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COMMENT

“LIKE” YOUR PRESIDENT: A CASE FOR ONLINE VOTING

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In the wake of Hurricane Sandy, New Jersey allowed displaced residents to vote in the 2012 elections by email.¹ The option to vote online has been available to military members stationed overseas since 2009.² New Jersey’s decision to open online voting to civilians raises the question of why this shift didn’t take place sooner. Assuming New Jersey’s system holds up under post-election scrutiny, why not utilize it to the fullest extent possible?³

Online voter registration is already permitted by eleven states,⁴ including the liberal, infrastructure-rich, population-heavy California and the conservative, sparsely populated Alaska.⁵ Extending the registration system to voting itself could save taxpayers significant amounts of money,⁶ encourage young

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1. Ginger Gibson, *New Jersey to Allow Voting by Email and Fax*, POLITICO (Nov. 4, 2012, 1:33 PM), <http://www.politico.com/news/stories/1112/83282.html>.

2. See *Electronic Options Move the Vote*, MYARMYBENEFITS (last visited March 20, 2013),

http://myarmybenefits.us.army.mil/Home/News_Front/Electronic_options_move_the_vote.html (describing the Federal Voting Assistance Program, which has been available since 2009 and allows military personnel to submit their absentee ballots by email, fax, or online delivery system).

3. To be clear, this Comment is advocating for *online* voting, not necessarily voting by email, which would give rise to additional security concerns.

4. Scott Keyes, *The Next Frontier in Voting Rights: Online Voter Registration*, THINKPROGRESS (Apr. 11, 2011, 7:25 PM), <http://thinkprogress.org/justice/2011/04/11/176987/the-next-frontier-in-voting-rights-online-voter-registration/?mobile=nc> (noting that “11 states across the ideological spectrum have opted to permit residents to register via the Internet”).

5. *State by State: Presidential Voting History*, KRDO (Nov. 5, 2012, 3:00 AM), <http://www.krdo.com/news/2012-elections/-/13062696/17100258/-/1uwr8jz/-/index.html> (showing California’s history of voting Democrat and Alaska Republican).

6. Cf. Erin Ferns Lee, *Online Voter Registration: A New and Inexpensive Way to Register Voters?*, PROJECT VOTE (Jan. 14, 2012), <http://www.projectvote.org/blog/2010/01/online-voter-registration-a-new-and-inexpensive-way-to-register-voters/> (discussing the fact that

people to get involved in politics early on, and provide millions of Americans with a more convenient way to vote.

These benefits have been realized in the past. In 2000, before the Internet had found a place in most American homes,⁷ the Arizona Democratic Party allowed primary voters to vote digitally. Turnout among Internet voters nearly matched that of mail-in ballot voters and in-person voters, and there were no reports of voting fraud.⁸ The system was relatively simple. Voters were sent a voter certificate and PIN number, which they used, along with information from two forms of identification, to vote on a website. Once they voted, the PIN number was “punched” so that it could not be used again.⁹ Considering that Arizona was able to run a successful Internet vote in 2000, it is not a stretch to say that after nearly twelve years of advancements in computer technology, America would be capable of making secure online voting available to the general public.¹⁰

Indeed, a number of State Bar Associations—including Illinois,¹¹ Florida,¹² Texas,¹³ and others¹⁴—already use online

online registration in Maricopa County, Arizona cost \$0.03 per voter compared to \$0.83 for paper registration).

7. See *Nation Online: Entering the Broadband Age*, NAT'L TELECOMM. & INFO. ADMIN. (Sept. 30, 2004), <http://www.ntia.doc.gov/report/2004/nation-online-entering-broadband-age> (showing in Figure 1 that less than 50% of American households had an internet connection up until September 2001).

8. See Jodi Kantor, *Arizonians Vote in Their Pajamas*, SLATE (Mar. 15, 2000, 3:00 AM), http://www.slate.com/articles/news_and_politics/net_election/2000/03/arizonans_vote_in_their_pajamas.html (reporting that there were no reports of “hacking, mass vote-robbing, downed servers, corrupted data, [or] not-so-secret balloting”).

9. *Id.*

10. For more background on the Arizona election and other early attempts at online voting, see Rachel Gibson, *Elections Online: Assessing Internet Voting in Light of the Arizona Democratic Primary*, 116 POL. SCI. Q. 561 (2001).

11. *Online Voting in ISBA Elections*, ILL. ST. B. ASS'N, <http://www.isba.org/leadership/elections/online> (last visited Nov. 9, 2012).

12. *E-Voting For Bar Elections Becomes a Reality*, FLA. B. NEWS (Jan. 15, 2001), <http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/cb53c80c8fabd49d85256b5900678f6c/58d83abac1668fb685256b100070a7b3?OpenDocument&Highlight=0,E-voting,for,bar,elections>.

13. *Vote in the State Bar Referendum*, 74 TEX. B.J. 113 (2011) (describing the process for online voting).

14. Melody Finnemore, *Madame Precedent: Osb's New President Outlines Clear Set of Objectives*, 65 OR. ST. B. BULL. 9 (2005); Keith B. Norman, *Coming This Spring: Online Voting For State Bar Elections*, 70 ALA. LAW. 409 (2009); Michael H. Rubin, *Carbon Paper & the Computer Revolution*, 49 LA. B.J. 434 (2002).

voting.¹⁵ Texas has nearly 90,000 active members of its bar,¹⁶ and Florida clears the 90,000 mark with room to spare.¹⁷ Additionally, other nations, such as Norway, have made the option of voting online in national elections available to the general public with success.¹⁸ Therefore, it cannot be said that online voting is only feasible on a small scale.

The normative appeal of online voting in the general election is significant. In 2008, President Obama garnered the largest percentage of American adult votes in decades and still failed to secure support from 70% of all eligible voters.¹⁹ Former President Bill Clinton was unable to win the votes of even a quarter of eligible voters (24% both times).²⁰ Indeed, voter turnout numbers in America are far lower than those of other wealthy nations,²¹ which serves as a black mark on the United States’ record as a world leader of democratic values.

There are different ways to mitigate this problem, including allowing citizens to register on election day, instituting early

15. *Cf. Notice By The Board of Elections*, AMERICAN BAR ASSOCIATION (last visited March 20, 2013), http://www.americanbar.org/groups/leadership/house_of_delegates/2009_notice.html (detailing the jurisdictions holding elections and the positions to be voted on).

16. See *About us: FAQs*, ST. B. OF TEX., http://www.texasbar.com/AM/Template.cfm?Section=About_Us_FAQs&Template=/CM/HTMLDisplay.cfm&ContentID=18680 (last visited Nov. 9, 2012).

17. *Frequently Asked Questions About the Florida Bar*, THE FLA. B., <http://www.floridabar.org/tfb/flabarwe.nsf/f6301f4d554d40a385256a4f006e6566/47fc0a8f415a11d285256b2f006ccb83?opendocument#How%20many%20lawyers%20are%20licensed%20to> (last visited Nov. 9, 2012).

18. See Steve Friess, *Email Voting in New Jersey Could be Rife With Cyber Snafus*, POLITICO (Nov. 5, 2012, 10:26 AM), <http://www.politico.com/news/stories/1112/83322.html> (noting that “the European Union’s Office for Democratic Institutions and Human Rights issued a 21-page report declaring it mostly successful”). For more information on Norway’s online voting system. See Ben Goldsmith, *Internet Voting: IFES Watches as Norway Votes from the Comfort of Home*, INT’L FOUND. FOR ELECTORAL SYSTEMS (Sept. 27, 2011), <http://www.ifes.org/Content/Publications/Articles/2011/Internet-Voting-IFES-Watches-as-Norway-Votes-from-the-Comfort-of-Home.aspx>.

19. These individuals either did not vote or voted for another candidate (such as John McCain).

20. See Keyes, *supra* note 4. Again, these individuals either did not vote or voted for another candidate (in this case, the main alternative candidates were George H.W. Bush and Robert Dole).

21. Howard Steven Friedman, *American Voter Turnout Lower Than Other Wealthy Nations*, THE HUFFINGTON POST (July 10, 2012, 11:42 AM), http://www.huffingtonpost.com/ward-steven-friedman/voter-turnout-europe-america_b_1660271.html.

voting, and moving Election Day from Tuesday to the weekend.²² While such changes would certainly encourage participation, they still require citizens to be physically present at the polls. This requirement allows a multitude of variables to depress voter turnout, including, but certainly not limited to, long wait times, inclement weather, poor access to transportation, and work schedules. Online voting, on the other hand, would not be nearly as affected by such issues and would have the added benefit of shortening the lines for those who chose to vote in person. It would also likely increase turnout among younger generations,²³ which have a reputation for being less likely to vote.

There are, of course, disadvantages. For instance, minority populations are significantly less likely to have Internet access in their homes.²⁴ This discrepancy gave rise to concerns of unequal access in Arizona's Democratic Primary of 2000.²⁵ Another worry is that online voting would cheapen the process of voting and rob it of much of its symbolism. This, in turn, would have a deleterious effect on political and civic engagement.²⁶

The biggest issue, however, may be the security concerns. In an era where fears of voter fraud and paper trail-less voting machines seem to dominate the headlines every election,²⁷ the

22. See H.R. 4183, 112th Cong. (2012) (moving Election Day from Tuesday to the weekend).

23. See R. Gibson, *supra* note 10, at 572.

24. See Lee, *supra* note 3 (noting that African-American and Latino citizens are less likely to have home internet access).

25. Yolanda D. Edwards, *Looking Beyond the Digital Divide*, 57 FED. COMM. L.J. 585, 589 (2005) (reviewing ANTHONY G. WILHELM, *DIGITAL NATION: TOWARDS AN INCLUSIVE INFORMATION SOCIETY* (2004)) (noting that online voting could maximize white electorate participation at ethnic and racial minorities' expense).

26. See R. Gibson, *supra* note 10, at 570–71.

27. See, e.g., Andres Jauregui, *Pennsylvania Voting Machine Switches Vote from Mitt Romney to Barack Obama*, THE HUFFINGTON POST (Nov. 6, 2012 4:14 PM), http://www.huffingtonpost.com/2012/11/06/pennsylvania-voting-machine-switches-vote-obama-romney_n_2083015.html; Judson Berger, *Watchdog Warns SEIU Contract for Nevada Voting Machines Poses 'Fraud' Concern*, FOX NEWS (Oct. 27, 2010), <http://www.foxnews.com/politics/2010/10/27/watchdog-warns-seiu-contract-nevada-voting-machines-poses-fraud-concern/>; Anahad O'Connor, *Mom, Can My Voting Machine Spend the Night?*, THE NEW YORK TIMES (August 19, 2008, 1:59 PM), <http://thelede.blogs.nytimes.com/2008/08/19/mom-can-my-voting-machine-spend-the-night/>; Jim Drinkard, *Primary voting-machine troubles raise concerns for '06*, USA TODAY (March 28, 2006, 7:04AM), War on Error, *Election Fraud: It's the Voting Machines, Not the Voters*, DAILY KOS (June 16, 2002, 5:25 PM), <http://usatoday30.usatoday.com/news/washington/2006-03-27-voting->

idea of trusting one’s constitutionally protected vote to a website sparks immediate distrust. In an article on online voting in light of Arizona’s experiment, Rachel Gibson noted three categories of security concerns: (1) ensuring that voters are who they claim to be (authentication); (2) ensuring that voters’ ballots are kept secret (privacy/secretcy); and (3) ensuring that the votes are not tampered with (integrity).²⁸ These types of problems still animate the discussion of online voting today. In a follow-up article on New Jersey’s foray into civilian online voting in the wake of Hurricane Sandy,²⁹ Lawrence Norden of the Democracy Project at New York University’s Brennan Center for Justice stated flatly, “Anybody who has studied this issue will say we’re not there yet for making this a really secure system ... there’s no question that we’re not ready yet, as appealing as the idea might be, to allow people in large numbers to be voting by email.”³⁰

Even if one takes Norden’s assertion at face value, that does not mean we *won’t* be ready. Cyber security will keep getting better, and, as technology moves forward, it will become easier to verify identity in a number of ways. For instance, webcams could be used to take voters’ images before they vote, which could be matched against their driver’s license (or state ID) photos before the vote becomes officially recorded. Alternatively, a state could try a variation of the system that Michigan uses for its State bar, whereby the state would give each voter a unique PIN to access the election website and vote.³¹ This PIN would be the voting equivalent of a social security number and could be entered along with the voter’s date of birth in order to add another layer of security. These are just a couple of examples of how the system could be made to work.

machines_x.htm; <http://www.dailykos.com/story/2012/06/16/1100628/-It-s-the-Voting-Machines-Not-the-Voters#>.

28. *See id.* at 569–70.

29. G. Gibson, *supra* note 1.

30. Friess, *supra* note 18. While this Comment proposes the use of an election website as opposed to voting by email, similar concerns color the discussion of both concepts. *See* Joanna Stern, *Election Day: Why You Cannot Vote Online or on the Internet Today*, ABC NEWS (Nov. 24, 2012, 3:47 PM), <http://abcnews.go.com/Politics/OTUS/election-day-vote-online-internet-today/story?id=17647954#.ULEudTkVcWF> (quoting Avi Rubin of the Johns Hopkins University as saying, “[t]he biggest obstacle to voting on the Internet is the security problem”).

31. *See* James C. Horsch & John T. Berry, *New Technology Helps the State Bar Serve Members Better, Faster*, 84 MICH. B.J. 36, 36–37 (2005).

It should be emphasized that this system would not supplant poll voting, but would instead create an alternative that encourages participation in our electoral system and makes our representative system of government even more representative. There will still be millions of Americans who go to the polls to vote, just like there are in every significant election, including in states that have early voting. For those individuals that either work long hours, have difficulty getting to the polls, or otherwise face significant obstacles in exercising their franchise, however, online voting wouldn't just give them a greater opportunity to vote but would, contrary to the assertion of opponents, make them feel *more* American. After all, what's more American than voting?