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We the People: The Consent of the Governed in the 21st 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 purpose…

Part I

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. 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. Americans do not love democracy because it is perfect –
it is not; it is only as good as we make it. Americans love democracy because doing so is part of our culture; our shared love of democracy creates a bond that binds together our diverse people and our vast continent. 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. Under our Constitution, neither the federal government nor the state governments are sovereign, nor do these governments somehow share sovereignty. In America the People alone are sovereign, all governments (federal, state, local) are mere agents of the People, subject always and in every case to their ultimate authority. As a result, through democracy (popular sovereignty-majority rule) it is possible to create 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, while much stronger than it was in 1788 is still weaker and more diluted

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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, a vote is a fundamental part of what it means to be American. See e.g., James v. Voltierra, 402 U.S. 137, 141 (1971) (the initiative reflects Americans’ “devotion to democracy”); Alan Hirsh, Direct Democracy and Civic Maturation, 29 HASTINGS CONST. L.Q. (2002), 195 at nt. 9 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 302-333 and accompanying text.
7 See generally, Amar, Of Sovereignty and Federalism supra note 1 at 1425 (“… true sovereignty in our system lies only in the people of the United States…”) id. at 1427.
8 See, The Federalist No. 46 (Madison):

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….

than it needs to be or than it should be.\textsuperscript{9} Under our representative democracy voters in fact play only a sporadic and limited role in the political life of the nation.\textsuperscript{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.\textsuperscript{11} But, this accountability is tenuous for many reasons including its periodic nature (a legislator may have cast 1000 votes between elections)\textsuperscript{12} and because it assumes often incorrectly that voters have, or at least may obtain, accurate information about what their agent has done and why.\textsuperscript{13} Periodic elections are a weak manifestation of the ideal consent of the governed that democracy envisions.\textsuperscript{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.\textsuperscript{15} There were simply too many voters spread over too great a distance to allow for a participatory democracy.\textsuperscript{16} As a result, our democratic ideals could be implemented at the federal level only through a representative democracy.\textsuperscript{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 first hand 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, and eventually so was Jim Crow, the right to vote was extended to all citizens and Senate elections were changed so that senators are now elected by popular vote. Changes like these give America a stronger, better and truer democracy and as a result, 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/logistical limitations of the past that required a representative democracy. The revolutionary developments in communication technology that occurred in the late 20th and early 21st centuries have made it possible for the United States to dramatically alter the way it puts its democratic ideals into practice. Today, for the first time we can, at the federal level, move

18 See U.S. Const. Amendment XIII.
19 See e.g., Civil Rights Act (1964); Civil Rights Act (1866).
20 See U.S. Const. Amendment XV (citizens including blacks and freed slaves may vote but not women), Amendment XIX (women may vote), Amendment XXVI (citizens 18 years of age and older may vote).
21 See U.S. Const. Amendment XVIII (Senate elections by popular vote).
22 See e.g., Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment Outside Article V (hereinafter “Amar, Consent of the Governed”) 95 COLUM. L. REV. 457 (1994) where Professor Amar stated in 1994 as follows:

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.)

Of course the communications revolution has continued to make dramatic improvements over the last 17 years. See e.g., infra note 217.
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 cites, wikis, skype etc.
dramatically toward a strong participatory democracy. Also, communications technology continues to improve and as a result so will our ability to implement federal direct democracy.

While practical/logistical limitations were the primary reason that we have a representative democracy they are not the sole reason. A few of the Founders favored a representative democracy because they feared the fleeting passions of the People, and were therefore reluctant to give power directly to the People notwithstanding the lofty language of our founding documents. 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. These concerns on the part of 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

24 See infra notes 272-282 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.
27 See e.g., The Declaration of Independence:

We hold these truths to be self-evidence, 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 affect their Safety and Happiness…. do 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 original Constitution (Article I-VII and the first ten Amendments) begins and ends with, “The People”:

“We the People…do ordain and establish the Constitution for the United States of America.”
See U.S. Const. Preamble. The Tenth Amendment provides: “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: “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. Amendment IX (the people are the source of all power – so that not delegated by them is reserved to them).
28 See Akhil Reed Amar, AMERICA’S CONSTITUTION – A BIOGRAPHY Random House (2005) at 87-98, 148-159 (the decision to elect the president via the Electoral College rather than by direct popular election was more a reflection of the young countries north/south split that resulted from slavery than from either a distaste of democracy or a desire to protect small states). Also the 3/5’s provision of Article 1 section 2 coupled with its apportionment scheme based on the number of free persons plus 3/5’s 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.
limitations of the times required.\textsuperscript{29} Slavery and many of its remnants were eventually eliminated. However, the fear of giving power directly to the people has been a constant through minor undercurrent of American democracy.\textsuperscript{30} This fear is no more valid today than it was at the time of the founding.\textsuperscript{31} The desire for democracy-in-theory, but elitism-in-practice is born of this fear and is illegitimate and undemocratic.\textsuperscript{32} Also, this fear of truly empowering the People has grown weaker as our democracy has grown stronger.\textsuperscript{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 of it (the fleeting passions) of the People.\textsuperscript{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.\textsuperscript{35} And, it’s important to note that most of the Founders did not share this fear. For example, James Wilson advocated the popular election of the president.\textsuperscript{36} However, the most important fact is that the Constitution the Founders created in Philadelphia and, more importantly, that was ratified by the People provided in its overall

\textsuperscript{29} See supra notes 18-21 and accompanying text.
\textsuperscript{30} See e.g., The Federalist No. 10 (James Madison) supra note 8, at761 (“… a pure democracy…can admit of no cure for the mischief’s of faction.”).
\textsuperscript{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 Federalist No. 55, supra note 8 at 343 (“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 preface or economic class are not reliable indicators of those few people who are not worthy of their humanity.
\textsuperscript{32} In fact, much of the original implementation of our democracy was elitist; only adult white well off (at least well enough to pay a poll tax, in some case 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.
\textsuperscript{33} See e.g., supra note 20 and the discussion infra at notes 35-54 and accompanying text.
\textsuperscript{34} See infra notes 290-299 and accompanying text.
\textsuperscript{36} See Amar, AMERICAN’S CONSTITUTION supra note 28 at 155.
structure, words and the interplay of its provisions, recognition of the People as the source of all government power.\footnote{See infra notes 283-333 and accompanying text.}

Since our founding we have embraced, at least in words and spirit a democratic ideal that harks back to the ancient Greek plebiscite.\footnote{See e.g., Hirsch supra note 5 at 189 noting that: “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.”} America’s commitment to the implementation of these ideals has, as noted, been much more tentative, reluctant and inconsistent than its rhetorical exhortation of these ideals.\footnote{See supra notes 3-18 and accompanying text.} 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.\footnote{See Amar, AMERICA’S CONSTITUTION 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 G. Pope, Republican Moments: The Role of Direct Popular Power in the American Constitutional Order, 139 U. Pa. L. Rev. 287, 338 esp. n. 235 (1990).} As noted, over time American democracy has become stronger and moved ever closer to the democratic ideals expressed in our founding documents.\footnote{Id.} 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,\footnote{See infra notes 107-125 and accompanying text.} 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,\footnote{See National Popular Vote bill, www.nationalpopularvote.com/ (40 states have held hearings on the bill and it has become law in Hawaii, Illinois, Maryland, New Jersey and Washington State).} and another movement aimed at using the internet to open the presidential nominating process.\footnote{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, www.americanselect.org.} In addition,
there have even been a few brave commentators arguing for (as I do here) the adoption of federal direct democracy.  

This article argues that the time has come once again to strengthen American democracy. It is time for American democracy at the federal level to move away from an exclusively representative democracy and to embrace a participatory/direct democracy in which voters play a constant and decisive role in the political life of the nation. Now is the time because for the first time in our history we have the communications capability to implement a federal participatory democracy. Our love of and commitment to true democracy will push us

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46 See infra notes 212-282 and accompanying text.

47 See infra notes 126-143 and accompanying text.

48 See infra notes 221-230 and accompanying text.
inexorably to the strongest democracy we can practically implement.⁴⁹ Even if there were no other reasons for adopting a participatory democracy, the fact that we now have the ability to do so coupled with our love of democracy would push us toward participatory democracy.⁵⁰ But there are other reasons. For example, we need a participatory democracy to reduce the moral hazard that is inherent in representative democracy, to create better law, to create better citizens, and to break the partisan gridlock that has grown so severe that it prevents Congress from being able to deal effectively with important national problems.⁵¹ Important societal problems including the federal deficit, the looming bankruptcy of social security, health care reform, and gun control, have proved to be intractable to 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 they will have been made directly by the voters.⁵³ Participatory democracy will allow us to break the political gridlock that is hobbling our government.⁵⁴

This article argues that the time is now for the United States to adopt legislation that recognizes the Peoples’ right to make law and specifies the procedures the People may use in

⁴⁹ See e.g., Eastlake v. Forest City Enterprises 426 U.S. 668, 679 (1976) (The democratic pedigree of direct voting is superior to that of ordinary legislation.) 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. 672-73. The court concluded that the use of direct voting “is a classic demonstration of ‘devotion to democracy’.” Id. 679 (quoting James v. Valtierra, 402 U.S. 141 (1971); Larry D. Kramer, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 47 (Oxford 2004) (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 supra note 49, and infra notes 348-361 and accompanying text.
⁵¹ See discussion infra notes 179-191 and accompanying text.
⁵² See infra notes 180-188 and accompanying text.
⁵³ See infra notes 199-211 and accompanying text.
⁵⁴ See e.g., Merrill supra note 45 at 279 (2010) (“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 for themselves.”). Although Merrill sees direct democracy as only appropriate to certain local matters – not state or federal politics because the number of voters is too great. Id. 282.
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 democracy. Part IV focuses on the protection of individual/minority rights, and Part V discusses the possible circumstances that will propel our movement toward a participatory democracy. Part VI concludes.

Part II

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. In a representative democracy the People do not exercise their power to govern directly, rather they periodically delegate their authority to an agent/representative. This agent, for example a Senator or Congresswomen, 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 politician’s to the voters. 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

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55 See e.g., supra note 27 quoting language from our Founding documents; Eastlake v. Forrest City Enterprises supra note 49; supra notes 31-38 and accompanying text.
Accountability occurs in our representative democracy by the process of periodic elections. For example, every six years a state-wide election for senator is held. If the voters are not pleased with the job the incumbent senator has done the voters may vote him/her out of office and elect a new person to represent them in the Senate. Thus, our representative democracy recognizes that the ultimate source of governmental power is the people and representatives are accountable at least periodically to them.58

This article argues, as have many others, that the quality of the democracy provided by our representative democracy is weak because the accountability it 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 and time consuming nature of communication and travel.64 Today, however, for the first

57 Id. (...asking how Congress might be made more accountable is one way of asking the question how Congress might be made more democratic.)
58 Id. (“Congress is often treated as democratically legitimate based on the simple fact that its members are elected and are, therefore answerable to voters.”) Id. at 643.
59 Id. (...there is far less than meets the eye to the reality of political accountability in the American context. [citations omitted]). Id. 642.
60 See infra notes 66-78 and accompanying text.
61 See infra notes 79-98 and accompanying text.
62 See infra notes 99-106 and accompanying text.
63 See, Akhil Reed Amar and Vik Amar, President Quale? 78 Va. L.Rev. 913, 928-929 (1992) (noting that voters really can’t “vote the bums out” with 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. (citing Thomas E. Cronin, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVES, REFERENDUM, AND RECALL 14 (1989)). Another illustration of the practical necessity for representative democracy is that on February 4, 1789 the Electoral College unanimously elected George Washington president, and Congress was to make that choice official that March but could not muster a quorum until April due to the bad roads of the
time in our history there is no need even at the federal level to have voters’ interests represented exclusively by agents. Today, thanks to the communications revolution of the past ten years, it is now possible to have voters at the federal level participate directly in the political process.65

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 keep track in a meaningful way of what the representative has done.66

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65 See e.g., Amar, Consent of the Governed, supra note 22 at 502 (stating in 1994 as follows “Today, 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 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. Finally Vermeule comes to federal direct democracy stating: … virtual voting could so reduce 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. 686.

One concern here is that internet access especially broadband access is more commonly available to better educated and wealthier Americans. The “digital divide” that has existed continues to exist. See generally Pippa Norris, DIGITAL DIVIDE: CIVIC ENGAGEMENT, INFORMATION POVERTY, AND THE INTERNET WORLDWIDE (2001); Schacter supra note562 at 670 (The fact that higher socioeconomic groups are more likely to have relevant Internet skills is unsurprising; given the digital divide [citing Norris]. But there is reason to believe that this situation is improving and will continue to improve. Schacter notes that “the racial divide seems to be shrinking, but the income and educational-based divides persist) Schacter supra note 56 at 670. More recently the federal government has created a map of the nation’s broad services as part of a multi-billion 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. JOURNAL Feb. 18, 2011 A-2 Col. 1.

However it is also important to recognize that the “digital divide” in the sense of certain groups having better access to information is not new and is not limited to digital information. The rich, better educated and urban have always had better access to information, weather towncriers, 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 the disfavored, the poor and uneducated, at least had a right to participate in the political process, a chance that prior to the advent of democracy was not afforded to them. Direct democracy importantly gives them a better chance to participate, but 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).
Thus, when the time for an election arrives it is very difficult for votes to determine whether, on balance, their representative has done a good job of representing their interests.\textsuperscript{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.\textsuperscript{68} Also, given the strength of the two dominate political parties (Republicans and Democrats) and the political reality that most House seats are “safe seats,” (the political composition of most districts ensures that one party will hold the seat) robust accountability is lessened even further.\textsuperscript{69} No meaningful challenge is likely to come from the “other” party, but rather only from intra-party competition in primaries.\textsuperscript{70} 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.”\textsuperscript{71}

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.\textsuperscript{72} Internet sites like Open Congress\textsuperscript{73} or Project Vote Smart\textsuperscript{74} are designed to do just this. Whether the internet will in fact make the accountability provided by elections more effective remains to be seen.\textsuperscript{75} The point made here is that the communications

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\textsuperscript{67} Id.
\textsuperscript{68} Id.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Id. 662-668.
\textsuperscript{73} Open Congress, http://www.opencongress.org./ (last visited August 22, 2011).
\textsuperscript{74} Project Vote Smart, http://www.votesmart.org./ (last visited August 22, 2011).
\textsuperscript{75} Schacter \textit{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 observes: “The Internet may in some respects mitigate, but cannot itself eliminate the inability of periodic elections to facilitate serious debate about the matters on which legislators have voted.” Id.
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revolution allows us to go beyond improving the accountability of elections – it allows us to have direct voter participation in government.\textsuperscript{76}

Even if we assume for a moment that 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 way the voter would have voted only some of the time. Even if a particular political agent is honest, hardworking and diligent, he or she still may not have done a good job from a particular voter’s point of view if by “good job” we mean doing 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 as a voter I can elect a representative who will vote the way I would vote on each issue. Thus, in a representative democracy, at best voters are left to try to determine whether their political representative is honest, under the influence of special interests, capable, and diligent (evaluating these characteristics is made even more difficult due to the inherent moral hazard discussed infra, which can result in intentional obfuscation by incumbents) and in fact on balance votes the way the voter thinks correct more often than not. As noted, it is extremely difficult if not impossible for voters to make this determination.\textsuperscript{77} More importantly, today it is no longer necessary because we can simply allow voters to vote for themselves.\textsuperscript{78}

3. \textbf{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

\textsuperscript{76} See supra notes 64-65 and accompanying text.  
\textsuperscript{77} See supra notes 66-75 and accompanying text.  
\textsuperscript{78} See supra notes 64-65 and accompanying text.
information is not available at all or is not easily available. In addition, as discussed below, some elected officials engage in deliberate obfuscation expressly to reduce the availability of this information. Moreover, even if adequate voting records and other basic information about incumbents’ actions and alliances is available it does not necessarily follow that accountability will become more robust. 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 don’t choose to avail themselves of political information, then accountability may not be improved. As a result, even the potential for increased transparency offered by the internet may not lead to a more robust accountability.

Information about the policy choices of representatives is not available at all in some cases. For example, activities like killing a bill in committee or killing a nomination or demanding important changes in proposed legislation, or 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 individuals involved. In addition, even when voting records are available, policy choices may be camouflaged. For example, if a piece of legislation relates to more than one subject either as a result of political bargaining (logrolling) or because a last minute unrelated provision was added to the bill

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79 See Schacter supra note 56 at 644 (Schacter refers to these problems as “literal lack of transparency” and “compromised transparency” respectfully) Id.
80 See infra notes 99-106 and accompanying text.
81 See Schacter supra note 56 at 645 (Schacter refers to this as “wasted transparency”).
82 Id.
83 Id. at 644.
84 Logrolling refers to “the combining of multiple measures, none of which would pass on its own into an omnibus proposition that receives majority support” [notes omitted] See Robert D. Cooter and Michael D. Gilbert, A Theory of Direct Democracy and the Single Subject Rule, 110 COLUM. L. REV. 687, 689 (2010).
(riders)\textsuperscript{85} it is impossible to tell whether a representative that voted for the bill was in favor of both proposals, or so in favor of one that his disfavor with the other proposal was overcome.\textsuperscript{86}

There are also instances where information is technically available to voters but practically it is not really available. Some scholars have referred to this as “compromised transparency.”\textsuperscript{87} For example, information may be available under regulations like the Freedom of Information Act (“FOIA”)\textsuperscript{88} but unless one understands its “technical and arcane ways,” and is willing to endure its delays and costs, the information will not be revealed.\textsuperscript{89}

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 Act\textsuperscript{90} or The Patient Protection and Affordable Care Act)\textsuperscript{91} or very long complex legislation (Obama Care – called The Patient Protection and Affordable Care Act), are examples of deliberate actions that reduce or eliminate transparency.\textsuperscript{92} It is also difficult for voters to determine the effect of lobbying on the conduct of their representative.\textsuperscript{93} Taken together these

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\textsuperscript{85} Riders are “unpopular measure that slips through the lawmaking process on the backs of a popular measure.” \textit{Id.} at 690.

\textsuperscript{86} In part to prevent these problems in direct democracy most jurisdictions providing for direct democracy adopt a “single subject” rule which limits ballot propositions to one subject. \textit{Id.} at 689. In many states some version of the single subject rule also applies to ordinary legislation. \textit{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.”) \textit{Id.} The federal government has not adopted a single subject rule and federal legislation often contains more than one subject whether as a result of logrolls or riders.

\textsuperscript{87} \textit{See Schacter supra} note 56 at 644.


\textsuperscript{89} \textit{See Schacter supra} note 56 at 644 (also listing other examples of “compromised transparency”).

\textsuperscript{90} Public Law 107-56. 18 U.S.C. 806 et. Sec.

\textsuperscript{91} Public Law 111-148 (H.R. 3590 (111th)).

\textsuperscript{92} These titles are designed for marketing – that is to “sell” the bills politically. Many would 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 the provisions of the bill don’t protect patients, in fact, they endanger or injure them. These folks might suggest re-titling the law the “Government Run Healthcare Act.” Whether these pieces of legislation are good or bad is not the point, the point is 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. \textit{See Schacter supra} note 56 at 644 (contending 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.).

\textsuperscript{93} \textit{See Schacter Supra} note 42 at 671-72 stating:
difficulties mean that it is often impossible for voters to know what policy choices their representative 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. This alone however will not necessarily lead to improvements in accountability. First, deliberate obfuscation or camouflage is not likely to be stopped by the internet – indeed it may make such efforts more effective. Second, increasing the amount of good information available to voters is not helpful if voters don’t use the information. 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 his/her vote has an impact, albeit a small one, on specific legislation. In addition, in a participatory democracy 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 don’t care enough to use political information because

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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 [notes omitted].

94 Id.
95 Id. at 645 (“Transparency while a predicate for accountability, is by no means a guarantee”).
96 The internet not only allows good information to be efficiently disseminated far and wide, but does the same for false information. Id. at 653-54 (discussing the viral emails about Barack Obama being a Muslim – citing a source saying that nearly 20% of Americans believed the rumor).
97 Id. at 645 (“wasted transparency”).
they don’t feel that they have the power to change anything anyway, then increased access to good political information will not improve overall accountability.  

4. **Weak Accountability: Strong Moral Hazard**

From the Georgia Yazoo land fraud early in our Republic (where state legislators passed laws selling state land to private companies at extremely low prices in exchange for personal profit) to Chicago style politics, to the political deal making that accompanied the passage of Obama Care in 2010 (which included the selling out of the taxpayers of 49 states to buy the vote of a Nebraska Senator) moral hazard and the related paternalism hazard have been constant problems in our representative democracy. Moral hazard is the risk that an agent will serve his/her own interests rather than his 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/her vote for money, for political favors, campaign

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98 Id.

99 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. A new Governor was elected and he soon signed a bill nullifying the Yazoo Act. Some of the purchasers of the land challenged the new law nullifying the Yazoo Act. 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 §10. See *Fletcher v. Peck* 10 U.S. 87 (1810). *See generally*, C. Peter Magrath, *YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC*. The Case of *Fletcher v. Peck*, (1966) (Providence, RI: Brown University Press).


101 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. In exchange for his vote, which was needed to override a potential Republican filibuster, the taxpayers of the other 49 states were to pay for 100% of Nebraska’s Medicaid expansion that was mandated as part of ObamaCare. See, *Nelson Accused of Selling Vote on Health Bill for Nebraska Pay-Off*, Fox News.com ([http://www.foxnews.com/politics/2009/12/20/nelson-accused-selling-vote-health-nebraska-pay/](http://www.foxnews.com/politics/2009/12/20/nelson-accused-selling-vote-health-nebraska-pay/)).
contributions, or power.\textsuperscript{102} Taking 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 don’t 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 mentioned earlier.\textsuperscript{103}

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 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.\textsuperscript{104} Moral hazard is inherent in any

\begin{flushleft}
\textsuperscript{102} See e.g., supra note 99.
\textsuperscript{103} Id.
\textsuperscript{104} Another approach to representative democracy (which I find incorrect and illegitimate) 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 that this approach is incorrect and illegitimate. For me the spirit (not to mention the actual words) of our founding documents (see supra note 27) and the basic concept of democracy or “rule by the people” requires that we reject this approach. 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 was 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 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 145.
\end{flushleft}
agency and is especially problematic in political agencies.\textsuperscript{105} 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 create camouflage, which significantly lessens transparency and as a result 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, without this knowledge the representative finds it much easier to hide his dishonest actions. As discussed \textit{infra}, the adoption of participatory democracy will significantly reduce both moral hazard and paternalism.\textsuperscript{106}

\textsuperscript{105} As James Madison stated “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.” (The Federalist No. 10, \textit{supra} note 8 at 77.

\textsuperscript{106} See \textit{infra} notes 150-152 and accompanying text. 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 \textit{supra} note 45 at 278-79. Protecting individual rights in a participatory democracy is discussed below at Part V.
B. Participatory Democracy

1. The Involvement the People, All People, Directly In the Legislative Process

The tools of direct democracy have been used at the state level in the United States since the early 20th century, though these tools have been notably absent at the federal level.\(^{107}\) The tools of direct democracy are the initiative, referendum and recall. In general, an initiative is proposed legislation (bill) or a proposed constitutional amendment originating among the citizenry.\(^{108}\) Private citizens propose either a statute or amendment, collect enough signatures of voters to put the proposal on the ballot, and then the voters in that jurisdiction vote on the proposal.\(^{109}\) No formal legislative body (Congress, City Council, etc.) is involved.\(^{110}\) 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.\(^{111}\) Referenda may be the voluntary act of a legislative body. For example, elected officials may use it to seek political cover or direction.\(^{112}\) 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.\(^{113}\) 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

\(^{107}\) See Cooter and Gilbert, supra note 84 at 688-89 and nt. 31.

\(^{108}\) Id. 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 and the District of Columbia currently have an initiative process. Id.

\(^{109}\) Id.

\(^{110}\) Id.

\(^{111}\) 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.

\(^{112}\) Id. 694-695.

\(^{113}\) Id.
sitting governor, Gary Davis, from office and replace him with Arnold Schwarzenegger. The controversy surrounding the collective bargaining rights of public unions is currently resulting in talk of both recalls and initiative 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 incidence of self-dealing by legislators. In the United States voters have directly passed thousands of initiatives at the state and local level. Controversial issues concurring affirmative action, stem cell research, eminent domain, same-sex marriage and political redistricting have all recently been decided by direct democracy. 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. Throughout the United States, direct democracy at the state level is widely supported and frequently used. Two commentators have concluded that “In short, direct democracy is a major, expanding, and controversial part of American Government.” Another commentator concludes, based on the California experience over the past decade that “the devices of direct democracy remain too blunt and expensive for anything but interstitial governance, filling in the spaces between the

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115 See Cooter and Gilbert, supra note 84 at 689; Baldassare and Katz, supra note 45 at 19.
116 See Cooter and Gilbert supra note 84 at 695.
117 Id. 689.
119 See Cooter and Gilbert supra note 84 at 689.
120 Id. 689.
bulk of legislation passed by the legislature.”121 Still other commentators, based on analysis of
the same California experience conclude that:

“[a] new system of governance has evolved in California over five elections in a
half-decade of furious political activity. An era of “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.”122

The term “Hybrid Democracy” was first used by Elizabeth Garrett.123 What I am
advocating for here is similar to 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.124 I do, however, suggest that a combination of
existing legislative institutions and direct democracy, including a federal process for initiative
and referendum, 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 in the sense that I see this step requiring elected legislators to solicit direct
voter involvement, it is different. The ultimate destination, though one that the People may
choose to never reach, is the complete replacement of representative democracy with pure
participatory democracy.125

121 See Hansen, supra note 118 at 1502-03.
122 See Baldassare and Katz supra note 45 at 219.
123 See Elizabeth Garrett, Hybrid Democracy 73 GEO.WASH.L.REV. 1096, 97 n. 7 (2005).
124 Id. See infra notes 126-145 and accompanying text.
125 At the state level the tools of direct democracy are often invoked. Recently for example, as some states have
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 STREET JOURNAL, June 3, 2011 at A5 Col. 3 (union members attempt to collect enough
signatures to trigger a statewide referendum); Vauhini Vara, Gov. Brown Seeks Fall Referendum, WALL STREET
JOURNAL April 15, 2011 A-4 (In order to balance the state budget Gov. Brown is aiming to put a tax initiative on the
ballot this fall); John Fund, Power to the People? How Declasse, WALL STREET JOURNAL June 11-12, 2011 p. A-11
Col. 1 (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; making the collection of signatures more difficult, a Colorado proposal to require 60% voter
approval of constitutional amendments rather than a simple majority; threatening initiative sponsors with personal
liability and challenging the very concept of initiative law making under the Constitutions Guarantee of a
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.\(^{126}\) Political leaders or representatives are elected by the citizens and held accountable to the citizens via periodic elections. As noted above, 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 strength, we begin to see the use of the tools of direct democracy as a supplement to representative

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\(^{126}\) See, e.g., Karen Syma Czapanskiy and 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. AND INT’L L. 1, 14 (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 (3d 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.
democracy. This is Garett’s hybrid democracy, a combination of representative and participatory democracy, however the existence of each effects 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. 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. Accountability under hybrid democracy is potentially more constant (voters may begin a recall or initiative process at any time), not just periodically, and thus democracy is strengthened.

Hybrid democracy covers a large range of the continuum, being more 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 ascendency of political polling is clearly a move in this direction, and already supplements our existing representative democracy especially at the federal level. Moving further toward strength would be a process for binding referenda, initiatives and recalls. Stronger still would be a process that sought to level the playing field on which proposals are qualified for the ballot. This process would be designed to answer one of the criticisms of the California experience which was that “…initiative supporters who have enough money can

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127 See discussion supra notes 128-139 and accompanying text.
128 See, Czapanskiy and Manjoo supra note 126 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”).
129 Id. R. Douglas Arnold, THE LOGIC OF CONGRESSIONAL ACTION (1990) (arguing generally that voters in fact 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 50, 54-63 (Richard W. Bauman and Tsui Kahara eds. (2006) (examining this argument).
qualify just about anything for the ballot—and those lacking money can qualify nothing…”

Fred Kimball of the signature-gathering firm Kimball Petition Management is quoted as saying “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.”

“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.” Also, spending by opponents of initiatives is effective at reducing support for proposals especially if opponents significantly outspend proponents.

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.

Balance in the process could be achieved for example, by establishing an independent government advisory office funded with tax dollars. This office would help people navigate the initiative or recall processes and could provide one source of balanced and accurate source of information related to initiatives.

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 things like on-line voting, on-line signature collection, and use of wikis for drafting legislative proposals which would make the initiative process less expensive and more efficient for

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130 See, Democracy by Initiative: Shaping California’s Fourth Branch of Government, by the Center for Government Studies, 284 (2nd ed. 2008).
131 Id.
132 Id. at 160.
133 Id. at 301.
134 Id.
135 See e.g., Philadelphia II supra note 45 and the proposed Democracy Act which establishes the Electoral Trust to administer the initiative and referendum process. See discussion of the Electoral Trust in Hirsch supra note 5 at 222-231.
136 Id.
everyone. Also, requiring 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. Under our current system, citizen input between elections is not forbidden, but is also not mandated, and elected representatives are not now 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. 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. On-line town-hall meetings where all on-line participants could see and hear each other would make holding hearings quick, cheap and efficient. Files of these virtual meetings could be available to be viewed after the meeting by those who did not attend “live” or who needed to refresh their memory of what was said. Moreover, a discussion board could be easily 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 hearings/meetings by revising the original proposal or explaining why they haven’t. Also, proposed legislation could be set up as a wiki allowing voters to suggest

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137 See e.g., Vermeule supra note 45 at 685-687 (noting that in early 2007, Utah State Senator Steve Urguhart 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.” [notes omitted]). Id. 986.
138 See supra notes 126-128 and accompanying text.
139 See Czapanskiy and Manjoo supra note 126 at 16.
140 See generally Id.
drafting changes or additions to proposed bills. On-line votes could be held on proposed amendments, closing 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, truer to our democratic ideals – than it is under our current representative democracy.

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, their role would be vastly different then it is today. The elected Congress would not have authority to finalize legislative proposals or to pass legislation on its own, except on an emergency temporary basis or where matters of national security prevent open deliberation. Congress’s role primarily would be to facilitate direct voter lawmaking.

(b) The New Role of Elected Legislators

It seems very unlikely that elected legislators are going away any time soon. Even under the strongest form of hybrid democracy and in all but the most extreme form of pure participatory democracy, there will continue to be a role for elected representatives. However, the role of elected legislators will begin to change as soon as movement toward a stronger democracy begins. Even the advent of polling data has caused professional politicians to pay more consistent (not just at election time) attention to (but not necessarily to comply with) the desires of their constituents.

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141 See supra note 137.
142 See supra notes 150-191 and accompanying text.
143 See supra notes 192-211 and accompanying text.
144 See e.g., supra note 129.
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 legislator’s changes when they have an explicit duty to educate constituents and solicit their input. In this case their role is no longer to make law in the way they believe a majority of their constituents would; their role now is to facilitate the making of law directly by the citizens or at least to facilitate the involvement of citizens in the making of law 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 affaires of the corporation as a result of 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 can’t 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

145 See supra note 104. I and others believe that under our existing representative democracy elected representatives have always had this obligation. See supra notes 99-106 and accompanying text. Others have argued essentially that voter input ends with the election. This position is nicely summarized by a quote from Edmund Burke: “Your representative owes you, not his industry only, but his judgement; and he betrays instead of serving you if he sacrifices it to your opinion.” Edmund Burke, Speech to the Electors of Bristol (1774-11-03) published in THE WORKS OF THE RIGHT HON. EDMUND BURKE (1834). And in a statement by Richard Brookhiser: “The Federalists taught that the people should rule at the polls, then let the victors do their best until the next election.” See Richard Brookhiser, The Father of American Politics, WALL STREET JOURNAL, Sept. 11-12, 2010 at A-13 Col. 1. Aspects of this issue also appear in the debate regarding the meaning of the Guarantee Clause in Article IV § 4 of the U.S. Constitution. See discussion infra notes 249-276 and accompanying text.
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 have (thanks to the communications revolution) a much stronger democracy than it currently has;\textsuperscript{146} that the evolution toward a stronger democracy is inevitable because of our abiding democratic rhetoric and traditions – in short the drive toward strong democracy is part of our culture;\textsuperscript{147} and finally that 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; a participatory democracy will be able to break this gridlock.\textsuperscript{148}

Sketching with broad strokes, the strong democracy likely to evolve in the United States in the near future 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.\textsuperscript{149} 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 dollar (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) limitation 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 (on line) on its

\textsuperscript{146}See supra notes 55-106 and accompanying text.
\textsuperscript{147}See supra notes 1-54 and accompanying text.
\textsuperscript{148}See infra notes 179-191 and accompanying text.
\textsuperscript{149}See e.g., Philadelphia II supra note 45.
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 that is, does not fall within the definition of “significant legislation” could be passed by the elected representatives acting alone, but 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 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.

Provision would need to be made for emergency legislation. When circumstances required, likely based on the judgment of Congress and the President at the federal level, Congress and the President could pass on their own any legislation that in their judgment was necessary for the country. Such emergency legislation would have a set limited duration unless subsequently approved directly by the voters.

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 changed 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 not as strong as a purely participatory democracy. However, the hybrid
democracy discussed above will likely be a step on the path to an even stronger, participatory
democracy that will be adopted further in the future.

Part III
THE BENEFITS OF A PARTICIPATORY DEMOCRACY

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

A. Reducing Moral Hazard

Both types of moral hazard discussed above, vote selling, and paternalism, will be
significantly reduced by the adoption of participatory democracy.\textsuperscript{150} 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 (no vote to trade or sell) to those who would corrupt
democracy.\textsuperscript{151} Second, under participatory democracy all bills would be available to the voters
for input in drafting and for review prior to voting. This will also reduce 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

\textsuperscript{150} See e.g., Merrill \textit{supra} noted 45 at 281 (“A Third advantage of direct democracy is that it is corruption free, in the
broader 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.) \textit{Id}.

\textsuperscript{151} \textit{Id}.  
moral hazard will not be eliminated. But, even the adoption of a partial participatory democracy will significantly reduce from current levels both types of moral hazard.\textsuperscript{152}

B. \textbf{Less Political Bargaining}

Political bargaining or deal-making usually manifests itself as omnibus legislation that contains more than one proposal (a “logroll”) because in order to pass a proposal important to some representatives, those representatives must include and vote for other proposals important to other representatives.\textsuperscript{153} The bargain struck is simple: “I’ll vote for yours, if you vote for mine.”\textsuperscript{154} In addition, our existing political process (committee structure, jurisdiction and 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.\textsuperscript{155} As a result of the manipulation of the political process, representatives are than left with having to vote for the rider in order to get the main bill passed.\textsuperscript{156} Important enablers of political deal-making are Congressional procedures such as the committee system, filibusters, and procedural devices such as closed deliberation that result in thwarting the will of the majority.\textsuperscript{157} For example, one commentator has observed, “depending on the rules of procedure, the information available to legislators and the transaction costs of haggling, a rider may be irremovable even though

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\textsuperscript{152} See \textit{e.g.}, Cooter and Gilbert \textit{supra} note 84 at 699 (“At its best, direct democracy can empower democratic majorities, weaken special interests, and enhance political transparency.”).

\textsuperscript{153} \textit{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.” [note omitted]).

\textsuperscript{154} \textit{Id.}

\textsuperscript{155} \textit{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.” [note omitted]).

\textsuperscript{156} See Gilbert \textit{supra} note 86 at 837-42.

\textsuperscript{157} \textit{Id.}
unpopular.”\textsuperscript{158} Manipulation of legislative procedures may leave legislators with the choice of passing a very popular law along with an unpopular one, or passing no law at all.\textsuperscript{159} At the federal level legislators are divided into Committees. Committees have jurisdiction over a specific subject matter, for example, tax laws. Committees have near exclusive gate-keeping authority, that is, the full legislature can’t 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.\textsuperscript{160} If the bill can’t be voted on it can’t be passed. Of course these legislative procedures and institutions encourage political deal-making.\textsuperscript{161} 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 can’t be removed.\textsuperscript{162} Political deal making may be used to 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 political bargaining, at least certain types (logrolls) are beneficial and are to be encouraged.\textsuperscript{163} As a result these commentators observe that a problem with participatory democracy is that it will discourage or eliminate political bargaining.\textsuperscript{164} Quite

\textsuperscript{158} \textit{Id.} at 837.
\textsuperscript{159} \textit{Id.}
\textsuperscript{160} See e.g., Schacter \textit{supra} note 56 at 644.
\textsuperscript{161} See e.g., Cooter and Gilbert \textit{supra} note 84 (observing that, “Direct democracy and representative government differ fundamentally in this respect: Direct democracy encumbers political bargaining, while representative government facilitates it.”)
\textsuperscript{162} See Gilbert \textit{supra} note 86 at 840-842 (explaining how riders are created).
\textsuperscript{163} See e.g., Cooter and Gilbert \textit{supra} note 84 at 698 (“The advantages of political bargaining is clear: It permits legislators to achieve their preferred outcomes on issues about which they care deeply. In exchange they accept the undesirable outcomes on issues about which they care minimally.” [notes omitted]); Gilbert \textit{supra} note 86 at 849-858 (Courts should condone logrolling).
\textsuperscript{164} \textit{Id.} at 700 (“In short, direct democracy, and the initiative process in particular, offers no forum for political bargaining so transaction costs are prohibitively high.” [notes omitted]). I suggest \textit{infra} that the communications revolution centered on the internet may in fact provide a forum. \textit{See infra} notes 221-230 and accompanying text.
to the contrary, I believe that 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, as outlined above, that result in riders is dysfunctional and should be prohibited.  

Second, the arguments that commentators advance in favor of political bargains that result in legislative logrolls only claim to demonstrate that these bargains leave a majority of legislators better off -- there is no claim that these deals necessarily leave the majority of citizens better off. In fact, the presence of moral hazard risks suggests that political deals may often not benefit citizens. 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

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 and Gilbert supra note 84 at 702-703.

See Gilbert supra note 86 at 858 (Courts should invalidate bills containing riders).

See e.g., Cooter and Gilbert supra note 84 at 698-699 where the authors note:

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 opaqueness. 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.

Id.
precisely why the deal was made) but it may create a collective loss for constituents.\textsuperscript{169} 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 representatives may sell their vote for personal gain (either direct dollars to the representative or political benefits – reelection – that flow from wasteful federal spending within the representatives’ district), provides camouflage to hide representative misconduct (constituents can’t tell why a representative voted for a combined piece of legislation), and encourages fiscal irresponsibility that results in bloated oversized government.\textsuperscript{170} In fact, the single subject rule is an attempt to eliminate political deal making because of these pernicious problems.\textsuperscript{171}

Political bargaining increases the risk legislators will betray the interests of the people because political bargains provide camouflage due to their opaque nature.\textsuperscript{172} As noted above, in the case of legislation that contains more than one subject voters can’t tell why their representative voted for it.\textsuperscript{173} In the case of political deals that kill a bill in committee, the voters may have no knowledge of this at all.\textsuperscript{174} Political bargaining reduces transparency and therefore accountability.\textsuperscript{175} 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’ll 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.\textsuperscript{176} In the end of course it is the taxpayers who

\textsuperscript{169} See Gilbert supra note 86 at 839. (“An instance of riding that yields an aggregate gain for legislators could create a collective loss for their constituents.”)
\textsuperscript{170} See infra notes 172-178 and accompanying text.
\textsuperscript{171} See infra notes 341-347 and accompanying text.
\textsuperscript{172} See e.g., Cooter and Gilbert supra note 84 at 698-699 quoted in note 166 supra.
\textsuperscript{173} Id. (hard to track the fidelity of representatives, or to tell when special interest have captured them.)
\textsuperscript{174} See Schacter supra note 56 at 644.
\textsuperscript{175} See supra note 166.
\textsuperscript{176} See e.g., Vermeule supra note 45 at 682-83 stating:
must pay for all of the wasteful projects. 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. This not only results in wasteful spending but also in bloated oversized government. In essence passing laws via political deal making is easy (lazy) 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. 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!

Also, while the adoption of 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

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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 “intensify 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 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. [notes omitted].

\(^{177}\) See supra notes 153-178 and accompanying text.

\(^{178}\) Political deal making corrupts this process. Cf. Gilbert supra note 86 at 858 (noting that some logrolls may be legitimate if “all of its components command majority support due to their 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 [citing Robert D. Cooter, THE STRATEGIC CONSTITUTION 7, 53 (2000)]. Id. at 854-55. What better way to achieve this than to make the constituents the legislators via direct democracy?
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 (our factions), and the desire to win elections. Rather than win elections by properly representing constituents and passing good laws, politicians seem to believe that to win elections it’s better to pass blame, distort opponents’ positions on issues and scare voters. There are a number of important national problems that Congress has not been able to address. These problems include, for example, the impending insolvency of social security, the staggering federal deficit, illegal drug use, gun control and affordable health care 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 due to partisan gridlock. For example, polling shows that 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) yet Congress refuses to implement these controls for fear of incurring

179 See infra notes 180-191 and accompanying text.
the wrath of NRA. Similarly, polling on Social Security indicates that a majority of voters are willing to consider real reform\(^{181}\) 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.\(^{182}\) In the case of the deficit, based on popular rhetoric the Republicans want to reduce it by cutting all social programs, while Democrats want to eliminate the Defense Department and significantly raise taxes. Obviously, such rhetoric is extreme and inaccurate – but it nevertheless gets in the way of passing legislation.\(^{183}\) 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.\(^{184}\) Polls show that

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\(^{181}\) See, *Hawkeye Poll: Majority of Americans Supports Social Security Reform*, April 22, 2011, The University of Iowa News Service, http://news-releases.uiowa.edu/2011/april/042211hawkeye-poll... (last visited 6/19/11) (reporting that nearly 9 out of 10 respondents supported at least one reform to social security and two-thirds supported at least two reforms). The reforms receiving support were increasing retirement age by up to three years; raising the income ceiling on Social Security taxes. Also 48% supported increasing the payroll tax by 2 percent. 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.*

\(^{182}\) Interestingly even special interests are sensing that eventually something must be done. The AARP, the senior lobby that carries much political clout changed its long run opposition to any cuts in Social Security, preferring instead to be at the bargaining table where the cuts will be decided. See, e.g., Laura Meckler, *Seniors Lobby Pivots on Benefits*, THE WALL STREET JOURNAL, June 17, 2011 at p. 1 col. 6 (noting that AARP is dropping its longstanding opposition to cutting Social Security benefits, concluding change is inevitable and wanting a place at the table to minimize the pain.)

\(^{183}\) See e.g., Nick Gillespie and Matt Welch, *Death of Duopoly*, WALL STREET JOURNAL, June 18-19, 2011 at C-1 stating that:

> 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.

\(^{184}\) See e.g., 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); The Informant, Poll: *Should Drug Users Go To Prison?* http://informant.kalwnews.org./2011/04/poll-should-drug-users-... (last visited 6/19/11) (noting that 9000 California inmates are in prison for “simple possession and that 72% favor reducing the penalty for personal drug possession); LOS ANGELES TIMES (on line), *Most California Voters Say Possessing Small Amount*
Americans know this approach is not working and don’t favor it, but Congress keeps dishing it out. Even in an area like healthcare where Congress did finally act, passing the Patient Protection and Affordable Care Act – 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. As a result, it seems very unlikely that we have as a country made any real progress toward providing affordable healthcare. 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.
An important benefit of participatory democracy is that it can be used to break this paralyzing political gridlock because voters don’t have to get elected. In addition, when voters are involved in the legislative process (that is in the drafting, revising and ultimately in voting on legislation) it ensures that the solutions adopted have the support of the majority of voters. Moreover, 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 interests like the NRA, AARP, Teacher Unions, and the Tea Party etc. In fact, directly involving voters in the legislative process may be the only way to address issues like Congressional term limits, the federal deficit, Social Security and healthcare that require the making of hard choices. When government asks its 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 weakly accomplished through elected representatives but today, in a world with Twitter, Facebook, texting, email and the internet – how much longer can we justify not asking the voters directly? This article argues that someday soon – the failure to ask the People directly (regarding pieces of legislation that effect them directly and significantly) will cast a shroud of illegitimacy on the political process and the legislation it produces. To regain legitimacy the federal political process must provide for the direct involvement of the People.

190 See e.g., Gerald F. Seib, In Battle Over Medicare, New Prescription Needed, WALL STREET JOURNAL, June 21, 2011 at A6, stating:
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.

191 On the federal deficit, polling shows that 80% want a budget compromise. See CBS News (on line), Eight in Ten Americans Want Budget Compromise, http://www.cbsnews.com/8301-503544_162-20046027-503544... (last visited 6/10/11).
D. Better Citizens

As noted above, the role of elected representatives changes fundamentally in a participatory democracy from making law themselves to facilitating law making by citizens. As a result, the relationship between elected representatives and citizens also changes fundamentally. It is the change 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, and in drafting proposed legislation, and ultimately to gain their approval, citizens become much more important and valuable to the legislative process. This increased value of citizen input will increase the sense of citizen ownership of the legislative process and will result in a deeper more essential involvement of citizens in government. 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 and citizens realize that are not really part of the legislative process. As a result citizens lose interest and fail to pay close attention to

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192 See e.g., Hirsch supra note 5 at 209-217 (“Initiative is an important means of achieving the civic maturation of Americans individually and our polity collectively”) Id. 209; Czapanskiy and Manjoo, supra note 126 at 15-16 stating:

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 to apathy and a tonic for empathy [notes omitted].

193 See Hirsch supra note 5 at 210-217 (seeing direct citizen involvement in lawmaking through the 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.” [citing Aristotle] [citations omitted]. Id. 216-217.

194 See e.g., Noonan supra note 177 discussing the town hall meetings held during the summer of 2009 to discuss President Obama’s health care 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.
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 productive way.195

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 and the communications revolution has given citizens the ability to become central actors in the legislative process.

Some also see additional benefits resulting from participatory democracy and the participation of all citizens in the legislative process. Some commentators argue that this will

195 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 abiding lack of political knowledge on the part of the American public”); Hirsch supra note 5 at 227 (“For most citizens, ignorance is, unfortunately, the rational choice” (citing James F. Fishkin, THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY, 21-22 (1995).
lead to greater economic justice. These commentators observe that a citizen cannot meaningfully participate in the political process without adequate education and a modest degree of economic security. 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 full participation in society. While it is certainly 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, as noted above 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

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196 See e.g., Czapanskiy and Manjoo supra note 126 at 22-23 stating:
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 Sens’ 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 public 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 [notes omitted].

197 Id.
198 Id.
government than does a representative democracy.\(^{199}\) This is because a participatory democracy reflects a stronger democracy, one in which popular sovereignty is more accurately reflected.\(^{200}\) For example, the Supreme Court has held that the democratic pedigree of direct voting is superior to that of ordinary legislation stating: “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.”\(^{201}\) A local referendum, the Court said, “is the city itself legislating through its voters, an exercise by the voters of their traditional right … to determine … what serves the public interest.”\(^{202}\) The court concludes that resolving controversies by direct voting “is a classic demonstration of ‘devotion to democracy.’”\(^{203}\)

Third, a participatory democracy is better able to break through partisan gridlock and find solutions to important social problems that most citizens find acceptable.\(^{204}\) 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.\(^{205}\) This argument is based on what

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\(^{199}\) This idea, radical at the time, of a self-governing people was at the heart of our Constitution which begins by acknowledging that it is the People who are creating this constitution and this 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, AMERICAN’S CONSTITUTION supra note 28 at 4-12) (discussing the creation of the Constitution and that it set up a system of self government based on popular sovereignty/majority rule).

Amar also notes: “Thus, the essence of the Article IV guarantee of each states “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.” Id. at 279.

\(^{200}\) See e.g., Eastlake v. Forest City Enterprises, 426 US 668, 678 (1976) (direct voting by citizens is a classic demonstration of democracy).

\(^{201}\) Id. at 672-73.

\(^{202}\) Id. at 678 quoting Southern Alameda Spanish Speaking Organization v. Union City, 424 F2d 291, 294 (9th Cit. 1970) (noting that direct democracy procedures such as the referendum have a constitutionally favored position).


\(^{204}\) 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 Merrill only argues in favor of direct democracy for local government).

\(^{205}\) See generally, Adrian Vermeule, Many-Minds Arguments in Legal Theory, 1 J. OF LEGAL ANALYSIS 1, (reaching no firm conclusion but offering suggestions and remaining personally skeptical).
is sometimes called the “many minds” theorem or the “Jury Theorem.” The basic gist of this theorem is that the larger the group making the decision, the more likely the decision will be correct or will best satisfy the majority. Professor Merrill applies this concept to resolving “controversies over the provision of local collective goods,” and argues that it should not be used in large politics like the nation or the state. However, today in light of the communications revolution and the consequent ability to deliberate nationally, the theorem seems, at least to me, to be well suited to national issues like, for example, health care and the environment.

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207 See e.g., Merrill, supra note 45 at 277 (“… the argument posits that under certain limiting conditions, the larger the group making a decision, the more likely the decision will be correct.”)

208 *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, *Limits of Reason*, supra note 196 at 32].

209 See Merrill, supra note 45 at 278.

210 *Id.* at 282 (“… direct democracy should not be used in large politics like the nation or state… but should be reserved for local matters where the number of voters is much smaller.”).

211 Professor Merrill notes that the limiting conditions for the jury theorem are three: “the average voter is more likely to get the answer right than wrong,” “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 “voters must have the same understanding of the choices before them on which they are voting.” See *Id.* at 277-78 [notes omitted]. Professor Merrill believes that as the number of voters goes up the likelihood of satisfying the first limiting condition goes down either because voters are unmotivated because their vote has little impact on the outcome, or because many voters will be little impacted by the ultimate choice or both. Two observations, first the issue for me is not whether voters are more likely to be correct in the abstract, rather the issue is whether voters are more likely to be correct than elected representatives, who are likely to respond similarly to voters in that they care much less about certain votes they cast then they do about other votes. See *infra* note 231. Moreover, voters’ decisions are not perverted by moral hazard. Second, when the question concerns a preference how can a voter be incorrect? Professor Merrill’s concern regarding enhanced nimbysm argues 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. As to majoritarian bias, this issue 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. With regard to minoritarian bias, the risk will go down in direct democracy. With regard to Professor Merrill’s concern for “intensities of preferences” and “temporary forces” (see Merrill *supra* note 45 at 286), this concern amounts to a fundamental rejection of popular sovereignty and majority rule. This is simply a way to say that one vote counts more than another – this simply cannot be in a democracy.
Part IV

CREATING A PARTICIPATORY DEMOCRACY: PROBLEMS AND SOLUTIONS

One of the most important challenges in a participatory democracy, as in a representative democracy, is protecting individual rights. This topic is discussed in a separate section that immediately follows this one.

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.\(^{212}\) As noted above, if a proposal contains more than one subject the result of voting is ambiguous.\(^{213}\) If the 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 didn’t 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

\(^{212}\) See Cooter and Gilbert, supra note 84 at 704-712 (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 the Romans in 98 B.C. forbade laws consisting of unrelated provisions [citing Robert Luce, Legislative Procedure 548 (1992)]. Many states have adopted some version of the single subject rule applicable to proposed legislation. See Gilbert supra note 86 at 812 (“By 1959, some version of the rule had been adopted by 43 states); See Philadelphia II supra note 45 and the proposed Democracy Act which provides at 3A that each initiative may “address only one subject” (though it “may include related or mutually dependent parts”).

\(^{213}\) See supra notes 84-86 and accompanying text.
such practices should not be permitted because they pervert the principle of majority rule.\textsuperscript{214} A full discussion of the single subject rule is beyond the scope of this article. It is sufficient to my purposes here to note that the single subject rule has for the reasons just assigned, been in use at least since Roman times.\textsuperscript{215} Second, determining whether a proposal contains a single subject is sometimes difficult and courts, who ultimately must resolve the issue, sometimes struggle with it.\textsuperscript{216} Notwithstanding these difficulties the rule where adopted has proved serviceable for a very long time, and promising recent scholarship in this area may add efficiency to the rule’s application.\textsuperscript{217}

As noted, an important advantage of participatory democracy is that it reduces moral hazard.\textsuperscript{218} This is so because legislators no longer have a vote to sell, or trade since the citizens will vote directly on proposed legislation.\textsuperscript{219} However, to ensure that individual citizen votes are not subject to moral hazard a secret ballot is required. With a secret ballot there is no way for a potential vote buyer to be sure he got what he paid for and thus he will be discouraged from attempting to buy votes.\textsuperscript{220}

\begin{itemize}
\item \textsuperscript{214} See e.g., Loontjer v. Robinson, 670 N.W. 2d 301, 314-315 (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).
\item \textsuperscript{215} See supra note 212.
\item \textsuperscript{216} See Cooter and Gilbert supra note 84 at 690-91 (while the rule limits ballot propositions to a single subject it does not elaborate on how to distinguish one subject from another; moreover 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).
\item \textsuperscript{217} See e.g., Cooter and Gilbert supra note 84; Gilbert supra note 86.
\item \textsuperscript{218} See supra notes 150-152 and accompanying text.
\item \textsuperscript{219} Id.
\item \textsuperscript{220} See 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. Key to this is the use of the secret ballot). Professor Merrill at nt. 25 cites Jones v. Glidewell, 13 S.W. 723, 725 (Ark. 1890) (noting that the secret ballot “checks bribery through uncertainty that the bribed party will vote as he promised” and that voters can’t be deprived of their legal right to a secret ballot) and Burson v. Freeman, 504 US 191, 203 (1992) (noting that the secret ballot has been advocated for “its usefulness in preventing bribery, intimidation, disorder and inefficiency at the polls.”).
B. Confusion of the Multitude\textsuperscript{221} -- Drafting Fair Proposals

Two fundamental concerns with participatory democracy especially at the federal level, are that the voters are simply not up to the task and/or are not to be trusted with the task, perhaps because they are susceptible to being swayed by passion or self interest.\textsuperscript{222} These concerns have several facets. First, can voters become well enough informed to deliberate proposals and make good decisions.\textsuperscript{223} This issue is discussed \textit{infra} at C. Second, even if votes can become well informed will they make the effort to do so?\textsuperscript{224} This issue is discussed \textit{infra} at D. Finally, how will it be possible to organize all voters in ways that allow them to learn about, deliberate, draft, and vote on legislation? The last concern, sometimes referred to as confusion of the multitude\textsuperscript{225} is discussed here. One often heard criticism of the potential of direct democracy is that it can’t

\textsuperscript{221} The Federalist No. 10 (James Madison) \textit{supra} note 8, at 77 (the number of representatives must be limited to a certain number to guard against confusion of the 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.

\textsuperscript{222} See \textit{supra} 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 \textit{supra} the discussion of moral hazard in representative democracy at notes 99-106 and accompanying text. But, being human means that we are also capable of honesty, integrity and reason, and isn’t that 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 other negative characteristics then why consider democracy at all? In fact, the founders made a clear decision to put their faith and trust in the individual expressly 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 with democratic self government. For example, James Madison refers in Federalist No. 39 to “the capacity of mankind of self-government,” where government derives “all its powers” from “the great body of the people” \textit{See The Federalists Papers No. 39 supra} note 8 at 236-237 at (James Madison). Madison also notes in No. 43, and elsewhere, that the Constitution itself was founded on these “republican principles.” \textit{Id} at 271. In No. 55 Madison states: “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.” \textit{See Id.} at 343.

\textsuperscript{223} Under the wisdom of crowds theory discussed supra at notes 205-211 and accompanying text \textit{all} voters may not have to become well informed in order to reach good decisions. \textit{See e.g.,} Schacter \textit{supra} note 56 at 645-646 (discussing the fact that the voters are woefully under-informed and acknowledging that “various lines of research in political science have countered 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.” [notes omitted]). \textit{Id.} Though Schacter has serious doubts about the ability of under-informed voters to make good choices. \textit{Id.} at 646. \textit{See generally,} James S. Schacter, POLITICAL ACCOUNTABILITY, PROXY ACCOUNTABILITY, AND DEMOCRATIC LEGITIMACY OF LEGISLATURES, IN THE EXAMINED BRANCH 43 (Richard W. Bauman and Tsui Kahama eds., 2006).

\textsuperscript{224} See \textit{infra} notes 231-242 and accompanying text.

\textsuperscript{225} See \textit{supra} note 221.
function well enough to play anything but a very occasional supporting role to representative democracy because in direct democracy there are no committees to set agendas or conduct hearings, no procedural rules, and most importantly no institutions or overall 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 ever valid and not just an excuse to justify elitism, 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 legislation, and vote on it efficiently already exists, it is the internet. Social networking sites (SNS) like Facebook or Linkedin show the organizing potential and efficiency of the internet. Within these SNS smaller groups constantly form and reform to

226 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’m not willing to make. See supra note 231. 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 measureable, I certainly believe that the People will produce the best set of rules for their own governance.

227 See e.g., Schacter supra note 56 at 658-663. Allow me to quote at length from Professor Schacter, whose discussion while in the context 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 pre-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
discuss topics, and share information. In fact, if Alexander Hamilton, James Madison and John Jay were to write The Federalist Papers today it’s hard to imagine them not choosing to use the internet. SNS 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”

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 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 rigueur 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. 658-660 [citations omitted].

Moreover, this phenomenon will continue to grow with the likes of “Twitter” and “Linkedin”.

Id. 658-660 [citations omitted].
is a real world example of the political power of the internet.\textsuperscript{228} In addition to SNS, 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.\textsuperscript{229} 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.\textsuperscript{230} Of course Congress’ efforts in this regard would, like all of Congress’ efforts, be subject to the direct control of voters should they choose to exercise such control.

\section*{C. The Information Challenge}

One justification for representative government is the informational advantage professional politicians are assumed to enjoy over the voters.\textsuperscript{231} Elected representatives are

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\item \textsuperscript{228} See e.g., Jeffrey Barholet, \textit{Young, Angry and Wired}, NATIONAL 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”).
\item \textsuperscript{229} See supra notes 231-283 and accompanying text.
\item \textsuperscript{230} See Philadelphia II supra note 45. 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 tout the specific procedures that the legislature of the People will follow to pass initiatives.
\item \textsuperscript{231} See e.g., 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 Spitzer, \textit{Perspective on Direct Democracy: Evaluating Direct Democracy: A Response}, 4 U. CHI. L. SCH. ROUNDTABLE 37, 39 (1997) (“If 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”); H. Richardson, \textit{WHAT MAKES YOU THINK WE READ THE BILLS?} (1978) (Mr. Richardson, a California legislator gave this title to his memoirs – suggesting that representatives often don’t read the bills they vote on, nor listen to debate.) It has been suggested that in fact, what representatives rely on is 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 e.g., Change Nobody Believes In, Editorial, WALL STREET JOURNAL, A20, 12/21/09 stating: 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
presumed to have a better understanding of the specific details of proposed legislation and of the state of the world in general. 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 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 historically this analysis was accurate, I will note two facts that at least 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. Second, to the extent elected representatives possess superior knowledge they should feel an obligation to educate their constituents on the matter and then seek their opinion rather than simply expecting the voters to trust that they know best (paternalism hazard). The most likely reason for not replacing 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 change 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.

232 See Vermeule supra note 45 at 681 (… like 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 supra note 221. Also, its 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 fact that many legislators are not well informed and the fact 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 e.g., Lynn Baker, Direct Democracy and Discrimination: A Public Choice Perspective, 67 CHI-KENT L. REV. (1991) (arguing that the average initiative voter is no less likely than the average legislator to vote in a thoughtful and public-spirited manner.

233 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 him/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 Blagojevich was convicted on 17 counts of corruption, including trying to sell the U.S. Senate seat vacated by President Barack Obama. See e.g., Douglas Belkin and Stephanie Banchero, Blagojevich Convicted on Corruption Charges, WALL STREET JOURNAL, June 28, 2011 (A3. Today it is possible to go directly to the voters via the internet in an efficient and timely manner to fill such vacancies.

234 For example, in the Illinois situation supra, the Governor could certainly share his/her thoughts with the voters on who would be a good Senator and why,
educating constituents is to preserve the camouflage that the ignorance of the voters affords to representative self dealing.\textsuperscript{235}

In any event, the focus here is the present not the past. To whatever extent political representatives enjoyed an informational advantage over voters in the past, such advantage is much less today due to the communications revolution.\textsuperscript{236} Today, the ability of voters to learn first hand the state of the world, as well as the details of proposed legislation has been greatly enhanced by the communications revolution.\textsuperscript{237} Similarly, the ability of elected representatives to share any superior knowledge they have with their constituents has also, thanks to the communications revolution, improved significantly.\textsuperscript{238} Eventually, any informational advantage enjoyed by elected representatives will completely disappear due to the ease with which voters may access information.\textsuperscript{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. That point is here now!\textsuperscript{240} The fact that elected representatives may enjoy an information advantage over voters is, even if true, no longer a reason to continue with representative rather than participatory democracy. Today any superior knowledge can be readily shared with constituents so that by the time of voting on a proposal, voters maybe at least as knowledgeable as their representatives.

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\textsuperscript{235} For example, in the case of Blagojevich, the less the voters knew about who he appointed and why the easier it would have been for him to hide his misconduct.
\textsuperscript{236} Information about the state of the world including political information is readily available online and thus easily accessible to voters. See supra note 221-230 and accompanying text.
\textsuperscript{237} Id.
\textsuperscript{238} Id. Though the U.S. Congress has been slow to take advantage of this ability. See Schacter supra note 56 at 665-667 (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.
\textsuperscript{239} See Vermeule supra note 45 at 680-682 (discussing the falling costs of political information).
\textsuperscript{240} See e.g., Baker supra note 232 (average initiative voter is no less likely than the average legislator to vote in a thoughtful and public-spirited manner).
\end{flushleft}
This observation raises the second part of the information challenge. That is, even if voters have ready access to sufficient information to become knowledgeable, past research suggests most voters will choose not to become informed.\(^\text{241}\) 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.\(^\text{242}\) Second, current conditions suggest that the adoption of participatory democracy may significantly increase the political literacy of voters. The combination of ever easier access to political information (i.e. low and falling cost to acquire knowledge) and the increased incentive to acquire such information (under participatory democracy, voters will be asked to actually participate in the legislative process, drafting, deliberating and voting on legislation) may result in significantly more politically well informed voters. However even if citizens, like elected representatives, do not become as politically informed as they could, there is a rough justice in the fact that under participatory democracy the voters will get the government they create – for good and bad – rather than one foisted upon them by elected professional politicians.

D. **Voter Apathy/Burnout**

\(^{241}\) See Schacter *supra* note 56 at 655-660. Discussing wasted transparency and stating:
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. [notes omitted].

\(^{242}\) See *supra* note 231.
The concern here is that voters cannot possibly handle the burden of being the primary legislators at all levels of government.\textsuperscript{243} That is, some voters will not even begin to make the effort required because of the relative insignificance of their one vote, and the fact that most voters are not directly affected by most pieces of legislation.\textsuperscript{244} Further, those other voters who do initially make an effort to keep up, will find the burden of doing so overwhelming and will eventually burnout and lose interest.

My response to these concerns is in three parts. First, those who express these concerns are overstating the difficulty of legislating and under estimating 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 be like a 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.\textsuperscript{245} For example, much of Congress’ time now 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. The People of course, not having to run for election, don’t have to spend time on camouflage. Moreover, the initial participatory

\textsuperscript{243} See e.g., Merrill \textit{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 effecting the outcome or both, and concluding that direct democracy should be reserved for local issues (small number of voters) of high importance not issues of routine governance); Hirsch \textit{supra} note 5 at 205-206 (noting that opponents of direct democracy trot out examples of initiatives too complicated for voters to understand – but Hirsch thinks these problems can be solved and that direct democracy can supplement representative democracy.); Schacter \textit{supra} note 56 at 674 (concluding that the Internet has more directly affected the how than the why of politics; that is those who are already politically well informed will become even better informed due to the internet, but those who are ignorant may remain so).

\textsuperscript{244} See e.g., Merrill \textit{supra} note 45 at 282 (listing these as possible reasons for voter ignorance and apathy).

\textsuperscript{245} See \textit{supra} note 231 and note 233.
democracy suggested here envisions that Congress will continue to exist, to coordinate and facilitate the drafting and deliberation of 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. As noted these matters could be determined by size, impact, repetitiveness or a combination of these or other criteria. The People could for example, 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. As a result, the People will be able to easily and efficiently participate directly in the legislative process. Third and finally, voter apathy will be reduced at least as compared to representative democracy because voters under participatory democracy will vote on actual legislation which has a much more direct impact on the country than just voting periodically for a political representative. Because each person’s vote is more important then it is now, the People may take a greater interest in legislative matters.

E. The Guarantee of a Republican Form of Government

246 See supra note 149-150 and accompanying text.
247 See supra note 225-230 and accompanying text.
248 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).
Some 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. I, as well as others, find these arguments unpervasive. These views have been well refuted elsewhere and 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: “the United States shall guarantee to every State in this Union a Republican Form of Government, …” The next stop in the argument is a passage in Federalist 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 later, to a small number of citizens elected by the rest.” Madison repeated this idea in Federalist 14. The final piece of evidence is found in the

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\[250\] See, Amar, AMERICA’S CONSTITUTION supra note 28 at 276-281 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 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. [notes omitted]

\[251\] The Federalist No. 10 supra note 8 at 76.

\[252\] The Federalist No. 14 supra note 8 at 95. (“The true distinction between these two forms [republic and democracy] was also adverted to on a former occasion. It is that in a democracy the people meet and exercise 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 proposing 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, as the one or the other Mode of Ratification may be proposed by the Congress.”

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 the Article IV does not on its face support this argument – 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. 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 Federalist 10 come in. In Federalist 10 and again in 14 Madison creates a distinction between a democracy and a republic, and defines the later as a representative democracy. With this definition of “republican-form-of-government” then 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 

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253 See Amar, Guaranteeing supra note 250 at 280 (noting that a monarch or tyrant in any one state would pose a geopolitical threat to neighboring states, 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”).
amendment process can even begin and, moreover, Congress may require that ratification be by state legislatures rather than by the People themselves. Moreover, the process does not authorize a majority, but requires a super major of elected officials for amendment.

The basic problem with those who argue that this evidence prohibits a participatory democracy is that they can’t see the forest for the trees. That is, the original Constitution (Articles I-VII and the first ten amendments) begins and ends literally as well a functionally with the People as the source of all governmental power. The Constitution could not exist without The People having such power; “We the People…do ordain and establish this Constitution…” Recognition of the People as the fundamental source of all governmental power is the foundation that supports our entire system of government. Several, possibly idiosyncratic, comments even by a leading light of the Constitution, taken out of context 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 People to ordain and establish government.”

Specifically, as commentators have pointed out, there is good reason to not attach too much significance to Federalist 10 and 14 especially in the context of the Guarantee Clause.

254 See Amar, Guaranteeing supra note 250 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 sovereignty – of the people’s right to “ordain” and “establish,” and their “reserved” and “retained” rights to “alter” or “abolish”).
255 See U.S. Const. pmbl and Amendment 10; 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. [notes omitted]).
256 See Hirsch supra note 5 at 194-200 (the People are the source of all governmental power and have an inalienable right to change their government).
257 Madison in Federalist 10 says “A republic by which I mean (indicating a possible unique usage), and in #14 he acknowledges that the common use of the terms republic and democracy as synonymous “noting that people are often “confounding a republic with a democracy.” See Federalist supra note 8 at 76 and 95 respectively. See, Amar, AMERICA’S CONSTITUTION supra note 28 at 276-81 (making this argument much better and in more detail).
258 Madison does not discuss the clause guaranteeing a republican form of government in either Federalist 10 or 14 and when Article IV Section IV is discussed no reference is made either to No. 10 or No. 14 or to the democracy/republic distinction made in them. See Id. at 176-77.
259 See Amar, Guaranteeing supra note 250 at 766 (noting that the exercise of majority rule popular sovereignty, provided the foundation of the Constitution itself).
260 See e.g., Hirsch supra note 5 at 190-193 (discussing the reasons why this is so).
Madison was not discussing the Guarantee Clause in Federalist 10 nor 14.\textsuperscript{261} Moreover, when the Guarantee Clause was discussed by Madison and Hamilton in Federalist 21 and 43 they did not refer to Federalist 10 or 14 or suggest that the clause prohibits direct democracy.\textsuperscript{262}

Second, it is unclear whether even Madison rejected direct democracy. His comments taken as a whole are at best ambiguous.\textsuperscript{263} Moreover, even if Madison was less than sanguine with concept of actual rule by the people,\textsuperscript{264} the evidence suggests that most of the Founders strongly supported a government of the People. As Alan Hisch states:

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. [notes omitted]\textsuperscript{265}

Hamilton for example specifically equated republican government with government “of the people.”\textsuperscript{266} The words democracy and republic, were often used interchangeably as synonyms even by Madison, and were used in counterdistinction not to each other but to monarchy and aristocracy.\textsuperscript{267} The balance of evidence simply does not support the argument that the Guarantee

\begin{footnotes}
\item[261] Id.
\item[262] Id.
\item[263] Id. 200 (noting that…”one must be careful about enlisting Madison as an opponent of direct democracy…”).
\item[264] Id. 192 (noting that Madison’s “misgivings and linguistic tendencies were not shared by other Framers).
\item[265] Id. at 189.
\item[266] Id. at 191.
\item[267] For example, while in #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, in #63 he acknowledges that many if not most ancient “democracys” also employed a scheme of representation for certain purposes. See Federalist supra note 8 No. 63 at 384-85. See Amar, AMERICA’S CONSTITUTION supra note 28 at 277 (“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.”). Professor Amar goes on to state: “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 counter-distinction to democracies but rather in opposition to monarchies and aristocracies.”) Id. 277-78.
\end{footnotes}
Clause of Article IV prohibits direct democracy. 268 Indeed, as noted many states have adopted direct democracy and the U.S. Supreme Court as well as state Supreme Courts have supported it, often enthusiastically. 269

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. 270 Article V contains no language establishing that its procedures are the only way to amend the Constitution. 271 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 it or remove it all together if they wish. 272 From the Preamble “We the People” to the final clause of the original Constitution in Amendment 10 “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.” 273 That is, if the ordinary government wants to instigate amendment they face a higher burden precisely because they are not the “People.” 274 Moreover, both the federal and state governments must be involved, because each can act as a check on the other to prevent the accumulation of power.

Madison himself supported the idea of direct democracy. For example, in response to a Maryland delegate at the Constitutional Convention who was concerned that the method of

268 See Hirsch supra note 5 at 193 (Guarantee Clause does not reflect opposition to direct democracy.)
269 Id. (Referring to the fact that many states have adopted direct democracy and “our highest courts have given it their imprimatur.”) [notes omitted]. See supra notes 201-203 and accompanying text.
270 See e.g., Hirsch, supra note 5 at 194 (Article V does not say that the procedures it outlines are the only means of amending the Constitution): See generally, Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment Outside of Article V, 94 COLUM. L. REV. 457 (1994) (same).
271 See e.g., Hirsch, supra note 5 at 194.
272 Id. 194-200 (concluding based on the history of Constitution’s own adoption, its text and structure that it may be amended by a majority of the people).
273 Id.
274 Id.
amendment, set out in the Maryland Constitution was not being followed in the process of adopting the federal constitution, 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…. First principles might be resorted to.”275

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:

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.276

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

Critics of 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.277 Implicit in this criticism is the belief that political compromise or what is discussed supra as political deal-making is generally a good thing.278 As noted, while political deal-making or compromise is good for the individual representatives that reach agreement, this does not mean that it is necessarily good for a majority of the representatives’ constituents.279 Indeed, as stated supra,

275 THE RECORDS OF THE FEDERAL CONSTITUTIONAL CONVENTION of 1787, 475 (Farrand ed., 1937) [cited in Hirsch supra note 5 at 195].
277 See supra notes 153-178 and accompanying text.
278 Id.
279 Id.
political deal-making encourages win/win 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.280

Regardless, however, 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 allow millions of voters to propose, deliberate, draft, amend and vote on legislation as efficiently as hundreds of legislations,281 and with a more legitimate result because of the elimination of the hazards of self dealing, paternalism, partisanship and fiscal irresponsibility.282

G. Responding to Legislative Emergencies

While technology has fundamentally changed the speed and efficiency of communication thereby allowing the adoption of federal level participatory democracy, it will be necessary in the context of an emergency to have legislation adopted very quickly or without open deliberation which may compromise sensitive information. Thus, our participatory democracy must be designed with emergency procedures that can be used when needed. The initial solution to this concern is to simply maintain our current representative structure even as we move to a partial/hybrid participatory democracy. As noted above, 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.

280 Id. See e.g., Fred Siegel, How Public Unions Took Taxpayers Hostage, WALL STREET JOURNAL Jan. 25, 2011 A15 (discussing that for political gain politicians gave public unions collective bargaining rights that have resulted in the looming public-pension crises threatening to bankrupt city, county and state governments).
281 See supra notes 227-230 and accompanying text.
282 See supra notes 150-152 and accompanying text; Hirsch supra note 5 at 208 (noting that the record suggests that citizen lawmaking not only avoids majority tyranny, but serves no particular ideological agenda); Merrill supra note 45 at 281 (direct democracy is corruption free).
In an emergency, Congress’ role would revert and they could pass on their own temporary legislation in response to an emergency. It is very important to recognize that all emergency power given to Congress, as well as the definition of emergency conditions, and all legislation passed by Congress under its emergency authority will be subject to the direct authority of the voters. In particular, for example, the voters could provide that emergency legislation adopted by Congress would automatically expire not more than 120 days after it is passed unless approved by direct vote of a majority of the voters.

Part V

PROTECTING INDIVIDUAL RIGHTS IN A PARTICIPATORY DEMOCRACY

The problem of protecting individual rights is inherent in any system of governance based on majority rule. Obviously, this includes our current representative democracy as well as the participatory democracy that I am advocating. Indeed our history provides many (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. However, solace may be taken from the fact that our Constitution with its protection of 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

283 Historically part of this problem has resulted from the definition of the People. See Amar, Guaranteeing supra note 250 at 766-773. 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.
fear from participatory democracy than from our current representative democracy. One commentator has observed that “the history of the initiative [at the state level] is remarkably free of the enactment of abusive legislation.” Another commentator has concluded that only a “tiny percentage of proposed [state] initiatives are aimed at restricting civil rights and most of these are defeated” and that “[t]he historical record in no way suggests that citizen lawmaking will, as a general matter, produce particularly undesirable or dangerous legislation.” 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. 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, as discussed infra, 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 and its respect for majority rule does not give the majority the moral right to dictate how everyone else should live. For example, the Supreme Court has stated:

“The majority may not use the power of the state to enforce its morality on the whole society via the criminal law. Our [the Court’s] obligation is to define the liberty of all not to mandate our own moral code.”

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286 See Hirsch supra note 5 at 208 [notes omitted].
287 Id. 207.
288 See J.S. Mill, On Liberty and Other Writings, 15-16 (Stefan Collini ed., Cambridge Univ. Press 1989) (1850); John Rawls, A Theory of Justice 60 (Original Ed., Belknap Press 2005) (“... each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others”)

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 are subject to judicial review, and would be limited to subject matter delegated to federal authority by the People in the Constitution. Consider two recently overturned laws, one from a representative legislature, and another, a state constitutional amendment, that came from the People via direct democracy. The first case involved a Texas statute that criminalized homosexual sodomy. Justice Kennedy writing for the majority of the United States Supreme Court stated that the statute was unconstitutional because homosexuals have a right to liberty in the form of autonomy because

“the Due Process Clause gives them the full right to engage in their conduct without the 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.

Further Justice Kennedy noted that “the right to non-interference in consensual homosexual activity is a right that cannot be encroached upon under the auspices majoritarian morality.”

The other case involves an anti-homosexual amendment to the Colorado Constitution, passed

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290 See e.g., Hirsch supra note 5 at 207; Matthew Dolan, Court Tosses Affirmative-Action Ban, WALL STREET JOURNAL July 2-3, 2011 (discussing a recent decision by the Sixth U.S. Circuit Court of Appeals finding that a state constitutional amendment passed by initiative was in violation of the U.S. Constitution and therefore void.) The amendment ban the consideration of race in college admissions for public universities. Once the initiative passed, those opposed sued on the grounds that the initiative violated federal law.
292 Id. at 578.
293 Id. Casey, supra note 289 at 947.
294 Lawrence, 539 U.S. at 571 (also citing Casey supra note 289 at 850).
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. Kennedy noted that the amendment singled out homosexuals not to further a proper legislative purpose but to make them unequal to everyone else, and this he said Colorado may not do. A state cannot so deem a class of persons a stranger to its laws.

These two cases illustrate the capacity for both representative and participatory democracy to produce laws that treat individuals and minorities unfairly, and also illustrate 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. As noted, the available evidence from the states suggests that participatory democracy will produce less. 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 it may also be used by the American people to amend the U.S. Constitution and thereby threaten individual rights. For example, theoretically, Article III could be amended and

296 Id. at 633.
297 Id.
298 Id. at 635.
299 See supra notes 283-287 and accompanying text.
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.\textsuperscript{300} Thus, the concern is that it is just too dangerous to give the People this
much power.\textsuperscript{301}

A second concern focuses on federalism and states’ rights. If a simple majority of
Americans can amend the Constitution then in that case 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.\textsuperscript{302}

Nevertheless, it is a possibility no matter how remote. But, it is not a new possibility. The
relevant question is not whether the Constitution can be amended nor whether the People or the

\textsuperscript{300} As noted, ordinary law making 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 government by the Constitution. See supra notes
290-299 and accompanying text. 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 can’t be unconstitutional. See e.g., Hirsch supra note 5 at 241 (implying in the text that
constitutional amendment by direct democracy is not subject to judicial review, and by a footnote reference noting
that the Philadelphia II proposal (see supra note 45) 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 (see infra notes 321-333
and accompanying text), might be properly reviewable, but it’s not at all clear by whom – 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 is applicable
only to amendments made by ordinary government. See Amar, The Consent of the Governed, supra note 22 at 504-
505 (“Ordinary Government should arguably not be allowed to amend this [unalienable rights away…”]).

\textsuperscript{301} See Hirsch supra note 5 at 237-240 (discussing this concern but not sharing it).

\textsuperscript{302} See infra notes 307-308 and accompanying text (each individual voter has reason not to be in favor of such an
amendment).
government can amend it.\textsuperscript{303} The right of the People and of the government to amend the Constitution was recognized in 1788-89 when the Constitution was ratified.\textsuperscript{304}

Moreover, the right of the People to amend is a necessary part of our Constitutional structure; that is the Constitution can’t exist without the People having this right. It is indeed the first principal on which our country, Constitution and our government is based.\textsuperscript{305} The relevant question is whether we should facilitate amendment by the People by passing a federal statute that outlines a possible 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 because they already have it, though they have 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 should we 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? For the reasons that follow I don’t think that we have much to fear at all. In fact, I think we have less to fear from constitutional amendment by the People than by ordinary government. Incidentally so did the Framers which is why Article V, which outlines the rules for amendment by ordinary government, requires super majority votes and the cooperation of both state and federal governments.\textsuperscript{306}

(b) The People Deserve Our Trust

I see less risk of individual rights being violated by the People (the majority) because doing so would be against the majorities’ own interests. Also, at the federal level the

\textsuperscript{303} See supra notes 249-276 and accompanying text.
\textsuperscript{304} See generally, Amar, The Consent of the Governed supra note 22 (arguing that “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).
\textsuperscript{305} Id. at 494-499.
\textsuperscript{306} Id. at 503-505.
diversity of our people and our vast geographic size also reduce the risk of trampling individual rights because these characteristics make the formation of a homogenous majority (which increases the risk of discrimination) less likely. A majority of the people will protect individual liberty because it is necessary if the individuals that comprise the majority are to achieve liberty for themselves.\textsuperscript{307} Thus, I think it will be less likely that minority and individual rights will be trampled under participatory democracy than under 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 is permitted to beat up on one person or group today, then they could beat up on me or a group that includes me tomorrow.\textsuperscript{308} 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? Are Americans worthy of self-government? The Founders thought we were and thus embarked on their Great Experiment. The past 222 years, while far from perfect, has seen us move in a positive direction; the People have, in my opinion, proved worthy, the experiment has been a success. Our size and our diversity is a strength; I 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. As noted, I don’t perceive this risk, especially in a national initiative or referendum, as significant enough to warrant additional safeguards. But if the presence of some

\textsuperscript{307} See e.g., Hirsch \textit{supra} note 5 at 240 and note 304 (each citizen sees herself in the minority on some issues); Amar, \textit{The Consent of the Governed}, \textit{supra} note 22 at 504. (similar).

\textsuperscript{308} See \textit{supra} note 307.
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. For example, of the two safeguards often suggested; a super-majority vote requirement, and a two-separate-vote requirement, the former is not proper while the later would be acceptable.\textsuperscript{309} The super-majority vote requirement is not acceptable because it violates the fundamental right of self government based on popular sovereignty majority rule.\textsuperscript{310} Basing outcomes on a simple majority ensues that everyone’s vote is equal.\textsuperscript{311} The two-separate-vote requirement is designed to encourage/ensure deliberation.\textsuperscript{312} 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.\textsuperscript{313} This would give voters six months after notice of the fact that the proposal was serious and was likely to be approved to further deliberate the proposal. This double vote is certainly not required under our Constitution, but if such a provision were included in the federal initiative statute for example, it may be workable.\textsuperscript{314} Of course the voters would retain the power to eliminate this requirement if a majority of them were so inclined.\textsuperscript{315}

(d) Individual Rights Always Depend on the Will of the Majority: Natural Law to Positive Law

There is a strong connection between natural law and our Constitution.\textsuperscript{316} A majority of the People is the only legitimate source of authority to govern precisely because each individual

\textsuperscript{309} See Amar, The Consent of the Governed, supra note 22 at 502-503 (two separate votes permissible, super majorities are not).
\textsuperscript{310} Id. (anything other than simple majority rule may result in a system that is surely not ruled by the people).
\textsuperscript{311} Id. (“only workable voting rule that treats all voters and all policy proposals equally” [note omitted]).
\textsuperscript{312} Id.
\textsuperscript{313} See e.g., Philadelphia II supra note 45 Proposed Democracy Amendment to the Constitution (http://www.ni4d.org).
\textsuperscript{314} See Hirsch supra note 5 at 241 (discussing this proposal).
\textsuperscript{315} Id.
\textsuperscript{316} According to the Declaration of Independence the source of our individual equality and of our unalienable Rights is our Creator. According to the Constitution’s Preamble, the government was created by “We the People” to secure
person is human and thus is “endowed by their Creator with certain unalienable rights” among which are the rights of “life, liberty and the pursuit of happiness.” Because human beings each have the capacity to discover for themselves the way to live a good, just, fair life, they have the right to live their lives free from unwarranted interference of others. These natural law ideas became part of our positive law and thus, are protected by our government because our Constitution recognizes them. While 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? This right can’t come from the Constitution, it must come before (the natural law) or perhaps along with the Constitution. That is the very act of ordaining and establishing the Constitution made the People’s right to ordain and establish, and by necessary implication the right to amend and abolish, part of our positive law. Having rights reflected in the positive law is critically important, because these are the rights that the government will protect.

My point is that natural law rights and liberties are not created by the Constitution, they are recognized by it. 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? Theoretically speaking of course they do, but practically speaking they do not. Thus, the intersection of natural and positive law tells us which natural law rights a particular government

the blessings of liberty to “ourselves” which implies individually not as a group. The Ninth Amendment notes explicitly that there are other rights not mentioned in the Constitution that are reserved to the People. Similarly the Tenth Amendment states that the balance of power (that which is not given to the United States or the States) belongs to the People.

317 The Declaration of Independence “We hold these truths to be self-evident…all men [people] are endowed by their creator with certain unalienable rights.” This is why, the “People” may “establish” and “ordain.” The Constitution states: “We the People … do ordain and establish. U.S. Const. Preamble. The People may do this because people are special because they are “endowed by their Creator.”

318 As the Declaration of Independence states, all men [people] have the right to life, liberty and the pursuit of happiness and other rights not enumerated (“among these are…”).
is willing to protect via its positive law. This is one reason, perhaps the most important one, that
our Constitution matters.\textsuperscript{319} 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, the practical enforcement of them,
depends on majority will.\textsuperscript{320}

(e) Limits On Constitutional Amendments by the People: Fundamental Rights

As noted our Constitution is based on a foundation of natural law.\textsuperscript{321} Our Constitution has
recognized certain natural law rights and liberties and has thereby made these rights and liberties
part of our positive law. Certain of these rights and liberties are, however, 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.\textsuperscript{322} The reason for this 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.\textsuperscript{323} For example, the People, the source of all government
authority, may not within the framework of the Constitution, eliminate their own or their

\textsuperscript{319} See Does the Constitution Still Matter, Time.
\textsuperscript{320} See e.g., Amar, Consent of the Governed supra note 22 at 504 (individual rights only safe if understood and
accepted by the majority).
\textsuperscript{321} See supra notes 316-320 and accompanying text.
\textsuperscript{322} See e.g., Amar, Consent of the Governed supra note 22 at 504 (referring to certain higher law principals that may
not be properly amendable). For example, the “People’s” (a simply majority of national U.S. voters) right to amend
(or abolish) the Constitution is recognized by the Constitution and is unalienable. \textit{Id.} at 474-75. (Quoting James
Wilson: “This is a right [to change the Constitution] of which no positive institution can ever deprive them” [notes
omitted]).
\textsuperscript{323} See Amar, The Consent of the Governed supra note 22 at 501. (quoting Wilson to the effect that under majority
rule the majority can’t simply do anything it wants).
posterities’ right of self-government. That is even the People may not eliminate popular sovereignty majority rule, 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. All rights for positive law purposes will then be determined by the new structure of government the majority establishes. 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 can’t be provided in any event. 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/liberties are fundamental, as does our Constitutional jurisprudence. For example, the Declaration of Independence says directly that “life, liberty and the pursuit of happiness” are such rights. The Constitution, its words “We the People” and its act of establishing and ordaining, establishes that popular sovereignty majority rule, as noted above, is also 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 that predate the Bill of Rights and are, therefore, rights reserved to the people against the State that are implicit in the

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324 Id. 496 note 154, 504 (popular sovereignty does prevent us from denying future generations of popular majorities).
325 Id.
326 If the People ever were to abolish the Constitution and replace it with something new, then individual rights would be determined, for positive law purposes, by the new document. But I for one would argue that under natural law fundamental individual liberty can’t 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 – the majority is not committed to protecting them – practically speaking do not exist.
328 381 U.S. 479 (1965).
Ninth Amendment.\textsuperscript{329} The Court held that there is “A realm of personal liberty that the majority or the majorities’ government may not enter.”\textsuperscript{330} Moreover, an individual “right of conscience”\textsuperscript{331} and what Professor Amar has called a “Meiklejohn Core” of rights (e.g., free expression, right to assemble) may also be inviolable and unalienable.\textsuperscript{332}

Thus, unless a majority of Americans, the People, in a properly called and administered referendum votes to abolish the Constitution, something the People clearly have the right to do 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.\textsuperscript{333}

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.\textsuperscript{334} The Constitution sets up two governments, state and federal, but neither is properly thought of as

\textsuperscript{329} Id. at 484-86.
\textsuperscript{330} Casey, supra note 279 at 847.
\textsuperscript{331} See Amar, The Consent of the Governed, supra note 293 at 504.
\textsuperscript{332} Id. at 503.
\textsuperscript{333} Id. at 504-05 (“ Ordinary government should arguably not be allowed to amend this [higher law principles] away...”). The reason to cast a leery eye on amendment via Article V is that it is subject to the same moral hazards, discussed above, as any representative government. See Amar, The Consent of the Governed, supra note 22 at 504 (noting that government officials often have interests separate from their constituents; in ways that often threaten liberty as a reason for Article V’s super majority requirement). Second, the Article V process that counts Utah equally to California is anti-self government and betrays popular sovereignty and majority rule. Id. (noting the malapportionment at the heart of Article V ratification and the fact that an amendment may be adopted under Article V that does not have the support of a majority of the American electorate). The amendment procedures for ordinary government outlined in Article V are part of a system of checks and balances, designed by the Founders to limit the aggregation of governmental power. The federal government may not amend without the cooperation of the states. Moreover, while three-fourths of the states may force a convention to propose amendments, the federal Congress can require that the People of the States, not the State legislatures, approve the proposed amendments. These checks and balances are designed to prevent to concentration of power.
\textsuperscript{334} See Amar, Of Sovereignty and Federalism supra note 1 at 1446-1466 (1987) (It is remarkable that the Reconstruction Amendments can be seen as perfecting the Federalist Constitution by trimming off its confederate vestiges). Id. 1464.
sovereign. Only the national People are sovereign under the Constitution. State peoples continue to exist and to in effect enjoy almost exclusive control over their state governments and state constitutions. But, the federal government is supreme. 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. 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, therefore 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.

C. Fair, Deliberative Procedures

As discussed above federal direct democracy, like state direct democracy, should include a single subject rule. Not only is this important in order to ensure meaningful majority consent, but it is also necessary to protect minority rights. Otherwise, proposals unfair to

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335 Under the Articles of Confederation the People of each State were sovereign; the Articles of Confederation being essentially a treaty among nations. Thus, ratification of the Constitution had to be done by the People of each state. Even though ratification was done via specially elected ratifying conventions of the people, 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 extremely limited conception of which people had the right to vote (adult, white, landowning, wealthy males), it was perhaps the greatest manifestation of democracy the world had ever known. In most states, for purposes of the ratifying conventions, in contrast to regular state elections, many more (though certainly not enough) of the people were permitted to vote and even to be delegates at the Conventions. Most states elected convention delegates under special rules that were more populist and less property-based than normal. See Amar AMERICA’S CONSTITUTION supra note 28 at 5-11.

336 After the Constitution was ratified by the People, 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 The Consent of the Governed supra note 22 at 506-07. (After ratification the state people is clearly subordinate to the national people.)

337 See Amar, Consent of the Governed, supra note 22 at 506.

338 See U.S. Const. Article VI (supremacy clause), Article V (states bound by any amendment of the U.S. Constitution even if the state did not support the amendment).

339 See Amar, AMERICA’S CONSTITUTION supra note 28 at 280 (Guarantee Clause as democratic insurance policy).

340 See Amar, Consent of the Governed, supra note 22 at 506-07 (discussing James Wilson’s understanding that after ratification “We the People” became to the national people).

341 See supra notes 79-86 and accompanying text.
individuals or minorities might be attached to other very popular proposals and the package presented to voters.\textsuperscript{342} Congress or the administrative body charged with facilitating federal direct democracy (for example the Electoral Trust under Philadelphia II)\textsuperscript{343} should prevent multi-subject proposals from being considered by the voters. Such proposals should be separated into individual subjects.\textsuperscript{344} However, ultimately the Supreme Court will have final say regarding the correctness/fairness of the procedures used for federal direct democracy. We 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.\textsuperscript{345}

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 insure that proposals are fully and deliberately considered before voting. As noted, Congress’ or perhaps some other administrative body will facilitate this process, and they should be obligated to inform and educate the People on the proposals the People will be asked to vote on, and to solicit and attend respectfully to input received from the People. 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.\textsuperscript{346} Obviously, the development of rules and procedures to guide federal direct democracy will be an ongoing process.\textsuperscript{347} However, the overall goal is clear: fully informed deliberation and voting by the People.

\textsuperscript{342} See supra notes 212-220 and accompanying text.
\textsuperscript{343} See Hirsch supra note 5 at 209-221 (discussing Philadelphia II and the Electoral Trust).
\textsuperscript{344} See generally Cooter and Gilbert supra note 74 (discussing this in the context of State direct democracy).
\textsuperscript{345} See supra notes 300-332 and accompanying text.
\textsuperscript{346} See supra notes 309-315 and accompanying text.
\textsuperscript{347} See e.g., the discussion of the Electoral Trust proposed by Philadelphia II in Hirsch supra note 5 at 209-221.
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. In short, our love of and our faith in democracy is our national identity. Democracy is what makes us American, not the state we come from, or the country we or our ancestors were born in, not our first language, our 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. As long as this is the choice of the American people that’s fine. As noted, in the States we 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. But the focus of this article is participatory democracy at the federal level. The question addressed in this section is what (event, legislation) will propel our movement at the federal level from our mostly representative democracy to at least a partial participatory democracy.

348 America’s creed is found in our founding documents – the first twelve lines of the second paragraph of the Declaration and in the Preamble of the Constitution. It exalts the idea of unalienable rights such as freedom, liberty and justice for all. Americans believe in these ideas, we really believe that each of us is created equal and is endowed with unalienable rights. Our countries’ 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, 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.

349 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, as noted, national security and emergency matters will often as a practical matter need to be dealt with in the first instance by the representative government.

350 See supra notes 107-125 and accompanying text.
I believe that the tools of participatory democracy such as the initiative and referendum will be introduced on the federal level in the near future due to the convergence of several factors. First, as discussed above 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. Second, our strong cultural commitment to democracy creates a constant pressure to move toward participatory democracy as it becomes technologically feasible. The ascendency 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 these factions (political parties) as Madison foresaw have developed to the point that they are seriously dysfunctional.

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351 See supra notes 221-230 and accompanying text.
352 See supra notes 1-54 and accompanying text.
353 A general illustration should suffice. I am writing this 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 won’t 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 effect whom will get the blame for the poor economy and high unemployment in the 2012 election. See e.g., Carol Eilee, Obama Centrist Move Checked, WALL STREET JOURNAL, July 16-17, 2011, pg. 1 (a large bipartisan deficit-reduction deal was key to avoiding tax-and-spend liberal label in 2012 election). Marie Pilon and Leslie Scism, Markets Ponder Consequences of a Downgrade, WALL STREET JOURNAL, July 16-17, 2011 at A4 (Standard and Poors and Moodys have warned that the U.S. may lose AAA credit rating unless a credible plan is reached to reduce the deficit); Naftali Bendand and Janet Hook, House GOP to Vote on $2.4 Trillion in Cuts, WALL STREET JOURNAL, June 16-17, 2011 pg. A4 (republicans in House to vote a bill that makes big cuts in spending and ties debt-ceiling relief to a balanced budget amendment – though bill has no chance of passing senate or getting signed by the President); Peggy Noonan, This is No Time for Games, WALL STREET JOURNAL, 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. and Scott Greenberg, Poll Shows Cuts Dilemma, WALL STREET JOURNAL, March 3, 2011 at A3 (referring to WSJ/NBC News Poll showing that 40 percent think that reducing the deficit and government spending is one of the top two priorities). Any voter knows that 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 house in order by spending less, collecting more or some combination. The political parties have gotten so good at their blame and scare games (President Obama played the “Grandma Card” saying that the
problems like, for example, controlling spending on Social Security, Medicare and Medicaid. In the past, that is before the internet, a deal may have been made behind closed doors that would have provided political cover while still making hard choices. Increasingly this sort of deal-making is not possible because it can’t be kept secret. Make no mistake, I think this is a good thing – but the point is that because of this reality backroom deals to solve difficult problems are much harder to make. For example, the passage of Obama Care entailed much backroom deal-making, 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 is likely to never be fully implemented and may be repealed altogether. The point is not whether Obama Care is good or bad, but simply that the current representative democracy is unable to deal effectively with the important and pressing problem of 46 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 is any specific grant of authority needed to allow the President or Congress to

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Social Security checks might not go out on August 3) and making sound bites for reelection that the actual interests of the country come a very distant second.

354 See supra notes 99-101 and accompanying text.

355 See supra note 187 and accompanying text.
seek an advisory referendum. 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 U.S. deficit, environmental issues, Obama Care uncertainty, as well as the problem of what to do about the ever expanding entitlement programs (Medicare, Medicaid and Social Security).

It’s not that politicians don’t 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 look at and make recommendations for fixing the budget/deficit problem. 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 11 of the 18 members on the commission. The plan offered by the commission suggested restraining spending on defense, Social Security, Medicare and Medicaid and rising taxes (for every $2.25 in spending cuts the Commission’s plan provided for $1.00 in higher taxes). However, in 2011 when President Obama provided his budget, no cuts to these programs were recommended. Rather, early in the year the President and the Republicans were fighting over cuts in domestic appropriations which represented only 15 percent of the total budget. Evidently the political cover offered by the bipartisan commission was not sufficient

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356 Professor Amar argues, convincingly to me, that the People, a majority of U.S. voters may amend the Constitution. See supra notes 300-333 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 the U.S. voters to make law via initiative. Thus, unlike Philadelphia II I don’t see the need for a constitutional amendment to allow for a federal lawmaking by initiative. A statute, however, spelling out a set of acceptable procedures would be very useful.

357 See David Wessel, Panel on Cutting Deficit Paves Way for Politicians, WALL ST. JOURNAL February 17, 2011 at A4 (referring to the work of the reduce-the-deficit commission led by Bowels and Simpson).

358 Id.

359 Id.

360 Gerald F. Seib, Budget Battle Lines Drawn: Obama Plan Offers Tax Increases and Spending Cuts but Avoids Big Fiscal Issues, WALL ST. JOURNAL, February 15, 2011 (referring to fact that Obama proposal does not build on Bowels/Simpson report and offer only modest cuts); Damian Paletta, Janet Hood and Jonathan Weisman, Deficit Outlook Darkens, WALL STREET JOURNAL, January 27, 2011 at A1 (referring to the fact that most spending cuts proposed focus on the roughly 14 percent of the budget known as nonsecurity discretionary spending).
for either the President or Congress to offer a real budget plan to address our $1.6 trillion deficient. 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 Bowels-Simpson commission or something similar could be presented to the voters and because it really addresses the deficit, and spreads the pain around more or less evenly, the public may well support the plan. Politicians that implemented a plan approved by the voters would have nothing to lose and everything to gain politically. This is the path, whether it involves budget/deficit, health care, the environment or some other issue, that will lead the U.S. to direct democracy on the federal level, and once we start down that path our love of democracy will not allow us to turn back. 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

As noted, I anticipate that the first advisory referendum will be conducted primarily online (provision initially may also be made for traditional voting). The next step may be an Executive Order that an advisory referendum shall be held for all important social legislation before the President would sign such bills. This could result because a candidate made this promise in order to get support during the general election or because a sitting President gave

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361 Since then we have had the “Gang of Six” deficit reduction group that has since given up. See, Naftali Bendavid and Damian Paletta, Senate ‘Gang’ Hashes Out Deficit Plan, WALL ST. JOURNAL, May 2, 2011 at A1 (discussing “gang of Six” senators who are working to craft a grand deficit-cutting deal); Janet Hook and Naftali Bendiard, The Quandary of Coburn’s Exit: Senator’s ‘Gang of Six’ Colleagues Struggle to Keep Deficit-Reduction Talks Alive, WALL ST. JOURNAL, May 19, 2011 at A4 (discussing breakdown in talks over size of Medicare cuts and noting that attention turns to another deficit cutting group led by Vice President Joe Biden). Next was a group led by Vice President Joseph Biden but so far no proposal have emanated from this group. Most recently (as of July 15, 2011) we had President Obama meet with Republicans in hopes of a grand deficit reduction agreement as part of a bill to raise the debt ceiling. But so far no deal. See, Damian Paletta, Carol E. Lee and Matt Phillips Raters Put U.S. On Notice: Moody’s, S&P Sound Alarms on Debt: President Obama Walks out of Talks, July 14, 2011 at A1 (The subtitle says it all).
such an order to try to break a political logjam to gain popular support, or 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 Act\textsuperscript{362} proposed by Philadelphia II but without the proposed constitutional amendment. The purpose of this statute would be to specify a possible procedure that the national People may use to propose and vote on ordinary laws and Constitutional amendments. In addition, such statute should establish a politically independent body similar to the Philadelphia II’s Electoral Trust to facilitate federal participatory democracy.

A good argument has been made by Professor Amar and others that, under our Constitution, the People already have the right to directly amend the Constitution.\textsuperscript{363} Moreover, it seems to me 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. How could the People not have this power? Article 1 Section 1 says “All legislative powers herein granted shall be vested in a Congress of the United States…”\textsuperscript{364} This statement is not inconsistent with the People’s right to make ordinary law (pass legislation) directly. Under our Constitution the People are the grantors referred to in Article 1 Section 1, and the Peoples’ ultimate power to legislate is simply not part of the “legislature Powers herein granted.” The People retained their right to legislate, in addition to giving elected officials the right, as outlined in the Constitution, to legislate. 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 claims otherwise because the People could use a two-step process to make ordinary law. The first step would be to amend Article 1 Section 1, and the second step would be to pass ordinary legislation pursuant to the amendment.

\textsuperscript{362} See supra note 45. See also Hirsch supra note 5 at 209-221 for a discussion of the Democracy Act.
\textsuperscript{363} See supra notes 300-333 and accompanying text.
\textsuperscript{364} U.S. Const. Article 1 Section 1.
Thus, we do not need the statute or as some have advocated, a Constitutional amendment,\textsuperscript{365} to give the national People the right to amend the Constitution and/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\textsuperscript{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.

Part VII

CONCLUSION

I have argued that we are at the beginning of an era of federal participatory democracy. That 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.

\textsuperscript{365} Philadelphia II calls for a constitutional amendment. \textit{See supra} note 362.

\textsuperscript{366} The Constitution was ratified by the necessary nine states, on June 21, 1788. \textit{See} \textit{Amar, AMERICA’S CONSTITUTION} \textit{supra} note 28 at 6 (“…tiny New Hampshire became the decisive ninth state by a margin of 57 to 47.”) The Constitution recognizes the Peoples power to make law. \textit{See supra} notes 300-333 and accompanying text.