
**WE THE PEOPLE: THE CONSENT OF THE GOVERNED
IN THE TWENTY-FIRST CENTURY:
THE PEOPLE’S UNALIENABLE RIGHT TO MAKE LAW**

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As to the people, however, in whom the sovereign power resides, the case is widely different, and stands upon widely different principles. From their authority the constitution originates: for their safety and felicity it is established: in their hands it is as clay in the hands of the potter: they have the right to mould, to preserve, to improve, to refine, and to finish it as they please. If so; can it be doubted, that they have the right likewise to change it? A majority of the society is sufficient for this purpose¹

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1. 1 THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. (Lorenzo Press, 1804), available at <http://www.constitution.org/jwilson/jwilson.htm>. James Wilson and James Madison were the principal architects of the Constitution of 1787. While Madison may be more familiar today, Wilson was one of colonial America’s most eminent men. He was perhaps America’s best and most well-known lawyer. He was a member of the Philadelphia Committee of Detail and wrote the Constitution’s famous first three words: “We the People.” While the word “sovereign” does not appear anywhere in our Constitution, Wilson, in commenting on this, noted that there was only one place where it might have been properly used and that was before the third word, “People.” See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1439 (1987). Wilson was one of only six men who signed both the Declaration of Independence and the Constitution. The great historian Gordon S. Wood noted: “More boldly and more fully than anyone else, Wilson developed the [popular sovereignty] argument that would eventually become the basis of all Federalist thinking.” See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787* 530 (1969). Under the United States Constitution, the People may make changes whenever and however they please. As Wilson noted: “This is a right of which no positive institution can ever deprive them.” See 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 432 (Jonathan Elliot ed., 2d ed., J. B. Lippincott & Co. 1891) (statement of James Wilson) [hereinafter Elliot, DEBATES].

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INTRODUCTION

The People of America love democracy. Americans do not love democracy because it is efficient; in some ways, other forms of government may respond more quickly.² Americans do not love democracy because it is without problems; while a strong democracy will prevent the tyranny of the few over the many, it requires constant vigilance to protect individual rights from the tyranny of the many over the few.³ Americans do not love democracy because it is perfect—it is not; it is only as good as we make it.⁴ Americans love democracy because doing so is simply part of our culture; our shared love of democracy creates a bond that binds together our diverse people and our vast continent.⁵ Americans love democracy because it and it alone has the potential to provide a moral, fair, and just government. This is so because our democracy recognizes that the only legitimate source of governmental power comes from those subject to the government’s exercise of power—the consent of the governed.⁶ Under our Constitution, neither the federal government nor the state governments are sovereign; nor do these governments somehow share sovereignty.⁷ In America, the People alone are sovereign; all governments (federal, state, and local) are mere agents of

2. For example, a monarch or dictator can make a unilateral decision and take action very quickly. In our democracy elected officials have limited power and must build consensus. The creators of our democracy preferred some disorder and inefficiency over concentrated governmental power.

3. See *infra* notes 284–345 and accompanying text.

4. For example, originally our democracy condoned slavery, denied women and blacks the vote, and pursued a policy of extermination of Native Americans.

5. From the rhetoric of our founding documents to today’s conception of “America” as revealed in phrases like “hey, it’s a free country,” the right of each person to have a say and a vote is a fundamental part of what it means to be American. See, e.g., *James v. Valtierra*, 402 U.S. 137, 141–42 (1971) (the initiative reflects Americans’ “devotion to democracy”); Alan Hirsch, *Direct Democracy and Civic Maturation*, 29 HASTINGS CONST. L.Q. 185, 203 n.91 (2002) (citing a 1993 national poll of adults conducted by the Los Angeles Times that found that 65% favored a system of national referenda).

6. See *infra* notes 299–331 and accompanying text.

7. See Amar, *supra* note 1, at 1427 (“[T]rue sovereignty in our system lies only in the People of the United States . . .”).

the People, subject always and in every case to their ultimate authority.⁸ As a result, democracy (popular sovereignty-majority rule) makes possible the creation of a society that fully embraces mutual respect for individual rights while allowing and encouraging just and fair collective action that benefits the overall society.

In the United States today, the consent of the governed, on which the strength of our democracy depends, is much stronger than it was in 1788 but is still weaker and more diluted than it needs to or should be.⁹ Under our representative democracy, voters play only a sporadic and limited role in the political life of the nation.¹⁰ Currently, especially at the federal level, voters participate in the political process only periodically via elections in which they select an agent to represent their interests in the political process. Voters do not participate again until the next election at which time they may, at least in theory, hold their representative accountable.¹¹ But this accountability is tenuous for many reasons, including its periodic nature (a legislator may have cast 1000 votes between elections)¹² and its often incorrect assumption that voters have, or at least may obtain, accurate information about what their agent has done and why.¹³ Periodic elections are a weak manifestation of the ideal consent of the governed that democracy envisions.¹⁴

For most of our history, this weak form of democracy was justified primarily by practical limitations related to travel, communication, information availability, and voting.¹⁵ There were simply too many voters spread over too great a distance to allow for a participatory democracy.¹⁶ As a result, our democratic ideals could be implemented at the federal level only through a representative democ-

8. The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes. The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other. These gentlemen must here be reminded of their error. They must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone

THE FEDERALIST NO. 46, at 291 (James Madison) (Clinton Rossiter ed., 2003).

9. See *infra* notes 55-108 and accompanying text.

10. See *infra* Part I.A.1.

11. See *infra* notes 57-58 and accompanying text.

12. See *infra* Part I.A.2.

13. See *infra* Part I.A.3.

14. See *infra* Part I.A.1-3.

15. See *infra* notes 64-65 and accompanying text.

16. See *infra* notes 64-65 and accompanying text.

racy.¹⁷ As our transportation and communication technology improved, our representative democracy also improved. For example, trains, automobiles, planes, and an extensive rail, highway, and airport system improved the ease, safety, and speed of travel. This allowed citizens to learn firsthand about other parts of America and other Americans, as well as about foreign lands and peoples. Over time, communication technology, such as the telegraph, telephone, radio, and television, also helped to better inform voters. Better-informed voters in turn demanded more democracy. As a result, America has become more democratic in practice and moved ever closer to fully implementing its democratic ideals. For example, slavery was abolished,¹⁸ and eventually so was Jim Crow.¹⁹ The right to vote was extended to all citizens,²⁰ and Senate elections were changed so that senators are now elected by popular vote.²¹ Changes like these make America a stronger, better, and truer democracy, and as a result, they make America a better country. But even with these improvements in travel and communication, a representative democracy at the federal level, albeit an improved one, was still the only practical possibility.

Today, however, for the first time in our history, it is possible to overcome the practical and logistical limitations of the past that required a representative democracy.²² The revolutionary developments in communication technology that occurred in the late twentieth and early twenty-first centuries have made it possible for the United States to dramatically alter the way it puts its democratic

17. See *infra* notes 64–65 and accompanying text.

18. See U.S. CONST. amend. XIII.

19. See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000 (2006)).

20. See U.S. CONST. amend. XV (granting citizens including blacks and freed slaves the right to vote); U.S. CONST. amend. XIX (granting women the right to vote); U.S. CONST. amend. XXVI (granting citizens eighteen years of age and older the right to vote).

21. See U.S. CONST. amend. XVII (stating Senate elections are by popular vote).

22. Today, because of vast improvements in communication and transportation technology—radio, television, cable, fiber-optics, electronic town meetings, etc.—there may be ways to retain the deliberation of the convention while providing for even more direct popular participation, akin to referenda. (Perhaps, for example, citizens could assemble in caucuses in their towns and neighborhoods, and these assemblies could be electronically and interactively linked to focused debate in a central convention assembly. After hearing these debates themselves and having the opportunity to speak up in their local caucus, the citizens could then vote directly on the proposed amendment, rather than in effect surrendering their proxies to convention members.)

Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 502–03 (1994). Of course, the communications revolution has continued to make dramatic improvements over the last seventeen years. See *infra* note 222.

ideals into practice.²³ Today, for the first time, we can move dramatically toward a strong participatory democracy at the federal level.²⁴ Also, communications technology continues to improve—a development that will increase our ability to implement federal direct democracy.

While practical and logistical limitations were the primary reason that we have a representative democracy, they were not the sole reason.²⁵ A few of the Founders favored a representative democracy because they feared the fleeting passions of the People.²⁶ They were therefore reluctant to give power directly to the People, notwithstanding the lofty language of our founding documents.²⁷ Other Founders were more interested in protecting slavery than in creating a robust democracy, and many of the Constitutional provisions that were less democratic than suggested and viable alternatives were adopted to protect slavery.²⁸ These concerns on the part of

23. The communications revolution referred to throughout this Article focuses primarily on the Internet, worldwide web, and its progeny such as smart phones, social networking sites, wikis, Skype, etc.

24. See *infra* notes 272–82 and accompanying text.

25. See *infra* notes 26–37 and accompanying text.

26. For example, John Marshall was concerned that state legislatures would be a danger to the Union, because they were too likely to be swayed by the People's fleeting and irrational passions. See *The Supreme Court: One Nation Under Law* (PBS television broadcast Jan. 31, 2007), available at http://www.pbs.org/wnet/supremecourt/about/episode1_video.html.

27. The Declaration of Independence states:

We hold these truths to be self-evident, that *all men* are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. – That to secure these rights, Governments are instituted among Men, *deriving their just powers from the consent of the governed*, – That whenever any Form of Government becomes destructive of these ends, it is the *Right of the People* to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to *them* shall seem most likely to effect their Safety and Happiness.

....

. . . [D]o, in the Name, and by the *Authority of the good People* of these Colonies, solemnly publish and declare, That these united Colonies are, and of Right ought to be Free and Independent States . . .

THE DECLARATION OF INDEPENDENCE para. 2, 32 (U.S. 1776) (emphasis added). The original Constitution (Article I–VII and the first ten Amendments) begins and ends with “The People.” See U.S. CONST. pmb. (“We the People . . . do ordain and establish this Constitution for the United States of America.”); U.S. CONST. amend. X (“The powers not delegated [to government] are reserved . . . to the people.”). Other provisions of the Bill of Rights also confirm the primacy of the People. For example, Amendment IX states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” See U.S. CONST. amend. IX (establishing that the People are the source of all power—so that power not delegated by them is reserved to them).

28. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 87–98, 148–59 (2005)

some of the Founders resulted in our original Constitution restricting both who was entitled to vote, and the political participation of voters even more severely than the practical limitations of the times required.²⁹ Slavery and many of its remnants were eventually eliminated. However, the fear of giving power directly to the People has been a constant though minor undercurrent of American democracy.³⁰ This fear is no more valid today than it was at the time of the founding.³¹ The desire for democracy-in-theory but elitism-in-practice is born of this fear, and it is illegitimate and undemocratic.³² Also, this fear of truly empowering the People has grown weaker as our democracy has grown stronger.³³ Moreover, history suggests that while there is a real need to protect individual rights in any democracy, it is more prudent to fear the moral hazard that is inherent in a representative democracy than it is to fear the wisdom or lack thereof (the fleeting passions) of the People.³⁴ Notwithstanding the fact that a few of the founders were cautious concerning giving too much direct power to the People, America has had a long and deep commitment to the ideals of democracy.³⁵ It is also important

(noting that the decision to elect the President via the Electoral College rather than by direct popular election was more a reflection of the young country's north/south split that resulted from slavery than from either a distaste of democracy or a desire to protect small states). Also, the three-fifths provision of Article I, Section II coupled with its apportionment scheme, based on the number of free persons plus three-fifths of slaves, rather than the number of voters, protected slavery at the expense of democracy. *Id.* Article II's apportionment of presidential electors further exacerbated the problem. *Id.*

29. See *supra* notes 18–21 and accompanying text.

30. See, e.g., THE FEDERALIST NO. 10, at 76 (James Madison) (Clinton Rossiter ed., 2003) (“[A] pure democracy . . . can admit of no cure for the mischiefs of faction.”).

31. The Founders knew that most people are worthy of their humanity. That realization was in fact the basis for the great experiment in democracy. See THE FEDERALIST NO. 55, at 343 (James Madison) (Clinton Rossiter ed., 2003) (“As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form.”). Today we know that characteristics such as race, gender, ethnic background, sexual preference, or economic class are not reliable indicators of those few people who are not worthy of their humanity.

32. In fact, much of the original implementation of our democracy was elitist; only adult, white, well-off (at least well-off enough to pay a poll tax and, in some cases well-off enough to own real property) males could vote and govern. This resulted in a landed, or at least moneyed, aristocracy. But the great thoughts reflected in the great words of our founding documents belie this elitist approach. Moreover, when viewed from the perspective of 1788, the great strides in democracy made by our Constitution, and especially by the ratification process of the Constitution itself, become evident. See *supra* note 27.

33. See, e.g., *supra* note 20 and the discussion *infra* notes 35–54 and accompanying text.

34. See *infra* notes 291–98 and accompanying text.

35. See, e.g., Hirsch, *supra* note 5, at 189–93 (citing examples of the strong commitment to

to note that most of the Founders did not share this fear. For example, James Wilson advocated the popular election of the President.³⁶ However, the most important fact is that the Constitution, created by the Founders in Philadelphia and ratified by the People in each state, recognized the People as the source of all government power both in its structure and words.³⁷

Since our founding we have embraced, at least in words and spirit, a democratic ideal that harkens back to the ancient Greek plebiscite.³⁸ America's commitment to the implementation of this ideal has, as noted, been much more tentative, reluctant, and inconsistent than its rhetorical exhortation of these ideals.³⁹ Nevertheless, America's commitment to the implementation of democratic ideals has been unwavering and deeply important from America's very beginning. For example, when it came to ratification of our Constitution, while it was not done by referendum due to the logistical concerns cited above, it was done by the most democratic, populous method the world or the colonies had ever seen.⁴⁰ As noted, over time American democracy has become stronger and moved ever closer to the democratic ideals expressed in our founding documents.⁴¹ Today the process of strengthening American democracy continues. For example, at the state and local level, the past decade has seen the increased use of the tools of participatory democracy.⁴² At the federal level there is a movement to ensure that the President is elected by popular vote rather than by the less democratic Electoral College,⁴³ and another movement aimed at using the Internet to open the pres-

the ideals of democracy by the Founders); see discussion *infra* notes 264–69 and accompanying text. See generally, JAMES F. FISHKIN, *THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY* 26–50 (1995) (discussing several issues in American democracy and how those issues have been addressed throughout the history of the nation).

36. See AMAR, *supra* note 28, at 155.

37. See *infra* notes 301–31 and accompanying text.

38. See, e.g., Hirsch, *supra* note 5, at 189 (“The more typical founding view, with roots in the political philosophy of Rousseau, held the Athenian model of pure democracy as the ideal form of government.”).

39. See *supra* notes 3–18 and accompanying text.

40. See AMAR, *supra* note 28, at 7. For a discussion of the special franchise rules in effect for ratification, see WOOD, *supra* note 1, at 289; James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 337–39 (1990).

41. See AMAR, *supra* note 28, at 7.

42. See *infra* notes 109–24 and accompanying text.

43. See *The National Popular Vote Bill Is Now at a Halfway Point*, NAT'L POPULAR VOTE BILL, www.nationalpopularvote.com/ (last visited May 8, 2012) (stating that forty states have held hearings on the bill, and it has become law in Hawaii, Illinois, Maryland, New Jersey, and Washington State).

idential nominating process.⁴⁴ In addition, there have even been a few brave commentators arguing (as I do here) for the adoption of federal direct democracy.⁴⁵

This Article argues that the time has come, once again, to strengthen American democracy.⁴⁶ American democracy at the federal level must move away from an exclusively representative democracy and embrace a participatory—or direct—democracy in which voters play a constant and decisive role in the political life of the nation.⁴⁷ For the first time in our history, we have the communications capability to implement a federal participatory democracy.⁴⁸

44. A group called Americans Elect hopes to use the Internet to wrest control of the presidential nominating process from the two dominant political parties and give the voters a credible third choice. See AMERICANS ELECT, www.americansselect.org (last visited May 8, 2012).

45. See, e.g., Adrian Vermeule, *Congress and the Costs of Information: A Response to Jane Schacter*, 89 B.U. L. REV. 677, 681–86 (2009) (recognizing the technological feasibility of federal direct democracy and the possibility that the communications revolution will reduce the “cost” of information and thus reduce the superior-knowledge-of-the-agent justification for representative democracy, but concluding that this will not occur any time in the near future); MARK BALDASSARE & CHERYL KATZ, *THE COMING AGE OF DIRECT DEMOCRACY: CALIFORNIA’S RECALL AND BEYOND 219* (2007) (“A new system of governance has evolved in California. . . . An era of a ‘hybrid democracy’ is now underway.”); Hirsch, *supra* note 5, at 218–21 (suggesting federal direct democracy as a means of civic maturation and discussing the work of an organization known as Philadelphia II, started by former United States Senator Mike Gravel (D. Alaska), which sponsors a national initiative for democracy that includes a constitutional amendment authorizing citizen law-making in every governmental jurisdiction—federal, state, and local—in the United States, and concurrent federal legislation called the Democracy Act which contains specific details regarding how to qualify an initiative, the procedures for the initiatives campaign, and for voting on qualified initiatives); see generally Elizabeth Garrett, *Perspectives on Direct Democracy: Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17 (1997) (discussing direct democracy in terms of special interests); John G. Matsusaka, *Direct Democracy Works*, 19 J. ECON. PERSP. 185, 186 (2005) (direct democracy often seems to improve the performance of government); Dennis Polhill, *The Issue of a National Initiative Process*, INITIATIVE AND REFERENDUM INSTITUTE, <http://www.iandrinstute.org/National%20I&R.htm> (last visited May 8, 2012). But see, e.g., Marci Hamilton, *Perspective on Direct Democracy: The People: The Least Accountable Branch*, 4 U. CHI. L. SCH. ROUNDTABLE 1, 13 (1997) (discussing how the system invites tyranny of majority over minority); Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 581 (1994) (discussing the danger of a tyrannical majority); Sherman J. Clark, *Tales of Popular Sovereignty: Direct Democracy in America*, 97 MICH. L. REV. 1560, 1573 (1999) (stating direct democracy results in “poor or short-sighted decisionmaking”); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1506, 1513–31 (1989) (discussing the popular belief that direct democracy is an authoritative expression of majority will, and identifying significant problems associated with this conception); Thomas W. Merrill, *Direct Voting by Property Owners*, 77 U. CHI. L. REV. 275, 282 (2010) (noting that although a number of advantages result from direct democracy, it should “not be used in large politics like the nation or the state,” nor should it be used even by local governments “to address issues of routine governance”).

46. See *infra* notes 213–83 and accompanying text.

47. See *infra* notes 128–45 and accompanying text.

48. See *infra* notes 227–31 and accompanying text.

Our love of and commitment to true democracy will push us inexorably to the strongest democracy we can practically implement.⁴⁹ Our love of democracy alone should be enough to encourage us toward participatory democracy.⁵⁰

But there are other reasons. A participatory democracy would reduce the moral hazard that is inherent in representative democracy, create better laws, create better citizens, and break the partisan gridlock that has grown so severe that it prevents Congress from dealing effectively with important national problems.⁵¹ Important societal problems, including the federal deficit, the looming bankruptcy of social security, healthcare reform, and gun control, have proved to be intractable in our current representative democracy.⁵² A participatory democracy, where legislation can be drafted with direct involvement of the people and voted on directly by the people, can pass and implement solutions to these important problems because the hard choices that solutions must entail will be palatable to the voters since the voters would have made those very choices.⁵³ Participatory democracy will allow us to break the political gridlock that is hobbling our government.⁵⁴

This Article argues that the United States should immediately adopt legislation that recognizes the people's right to make law and specifies the procedures the people may use in exercising this right. Part I begins with an overview of the differences between a representative democracy and a participatory democracy. Part II discusses the benefits of a participatory democracy, while Part III discusses some of the challenges associated with creating a participatory de-

49. See, e.g., *City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 679 (1976). The Court also stated: "Under our constitutional assumptions, all power derives from the people, who . . . can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature." *Id.* at 672. The Court concluded that the use of direct voting "is a classic demonstration of 'devotion to democracy.'" *Id.* at 679 (quoting *James v. Valtierra*, 402 U.S. 137, 141 (1971); see also LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 5 (Oxford 2004) (stating that American culture prides itself on being a democracy; the closer a decision comes to being made by "the people themselves," the stronger its democratic credentials.).

50. See discussion *infra* Part I.B.

51. See discussion *infra* Part IV.A.

52. See discussion *infra* Part II.C.

53. See discussion *infra* Part II.B.

54. See, e.g., Merrill, *supra* note 45, at 279 ("Given the perception that direct democracy reflects the common will, it is a particularly useful tool for resolving sharply contested issues that elected representatives and administrators may be reluctant to decide themselves."). However, Merrill sees direct democracy as only appropriate in certain local matters — not state or federal politics — because the number of voters is too great. *Id.* at 282.

mocracy. Part IV focuses on the protection of individual and minority rights, and Part V identifies the possible circumstances that will propel our movement toward a participatory democracy. Part VI concludes.

I. CREATING A STRONGER DEMOCRACY

A. *Representative Democracy Is Weak Democracy*

1. *Accountability*

The fundamental truth upon which our democracy is based is that the only legitimate source of governmental power is the people—all of the people over which the government has authority.⁵⁵ In a representative democracy, the people do not exercise their power to govern directly; rather, they periodically delegate their authority to an agent or representative. This agent, a senator or congressional representative for example, is to participate in government directly (proposing and voting on legislation) on behalf of the voters who elected the agent. The very heart of a representative democracy is the accountability of elected politicians to the voters.⁵⁶ Voters must have the right to terminate the agency if the agent does not represent the voters to their satisfaction. Without accountability, there is no real consent of the governed, and thus no real democracy.⁵⁷ Accountability occurs in our representative democracy by the process of periodic elections. For example, every six years a statewide senatorial election is held. If the voters are displeased with the job the incumbent senator has done, the voters may elect a new person to represent them. Thus, our representative democracy recognizes that the ultimate source of governmental power lies in the People and elected agents are at least periodically accountable to the People.⁵⁸

This Article argues that the quality of the democracy provided by our representative democracy is weak because the accountability it

55. See, e.g., DECLARATION OF INDEPENDENCE, *supra* note 27; See *City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 671 (1976); see also *supra* note 49 and accompanying text; *supra* notes 31–38 and accompanying text.

56. See Jane S. Schacter, *Digitally Democratizing Congress? Technology and Political Accountability*, 89 B.U. L. REV. 641, 642 (2009) (“Accountability is central to democratic theory as conventionally understood because it stands for the consent of the governed.”).

57. *Id.* (“[A]sking how Congress might be made more accountable is one way of asking the question how Congress might be made more democratic.”).

58. See *id.* at 643 (“Congress is often treated as democratically legitimate based on the simple fact that its members are elected and are, therefore, answerable to voters.”).

provides is weak.⁵⁹ The main causes of this weakness are the periodic nature of elections,⁶⁰ the lack of transparency concerning the actions of political agents,⁶¹ the moral hazard that is inherent in the delegation of authority to an agent,⁶² and congressional structural rules that punish voters who vote out incumbents with the loss of seniority and clout relative to voters from other districts.⁶³ In the past, this weak form of democracy, representative democracy, was the best we could do, given the practical constraints caused by a geographically large country, a large population, and the difficult, time-consuming nature of communication and travel.⁶⁴ Today, however, for the first time in our history, there is no need to have voters' interests represented exclusively by agents. Today, thanks to the communications revolution, it is now possible to have voters participate directly in the political process.⁶⁵

59. *Id.* at 642 (“[T]here is far less than meets the eye to the reality of political accountability in the American context.” (footnote omitted)).

60. See discussion *infra* Part I.A.2.

61. See discussion *infra* Part I.A.3.

62. See discussion *infra* Part I.A.4.

63. See Akhil Reed Amar & Vik Amar, *President Quayle?*, 78 VA. L. REV. 913, 928–29 (1992) (noting that voters cannot “vote the bums out” without incurring substantial costs).

64. See Hirsch, *supra* note 5, at 188 (noting that the Framers established a representative democracy at the federal level because the country was too large for direct democracy). Hirsch goes on to quote John Adams: “In a large society, inhabiting an extensive country, it is impossible that the whole should assemble to make laws. The first necessary step then is to delegate power” *Id.* (quoting THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVES, REFERENDUM, AND RECALL* 14 (1989)). Another illustration of the practical necessity for representative democracy occurred on February 4, 1789, when the Electoral College unanimously elected George Washington President. Congress was to make that choice official that March but could not muster a quorum until April due to the new country’s bad roads. See RON CHERNOW, *WASHINGTON: A LIFE* (2010), as reprinted in *The Reluctant President*, THE SMITHSONIAN, Feb. 2011, at 45.

65. See, e.g., Amar, *supra* note 22, at 502 (“Today [in 1994], because of improvements in communication and transportation technology . . . there may be ways to retain the deliberation of the convention while providing for even more direct popular participation, akin to referenda.”); Schacter, *supra* note 56, at 643 (“There is no question that the Internet has risen rapidly to become a very substantial factor, and an important venue, in our collective political life. Nor is there question that this has vastly expanded the availability and accessibility of political information.”); Vermeule, *supra* note 45, at 684 (“It is now technically feasible for Congress to become a virtual assembly. Legislators could hold committee meetings by teleconference, vote by some remote mechanism and so forth.”). Vermeule argues that with today’s technology direct democracy is not only feasible—it is less costly. Vermeule, goes on to state: “It is also technically feasible to have much more virtual voting by citizens than we currently do, eliminating the substantial opportunity costs of physical voting in the sense of going to a designated balloting place.” *Id.* at 685 (ultimately finding insufficient evidence to advocate for or against such a development). The Internet not only makes virtual voting possible, but it also makes it feasible for Congress to assemble virtually and decide issues by referenda. *Id.* Finally, Vermeule comes to federal direct democracy, stating that “virtual voting could so re-

2. *Weak accountability: One thousand votes but only one election*

One reason that accountability in a representative democracy is weak is that the agent/representative has taken so many actions between elections that it becomes difficult or impossible for voters to meaningfully keep track of what the representative has done.⁶⁶ Thus, when the time for an election arrives, it is very difficult for voters to determine whether, as a whole, their representative has done a good job of representing their interests.⁶⁷ For example, “House members typically make more than 1,000 votes in a two-year term,” and in just one election, voters must try to evaluate this overall voting record.⁶⁸ Also, the strength of the two dominant political parties—Republicans and Democrats—and the political reality

duce the costs of voting to citizens as to greatly increase the scope for mechanisms of direct democracy, even at the federal level. Congress could not only assemble virtually, it could decide some or many issues by direct-democracy referenda, delegating them back to the people at large, or could at least hold advisory referenda to get a formal statement of public opinion on particular issues.” *Id.* Vermeule observes that the communications revolution has made federal direct democracy feasible but finds insufficient evidence to advocate for or against such a development. *Id.* at 686.

A popular criticism of direct democracy is that low-income households have less access to high-speed Internet access than wealthy households. See Dick Morris, *Direct Democracy and the Internet*, 34 LOY. L.A. L. REV. 1033, 1051 (2011); Patricia M. Worth, *Racial Minorities and the Quest to Narrow the Digital Divide: Redefining the Concept of “Universal Service,”* 26 HASTINGS COMM. & ENT. L.J. 1, 47–48 (2003). The “digital divide” that has existed continues to exist. See generally PIPPA NORRIS, DIGITAL DIVIDE: CIVIC ENGAGEMENT, INFORMATION POVERTY, AND THE INTERNET WORLDWIDE 68–92 (2001); Schacter, *supra* note 56, at 670 (noting that the fact that higher socioeconomic groups are more likely to have relevant Internet skills is unsurprising, given the digital divide). But there is reason to believe that this situation is improving and will continue to improve. *Id.* (noting that “the racial divide seems to be shrinking, but the income and educational-based divides persist”). Recently, the federal government created a map of the nation’s broadband services as part of a multibillion dollar effort by the federal government to improve broadband service and availability around the country. See Amy Schatz, *Rural Areas Still Lag in Broadband Access*, WALL ST. J., Feb. 18, 2011, at A2.

However, it is also important to recognize that the “digital divide” in the sense of certain groups having better access to information is not limited to digital information. The rich, better educated, and urban have always had better access to information, whether via town criers, newspapers, telegraph, newsreels, television, telephone, etc. Moreover, these same favored groups have always been in a better position to use and act on this information. The revolution brought about by democracy was that it gave the disfavored, the poor, and the uneducated a right to participate in the political process. This chance was not afforded to them before the advent of democracy. Thus, direct democracy importantly gives the disenfranchised a better chance to participate. However, neither representative democracy nor direct democracy can ensure that the chance will be used.

66. Schacter, *supra* note 56, at 646 (discussing various reasons why elections may not provide for meaningful accountability).

67. See *id.*

68. *Id.*

that most House seats are “safe seats,”⁶⁹ further reduce robust accountability.⁷⁰ No meaningful challenge is likely to come from the “other” party, but rather only from intra-party competition in primaries.⁷¹ In addition, commentators have pointed out that accountability is lessened even further by incumbent advantages such as “fundraising advantages, seniority, and the ability of incumbents to dole out pork and do casework.”⁷²

The communications revolution brought about by the Internet may well enable periodic elections to provide more robust accountability by giving voters better access to, and a better ability to manage, voting records.⁷³ Internet sites like Open Congress⁷⁴ and Project Vote Smart⁷⁵ are designed to do just this. Whether the Internet will in fact make the accountability provided by elections more effective remains to be seen.⁷⁶ The point made here is that the communications revolution allows us to go beyond improving the accountability of elections, because the Internet allows us to have direct voter participation in government.⁷⁷

Even if voters have perfect knowledge of what the agent has done and why he has done it, most voters would likely conclude that the agent voted the voter’s way only some of the time. Even if a particular political agent is honest, hardworking, and diligent, he still may not have done a “good job” from a particular voter’s point of view. Voters identify a “good job” by measuring whether the political agent did what the voter would have done if the voter had been given the chance. No election-based representative democracy, no matter how frequent the elections nor how transparent or manageable the voting records of incumbents, can ensure that the individual voter can elect a representative who will vote the way that the voter

69. This term refers to the fact that “the political composition of most congressional districts virtually guarantees that one party will hold the seat.” *Id.*

70. *Id.* at 642 (citing Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737, 755–59 (2004)).

71. *See id.* at 646.

72. *Id.*

73. *See id.* at 662–68.

74. OPEN CONGRESS, <http://www.opencongress.org> (last visited May 8, 2012).

75. PROJECT VOTE SMART, <http://www.votesmart.org> (last visited May 8, 2012).

76. Schacter, *supra* note 56, at 662. With regard to improving the ability of periodic elections to provide meaningful accountability, there is reason for doubt. As Jane Schacter observed, “The Internet may in some respects mitigate, but cannot itself eliminate, the inability of periodic elections to facilitate serious debate about many of the matters on which legislators have voted.” *Id.*

77. *See supra* notes 64–65 and accompanying text.

would on each issue. Thus, in a representative democracy, voters are at best left to try to determine whether their political representative is honest, under the influence of special interests, capable, diligent,⁷⁸ and votes the way the constituent wishes most of the time. As noted, it is extremely difficult, if not impossible, for voters to make this determination.⁷⁹ More importantly, today it is no longer necessary, because we can simply allow voters to vote for themselves.⁸⁰

3. *Weak accountability: Poor transparency*

In addition to voting records, additional basic information about the policy choices made by elected representatives is necessary for meaningful accountability. Some of this information is not easily available or is not available at all.⁸¹ In addition, as discussed below, some elected officials engage in deliberate obfuscation to reduce the availability of this information.⁸² Moreover, even if adequate voting records and other basic information about incumbents' actions and alliances are available, it does not necessarily follow that accountability will become more robust.⁸³ That is, if an increase in the information available does not result in an increase in the information possessed by most voters, because most voters do not choose to avail themselves of political information, accountability may not be improved.⁸⁴ As a result, even the potential for increased transparency offered by the Internet may not lead to more robust accountability.

Information about an agent's policy choices is not available at all in some cases. For example, activities such as killing a bill in committee, killing a nomination, demanding important changes in proposed legislation, adopting procedural rules limiting or eliminating debate or limiting amendments, or other manipulations of the legislative process often occur outside of public view or occur without attribution to the agents involved.⁸⁵ In addition, even when voting records are available, policy choices may be camouflaged. For ex-

78. Evaluating these characteristics is made even more difficult by incumbents' intentional obfuscation. See *infra* notes 92–100 and accompanying text.

79. See *supra* notes 66–70 and accompanying text.

80. See *supra* notes 64–65 and accompanying text.

81. See Schacter, *supra* note 56, at 648 (Schacter refers to these problems as “literal lack of transparency” and “compromised transparency,” respectively).

82. See *infra* notes 102–08 and accompanying text.

83. See Schacter, *supra* note 56, at 645 (Schacter refers to this as “wasted transparency”).

84. *Id.*

85. *Id.* at 644.

ample, if a piece of legislation relates to more than one subject either due to political bargaining (logrolling),⁸⁶ or due to a last-minute addition of an unrelated provision (rider),⁸⁷ it is impossible to tell whether a representative who voted for the bill was in favor of both proposals, or so in favor of one that he/she voted for the bill anyway, even though they would have preferred to have voted for only the favored proposal.⁸⁸

There are also instances where information is *technically* available to voters but practically inaccessible. This phenomenon is known as “compromised transparency.”⁸⁹ For example, information may be available under regulations like the Freedom of Information Act (“FOIA”),⁹⁰ but unless one understands its “technical and arcane ways” and is willing to endure its delays and costs, the information will not be revealed.⁹¹

Deliberate obfuscation by legislators also inhibits or eliminates transparency. As noted, logrolls, riders, manipulation of the legislative process, misleading bill titles (e.g., The Patriot Act⁹² or The Patient Protection and Affordable Care Act⁹³), and very long, complex legislation (for example ObamaCare, which is also called The Patient Protection and Affordable Care Act), are examples of intentional congressional actions that reduce or eliminate transparency.⁹⁴ It is

86. Logrolling refers to “the combining of multiple measures, none of which would pass on its own, into an omnibus proposition that receives majority support.” Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 689 (2010) (footnote omitted).

87. Riders are “unpopular measures that slip through the lawmaking process on the backs of popular measures.” *Id.* at 690 (footnote omitted).

88. In part to prevent these problems, most jurisdictions providing for direct democracy adopt a “single subject” rule “which limits ballot propositions to one ‘subject.’” *Id.* at 689. In many states, some version of the single subject rule also applies to ordinary legislation. See Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 812 (2006) (“By 1959, some version of the rule had been adopted in forty-three states.”). The federal government has not adopted a single subject rule, and federal legislation often contains more than one subject, often as a result of logrolls or riders. See Cooter & Gilbert, *supra* note 86, at 706–12.

89. See Schacter, *supra* note 56, at 644.

90. 5 U.S.C. § 552 (West 2000).

91. See Schacter, *supra* note 56, at 644.

92. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107–56, 115 Stat. 272 (2001).

93. Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010).

94. These titles are designed for marketing—that is, to “sell” the bills politically. Many critics argue that the Patriot Act, far from being patriotic, actually violates the Bill of Rights—and some suggest an alternate name, such as the “Elimination of the Right to Privacy Act.” In the case of the Patient Protection and Affordable Care Act, many argue that provisions of the bill

also difficult for voters to determine how lobbying affects the conduct of their representatives.⁹⁵ Taken together, these difficulties mean that it is often impossible for voters to know what policy choices their representatives are making and why.

The same communications revolution that I suggest allows us to move to a participatory democracy is also likely to increase overall transparency.⁹⁶ This alone, however, will not necessarily lead to improvements in accountability.⁹⁷ First, deliberate obfuscation or camouflage is not likely to be stopped by the Internet—indeed, it may make such efforts more effective.⁹⁸ Second, increasing the amount of good information available to voters is not helpful if voters do not use the information.⁹⁹ As discussed *infra*, participatory democracy may provide a remedy to voter apathy, because under participatory democracy, a voter really gets to vote on specific bills, and thus each vote has an impact, albeit a small one, on specific legislation. In ad-

do not protect patients, but rather endanger or injure them. These critics might suggest re-titling the law the “Government-Run Healthcare Act.” Whether these pieces of legislation are good or bad is not pertinent, the point is that these titles are not selected to inform voters of the substance of the bill—the titles are selected to push a particular political point of view and are therefore misleading. See Schacter, *supra* note 56, at 644 (“[C]ontending forces . . . characterize bills in ways that make it hard for the public to cut through the fog of spin and determine what a given bill will actually do.”).

95. *Id.* at 671–72.

The Internet dramatically reduces the cost of obtaining political information and, in that way, threatens to rob organized groups of important structural advantages—their access to detailed, up to date information about the legislative process and their ability to monitor the legislative process closely. The Internet is positioned to level these traditional information advantages in various ways. Imagine, for example, that bill drafts and markups are routinely posted online, diluting the value of lobbyists’ privileged access to that information. Imagine further that bloggers who are expert in a particular area of legislation analyze bills in detail, place contested provisions in political and legal context, and explain who would be helped and hurt by parts of the bill. Imagine, finally, that information about traditional lobbying appeared online, so that citizens could know, on a timely basis, who was lobbied by whom on a particular bill. To imagine this world is to imagine something very different from the legislative world we have always known, where it is frequently the case that the details and tradeoffs in pending legislation are principally intelligible only to a small audience comprised of those with significant interests in the legislation, the resources to pursue preferred outcomes, and the ability to lobby out of the public’s view.

Id. (footnotes omitted).

96. See *id.* at 671–73.

97. *Id.* at 645 (“Transparency, while a predicate for accountability, is by no means a guarantee.”).

98. The Internet not only allows good information to be efficiently disseminated far and wide, but does the same for false information. See *id.* at 653 (discussing the viral e-mails about Barack Obama being a Muslim and citing a source saying that nearly 20% of Americans believed the rumor).

99. *Id.* at 645 (“wasted transparency”).

dition, a participatory democracy provides that each voter may be involved in the drafting and deliberation concerning proposed legislation, and this involvement may also reduce voter apathy. But, if under a representative democracy, voters do not care enough to use political information because they do not feel they have the power to change anything anyway, then increased access to good political information will not improve overall accountability.¹⁰⁰

4. *Weak accountability: Strong moral hazard*

From the Georgia Yazoo land fraud early in our Republic¹⁰¹ to Chicago-style politics,¹⁰² to the political deal-making that accompanied the passage of ObamaCare in 2010 (which included the selling out of the taxpayers of forty-nine states to buy the vote of a Nebraska Senator),¹⁰³ moral hazard and the related paternalism hazard have been constant problems in our representative democracy. Moral hazard is the risk agents will serve their own interests rather than

100. *See id.*

101. State legislators passed laws selling state land to private companies at extremely low prices in exchange for personal profit. *See generally* C. PETER MAGRATH, *YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC: THE CASE OF FLETCHER V. PECK* 6-10 (1966). When the details of these contracts (known as the Yazoo Act) to sell the land at such low prices to companies, in which many Georgia officials and legislators were stockholders, became known to the public, outrage was widespread. *Id.* A new governor was elected, and he soon signed a bill nullifying the Yazoo Act. *Id.* at 10-14. Some of the purchasers of the land challenged the new law nullifying the Yazoo Act. *Id.* This ultimately resulted in the Supreme Court case of *Fletcher v. Peck*, and the Supreme Court overturned the Georgia law nullifying the Yazoo Act as unconstitutional under the Contract Clause of Article I, Section X. *See id.*; *Fletcher v. Peck*, 10 U.S. 87 (1810).

102. Chicago-style politics generally refers to a political system plagued by corruption, patronage, nepotism, and authoritarianism. The administration of Chicago Mayor Richard J. Daley is often cited as a prime example of Chicago-style politics. *See generally* BILL GRANGER & LORI GRANGER, *LORDS OF THE LAST MACHINE: THE STORY OF POLITICS IN CHICAGO* (1987). More recently, four Chicago mayors and a total of 1000 public officials and businessmen have been convicted of public corruption since 1970. *See* Thomas J. Gradel et al., *Curing Corruption in Illinois: Anti-Corruption Report Number 1*, U. ILL. CHICAGO, 1 (Feb. 3, 2009), <http://www.uic.edu/depts/pols/ChicagoPolitics/Anti-corruptionReport.pdf>. Illinois Governor Rod Blagojevich was convicted of corruption in 2010. *See* Monica Davey & John O'Neil, *Ex-Governor of Illinois Is Convicted on All Charges*, N.Y. TIMES, Apr. 17, 2006, available at <http://www.nytimes.com/2006/04/17/us/17cnd-ryan.html>.

103. This became known as the "Cornhusker Kickback," a deal made in December 2009 by United States Senate Majority Leader Harry Reid with Nebraska's democratic Senator, Ben Nelson. *See* Trish Turner, *Nelson Accused of Selling Vote on Health Bill for Nebraska Pay-Off*, FOX NEWS.com (Dec. 20, 2009), <http://www.foxnews.com/politics/2009/12/20/nelson-accused-selling-vote-health-nebraska-pay>. In exchange for his vote, which was needed to override a potential Republican filibuster, the taxpayers of the other forty-nine states were to pay for 100% of Nebraska's Medicaid expansion mandated as part of ObamaCare. *Id.*

their principal's. In the political context, representatives may choose to serve their own interests rather than the interests of the voters. This risk is realized when the agent/representative sells his or her vote for money, political favors, campaign contributions, or power.¹⁰⁴ Using an extreme example, a representative might vote to allow a landfill to be created in her district even though the majority of the voters who elected her do not want the landfill. In this example, the reason the representative votes in favor of the landfill is because the people who want the landfill (who may not even be voters in that jurisdiction) have paid the representative for her vote. This is simply a version of the Georgia Yazoo land fraud debacle mentioned earlier.¹⁰⁵

A related, though slightly different, moral hazard is the risk that a representative will disregard the desires of voters because he believes he knows better than the voters about what is best for them. We might call this the "arrogance" or "paternalism" hazard. From the voter's point of view, the two hazards are the same – the representative has willfully failed to represent the will of the voters. The deleterious effect on democracy is also the same regardless of the representative's reasons for disregarding the will of the voters.¹⁰⁶

104. See, e.g., Schacter, *supra* note 56, at 645.

105. See *supra* note 102 and accompanying text.

106. Another approach to representative democracy considers the process of elections with its respect for majority will as separate and distinct from the process of governing. That is, the will of the majority of the voters is only relevant in selecting their representative. After a political representative is elected, then that individual has an obligation to do what she honestly thinks is best for the country and her constituents. Her obligation is *not* to do what a majority of her constituents want her to do or to vote the way a majority of her constituents would vote. Once elected, a political representative is obligated to do what she believes is best even if no one else agrees. If she wants to get reelected, she will have to convince her constituents that, contrary to what they believed, what she did was the best course of action.

If one accepts this approach, then polling is only relevant to a many-minds-type argument that suggests that polling is likely to identify the true "best answer," but, as a mere reflection of majority preference, polling would be irrelevant. Also, under this approach, the paternalism hazard is not a hazard at all but is the appropriate way for an elected official to act.

While not the focus of this Article, I assume this approach is incorrect and illegitimate. For me, the spirit, not to mention the actual words, of our founding documents and the basic concept of democracy or "rule by the people" requires that we reject this approach. See *supra* note 27 and accompanying text. The concept of democracy is not to elect a king for a time, with the ability to elect a new king every so often. The idea is to have the People govern themselves. As discussed *supra*, in order to implement this idea practically required a representative government, but this concession was made because it was the only way to get as close as we could to true democracy. The representatives had an obligation to vote according to the will of their constituents because in the People lay not just the power to elect a representative, but the power to govern. See *infra* note 147.

Moral hazard is inherent in any agency relationship, and it is especially problematic in political agencies.¹⁰⁷ Moral hazard makes our representative democracy weak because it thwarts the will of the People and creates an incentive on the part of elected representatives to camouflage their actions, which significantly lessens transparency and destroys meaningful accountability. Moral hazard creates an incentive for camouflage to hide self-dealing or patronage to special interests. Moreover, the claim of arrogance or paternalism can be used as camouflage to hide outright vote selling. That is, from the representative's perspective, it is worse for her to be found to have sold her vote than to have exercised her best judgment, based on her (allegedly) superior knowledge to do what she honestly believed was best for her constituents, even though her constituents wanted something else.

For example, assume a case where the will of the majority of voters is known as a result of polling, and assume the voter's representative has voted against the wishes of the majority. Because of the paternalism hazard, the objective evidence of misconduct—voting inconsistently with the desire of the majority of voters—becomes ambiguous. Such behavior could indicate illegal vote selling, or it could be a democratically damaging but legal act of paternalism. This example also illustrates why dishonest political agents may resist even advisory referenda. The dishonest representative does not want the desires of his constituents known with precision or even accuracy because, without this knowledge, the representative finds it much easier to hide his dishonest actions. As discussed below, the adoption of participatory democracy will significantly reduce both moral hazard and paternalism.¹⁰⁸

107. THE FEDERALIST NO. 10, *supra* note 30. "Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people." *See id.* at 77.

108. *See infra* Parts III.A-B. In a participatory democracy, like a representative democracy, there is a different type of moral hazard, one which comes from the ability of the majority to treat individuals or minorities unfairly. This problem may, theoretically, be worse in a participatory democracy than a representative democracy because the strong imprimatur of democracy that is created by direct majority action may embolden the majority to enforce its will unfairly on individuals or minorities. *See Merrill, supra* note 45, at 278-79. Protecting individual rights in a participatory democracy is discussed below at Part IV.

*B. Participatory Democracy**1. Direct involvement of all people in the legislative process*

The tools of direct democracy have been used at the state level in the United States since the early twentieth century, though these tools have been notably absent at the federal level.¹⁰⁹ The tools of direct democracy are the initiative, referendum, and recall. In general, an initiative is a proposed legislation (bill) or constitutional amendment originating among the citizenry.¹¹⁰ Private citizens propose either a statute or amendment, collect enough voters' signatures to put the proposal on the ballot, and then vote on the proposal.¹¹¹ No formal legislative body like a Congress or a city council is involved.¹¹² A referendum, however, usually originates with a formal legislative body or elected official who decides to send the proposal to the voters for approval or rejection.¹¹³ The referendum may be the voluntary act of a legislative body, e.g., elected officials may use it to seek political cover or direction.¹¹⁴ Or state law may require that certain types of legislation be submitted to the voters, or the voters may demand that a particular piece of legislation be submitted to them for approval or rejection.¹¹⁵ A recall refers to the ability of voters to remove a political representative from office between elections. In 2003, California voters used the recall process to remove a sitting governor, Gary Davis, from office and replace him with Arnold Schwarzenegger.¹¹⁶ Currently, the controversy surrounding the collective bargaining rights of public unions is resulting in talk of both recalls and initiatives in the states involved.

Those who advocate for the increased use of the tools of direct democracy believe that direct democracy empowers the majority of citizens and reduces the influence of special interests and the inci-

109. See Cooter & Gilbert, *supra* note 86, at 688-89, 694 & n.31.

110. *Id.* at 694 ("We define initiatives to be statutes or constitutional amendments that originate among the citizenry."). In this Article I am adopting this definition of "initiative." Twenty-four states currently have an initiative process. *Id.* at 695.

111. *Id.* at 694.

112. *Id.*

113. *Id.* ("We define referenda . . . to be statutes or constitutional amendments that a representative body refers to the citizens for approval or rejection."). In this Article I am adopting this definition of "referenda." Most states have a version of the referendum process. *Id.* at 695.

114. *Id.*

115. *Id.* at 694-95.

116. See DANIEL WEINTRAUB, PARTY OF ONE: ARNOLD SCHWARZENEGGER AND THE RISE OF THE INDEPENDENT VOTER 31-34 (2007).

dence of self-dealing by legislators.¹¹⁷ In the United States, voters have directly passed thousands of initiatives at the state and local level.¹¹⁸ Controversial issues including affirmative action, stem cell research, eminent domain, same-sex marriage, and political redistricting have all recently been decided by direct democracy.¹¹⁹ In California, for example, between 2002 and 2009, voters were asked to approve sixty-nine ballot measures—forty-three voter initiatives and twenty-six ballot measures proposed by the legislature.¹²⁰ Throughout the United States, direct democracy at the state level is widely supported and frequently used.¹²¹ Two commentators have concluded: “In short, direct democracy is a major, expanding, and controversial part of American Government.”¹²² Another commentator concludes, based on the California experience over the past decade, that “the devices of direct democracy remain too blunt and expensive as tools for anything but interstitial governance, filling in the spaces between the bulk of legislation passed by the legislature.”¹²³ Still other commentators, based on analysis of the same California experience, conclude: “A new system of governance has evolved in California over five elections in a half-decade of furious political activity. An era of a “hybrid democracy” is now underway, with elected representatives through the legislative process and voters at the ballot box jointly sharing responsibility for making public policy.”¹²⁴

The term “Hybrid Democracy” was first used by Elizabeth Garrett.¹²⁵ What I am advocating for here resembles Garrett’s hybrid democracy, but I am also suggesting the possibility of an eventual change more fundamental than supplementing a representative democracy with the tools of direct democracy.¹²⁶ I do, however, suggest that a combination of existing legislative institutions and direct democracy—including a federal process for initiative and referen-

117. See Cooter & Gilbert, *supra* note 86, at 689; BALDASSARE & KATZ, *supra* note 45, at 19.

118. See Cooter & Gilbert, *supra* note 86, at 695.

119. *Id.* at 688–89.

120. Richard L. Hansen, *Assessing California’s Hybrid Democracy*, 97 CALIF. L. REV. 1501, 1503 (2009) (reviewing BALDASSARE & KATZ, *supra* note 45; CTR. FOR GOVERNMENTAL STUDIES, *DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA’S FOURTH BRANCH OF GOVERNMENT* (2d ed. 2008); WEINTRAUB, *supra* note 116).

121. See Cooter & Gilbert, *supra* note 86, at 689.

122. *Id.*

123. See Hansen, *supra* note 120, at 1502–03.

124. See BALDASSARE & KATZ, *supra* note 45, at 219.

125. See Elizabeth Garrett, *Hybrid Democracy*, 73 GEO. WASH. L. REV. 1096, 1097 n.7 (2005).

126. *Id.*; see also *supra* notes 23–25 and accompanying text.

dum—will be the first step toward a stronger participatory democracy in the United States. This particular “step on the path” is similar in many ways to Garrett’s “hybrid democracy,” but it is quite different in the sense that I see this step requiring elected legislators to solicit direct voter involvement. The ultimate destination, though one that the People may choose to never reach, is the complete replacement of representative democracy with pure participatory democracy.¹²⁷

127. At the state level, the tools of direct democracy are often invoked. Recently, for example, as some states attempted to cut back on the collective bargaining rights of public employees, the tools of direct democracy have been touted as a way for those dissatisfied with the legislature or governor to remedy the situation. See, e.g., Kris Maher, *Unions Push to Undo Ohio Law: Showdown Looms over Referendum to Repeal Public-Employee Bargaining Limits*, WALL ST. J., June 3, 2011, at A5 (discussing union members attempting to collect enough signatures to trigger a statewide referendum); Vauhini Vara, *Gov. Brown Seeks Fall Referendum*, WALL ST. J., Apr. 15, 2011, at A4 (discussing that in order to balance the state budget, Governor Brown aimed to put a tax initiative on the ballot); John Fund, *Power to the People? How Déclassé*, WALL ST. J., June 11–12, 2011, at A11 (discussing attempts by various states to restrict or otherwise make the tools of direct democracy more difficult to use). These attempts include court use of the single subject rule to invalidate initiatives found to contain more than one subject. This threatens initiative sponsors with personal liability and challenges the very concept of initiative law making under the Constitution’s Guarantee of a Republican Form of Government Clause in Article IV, Section IV. See *infra* Part III.E for a discussion of this issue. Fund also notes:

Twenty-four states currently allow voters to write their own laws through the initiative process, side-stepping gridlocked legislatures to pass statutes or constitutional amendments. Conservative voters have used the tool to impose term limits and curb racial quotas. At the same time, liberals have used initiatives to pass minimum-wage laws and tobacco taxes that were often blocked by legislatures where lobbyists held sway.

It’s just such citizen democracy that has irked the establishment in states such as Colorado, California and Oregon – so the political class is trying to rein it in.

....

Elena Nunez, program director for the liberal advocacy group Colorado Common Cause, says that protecting the right of initiative is critical, no matter who wins at the ballot box. “We’ve only been able to pass the sunshine and campaign finance laws we need through the initiative,” she told me. As for complaints the ballot is too cluttered by initiatives, she notes that two-thirds of the constitutional changes placed on Colorado’s ballot since the state adopted the initiative in 1912 were put there by the legislature.

It’s fashionable these days for elites to disparage popular democracy. “The longer that people live in California, it seems, the more likely they are to be misinformed, and possibly brainwashed into ignorance,” sniffed the Economist last April in a 16-page special report slamming that state’s initiative process. But in reality, the initiative process serves as a popular check on out-of-touch legislators and reminds everyone that it’s the voters who should be in charge of the politicians, not the other way around.

Fund, *supra*.

2. *Democracy: From weak to strong*

a. The democracy continuum

It is possible to think of democracy as a continuum from relatively weak to relatively strong. At the weak end is pure representative democracy, which is pretty much what we currently have at the federal level in the United States.¹²⁸ Political leaders or representatives are elected by the citizens and held accountable to the citizens via periodic elections. The quality of the accountability provided by this process depends, among other things, on the availability of accurate and timely information concerning the activities of elected officials and on the willingness of voters to make use of this information. Moving toward the stronger end of the continuum, we begin to see direct democracy tools used as a supplement to representative democracy.¹²⁹ This is Garrett's hybrid democracy, a combination of representative and participatory democracy. The existence of each, however, affects the other. That is, while all of the institutions and functions of pure representative democracy remain in hybrid democracy, these institutions, and in fact the representatives themselves, will function differently because of the existence of the procedures for direct democracy.¹³⁰ The fact that voters have a ready process that they may use to inject themselves directly into the legislative process will result in elected officials being more in tune with, and paying more heed to, the policy choices of voters.¹³¹ Accounta-

128. See, e.g., Karen Syma Czapanskiy & Rashida Manjoo, *The Right of Public Participation in the Law-Making Process and the Role of Legislature in the Promotion of this Right*, 19 DUKE J. COMP. & INT'L L. 1, 14–15 (2008) (“In recent years, theoreticians on the subject of participatory democracy have identified two models for citizen engagement in governance between elections: strong democracy and discourse, or dialogic participation. Both stand in contrast to ‘thin’ or purely representative democracy, in which the citizen’s role is to elect representatives periodically.”); BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 117–19 (20th anniv. ed. 2003) (noting that citizen deliberation is the hallmark of strong democracy). My point in this Article is that, due to the communications revolution, we may now have a national deliberation and thus strong participatory democracy on the federal level.

129. See *supra* Part I.B.1.

130. See Czapanskiy & Manjoo, *supra* note 128, at 19 (“Once they have invited input, legislators cannot avoid the task of being accountable to those who go to the trouble of giving input.”).

131. *Id.*; see generally R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* (1990) (arguing that voters need very little political information to make rational voting decisions, because legislators are concerned about what might attract voters’ interest at the next election and, as a result, will try to do what they think most voters want them to do); see also Jane S. Schacter, *Political Accountability, and the Democratic Legitimacy of Legislatures*, in *THE LEAST EXAMINED BRANCH* at 45, 54–63 (Richard W. Bauman & Tsvi Kahana eds., 2006) (examining R. Douglas Arnold’s argument).

bility under hybrid democracy is potentially more constant (voters may begin a recall or initiative process at any time), rather than just periodic, and thus democracy is strengthened.

Hybrid democracy covers a large range of the continuum, being stronger or less strong depending on how it is implemented. At the weak end are simply advisory referenda, requested by the legislature or executive at their complete discretion when seeking political cover or favor with voters. In fact, the ascendancy of political polling is a move in the direction of advisory referenda, as it already supplements the existing representative democracy, especially at the federal level. A move toward further democratic strength would include creating a process for binding referenda, initiatives, and recalls. Stronger still would be a process that leveled the playing field on which proposals are qualified for the ballot. Such a process would be designed to answer one of the criticisms of the California experience, which was that “initiative supporters who have enough money can qualify just about anything for the ballot—and those lacking money can qualify nothing”¹³² Fred Kimball, of the signature-gathering firm Kimball Petition Management, claimed, “If you want to have your kid’s birthday as a holiday, give me a million and a half dollars and I’ll at least get it on the ballot for people to vote on.”¹³³ The fact that no “California initiative has relied exclusively on volunteers since 1982, and that very few have used volunteers at all, indicates the difficulty of organizing and sustaining a grassroots management capable of collecting several hundred thousand signatures.”¹³⁴

Also, spending by opponents of initiatives is effective at reducing support for proposals—especially if opponents significantly outspend proponents.¹³⁵ However, a number of other factors also affect the success of initiatives, and under certain circumstances may create an exception to the he-who-spends-the-most-wins rule.¹³⁶ Balance in the process could be achieved, for example, by establishing an independent government advisory office funded with tax dollars.¹³⁷ This office would help people navigate the initiative or recall

132. See CTR. FOR GOVERNMENTAL STUDIES, *supra* note 20, at 284.

133. *Id.*

134. *Id.* at 169.

135. *Id.* at 301.

136. *Id.*

137. See, e.g., Hirsch, *supra* note 5, at 218–31 (discussing Philadelphia II’s proposal for a Democracy Act which would establish the Electoral Trust to administer the initiative and referendum processes).

process and could be one source of balanced and accurate information related to initiatives.¹³⁸

Harnessing the power of the Internet would allow voters easy access to information regarding initiatives, referenda, and recalls. In addition, the Internet would also allow for novel practices like online voting, online signature collection, and use of wikis for drafting legislative proposals which would make the initiative process less expensive and more efficient for everyone.¹³⁹ Also, a process that requires elected political representatives to engage in a process designed to fully inform voters regarding pending congressional legislation and to allow voters to comment orally and/or in writing on such legislation or to propose amendments to such legislation would further strengthen democracy.¹⁴⁰ Under our current system, citizen input between elections is not forbidden, but it is also not mandated,¹⁴¹ and elected representatives are no longer required to attend to citizen input when it is offered.

Democracy could be further strengthened by changing the role of political representatives to specifically include the obligation to educate voters on proposed legislation and solicit opinions on proposed legislation from all constituents, especially individuals affected by proposed laws.¹⁴² These obligations could be fulfilled by holding a series of online and in-person hearings on proposed legislation. Again, the Internet can make these efforts faster, less expensive, and more effective. Online town-hall meetings where all online participants could see and hear each other would make holding hearings quick, cheap, and efficient. Files of these virtual meetings could be available for viewing after the meeting by those who did not attend or who need to refresh their memory of what was said. Moreover, a discussion board could easily be set up in advance of the meeting to post the specific proposals and written comments. Stronger yet would be a process that requires political representatives to respond to the discussion generated by the meetings by revising the original proposal or explaining why they have not revised it. Also, proposed

138. *Id.* at 222-24.

139. *See, e.g.,* Vermeule, *supra* note 45, at 686 ("In early 2007, Utah State Senator Steve Urquhart launched Politicopia, a wiki for debating and drafting legislation through the putative 'wisdom of crowds.' There is no reason that federal legislators could not create similar resources and use their products, or pretend to do so." (footnotes omitted)).

140. *See supra* notes 128, 130, and accompanying text.

141. *See, e.g.,* Czapanskiy & Manjoo, *supra* note 128, at 16.

142. *See generally id.* (discussing South African Constitutional Court decision to institute mandatory mechanisms for interactions between legislators and the public).

legislation could be set up as a wiki, allowing voters to suggest drafting changes or additions to proposed bills.¹⁴³ Online votes could be held on proposed amendments—adding to the discussion and finalizing the proposal to be voted on. Such a hybrid system would allow voters to play a direct role in agenda setting, legislative drafting, and the ultimate approval or disapproval of legislation. The consent of the governed obtained under the hybrid democracy outlined above is very different—stronger, more meaningful, more consistent, and more true to our democratic ideals¹⁴⁴—than it is under our current representative democracy.¹⁴⁵

To complete our continuum, we arrive at a pure participatory democracy. Every voter is a member of Congress. While it is likely that a formal, elected Congress would continue to exist, its role would be vastly different than it is today. The elected Congress would not have authority to finalize legislative proposals or pass legislation on its own, except on an emergency temporary basis or where matters of national security prevent open deliberation. Congress's primary role would be to facilitate direct voter lawmaking.

b. The new role of elected legislators

It seems very unlikely that elected legislators will disappear any time soon. Even under the strongest form of hybrid democracy—and in all but the most extreme form of pure participatory democracy—elected representatives will continue to have a role. However, this role will begin to change as movement toward a stronger democracy begins. Even the advent of polling data caused professional politicians to pay more consistent and ongoing attention to, but not necessarily to comply with, the desires of their constituents.¹⁴⁶

The eventual adoption of rules that require elected officials to seek and facilitate citizen input into the legislative process will fundamentally change the relationship between legislators and citizens. Conceiving of this change as simply an extension or expansion of the existing running-for-election part of a legislator's role misses the point. The change is more fundamental; the very nature of the role of elected legislators changes when they have an explicit duty to educate constituents and solicit their input.¹⁴⁷ In this case, their role is

143. See *supra* note 139.

144. See discussion *supra* Part I.B.

145. See discussion *supra* Part I.A.

146. See, e.g., *supra* note 131.

147. Other scholars and I believe that under our existing representative democracy, elected

no longer to make law in the way they believe a majority of their constituents would; their role is now to facilitate the lawmaking directly by the citizens, or at least to facilitate the involvement of citizens in the lawmaking by the legislature. This is a fundamental change that dramatically enhances the quality of the “consent of the governed” and thus dramatically strengthens democracy. It is as if citizens have gone from being mere small shareholders in a large publicly traded corporation to being full-fledged partners in a government set up as a partnership. Even small shareholders have the right to vote once a year but the significance of the influence exerted over the management of the affairs of the corporation due to this annual right to vote is very small. A partner, however, has a right to participate in the day-to-day management of the business, and important decisions cannot be made without all partners’ involvement. A democracy is at heart a partnership—a voluntary coming together of equals in order to protect the rights of each person and to further the interests of the group.

c. Characteristics of strong democracy in the United States

The purpose of this Article is not to advocate the exact and precise nature of strong democracy in the United States. Rather, the central points made here are that: America may now develop—due to the communications revolution—a much stronger democracy than it currently has;¹⁴⁸ the evolution toward a stronger democracy is inevitable because of our abiding democratic rhetoric and traditions;¹⁴⁹ and finally, the specific impetus for beginning the move toward a federal participatory democracy is the inability of our current extremely partisan representative democracy to address many important national issues.¹⁵⁰

representatives have always had an obligation to invite and attend to public input. See Czapskiy & Manjoo, *supra* note 128, at 4. Others have argued essentially that voter input ends with the election. Edmund Burke nicely summarized this position: “Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.” 2 EDMUND BURKE, *THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE* 95 (Boston, Little, Brown & Co., 3d ed. 1869). In a statement by Richard Brookhiser: “[The Federalists] thought that the people should rule at the polls, then let the victors do their best until the next election.” Richard Brookhiser, Editorial, *The Father of American Politics*, WALL ST. J., Sept. 11–12, 2010, at A13. Aspects of this issue also appear in the debate regarding the meaning of the Guarantee Clause in Article IV, Section IV of the U.S. Constitution. See discussion *infra* notes 247–77 and accompanying text.

148. See discussion *supra* text accompanying notes 55–108.

149. See discussion *supra* text accompanying notes 1–54.

150. See discussion *infra* text accompanying notes 181–92.

Sketching with broad strokes, the democracy likely to evolve in the United States will be a hybrid democracy which will continue to include and rely in part on the current institutions of representative democracy. At the federal level, for example, Congress will continue to exist but will be supplemented by a federal initiative and referendum process.¹⁵¹ Next, there will be a voluntary commitment or legal requirement that in the case of “significant legislation,” Congress must educate, solicit input, and ultimately get approval for passage directly from the voters. How “significant legislation” will be defined specifically is beyond the scope of this Article, but broadly speaking a limitation on cost (how much the law will cost to implement), time (how long the law will last), or impact (the number of people impacted by the law and/or the extent to which they are impacted by the proposed law), or some combination of the three, could be established. The best way to establish the exact limitation may be to ask the voters directly by setting up a wiki to draft the limitation, and then have voters vote directly (online) on its adoption. A proposed law that exceeds the established limitation would require direct voter approval to become law. In addition, Congress would be required to educate voters on the proposal and solicit their input in the drafting process. Proposed legislation that did not exceed the established limitation, or that did not fall within the definition of “significant legislation,” could be passed by the elected representatives acting alone. However, voters could inject themselves directly into this process via the initiative procedure if a majority of voters so chose. With regard to large recurring detailed legislation like the federal budget, voters could also choose their level of direct involvement. They may choose, for example, to set overall parameters such as a spending cap or a balanced budget requirement and allow elected representatives to do the rest, with the understanding that the voters could come back into the process to exercise a line item veto any time the voters desired.

Provisions would need to be made for emergency legislation. When circumstances require, based at the federal level on the judgment of Congress and the President, Congress and the President could, *sua sponte*, pass any legislation that in their judgment is necessary for the country. Such emergency legislation would have a set limited duration unless subsequently approved directly by the voters.

151. See, e.g., Hirsch, *supra* note 5, at 218–45 (discussing work of Philadelphia II).

Two points should be made about the possible hybrid democracy discussed above. First, even though the institutions and processes of our current representative democracy remain, they will be altered even in cases where they are used to act without the direct involvement of voters because of the possibility of direct voter involvement. Second, while the hypothetical hybrid democracy discussed above is a much stronger democracy than our current representative democracy, it is still not as strong as a purely participatory democracy. A hybrid democracy, however, will likely be a step on the path to an even stronger, participatory democracy that will be adopted further in the future.

II. THE BENEFITS OF A PARTICIPATORY DEMOCRACY

The benefits of adopting a participatory democracy, even a partial one, include creating a stronger democracy, reducing the moral hazard associated with representative government, reducing political deal-making and its attendant problems, overcoming our partisan-political grid-lock, and ultimately fostering better citizenship and better government.

A. Reducing Moral Hazard

Both types of moral hazard, vote selling and paternalism, will be significantly reduced by the adoption of participatory democracy.¹⁵² First, to the extent that the right to vote on legislative matters is taken away from elected representatives and given to the People, the representatives have less to give to those who would corrupt democracy.¹⁵³ Second, under a participatory democracy, all bills will be available to the voters for input in drafting and for review prior to voting. This also reduces the ability of elected officials to sell influence to special interests. The same analysis applies to the representative's ability to force his choice on the voters against their wishes. However, even in a strong hybrid democracy where representatives have no vote to sell or cast paternalistically, as long as elected representatives exist, they will always have greater access to the process than others, and thus moral hazard will not be eliminated. But even

152. See, e.g., Merrill, *supra* note 45, at 281 ("A third advantage of direct democracy is that it is corruption free, in the broadest sense that includes not just bribery and extortion, but any kind of special interest influence."). Merrill conditions this result on the use of a secret ballot for citizen voting. *Id.*

153. See *id.*

the adoption of a partial participatory democracy will significantly reduce the current instances of both types of moral hazard.¹⁵⁴

B. Reducing Political Bargaining

Political bargaining or deal-making usually manifests itself as omnibus legislation that contains more than one proposal (a “log-roll”), because in order to pass a proposal important to some representatives, those representatives must include and vote for other proposals important to other representatives.¹⁵⁵ The bargain that is struck is simple. Representatives agree that “I will vote for yours, if you vote for mine.”¹⁵⁶ In addition, our existing political process (committee structure, jurisdiction, rules of debate, etc.) may sometimes result in “deals” that are more akin to extortion. For example, an unrelated provision may be added to a bill (a “rider”) just before voting.¹⁵⁷ As a result of the manipulation of the political process, representatives then must vote for the rider to get the main bill passed.¹⁵⁸ Congressional procedures such as the committee system, filibusters, and procedural devices such as closed deliberation are important enablers of political deal-making that result in thwarting the will of the majority.¹⁵⁹ For example, one commentator has observed, “Depending on the rules of procedure, the information available to legislators and the transaction costs of haggling, the unpopular measure may be irremovable.”¹⁶⁰

Manipulation of legislative procedures may leave legislators with the choice of passing a very popular law along with an unpopular one, or of passing no law at all.¹⁶¹ At the federal level, legislators are divided into committees. Committees have jurisdiction over a specific subject matter, such as tax legislation. Committees have near

154. See, e.g., Cooter & Gilbert, *supra* note 86, at 699 (“At its best, direct democracy can empower democratic majorities, weaken special interests, and enhance political transparency.”).

155. *Id.* at 706 (“Logrolling occurs when two proposals each supported by a minority are combined into one ballot proposition supported by a majority, and the two minorities support the combination of policies but respectively prefer to enact one policy and not enact the other.” (footnote omitted)).

156. See *id.* at 706–07.

157. *Id.* at 707 (“Riding occurs when a proposal commanding majority support is combined with a proposal commanding minority support, and a majority supports the combination, even though it would prefer to enact the first proposal and not enact the second.” (footnote omitted)).

158. See Gilbert, *supra* note 88, at 840–44.

159. *Id.*

160. *Id.* at 837.

161. *Id.*

exclusive gate-keeping authority; that is, the full legislature cannot vote on a bill unless the committee to which it was assigned consents. As a result, legislative procedures may be manipulated to ensure that a bill, even a popular one, does not reach the floor of the legislature for a vote.¹⁶² If the bill cannot be voted on, it cannot be passed. Of course, these legislative procedures and institutions encourage political deal-making.¹⁶³ A strong committee chair may agree to bring the bill to the floor only if a rider he favors is attached to the bill, and the deliberation rules are set so that the rider cannot be removed.¹⁶⁴ Political deal-making may facilitate the realization of the moral hazards discussed above. The ability to engage in political deal-making also reduces accountability. Committee assignments and leadership positions are based in large part on seniority, thus the cost of voting out an incumbent is that the voters suffer a loss of power in the legislature.

Commentators have argued that certain types of political bargaining such as logrolls are beneficial and are to be encouraged.¹⁶⁵ These commentators speculate that participatory democracy will discourage or eliminate political bargaining,¹⁶⁶ which would be problematic. However, reducing or eliminating political bargaining is not a problem at all; rather, it is one advantage of adopting participatory democracy. First, there is some agreement that the type of political deal-making that result in riders is dysfunctional and should be prohibited.¹⁶⁷ Second, the arguments advanced by commentators in favor of political bargains that result in legislative logrolls only

162. See, e.g., Schacter, *supra* note 56, at 644.

163. See, e.g., Cooter & Gilbert, *supra* note 86, at 689 ("Direct democracy and representative government differ fundamentally in this respect: Direct democracy encumbers political bargaining, while representative government facilitates it.").

164. See Gilbert, *supra* note 88, at 840-42 (explaining how riders are created).

165. See, e.g., Cooter & Gilbert, *supra* note 86, at 698 ("The advantage of political bargaining is clear: It permits legislators to achieve their preferred outcomes on issues about which they care deeply. In exchange, they accept undesirable outcomes on issues about which they care minimally." (footnotes omitted)); Gilbert, *supra* note 88, at 849-58 (explaining why the courts should condone logrolling).

166. Cooter & Gilbert, *supra* note 86, at 700 ("In short, direct democracy, and the initiative process in particular, offers no forum for political bargaining, so transaction costs are prohibitively high." (footnote omitted)). I suggest that the communications revolution centered on the Internet may in fact provide a forum. See *infra* notes 228-31 and accompanying text. Also, while Cooter and Gilbert see benefit in political bargaining, at least logrolls by Congress, they see danger in any logrolls attempted by initiative sponsors and thus support the application of a *democratic-process-based* single subject rule to direct democracy. See Cooter & Gilbert, *supra* note 86, at 702-03.

167. See Gilbert, *supra* note 88, at 858-59 (explaining why courts should adopt a presumption against riding).

claim to demonstrate that these bargains leave a majority of *legislators* better off¹⁶⁸—there is no claim that these deals necessarily leave the majority of citizens better off.¹⁶⁹ In fact, the presence of moral hazard suggests that political deals may often not benefit citizens.¹⁷⁰

The same moral hazard that is of general concern in the context of political agencies is also of concern in the specific context of logrolls and riders. That is, a particular logroll would be expected to yield an aggregate gain for legislators (this is precisely why the deal was made), but it may create a collective loss for constituents.¹⁷¹ In fact, the ability of legislators to bargain significantly increases the moral hazard associated with political agency because it provides a ready market in which a representative may sell his vote for personal gain (either direct dollars to the representative or political benefits, such

168. See, e.g., Cooter & Gilbert, *supra* note 86, at 698–99, where the authors note the following:

The advantage of political bargaining is clear: It permits legislators to achieve their preferred outcomes on issues about which they care deeply. In exchange, they accept undesirable outcomes on issues about which they care minimally. As with all voluntary agreements, legislators will not accept a bargain unless they expect it to benefit them. When legislators properly represent their constituents, political bargains benefit ordinary citizens as well.

Unfortunately, legislators do not always act in the best interest of their constituents. As Madison noted, “men of factious tempers, of local prejudices, or of sinister designs, may by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests of the people.”

Political bargaining heightens this risk because of its opacity. Citizens must be able to punish their representatives—primarily by voting them out of office—for failing to pursue their interests. This requires citizens to monitor their representatives’ activities, especially their voting records. Political bargaining obscures voting records. Legislators engaged in political bargains sometimes vote in favor of bills their constituents do not like. But constituents cannot tell whether the votes were part of a political deal that delivered substantial benefits, or simply bad choices. Consequently, it is difficult for citizens to track the fidelity of their representatives or to determine when special interests capture them.

When legislatures produce bad policies and citizens cannot blame individual representatives, direct democracy may provide a corrective. Through direct democracy, citizens can preempt representative government and the bargains that corrupt legislators strike. They can do this *de jure* by overriding existing legislative bargains and amending state constitutions in ways that limit the scope of future political deals. And they can do this *de facto* by giving initiatives that pass the imprimatur of popular support, which legislators hesitate to contradict. At its best, direct democracy can empower democratic majorities, weaken special interests, and enhance political transparency.

Id.

169. *Id.*

170. *Id.* at 698–700.

171. See Gilbert, *supra* note 88, at 839 (“An instance of riding that yields an aggregate gain for legislators could create a collective loss for their constituents.”).

as reelection, that flow from wasteful federal spending within the representative's district), provides camouflage to hide representative misconduct (constituents cannot tell why a representative voted for a combined piece of legislation), and encourages fiscal irresponsibility that results in bloated government.¹⁷² In fact, the single subject rule attempts to eliminate political deal-making due to these pernicious problems.¹⁷³

Political bargaining increases the risk that legislators will betray the interests of the People because political bargains provide camouflage.¹⁷⁴ In the case of legislation that contains more than one subject, voters may not understand why their representative voted for it.¹⁷⁵ The voters may have no knowledge of political deals that kill a bill in committee.¹⁷⁶ Political bargaining reduces transparency and therefore accountability.¹⁷⁷

In addition, the ability to enter into political bargains creates an additional moral hazard—fiscal irresponsibility. In essence, it facilitates wasteful spending by encouraging this deal: "I will vote for your wasteful project if you will vote for mine." In this regard, the Internet is likely to exacerbate the problem, because it allows legislators to keep better tabs on each other and then demand an equal amount of the pork.¹⁷⁸ In the end, of course, it is the taxpayers who must pay for all the wasteful projects.

172. See discussion *infra* notes 174–80 and accompanying text.

173. See discussion *infra* Part II.C.

174. See, e.g., Cooter & Gilbert, *supra* note 86, at 698–99; see also *supra* note 166 and accompanying text.

175. See Cooter & Gilbert, *supra* note 86, at 698–701 (explaining that it is difficult to track the fidelity of representatives or to tell when special interests have captured them).

176. See Schacter, *supra* note 56, at 644.

177. See Cooter & Gilbert, *supra* note 86, at 699.

178. See, e.g., Vermeule, *supra* note 45, at 682–83.

We should not neglect that reduced costs of political information also affect relationships between legislators, sometimes in surprising ways. One well-documented anecdote involves a reform put in place by the new Democratic majority after the 2006 elections in order to increase the transparency of earmarks. The unanticipated effect was to "intensif[y] the competition for projects by letting each member see exactly how many everyone else is receiving Because everyone can see who is receiving what, rank-and-file members are clamoring for their districts to obtain a bigger share of the goodies." Another effect was to shift the distribution of earmarks within Congress; committee barons who had previously received the lion's share were faced with pressure to share their wealth with backbenchers. Finally, organized interest groups, nonprofits, and other entities also demanded and obtained more benefits, arguably demonstrating the third-party moral hazard costs of transparency. In general, "the new transparency . . . raised the value of earmarks as a measure of members' clout" as lawmakers "competed to have their names attached to individual earmarks and rushed to put out press releases claiming credit for the money they

Similarly, political bargaining encourages the growth of government. Political bargaining often allows laws to get passed without anyone having to make a difficult choice; political bargaining allows every legislator to get what he or she wants by voting for what everyone else wants.¹⁷⁹ This not only results in wasteful spending but also in bloated oversized government. In essence, passing laws via political deal-making is easy but illegitimate. A bill should become a law because its supporters have taken the time to educate and convince a majority of voters that the proposal is good policy, without any direct quid pro quo.¹⁸⁰ For all of these reasons, political bargaining weakens democracy. The fact that adopting participatory democracy will reduce or may eliminate political bargaining is not a problem—it is a benefit!

However, while the adoption of a participatory democracy may eliminate traditional political bargaining, it may be short-sighted to assume that all political compromise will cease. In this context, as in many others, it may be a mistake to underestimate the impact of the communications revolution. The Internet may well provide a new forum for political compromise via direct democracy.

C. *Breaking Washington's Partisan Political Gridlock*

Our political gridlock is largely due to the dominance of our two largest political parties (factions) and the desire to win elections. Politicians seem to believe that to win elections it is better to pass blame, distort opponents' positions on issues, and scare voters, rather than to properly represent constituents and pass good laws. There are a number of important national problems that Congress has not been able to address, including the impending insolvency of Social Security, the staggering federal deficit, illegal drug use, gun

bring home." Of course, some of these effects could have obtained in the pre-Internet era as well, but the Internet has surely made it less costly for legislators to inform constituents of their prowess at obtaining pork, and has plausibly made it easier for legislators to know what their colleagues are doing.

Id. (footnotes omitted).

179. See *supra* notes 155–78 and accompanying text.

180. Political deal-making corrupts this process. Cf. Gilbert, *supra* note 88, at 858 (noting that some logrolls may be legitimate if "all of [the bill's] components command majority support due to its individual merits or legislative bargaining"). Gilbert recognizes that logrolls, while always beneficial to legislators, may be harmful to society. But "the more representative legislators are of large numbers of constituents, the more logrolls will tend to be beneficial—not just to legislators, but to society as well." *Id.* at 855 (citing ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 7, 53 (2000)). What better way to achieve this than to make the constituents the legislators via direct democracy?

control, and affordable healthcare for all Americans. This list is certainly not exhaustive.

Polling indicates that, at least with respect to some of these problems, a majority of Americans support specific solutions. However, Congress has been largely unable to implement these solutions because of partisan gridlock. For example, polling shows a majority of Americans support reasonable gun control measures, such as an assault weapons ban; restrictions on ammunition capacity; background checks for all purchases, even at gun shows; restrictions on the number of hand guns purchased at one time; and stricter regulations designed to detect and prohibit straw purchases.¹⁸¹ Nevertheless, Congress refuses to implement these controls for fear of incurring the wrath of the National Rifle Association (NRA). Similarly, polling on Social Security indicates that a majority of voters are willing to consider real reform,¹⁸² but Congress is afraid to touch the topic for fear that opponents will be able to exploit any Social Security reform in the next election.¹⁸³ In the case of the deficit, popular rhetoric would lead one to believe that Republicans want to reduce it by cutting all social programs, while Democrats want to eliminate the Defense Department and significantly raise taxes. Obviously,

181. See, e.g., Lucy Madison, *Poll: Americans Remain Split on Gun Control*, CBSNEWS (Jan. 20, 2011, 6:30 PM), http://www.cbsnews.com/8301-503544_162-20029126-503544.html (citing a CBS News/New York Times poll reporting 63% of Americans support an assault weapons ban, up from 54% in 2009; 63% of Americans favor banning high capacity clips/magazines that hold a large number of bullets); Amanda Terkel, *Poll: Majority of Americans, Including Gun Owners, Support Tougher Restrictions*, HUFFPOST POLITICS (Jan. 18, 2011, 9:07 AM), http://www.huffingtonpost.com/2011/01/18/poll-americans-gun-owners-stronger-laws_n_810069.html (citing a poll conducted for the coalition Mayors Against Illegal Guns, reporting that 90% of Americans favor fixing gaps in government databases to prevent the mentally ill, drug abusers, and others from buying guns; 89% of Americans support requiring background checks for all guns sold at gun shows); see generally J. Harvie Wilkinson III, *Of Guns, Abortions and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 301 (2009) (discussing public opinion regarding the correct level of gun control).

182. See *Hawkeye Poll: Majority of Americans Supports Social Security Reform*, U. IOWA NEWS SERVICES (Apr. 22, 2011), <http://news-releases.uiowa.edu/2011/april/042211hawkeye-poll.html> (reporting that nearly nine out of ten respondents supported at least one reform to Social Security, and two-thirds supported at least two reforms). The reforms receiving majority support were increasing retirement age by up to three years and raising the income ceiling on Social Security taxes. *Id.* Also, 48% of Americans supported increasing the payroll tax by 2%. *Id.* The other two reforms offered were strongly opposed—78% opposed a decrease in benefits, and 60% opposed a decrease in the cost-of-living adjustment. *Id.*

183. Interestingly, even special interest groups are sensing that eventually something must be done. AARP (formerly The American Association of Retired Persons), the senior lobby that carries much political clout, changed its long-standing opposition to any cuts in Social Security, preferring instead to be at the bargaining table where the cuts will be decided to minimize the pain. See, e.g., Laura Meckler, *Seniors Lobby Pivots on Benefits*, WALL ST. J., June 17, 2011, at A1.

such rhetoric is extreme and inaccurate, but it nevertheless inhibits the legislative process.¹⁸⁴ Political rhetoric has also done our country a disservice in dealing with the problem of illegal drugs. Rhetorically, it is much more effective to declare war on drugs than to declare thought on them. Candidates believe they have a better chance of getting elected by competing to see who can be the toughest—mandating prison sentences, no parole, etc.—than by being thoughtful about dealing with the problem of addiction. As a result, we have filled our prisons, to our fiscal and social detriment, with non-violent drug offenders.¹⁸⁵ Polls show that Americans know this approach is not working and do not favor it, but Congress keeps dishing it out.¹⁸⁶ Even in an area like healthcare where Congress did finally act in passing the Patient Protection and Affordable Care

184. See, e.g., Nick Gillespie & Matt Welch, *Death of Duopoly*, WALL ST. J., June 18–19, 2011, at C1.

Americans have watched, with a growing sense of alarm and alienation, as first a Republican administration and then its Democratic successor have flouted public opinion by bailing out banks, nationalizing the auto industry, expanding war in Central Asia, throwing yet more good money after bad to keep housing prices artificially high, and prosecuting a drug war that no one outside the federal government pretends is comprehensible, let alone winnable. It is easy to look upon this well-worn rut of political affairs and despair.

Id.

185. See, e.g., Rina Palta, *Poll: Should Drug Users Go to Prison?* KALW NEWS, THE INFORMANT, (Apr. 11, 2011, 5:09 PM), <http://informant.kalwnews.org/2011/04/poll-should-drug-users-go-to-prison/> (noting that 9000 California inmates are in prison for “simple possession” of illegal drugs, and that 72% of registered California voters are in favor of reducing the penalty for personal drug possession); John Hoeffel, *Most California Voters Say Possessing Small Amount of Illegal Drugs Should Be Misdemeanor, Not Felony*, L.A. TIMES BLOG, (Apr. 11, 2011, 8:20 AM), <http://latimesblogs.latimes.com/lanow/2011/04/voters-marijuana-use-felony-to-misdemeanor.html> (noting that almost 75% of California voters thought that in a budget crisis, the state should use the millions of dollars spent imprisoning drug users on schools, healthcare, and law enforcement); *Brown v. Plata*, 131 S. Ct. 1910 (2011) (ordering California to reduce prison population—part of the California problem is that its prisons are filled with many non-violent drug offenders); see generally Bryan Stevenson, *Drug Policy, Criminal Justice and Mass Imprisonment*, (Jan. 24–25, 2011) (unpublished manuscript), available at http://www.globalcommissionondrugs.org/wpcontent/themes/gcdp_v1/pdf/Global_Co_Bryan_Stevenson.pdf (noting that, due largely to the incarceration of low-level drug offenders, the United States has the highest rate of incarceration in the world at a cost of over \$60 billion a year, and that a growing body of scientific evidence indicates that drug treatment and counseling programs are far more effective in reducing drug addiction and abuse than incarceration). But see Nathan Koppel & Gary Fields, *States Rethink Drug Laws: Treatment Gains Favor Over Long Prison Terms; A New Look at Rehabilitation*, WALL ST. J., Mar. 5–6, 2011, at A3 (“A growing number of states are renouncing some of the long prison sentences that have been a hallmark of the war on drugs and instead focusing on treatment, which once-skeptical lawmakers now say is proven to be less expensive and more effective.”).

186. See, e.g., Mary Anastasia O’Grady, *More Calls for a Drug War Cease-Fire*, WALL ST. J., June 6, 2011, at A17 (comparing the failed drug war to prohibition).

Act,¹⁸⁷ the law was written and passed in such an overtly partisan, duplicitous, and paternalistic fashion that by the time it was passed, many voters were disgusted with the law and with Washington.¹⁸⁸ As a result, it seems very unlikely that the country has made any real progress toward providing affordable healthcare.¹⁸⁹ This is especially troubling because a majority of Americans seem to have the will to address this problem—albeit not with a national healthcare system.¹⁹⁰

An important benefit of a participatory democracy is that it can be used to break this paralyzing political gridlock because voters do not need to get elected.¹⁹¹ In addition, when voters are involved in the drafting, revising, and enacting of legislation it ensures that the adopted solutions have the support of the majority of voters. More-

187. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

188. See, e.g., Editorial, *The Repeal Pledge*, WALL ST. J., Sept. 30, 2010, at A24 (“According to this week’s Wall Street Journal-NBC News poll, 40% of the public strongly supports repeal [of ObamaCare], and another 11% is generally in favor.”); Brody Mullins & Greg Hitt, *Various Incentives Elicited ‘Yes’ Votes*, WALL ST. J., Mar. 23, 2010, at A5 (discussing the deal-making that was used to pass ObamaCare); Peggy Noonan, *‘You Are Terrifying Us,’* WALL ST. J., Aug. 8-9, 2009, at A13 (discussing the town-hall meetings held to discuss ObamaCare and the sharp partisan fighting that followed, concluding that “[a]ll of this is unnecessarily and unhelpfully divisive and provocative”); Op-Ed., *Change Nobody Believes In*, WALL ST. J., Dec. 21, 2009, at A20 (noting that “[s]ome 51% of the public [was at that time] opposed [to ObamaCare], according to National Journal’s composite of all health polling,” and “Mr. Obama inherited a consensus that the health-care status quo needs serious reform,” but the consensus has been lost to partisan fighting).

189. Polling shows that the majority of voters opposed ObamaCare almost a year after its passage (the polling was conducted January 18 and 19, 2011). See Fox News Poll, Opinion Dynamics (Jan. 20, 2011), <http://www.foxnews.com/projects/pdf/poll1.pdf> (last visited May 5, 2012). After President Obama’s State of the Union Address, 45% favored repeal and 46% opposed it. Jonathan Weisman & Danny Yadron, *President’s Ratings Climb*, WALL ST. J., Jan. 20, 2011, at A4. Cf. Janet Adamy & Naftali Bendavid, *House Approves Health Law Repeal*, WALL ST. J., Jan. 20, 2011, at A4 (noting the House of Representatives voted 245-189 to repeal ObamaCare).

190. See, e.g., *Americans Widely Support Health Care Reform, Despite the Implications of New GOP Poll*, POLITICAL CORRECTION (June 22, 2009), <http://politicalcorrection.org/factcheck/200906220003> (noting that according to a CBS News/New York Times poll, 57% of Americans were willing to pay higher taxes to ensure health coverage for all).

191. See, e.g., Gerald F. Seib, *In Battle Over Medicare, New Prescription Needed*, WALL ST. J., June 21, 2011, at A6.

When it comes to Medicare, the bad news for Republicans is that they clearly haven’t convinced people that Rep. Paul Ryan’s controversial plan to change how it works is a good idea. For Democrats, meanwhile, the bad news is that very few people think the status quo on Medicare is good enough either. The bad news for all of us is that the temptation to resort to demagoguery rather than solutions to Medicare’s problems remains alive and well.

Id.

over, a participatory democracy can provide legislators with the political cover that comes from the imprimatur of the People, and this will allow them to stand up to challenges from special interest groups like the NRA, AARP, teachers unions, and the Tea Party. In fact, directly involving voters in the legislative process may be the only way to address issues that require making hard choices like congressional term limits, the federal deficit,¹⁹² Social Security, and healthcare. When the government asks citizens to give up something, fundamental ideas of republican government, fairness, and justice require that the citizens have a direct say in the matter. Traditionally this has been inadequately accomplished through elected representatives, but today, in a world with Twitter, Facebook, texting, and the Internet, how much longer can we justify not asking the voters directly? This Article argues that someday soon, the failure to address the People directly, regarding pieces of legislation that affect them significantly, will cast a shroud of illegitimacy on the political process and the legislation it produces. To retain legitimacy, the federal political process must provide for the direct involvement of the People.

D. Better Citizens

As noted above, the role of elected representatives changes profoundly in a participatory democracy from making law to facilitating law making by citizens. As a result, the relationship between elected representatives and citizens also changes fundamentally. It is the shift in this relationship that is responsible for the development of better citizens. When legislators must specifically reach out to citizens to educate them, to seek their input in agenda setting, to draft proposed legislation, and ultimately to gain their approval, citizens become much more important and valuable to the legislative process.¹⁹³ This increased value of citizen input will increase the

192. Regarding the federal deficit, polling shows that 81% of Americans want a budget compromise. Stephanie Condon, *Poll: Eight in 10 Americans Want Budget Compromise*, CBS NEWS (Mar. 22, 2011), http://www.cbsnews.com/8301-503544_162-20046027-503544.html.

193. See, e.g., Hirsch, *supra* note 5, at 209–17 (“Initiative is an important means of achieving the civic maturation of Americans individually and of our polity collectively.”); see also Czapskiy & Manjoo, *supra* note 128, at 15–16.

According to classic and modern advocates for participatory democracy, the more that citizens are engaged in self-governance, the more they gain in self-respect, autonomy and empathy for others. As they work together, they learn the art of give and take and become more willing to accept decisions that advance the common good even when their individual good may be disserved. It can serve as an antidote

sense of citizen ownership of the legislative process and will result in a deeper, more essential involvement of citizens in government.¹⁹⁴ Under our current representative democracy, citizen input is typically not sought between elections, and if it is volunteered, it is often not attended to respectfully. Citizens realize they are not really part of the legislative process.¹⁹⁵ As a result, citizens lose interest and fail

to apathy and a tonic for empathy.

Id. (footnotes omitted).

194. See Hirsch, *supra* note 5, at 210–17 (discussing direct citizen involvement in lawmaking through voter initiative as a substitute for the civic education that in an earlier time was provided by militia and jury service). Hirsch suggests that direct democracy may “help the People mature into full-fledged citizens, and help produce a more mature polity in every respect[,]” ultimately cultivating a “more virtuous people living more fulfilled lives.” *Id.* at 216–17 (citing David Hoeveler, *Original Intent and the Politics of Republicanism*, 75 MARQ. L. REV. 836, 879 (1992); Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City States in American Law*, 1986 WIS. L. REV. 83, 106 (1986)).

195. See, e.g., Noonan, *supra* note 188 (“What the town-hall meetings represent is a feeling of rebellion, an uprising against change they do not believe in.”). Discussing the town-hall meetings held during the summer of 2009 to discuss President Obama’s healthcare plan (ObamaCare), Noonan describes the political reaction as follows:

What has been most unsettling is not the congressmen’s surprise but a hard new tone that emerged this week. The leftosphere and the liberal commentariat charged that the town hall meetings weren’t authentic, the crowds were ginned up by insurance companies, lobbyists and the Republican National Committee. But you can’t get people to leave their homes and go to a meeting with a congressman (of all people) unless they are engaged to the point of passion. And what tends to agitate people most is the idea of loss – loss of money hard earned, loss of autonomy, loss of the few things that work in a great sweeping away of those that don’t.

People are not automations. They show up only if they care.

What the town-hall meetings represent is a feeling of rebellion, an uprising against change they do not believe in. And the Democratic response has been stunningly crude and aggressive. It has been to attack. Nancy Pelosi, the speaker of the United States House of Representatives, accused the people at the meetings of “carrying swastikas and symbols like that.” (Apparently one protester held a hand-lettered sign with a “no” slash over a swastika.) But they are not Nazis, they’re Americans. Some of them looked like they’d actually spent some time fighting Nazis.

Then came the Democratic Party charge that the people at the meetings were suspiciously well-dressed, in jackets and ties from Brooks Brothers. They must be Republican rent-a-mobs. Sen. Barbara Boxer said on MSNBC’s “Hardball” that people are “storming these town hall meetings,” that they were “well dressed,” that “this is all organized,” “all planned,” to “hurt our president.” Here she was projecting. For normal people, it’s not all about Barack Obama.

The Democratic National Committee chimed in with an incendiary Web video whose script reads, “The right wing extremist Republican base is back.” DNC communications director Brad Woodhouse issued a statement that said the Republicans “are including angry mobs of . . . right wing extremists” who are “not reflective of where the American people are.”

But most damagingly to political civility, and even our political tradition, was the new White House email address to which citizens are asked to report instances of “disinformation” in the health-care debate: If you receive an email or see something

to pay close attention to political matters. It is simply not worth the time and effort for most citizens to become politically knowledgeable, except around election time, because it is very difficult for citizens to use political knowledge in any other productive way.¹⁹⁶

In a participatory democracy, citizen input is required and thus sought after; as a result, citizens have a reason to become politically knowledgeable. Moreover, the communications revolution has made acquiring such knowledge much easier, cheaper, and more effective than in the past. The adoption of participatory democracy will give citizens the incentive as the communications revolution has given citizens the ability to become central actors in the legislative process.

Some commentators recognize additional benefits resulting from participatory democracy and the participation of all citizens in the legislative process, arguing that it will lead to greater economic justice.¹⁹⁷ These commentators observe that a citizen cannot meaning-

on the Web about healthcare reform that seems “fishy,” you can send it to flag@whitehouse.gov. The White House said it was merely trying to fight “intentionally misleading” information.

Sen. John Cornyn of Texas on Wednesday wrote to the president saying he feared that citizens’ engagement could be “chilled” by the effort. He’s right, it could. He also accused the White House of compiling an “enemies list.” If so, they’re being awfully public about it, but as Byron York at the Washington Examiner pointed [out], the emails collected could become a “dissident database.”

Id.

196. See, e.g., Schacter, *supra* note 56, at 645 (discussing “wasted transparency” or political information available to votes that they choose not to use and referring to “the deep and abiding lack of political knowledge on the part of the American public”); Hirsch, *supra* note 5, at 227 (“[F]or most citizens, ignorance is, unfortunately, the rational choice” (quoting JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY* 22 (1995))).

197. See, e.g., Czapanskiy & Manjoo, *supra* note 128, at 22–23.

An additional criticism of deliberative democracy is that it contributes little to the achievement of economic justice. Cass Sunstein has argued that assuming the absence of a relationship between civil rights and economic rights is a “large error.” He points to the Amartya Sen’s finding that famine does not occur in a society with political safeguards against tyranny, because a government with an incentive to listen to its citizens is more likely to adopt pro-social welfare policies. At the same time, Sunstein cautions, a democratic system may insulate great wealth by allowing wealthy citizens to, in effect, buy greater access to decisionmakers. Avoiding that result requires, at least, capacity building so that citizens are adequately educated and enjoy some modest degree of economic security.

A more extended consideration of the relationship between public participation and economic justice is offered by James Bohman, who argues that, since democratic deliberation is incompatible with persistent inequality, “the norm of political equality in deliberation serves as a critical standard of democratic legitimacy.” In his view, “persistent inequalities of race, class, and gender are not merely the results of the unequal distribution of resources; they are also due to the lack of social agency by these groups in relation to the goals and interests of others.” Ignored as agents in the pub-

fully participate in the political process without adequate education and a modest degree of economic security.¹⁹⁸ In addition, as the relationship between citizens and elected representatives changes, these commentators expect that citizens, because they are now valued, will see themselves as political participants and will be encouraged “to develop the skills and self-respect necessary for fuller participation in society.”¹⁹⁹ While it is possible that adopting participatory democracy will encourage these additional benefits, and while I am hopeful this will in fact occur, it seems far from certain.

E. Better Government

Participatory democracy will produce better government for several reasons. First, a participatory democracy reduces the risk of moral hazard and the influence of special interests. Second, a participatory democracy comes closer to achieving the ideal of self-government than does a representative democracy.²⁰⁰ This is because a participatory democracy reflects a stronger democracy, one in which popular sovereignty is more accurately reflected.²⁰¹ For example, the Supreme Court has held that the democratic pedigree of direct voting is superior to that of ordinary legislation: “Under our constitutional assumptions, all power derives from the people . . .

lic debate, the interests and needs of these groups are also ignored. The solution is not solely economic, therefore; it also requires that government ensure that a threshold of resources and capacities are provided to each citizen so that he or she is not ignored and can make his or her public reasons convincing to others.

Guaranteeing the capacity of individual citizens to participate does not guarantee positive results in terms of economic justice, but it opens the door for individuals to make the connections with others that are necessary to achieve common goals. Acknowledging the necessity of collective action, Bohman asserts that government may have a role in developing opportunities for collectivities to organize and make their views a part of the public debate.

Id. (footnotes omitted).

198. *Id.* at 23.

199. *Id.* at 24.

200. This idea of a self-governing people—radical at the time—was at the heart of our Constitution which begins by acknowledging that it is the People who are creating this constitution and government. Moreover, the People remain the sole source of power with the ability to abolish or modify their creation as they see fit. While the Constitution does not require direct voter involvement in day-to-day government, lawmaking, etc., it certainly does not prohibit direct democracy. See AMAR, *supra* note 28, at 5–13, 279 (“Thus, the essence of the Article IV guarantee of each state’s ‘Republican’ form of government was not to prohibit town meetings or initiatives or referenda or juries or any other form of direct popular participation. Rather the big idea was to shore up popular sovereignty.” (footnotes omitted)).

201. See, e.g., *City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 678 (1976) (discussing direct voting by citizens as a classic demonstration of democracy).

[T]he people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature."²⁰² A local referendum, the Court said, "is the city itself legislating through its voters, an exercise by the voters of their traditional right . . . to override the views of their elected representatives as to what serves the public interest."²⁰³ The Court concluded that resolving controversies by direct voting "is a classic demonstration of 'devotion to democracy.'"²⁰⁴

Third, a participatory democracy is better able to break through partisan gridlock and find solutions to important social problems that most citizens find acceptable.²⁰⁵ The reason for this is that all citizens may be part of the legislative process that creates the solutions. Finally, there may be some reason to believe that the decisions reached under a participatory democracy may be wiser than those reached under a representative democracy.²⁰⁶ This argument is based on the "many minds" theorem or the "Jury Theorem."²⁰⁷ The basic gist of this theorem is that the larger the group making the decision, the more likely the decision will be correct²⁰⁸ or will best satisfy the majority.²⁰⁹ Professor Merrill applies this concept to resolve "controversies over the provision of local collective goods"²¹⁰ and

202. *Id.* at 672-73.

203. *Id.* at 678 (quoting *S. Alameda Spanish Speaking Org. v. City of Union City*, 424 F.2d 291, 294 (9th Cir. 1970)) (noting that direct democracy procedures such as the referendum have a constitutionally favored position).

204. *Id.* at 679 (quoting *James v. Valtierra*, 402 U.S. 137, 141 (1971)).

205. *See, e.g.,* Merrill, *supra* note 45, at 279 ("Given the perception that direct democracy reflects the common will, it is a particularly useful tool for resolving sharply contested issues that elected representatives and administrators may be reluctant to decide themselves."). Note that Merrill only argues in favor of direct democracy for local government.

206. *See generally* Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1 (reaching no firm conclusion regarding representative democracy, but offering suggestions and remaining personally skeptical of it).

207. Merrill, *supra* note 45, at 277; *see also, e.g.,* JAMES SUROWIECKI, *THE WISDOM OF CROWDS*, 22, 36-39, 41-43, 70-72 (2004) (discussing the conditions that allow the many minds theory to work, including diversity, independence, and decentralization). All of these could easily apply to federal participatory democracy. *See generally* Paul H. Edelman, *On Legal Interpretations of the Condorcet Jury Theorem*, 31 J. LEGAL STUD. 327 (2007). *Cf.* ADRIAN VERMEULE, *LAW AND THE LIMITS OF REASON* 25-55 (2009) (expressing skepticism that the theorem is useful in the real world).

208. *E.g.,* Merrill, *supra* note 45, at 277 ("[T]he argument posits that under certain limiting conditions, the larger the group making a decision, the more likely the decision will be correct.").

209. *Id.* at 278 ("If each voter is asked to choose which outcome best advances her preferences, then the aggregate vote will tell us 'which collective choice will maximize satisfaction of the preferences of the majority.'" (citing VERMEULE, *supra* note 207, at 32)).

210. *See id.*

argues that it “should not be used in large politics like the nation or the state.”²¹¹ Today, however, in light of the communications revolution and the consequent ability to deliberate nationally, the theorem seems to be well suited to national issues such as healthcare and the environment.²¹²

III. CREATING A PARTICIPATORY DEMOCRACY: PROBLEMS AND SOLUTIONS

A. *Ensuring Fair Process: Adopt a Single Subject Rule and Secret Ballot*

The single subject rule requires that ballot propositions (initiatives, referenda, or constitutional amendments) contain only a single subject so that voting will reflect as clearly as possible the preference of the majority of voters.²¹³ As noted above, if a proposal contains

211. *Id.* at 282 (“[D]irect democracy should not be used in large politics like the nation or state . . . but should be reserved for local issues where the number of voters is much smaller.”).

212. Professor Merrill notes three limiting conditions for the jury theorem: (1) “the average voter is more likely to get the answer right than wrong,” (2) “voters must cast their votes independently of each other, in the sense that no one’s vote is required by the vote of any other,” and (3) “voters must have the same understanding of the choices before them on which they are voting.” *Id.* at 277. Professor Merrill suggests that as the number of voters goes up, the likelihood of satisfying the first limiting condition could go down, either because voters are unmotivated because of their vote having little impact on the outcome, the fact that many voters will experience little impact by the ultimate choice, or both. *Id.* at 281–83. The issue for me is not whether voters are more likely to be correct in the abstract, rather whether voters are more likely to be correct than elected representatives. See *infra* notes 232–41 and accompanying text. Moreover, voters’ decisions are not perverted by moral hazard. Professor Merrill’s concern regarding enhanced NIMBYism falls in favor of federal direct democracy because in that context there are no people outside the community. Professor Merrill’s final concerns are exaggerated majoritarian and minoritarian bias. The majoritarian bias is no different in direct democracy than in representative democracy, and the protection of minority and individual interests must be accomplished in the same way it is now. The risk of minoritarian bias will go down in direct democracy. Professor Merrill’s concern for “intensities of preferences” and “tempering forces” amounts to a fundamental rejection of popular sovereignty and majority rule. See *id.* at 286. This is a way to say that one vote counts more than another – that cannot be in a democracy.

213. See Cooter & Gilbert, *supra* note 86, at 704 (noting that the single subject rule for ballot propositions grew out of the single subject rule for legislation, which “dates to ancient Rome, where crafty lawmakers learned to carry an unpopular provision by ‘harnessing it up with one more favored.’ To prevent this practice, the Romans in 98 B.C. forbade laws consisting of unrelated provisions.”) (citing ROBERT LUCE, LEGISLATIVE PROCEDURE 548 (1922)). Many states have adopted some version of the single subject rule applicable to proposed legislation. See Gilbert, *supra* note 88, at 812 (“By 1959, some version of the rule had been adopted in forty-three states.”); see also Hirsch, *supra* note 5, at 224 (describing the proposed Democracy Act which provides at section 3(A) that each initiative “may ‘address only one subject’ (though it

more than one subject, the result of voting is ambiguous.²¹⁴ If a proposal passes, is it because the majority preferred both proposals or because they preferred one proposal so strongly that they voted in favor of the other one even though they did not want it in order to ensure passage of the favored proposal? When proposals are combined, as is the case with legislative logrolls and riders, the result of voting is ambiguous. Further, combined proposals encourage manipulation. That is, those in favor of a proposal that does not have majority support may attempt to combine it with a very popular proposal in order to gain passage of the disfavored proposal. Obviously such practices should not be permitted because they pervert the principle of majority rule.²¹⁵ A full discussion of the single subject rule is beyond the scope of this Article. It is sufficient here to note that the single subject rule has, for the reasons just discussed, been in use at least since Roman times.²¹⁶ Second, determining whether a proposal contains a single subject is sometimes difficult, and courts—who ultimately must resolve the issue—sometimes struggle with it.²¹⁷ Notwithstanding these difficulties, where adopted, the rule has proved serviceable for a very long time, and promising recent scholarship in this area may add efficiency to the rule's application.²¹⁸

As noted, an important advantage of participatory democracy is that it reduces moral hazard.²¹⁹ This is because legislators no longer have a vote to sell or trade since the citizens will vote directly on proposed legislation.²²⁰ However, to ensure that individual citizen votes are not subject to moral hazard, a secret ballot is required. Se-

'may include related or mutually dependent parts').

214. See *supra* notes 86–88 and accompanying text.

215. See, e.g., *Loontjer v. Robinson*, 670 N.W.2d 301, 314–15 (Neb. 2003) (Wright, J., concurring) (stating that the single subject rule prevents groups from combining proposals that, standing alone, would not gather majority support into measures that would gather majority support).

216. See *supra* note 213 and accompanying text.

217. See Cooter & Gilbert, *supra* note 86, at 690–91. The authors explain that, while the rule limits ballot propositions to a single subject, "it does not elaborate on how to distinguish one subject from another." *Id.* Moreover, they state that almost any two subjects "may be considered part of the same subject if that subject is defined with sufficient abstraction," and, as a result, courts have struggled with this issue, producing erratic results often resulting in allegations that the courts have overturned initiatives, referenda, or constitutional amendments based on judges' personal preferences. *Id.* (footnote omitted).

218. See *id.* at 691–92 (advocating for democratic process theory of single subject rule); Gilbert, *supra* note 88, at 813.

219. See *supra* Part II.A.

220. See *supra* Part II.A.

cret ballots disincentivize vote-buyers because vote-buyers cannot confirm whether a citizen voted in accordance with their deal.²²¹

B. Confusion of the Multitude²²² – Drafting Fair Proposals

Two fundamental concerns with participatory democracy—especially at the federal level—are that voters are simply not up to the task and that voters cannot be trusted with the task because they are susceptible to being swayed by passion or self-interest.²²³ These concerns have several facets. First, can voters become sufficiently well informed to deliberate over proposals and make good decisions?²²⁴ This issue is discussed *infra* at Part III.C. Second, even if

221. See Merrill, *supra* note 45, at 281 & n.25 (noting that the secret ballot “checks bribery through uncertainty that the bribed party will vote as he promised” and that voters cannot be deprived of their legal right to a secret ballot (citing Jones v. Glidewell, 13 S.W. 723, 725 (Ark. 1890) and Burson v. Freeman, 504 U.S. 191, 203 (1992))). “A third advantage of direct democracy is that it is corruption free, in the broadest sense that includes not just bribery and extortion, but any kind of special interest influence. Key to this is the use of the secret ballot.” *Id.* at 281.

222. THE FEDERALIST NO. 10, *supra* note 30, at 77 (noting that the number of representatives “must be limited to a certain number to guard against the confusion of a multitude”). My point here is that thanks to the communications revolution, the limit has been expanded dramatically so as to allow for a federal direct democracy.

223. See *supra* text accompanying note 26. Of course, elected political agents, being human, are similarly susceptible and perhaps more so because they are able to profit much more from their position in a representative democracy than are individual voters in a participatory democracy. See *supra* notes 101–08 and accompanying text. But, being human means that we are also capable of honesty, integrity, and reason. Isn't the whole point of democracy to create a self-governing people? If fundamentally one does not believe that each individual person is much more likely to exhibit honesty, integrity, and reason than negative characteristics, then why consider democracy at all? In fact, the Founders made a clear decision to put their faith and trust in individuals because our humanness carries with it not just the capacity to do good, but the overwhelming likelihood that we will, in fact, do good. The main risk to this, also recognized by the Founders, is that giving power to an individual tends to corrupt, and absolute power corrupts absolutely! Thus, trust in the capacity and likelihood of each individual to do good, coupled with the great dispersion of power among many, are the keys to honest, good government. These points underlie the whole experiment of democratic self-government. For example, James Madison referred to “the capacity of mankind for self-government,” where government “derives all its powers” from “the great body of the people.” THE FEDERALIST NO. 39, at 236–37 (James Madison) (Clinton Rossiter ed., 2003). Madison also noted that the Constitution itself was founded on these “republican principles.” See, e.g., THE FEDERALIST NO. 43, at 271 (James Madison) (Clinton Rossiter ed., 2003). In THE FEDERALIST NO. 55, Madison stated: “Republican government presupposes the existence of [virtuous] qualities in a higher degree than any other form . . . [Republicanism requires] sufficient virtue among men for self-government.” See THE FEDERALIST NO. 55, *supra* note 31.

224. Under the wisdom of crowds theory, *all* voters may not need to become well-informed in order to reach good decisions. See *supra* text accompanying notes 206–12; see also Schacter, *supra* note 56, at 645–46 (discussing the fact that the voters are woefully under-informed and acknowledging that “various lines of research in political science have coun-

voters can become well informed, will they make the effort to do so?²²⁵ This issue is discussed *infra* at Part III.D. Finally, is it possible to organize voters in such a way that will allow them to learn about, deliberate, draft, and vote on legislation? The last concern, sometimes referred to as confusion of the multitude,²²⁶ is discussed here. One often heard criticism of the potential of direct democracy is that it cannot function well enough to play anything but a very occasional supporting role to representative democracy. The reasoning goes that, in direct democracy, there are no committees to set agendas or conduct hearings, no procedural rules, and, most importantly, no institutions or forum in which deliberation can take place. In short, there is no structure to support a meaningful, efficient, legislative process. This criticism, if it were valid rather than just an excuse to justify elitism,²²⁷ is not valid today because it fails to take into account the potential created by the communications revolution. Today, many individuals can share information and discuss proposals as effectively as a small group could in the past.

The structure that will allow hundreds of thousands, or even millions, of voters to organize, learn, discuss, draft, and vote on legislation efficiently already exists. Social networking sites (SNSs), like Facebook or LinkedIn, show the organizing potential and efficiency of the Internet.²²⁸ Within these SNSs, smaller groups constantly form

tered that voters in fact need very little information to make rational voting choices A third line of work argues that the electorate can be saved by aggregation (the proverbial wisdom of crowds), disaggregation (the fact that some electoral sub-groups are knowledgeable) or both." (footnotes omitted)). However, Schacter has serious doubts about the ability of under-informed voters to make good choices. *Id.* at 646. See generally Jane S. Schacter, *Political Accountability, Proxy Accountability, and Democratic Legitimacy of Legislatures*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 43 (Richard W. Bauman & Tsvi Kahana eds., 2006).

225. See *infra* Part III.C.

226. See *supra* note 222 and accompanying text.

227. My reason for doubting the veracity of this criticism is that it presupposes that meaningful, well-informed deliberation takes place in formal legislative bodies. This is an assumption I am not willing to make. See *infra* note 232. It is disingenuous to compare participatory democracy to a theoretical perfect legislative process; the only valid comparison is between the representative democracy we actually have and the participatory democracy we are likely to get. Moreover, even this comparison assumes that our sole goal is good legislative process or good, correct legislation. I suggest that this is not the only goal and not even the most important one—our primary goal is democratic legitimacy—government based on the consent of the governed. And if quality is measurable, I certainly believe that the People will produce the best set of rules for their own governance.

228. See, e.g., Schacter, *supra* note 56, at 658–63. Allow me to quote at length from Professor Schacter, whose discussion of whether new technologies will make previously disengaged citizens more likely to become politically aware (for Professor Schacter, this remains an open question) offers a good overview of the political potential of the communications revolution:

There is another way to think about this question, and that is to focus not on whether people will consume more political information because it has been made more readily available to them, but on whether the Internet might transform the category of political information itself. A dynamic like this is already apparent in some areas of traditional media, as *The Daily Show* has become an unorthodox source of political information made entertaining and appealing to many viewers, especially younger ones. It may be that the Internet and contemporary technologies will expand the range of politically-related content available to a broad segment of the population in potentially dramatic ways. In the context of elections, consider the viral videos of pro-Obama music during the 2008 primaries produced by the popular musician will.i.am.

Granted, it is hard to imagine the will.i.am-equivalent video inspired by a piece of congressional legislation. But it is not hard to imagine, for example, creative uses of social networking services (SNS) technology on sites like Facebook—uses that are steeped in the medium's sensibility. Imagine that a member of Congress, for example, moves away from a position taken during a campaign, accepts a contribution from a controversial source, or backs or opposes a controversial measure. It is easy enough to imagine an enterprising Facebook user informing many friends about this, perhaps using a link or video if appropriate, and adopting a tone of irony or humor. This would represent a new kind of publicity, one that circulates on a website that is not limited to—or defined by—a political focus.

The social networking phenomenon, in fact, suggests another sense in which the Internet may alter the very concept of political information and knowledge, and it relates to the fact that much political engagement on the Web is relational. Sometimes—as with Congresspedia, a wiki about Congress and legislators—citizens collaborate so as to create a kind of political information themselves. More commonly, users interact with one another on political matters in cyber-communities, such as those created on blogs, listservs and, increasingly, social network sites like Facebook and MySpace. The information or knowledge about politics or policy that is shared in these contexts goes beyond bare facts, for an important part of what is being communicated is what others know and how they think. The political information, in other words, is inflected with the distinctive attribute of peer credibility (or, perhaps, lack of credibility, depending on the peer). That attribute, in fact, functions as an independent piece of political information.

Indeed, the social networking sites Facebook and MySpace loomed large in the 2008 election as a new political venue capable of producing and disseminating innovative kinds of political information. The state-of-the-art Obama effort dominated that of its rival in number of users and types of use. It showed how the medium can be used by campaigns during elections to aggregate, communicate with, and mobilize supporters; to share media and try to induce distribution of videos; to get its message out; and perhaps most importantly, to enable and encourage supporters to communicate with one another in new ways that are not necessarily scripted or managed by the campaign. Indeed, the election richly illustrates the many ways in which Facebook users did, in fact, act independently of the campaign, including through “wall” postings, events planned outside the campaign, and the creation of candidate-centered groups. Some of these groups had quite an original flourish, such as the group in which members, en masse, added “Hussein” as their middle name (as in “John Hussein Smith”).

The 2008 campaign catapulted SNS (along with YouTube) to new prominence. Only a few years ago, Facebook did not even allow candidates to post a profile. The extent to which the presidential candidates tapped sites like Facebook and MySpace is unsurprising, given the rapidly rising use of SNS. As of 2008, MySpace had about

and re-form to discuss topics and share information. In fact, if Alexander Hamilton, James Madison, and John Jay wrote *The Federalist Papers* today, it is hard to imagine them not choosing to use the Internet. SNSs are one example of the virtual community the Internet can provide. In addition, the Internet, with its ability to easily handle documents and facilitate discussions, is in many ways an ideal forum for the deliberation required by participatory democracy. This year's "Arab Spring" is a real world example of the political power of the Internet.²²⁹ In addition to SNSs, wikis, for example, could be used for the initial drafting of legislation or for collecting and discussing modifications to proposed legislation. As we move along the continuum toward stronger democracy, many of the structures of our existing representative democracy will remain but be repurposed.²³⁰ For example, Congress will continue to exist, but its primary role will be to facilitate the participatory legislative process—the making of laws by the voters. At the national level, part of Congress's role may be to establish a non-partisan commission to maintain an online legislative forum.²³¹ Of course, Congress's efforts in this regard would, like all of Congress's efforts, be subject to the

seventy-three million users in the United States and Facebook thirty-six million. Ten percent of adults in the U.S. have used SNS for some political purposes, including a very large percentage of those who have created an SNS profile. While younger people are much more likely to use SNS, the target audience is not limited to them.

To be sure, there is a question about how much Facebook activity of this kind is attributable to an unusually high-profile presidential campaign and how much will carry over to affect Congress. It is apparently now de rigeur for congressional candidates to have links to SNS; the majority of U.S. Senate campaigns had a social networking presence in 2008. More notable, perhaps, is the percentage of SNS users claiming to have used the site to communicate information about candidates and campaigns. According to Pew, 40% of those with MySpace or Facebook pages used them for political activity. The penetration of social networking pages among younger Americans is 66%, and explains the fact that fully 32% of all eighteen to twenty-nine-year-olds say they have used a social networking site for political reasons.

Id. 658–60 (citations omitted). Moreover, this phenomenon will continue to grow with the likes of Twitter and LinkedIn.

229. See, e.g., Jeffrey Bartholet, *Young, Angry and Wired*, NAT'L GEOGRAPHIC, July 2011, at 102 ("Armed with cell phones, social media, and sometimes just sheer determination, youth from North Africa to the Middle East are struggling to take ownership of their future.").

230. See *infra* text accompanying notes 232–83.

231. See Schacter, *supra* note 56, at 672–73. Philadelphia II proposes the creation of such a forum, the Electoral Trust, as part of its overall package called the National Initiative for Democracy. This group calls for a constitutional amendment to create a "legislature of the People" in every governmental jurisdiction in the United States and for the passage of a statute the "Democracy Act," which spells out the specific procedures that the legislature of the People will follow to pass initiatives.

direct control of voters—should they choose to exercise such control.

C. *The Information Challenge*

One justification for representative government is the informational advantage professional politicians are assumed to enjoy over the voters.²³² Elected representatives presumably have a better understanding of the specific details of proposed legislation and of the state of the world in general.²³³ Thus, if we put aside concerns about moral hazard for a moment, and if elected representatives in fact have superior knowledge, then it can be argued that they should

232. See Vermeule, *supra* note 45, at 684 (noting that representative democracy is premised on the informational advantages of political specialization by representatives). There are many good reasons to question this justification. See, e.g., Matthew L. Spitzer, *Evaluating Direct Democracy: A Response*, 4 U. CHI. L. SCH. ROUNDTABLE 37, 39 (1997) (“[I]f the legislators read anything, it is the summary of the bill prepared by the relevant committee. More often, however, the legislators do not even read the summary.”). See generally H. L. RICHARDSON, *WHAT MAKES YOU THINK WE READ THE BILLS?* (1978) (suggesting that representatives often don’t read the bills they vote on, nor listen to debate). In fact, it has been suggested that representatives rely on requests from party leaders or major campaign contributors. See Hirsch, *supra* note 5, at 205 (“Legislatures do not always conform to the civics class model . . . representatives often don’t read the bills they vote on, nor listen to debate.”). At the federal level, ObamaCare is a good illustration. The final bill emerged so late and was so large that virtually no one could read it, let alone digest it and debate it, before the vote. See *Change Nobody Believes In*, *supra* note 188.

Mr. Obama promised a new era of transparent good government, yet on Saturday morning Mr. Reid [majority leader of the Senate] threw out the 2,100-page bill that the world’s greatest deliberative body spent just 17 days debating and replaced it with a new “manager’s amendment” that was stapled together in covert partisan negotiations. Democrats are barely even bothering to pretend to care what’s in it, not that any Senator had the chance to digest it in the 38 hours before the first cloture vote at 1 a.m. this morning. After procedural motions that allow for no amendments, the final vote could come at 9 p.m. on December 24[, 2009].

Id.

233. See Vermeule, *supra* note 45, at 681 (“[L]ike principal-agent models generally, all assume that legislators have better information about the state of the world than voters do.”). Professor Vermeule notes that as information costs fall, this may no longer be true; but he doubts that we will be anywhere close to that extreme in the near future. *Id.* However, regardless of the potential for superior knowledge that agents may develop, the actual knowledge they develop is unimpressive. See sources cited *supra* note 232. Also, it is not necessary for informational costs to fall to zero to eliminate the justification for representative government. They must only fall enough for the average initiative voter to be well enough informed to vote as well as the average legislator. The facts that many legislators are not well informed and that many fall prey to moral hazard both significantly reduce the gap the initiative voters must overcome. In fact, the gap may have already been overcome. See generally Lynn Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 708 (1991) (arguing that the average initiative voter is no less likely than the average legislator to vote in a thoughtful and public-spirited manner).

make better decisions than the voters regarding the writing and passing of legislation.

While it is not the focus of this Article to discuss whether this analysis was historically accurate, I will note two facts that call into question its historical accuracy. First, any information advantage enjoyed by elected representatives may be completely overwhelmed by the self-dealing (moral hazard) opportunity it allows representatives.²³⁴ Second, to the extent elected representatives possess superior knowledge, they should feel an obligation to educate their constituents on the matter and seek their opinion rather than simply expecting the voters to trust that they know best—a problem also known as the paternalism hazard.²³⁵ The most likely reason a representative would not educate his or her constituents is to preserve the camouflage that the voters' ignorance affords to one's own self-dealing.²³⁶

To whatever extent political representatives enjoyed an informational advantage over voters in the past, such advantage is much less today because of the communications revolution.²³⁷ Today, the ability of voters to learn firsthand the state of the world, as well as the details of proposed legislation, has been greatly enhanced by the communications revolution. Similarly, the ability of elected representatives to share any superior knowledge they have with their constituents has also improved significantly due to the communications revolution.²³⁸ Eventually, any informational advantage enjoyed

234. For example, under Illinois law the governor is empowered to appoint someone to fill any U.S. Senate seat that is vacated between elections. At one time it could be argued that it was too time consuming and difficult to go directly to voters to fill such a vacancy. Moreover, the governor was likely to have superior knowledge that would allow her to select the best person to fill the seat. The recent events in Illinois illustrate moral hazard and the Founders' concern that power corrupts. Then-Governor Rod Blagojevich was convicted on seventeen counts of corruption, including trying to sell the U.S. Senate seat vacated by President Barack Obama. See Douglas Belkin & Stephanie Banchemo, *Blagojevich Convicted on Corruption Charges*, WALL ST. J., June 28, 2011, at A3. Today it is possible to go directly to the voters via the Internet in an efficient and timely manner to fill such vacancies.

235. For example, in the Illinois situation, the Governor Blagojevich could certainly have shared his thoughts with the voters on who would be a good senator and why. See discussion *supra* note 234.

236. For example, in the case of Blagojevich, the less the voters knew about his Senate seat appointment the easier it would have been for him to hide his misconduct.

237. Information about the state of the world, including political information, is readily available online and thus easily accessible to voters.

238. However, the U.S. Congress has been slow to take advantage of this ability. See Schacter, *supra* note 56, at 665–67. “Congress is not monolithic, but the picture that emerges from recent studies is one in which the institution is something of a ‘techno-laggard’ that has yet to harness even a fraction of the communicative capacity the Internet provides.” *Id.* at 665.

by elected representatives will disappear due to the ease with which voters will be able to access information.²³⁹ However, we need not be concerned with reaching that ultimate point in order to argue in favor of a participatory democracy. As soon as the benefit from the information advantage falls below the cost represented by the moral and paternalism hazards, participatory democracy can be expected to produce a better government. The time is now!²⁴⁰ The fact that elected representatives may enjoy an informational advantage over voters is, even if true, no longer a reason to continue with a representative, rather than a participatory, democracy. Today, any superior knowledge can be readily shared with constituents so by the time a proposal is voted on, voters may be as knowledgeable as their representatives.

This observation raises the second part of the informational challenge. That is, even if voters have access to sufficient information to become knowledgeable, past research suggests most voters will choose not to become informed.²⁴¹ First, it should be noted that there is no guarantee that all elected representatives choose to use all or even most of the information that is available to them. Second, current conditions suggest that the adoption of participatory democracy may significantly increase the political literacy of voters. The combination of better access to political information (i.e., the already low and falling costs of acquiring knowledge) and the increased incentive to acquire such information (under participatory democracy, voters will be asked to participate in the legislative process by drafting, deliberating, and voting on legislation) may result in more well-informed voters. However, even if citizens, like elected representatives, do not become as politically informed as they could,

239. See Vermeule, *supra* note 45, at 680–82 (discussing the falling costs of political information).

240. See Baker, *supra* note 233 (stating that the average initiative voter is no less likely than the average legislator to vote in a thoughtful and public-spirited manner).

241. See Schacter, *supra* note 56, at 655–60 (discussing wasted transparency in the media). The problem of wasted transparency is long-standing. Newspapers, magazines, television news and other conventional media have traditionally covered Congress, particularly in relation to major legislation. Since 1979, C-SPAN has provided extensive coverage of congressional proceedings on cable television. The electorate's deficient political knowledge has, thus, long coexisted with the ready availability of information that would fill at least some of the gaps. Undoubtedly, as the earlier discussion showed, more information about Congress is now considerably easier for citizens to obtain because of the Internet. But the fact that much of the public has long eschewed even the most basic information about Congress routinely covered in newspapers raises the question, in the context of the Internet, of the proverbial horse who can be taken to water but not made to drink. And on this question, the available evidence is mixed.

there is a rough justice in the fact that, under participatory democracy, the voters will get the government they create—for better or worse—rather than one foisted upon them by elected professional politicians.

D. Voter Apathy/Burnout

The concern here is that voters cannot possibly handle the burden of being the primary legislators at all levels of government.²⁴² Specifically, some voters will not make the required effort because of the relative insignificance of their one vote and the fact that most voters are not directly affected by most pieces of legislation.²⁴³ Further, those other voters who do initially make an effort to keep up will find the burden of doing so overwhelming and will eventually burn out and lose interest.

My response to these concerns is three-part. First, those who express these concerns are overstating the difficulty of legislating and underestimating the abilities of the People. The work done by an employee—this may be especially true of a government or not-for-profit employee—tends to behave like gas released in a closed space: no matter how large the space, the gas will expand to fill it. The fact that legislators fill their time doing many things does not necessarily mean all of those things need to be or even should be done. For example, much of Congress's time is spent trying to please many masters. That is, the process of legislating becomes much more complex and time consuming when one is primarily focused on re-election. Being elected requires pleasing party superiors and big donors and at least not attracting the negative attention of the voters. Often the interests of these groups are not aligned; as a result, it is in the representatives' best interest (not the Peoples') to appear to do one thing even when doing another. Deception is always more complex than truth. Of course, the People do not have to spend time on camouflage because they're not running for office.

242. See, e.g., Merrill, *supra* note 45, at 282 (noting many possible sources of voter ignorance and apathy such as a small stake in the outcome or a perceived small chance of affecting the outcome and concluding that direct democracy should be reserved for local issues (with a small number of voters) of high importance, not issues of routine governance); Hirsch, *supra* note 5, at 205–06 (noting that “opponents of direct democracy trot out examples of initiatives too complicated for voters to understand” – but reasoning that such problems can be solved and that direct democracy can supplement representative democracy). Cf. Schacter, *supra* note 56, at 674 (concluding that “the Internet has more dramatically affected the *how* than the *who* of politics” (emphasis added)).

243. See Merrill, *supra* note 45, at 282.

Moreover, the initial participatory democracy suggested here envisions that Congress will continue to exist, coordinating, drafting, and deliberating legislative proposals, including those proposed by the People. As noted above, even in a participatory democracy, the People may choose to allow Congress to deal directly with certain legislative matters. These matters could be determined by size, impact, repetitiveness, or a combination of these or other criteria.²⁴⁴ For example, the People could delegate broad authority to Congress to deal directly with minor legislative matters, while giving broad or detailed guidance to Congress when dealing with legislative matters of medium importance and reserving to themselves (the People) the authority to draft and pass very important legislation.

Second, the communications revolution that has fundamentally changed our capacity for participatory democracy will also help to prevent voter burn-out. The communications revolution allows for online voting, wiki sites for drafting proposed legislation, and social networks for efficient deliberation among many individuals.²⁴⁵ As a result, the People will easily be able to participate directly in the legislative process. Finally, voter apathy will decrease because voters in a participatory democracy will vote on actual legislation directly impacting the country, as opposed to voters in a representative democracy who simply vote for a political representative. Because each person's vote would be more important than it is now, the People may take a greater interest in legislative matters.²⁴⁶

E. The Guarantee of a Republican Form of Government

Some scholars have argued that direct democracy is inconsistent with the views of those who established our country and is, in fact, prohibited by the U.S. Constitution.²⁴⁷ These arguments, however, are unpersuasive. As these arguments have been well refuted else-

244. See *supra* note 147 and accompanying text.

245. See *supra* notes 142-54 and accompanying text.

246. See, e.g., Hirsch, *supra* note 5, at 204. "Involving people in the process of making laws is a step in the direction of fostering public-spiritedness. By contrast, allowing people to vote only for representatives, who often duck hard choices and place their own ambitions ahead of public service, is a prescription for a selfish and apathetic citizenry." *Id.*

247. See, e.g., Hans A. Linde, *Who Is Responsible for Republican Government?* 65 U. COLO. L. REV. 709, 719 (1994); Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 20 (1993); CHARLES AUSTIN BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 189-216 (2d. ed. 1913).

where,²⁴⁸ I will not repeat that work here. What follows is a brief summary of the arguments related to this concern.

The alleged case against direct democracy begins with Article IV, Section IV of the United States Constitution which states: “[T]he United States shall guarantee to every State in this Union a Republican Form of Government.”²⁴⁹ The next stop in the argument is a passage in *The Federalist No. 10* by James Madison, which states:

[A] republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking: [A] great point[] of difference between a democracy and a republic [is] . . . the delegation of the government, in the latter, to a small number of citizens elected by the rest²⁵⁰

Madison repeated this idea in *The Federalist No. 14*.²⁵¹ The final piece of evidence is found in the amendment procedures in Article V of the U.S. Constitution, which state:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for pro-

248. See AMAR, *supra* note 28, at 279–80, where Professor Amar states:

Thus, the essence of the Article IV guarantee of each state’s “Republican” form of government was not to prohibit town meetings or initiatives or referenda or juries or any other form of direct popular participation. Rather, the big idea was to shore up popular sovereignty. The electorate of a given state, acting by “a majority of the people in a legal and peaceable mode” would of course retain the right to “alter or abolish” their state constitutions (subject to the overriding dictate of federal supremacy), but the United States would protect against “changes to be effectuated by violence” – usurpations, military coups, and so on.

Id. at 279–80 (footnotes omitted); Hirsch, *supra* note 5, at 188 (noting that the Framers formed a representative democracy for practical reasons not because they disliked or meant to prohibit direct democracy); FISHKIN, *supra* note 35, at 26–30; Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994) (“Republican Government probably does not (as some have claimed) prohibit all forms of direct democracy, such as initiative and referendum, but neither does it require ordinary lawmaking via these direct populist mechanisms.” (footnote omitted)).

249. U.S. CONST. art. IV, § 4.

250. THE FEDERALIST NO. 10, *supra* note 30, at 76.

251. THE FEDERALIST NO. 14, at 95 (James Madison) (Clinton Rossiter ed., 2003) (“The true distinction between these forms [republic and democracy] was also adverted to on a former occasion. It is, that in a democracy, the people meet and exercise the government in person; in a republic, they assemble and administer it by their representatives and agents.”). Madison goes on to note that, as a result, a democracy must be confined to a small spot while a republic may be extended over a large region. *Id.*

posing Amendments . . . [which shall become part of the Constitution when] ratified by the Legislatures of three-fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress²⁵²

From this evidence, it is argued that the Founders not only created a representative democracy, but they required one and prohibited direct democracy. The Guarantee Clause of Article IV does not on its face support this argument—rather, it more likely means that a state may not have a government that is not based on popular sovereignty. For example, a state could not adopt a monarchy.²⁵³ The Guarantee Clause only supports the anti-direct democracy argument when the term “republican form of government” is defined to be exclusively a representative democracy. This is where Madison’s words in *The Federalist No. 10* come in. In *The Federalist No. 10* and again in *The Federalist No. 14*, Madison creates a distinction between a democracy and a republic and defines the latter as a representative democracy. With this definition of “republican form of government,” one can argue that the Guarantee Clause guarantees a representative democracy and, perhaps, prohibits a direct democracy. Those who make this argument find further support for it in the amendment provisions of Article V cited above. The argument is that Article V does not allow for the People themselves to amend the Constitution; rather, Article V requires the action of elected legislators. Congress must act on its own or in response to state legislatures before an amendment process can even begin. Moreover, Congress may require that ratification be by state legislatures rather than by the People themselves. Furthermore, the process does not authorize a majority but requires a super-majority of elected officials for amendment.

The basic problem with those who argue that this evidence prohibits a participatory democracy is that they, proverbially, cannot see the forest for the trees.²⁵⁴ That is, the original Constitution (Arti-

252. U.S. CONST. art. V.

253. See AMAR, *supra* note 28, at 280 (noting that “[a] monarch or tyrant in any one state would pose a geostrategic threat to each and every neighboring state” and would “undermine the republican character of the federal government” and thus would require under Article IV, Section IV that the federal government restore popular sovereignty—a republican form of government—to such a state); see also HIRSCH, *supra* note 5, at 191 (noting Samuel Johnson’s Dictionary of 1786 defined “republican” as “placing the government in the people”).

254. See Amar, *supra* note 248, at 761–62 (noting that all of the “references to ‘the People’ are embodiments of the Constitution’s unitary structure and overarching spirit of popular

cles I–VII and the first ten amendments) begins and ends literally, as well as functionally, with the People as the source of all governmental power.²⁵⁵ The Constitution could not exist without the People having such power. The preamble states: “We the People . . . do ordain and establish this Constitution”²⁵⁶ The recognition of the People as the fundamental source of all governmental power is the foundation that supports our entire system of government.²⁵⁷ Several possibly idiosyncratic²⁵⁸ comments, taken out of context,²⁵⁹ cannot begin to change the basic foundation that supports the Declaration of Independence, the Constitution, and, indeed, the very birth of our nation: the “right of the [P]eople to ordain and establish government.”²⁶⁰

Specifically, as commentators have pointed out, there is good reason to not attach too much significance to *The Federalist Nos. 10* and *14*, especially in the context of the Guarantee Clause.²⁶¹ First, Madison was not discussing the Guarantee Clause in *The Federalist Nos. 10* or *14*.²⁶² Moreover, when Madison and Hamilton discussed the Guarantee Clause in *The Federalist Nos. 21* and *43*, they did not refer to *The Federalist Nos. 10* or *14* or suggest that the clause prohibits direct democracy.²⁶³

sovereignty—of the people’s right to ‘ordain’ and ‘establish,’ and their ‘reserved’ and ‘retained’ rights to ‘alter’ or ‘abolish,’ their Constitution”).

255. See U.S. CONST. pmb.; U.S. CONST. amend. X; see also Hirsch, *supra* note 5, at 196 (“The Preamble’s declaration that ‘We the People of the United States . . . do ordain and establish this Constitution’ embodies the principal of popular sovereignty.” (footnotes omitted)).

256. U.S. CONST. pmb.

257. See Hirsch, *supra* note 5, at 195 (describing how the People are the source of all governmental power and have an inalienable right to change their government).

258. In *The Federalist No. 10*, Madison says “[a] republic, by which I mean,” which indicates a possible unique usage. FEDERALIST NO. 10, *supra* note 30, at 76. In *The Federalist No. 14*, he acknowledges that the common use of the terms “republic” and “democracy” are synonymous, noting that people are often “confounding of a republic with a democracy.” THE FEDERALIST NO. 14, *supra* note 251, at 95; see also AMAR, *supra* note 28, at 276–81 (discussing the Madisonian distinction between a republic and a democracy).

259. Madison does not discuss the clause guaranteeing a republican form of government in either *The Federalist Nos. 10* or *14*. When he discusses Article IV, Section IV, he also makes no reference to them or their democracy/republic distinction. See AMAR, *supra* note 28, at 276–78.

260. See Amar, *supra* note 248, at 726, 766 (“[T]he exercise of majority rule popular sovereignty . . . provided the foundation of the Constitution itself.”).

261. See, e.g., Hirsch, *supra* note 5, at 190–93 (discussing the Madisonian Republic government in contrast to Hamilton view).

262. *Id.*

263. *Id.*

Second, it is unclear whether even Madison rejected direct democracy. His comments taken as a whole are at best ambiguous.²⁶⁴ Moreover, even if Madison was less than sanguine about the concept of actual rule by the People,²⁶⁵ the evidence suggests that most of the Founders strongly supported a government of the People. As Alan Hirsch stated:

Madison himself considered direct democracy inherently risky. For him, America's size was a blessing—an extended society required representative democracy, thus avoiding the risks of popular government. But in his abiding preference for representative government, Madison was the exception. The more typical founding view, with roots in the political philosophy of Rousseau, held the Athenian model of pure democracy as the ideal form of government. However, that model was considered workable only in a small society, with a representative government necessary in a larger one.²⁶⁶

Hamilton, for example, “explicitly equated republican government with government ‘of the people.’”²⁶⁷ The words “democracy” and “republic” were often used interchangeably as synonyms even by Madison and were used in counterdistinction to “monarchy” and “aristocracy.”²⁶⁸ The balance of evidence simply does not support the argument that the Guarantee Clause of Article IV prohibits direct democracy.²⁶⁹ Indeed, many states have adopted direct democ-

264. *Id.* at 200 (“[O]ne must be careful about enlisting Madison as an opponent of direct democracy.”).

265. *Id.* at 192 (noting that Madison’s “misgivings and linguistic tendencies” were likely not shared by other Framers).

266. *Id.* at 189 (citation omitted).

267. *Id.* at 191.

268. For example, in *The Federalist No. 10*, Madison distinguishes “pure democracy” from “republic” based on the delegation of government in the latter to “a small number of citizens” in a scheme of representation. THE FEDERALIST NO. 10, *supra* note 30. In *The Federalist No. 63*, he acknowledges that many, if not most, ancient “democracies” also employed a scheme of representation for certain purposes. THE FEDERALIST NO. 63, at 384–85 (James Madison) (Clinton Rossiter ed., 2003); see also AMAR, *supra* note 28, at 277–78 (“At the same time that Madison was drawing his fine linguistic distinction, other leading Federalists were obliterating it, proclaiming that a ‘republican’ government could be either directly or indirectly democratic Repeatedly, Federalists explained the central meaning of republican government—especially in discussing the meaning of Article IV’s use of the word ‘Republican’—by defining republics not in contradistinction to democracies but, rather, in opposition to monarchies and aristocracies.”).

269. See Hirsch, *supra* note 5, at 193 (stating that the Guarantee Clause does not “reflect opposition to direct democracy”).

racy, and the U.S. Supreme Court, as well as state supreme courts, has supported it, often enthusiastically.²⁷⁰

Finally, the arguments based on the amendment provisions of Article V are fatally flawed because they assume that Article V sets out the exclusive methods for constitutional amendment.²⁷¹ Article V contains no language suggesting that its procedures are the only way to amend the Constitution.²⁷² Second, the Constitution itself was an act of the "People." If the "People" can ordain and establish the Constitution, then, logically, they must have the power to amend or remove it all together if they wish.²⁷³ From the Preamble, "We the People," to the final clause of the original Constitution in Amendment X, "power reserved or to the People," the "People" are the source of all governmental power. Finally, the super-majority provisions of Article V make sense precisely because they apply to the ordinary representative government, not the "People."²⁷⁴ That is, if the ordinary government wants to instigate amendment, they face a higher burden precisely because they are not the "People."²⁷⁵ Moreover, both the federal and state governments must be involved because each acts as a check on the other to prevent the accumulation of power.

Madison himself supported the idea of direct democracy. For example, Madison said, "The people were in fact, the fountain of all power, and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased [F]irst principles might be resorted to."²⁷⁶ These do not seem like the words of a man strongly opposed to direct democracy; they do, however, reflect the ideas that are the foundation upon which our Constitution rests. As Hirsch concludes:

270. *Id.* (explaining that "many states have adopted direct democracy and our highest courts have given it their imprimatur" (footnotes omitted)); see also *supra* text accompanying notes 200–04.

271. *E.g.*, Hirsch, *supra* note 5, at 194 (noting Article V does not say the procedures it outlines are the only means of amending the Constitution); see generally Amar, *supra* note 22 (discussing majoritarian and popularity mechanisms of our Constitution).

272. *E.g.*, Hirsch, *supra* note 5, at 194.

273. *Id.* at 194–200 (concluding, based on the history of the Constitution's adoption, a majority of the People may amend its text and structure).

274. *Id.*

275. *Id.*

276. Hirsch, *supra* note 5, at 195 (quoting THE RECORDS OF THE FEDERAL CONSTITUTIONAL CONVENTION OF 1787, 476 (Max Farrand ed., 1937)). Madison was responding to a Maryland delegate at the Constitutional Convention who was concerned that the method of amendment, set out in the Maryland Constitution, was not being followed in the process of adopting the federal constitution. *Id.*

In sum, the notion that the Framers opposed direct democracy does not hold up. They established representative government at the federal level because America was too large for anything else. They guaranteed states a “republican form of government,” but did not regard this commitment as preventing states from utilizing direct democracy. While they established a cumbersome means for government officials to amend the Constitution, they recognized that the People themselves retain the right to amend the Constitution directly. James Madison embraced the right of the People to control their government, and the misgivings he expressed about direct democracy are inconclusive when seen in the context of his larger goals and developments in contemporary society.²⁷⁷

F. Will Political Compromise Be Possible in a Participatory Democracy?

Critics of a participatory democracy argue that political compromise will not be possible because there is no forum or structure to allow bargains to be reached and enforced.²⁷⁸ Implicit in this criticism is the belief that political compromise, or political deal-making, is generally a good thing.²⁷⁹ As noted, while political deal-making or compromise is good for the individual representatives that reach agreement, this does not necessarily mean that it is good for a majority of the representatives’ constituents.²⁸⁰ Indeed, as previously stated, political deal-making encourages agreements where all of the representatives get what they want at the expense of the constituents who are being forced to live with and pay for these deals.²⁸¹

Regardless, whether one thinks political deals are good or bad, the critics of participatory democracy fail to account for the communications revolution and its ability to provide a forum for direct political compromise by the voters. Technology will permit millions of voters to propose, deliberate, draft, amend, and vote on legislation

277. Hirsch, *supra* note 5, at 202.

278. *See supra* text accompanying notes 155–80.

279. *See supra* text accompanying notes 155–80.

280. *See supra* text accompanying notes 155–80.

281. *See supra* text accompanying notes 155–80; *see also, e.g.,* Fred Siegel, *How Public Unions Took Taxpayers Hostage*, WALL ST. J., Jan. 25, 2011, at A15 (discussing how politicians gave public unions collective bargaining rights for political gain, which now has resulted in the looming public-pension crises “threaten[ing] to bankrupt city, county, and state governments”).

as efficiently as hundreds of legislators²⁸²—likely with a more legitimate result because of the elimination of the hazards of self-dealing, paternalism, partisanship, and fiscal irresponsibility.²⁸³

G. Responding to Legislative Emergencies

Technology has fundamentally changed the speed and efficiency of communication, thereby allowing the adoption of federal level participatory democracy. However, in emergencies it will be necessary to have the ability to adopt legislation very quickly or without open deliberation, which may compromise sensitive information. Thus, the Government must design our participatory democracy to include emergency procedures when necessary. The initial solution to this concern is to simply maintain our current representative structure even as we move to a partial or hybrid participatory democracy. As we begin to move toward a stronger democracy, the current representative structure will remain in place but the role of Congress will fundamentally change from making law to facilitating the making of law directly by the voters. In an emergency, Congress's role would revert, and it could pass on its own temporary legislation in response. All emergency power given to Congress, as well as the definition of emergency conditions, and all legislation passed by Congress under its emergency authority would be subject to the direct authority of the voters. For example, the voters could provide that emergency legislation adopted by Congress would automatically expire not more than 120 days after Congress passes it unless a majority of the voters, by a direct vote, approve otherwise.

IV. PROTECTING INDIVIDUAL RIGHTS IN A PARTICIPATORY DEMOCRACY

The problem of protecting individual rights is inherent in any system of governance based on majority rule.²⁸⁴ Obviously, this includes our current representative democracy as well as the partici-

282. See *supra* text accompanying notes 228–31.

283. See *supra* text accompanying notes 152–54; Hirsch, *supra* note 5, at 208 (noting that “[t]he track record suggests that citizen lawmaking not only avoids majority tyranny, but serves no particular ideological agenda”); Merrill, *supra* note 45, at 281 (noting direct democracy is “corruption free”).

284. Historically, part of this problem has resulted from the definition of the People. See Amar, *supra* note 248, at 766–73. In some southern states, slaves were a majority of the adult population, but their status as slaves continued due to their disenfranchisement. The disenfranchisement of women until 1920 is another example of this problem.

participatory democracy that I am advocating. Indeed, our history provides too many examples of unjust treatment of individuals and minorities by our representative democracy. Thus, the struggle to protect individual and minority rights that has been ongoing since the founding of our republic, will have to continue under a federal participatory democracy. This offers cold comfort to those concerned with individual rights, as will the observation that ultimately minority and individual rights depend for their protection on the will of the majority. Solace may be taken, however, from the fact that our Constitution, which protects individual rights, was approved by the People (the majority). In addition, the relevant evidence from the states' experiences with direct democracy suggests that individuals have even less to fear from participatory democracy than from our current representative democracy. One commentator has observed that "[t]he history of the initiative [at the state level] is remarkably free of the enactment of abusive legislation."²⁸⁵ Another commentator stated that "few measures that would have the effect of narrowing civil rights and civil liberties have been put before the voters, and most of those have been defeated."²⁸⁶ Finally, another commentator stated that "[t]he historical record in no way suggests that citizen lawmaking will, as a general matter, produce particularly undesirable or dangerous legislation."²⁸⁷

The main point is that the problem of protecting individual rights is not new and is not unique to participatory democracy, though clearly participatory democracy, like representative democracy, has the potential to produce laws that trample individual rights.²⁸⁸ Not surprisingly, then, with regard to ordinary lawmaking in a participatory democracy, we will look to the same solutions that we have always used to deal with this problem under our representative democracy. In this context, our Constitution via judicial review has provided important protection. In the context of constitutional amendment by participatory democracy, however, we must ultimately rely on the enlightened self-interest of the majority for the protection of individual rights.

Individual rights and liberties are a fundamental part of democracy. It has long been recognized that democracy, despite its prefer-

285. Ronald J. Allen, *The National Initiative Proposal: A Preliminary Analysis*, 58 NEB. L. REV. 965, 1021 (1979).

286. THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 92 (1989).

287. See Hirsch, *supra* note 5, at 208.

288. *Id.* at 207.

ence for majority rule, does not give the majority the moral right to dictate how everyone else should live.²⁸⁹ The Supreme Court has stated, “[This Court’s] obligation is to define the liberty of all, not to mandate our own moral code.”²⁹⁰ In other words, there are limits to what the majority may do in a democracy, and these limits apply regardless of whether the democracy is representative or direct. Our supreme positive law, the Constitution, demands respect for each individual, and this necessarily limits the power of the majority to interfere with fundamental individual liberties by ordinary lawmaking.

A. Ordinary Lawmaking by Federal Direct Democracy: The Courts and Judicial Review

Laws created by direct democracy, like laws created by Congress, would be subject to judicial review, and they would be limited to subject matter delegated to federal authority by the People in the Constitution.²⁹¹ Consider two recently overturned laws, one from a representative legislature and a state constitutional amendment that came from the People via direct democracy. The first case involved a Texas statute that criminalized homosexual sodomy.²⁹² Justice Kennedy, writing for the majority of the United States Supreme Court, held the statute unconstitutional because homosexuals have a right to liberty in the form of autonomy. He wrote, “[T]he Due Process Clause gives them the full right to engage in their conduct without intervention of the government. ‘It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.’”²⁹³ As one commentator explained, Justice Kennedy’s opinion stood for the proposition that “the right to non-interference in consensual homosexual activity is a right that cannot be encroached upon under the auspices majoritarian morality.”²⁹⁴

289. See J. S. MILL, ON LIBERTY AND OTHER WRITINGS, 14–16 (Stefan Collini ed., 1989) (1850); JOHN RAWLS, A THEORY OF JUSTICE 60 (1971) (“[E]ach person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.”).

290. *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992).

291. See, e.g., Hirsch, *supra* note 5, at 207; Matthew Dolan, *Court Tosses Affirmative-Action Ban*, WALL ST. J., July 2, 2011, at A5 (discussing a recent decision by the Sixth Circuit which found that a state constitutional amendment, passed by initiative and banning the consideration of race in college admissions for public universities, was in violation of the U.S. Constitution and therefore void).

292. *Lawrence v. Texas*, 539 U.S. 558 (2003).

293. *Id.* at 578 (quoting *Casey*, 505 U.S. at 847).

294. Stephen O’Hanlon, *Justice Kennedy’s Short-Lived Libertarian Revolution: A Brief History of*

The other case involves an anti-homosexual amendment to the Colorado Constitution that was passed directly by a majority of the voters. This amendment forbade any executive, legislative, or judicial action to counter anti-homosexual discrimination. Again, Justice Kennedy, writing for the majority, held that the amendment failed rational review and violated the Equal Protection Clause of the Fourteenth Amendment.²⁹⁵ Kennedy noted that the amendment singled out homosexuals not to further a proper legislative purpose, but to make them unequal to everyone else. This, he said, Colorado may not do:²⁹⁶ "A state cannot so deem a class of persons a stranger to its laws."²⁹⁷

These two cases illustrate (1) the capacity for both representative and participatory democracy to produce laws that treat individuals and minorities unfairly and (2) that judicial review can provide a solution. The real crux of the issue is whether participatory democracy is likely to produce more legislation that is unfair to individuals or minorities. The available evidence from the states suggests that participatory democracy will produce less.²⁹⁸ In addition, at the federal level it is even less likely that unfair legislation will be passed by direct democracy because of the diversity of the national People and the resulting difficulty of building a consensus to discriminate.

B. Amending the U.S. Constitution by Initiative: Natural Law, the Constitution, Individual Rights, and Trust in the People

One concern about federal direct democracy is that, in addition to being used for ordinary lawmaking, the American People may use it to amend the U.S. Constitution and thereby threaten individual rights. For example, theoretically, Article III could be amended and the Supreme Court eliminated. Moreover, constitutional amendments, unlike ordinary lawmaking, would not be subject to full judicial review, though arguably some judicial review may be appropriate.²⁹⁹ Thus, the concern is that it is just too dangerous to give the People this much power.³⁰⁰

Supreme Court Libertarian Ideology, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 1, 34 (2008) (citing *Lawrence*, 539 U.S. at 571).

295. *Romer v. Evans*, 517 U.S. 620, 633–36 (1996).

296. *Id.* at 633.

297. *Id.* at 635.

298. *See supra* notes 284–90 and accompanying text.

299. As noted, ordinary lawmaking by federal initiative would be subject to judicial review and would be limited in scope to the exercise of the limited powers given to the federal

A second concern focuses on federalism and states' rights. If a simple majority of Americans can amend the Constitution, then the states, as states, are eliminated from the amendment process. The concern is that allowing constitutional amendment by a majority of the American People somehow tramples states' rights. Neither of these concerns should stand in the way of federal direct democracy.

1. *Trust the American People*

a. An old and necessary right

It is frightening to think of the possibility that the People or the government could amend away various individual rights or even amend away the Supreme Court. It is important to remember that this theoretical possibility has very little chance of becoming a reality.³⁰¹ Nevertheless, it is a possibility, no matter how remote. The relevant question is not whether the Constitution can be amended nor whether the People or the government can amend it.³⁰² The right of the People and the power of the government to amend the Constitution was recognized in 1788–89 when the Constitution was ratified.³⁰³

Moreover, the right of the People to amend is a necessary part of our constitutional structure; that is, the Constitution cannot exist without the People having this right. It is indeed the first principle on which our country, Constitution, and government are based.³⁰⁴

government by the Constitution. *See supra* Part IV.A. Constitutional amendment by federal initiative or referendum would not be subject to full judicial review because, once an amendment is approved by a proper process, then it becomes part of the Constitution and thus cannot be unconstitutional. *See, e.g.,* Hirsch, *supra* note 5, at 241 & n.309 (implying that constitutional amendment by direct democracy is not subject to judicial review, and noting that the Philadelphia II proposal provides that constitutional amendments by direct democracy are not subject to judicial review except in the case of fraud). Allegations of fraud in the process, or other process defects, perhaps the elimination of fundamental rights without abolishing the Constitution, might be properly reviewable—but it is not at all clear by whom. *See infra* Part IV.B.1(e). Remember, the Supreme Court could potentially be amended away. Some have argued that certain rights in the Constitution are not amendable, even by the People. *See* Hirsch, *supra* note 5, at 241. Others have argued this limitation applies only to amendments made by ordinary government. *See* Amar, *supra* note 22, at 504–05.

300. *See* Hirsch, *supra* note 5, at 237–40 (discussing this concern but not sharing it).

301. *See supra* Part I.B.1.

302. *See supra* Part III.E.

303. *See* Amar, *supra* note 22, at 457 (“We the People of the United States have a legal right to alter our Government—to change our Constitution—via a majoritarian and populist mechanism akin to a national referendum, even though that mechanism is not explicitly specified in Article V.”).

304. Hirsch, *supra* note 5, at 194–99.

One way to facilitate amendment by the People is to pass a federal statute that outlines a process for the People to follow in exercising their right to amend. Passing such a statute cannot properly be thought of as giving the People this power; the People already have it—they have just never used it. But passing such a statute would increase the likelihood of the People using their power to amend the Constitution. Thus, the question is how much we should fear constitutional amendment by the People. How great is the risk that a majority of Americans will use this right to trample individual or minority rights? We do not have much to fear at all. In fact, there is less to fear from constitutional amendment by the People than by ordinary government. The Framers also feared amendment by the People less because Article V, which outlines the rules for amendment by ordinary government, requires super-majority votes and the cooperation of both state and federal governments.³⁰⁵

b. The People deserve our trust

There is less risk of a majority of the People violating individual rights because doing so would be against the majority's own interests. At the federal level, the diversity of our people and our vast geographic size reduce the risk of trampling individual rights. These characteristics make the formation of a homogenous majority unlikely. A majority of the People will protect individual liberty because they will want to achieve liberty for themselves.³⁰⁶ Thus, a participatory democracy is less likely to trample minority and individual rights than a representative democracy. That is, it does not take long for each voter to realize that he or she has some skin in the game. If the majority can harass one person or group today, then they could harass me or my group tomorrow.³⁰⁷ Under a representative democracy, the small number of representatives makes a majority easier to organize, and more importantly, it is easier to write and pass legislation that exempts the representatives and their favored constituents from discriminatory legislation.

In the end, it comes down to a very basic and simple question: are most Americans trustworthy? Specifically, are Americans worthy of self-government? The Founders thought so and thus embarked on their great experiment. The past 222 years, while far from perfect,

305. Amar, *supra* note 22, at 503–05.

306. See, e.g., Hirsch, *supra* note 5, at 240; *supra* Part III.E (explaining that each citizen sees herself in the minority on some issues).

307. See Amar, *supra* note 22, at 494–99.

have seen movement in a positive direction; the People have proven worthy, and the experiment has been a success. Our size and our diversity are strengths, and we can trust our collective judgment.

c. Reducing the perceived risk

Some commentators have discussed the possibility of providing some sort of procedural safeguards to prevent the People from running amuck and unjustly curtailing individual or minority rights. These risks are likely exaggerated, especially in a national initiative or referendum. But if the presence of some procedural safeguards will help with the passage of a federal direct democracy statute then they may be of value and, if done properly, should do no harm. Of the two safeguards often suggested—a super-majority vote requirement and a two-separate-vote requirement—the former is improper, while the latter would be acceptable.³⁰⁸ The super-majority vote requirement is unacceptable because it violates the fundamental right of self-government based on popular sovereignty majority rule.³⁰⁹ Basing outcomes on a simple majority ensures that everyone's vote is equal.³¹⁰ The two-separate-vote requirement is designed to ensure deliberation.³¹¹ For example, a proposed constitutional amendment would need to be voted on nationally and approved but would not become effective unless voted on again six months later and approved again.³¹² This would give voters six months to deliberate the proposal once they received notice that the proposal was serious and likely to be approved. This double vote is certainly not required by the Constitution, but if such a provision were included in the federal initiative statute, it may be workable.³¹³ Of course, the voters would retain the power to eliminate this requirement by majority vote.³¹⁴

308. *See id.* at 502–03 (suggesting two separate votes are feasible, but super-majorities are not).

309. *See id.* at 503 (suggesting that anything other than simple majority rule may result in a system that “surely is not ruled by the people”).

310. *Id.* (majority rule is the “only workable voting rule that treats all voters and all policy proposals equally”).

311. *Id.*

312. *See, e.g.,* Hirsch, *supra* note 5, at 218 (discussing Philadelphia II's Proposed Democracy Amendment).

313. *See id.* at 241 (discussing this proposal).

314. *Id.*

d. Individual rights always depend on the will of the majority:
from natural law to positive law

There is a strong connection between natural law and our Constitution.³¹⁵ A majority of the People govern with precise, legitimate authority because each individual is “endowed by their Creator with certain unalienable rights” among which are the rights of “life, liberty and the pursuit of happiness.”³¹⁶ Because human beings each have the capacity to discover for themselves the way to live a good, just, and fair life, they have the right to live their lives free of unwarranted interference from others.³¹⁷ These natural law ideas became part of our positive law recognized in our Constitution, and are thus protected by our government. Although our personal liberties are reflected in our Constitution explicitly and implicitly, they do not originate there. For example, the Constitution’s existence and authority comes from the “People.” From where do the People get the right of self-government, the right to “establish and ordain” a constitution? Because this right cannot come from the Constitution, it must originate from the natural law, or, perhaps, from a contemporaneous source. That is, the very act of ordaining and establishing the Constitution solidified the People’s right to ordain and establish, and by necessary implication the right to amend and abolish. Having rights reflected in the positive law is critically important because the government will protect these rights.

In summation, natural law rights and liberties are not created by the Constitution; they are recognized by it and protected by the government. And this recognition is very important because the rights recognized are the ones that the government created by the Constitution will protect. Do rights that are not protected exist?

315. According to the Declaration of Independence, the source of our individual equality and of our unalienable rights is our “Creator.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). According to the Constitution’s Preamble, the government was created by “We the people” to “secure the blessings of liberty to ourselves,” which implies individual, not group rights. See U.S. CONST. pmbl. The Ninth Amendment notes explicitly that there are other rights not mentioned in the Constitution that are reserved to the People. U.S. CONST. amend. IX. Similarly, the Tenth Amendment states that the balance of power, that which is not given to the federal government or the states, belongs to the People. U.S. CONST. amend. X.

316. This is why the “People” may “establish” and “ordain.” U.S. CONST. pmbl. As expressed in the Declaration of Independence, natural law taught that the People were “endowed by their Creator with certain unalienable Rights” and could alter or abolish government “destructive” of those rights. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

317. The Declaration of Independence proclaimed that “all men” are born with certain “unalienable Rights,” including rights to “Life, Liberty and the pursuit of Happiness.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Theoretically speaking of course they do, but practically speaking they do not. Thus, the intersection of natural and positive law shows us which natural law rights a particular government is willing to protect via its positive law. This protection is one reason—perhaps the most important reason—that our Constitution matters.³¹⁸ It matters because it manifests the will of “We the People” and the government “we” created and that “we” control to protect the rights recognized by the Constitution. Ultimately, the reality of individual liberties, and the practical enforcement of them, depends on majority will.³¹⁹

e. Limits on constitutional amendments by the People:
fundamental rights

Our Constitution is based on a foundation of natural law.³²⁰ Our Constitution has recognized certain natural law rights and liberties and has thereby made these rights and liberties part of our positive law. Certain rights and liberties, however, are of a higher order under our constitutional framework. As a result, these higher order or fundamental rights are unalienable and inviolable. Recognizing a right as fundamental is important because even a majority of the People may not, *acting within our constitutional order*, eliminate fundamental rights.³²¹ The reason is that the elimination of fundamental rights, in effect, abolishes the Constitution; thus, such action can’t be taken *within* our constitutional order. As James Wilson noted, the People stood under God and natural law and even a majority of the People was not entitled to do whatever it pleased.³²² For example, the People, as the source of all government authority within the framework of the Constitution, may not eliminate their own or their

318. Cf. Richard Stengel, *One Document, Under Siege*, TIME, July 4, 2011, at 32, 45, available at <http://www.time.com/time/nation/article/0,8599,2079445,00.html> (“The Constitution works so well precisely because it is so opaque, so general, so open to various interpretations.”).

319. See, e.g., Amar, *supra* note 22, at 503–05 (discussing how individual rights are only safe if the majority understands and accepts them).

320. See *supra* notes 315–19 and accompanying text.

321. See, e.g., Amar, *supra* note 22, at 504 (referring to certain higher law principals that may not be properly amendable). For example, the “People’s” (a simple majority of national U.S. voters) right to amend (or abolish) the Constitution is recognized by the Constitution and is unalienable. *Id.* at 474–75 (“[A right to change the Constitution] of which no positive institution can ever deprive the [People].” (quoting Elliot, DEBATES, *supra* note 1)).

322. See *id.* at 501 (stating that “majority rule does not necessarily imply majority will or majority whim”).

posterities' right of self-government.³²³ That is, even the People may not eliminate popular sovereignty majority rule³²⁴ because to do so would in effect abolish the Constitution. Clearly, the People may abolish the Constitution, but if they do so we would, afterward, no longer be operating from *within* our constitutional order. The new structure of government, established by the majority, would then determine all rights for positive law purposes.³²⁵

What exactly are the fundamental rights and liberties that even the majority may not violate while acting within our constitutional order? The precise answer to this question is not my focus here, and it is likely that a precise list cannot be provided. In broad terms, these are rights that form the foundation of our Constitution. That is, if the People did not have these rights, the Constitution could not exist. The Constitution and the Declaration of Independence provide direct and indirect guidance regarding which rights are fundamental, as does our constitutional jurisprudence.³²⁶ For example, the Declaration of Independence directly states that "life, liberty and the pursuit of happiness" are such rights. The Constitution, through its words "We the People" and its act of establishing and ordaining, establishes that popular sovereignty majority rule, as noted above, as one of these rights. Justice Douglas, speaking for the Supreme Court in *Griswold v. Connecticut* stated that there are certain zones of privacy and liberty, implicit in the Ninth Amendment, that predate the Bill of Rights and are reserved to the People against the State.³²⁷ As previously stated, the Court held that there is "a realm of personal liberty which the government may not enter."³²⁸ Moreover, an individual "right of conscience"³²⁹ and what Professor Amar has called a

323. *Id.* at 504 (declaring that popular sovereignty does prevent us from denying future generations of popular majorities "the right to strike a different balance").

324. *See id.*

325. If the People ever abolished the Constitution and replaced it with something new, then the new document, for positive law purposes, would determine individual rights. But I would argue that, under natural law, fundamental individual liberty cannot be morally violated; a people and its government must, to be right, just, and moral, respect fundamental individual liberty. Of course, as noted above, natural law rights that find no expression in the positive law, practically speaking, do not exist.

326. *See generally* O'Hanlon, *supra* note 294, at 8-21 (listing sixteen fundamental rights or interests recognized by constitutional jurisprudence).

327. 381 U.S. 479, 484-86 (1965).

328. *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992).

329. *See Amar, supra* note 22, at 504.

“Meiklejohn core” of rights (e.g., free expression, right to assemble) may also be inviolable and unalienable.³³⁰

Thus, unless a majority of Americans—the People—in a properly called and administered referendum, vote to abolish the Constitution—an indisputable right under our Constitution—amendments eliminating fundamental rights are not proper or permissible. Obviously, Article V’s silence notwithstanding, amendments eliminating fundamental rights by ordinary government are never permissible.³³¹

2. *Does amendment of the Constitution by the American People violate states’ rights?*

Constitutional amendment by the American People does not violate states’ rights. The ratification of our Constitution under Article VII created, and the Reconstruction amendments perfected, the existence of one sovereign people—the People of the United States.³³² The Constitution establishes two governments, state and federal, but neither is properly thought of as sovereign.³³³ Only the national

330. *Id.* at 505.

331. *Id.* at 504–05 (“Ordinary Government should arguably *not* be allowed to amend [higher law principles] away . . .”). One should cast a leery eye on amendment via Article V because it is subject to the same moral hazards as any representative government. *See id.* at 504 (“Government officials often have interests separate from their constituents, in ways that often threaten liberty.”). Second, the Article V process that counts Utah equally to California is anti-self-government and betrays popular sovereignty and majority rule. *See id.* Article V’s amendment procedures for ordinary government are part of a system of checks and balances designed by the Founders to limit the aggregation of governmental power. *See* Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 VA. L. REV. 1509, 1517–18 (2010). The federal government may not amend without the cooperation of the states. Moreover, although two-thirds of the states’ legislatures may force Congress to call a convention to propose amendments, Congress can require that the People, not the state legislatures, approve the proposed amendments. *See* U.S. CONST. art. V. These checks and balances are designed to prevent the concentration of power.

332. *See* Amar, *supra* note 1, at 1464 (1987) (“It is remarkable that the Reconstruction Amendments can be seen as perfecting the Federalist Constitution by trimming off its confederate vestiges.”).

333. Under the Articles of Confederation, the People of each state were sovereign as the Articles of Confederation was essentially a treaty among nations. *Id.* at 1448 (arguing, in practice, that the United States under the Articles of Confederation “was not much more than the ‘United Nations’ is in 1987: a mutual treaty conveniently dishonored on all sides.”). Thus, the People of each state needed to ratify the Constitution. *See* THE FEDERALIST NO. 39, *supra* note 223 (describing how the ratification of the Constitution requires a majority of the people in the nation). Even though ratification was done via specially-elected ratifying conventions rather than by direct referendum, it was done in such a way that—given the constraints of the day relating to communication and travel, as well as the limited number of eligible voters—it was perhaps the greatest manifestation of democracy the world had ever known. *See* AMAR, *supra*

People are sovereign under the Constitution.³³⁴ State peoples continue to exist and to in effect enjoy almost exclusive control over their state governments and state constitutions.³³⁵ But the federal government is supreme.³³⁶ For example, a state could not, even by a vote of a majority of its people, establish a state government that was not based on popular sovereignty majority rule, for this would violate the Guarantee Clause of Article IV and result in federal intervention to restore popular sovereignty.³³⁷ Under our Constitution, which no state or states could force any other state to ratify, the federal People, like the federal Constitution, are supreme. Once ratification occurred, in those States and only those States ratifying (which, of course, was in fact but did not have to be all of them), the sovereign People ceased to be the individual people of each state and became the People of the United States.³³⁸

C. Fair, Deliberative Procedures

As discussed above, federal direct democracy, like state direct democracy, should include a single subject rule.³³⁹ Not only is this important to ensure meaningful majority consent, but it is also necessary to protect minority rights. Otherwise, proposals unfair to individuals or minorities might be attached to other very popular proposals and the package presented to voters.³⁴⁰ Congress or the administrative body charged with facilitating federal direct democ-

note 28, at 7; Carlos E. González, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 657-58 (1996). Most states waived standard voting restrictions and allowed a uniquely broad class of citizens to vote for ratification-convention delegates. See AMAR, *supra* note 28, at 7. Most states elected convention delegates under special rules that were "more populist and less property-based than normal." *Id.* at 5-11.

334. After the national People ratified the Constitution, the source of the power to ordain and establish, and to alter and abolish, became the People of the United States of America. See Amar, *supra* note 22, at 506-07. Post-ratification, the state People is clearly subordinate to the national People. See *id.* at 506 ("The people of a single state may not nullify the federal Government's action, but the national people may.").

335. See *id.* at 506.

336. See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . ."). Thus, any amendment of the U.S. Constitution binds the states even if a state did not support the amendment.

337. See AMAR, *supra* note 28, at 280 (describing the Guarantee Clause as "a kind of democratic insurance policy").

338. See Amar, *supra* note 22, at 506-07 (discussing James Wilson's understanding that after ratification "We the People" became the national People).

339. See *supra* note 88 and accompanying text.

340. See *supra* notes 213-21 and accompanying text.

racy (for example, the Electoral Trust under Philadelphia II)³⁴¹ should prevent voters from considering multi-subject proposals. Such proposals should be separated into individual subjects.³⁴² However, ultimately the Supreme Court will have final say regarding the fairness of the procedures used for federal direct democracy. I noted above that there may be only limited judicial review of federal constitutional amendments passed by direct democracy, but even this would include judicial review of the procedural process.³⁴³

Under a participatory democracy, as with a representative democracy, a balance must be found between the need to pass timely legislation and the need to ensure that proposals are fully and deliberately considered before voting. Congress or an administrative body who will facilitate this process, should be obligated to inform and educate the People on the proposals the People will be asked to vote on and to solicit and respectfully attend to input received from them. The People may be asked to approve the final form of the proposal and/or to consider amendments to the proposal before it is considered for passage. Once a final proposal is determined, a sufficient discussion period should follow before a final vote. As noted above, in the case of federal constitutional amendments, two separate votes may be required to encourage deliberation.³⁴⁴ Obviously, the development of rules and procedures to guide federal direct democracy will be an ongoing process.³⁴⁵ However, the overall goal is clear: fully informed deliberation and voting by the People.

V. GETTING THERE FROM HERE: MOVING FROM A REPRESENTATIVE TO A PARTICIPATORY DEMOCRACY

A. *Advisory Referenda to Break Political Gridlock*

The move to a federal participatory democracy in America is inevitable because of our cultural traditions, our political rhetoric, the words and spirit of our founding documents, and our sense as Americans of what it means for a government to be fair and just.³⁴⁶

341. See Hirsch, *supra* note 5, at 218–25 (discussing Philadelphia II and the Electoral Trust).

342. See generally Cooter & Gilbert, *supra* note 86 (discussing multi-subject proposals in the context of state direct democracy).

343. See *supra* text accompanying notes 301–14.

344. See *supra* text accompanying notes 308–14.

345. See, e.g., Hirsch, *supra* note 5, at 218–25 (discussing the Electoral Trust proposed by Philadelphia II).

346. America's creed is found in our founding documents—the first twelve lines of the second paragraph of the Declaration and the Preamble of the Constitution. It exalts the idea of

In short, our love of and faith in democracy is our national identity. Democracy is what makes us American, not the state we come from, nor our ancestry, native tongue, race, religion, or ethnic background. The road to a pure participatory democracy, however, is a long one with many stops along the way. In practice, we may choose to never get to that ultimate destination.³⁴⁷ That decision resides with the American People alone. The States have been moving along this road for years, and over the past decade, as the communications revolution has been occurring, the rate of speed has increased.³⁴⁸ The topic addressed in this Section addresses what event will propel our movement at the federal level from our mostly representative democracy to at least a partial participatory democracy.

The tools of participatory democracy, such as the initiative and referendum, will be introduced on the federal level in the near future because of the convergence of several factors. First, the communications revolution has given us, for the first time in our history, the ability to implement participatory democracy at the federal level effectively and efficiently.³⁴⁹ Second, our strong cultural commitment to democracy creates a constant pressure to move toward participatory democracy as it becomes technologically feasible.³⁵⁰ The ascendancy of polling in politics is an example of this movement. Today, we no longer need to rely on a poll to see what the voters think—we can simply have the voters vote directly on legislation. Finally, our current representative democracy is breaking down and failing to function, due in part to the communications revolution. Our representative democracy and its attendant two-party system have created the very factions Madison feared. And, as Madison

unalienable rights, such as freedom, liberty, and justice for all. Americans believe in these ideas; we actually believe that each of us is created equal and is endowed with unalienable rights. Our country's attainment of these ideals has been, and is, less than perfect, but we strive to do better—to continually form a more perfect union. Our Constitution as originally written was shamefully pro-slavery, anti-women, anti-Native American, and anti-poor. It failed to fully implement its own democratic ideals, but, through the amendment process, we have sought redemption. We are not perfect yet, but it is undeniable that we have moved far in the direction of freedom, equality, liberty, and justice for all.

347. There are benefits, as well as risks, to representative government. As noted, the risks are greatly ameliorated when it is clear that "the People" may act easily and efficiently as a corrective to a malfunctioning representative government. Thus, the People may choose to leave a large amount of relatively minor or repetitive lawmaking chores to the representative government. Also, the representative government will often, as a practical matter, need to deal with national security and emergency matters in the first instance.

348. See *supra* notes 109–27 and accompanying text.

349. See *supra* notes 222–31 and accompanying text.

350. See *supra* notes 1–54 and accompanying text.

foresaw, these factions (or political parties) have developed to the point that they are seriously dysfunctional.³⁵¹ The current system simply cannot deal with many important and pressing problems.

In the past—before the Internet, that is—a deal may have been made behind closed doors that would have provided political cover while allowing legislators to still make hard choices. Increasingly this sort of deal-making is not possible because it cannot be kept secret. While this is a positive development, it is much more difficult to make backroom deals to solve difficult problems. For example, the passage of ObamaCare entailed much backroom deal-making,³⁵² certainly nothing new in Washington. But, information about these backroom deals was instantly available on the Internet for public inspection. Not only did the revelation of the deal-making disgust the voters and threaten to derail passage of the bill, but the awareness of the process used to secure passage also resulted in a lame piece of legislation that, while passed, will likely never be fully implemented and may be repealed altogether.³⁵³ The point is not whether

351. A general illustration should suffice. I am writing this Article in July 2011. The current political issue de jure is the debt ceiling, which needs to be increased by August 2 or we are told the United States will default on its debt. Many congressional Republicans refuse to vote for an increase unless the bill also includes spending cuts equal to the increase. Many Democrats will not cut spending without new taxes, but Republicans will not vote for the bill if any new taxes are included. In addition, the President and congressional leaders try to use their position on the debt ceiling to affect whom will get the blame for the poor economy and high unemployment in the 2012 election. See, e.g., Carol E. Lee, *Election Shadows Deficit Battle*, WALL ST. J., July 16–17, 2011, at A1 (observing that a large bipartisan deficit-reduction deal was key to avoiding a tax-and-spend liberal label in 2012 election); Marie Pilon & Leslie Scism, *Markets Ponder Consequences of a Downgrade*, WALL ST. J., July 16–17, 2011, at A4 (“Standard & Poor’s and Moody’s Investors Service have warned that the U.S. may lose AAA credit rating unless a credible plan is reached to reduce the federal deficit.”); Naftali Bendavid & Janet Hook, *House GOP to Vote on \$2.4 Trillion in Cuts*, WALL ST. J., June 16–17, 2011, at A4 (reporting House Republicans to vote on a bill that makes big cuts in spending and ties debt-ceiling relief to a balanced-budget constitutional amendment—though the bill is unlikely to pass the Senate or be signed by the President); Peggy Noonan, *This Is No Time for Games*, WALL ST. J., July 16–17, 2011, at A13 (referring to President Obama’s statement to Scott Pelley that the President “isn’t sure there will be ‘money in the coffers’ to send out Social Security checks”); Neil King, Jr. & Scott Greenberg, *Poll Shows Budget-Cuts Dilemma*, WALL ST. J., Mar. 3, 2011, at A5 (referring to a WSJ/NBC News poll showing that 40% of Americans think that reducing the deficit and government spending is one of the top two priorities). Any voter knows the debt ceiling needs to be increased before August 2—and preferably long before. Also, any voter knows that the government needs to get its fiscal condition in order by spending less, collecting more, or some combination thereof. The political parties have gotten so good at their blame-and-scare games—such as when President Obama played the “Grandma Card” by saying that the Social Security checks might not go out on August 3—and making sound bites for re-election that the actual interests of the country come in at a very distant second.

352. See *supra* note 103 and accompanying text.

353. See *supra* note 188 and accompanying text.

ObamaCare is good or bad, but simply that the current representative democracy is unable to deal effectively with the important and pressing problem of forty-six million Americans who have no reliable access to basic healthcare. Moreover, the solution to our political impotence is participatory democracy.

It is easy to imagine the President or Congress deciding to go directly to the voters via an advisory referendum (conducted online) in order to make progress on an important political issue while also gaining political cover and even political credit for finding a democratic solution to an important problem. There is no prohibition constitutionally or otherwise to an advisory referendum nor does the President or Congress need any specific grant of authority to seek an advisory referendum.³⁵⁴ A quick perusal of the front page of any newspaper offers many potential vehicles that could carry us toward federal participatory democracy. These include, for example, the federal budget battle and the \$1.6 trillion deficit, environmental issues, ObamaCare uncertainty, and the problem of what to do about the ever-expanding entitlement programs of Medicare, Medicaid, and Social Security.

It is not that politicians do not know how to address these issues; the problem is that politicians are afraid that doing so is political suicide. Toward the end of 2010, President Obama put together a bipartisan group to examine and make recommendations for fixing the budget and addressing the deficit problem.³⁵⁵ This “reduce-the-deficit” commission was led by Erskin Bowles (a Democrat) and Alan Simpson (a Republican), and their plan was realistic, non-partisan, and received support from eleven of the eighteen members on the commission.³⁵⁶ The plan offered by the commission suggested restraining spending on defense, Social Security, Medicare, and Medicaid, and raising taxes.³⁵⁷ However, President Obama recommended no cuts to these programs when he provided his budget in

354. Professor Amar argues, convincingly to me, that the People, a majority of U.S. voters, may amend the Constitution. *See supra* notes 303–31 and accompanying text. It seems to me that it may be possible to marshal the same arguments in favor of a right of the People, a majority of U.S. voters, to make law via initiative. Thus, unlike Philadelphia II, I do not see the need for a constitutional amendment to allow for a federal lawmaking by initiative. However, a statute spelling out a set of acceptable procedures would be very useful.

355. *See* David Wessel, *Panel on Cutting Deficit Paves Way for Politicians*, WALL ST. J., Feb. 17, 2011, at A4 (referring to the work of the reduce-the-deficit commission led by Bowles and Simpson).

356. *Id.*

357. *Id.* For every \$2.25 in spending cuts, the Commission’s plan provided for \$1.00 in higher taxes. *Id.*

2011. Rather, earlier in the year the President and the Republicans were fighting over cuts in domestic appropriations which represented only 15% of the total budget.³⁵⁸ Evidently, the political cover offered by the bipartisan commission was not sufficient for either the President or Congress to offer a real budget plan to address our \$1.6 trillion deficit.³⁵⁹

My argument is that the President, or Congress, or both, could use a federal advisory referendum to make real progress on the budget/deficit. For example, a plan like that proposed by the Bowles-Simpson commission, or something similar, could be presented to the voters. Because this plan addresses the deficit and spreads the pain around more or less evenly, the public may well support the plan. Politically, politicians who implement a plan approved by the voters have nothing to lose and everything to gain. This is the path, whether it involves the budget or deficit, healthcare, the environment, or some other issue, that will lead the U.S. to direct democracy on the federal level. Once we start down that path, our love of democracy likely will carry us forward. However, to fully encourage federal direct democracy, we need more—we need a clear procedure.

B. Formal Adoption of a Federal Process for Participatory Democracy

I anticipate the first advisory referendum will be conducted primarily online, although initially a provision may also be made for traditional voting. The next step may be an executive order that an

358. Damian Paletta et al., *Deficit Outlook Darkens*, WALL ST. J., Jan. 27, 2011, at A1 (discussing how most spending cuts proposed focus on the roughly 15% of the budget known as non-security discretionary spending); Gerald F. Seib, *Budget Battle Lines Drawn: Obama Plan Offers Tax Increases and Spending Cuts, but Avoids Big Fiscal Issues*, WALL ST. J., Feb. 15, 2011, at A1 (discussing how Obama's proposal does not build on Bowles/Simpson report and offers only modest cuts).

359. Since then, we have had the "Gang of Six" deficit reduction group that has since given up. See Naftali Bendavid & Damian Paletta, *Senate 'Gang' Hashes Out Deficit Plan*, WALL ST. J., May 2, 2011, at A1 (discussing "Gang of Six" senators who are working to craft a grand deficit-cutting deal); Janet Hook & Naftali Bendavid, *Six Minus One Could Equal Zero*, WALL ST. J., May 19, 2011, at A4 (discussing breakdown in talks over size of Medicare cuts and noting that attention had turned to another deficit cutting group led by Vice President Joe Biden). Next, a group led by Vice President Joseph Biden surfaced, but, so far, no proposals have emanated from this group. Most recently, as of July 15, 2011, President Obama met with Republicans in hopes of a grand deficit reduction agreement as part of a bill to raise the debt ceiling. But, so far, there has been no deal. See Damian Paletta et al., *Raters Put U.S. on Notice: Moody's, S&P Sound Alarms on Debt; President Obama Walks out of Talks*, WALL ST. J., July 14, 2011, at A1. (The subtitle says it all.)

advisory referendum be held for all-important social legislation before the President would sign such bills. This could result because a candidate made this promise to get support during the general election, a sitting President gave such an order to try to break a political logjam to gain popular support, to help with reelection, or all of the above. However, what is necessary to fully encourage federal direct democracy is the adoption of a federal statute similar to the Democracy Act³⁶⁰ proposed by Philadelphia II but without the proposed constitutional amendment. The purpose of this statute would be to specify a possible procedure that the People may use to propose and vote on ordinary laws and constitutional amendments. In addition, such a statute should establish a politically independent body similar to Philadelphia II's Electoral Trust to facilitate federal participatory democracy.³⁶¹

Professor Amar and others have cogently argued that, under our Constitution, the People already have the right to directly amend the Constitution.³⁶² Moreover, it appears that if the People have the right to directly amend the Constitution, which is the supreme law of the land, then of course the People also have the right to directly make ordinary law. Article I, Section I of the Constitution states, "All legislative powers herein granted shall be vested in a Congress of the United States"³⁶³ This statement is not inconsistent with the People's right to make ordinary law by passing legislation directly. Under our Constitution, the People are the grantors referred to in Article I, Section I, and the People's ultimate power to legislate is simply not part of the "legislative Powers herein granted."³⁶⁴ The People retained their right to legislate, in addition to giving elected officials this same right, as outlined in the Constitution. Thus, the People continue to have the power to legislate directly. If Professor Amar is correct, and I think that he is, it would be futile to claim otherwise because the People could use a two-step process to make ordinary law. The first step would be to amend Article I, Section I, and the second step would be to pass ordinary legislation pursuant to such an amendment.

360. See *supra* note 45; see also Hirsch, *supra* note 5, at 218-21 (discussing the Democracy Act).

361. See *supra* note 231 and accompanying text.

362. See *supra* Part IV.B.1.

363. U.S. CONST. art. I, § 1.

364. See *id.*

Thus, we do not need the statute or, as some have advocated, a constitutional amendment,³⁶⁵ to give the People the right to amend the Constitution or to make ordinary law. The statute would be useful because it would establish a clear procedure for the People to follow when exercising this power. The People have had this power since 1788,³⁶⁶ but they have never used it; thus the lack of an established procedure is a significant impediment to the use of this power. The statute called for here will remove this impediment.

VI. CONCLUSION

I have argued that we are at the beginning of an era of federal participatory democracy. We should adopt a federal statute that specifies a procedure the People can use for federal direct democracy and that creates an entity to facilitate the People's participation in federal direct democracy. The revolution in communication technology has made this era possible, and our abiding love of democracy will usher it in. Of course there will be challenges, but there is also great potential for a stronger democracy, a stronger country, and ultimately a better life for the People of America.

365. Philadelphia II calls for a constitutional amendment. *See supra* note 45.

366. On June 21, 1788, the necessary nine states ratified the Constitution. *See AMAR, supra* note 28, at 6 ("[T]iny New Hampshire became the decisive ninth state by a margin of 57 to 47.").