e.g., Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998) (arguing that plebiscites do not accurately reflect the complexities of voter preferences); Julian N. Eule, *Judicial Review of*

reform.¹¹⁹ Some of the sharpest criticism has arisen from the application of direct democracy in the context of complex fiscal decisions.¹²⁰ “[V]oters do not fully understand the relationship between current deficits and future taxes,” expecting to be “taxed like libertarians, but subsidized like socialists.”¹²¹ One argument is that tax and other complex issues should remain within the exclusive province of representatives so that lawmakers can better weigh complex and competing concerns and respond to changing conditions.¹²² Many blame California’s fiscal dysfunction on direct democracy.¹²³ Estimates of the percentage of California’s budget tied

Direct Democracy, 99 YALE L.J. 1503 (1990) (discussing how courts should proceed in deciding constitutionality challenges to voter enactments); David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 46 (1995) (“Direct legislation is at best a supplement to representative democracy.”).

¹¹⁹ See, e.g., CAL. COMM’N ON CAMPAIGN FIN., *DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA’S FOURTH BRANCH OF GOVERNMENT* (1992); Collins, *supra* note 117; Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don’t Work*, 66 U. COLO. L. REV. 47 (1995); PETER SCHRAG, *PARADISE LOST* (1998).

¹²⁰ Peter Conti-Brown, *Direct Democracy and State Fiscal Crises: The Problem of Too Much Law*, 7 DUKE J. CONST. L. & PUB. POL’Y 43 (2012); Jessica A. Levinson & Robert M. Stern, *Ballot Box Budgeting in California: The Bane of the Golden State or an Overstated Problem?*, 37 HASTINGS CONST. L.Q. 689, 696 & n.34 (2010). *But see* John G. Matsusaka, *Direct Democracy and Fiscal Gridlock: Have Voter Initiatives Paralyzed the California Budget?*, 5 ST. POL. & POL’Y Q. 248 (2005) [hereinafter *Fiscal Gridlock*]; John G. Matsusaka, *Direct Democracy Works*, 19 J. ECON. PERSP. 185 (2005). *But see* David M. Primo, *The Effect of Initiatives on Local Government Spending*, 22 J. THEORETICAL POL. 6 (2010) (arguing that spending mandates reduced deadweight costs of taxation and increased local spending twelve to fourteen percent); S. Brock Blomberg, Gregory D. Hess & Akila Weerapana, *The Impact of Voter Initiatives on Economic Activity*, 20 EUR. J. POL. ECON. 207 (2004) (arguing that states with initiative systems waste twenty to thirty percent fewer resources).

¹²¹ Conti-Brown, *supra* note 120, at 44 nn.3–4. In addition to California, discussed below, Colorado citizens have passed initiatives over the years that first cut taxes and then required certain payments to schools, creating conflicting, irreconcilable mandates.

¹²² Levinson & Stern, *supra* note 120, at 696 & n.34. *But see* Conti-Brown, *supra* note 120, at 45 (advocating that fiscal policy-making be taken from both the legislature and initiative/referendum control and instead lodged in a “federally created commission called the Fiscal Restoration Commission”).

¹²³ *Fiscal Gridlock*, *supra* note 120, at 250 tbl.1 (providing pundit comments on initiatives and the California budget from Panetta, Broder, Tyson, Schrag & ECONOMIST). Note that California voters passed Prop. 30 on November 6, 2012. *California Proposition 30, Sales and Income Tax Increases (2012)*, BALLOTEDIA, http://ballotpedia.org/wiki/index.php/California_Proposition_30,_Sales_and_Income_Tax_Increase_%282012%29 (last modified Feb. 18, 2013). This proposition increases taxes on earnings over \$250,000 for seven years and sales taxes by one-fourth of a percent for four years, to fund schools. *Id.* Prop. 30 also guarantees public safety realignment funding. *Id.* The fiscal impact will be increased state tax revenues through 2018–19, averaging about \$6 billion annually over the next few years. *Id.* These revenues will be available for funding the state budget. *Id.*

up by voter-mandated initiatives range from thirty-three to seventy percent.¹²⁴ These unfunded set-asides, in combination with initiative-created restrictions on raising revenue, like Proposition 13, have “increased nonguaranteed debt,” “privatized the public fisc,” and “devolved the authority to lay and collect taxes and to spend the proceeds so gained.”¹²⁵

Despite these problems, the approval rate for initiatives is high,¹²⁶ and initiative democracy continues to grow. Defenders argue that initiatives serve as a valuable way of giving citizens a direct voice in their government. Elizabeth Garrett notes that “the appropriate frame for any analysis of direct democracy is that of ‘hybrid democracy’” because of the profound impact “the presence of robust direct democracy” has on “[l]egislators and the traditional legislative process.”¹²⁷ Even though the initiative process is currently restricted to state and local governments, it has had considerable influence on public policy nationwide.¹²⁸

So, should we have a national initiative process to allow citizen input on federal legislation? Scholars have proposed such a process to allow citizens to initiate laws at the federal level, whether through a binding¹²⁹ or nonbinding vote.¹³⁰ In fact, some opinion polls have

Additionally, in 2012–13, planned spending reductions, primarily to education programs, will not occur. *Id.* But Prop. 31 failed. *California Proposition 31, Two-Year State Budget Cycle (2012)*, BALLOTEDIA, http://ballotpedia.org/wiki/index.php/California_Proposition_31_Two-Year_State_Budget_Cycle_%282012%29 (last modified Feb. 21, 2013). Prop. 31 would have established a two-year state budget and set rules for offsetting new expenditures and Governor budget cuts in fiscal emergencies. *Id.*

¹²⁴ Levinson & Stern, *supra* note 120, at 697 & nn.39–40.

¹²⁵ Colin H. McCubbins & Mathew D. McCubbins, *Proposition 13 and the California Fiscal Shell Game*, 2 CAL. J. POL. & POL’Y 1 (2010). See also Nicholas Hromalik, *Setting Aside Politicians: The Effects of Set-Aside Initiatives on California Local Governments*, 2 CAL. J. POL. & POL’Y 1 (2010) (arguing initiatives create “higher taxes on all”).

¹²⁶ IRI ELECTION RESULTS 2012, *supra* note 108, at 1.

¹²⁷ Garrett, *supra* note 106, at 138.

¹²⁸ Initiatives on various public policy issues have brought about fundamental changes in the United States, including, but not limited to: women gaining the right to vote; election of politicians through direct primaries; prohibition on state-funded abortions; creation of the eight-hour workday; legalization of physician-assisted suicide; placement of term limits on elected officials; adoption and abolishment of prohibition; abolishment of poll taxes; legalization of marijuana; and adoption of campaign finance reform. IRI BRIEF HISTORY, *supra* note 103, at 6.

¹²⁹ See, e.g., AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS 38 (1998); CRONIN, *supra* note 102, at 12–22, 41; Alan Hirsch, *Direct Democracy and Civic Maturation*, 29 HASTINGS CONST. L.Q. 185 (2002); Clayton P. Gillette, *Is Direct Democracy Anti-Democratic?*, 34 WILLAMETTE L. REV. 609, 618 (1998); Dennis W. Arrow, *Representative Government*

shown that the majority of Americans would favor a national statutory initiative.¹³¹ Yet, there has been no indication that Congress has the slightest interest in sharing with citizens any of its power to create laws. E-legislating may change this.

D. E-Legislating Under the Obama Administration

The petition and initiative efforts outlined above currently fail to give citizens any direct role in federal lawmaking beyond electing their representatives. E-legislating represents how electronic tools might change that dynamic. This section illustrates the growing significance of e-legislating by describing how Obama supporters have used, and plan to use, e-legislating to increase citizen involvement in the lawmaking process.

Obama's community organizer roots¹³² were reflected from the very start of his 2008 campaign. His message of inclusiveness and self-actualization resonated with voters, enabling him to motivate record numbers to register and vote.¹³³ It is no surprise that the very first document Obama signed when he took office in 2009 was the

and Popular Distrust: The Obstruction/Facilitation Conundrum Regarding State Constitutional Amendment by Initiative Petition, 17 OKLA. CITY U. L. REV. 3 (1992).

¹³⁰ DuVivier, *supra* note 78 (calling for a federal nonbinding initiative process to allow citizen votes on issues of national significance).

¹³¹ A national poll reflected backing for a national statutory initiative at a three-to-one margin (with fifty-seven percent of Americans favoring it and only twenty-one percent opposed). DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION* 176 (1989); *see also* CRONIN, *supra* note 102, at 4–5, 157–95 (1989); MAGLEBY, *supra* note 108 at 7, 12–14. Mike Gravel, a former U.S. Senator from Alaska, used the Internet to garner support for the National Initiative for Democracy, a proposed constitutional amendment and federal statute to establish procedures for citizens to make laws by ballot initiative. *See* Senator Mike Gravel, *Edwin and Joyce Koupal's Contribution to Democracy*, THE DEMOCRACY FOUNDATION (Sept. 1, 2001), <http://demofound.org/symposium/5.htm>; *National Citizens Initiative for Democracy*, THE DEMOCRACY FOUNDATION, http://ni4d.us/national_initiative (last visited July 12, 2013).

¹³² *See* BARACK OBAMA, *DREAMS FROM MY FATHER*, 164–206, 249–95 (2004).

¹³³ Approximately 146 million people were registered and 131 million people voted in the 2008 presidential election, an increase of four million registrations and five million votes from 2004. U.S. CENSUS BUREAU, U.S. DEPT. OF COMMERCE, *VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2008*, at 1 (2012), *available at* <http://www.census.gov/prod/2010pubs/p20-562.pdf>. The number of voters was the most ever in a presidential election, though the percentage of voter turnout did not set a record, possibly because of low Republican turnout. *Number of Votes Cast Set Record, But Voter Turnout Percentage Didn't*, CNN, Nov. 6, 2008, http://articles.cnn.com/2008-11-06/politics/voter.turnout_1_voter-turnout-curtis-gans-absentee-ballots?_s=PM:POLITICS.

Memorandum on Transparency and Open Government.¹³⁴ In this memorandum, Obama announced his vision that government should stand on three pillars—transparency, participation, and collaboration—and that this vision was to be implemented through digital technology.¹³⁵

While some argue that Obama's pledge was more symbolic than substantive,¹³⁶ a number of federal agencies responded with innovative digital outreach projects. NASA used social media tools to promote interest in its missions.¹³⁷ The Federal Communication Commission's website allowed citizens to track its broadband plan and share information with the agency through Twitter.¹³⁸ In addition, the *Recovery.gov* website provided fiscal transparency by allowing anyone to track spending on projects funded by the Stimulus bill and to report fraud or waste.¹³⁹

¹³⁴ Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4685 (Jan. 21, 2009) [hereinafter Transparency Memorandum].

¹³⁵ *Id.* at 4685; *see also* Memorandum from Peter R. Orszag, Director, Office of Mgmt. & Budget, on Open Gov't Directive to the Heads of Exec. Dep't & Agencies 9 (Dec. 8, 2009). The OMB directive lists, as one component of the Open Government plan:

Participation: To create more informed and effective policies, the Federal Government should promote opportunities for the public to participate throughout the decision-making process. Your agency's Open Government Plan should explain in detail how your agency will improve participation, including steps your agency will take to revise its current practices to increase opportunities for public participation in and feedback on the agency's core mission activities. The specific details should include proposed changes to internal management and administrative policies to improve participation.

- i. The Plan should include descriptions of and links to appropriate websites where the public can engage in existing participatory processes of your agency.
- ii. The Plan should include proposals for new feedback mechanisms, including innovative tools and practices that create new and easier methods for public engagement.

Id.

¹³⁶ Ronald J. Krotoszynski, Jr., *Transparency, Accountability, and Competency: An Essay on the Obama Administration, Google Government, and the Difficulties of Securing Effective Governance*, 65 U. MIAMI L. REV. 449, 459–75 (2011) (“The Obama Administration's Commitment to Transparency and Openness is Far From Total.”); *Testing Obama's Promise of Government Transparency*, BLOOMBERG (Sept. 27, 2012, 9:00 PM), <http://go.bloomberg.com/multimedia/bloomberg-checks-obama-transparency/> (providing an open government scorecard).

¹³⁷ *Connect and Collaborate with NASA*, NASA.GOV, <http://www.nasa.gov/connect/social/index.html> (last visited July 12, 2013).

¹³⁸ *FCC Connect*, FCC.GOV, <http://www.fcc.gov/connect> (last visited Feb. 28, 2013).

¹³⁹ *Track the Money*, RECOVERY.GOV, <http://www.recovery.gov/Pages/default.aspx> (last visited July 12, 2013).

Among the three pillars of government laid out, Obama's approach was perhaps most innovative in its commitment to "offer Americans increased opportunities to participate in policymaking and to provide their Government with the benefits of their collective expertise and information."¹⁴⁰ Thus, Obama sought to crowdsource the development of U.S. policy.

Although the concept of outsourcing problem solving to the public is not a new idea—at least one author observes that in the late nineteenth century, the Oxford English Dictionary was "history's first massively-crowdsourced collation of English knowledge"¹⁴¹—Obama's effort to use online platforms for developing policy was.

The January 2009 Memorandum only addressed action at the federal administrative level, but even before the election, candidate Obama had opened up new channels for citizen input on legislation and policy. Candidate Obama offered citizens the opportunity to submit ideas and questions to him through the *Change.gov* platform, and he received almost five million votes on some of the ideas submitted.¹⁴²

In addition, the Obama administration created something comparable to the constitutional right to petition. As discussed in Part II.B above, petitions are now routinely ignored by Congress. In

¹⁴⁰ Transparency Memorandum, *supra* note 134, at 4685. That portion of the memo states:

Government should be participatory. Public engagement enhances the Government's effectiveness and improves the quality of its decisions. Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge. Executive departments and agencies should offer Americans increased opportunities to participate in policymaking and to provide their Government with the benefits of their collective expertise and information. Executive departments and agencies should also solicit public input on how we can increase and improve opportunities for public participation in Government.

Id.

¹⁴¹ Nate Lanxon, *How the Oxford English Dictionary Started out like Wikipedia*, WIRED.CO.UK (Jan. 13, 2011) <http://www.wired.co.uk/news/archive/2011-01/13/the-oxford-english-wiktionary>.

¹⁴² However, when Obama tried similar participatory activities as President, such as the Open Government Initiative, the number of participants dropped with each phase, down to approximately 2000 in the last. SCOTT BITTLE, CHRIS HALLER & ALISON KADLEC, CENT. FOR ADVANCES IN PUB. ENGAGEMENT, PROMISING PRACTICES IN ONLINE ENGAGEMENT 5, n.6 (2009), available at http://www.publicagenda.org/files/pdf/PA_CAPE_Paper3_Promising_Mech2.pdf; Jesse Lee, *Open for Questions Round 2: Response*, CHANGE.GOV (Jan. 9, 2009), http://change.gov/newsroom/entry/open_for_questions_round_2_response/ (cited in Paul Johnston, *Transforming Government's Policy-Making Processes*, 2 EJOURNAL EDEMOCRACY & OPEN GOV'T 162, 162 n.2 (2010)).

response, the Obama administration attempted to create an electronic counterpart within the Executive branch. On September 22, 2011, the White House launched its “We the People” website.¹⁴³ Through the website, the administration pledges to respond to any petition that meets its threshold of signatures.¹⁴⁴ Unlike Congress, which could reinvigorate the petition process to set its legislative agenda, the White House may not have the power to use this platform to create laws. However, the electronic petition platform at least provides an outlet for citizen frustration and some kind of government response to petitions, which was foreclosed when Congress adopted its current procedure.

The “We the People” platform has opened discussion on important issues, but some citizens also have abused it. For example, a Colorado man filed a petition on November 14, 2012, for the “construction of a Death Star by 2016.”¹⁴⁵ That petition met the threshold for signatures, thus requiring a government response.¹⁴⁶

In addition to his “We the People” website and his Memorandum on Transparency and Open Government, President Obama declared, when he first welcomed his senior staff and cabinet to the White House in 2009, that “the way to solve the problems of our time, as one nation, is by involving the American people in shaping the policies that affect their lives.”¹⁴⁷ His use of the phrase, “You and I, as citizens” in his 2013 inauguration address echoes the same

¹⁴³ Katelyn Sabochik, *Petition the White House with We the People*, WHITE HOUSE.GOV (Sept. 22, 2011), <http://www.whitehouse.gov/blog/2011/09/22/petition-white-house-we-people>.

¹⁴⁴ *We the People, Terms of Participation*, WHITE HOUSE.GOV, <https://petitions.whitehouse.gov/how-why/terms-participation> (last visited July 12, 2013) (indicating that the signature threshold was raised to 100,000 on January 15, 2013).

¹⁴⁵ *Secure Resources and Funding, and Begin Construction of a Death Star by 2016*, Petition to the Obama Administration, WHITE HOUSE.GOV, <https://petitions.whitehouse.gov/petition/secure-resources-and-funding-and-begin-construction-death-star-2016/wlKzFkN> (last visited July 12, 2013).

¹⁴⁶ At the time the Death Star petition was filed, the threshold for signatures was only 25,000. The petition received 27,456. Mitchell Byars, *Longmont Man’s Petition for U.S.-Built Death Star Draws Support*, DENVER POST (Dec. 15, 2012), http://www.denverpost.com/news/ci_22196415/longmont-mans-petition-u-s-built-death-star?

¹⁴⁷ Barack Obama, President of the United States, Remarks by the President in Welcoming Senior Staff and Cabinet Secretaries to the White House (Jan. 21, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-welcoming-senior-staff-and-cabinet-secretaries-white-house>.

theme.¹⁴⁸ And the Organizing for Action campaign seems to be taking this goal to the new level of e-legislating.

With the current representative government, U.S. citizens have a significant voice during elections but virtually no voice between election cycles when actual laws are made. During the legislating phase, large donors and interest groups with enough money to hire lobbyists enjoy a significant advantage in terms of gaining legislators' attention. The average citizen is relegated to expressing his or her opinion at town hall meetings or through an occasional phone call or letter that is easily lost among the thousands received each week.¹⁴⁹

What will Organizing for Action do to shift the balance so that average citizens will have more say in legislating? The website is vague: "this is your movement . . . it can do whatever you make of it."¹⁵⁰ Presumably, the approach will involve campaigns with "ladders-of-engagement,"¹⁵¹ combining many of the actions in electronic as well as traditional forms: petitions, letter writing, calls to representatives, rallies, and lobbying opportunities. What will be different is the potential for intensifying all of these activities through the power of the Internet and social media so that they become more effective. Thus, e-legislating will allow a difference-in-degree of citizen activity.

Will e-legislating also allow citizen participation of a fundamentally different kind? Perhaps so. The extension of the fundraising function will allow groups to prepare and air informational ads to hold legislators accountable. In addition, the following section will describe in more detail some of the distinctions between e-legislating and traditional citizen input into federal legislation. The goal is to use the "powerful transformative potential" of digital technologies to "begin a new chapter in citizen participation and public accountability."¹⁵²

¹⁴⁸ Barack Obama, President of the United States, 2013 Inaugural Address (Jan. 21, 2013), available at <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/21/transcript-president-obama-2013-inaugural-address/>.

¹⁴⁹ E-mail from Mark Udall, U.S. Senator for Colorado, to author (Jan. 28, 2013) (on file with author) (estimating he receives 10,000 letters each week).

¹⁵⁰ Michele Obama, *Organizing for Action: You In?*, BARACKOBAMA.COM, <https://my.barackobama.com/page/s/organizing-for-action> (last visited July 12, 2013).

¹⁵¹ David Karpf, *Online Political Mobilization from the Advocacy Group's Perspective: Looking Beyond Clicktivism*, 2 POL'Y & INTERNET 7, 16 (2010).

¹⁵² Jennifer Shkabatur, *Digital Technology and Local Democracy in America*, 76 BROOK. L. REV. 1413, 1416 (2011).

III DISTINGUISHING CHARACTERISTICS OF E-LEGISLATING

The Internet was a critical component of Revolution 2.0's success. Without the ability to enter the world stage cheaply, the Facebook and Twitter coordinators of the revolution would not have been able to gain global support and protection because of the world's scrutiny of the situation. Without the safe space of the Internet, the coordinators could have been more easily isolated and silenced by authorities.¹⁵³ Without the speed and flexibility provided by the Internet to adjust to on-the-ground conditions, the groups of protestors could have been crushed by government forces.¹⁵⁴ Without instantaneous posts that included compelling, emotional music and graphics, Khaled's death and the following demonstrations would not have had the personal relevance needed to create community involvement and motivate mass participation.¹⁵⁵

While some authors argue that online activism simply represents a "difference-of-degree rather than a difference-in-kind" from traditional activism,¹⁵⁶ this section will address the "unique characteristics" of the Internet¹⁵⁷ and some of the arguments that have been made about whether these characteristics justify different

¹⁵³ As Ghonim noted at the end of his book,

The Egyptian revolution showed us that the great mass of people who are normally risk-averse, aren't normally activists, can become extraordinarily brave and active when they unite together as one. It was like an offline Wikipedia, with everyone anonymously and selflessly contributing efforts toward a common goal. . . . Revolutions of the past have usually had charismatic leaders who were politically savvy and sometimes even military geniuses. Such revolutions followed what we can call the Revolution 1.0 model. . . . [Egypt] was the Revolution 2.0 model: no one was *the* hero because *everyone* was a hero.

GHONIM, *supra* note 2, at 293–94.

¹⁵⁴ The protests swelled as news got out on the Internet. Rumors were that the government tried to block access, but some electronic messages could still get through. *E.g.*, GHONIM, *supra* note 2, at 184–86. Although the Syrian government claims it was not responsible, Internet access disappeared across the country for multiple days at the end of November 2012—raising fears of escalation of a government crackdown on the uprising. Catherine Smith, *Syria's Internet Reportedly Shut Down*, HUFFINGTON POST (Nov. 29, 2012), http://www.huffingtonpost.com/2012/11/29/syria-internet-down_n_2211458.html.

¹⁵⁵ It was a photograph of Khaled's battered face that first motivated Ghonim to launch the webpage. GHONIM, *supra* note 2, at 59. Ghonim posted a stirring video with music instead of using "the regular practice of lawyers and human rights defenders, who used facts and statistics to garner support. Instead, the video created an emotional bond between the cause and the target audience." GHONIM, note 2, at 86–87.

¹⁵⁶ Karpf, *supra* note 151, at 9.

¹⁵⁷ *Ashcroft v. ACLU*, 535 U.S. 564, 583 (2002).

treatment of Internet data under the law. It also will consider whether the use of the Internet may result in a different quality of response from citizens and legislators that could undermine its effectiveness. This section concludes with the ultimate question: whether e-legislating efforts will have any greater impact than conventional lobbying campaigns.

A. Size and Geographic Scope of the Internet

“A *unique and wholly new medium of worldwide human communication.*”¹⁵⁸

Thomas Paine’s best-selling pamphlet *Common Sense* helped drive the American Revolutionary War. Advocating an alternative to British rule, its influence spread as 120,000 to 150,000 copies were printed in 1776 and circulated across colonial America, where it was read aloud in homes and taverns.¹⁵⁹ But the ability of the printing press to disperse information is no match for the eye-popping numbers of the Internet for which the term “going viral” was coined to capture the enormity of the phenomenon.¹⁶⁰ With one post, the Egyptian revolutionaries expanded their reach twenty times, leading them to conclude that Mubarak’s “usual methods of oppression might not work in this new world.”¹⁶¹

While quantity of participants may be the most obvious distinction between traditional input to legislators and e-legislating, the additional number of participants may be detrimental if their input is duplicative and unfiltered. In the context of e-rulemaking, some agency recipients have objected to the extra administrative and mental burden of sorting through vast numbers of comments to find those with relevance and focus.¹⁶² As with the number of legal arguments

¹⁵⁸ *Reno v. ACLU*, 521 U.S. 844, 850 (1997) (quoting *ACLU v. Reno*, 929 F.Supp. 824, 844 (1996)). The Court in *Reno* held the Communications Decency Act of 1996 was facially overbroad and unconstitutional. *Reno*, 521 U.S. at 864–65.

¹⁵⁹ Robert A. Ferguson, *The Commonalities of Common Sense*, 57 WM. & MARY Q. 465, 466 (2000).

¹⁶⁰ Merriam-Webster Dictionary defines “viral” as “quickly and widely spread or popularized especially by person-to-person electronic communication.” *Viral*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/viral> (last visited July 12, 2013).

¹⁶¹ The Revolutionaries went from about 5000 to 7000 followers to 120,000 followers with one post. GHONIM, *supra* note 2, at 84–85.

¹⁶² Benjamin, *supra* note 45, at 909.

in a brief, the inclusion of weaker points may dilute the impact of stronger ones.

Closely related to the numbers of participants is the world-wide scope of Internet postings. As the Supreme Court has noted, “the geographic reach of the Internet is greater than anything which could have been designed in colonial times.”¹⁶³ This combination of breadth, along with the inability to control the geographic location of its audience, split the Court in its consideration of the impact of the Internet when determining whether the Child Online Protection Act violated First Amendment guarantees of free speech.¹⁶⁴ This geographic breadth may be an advantage for getting information out to all parts of the country. However, in the legislative context, effective pressure on a particular representative will most likely come from those who have the power to vote him or her out of office. Thus, identifying whether those commenting are constituents is important.

B. Anonymity of and Cost to Internet Speakers

“[E]asy and cheap to reach a worldwide audience.”¹⁶⁵

The standing joke is that we are younger, taller, and better looking on the Internet than in real life.¹⁶⁶ This is because the audience usually does not know the person behind the other screen. Anonymity was critical in Egypt’s Revolution 2.0. When the authors of the revolutionary “We Are All Khaled” website accidentally released data via their posts that could have been used to identify them, they panicked, believing the government would quickly seek them out and silence them.¹⁶⁷ This has been the fate of some who spoke their minds

¹⁶³ *Smith v. Doe*, 538 U.S. 84, 99 (2003). The *Smith* court held that the Alaska Sex Offender Registry Act was not punitive even though the data was posted on the Internet, which provided for widespread public access outside of the state. *Id.* at 105, 109.

¹⁶⁴ *Ashcroft v. ACLU*, 535 U.S. 564, 565, 586 (2002) (remanding case to the Third Circuit to decide which provisions of the Act might be too broad).

¹⁶⁵ *Id.* at 595.

¹⁶⁶ A most recent example is the “Catfish” phenomenon, popularized by a documentary movie and television show that chronicles online dating relationships where one or both parties have misrepresented their identity. The recent saga with Notre Dame star football player Manti Te’o raised the issue to national prominence. *See, e.g.*, Ben Zimmer, *Catfish: How Manti Te’o’s Imaginary Romance Got Its Name*, BOSTON GLOBE, Jan. 27, 2013, <http://www.bostonglobe.com/ideas/2013/01/27/catfish-how-manti-imaginary-romance-got-its-name/inqu9zV8RQ7j19BRGQkH7H/story.html>.

¹⁶⁷ Ghonim refused to disclose that he was the administrator of the Kullena Khaled Said webpage and panicked when he made mistakes that led a few to discern who he was. GHONIM, *supra* note 2, at 115.

in other countries,¹⁶⁸ and it illustrates the significance of this unique aspect of the Internet forum in those high-risk contexts.

Internet anonymity can also be valuable in the United States. Although the First Amendment protects us from the government, we may need to fear extremists who issue death threats if what we have posted does not mesh with their beliefs. The Supreme Court addressed the role of anonymity in *Doe v. Reed*.¹⁶⁹ In *Reed*, plaintiffs sought a preliminary injunction to bar public disclosure of referendum petitions.¹⁷⁰ Plaintiffs were concerned that interest groups planned to post the petitions on the Internet, exposing the signatories to possible harassment.¹⁷¹ The Court held that Washington State's Public Records Act, which required the disclosure, did not violate the First Amendment.¹⁷²

Justice Scalia's concurring opinion distinguishes the roles citizens can play in the legislative process as discussed in Part II above. While the United States currently allows anonymity during the election stage through a secret ballot,¹⁷³ Scalia observes that "the exercise of lawmaking power in the United States has traditionally been public. . . . [E]ven when the people *asked* Congress for legislative changes—by exercising their constitutional right to 'to petition the Government for a redress of grievances,' U.S. Const., Amdt. 1—they did so publicly."¹⁷⁴

Scalia also noted in his *Reed* concurrence that when a voter signs a referendum petition, "he is acting as a legislator."¹⁷⁵ Therefore, "electioneering disclosure cases," which allow anonymity, are

¹⁶⁸ Keeping anonymity is probably a smart move. For example, thirty-five-year-old activist blogger Sattar Beheshti fell under the custody of Iran's cyberpolice and was killed in early November of 2012. The Associated Press, *Blogger's Death in Iran Opens Window on Cyber Patrols*, DENVER POST (Nov. 23, 2012, 12:01 AM), http://www.denverpost.com/nationworld/ci_22050493?source=rss.

¹⁶⁹ *John Doe No. 1 v. Reed*, 130 S. Ct. 2811 (2010).

¹⁷⁰ *Id.* at 2813.

¹⁷¹ *Id.* at 2825.

¹⁷² *Id.* at 2821.

¹⁷³ Scalia notes, however, that this was not always the case: "Legislating was not the only governmental act that was public in America. Voting was public until 1888 when the States began to adopt the Australian secret ballot." *Id.* at 2834.

¹⁷⁴ *Id.* at 2833–34. The opinion goes on to say, "The petition was read aloud in Congress. Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 726 (2002). . . . Even when the people exercised legislative power directly, they did so not anonymously, but openly in town hall meetings. See generally J. ZIMMERMAN, *THE NEW ENGLAND TOWN MEETING* (1999)." *Id.* at 2834.

¹⁷⁵ *Reed*, 130 S. Ct. at 2833.

distinguishable from the *Reed* situation, which involved a referendum, and therefore, legislative action.¹⁷⁶

While there may be advantages to anonymity, it is less valuable in the context of e-legislating, which encourages others to influence their legislators on a vote. Contacts with familiar sources usually prove most persuasive; i.e., in the Obama campaign, social networks made a difference—Tweets and Facebook messages from friends were more effective than ads.¹⁷⁷ Also, relying on a trusted organization, whether the National Rifle Association or the Sierra Club, can influence group-based decision-making, as discussed below.

The low cost of entry and efficiency also are significant in the e-legislating context. The Internet can be a great leveling force for the general public as against the moneyed interests, which tend to dominate political discourse under conventional methods. Those with more money can hire lobbyists, who are cost prohibitive for more grass-roots groups. The Internet may be able to empower traditionally less-represented groups to inexpensively organize and mobilize to influence elected officials on the same level as their richer counterparts.¹⁷⁸

While addressing the role of money, we must consider the cynicism of some who believe the main object of many social media campaigns is not to encourage public involvement, but rather to raise funds.¹⁷⁹ There is little doubt that electronic mediums have allowed a

¹⁷⁶ *Id.* at 2833 n.3.

¹⁷⁷ See, e.g., Richard Parker, *Social and Anti-Social Media*, N.Y. TIMES (Nov. 15, 2012, 9:16 PM), <http://campaignstops.blogs.nytimes.com/2012/11/15/social-and-anti-social-media/> (noting that the Obama campaign's ability to move beyond "traditional media" was a big factor in connecting with voters, particularly Hispanics, African Americans, and voters under thirty).

¹⁷⁸ For example, in the October 2012 presidential debate when Mitt Romney used the phrase "binders full of women," the social media universe exploded. At one point during the debate, the phrase was mentioned 40,000 times in *one minute* on social media. Timothy Stenovec, '*Binders Full of Women*': Mitt Romney's Comment Goes Viral, HUFFINGTON POST (Oct. 16, 2012, 11:33 PM), http://www.huffingtonpost.com/2012/10/16/bindings-full-of-women-mitt-romney_n_1972337.html. Pay equity and other women's rights issues immediately became a topic of paramount political importance in the campaign. Michael D. Shear, *Debate Moves Women to Fore in Race for the White House*, N.Y. TIMES (Oct. 17, 2012), http://www.nytimes.com/2012/10/18/us/politics/obama-and-romney-focus-on-efforts-to-woo-women.html?_r=0.

¹⁷⁹ As most of the Internet campaigns include a "donate" button, some cynics believe fundraising and not activism is the motivation for many of these campaigns. For example, the *Kony 2012* video, which went viral in early 2012, purported to raise public consciousness about the atrocities of Ugandan-born rebel leader Joseph Kony, who for almost twenty years terrorized villagers in at least four countries in central Africa—killing tens of thousands of adults, turning young boys into soldiers, and turning girls into sex

broader base of supporters to donate small amounts to a candidate or cause to counteract large donations from a few.¹⁸⁰ As an example, the

slaves. The video was a fundraising success far exceeding expectations. *Kony 2012*, INVISIBLE CHILDREN, invisiblechildren.com/kony/ (last visited July 13, 2013). The sponsoring group, Invisible Children, received millions of dollars in donations and ran out of its “Kony Kits” within days, so a website was created for consumers to shop for *Kony 2012* t-shirts and other merchandise. SHOP MOS, http://www.shopmos.com/kony-2012?i=us_1_34684~5336690021 (last visited Feb. 25, 2013). See also Mike Pflanz, *Joseph Kony 2012: Growing Outrage in Uganda over Film*, THE TELEGRAPH (Mar. 8, 2012, 4:40 PM), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/uganda/9131469/Joseph-Kony-2012-growing-outrage-in-Uganda-over-film.html>. (“Invisible Voices has faced criticism over its finances. Of more than £6 million it spent in 2001, less than £2.3 million was for activities helping people on the ground. The rest went on ‘awareness programmes [sic] and products’, [sic] management, media, and others.”); Tory Shepherd, *Remember Kony 2012? Well, It’s 2013. What happened?*, NEWS.COM.AU (Jan. 11, 2013, 6:15 AM), <http://www.news.com.au/world-news/remember-kony-2012-well-its-2013-what-happened/story-fndir2ev-1226550575923> (“The organisation [sic] which urged grassroots campaigners to help take down the African warlord Joseph Kony made nearly \$20 million last year with its Kony 2012 campaign. And according to Invisible Children’s 2011–12 financial report, the company still has \$12.6 million of campaign funds in its coffers after spending \$6.7 million on expenses.”). Similarly, interest groups may be using social media petitions and lobbying efforts to fire up constituents and increase traffic to their Websites. Some grants require statistics of such Internet traffic as evidence that a potential recipient of funding is worthy. Therefore, one might cynically conclude that many of the initiators of these campaigns know that the signatures and letters that they are seeking will have little to no impact, yet they encourage these campaigns for their own financial benefit. Addressing this concern in more depth is beyond the scope of this Article. See, e.g., MARK SURMAN & KATHERINE REILLY, SOCIAL SCIENCES RESEARCH COUNCIL, APPROPRIATING THE INTERNET FOR SOCIAL CHANGE: TOWARDS THE STRATEGIC USE OF NETWORKED TECHNOLOGIES BY TRANSNATIONAL CIVIL SOCIETY ORGANIZATIONS (2003), available at http://library.uniteddiversity.coop/Effective_Organising/Appropriating_the_Internet_for_Social_Change.pdf.

No one has yet figured out a reliable and dramatically successful new model for sustaining online technology and media projects.

In the mean time, the old techniques of donor dependency and extreme volunteerism are used to keep most projects alive. In some regards, there is nothing wrong with this. We have known for a very long time that socially relevant media and communications projects require outside support to provide.

The problem is that donors have both moved to more project based funding and put pressure on grantees to find new, independent revenue models.

Id. at 75; Dana R. Fisher, *The Activism Industry*, CBSNEWS.COM (Feb. 11, 2009), http://www.cbsnews.com/2100-215_162-2013172.html?pageNum=1 (talking about how activist organizations cannot afford to do grassroots outreach on their own, so they outsource it to organizations that specialize in outreach and canvass for many organizations).

¹⁸⁰ For example, a school bus monitor received over \$500,000 from Internet supporters after some teenagers harassed her and the video was posted on YouTube. Meaghan M. McDermott, *Fundraising Passes \$500,000 for Victim of Bus Taunting*, U.S.A. TODAY, <http://usatoday30.usatoday.com/news/nation/story/2012-06-21/bus-taunt-victim-fund-raising/55729944/1>, (last updated June 22, 2012, 5:11 PM).

Obama campaign used social media to raise \$147 million from donors who gave \$200 or less.¹⁸¹

Overall, the ability of the party posting Internet data to remain unknown or unauthenticated and the low cost of entry have mixed benefits and detriments. It allows the “bypassing [of] traditionally powerful communication gatekeepers.”¹⁸² Instead of having a few news networks controlled by the government or powerful corporate interests, the public can receive news from alternative, sometimes unknown, sources. This enables “Internet users to reconfigure their access to other people, information, services and technologies.”¹⁸³

While this process may positively disrupt normal balances of power and expectations, it also eliminates some of the filtering functions those gatekeepers performed. Elimination of the gatekeepers will require Internet users to be more vigilant in assuring accuracy, scientific support, or verification.¹⁸⁴ Transparency can help because it “enables the electorate to make informed decisions and give proper weight to different speakers and messages.”¹⁸⁵

C. Type, Speed, and Quality of Information Received

*“[D]ynamic and instantaneous forms of communication . . . actually represent[] a return to the tribal era, for network society displays many of the characteristics of preliterate oral societies.”*¹⁸⁶

¹⁸¹ The smaller donors of \$200 or less accounted for thirty-four percent of Obama’s total receipts from individuals. The less social-media savvy Romney campaign raised only \$39.5 million from such small donors, or eighteen percent of his total receipts from individuals. Julianna Goldman, *Obama Winning Social Media, If #Hashtagwars Really Matter*, BLOOMBERG (Oct. 21, 2012, 9:00 PM), <http://www.bloomberg.com/news/2012-10-22/obama-winning-social-media-if-hashtagwars-really-matter.html>.

¹⁸² DUTTON & PELTU, *supra* note 11, at 7.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 5–7.

¹⁸⁵ *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 916 (2010) (“With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation’s political speech advances the corporation’s interest in making profits, and citizens can see whether elected officials are ‘in the pocket’ of so-called moneyed interests. The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”) (internal quotation marks omitted) (citation omitted).

¹⁸⁶ David Howes, *e-Legislation: Law-Making in the Digital Age*, 47 MCGILL L.J. 39, 41–42 (2001).

Sociologists have documented that Internet rhetoric is more emotional.¹⁸⁷ Some of this may be due to the stimuli of the Internet; some to the speed of responses; and still more to anonymity and lack of accountability. Justice Scalia used this as an argument against anonymity in the legislative context:

Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which . . . exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism.¹⁸⁸

This section will address how information received electronically compares to more conventional modes, focusing on distinctions in type, speed, and quality.

1. Type

It is unlikely that the “We Are All Khaled” website would have gotten the response it did if it had not included photos of Khaled’s bashed and bloody head. Instead of focusing on “facts and statistics,” the revolutionaries used this photo and stirring videos to “creat[e] an emotional bond between the cause and the target audience.”¹⁸⁹

One of the Internet’s attractions is its ability to communicate in ways beyond the written word. As Internet speeds increase and video postings proliferate, more and more users are garnering information through multimedia—images, music, animations, and videos.

In his article, *e-Legislation: Law-Making in the Digital Age*, David Howes, an anthropology professor at Concordia University, does not address the *process* of e-legislating as discussed here. Instead, he describes the impact of the Internet on legislation from the perspective of communications studies. He argues:

[B]oth the construction and dissemination of legislation tend to be inflected by the implicit normative structure of the prevailing mode of communication (oral, print, or digital).

As cyberspace becomes more interactive, more sensuous, and more ubiquitous through new developments in network technology, the way in which legislation is conceptualized and experienced may

¹⁸⁷ See Matt Ridley, *Internet On, Inhibitions Off: Why We Tell All*, WALL ST. J., Feb. 18, 2012, <http://online.wsj.com/article/SB10001424052970204795304577221164189123608.html>.

¹⁸⁸ John Doe No. 1 v. Reed, 130 S. Ct. 2811, 2837 (2010) (Scalia, J., concurring).

¹⁸⁹ GHONIM, *supra* note 2, at 86–87. See also WE ARE ALL KHALED SAID, <http://www.elshaheed.co.uk/> (last visited July 13, 2013).

become less and less textual (*i.e.* informed by the icon of the statute book) and more like a song, a dance, or even a feast—all traditional forms of legal expression in oral societies.¹⁹⁰

Howes argues that digital modes more closely follow how humans have been mentally wired in oral societies in the past. Thus, they are “motivated by the ubiquity, multisensoriality (or organicity), and instantaneous-interactive quality of communication.”¹⁹¹ Instead of looking at how existing legal rules may be adapted to cyberspace, Howes believes cyberspace will fundamentally change the law itself.

For example, modern law has traditionally been text-based. “The doctrine of *legal positivism* is shown to derive from a text-based communications order. The legislative ideals associated with this doctrine, such as generality, promulgation, clarity and absence of contradiction, and top-down authority, all reflect the imprimatur of the printed text.”¹⁹²

On the other hand, “in pre- and post-typographic (*i.e.* oral and digital) communications orders, the predominant legislative values are flexibility, participation and accessibility, contextuality, and multicentric authority. These tenets are summed up by the notion of *legal interactivism*.”¹⁹³

What this could mean, in the context of e-legislating, is that more legislative decisions will be driven by multisensory data that is less normatively objective or statistical and more experientially based.

¹⁹⁰ Howes, *supra* note 186, at 42. Howes explains,

Communication on the Internet will hence no longer be limited to disembodied, linear typed messages and responses but will consist of dynamic, multisensory interactions between “re-embodied” virtual beings. . . . With the success of user-friendly software and Web sites, convenience has become another of the defining characteristics and thus one of the norms of Internet communication. . . . The advent of electronic communications has ushered in a new age of orality, for while electronic messages at present still primarily take written form, the interactive, dialogical character of Internet communication mimics the qualities of oral communication. . . . In an oral society the law is personal: it is always conveyed by one person to another, and hence never has the depersonalized objective character of a written text.

Id. at 46, 48, 51, 54.

¹⁹¹ Howes, *supra* note 186, at Preface.

¹⁹² *Id.*

¹⁹³ *Id.*

2. Speed

Many, including the Supreme Court, have acknowledged that “the Internet evolves at a rapid pace.”¹⁹⁴ While this quote referred to the changes in electronic technologies, it also reflects the dynamic and instantaneous communication that the Internet now makes possible.

The speed at which information is shared represents one of the unique attributes of the Internet. Thus, because of simultaneous Tweeting, speech is defined as it is in progress rather than viewed or digested in its entirety upon completion. This can fundamentally change the message the presenter intended, illustrated when Marco Rubio awkwardly lurched off screen to grab a drink of water during his rebuttal to President Obama’s 2013 State of the Union address. As comedian Stephen Colbert observed, “Don’t worry, Senator Rubio, nobody noticed—that you gave a speech.”¹⁹⁵

The fast, flexible, and sophisticated targeting that the Internet allows was critical in Revolution 2.0 and even more so in the Obama campaign. This agility empowers groups that might otherwise be outgunned to make more surgical and strategic strikes. This may prove pivotal in the context of e-legislating. In the past, only those with enough resources to have lobbyists covering the Capitol full-time could have their voices heard during critical votes. Now, social media puts a broad public spotlight on everything that Congress is doing.

Speed also has its drawbacks. “[T]he ‘tyranny of real-time’—round-the-clock, round-the-world news and opinion from a multitude of sources . . . [is] putting pressure on slower, more deliberative governance processes.” Therefore, in the e-legislating context, it will be best if systems can be established “to react in Internet time and in the Internet space . . . to respond rapidly to (mis)information disseminated online.”¹⁹⁶ Part IV below illustrates some of the problems when the Internet mobilizes mass action without providing full or accurate information.

¹⁹⁴ *Ashcroft v. ACLU*, 542 U.S. 656, 671 (2004).

¹⁹⁵ *The Colbert Report* (Comedy Central broadcast Feb. 13, 2013), available at <http://www.colbertnation.com/the-colbert-report-videos/423831/february-13-2013/state-of-the-rubio>.

¹⁹⁶ DUTTON & PELTU, *supra* note 11, at 7 (quoting RICHARD GRANT, OXFORD INTERNET INSTITUTE, *THE DEMOCRATIZATION OF DIPLOMACY: NEGOTIATING WITH THE INTERNET*, 5 (2004)).

3. *Quality*

Both citizen initiative and social media campaigns might be well-intentioned and motivated by genuine concerns, but most often they are persuasive, rather than educational, and consequently rely on a certain degree of manipulation. As some scholars have noted in the context of e-rulemaking campaigns:

[These campaigns use] techniques that rhetoricians and marketers have long used to motivate people to take a desired action: appeals to emotion and exploitation of fears and insecurities; hyperbolic, sometimes inflammatory, language and imagery; selective deployment of facts and strategic, sometimes misleading, juxtapositions or omissions of information.¹⁹⁷

In a citizen initiative campaign, those with money have a distinct advantage because they can bombard the airwaves with emotional and sometimes misleading ads.¹⁹⁸ To counteract this, some governments have enacted reforms that require the dissemination of objective summaries of the ballot measures. In addition, these ballot pamphlets may allow proponents and opponents of an initiative equal opportunities to make their case for or against the measure.

The relative lack of expense in mounting an Internet e-legislating campaign can be an equalizing and positive factor. This is significant because, unlike citizen initiatives and the election campaigns, which run in regular cycles, e-legislating requires daily diligence as measures move through Congress. The ability to mount social media campaigns on a daily basis also means they need more “pop” to catch our attention among the daily competing messages in our inboxes. Unfortunately for citizens who want to make an informed choice, these campaigns also do not have neutral forums, like the ballot pamphlet, to allow balanced presentation of both sides. Furthermore, social media campaigns have little incentive to provide their targets with follow-up links to find more balanced or complete coverage of the issues. Consequently, even if citizens want to know more, it can be very time consuming and challenging for them to find more comprehensive information to make informed choices.

The effort to have campaigns stand out can lead to oversimplification of complex issues.¹⁹⁹ Citizen initiatives may

¹⁹⁷ *Rulemaking vs. Democracy*, *supra* note 45, at 141–42.

¹⁹⁸ K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 WAKE FOREST L. REV. 221, 245–46 (2005).

¹⁹⁹ Oversimplification might be appropriate in the Joseph Kony situation. Beth Rowen, *The World's Most-Wanted Fugitives*, INFOPLEASE, <http://infoplease.com/world/statistics>

include pages of graduate-level language,²⁰⁰ but the campaigns reduce those issues to sound bites and slogans, and the citizen's choice is ultimately a simple "yes" or "no." Similarly, social media campaign messages must fit on a webpage or within the 140 characters of a Tweet.

The oversimplification of complex issues into "starkly us-or-them, all-or-nothing terms"²⁰¹ to encourage mass action has resulted in bizarre outcomes. Lack of citizen education about the issues upon which they are voting and misleading language has influenced citizens to vote contrary to their intent. Voters can "substitute voting cues for substantive policy knowledge," which can result in decisions that are not always "welfare-improving."²⁰²

While this section focused on the information citizens receive in e-legislating campaigns, the following will address citizen responses to that information.

D. Type & Quality of Citizen Response

"[L]ow-threshold civic engagement"²⁰³

Some applaud virtual public participation as a positive trend—a signal that individuals are turning away from their personal needs,

/most-wanted-fugitives.html (last visited July 13, 2013). The International Criminal Court's designation of Kony as the most wanted war criminal provided independent verification that action against him is just. However, other issues arguably have less obvious villains. For example, the Keystone XL pipeline is controversial, but stopping the exportation of the tar sand oils to the United States will not prevent Canada from exporting the oil to China instead. *Did Obama Push Canada into China's Arms by Rejecting the Keystone Pipeline?*, THE WEEK, (July 25, 2012), <http://theweek.com/article/index/231023/did-obama-push-canada-into-chinas-arms-by-rejecting-the-keystone-pipeline>.

²⁰⁰ MAGLEBY, *supra* note 108.

²⁰¹ *Rulemaking vs. Democracy*, *supra* note 45, at 141–42.

²⁰² Craig M. Burnett, Elizabeth Garrett & Matthew D. McCubbins, *The Dilemma of Direct Democracy*, 9 ELECTION L.J. 305, 305 (2010). Here is a specific example: In an effort that seemed designed to confuse voters, Occidental Petroleum (Oxy) introduced a ballot initiative in 1988 to defeat a competing initiative it opposed, Proposition O, which would bar Oxy's drilling beneath a coastal community near Los Angeles. Occidental's competing initiative, Proposition P, permitted Oxy's *coastal* drilling, but was marketed as opposing *offshore* drilling. Proposition O passed with 52.3% of the vote; Proposition P failed with only 34.2% of the vote. Tedd Vollmer & Tracy Wood, *Anti-Drilling Prop. O Wins as Prop. P Loses*, L.A. TIMES, Nov. 9, 1988, http://articles.latimes.com/1988-11-09/news/mn-444_1_drilling-project.

²⁰³ Bill Sherman, *Your Mayor, Your "Friend": Public Officials, Social Networking, and the Unmapped New Public Square*, 31 PACE L. REV. 95, 102 (2011) (addressing local government restrictions on social networking and fears of violating campaign finance, open meeting, FOI, and government ethics laws).

even if briefly, to attempt a measure of altruism or personal responsibility. At least one study showed that Internet “information exchange” correlated positively with “life contentment” in contrast to Internet “social recreation,” which correlated negatively.²⁰⁴ Sadly, the same study found that the increased political engagement fostered by online political discussions did not correlate to “increased levels of political knowledge”²⁰⁵:

The fundamentals of democracy assume a knowledgeable public, one that is capable of representing its own self-interest effectively. A healthy democracy, then, should see tandem movement between political knowledge and political participation. Here we find that while online group membership predicts increased levels of offline political participation, we do not see an equally significant effect on the levels of political knowledge.²⁰⁶

When the authors examined the social media wall posts in the study database, they found most of the posts to be opinionated, incoherent, or lacking support. These posts were low quality, reinforcing existing prejudices, and exposing group members to little new, well-articulated, enlightening, or educational information.²⁰⁷ These findings are consistent with others who have concluded that:

[I]dealists hoping that social networks would enable a high-minded process of deliberative democracy are likely to be disappointed—

²⁰⁴ Jessica T. Feezell, Meredith Conroy & Mario Guerrero, *Facebook is . . . Fostering Political Engagement: A Study of Online Social Networking Groups and Offline Participation*, Presentation at the American Political Science Association Meeting 3 (2009) (citing D.V. Shah, N. Kwak & Holbert 2001 for the conclusions about contentment, etc.). A study of 790 randomly selected wall posts by 455 undergraduate students at a public university in California (nearly seventy percent of which declared Political Science as their major) to assess the quality of online political discussion groups and the effects on political engagement found the following:

- 1) Online groups encourage offline political participation—this result is consistent with a 2008 study that also showed the chat rooms, political email correspondence, and online news exposure predict higher voting rates; and
- 2) “[I]ncreased online political group membership . . . [has] not increased levels of political knowledge.”

Id. at 3–5.

²⁰⁵ Feezell, *supra* note 204, at 9, 16. A study of eParticipation in the EU also concluded that two key obstacles encountered included (1) “lack of awareness and information for the citizens about what is being decided” and (2) lack of the necessary “expertise and knowledge sophistication often required to make a contribution to arguments.” Thanassis Chrissafis & Mechthild Rohen, *European eParticipation Developments: From Ad Hoc Experiences Towards Mass Scale Engagement*, 2 *EJOURNAL EDEMOCRACY & OPEN GOV’T* 89, 91–92 (2010).

²⁰⁶ Feezell, *supra* note 204, at 15–16.

²⁰⁷ *Id.*

after all, study after study has demonstrated that online discourse is factually unreliable, consists of opinion rather than objective information, creates “echo chambers” in which people only talk to or hear from those who already agree with them, and therefore reinforce polarization in politics.²⁰⁸

Assuming that citizens would take the time if a proper online forum were created, some argue that politicians and public officials can facilitate civil discussions and debates by establishing public online spaces and the rules by which they are moderated, just as all other democratic forums have been governed by rules of order. These forums might serve a function similar to the balanced or neutral ballot pamphlets created for citizen initiated measures. The tricky part would be structuring and monitoring discussions to avoid “sabotage and distort[ion]” and “to defuse flare-ups and disruptions.”²⁰⁹

Others place blame for the decrease in political knowledge not on those disseminating the information but upon the lack of “cognitive investment”²¹⁰ of those gathering it. In an e-electioneering context, research shows that voters have little incentive to invest the time to conduct sufficient research to choose candidates for office who reflect their preferences on pivotal issues.²¹¹ Any type of public participation is valued in electoral democracy as “[v]oters are asked for outcomes, not reasons.”²¹² Consequently, some studies have concluded that an

²⁰⁸ Sherman, *supra* note 203, at 102 (quoting SUNSTEIN, REPUBLIC.COM 2.0, *supra* note 32, at 25); DUTTON & PELTU, *supra* note 11, at 21 (“Unregulated forums tend to become boxing rings for the extremes of an argument.”).

²⁰⁹ DUTTON & PELTU, *supra* note 11, at 21 (suggesting the stage at which online consultation takes place—saying e-petitions are most appropriate for highlighting issues not yet widely debated). Also, “web design tools . . . include advice to citizens on how to engage with government officials in non-abusive ways, while clearly making the points they wish to raise.” *Id.* at 22.

²¹⁰ *Rulemaking vs. Democracy*, *supra* note 45, at 135. “[T]he participatory model of electoral democracy contains fewer incentives for citizens to make the cognitive investment needed to form higher information or higher thought preferences. The result, as voting research repeatedly shows, is that many voters are unaware of, or mistaken about, the record and positions of candidates for major office *even on policy issues that they identify as important*.” *Id.* These political outcomes are legitimate because there is no remedy to challenge them. *Id.* at 136; *see also* MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 263–64 (1997); MARTIN P. WATTENBERG, THE RISE OF CANDIDATE-CENTERED POLITICS: PRESIDENTIAL ELECTIONS OF THE 1980S, at 124–26 (1992); Kate Kenski & Kathleen Hall Jamieson, *Issue Knowledge and Perceptions of Agreement in the 2004 Presidential General Election*, 36 PRESIDENTIAL STUD. Q. 243 (2006).

²¹¹ *Rulemaking vs. Democracy*, *supra* note 45, at 135.

²¹² *Id.* “Even if exit polls reveal widespread ignorance, misinformation, or mistake, the outcome is legitimate so long as ballots are freely cast by eligible voters.” *Id.*

average of twenty-five percent of voters makes the “wrong” choice.²¹³

But this “wrong choice” conclusion might be challenged. Citizens make their choices about representatives on the basis of a number of criteria other than on a candidate’s stance with respect to one or two issues. Arguably, voters’ choices with respect to citizen initiatives or e-legislating should more closely align with their preferences.

However, even in the context of citizen initiatives, there is evidence of voter confusion. Despite single-subject restrictions,²¹⁴ much legislation is complex. Furthermore, choices can be confused when individuals also feel affiliation with a group. Interest groups and political parties are increasingly becoming involved with citizen initiatives and e-legislating campaigns.²¹⁵ As citizens learn of endorsements of particular pieces of legislation, it becomes more likely that voters will base their decisions on group-framed preferences.²¹⁶

Social media decisions may be even more prone to a lack of cognitive investment because of two fundamental characteristics of digital communication: convenience and high speed. For example, the current modus operandi for many e-legislating campaigns is to send individuals a message—by link, e-mail, Facebook, Twitter, etc.—that includes a pre-composed form letter or comment.²¹⁷ The recipient

²¹³ See, e.g., Richard R. Lau et al., *An Exploration of Correct Voting in Recent U.S. Presidential Elections*, 52 AM. J. POL. SCI. 395, 396–97 (2008) (analyzing data from 1972 through 2004 presidential elections, and defining a vote as “correct” if it was cast for the candidate whose expressed issue positions most closely matched the voter’s collection of expressed, weighted preferences). Lau et al. found that the proportion of “incorrect” votes averaged twenty-five percent of all voters and reached a highpoint of forty-nine percent in the 1980 election of Ronald Reagan; in several presidential elections, they concluded, the incidence and direction of incorrect voting affected the outcome. *Id.* at 401–02, 406. Cf. Larry M. Bartels, *Homer Gets a Tax Cut: Inequality and Public Policy in the American Mind*, 3 PERSP. ON POL. 15 (2005) (examining disconnect between voters’ knowledge of and expressed views about the increasing gap between rich and poor and their support for regressive Bush administration cuts in income and estate taxes).

²¹⁴ Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803 (2006).

²¹⁵ K.K. DuVivier, *Out of the Bottle: The Genie of Direct Democracy*, 70 ALB. L. REV. 1045, 1049–50 (2007) (noting that the parties have used the initiative process to boost turnout for candidates).

²¹⁶ Surprisingly, at least one study found that “better-informed voters . . . are no more likely to make reasoned decisions than those who are, by our measure, uninformed.” Burnett, Garrett & McCubbins, *supra* note 202, at 305.

²¹⁷ Some groups encourage personalization of the letters to give them more weight, but the vast number of identical submissions suggests that few take the time to do so. *Rulemaking vs. Democracy*, *supra* note 45, at 130 (citing Stuart W. Shulman, *The Case*

need not read the letter before sending it to legislators or making a donation to a cause.

Statistics show that virtual participation declines with any additional time or financial investment.²¹⁸ So while some e-legislating requests require the senders to input personal data, many make it easier by storing that data and requiring a single click on one's electronic device to deliver a message to one's representatives. Contrast this investment of time to what, in the past, required educating oneself on the issue enough to compose a letter, finding the proper address and a stamp, and traveling to a box or post office to get your letter into the mail. The current electronic activism is so easy and involves such a low-time-investment that it has been given the derogatory labels of "slacktivism"²¹⁹ or "clicktivism."²²⁰

Consequently, some argue that those responding to electronic campaigns base their positions less on objective information or deliberation, and instead on decision-making that is either (1) "spontaneous," meaning "rapid, low-thought extrapolations from the individual's general knowledge, underlying value system, and worldview" or (2) "group-framed," which are "based on information . . . provided by a group with which the individual feels affiliation."²²¹

Against Mass E-mails: Perverse Incentives and Low Quality Public Participation in U.S. Federal Rulemaking, 1 POL'Y & INTERNET 23, 34, fig.4, 35 (2009).

²¹⁸ Cameron Chapman, *10 Usability Tips Based on Research Studies*, SIX REVISIONS (Sept. 15, 2010), <http://sixrevisions.com/usabilityaccessibility/10-usability-tips-based-on-research-studies/>.

²¹⁹ Technologically-assisted forms of public participation are sometimes referred to as "slacktivism," a term used to "describe feel-good online activism that has zero political or social impact." Evgeny Morozov, *The Brave New World of Slacktivism*, NET.EFFECT (May 19, 2009), http://neteffect.foreignpolicy.com/posts/2009/05/19/the_brave_new_world_of_slacktivism.

²²⁰ By "liking" an online messaging campaign through Facebook, or by clicking a link embedded in an e-mail from your favorite nonprofit organization, clicktivists do nothing more than express support of a cause or generate an identical copy of a letter that is then electronically disseminated. It is impossible to determine whether participants in digital activism actively enhanced their "carbon-copy" submissions to reflect their own personal concerns or impacts, or whether they were content to simply click on the link and submit the comments pre-generated for them.

²²¹ *Rulemaking vs. Democracy*, *supra* note 45, at 130. Farina first sets out a typology of public preferences based on how they are informed: (1) Spontaneous Preferences; (2) Group-Framed Preferences; (3) Informed Preferences—"based on exposure to, and consideration of, reasonably full and accurate factual information"; and (4) Adaptive Preferences—"informed preferences modified by an assessment of the larger socio-political environment, legal and organizational constraints, and the claims of competing preferences [etc.] . . . [i.e.] what is workable over what is ideal." *Id.* at 132-34.

Spontaneous or impulse-based decisions are especially susceptible to the emotion that online communication fosters, so some might feel that group-framed decision-making is more legitimate. When Alexis de Tocqueville toured the United States in the 18th century, he observed that Americans “ultimately look upon public association as the universal, or in a manner the sole means, which men can employ to accomplish the different purposes they may have in view. . . . The art of association then becomes, as I have said before, the mother of action, studied and applied by all.”²²² Since that time, U.S. political engagement has frequently been spurred by group membership.

In 2000, Robert Putnam observed a decline in offline groups—paired by growth of online groups for civic engagement.²²³ A problem with this shift is that the anonymity of the Internet, as indicated in Part II.B above, can distort or hide a group’s true identity and mislead citizens to trust that group’s statements.²²⁴ Furthermore, as discussed in Part II.C above, the goal of e-legislating campaigns is to spur supporters into action. Because providing more balanced facts may be less effective in motivating members, there may be a tendency for some groups to oversimplify and to be inflammatory and selective in the short space they have for their messages.

E. Impact

*“It’s a new day . . . Brace yourselves.”*²²⁵

Few can argue that it is a bad thing to have citizens pay attention in a democracy—whether representative or direct. There is so much competition for our attention that it has become a praiseworthy event when someone turns away from sports team rankings or entertainment, even briefly, and becomes concerned with making a

²²² ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 639 (1835) (Bantam Dell ed. 2004).

²²³ ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (Arthur Goldhammer trans., 2000).

²²⁴ For example, The Alliance to Protect Nantucket Sound, one of the most recognized adversaries of what was hoped to be the first offshore wind farm in the United States, Cape Wind, raised \$11 million in 2006. Ninety percent of its funds were donated by Bill Koch and his wealthy friends, such as Paul Fireman of Reebok and Michael Egan, son to the founder of EMC Corp. Koch’s corporation, the Oxbow Corporation, makes over \$3.7 billion in sales annually through the sale of petroleum coke and coal mining. *Bill Koch: The Dirty Money Behind Cape Wind Opposition*, GREENPEACE, <http://www.greenpeace.org/usa/global/usa/binaries/2010/bill-koch-the-dirty-money-beh.pdf> (last visited July 15, 2013).

²²⁵ Weisman, *supra* note 1 (quoting Senator Chris Dodd).

decision about world or local issues.²²⁶ E-legislating, like citizen initiatives, can stimulate interest and debate about policy issues, reduce apathy and alienation, and increase political participation.²²⁷

One of the biggest questions is whether e-legislating will be any more effective than conventional grassroots lobbying campaigns. For any number of reasons—time, effort, a sense of not being effective—U.S. citizens have participated less, rather than more, in President Obama’s past invitations for them to become part of the policy-making process. For example, Candidate Obama received up to five million votes on some of the ideas submitted online before he became president,²²⁸ but when he tried similar participatory activities after he took office, the number of participants dropped to as low as two thousand.²²⁹

Politicians must pay attention to e-electioneering campaigns because citizen actions can translate into real consequences. For example, politicians who ignore constituents can be voted out. Similarly, most citizen initiative votes result in legislation or amendment of the state constitution, which, in many cases, state legislators have no power to change. In contrast, citizen input through the process of e-legislating is not binding. So how does, or should, it impact members of Congress? Because this is a new question, this section starts by looking to the extensive scholarship about assessing the appropriate role for social media in the administrative e-rulemaking context.²³⁰ It then looks at how e-legislating embodies some of the attributes of e-electioneering that might make legislators pay more attention to social media for e-legislating than they might in the e-rulemaking context.

²²⁶ DuVivier, *supra* note 198, at 236–38.

²²⁷ *Id.* at 236–38. See also Manabu Saeki, *Direct Democracy Paradox: State Fiscal Policies in the United States and the Threat of Direct Initiatives*, 23 REV. POL’Y RES. 915, 915 (2006) (listing some of the benefits of initiatives and citing Dye, 2000 pp. 40–42 and Schmidt, 1989).

²²⁸ Johnston, *supra* note 13, at 162. See BITTLE, HALLER & KADLEC, *supra* note 143; Lee, *supra* note 143.

²²⁹ Johnston, *supra* note 13, at 162.

²³⁰ This discussion addresses social media input in the “notice and comment” rulemaking process, which anticipates and mandates public input. Administrative agencies, alternatively, sometimes take on a quasi-judicial role that is meant to be a non-political decision-making process similar to that of the courts. Many administrative land use decisions—like the Keystone Excel Pipeline or approval of land use plans—would fit in this quasi-judicial category (e.g., Interior Board of Land Appeals) unless NEPA or Federal Land Policy and Management Act of 1976 (FLPMA) public comment requirements are triggered.

In a 2011 article, Nina Mendelson argued that agencies receiving a high volume of comments “occasionally acknowledge the number of lay comments and the sentiments they express [but] they very rarely appear to give them any significant weight.”²³¹ “Interviews with agency rule writers show that agencies do not value and often openly resent form letters.”²³² This may not be surprising considering that in a March 2011 rulemaking on Mercury and Air Toxics Standards, for example, EPA employees had to process about 3000 public comments per day.²³³ However, the problem is worse than simply “systematically discounting [social media comments]”;²³⁴ sometimes mass and electronic form-letter comments are “derided by agency staff.”²³⁵

Mendelson specifically advocates that agencies make more of an effort to be responsive, not only to technical comments, but also to “value-focused” or “value-laden” comments.²³⁶ Alternatively, she

²³¹ Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1363–64 (2011).

²³² Schlosberg et al., *supra* note 45, at 143.

²³³ *EPA Fact Sheet: Mercury and Air Toxic Standards—Adjustments from Proposal to Final*, ENVTL. PROTECTION AGENCY, <http://www.epa.gov/mats/pdfs/20111221MATSadjustmentsfs.pdf> [hereinafter *EPA Fact Sheet*] (last visited July 15, 2013). The EPA claimed to have received over 900,000 public comments. *Id.* Considering nine-month comment period, the agency would have had to analyze an average of 100,000 comments each month or approximately 3,000 per day. See also Lindsay McNamara, *Mercury and Air Toxics Standards (MATS) Series Part I: Overview*, SIERRA CLUB: DELAWARE CHAPTER (Oct. 9, 2012), <http://delaware.sierraclub.org/content/mercury-and-air-toxics-standards-mats-series-part-i-overview>; *News Releases from Headquarters: EPA Issues First National Standards for Mercury Pollution from Power Plants/ Historic ‘Mercury and Air Toxics Standards’ Meet 20-Year Old Requirement to Cut Dangerous Smokestack Emissions*, ENVTL. PROTECTION AGENCY (Dec. 21, 2011), <http://yosemite.epa.gov/opa/admpress.nsf/bd4379a92ceceac8525735900400c27/bd8b3f37edf5716d8525796d005dd086%21OpenDocument> [hereinafter *EPA News Release*].

²³⁴ Mendelson, *supra* note 231, at 1346.

²³⁵ *Id.* at 1363. Additionally, agencies frequently treat multiple postings through letters, postcards, or e-mails with little real engagement as evidenced by the lack of agency response to mass comments. *Id.* at 1343, 1363–64. Additionally, federal agencies should work with developers of social media to enhance processing capabilities. The same technology that negatively impacts timelines could help expedite the review process. Congress should direct funding toward research and development, partnering with social media developers, to develop technology that facilitates effective public participation. E-rulemaking, the use of technology to help facilitate public participation in agency rulemaking, may “have the potential to enhance . . . public understanding of and involvement in rulemaking.” *Id.*

²³⁶ The “value-focused” and “value-laden” terminology is Mendelson’s. Examples she provides include “whether reduced pollution is worth higher electricity bills or whether the risk presented by a convenient infant bath seat is tolerable.” *Id.* at 1371. These types of

notes, “[A]gencies should more candidly and publicly acknowledge that participation in rulemaking can serve only a limited function.”²³⁷

The second alternative—of relegating social media comments to a limited function—appears to be what Cynthia R. Farina and members of the Cornell eRulemaking Initiative advocate in a 2012 article.²³⁸ Farina argues that this limited function approach is more in line with the goals of the administrative rulemaking process. Even if new interactive technologies, such as Web 2.0, will allow “democracy on steroids”²³⁹ to assist in processing tsunamis of rule comments, there are other reasons not to place much weight on the growing quantities of input. Farina argues, “Rulemaking is not supposed to be a plebiscite.”²⁴⁰ The rulemaking process is legitimate only if based on a “formally transparent process of reasoned [data-driven] deliberation.”²⁴¹

Mendelson anticipated this response by noting “agency officials may see themselves as operating in an atmosphere of rational, technocratic analysis.”²⁴² Yet, Mendelson raised the issue that regulatory decisions are still “heavily value-laden, even when they also require deployment of scientific or other specialized knowledge.”²⁴³

comments are contrasted to those that are “sophisticated” and “advance the most technical concerns.” *Id.* at 1362.

²³⁷ *Id.* at 1346–47.

²³⁸ *Rulemaking vs. Democracy*, *supra* note 45.

²³⁹ *Id.* at 128.

²⁴⁰ *Id.* at 131 & n.37 (“Several scholars have expressed concern about e-rulemaking precisely because the kind of participation it evokes might push agencies towards plebiscitary decisionmaking.”). *See, e.g.*, David Schlosberg & John S. Dryzek, *Digital Democracy: Authentic or Virtual?* 15 *ORG. & ENV’T* 332 (2002); Bill Funk, *The Public Needs a Voice in Policy. But is Involving the Public in Rulemaking a Workable Idea?* *CPR BLOG* (Apr. 13, 2010), <http://progressivereform.org/CPRBlog.cfm?idBlog=F74D5F86-B44E-2CBB-ED1507624B63809E>; *cf.* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 *NW. U. L. REV.* 173 (1997) (examining problems in administrative contexts beyond rulemaking).

²⁴¹ *Rulemaking vs. Democracy*, *supra* note 45, at 135.

²⁴² Mendelson, *supra* note 231, at 1371.

²⁴³ *Rulemaking vs. Democracy*, *supra* note 45 (Farina commenting on Mendelson’s point), at 132; *see also* Mendelson, *supra* note 231, at 1371; Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 *MICH. L. REV.* 733, 736 (2011); Stephen Zavestoski, Stuart W. Shulman & David Schlosberg, *Democracy and the Environment on the Internet: Electronic Citizen Participation in Regulatory Rulemaking*, 31 *SCI., TECH., & HUM. VALUES* 383 (2006); Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 *ADMIN. L. REV.* 411, 461–68 (2005).

The remedy that the system has provided for challenging administrative decisions reflects normative weighting of priorities.²⁴⁴ In the rulemaking context, a decision can be changed on judicial review, but based on limited criteria only.²⁴⁵ “Peter Strauss has written compellingly of the importance of the culture of administrative legality, whose norms impel those who write the rules (and ultimately those who defend them in court) to justify regulatory outcomes on more than bare political preference.”²⁴⁶ Farina goes on

²⁴⁴ Mendelson acknowledges:

[J]udicial review requirements provide agencies with an incentive to take technical comments more seriously than value-focused comments. . . . [I]n applying the arbitrary and capricious review standard, judges often focus explicitly on the rational connection between the “facts found” and the “choices made” by an agency in rulemaking. Consequently, an agency’s failure to acknowledge these sorts of issues may be vacated on judicial review. . . . [E]fforts to argue that agencies are obligated to follow the weight of preferences in the comments have been roundly—and appropriately—rejected, as with one opinion, where the court wrote that agency rulemaking is not a process in which “the majority of commenters prevail by sheer weight of numbers.”

Mendelson, *supra* note 231, at 1370.

²⁴⁵ Administrative Procedure Act (APA) of 1946, 5 U.S.C. § 706 (2006). The APA states:

The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Id. § 706 (1), (2)(A)–(F).

²⁴⁶ *Rulemaking vs. Democracy*, *supra* note 45, at 139 (citing Peter L. Strauss, *Overseer, or “The Decider”?: The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007)).

to explain that “[r]easoned decisionmaking requires technocratic rationality” and not electoral democracy.²⁴⁷

So how does this analysis translate to e-legislating? As with e-rulemaking, the citizen comments in the e-legislating context are not binding votes. In fact, legislators often cannot tell if they are receiving a distorted sampling of public interest. In elections, whether for representatives or for a citizen initiative issue, the one-voter-one-vote rule prevails. In the contexts that social media is currently used—such as lobbying or rulemaking—there is rarely, if ever, any restriction on voting multiple times.

All evidence indicates that multiple voting is prevalent in social media campaigns. Some multiple voting may be unintentional. Because of different solicitations from different sources, it is possible that one person will sign a petition or send the same letter multiple times.

Other instances of multiple voting are deliberate. In a 2009 study, Stuart Shulman coined the term “plebers” in order to “describe commenters who are contributing to the plebiscitary notion of electronic rulemaking by sending two or more e-mails.”²⁴⁸ In some of Shulman’s studies, plebers accounted for more than half of the total comments received. Furthermore, Shulman’s work identified a few “Super-Plebers” who submitted more than 100 comments from a single e-mail address.²⁴⁹ Unless there is some way to distinguish input from single individuals as opposed to input from plebers, any conclusions based on the number of electronic messages from an e-democracy campaign must be suspect.²⁵⁰

²⁴⁷ *Rulemaking vs. Democracy*, *supra* note 45, at 139. Farina’s recommendations include three principles:

Principle 1: No Bread and Circuses—do “not actively facilitate public participation that [the government] does not value.” *Id.* at 150.

Principle 2: Abandon the Equal Treatment Norm—tailor information to different participant needs. *Id.* at 156–58.

Principle 3: Means Should Change; Ends Should Not—do not make participation too easy. “[L]owest common-denominator participation system design” should not be the goal. *Id.* at 160–61.

²⁴⁸ Shulman, *supra* note 45, at 35.

²⁴⁹ *Id.* at 35–36. One pleber sent the same comment 314 times. *Id.* at 36.

²⁵⁰ As noted above, confusion about the content might also make the results suspect. Because of errors, it may not effectively “gauge . . . citizen value preferences.” *Rulemaking vs. Democracy*, *supra* note 45, at 142. “A reasonable agency, in short, would assume that mass comments suffer from the kinds of fundamental defects in information quality and deliberative judgment that would (justifiably) prompt judicial reversal were such flaws found in its own decisionmaking.” *Id.* at 143.

Whether it is because of the possibility of multiple voting or simply because of other social media characteristics, initial empirical data shows that legislators, just like administrative agencies, tend to discount high volumes of social media comments in the legislating context. Yet the basis for the screening process is different. Agency decision-making is structured to be objective, so it is arguably reasonable to filter out “value-laden” input. In contrast, legislating is more like e-electioneering. These choices reflect a society’s values, so legislators may have more of an obligation than an administrative agency to respond to citizen input on values. Large numbers of comments can reflect the intensity of those values.

Furthermore, legislators are more politically attuned to the risks of ignoring mass public input if they are subject to reelection. If they fear political consequences, they are more likely than agency personnel to respond at least in some fashion.²⁵¹ This means e-legislating may have the potential to shift balances from those with power and money to those with little of either, from large corporations to non-profit groups, and from the entrenched few to the many.²⁵²

But legislator responses are calculated. For example, empirical data shows that legislators give different weight to emails from different groups—placing higher value on input from constituents than from interest groups.²⁵³ Furthermore, in contrast to the threat of an immediate election in the e-electioneering context, legislators may be more willing to take the risk of ignoring the desires of constituents who are not large donors in the context of e-legislating because the consequences are more remote.

Finally, Organizing for Action has not limited its efforts to electronic communications with Congress. Instead, social media has opened up the possibility of flash mobs and demonstrations to create

²⁵¹ In saying that some agency personnel deride mass comments, Cuéllar is talking about letters to agencies, which do not always give form letters the same weight as an individualized letter. Cuéllar, *supra* note 243, at 421–22. In contrast, legislators are more likely to take note of a high volume of letters, which could “entice legislators” to rebuke the agency and force the agency to reconsider the rule. *Id.*

²⁵² Emily Flynn Vencat, *The Big Power Shift*, NEWSWEEK (Jan. 28, 2007, 7:00 PM), <http://www.thedailybeast.com/newsweek/2007/01/28/the-big-power-shift.html> (noting how the World Economic Forum in Davos focused less on the geographical power shift from West to East, but more on how the digital revolution is shifting power from traditional institutions and the domains of nation-states and megacorporations into the hands of the masses).

²⁵³ Lilliard E. Richardson, Jr. & Christopher A. Cooper, *E-mail Communication and the Policy Process in the State Legislature*, 34 POL’Y STUD. J. 113, 126 (2006).

timely and focused political pressure. It is much easier to ignore thousands of protesters on the computer than it is to ignore thousands of protestors on the streets outside one's office.

IV

E-LEGISLATING IN ACTION

Although it may represent the first conversion of an e-electioneering campaign morphing into an ongoing e-legislating campaign, Organizing for Action is not the first, or only, use of the Internet to influence legislating. A dramatic example of the phenomenon of e-legislating occurred approximately a year before Organizing for Action was created. In January of 2012, over 100,000 websites²⁵⁴ participated in a protest against the proposed "Stop Online Piracy Act" (SOPA) in the House and the companion "Protect IP Act of 2011" (PIPA) in the Senate.²⁵⁵ The SOPA experience will be used here to illustrate how each of the five characteristics described in the previous section may play out in the context of e-legislation. To some, the results may be inspiring, and to others, alarming.

A. The SOPA Protest Chronology

The SOPA bill, introduced by Republican Representative Lamar Smith in late October of 2011, was a complex, seventy-eight-page measure attempting to protect intellectual property rights by boosting enforcement, especially against foreign websites.²⁵⁶ The bill had broad support among prominent corporations, law firms, most major media companies, and businesses in America, including ABC, CBS, Comcast/NBC Universal, Capitol Records, the NFL, Time Warner,

²⁵⁴ Leo Kelion, *SOPA: Sites Go Dark as Part of Anti-Piracy Law Protests*, BBC NEWS (Jan. 18, 2012), <http://www.bbc.co.uk/news/technology-16612628>. Although only 7000 sites went dark, 115,000 participated in the strikes in some way (45,000 of these were on Wordpress.com). *The January 18 Blackout / Strike in Numbers and Screenshots*, FIGHT FOR THE FUTURE, <http://sopastrike.com/numbers/> (last visited July 15, 2013).

²⁵⁵ Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011) [hereinafter SOPA], available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.03261>. The Senate had a companion bill with the full name of "Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011" (PIPA). S. 968, 112th Cong. (2011). Because most of the press coverage used the SOPA acronym, this Article will do the same.

²⁵⁶ SOPA, *supra* note 255.

3M, Adidas, Random House, and many others.²⁵⁷ Advocates of SOPA claimed that the bill would expand U.S. law enforcement to fight online trafficking of intellectual property. These curbs on counterfeiting and piracy were said to support 2.2 million jobs in the U.S. movie industry alone.²⁵⁸

About two weeks after SOPA was introduced, web giants, including Google, Facebook, Twitter, PayPal, eBay, Mozilla, Yahoo, AOL, LinkedIn, and Zynga, (“SOPA opponents”) wrote Congress objecting that the bill would “pose a serious risk to our industry’s continued track record of innovation and job-creation”²⁵⁹ As is often the case for legislation between competing business interests, many of the SOPA opponents were web giants in their own right, such as Google and Facebook, and had “political muscle of their own, with in-house lobbying shops and trade associations just like traditional media’s.”²⁶⁰ Following the age-old legislative dance in Congress, the SOPA opponents had sponsors introduce an alternative bill, the Online Protection and Enforcement of Digital Trade Act (OPEN Act).²⁶¹

But the opponents could see that their use of traditional lobbying tactics was faltering. SOPA appeared destined to pass. It had cleared a Senate committee and had bipartisan support in the House.²⁶² In late

²⁵⁷ For a complete list of the bill’s supporters, see David Harris-Gershon, *THE LIST—Every Corporation & Organization Supporting SOPA*, Care of the House Judiciary Committee, DAILY KOS (Dec. 21, 2011, 4:45 PM), <http://www.dailykos.com/story/2011/12/21/1047747/-THE-LIST-Every-Corporation-Organization-Supporting-SOPA-Care-of-the-House-Judiciary-Committee>.

²⁵⁸ Jim Puzanghera, *PIPA Anti-Piracy Bill Vote Postponed in Senate*, L.A. TIMES (Jan. 20, 2012, 6:51 AM), <http://latimesblogs.latimes.com/technology/2012/01/pipa-anti-piracy-bill-vote-postponed-senate.html>.

²⁵⁹ Mary Quinn O’Connor, *Censoring Clicks or Saving the Web? SOPA Hearing May Shape Net’s Future*, FOX NEWS (Dec. 15, 2011), <http://www.foxnews.com/tech/2011/12/15/censoring-your-clicks-saving-web-sopa-hearing-may-shape-nets-future/#ixzz2LdeGaXpk> (quoting an Open Letter to Washington).

²⁶⁰ Weisman, *supra* note 1. See also Christopher S. Stewart, Geoffrey A. Fowler & Sam Schechner, *New, Old Media Battle Over Net Rules*, WALL ST. J. (Jan. 18, 2012), <http://online.wsj.com/article/SB10001424052970203735304577167331129343336.html> (Former White House Press Secretary, Joe Lockhart, works for Facebook, and former counsel to John McCain, Pablo Chavez, for Google).

²⁶¹ Online Protection and Enforcement of Digital Trade Act, H.R. 3782, 112th Cong. (2012) [hereinafter *The OPEN Act*].

²⁶² David A. Farenthold, *SOPA Protests Shut Down Websites*, WASH. POST (Jan. 17, 2012), http://www.washingtonpost.com/politics/sopa-protests-to-shut-down-web-sites/2012/01/17/gIQA4WY16P_story.html.

January, with a vote on the bill less than a week away,²⁶³ opponents mobilized the public through an e-legislating campaign. The plan for the campaign had been months in the hatching. Mark Zuckerberg, chief executive of Facebook, said, “The world today needs political leaders who are pro-Internet. We have been working with many of these folks for months on better alternatives to these current proposals.”²⁶⁴

First, the opponents posted information on their websites alerting users to their concerns about SOPA. One site, Tumblr, hosted a “Stop Censorship” day and helped generate over 87,000 phone calls to U.S. Representatives on a single day.²⁶⁵ But no legislators were yet abandoning the bill, and SOPA was scheduled to go for a vote.

So then, the SOPA opponents rolled out their “Nuclear Option,”²⁶⁶ a coordinated blackout on January 18, 2012. Jimmy Wales, the founder of Wikipedia, threatened the blackout over a month ahead saying:

Right now, what I’m thinking is that if there is credible threat that [SOPA might pass], this [blackout] could have a positive impact on the thinking of some legislators Do not underestimate our power—in my opinion, they are terrified of a public uprising about this, and we are uniquely positioned to start that.²⁶⁷

The story illustrates the Internet’s agility, as vast numbers of supporters of the SOPA opponents responded worldwide to the protest.²⁶⁸ Wikipedia, the sixth largest website in the United States²⁶⁹

²⁶³ Paul Kane, *SOPA, PIPA Votes to be Delayed in House and Senate*, WASH. POST (Jan. 20, 2012 11:16 AM), http://www.washingtonpost.com/blogs/2chambers/post/sopa-senate-vote-to-be-delayed-reid-announces/2012/01/20/gIQApRWVDQ_blog.html.

²⁶⁴ Jenna Wortham, *With Twitter, Blackouts and Demonstrations, Web Flexes Its Muscle*, N.Y. TIMES, Jan. 18, 2012, http://www.nytimes.com/2012/01/19/technology/protests-of-antipiracy-bills-unite-web.html?_r=1&.

²⁶⁵ TUMBLR STAFF BLOG (Nov. 17, 2011), <http://staff.tumblr.com/post/12930076128/a-historic-thing>. November 16, 2011 was dubbed “American Censorship Day.” *American Censorship Day*, AMERICANCENSORSHIP.ORG, <http://americancensorship.org/> (last visited July 15, 2013).

²⁶⁶ Declan McCullagh, *SOPA Opponents May Go Nuclear and Other 2012 Predictions*, CNET.COM (Dec. 29, 2011, 4:00 AM), http://news.cnet.com/8301-31921_3-57349540-281/sopa-opponents-may-go-nuclear-and-other-2012-predictions/.

²⁶⁷ Christopher Williams, *Wikipedia Co-Founder Threatens Blackout Over Anti-Piracy Law*, THE TELEGRAPH (Dec. 13, 2011, 11:58 AM), <http://www.telegraph.co.uk/technology/jimmy-wales/8953273/Wikipedia-co-founder-threatens-blackout-over-anti-piracy-law.html>.

²⁶⁸ A few objectors resorted to old-fashioned letter writing, including an open letter to Congress from several well-known artists and performers. An Open Letter to Washington from Artists and Creators, Jan. 17, 2012, *available at* <http://www.stopthewall.us/artists/>.

with twenty-five million visitors on a typical day,²⁷⁰ completely blacked out its English service. The landing page simply directed its users to contact their representatives to protest SOPA. Over 160 million people viewed Wikipedia's banner.²⁷¹ Reddit and an estimated 7000 smaller websites also joined in the service blackout.²⁷²

While other websites did not completely deny service, many, such as Google, Yahoo, Facebook, and Twitter, used their online platforms to spread warnings and disseminate protest plans. The results were dramatic: ten million petition signatures were collected, eight million phone calls were attempted,²⁷³ and four million emails were sent.²⁷⁴ Google, which had the widest reach with 153.4 million site visits each month in 2011,²⁷⁵ alone collected over seven million signatures.²⁷⁶

And yes, this e-legislating campaign had impact even though members of Congress may not have known how many of these millions of responses were from plebers or international interests rather than from their constituents. In a dramatic turnaround, members of Congress, including some of the initial sponsors, shelved SOPA and PIPA indefinitely.²⁷⁷ At the beginning of the day, the odds

²⁶⁹ *Bill Killed: SOPA Death Celebrated as Congress Recalls Anti-Piracy Acts*, RT.COM (Jan. 20, 2012, 9:33 PM), <http://rt.com/news/sopa-postponed-anonymous-piracy-337/>.

²⁷⁰ Jimmy Wales, @JIMMY_WALES (Jan. 16, 2012, 9:18 AM), available at *How Many People Saw the SOPA Blackout?*, THE ECONOMIST (Jan. 20, 2012, 11:03 PM), <http://www.economist.com/node/21005042/2012/01/web-statistics.?page=2>.

²⁷¹ Jimmy Wales, *supra* note 270.

²⁷² *The January 18 Blackout / Strike*, *supra* note 254.

²⁷³ Demand was so heavy that the switchboard went down and calls could not be completed. Wortham, *supra* note 264.

²⁷⁴ *The January 18 Blackout / Strike*, *supra* note 254. Some groups even resorted to guerilla warfare tactics. After a government crackdown on the website Megaupload, which hosts up to fifty million users a day, a "hacktivist" Internet group known as Anonymous waged online attacks against several SOPA proponents, including the Department of Justice, the RIAA, and Warner Music. Anonymous allegedly hacked their websites and shut them down for extended periods. Philiana Ng, *Hacktivist Group Anonymous Takes Down Government, Music Industry Websites*, HOLLYWOOD REPORTER (Jan. 19, 2012, 4:24 PM), <http://www.hollywoodreporter.com/news/megaupload-anonymous-mpaa-riaa-Websites-hacked-283427>.

²⁷⁵ Brandon Russell, *Google Amassed 153.4 Million U.S. Visitors Per Month in 2011*, TECHNOBUFFALO (Dec. 28, 2011), www.technobuffalo.com/2011/12/28/google-amassed-153-4-million-u-s-visitors-per-month-in-2011.

²⁷⁶ *Bill Killed*, *supra* note 269. Electronic Frontier Foundation, a U.S.-based international digital rights advocacy nonprofit also claims it sent over 1 million e-mails on January 18. *Id.*

²⁷⁷ Alan Fram, *Web World Surprised by Political Victory on Anti-Piracy Bills*, DENVER POST (Jan. 22, 2012, 1:00 AM), http://www.denverpost.com/search/ci_19792107. See also Jim Puzanghera, *SOPA Blackout: Bills Lose Three Co-Sponsors Amid Protests*, L.A.

in favor of passing the bill were two to one; by the end of the day, almost every representative was aligned against it.²⁷⁸

As lawmakers fled from the bill in response to the backlash, SOPA sponsor Representative Lamar Smith announced that any vote on the bill would be delayed until they could reach a broader consensus.²⁷⁹

“I have heard from the critics and I take seriously their concerns It is clear that we need to revisit the approach,” Smith explained.²⁸⁰ As of this writing more than a year later, Congress has still not entertained any similar legislation.

B. The SOPA Protest in Light of the Five E-Legislating Characteristics

This section will address each of the distinguishing characteristics of e-legislating from Part III above in the context of the SOPA protest.

1. Size and Geographic Scope of the Internet

The SOPA protest illustrates the dramatic numbers that Internet campaigns can generate. When the petition signatures, phone calls, and emails were all tallied, the number of responses exceeded twenty-two million. This volume of virtual participants was overwhelming in comparison to conventional citizen lobbying efforts—the switchboard in Congress temporarily shut down from the overload. The next day, Jimmy Wales of Wikipedia tweeted that “162 million worldwide saw

TIMES (Jan. 18, 2012, 10:19 AM), <http://latimesblogs.latimes.com/technology/2012/01/sopa-blackout-sopa-and-pipa-lose-three-co-sponsors-in-congress.html>. Senator Marco Rubio posted his decision to withdraw his support on his Facebook page, explaining, “[W]e’ve heard legitimate concerns about the impact the bill could have on access to the Internet and about a potentially unreasonable expansion of the federal government’s power to impact the Internet. Congress should listen and avoid rushing through a bill that could have many unintended consequences.” Senator Marco Rubio, *A Better Way to Fight the Online Theft of American Ideas and Jobs*, FACEBOOK (Jan. 18, 2012, 6:33 AM), <https://www.facebook.com/SenatorMarcoRubio/posts/340889625936408>.

²⁷⁸ “By the end of the day, we had a huge swing in Congress” *Bill Killed*, *supra* note 269. Electronic Frontier Foundation, a U.S.-based, international digital rights advocacy nonprofit, claims to have sent over one million emails on January 18. *See* Weisman, *supra* note 1.

²⁷⁹ Puzanghera, *supra* note 258.

²⁸⁰ Roger Yu, *Congress Shelves Anti-Piracy Bills*, USA TODAY (Jan. 20, 2012, 2:38 PM), <http://usatoday30.usatoday.com/tech/news/story/2012-01-20/anti-piracy-bills-halted/52698192/1>.

the blackout page.”²⁸¹ According to Wales, only eight million of the 162 who viewed the page looked up congressional phone numbers. This could mean that others who signed petitions or sent emails were not American voters. In addition, there are no figures about how many of the twenty-two million responses might have been from plebers or super-plebers who submitted multiple responses from a single email address.

2. *Aspects of Internet Speakers*

It was easy to join the SOPA protest. The 100,000 websites that did could unilaterally make the decision because they controlled the platforms. Access was also cheap for them. Aside from the possible loss of advertising revenue, they did not have to pay anything to disperse their messages. They essentially enlisted their viewers as free lobbyists.

While the entities urging the protests were known to their viewers, anonymity could have played a role in the responses sent to Congress. The Internet vehicle shields anyone who may have used fictitious names from negative consequences. Further, there is no one-person-one-vote restriction to prevent those who responded from submitting multiple messages.

3. *Type, Speed, and Quality of Information Received*

The SOPA protest illustrates the alacrity of the Internet. The SOPA opponents were able to get their message out, to awaken their followers to act, and to alarm legislators sufficiently to persuade them to abandon the bill—all in a single day.

As with most lobbying information found on the Internet, the quality of many of the messages on the day of the blackout was one-sided and inflammatory. It is beyond the scope of this article to describe what each of the 100,000 websites that participated displayed, but Wikipedia’s was one that had some of the broadest reach. That webpage read: “Imagine a World Without Free Knowledge . . . Right now, the U.S. Congress is considering legislation that could fatally damage the free and open Internet.”²⁸²

Although it is difficult to find multisensory videos of legislation, the visual images the SOPA opponents posted helped achieve their

²⁸¹ Jimmy Wales, @JIMMY_WALES (Jan. 19, 2012, 12:54 AM), available at *How Many People Saw the SOPA Blackout?*, *supra* note 270.

²⁸² *The January 18 Blackout / Strike*, *supra* note 254.

goal of invoking both fear and resentment. Wikipedia's website featured a colorless image casting long, potentially ominous, shadows.²⁸³ Google's site and others posted large sections of redacted words and spaces, and yet others stamped "Censored" across the screen.

SOPA supporters countered, "The bill will not harm Wikipedia, domestic blogs or social networking sites. This publicity stunt does a disservice to its users by promoting fear instead of facts. Perhaps during the blackout, Internet users can look elsewhere for an accurate definition of online piracy."²⁸⁴ But these SOPA supporters needed to make their points through traditional media because they did not have access to Internet sources.

This illustrates an especially troubling aspect of the blackout: SOPA opponents controlled access to information that citizens needed to make an informed choice about the legislation. Major media and entertainment companies who supported SOPA could not get their message out. Critics complained that "[i]t's very difficult to counter the misinformation when the disseminators also own the platform"²⁸⁵ and that "[i]t is ironic that a website dedicated to providing information is spreading misinformation about the Stop Online Piracy Act."²⁸⁶

Google, Wikipedia, and many of the other websites that participated are known for providing information, but on the day of the protest, the quality of the messages from the SOPA opponents was persuasive, not objective. They had tried earlier to educate and to provide more specifics about the bill, but the choice had not been dire or clear enough to exhort their followers into action. This time, the message was clear. A caption beneath the black banner across Google's page said, "Tell Congress: Please don't censor the web!"²⁸⁷

²⁸³ *Protests Against SOPA and PIPA*, WIKIPEDIA, http://en.wikipedia.org/wiki/Wikipedia_blackout (last visited July 16, 2013).

²⁸⁴ Brendan Sasso, *Sponsor of Online Piracy Bill Calls Wikipedia Blackout a "Publicity Stunt,"* HILLICON VALLEY (Jan. 17, 2012, 4:30 PM), <http://thehill.com/blogs/hillicon-valley/technology/204629-gop-chairman-wikipedia-blackout-a-publicity-stunt#ixzz2LDWISjvS> (quoting SOPA sponsor Lamar Smith).

²⁸⁵ Wortham, *supra* note 264 (quoting Cary H. Sherman, chairman and chief executive of the Recording Industry Association of America, a trade group that represents the United States music industry, referring to Google and Facebook).

²⁸⁶ Sasso, *supra* note 284.

²⁸⁷ Farenthold, *supra* note 262.

4. *Type and Quality of Citizen Response*

Some applauded the SOPA e-legislating campaign as a victory for the people. “I think it is an important moment in the Capitol. . . . Too often, legislation is about competing business interests. This is way beyond that. This is individual citizens rising up.”²⁸⁸ Others saw it as the web opponents exercising their right to free speech, or something akin to a union strike.²⁸⁹

Yet, still more saw it as a masterful lobbying strategy on the part of the SOPA opponents:

It culminates a surprising lobbying effort in which technology companies such as Twitter, Wikipedia and Google have used their massive reach into Americans’ daily lives as a political weapon, to whip up support from online users. . . . In back offices of the Senate, many longtime aides were amazed at how quickly a new lobbying force had managed to outmaneuver experienced heavyweights.²⁹⁰

SOPA did represent a battle of heavyweights—large media and manufacturing companies against large web companies. Each side had the money and firepower to play the traditional lobbying game in Congress. The “old economy” mustered “campaign contributions, Washington parties and high-priced lobbyists,” but “nothing could compare to the tentacles the new economy [could] reach into Americans’ everyday lives through sites like Wikipedia.”²⁹¹

The suggestion that the SOPA battle was just an extension of lobbying-as-usual may tarnish the David v. Goliath image of e-legislating. Were Internet users just another unpaid arm of the web opponents’ lobbying efforts when their traditional paid lobbyists had failed? Were we just unwitting pawns in this battle of titans? This result would be consistent with early studies which found that “the Internet has not become a force for democratizing policy decisions In fact, there is preliminary evidence that the Internet is

²⁸⁸ Weisman, *supra* note 1 (quoting Representative Zoe Lofgren, a Democrat from California who opposed the legislation).

²⁸⁹ Melissa Bell, *Web Strike Goes Back to the Future*, WASH. POST, Jan. 22, 2012, at E25. See also *Internet Goes on Strike*, AMERICANCENSORSHIP.ORG, <http://american.censorship.org/modal/sopastrikeoverlay.html> (last visited July 16, 2013).

²⁹⁰ Fahrenthold, *supra* note 262.

²⁹¹ Weisman, *supra* note 1.

increasingly a tool of the powerful and entrenched rather than the new and reform-minded.”²⁹²

Our Founders wanted a deliberative decision process for enacting legislation to encourage informed decision-making that adapted to competing constituent preferences or to legal and organizational constraints.²⁹³ There is no empirical data on what those who contacted their legislators were thinking on January 18, 2012. However, it was unlikely that even a fraction of the millions who contacted their legislators had read and fully understood the seventy-eight-page SOPA bill. Nor is it likely that most of the responses were deliberative, informed, and adapted to competing preferences or constraints.

It is possible that some read the posts of Zuckerberg and others²⁹⁴ and were persuaded to contact their legislators because of group-framed preferences. We might ask, however, why we should feel a closer affiliation with the SOPA opponent groups than with the traditional media proponents of SOPA who were trying to save American jobs by fighting counterfeiting and piracy. Considering the fear and outrage techniques described above, impulse may have been the primary motivating factor.

Finally, and perhaps most sinisterly, the SOPA opponents had the ability to deprive users of their services as a means of motivating them to act politically. The question became “how to translate the inevitable confusion and outrage from those who don’t know what SOPA is into activism. . . . [There is] a great possibility to focus and direct that energy [due to people’s frustration about unavailability of social media] into productive activism against SOPA.”²⁹⁵ Thus, the Internet companies that opposed SOPA had a tool that few e-legislating campaigns enjoy. By denying their viewers access, they opened up some of those viewers’ free time. They were then able to

²⁹² R. Karl Rethemeyer, *Policymaking in the Age of Internet: Is the Internet Tending to Make Policy Networks More or Less Inclusive?*, 17 J. PUB. ADMIN. RES. & THEORY 259, 279 (2006).

²⁹³ See, e.g., *Rulemaking vs. Democracy*, *supra* note 45, at 134 (defining “informed preferences” as those “based on exposure to, and consideration of, reasonable full and accurate factual information” and “adaptive preferences,” meaning those that are “informed preferences modified by an assessment of the larger social-political environment, legal and organizational constraints, and the claims of competing preferences,” etc.—i.e., “what is workable over what is ideal”).

²⁹⁴ Wortham, *supra* note 264 (quoting Mark Zuckerberg’s Facebook page).

²⁹⁵ Graeme McMillan, *SOPA: What if Google, Facebook and Twitter Went Offline in Protest?*, TIME TECH (Jan. 5, 2012), <http://techland.time.com/2012/01/05/sopa-what-if-google-facebook-and-twitter-went-offline-in-protest/>.

divert that newfound time into activism that promoted the website's political message.

Does this deprivation to coerce political action violate any laws? The Civil Rights Act and the Voting Rights Act prohibit persons from attempting to “threaten, intimidate, or coerce” another person for the purpose of interfering with that person's right to vote or to vote as he or she may choose in an election.²⁹⁶ Threats to deprive former slaves of use of farms²⁹⁷ or threats to prevent a black man from entering property to conduct his job²⁹⁸ were both found to violate one of these acts. Courts have also found that baseless arrests and prosecutions of people for the purpose of denying them the right to vote or scaring them from registering also violate 42 U.S.C. §§ 1971 and 1973.²⁹⁹

Similarly, threatening to deprive employees of their jobs if they do not vote for a particular candidate is illegal under some state statutes.³⁰⁰ “About half of Americans live in jurisdictions that protect

²⁹⁶ Voting Rights Act of 1965, 42 U.S.C. §§ 1973–1973b (2012); Civil Rights Act, 42 U.S.C. § 1971 (2012). To win a claim, a plaintiff must satisfy two requirements: (1) showing that there was an intimidation, threat, or coercion, or an attempt to intimidate, threaten or coerce, and (2) that the intimidation was for the purpose of interfering with the right to vote. *United States v. McLeod*, 385 F.2d 734, 740 (5th Cir. 1967).

²⁹⁷ *United States v. Beatty*, 288 F.2d 653, 654 (6th Cir. 1961). In *United States v. Beatty*, white landowners evicted or threatened to evict blacks of voting age from the farms where they lived and worked as sharecroppers as a means to punish or prevent blacks from registering to vote. The Court labeled the practice “economic strangulation” and held that it violated 42 U.S.C. § 1971(b)'s prohibition on “threats, intimidation, or coercion.” *Id.* at 656. The court also noted the fact that the landowners’ “coercion relate[d] to land or contracts would furnish no excuse or defense.” *Id.* Note that *Beatty* deals with the Civil Rights Act, which is based on race, but the spirit and language of that act is sufficiently similar to the Voting Rights Act to translate to the VRA as well. *Id.*

²⁹⁸ *United States v. Bruce*, 353 F.2d 474, 476 (5th Cir. 1965). The court in *United States v. Bruce* also dealt with exertions of power over a man's profession as a means of improper coercion under § 1971. In *Bruce*, landowners denied a black man the right to enter their property, and in so doing prevented him from performing his job of collecting the money for their insurance policy premiums. The court held that, even though it is perfectly legal to exclude another from one's private property, the exclusion was nevertheless illegal under § 1971 because the exclusion, which affected the man's livelihood, was coercion for the purpose of interfering with his right to register to vote. *Id.* at 477; see also *McLeod*, 385 F.2d at 740 (“Acts otherwise entirely within the law may violate the statute if they have the proscribed effect and purpose.”).

²⁹⁹ *McLeod*, 385 F.2d at 734; *City of Greenwood v. Peacock*, 384 U.S. 808, 847 (1966).

³⁰⁰ Some state laws may prohibit companies taking action to influence how their employees vote. David A. Graham, *Can Your Boss Threaten to Fire You if You Don't Vote for Romney?*, THE ATLANTIC (Oct. 20, 2012 10:00 AM), <http://www.theatlantic.com/politics/archive/2012/10/can-your-boss-threaten-to-fire-you-if-you-dont-vote-for-romney/263709/#>. See, e.g., CAL. LAB. CODE, § 1102 (West 2012) (“No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following

some private employee speech or political activity from employer retaliation.”³⁰¹ However, if properly worded, such threats do not appear to violate federal law, which explains why several CEOs who made threats to their employees at Presidential Candidate Romney’s urging could do so without legal repercussions.³⁰²

any particular course or line of political action or political activity.”); OR. REV. STAT. § 260.665 (2012) (“(1) As used in this section, “undue influence” means force, violence, restraint or the threat of it, inflicting injury, damage, harm, loss of employment or other loss or the threat of it, or giving or promising to give money, employment or other thing of value. (2) A person, acting either alone or with or through any other person, may not directly or indirectly subject any person to undue influence with the intent to induce any person to: (a) register or vote; (d) be . . . a candidate; or (i) sign or refrain from signing a prospective petition or an initiative, referendum, [or] recall.”).

³⁰¹ Eugene Volokh, *Private Employees’ Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295, 297 (2012).

³⁰² During the 2012 campaign, Mitt Romney urged employers:

I hope you make it very clear to your employees what you believe is in the best interest of your enterprise and therefore their job and their future in the upcoming elections Nothing illegal about you talking to your employees about what you believe is best for the business, because I think that will figure into their election decision, their voting decision and of course doing that with your family and your kids as well.

Josh Voorhees, *Romney Wants Small Business Owners to Tell Their Employees How They Should Vote*, SLATE.COM (OCT. 18, 2012, 10:40 AM), http://www.slate.com/blogs/the_slatest/2012/10/18/romney_s_nfib_call_gop_hopeful_tells_employers_to_tell_employees_who_to.html. Several employers followed up by threatening employees that their jobs would be on the line if Obama was reelected. Adam Peck, *CEO Threatens Employees With ‘Personal Consequences’ If Romney Loses*, THINKPROGRESS.COM (Oct. 25, 2012, 1:35 PM), <http://thinkprogress.org/economy/2012/10/25/1089891/ceo-consequences-romney/?mobile=nc>; Alexis Kleinman, *Nine CEOs Pushing Workers to Vote for Romney*, HUFFINGTON POST (Oct. 28, 2012, 12:30 PM), http://www.huffingtonpost.com/2012/10/28/ceos-urge-employees-vote-romney_n_2018264.html; Larry Gold, associate general counsel of the AFL-CIO, opined that such threats crossed the line into improper coercion or intimidation of voters into voting a certain way. Steven Greenhouse, *Here’s a Memo From the Boss: Vote This Way*, N.Y. TIMES, Oct. 26, 2012, <http://www.nytimes.com/2012/10/27/us/politics/bosses-offering-timely-advice-how-to-vote.html?pagewanted=all&r=0>.

Larry Gold, associate general counsel of the A.F.L.-C.I.O., said some of the recent employer letters, by hinting at the possible loss of employees’ jobs, appeared to cross the line into improper coercion. Federal law and the laws of several states bar anyone from coercing or intimidating voters into voting a certain way.

But Bradley A. Smith, a Republican former member of the Federal Election Commission and a professor at Capital University Law School, disagreed, saying letters like those sent by the companies were not firm threats to fire anyone if Mr. Obama won.

“The concern here is there is an unavoidable power disparity between management and employees,” said Adam Skaggs, senior counsel at the liberal Brennan Center for Justice. “Put yourself in the shoes of an employee at any of

It is unlikely that the deprivation of Internet services that SOPA opponents used on January 18, 2012, rises to the level of an illegal act. The Internet is not a necessary service, and the deprivation was not intended to influence voting in an election, which is the scope of the statutes. However, using deprivation to manipulate and motivate political action is disturbing. “Mr. Dodd said Internet companies might well change Washington, but not necessarily for the better with their ability to spread their message globally, without regulation or fact checking. ‘It’s a new day,’ he added. ‘Brace yourselves.’”³⁰³

5. Impact

Despite the emotion and inability to verify whether constituents or non-citizens were speaking, members of Congress were so overwhelmed by the one-day deluge of protests against SOPA that they fled from it in droves. Thus, this campaign proved that e-legislating has the ability to stop legislation. The question remains whether it also can be effective as a constructive mechanism for the creation of laws.

An often overlooked part of the SOPA blackout story is that the Internet protest translated to some actual physical turnout in San Francisco and New York. However, in comparison to the millions who responded online, the real-world turnout was relatively meager. About a thousand protestors flocked into Midtown Manhattan.³⁰⁴ But only around one hundred people showed up for a rally at City Hall in San Francisco.³⁰⁵ Another rally planned in Seattle was postponed due to rain.³⁰⁶ These numbers are paltry in comparison to those for the first Earth Day in 1970. Mayor John Lindsay shut down Fifth Avenue

those companies. Are you going to be comfortable putting an Obama bumper sticker on your car and driving into the company parking lot? If you’re in a small community with a big employer, will you feel uncomfortable about putting up a yard sign for a candidate your boss doesn’t favor?”

Id.

³⁰³ Weisman, *supra* note 1. “Mr. Smith, the House Republican author, said opposition Web sites were spreading ‘fear rather than fact.’ ‘When the opposition is based upon misinformation, I have confidence in the facts and confidence that the facts will ultimately prevail,’ Mr. Smith said.” *Id.*

³⁰⁴ Wortham, *supra* note 264.

³⁰⁵ Sarah Mitroff, *Silicon Valley Luminaries Protest SOPA in Downtown San Francisco*, VBNEWS (Jan. 18, 2012, 2:39 PM), <http://venturebeat.com/2012/01/18/sopa-san-francisco-protest/>.

³⁰⁶ Wortham, *supra* note 264. *Stop SOPA in Seattle: Microsoft, Amazon, Geekwire, and a Rally*, SEATTLE PI (Jan. 18, 2012), <http://blog.seattlepi.com/seattlewaterfronthomes/2012/01/18/stop-sopa-in-seattle-microsoft-amazon-geekwire-and-a-rally/>.

as a crowd of approximately one million demonstrated in Central Park,³⁰⁷ and nationwide, an estimated twenty million participated in peaceful teach-ins to persuade politicians to enact substantial and lasting environmental legislation.³⁰⁸

Although it may be true that “pressure works,”³⁰⁹ a virtual revolution may be confined to the virtual world until it generates some boots on the ground. It is easier for a legislator to ignore a virtual presence of one million electronic letters than a mob of one million angry constituents outside the office door. E-legislating may need to get people into the streets to be effective, but Revolution 2.0 showed that social media may just be up to that task.

CONCLUSION

Congress can no longer escape the impact of e-legislating. Interest groups have recognized its potential and are engaged in an escalating arms race for virtual participants.³¹⁰ Consequently, we must all become aware of e-legislating’s positive attributes and its drawbacks. E-legislating’s success in thwarting Congress’s efforts to pass the Stop Online Piracy Act provides a valuable illustration.

The SOPA experience may have exaggerated the problems because of the players and the issue. Yet, it provides valuable lessons about the potential vulnerabilities of the e-legislating process in general. Most importantly, how can we avoid manipulation of average citizens? The SOPA opponents were in the unique position of being able both to create citizen outrage through deprivation and fear and to harness into lobbying action the additional time created by taking away Internet entertainment. In addition, the SOPA situation highlighted the ability of the Internet to allow the lightning-fast spread of misinformation, while corrections never receive the same penetration or coverage.³¹¹

³⁰⁷ See *EPA History: Earth Day*, EPA, <http://www2.epa.gov/aboutepa/epa-history-earth-day> (last updated June 19, 2013).

³⁰⁸ EARTH DAYS (PBS television broadcast, Zeitgeist Films 2010), available at <http://video.pbs.org/video/1463378089/>. See also ENVIROLINK, <http://earthday.envirolink.org/history.html> (last visited July 17, 2013).

³⁰⁹ *Rachel Maddow Show* (NBC television broadcast Jan. 30, 2013) (discussing Organizing for Action).

³¹⁰ Fred Emery & Andrew Emery, *A Modest Proposal: Improve E-Rulemaking by Improving Comments*, 31 ADMIN. & REG. L. NEWS 8 (2005) (referring to a “rulemaking arms race”).

³¹¹ Jon Stewart mocked how little coverage studies reaffirming climate change by previous skeptics received compared to that of the McDonald’s McRib sandwich on *The*

Furthermore, the SOPA experience illustrated only the ability of e-legislating to stop congressional action. It does not illustrate success in achieving positive action—actually getting statutes enacted. Vested interests have always screamed the loudest when opposing change, so does e-legislating just give these interests a larger megaphone? Or can the virtual pressure translate to a true turnout of activists as in Egypt? The flexibility and speed of the Internet allow more close monitoring of Congress so average citizens can respond at critical times in the legislative process. But how can we keep people focused to carry through and maintain pressure at every stage of what our Founders intentionally created as a complex, deliberative legislative process? This may be the challenge of our time. Can we be persistent as the process requires, or does the quick and fleeting attention span of the Internet make this especially challenging?

E-legislating has the potential for leveling the playing field for average citizens who have in the past been competing with privileged interests who can afford full-time lobbyists. If we can harness this positive change, then the “new day” in Washington will be a sunny one.

Daily Show. Jon Stewart Rips Media for Ignoring 'Climategate' Debunking, Covering McRib Instead, HUFFINGTON POST (Oct. 27, 2011, 10:51 AM), http://www.huffingtonpost.com/2011/10/27/jon-stewart-climategate-debunkin-media-mcrib_n_1034792.html.