



1-1-1998

Electronic Ballot Boxes: Legal Obstacles to Voting over the Internet

Pamela A. Stone

University of the Pacific, McGeorge School of Law

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Pamela A. Stone, *Electronic Ballot Boxes: Legal Obstacles to Voting over the Internet*, 29 MCGEORGE L. REV. 953 (1998).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol29/iss4/7>

This Comments is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Electronic Ballot Boxes: Legal Obstacles to Voting Over the Internet

Pamela A. Stone*

TABLE OF CONTENTS

I. INTRODUCTION	954
II. OVERVIEW	956
A. <i>Description of the Internet</i>	956
B. <i>Description of Traditional Voting Methods</i>	958
III. LEGAL OBSTACLES TO THE IMPLEMENTATION OF INTERNET VOTING	960
A. <i>Summary of Federal Requirements for Voting</i>	960
B. <i>Voting Machines</i>	960
C. <i>Assisted Voting</i>	962
D. <i>Accessible Voting</i>	963
E. <i>Multilingual Election Requirements</i>	965
F. <i>Links to Relevant Political Information</i>	966
G. <i>Requirements for Observers at Elections</i>	969
H. <i>Write-In Votes</i>	970
IV. CURRENT AND PROPOSED ALTERNATIVES TO TRADITIONAL BALLOT BOX VOTING	972
A. <i>Current Alternative Voting Systems</i>	972
1. <i>All-Mail Ballot Elections</i>	972
2. <i>Voting by Telephone</i>	972
B. <i>Proposals for New Voting Systems</i>	974
1. <i>Minnesota</i>	974
2. <i>California</i>	974
3. <i>Florida</i>	975
4. <i>Military Vote</i>	976
C. <i>Computerized Voting Systems In Use Today</i>	976
V. PRACTICAL CONSIDERATIONS FOR THE INTERNET VOTING SYSTEM	977
A. <i>Verification of Votes</i>	977
1. <i>Electronic Signatures</i>	977

* J.D., University of the Pacific, McGeorge School of Law, to be conferred 1999; B.A., University of Florida, 1992.

2. <i>Other Technology</i>	978
B. <i>Secrecy</i>	978
C. <i>Security</i>	979
D. <i>System Failure</i>	980
VI. DESCRIPTION OF THE PROPOSED INTERNET BALLOT	980
VII. CONCLUSION	981
APPENDIX	982

I. INTRODUCTION

Imagine your voting experience going something like this.¹ You wake up, pour a cup of coffee and fire up your personal computer. You access the election web site and view a portfolio on those candidates in which you are interested. The candidates' pictures are displayed, and previously recorded statements play through your speakers with startling clarity. The electronic ballot is summoned and you key in your security code. You enter your vote and submit your ballot. Moments later, you are contacted to verify your transmission along with your security code, which is verified at the county clerk's office. Your code agrees and you sign off until this evening, when you will return to instantly view the election results, along with detailed demographic studies and video clips of acceptance speeches.²

A scenario such as this may not be as far fetched as it sounds. With the resources now available, an Internet ballot could become mainstream within the next decade.³ The web site could contain a spot for a visitor to "click" to enter the electronic polling area. After entering, the voter would input the information needed to maintain security and prevent voter fraud, such as one might find at the traditional polling place.⁴ Next, the voter would enter his or her choices, and then the correct ballot would be presented to the voter on the computer screen.

1. *Infra* app.

2. See Lindsey McWilliams, *Is Online Voting Around the Corner?* (visited Mar. 29, 1998) <<http://www.govtech.net/1995/gt/jun/dept/voting.htm>> (copy on file with the *McGeorge Law Review*) (noting the ease with which voters could cast their ballots on-line, with the added benefit of receiving interactive feedback from candidates and a voter's political party).

3. See *infra* notes 15-16 and accompanying text (noting the increasing demand for Internet services).

4. See *infra* Part II.B (describing traditional "in person" election day procedures to verify a voter's identification).

The use of the Internet for many types of secure transactions is on the rise, from banking on-line to corporate proxy voting by shareholders.⁵ With government issues being discussed on the Internet with increasing frequency, the possibility of voting in general elections via the Internet seems a natural extension of this powerful technology.⁶ However, voting remains one of the few tasks our society requires to be performed in person. Is this because there are legal barriers to electronic voting, or does citizens' confidence in the traditional ballot box dissuade the government from allowing electronic access to our elections?

The United States Constitution gives a great deal of power to the States to conduct their own elections.⁷ However, certain mandatory federal provisions still exist which regulate state elections and with which all States must comply.⁸ For example, States must provide assisted voting for handicapped persons⁹ and multilingual ballots.¹⁰ In addition, federal regulations require all States to ensure that all votes for congressional representatives be cast in an approved "voting machine."¹¹

Furthermore, another obstacle to implementing an electronic voting system is compliance with state law. For example, all States prohibit campaigning near the polling place.¹² Thus, problems may arise if "links" are provided on the electronic ballot to relevant political information: Does this constitute "campaigning" for the purposes of these statutes?

No electronic voting system has yet been implemented in any state.¹³ However, with the possibility of increased voter participation and the wealth of information available to a voter on the Internet, examination of this possibility seems timely in our new electronic era.¹⁴ Many supporters of electronic voting see it as a way to

5. See *infra* notes 43-49 and accompanying text (discussing various transactions performed over the Internet).

6. See GRAEME BROWNING, ELECTRONIC DEMOCRACY, USING THE INTERNET TO INFLUENCE AMERICAN POLITICS 86 (Daniel J. Weitzner ed., 1996) (stating that "computer users are flocking to sites like Votelink and America Vote," and that electronic voting could relieve busy citizens of the burden of voting in person).

7. See U.S. CONST. art. I, § 4, cl. 1 (stating that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof"). *But see Oregon v. Mitchell*, 400 U.S. 112, 123 (1970) (noting that although the Constitution gave the States the power to make laws regarding national elections, Congress has the power to alter the states' election laws if they so choose).

8. See *infra* Part III (discussing federal statutes with which States must comply in order to conduct valid elections).

9. 42 U.S.C.A. § 1973aa-6 (West 1994); see *infra* Parts III.C, III.D (describing requirements for assisted and accessible voting).

10. 42 U.S.C.A. § 1973aa-1a (West 1994); see *infra* Part III.E (evaluating the current multilingual elections requirements).

11. 2 U.S.C.A. § 9 (West 1997); see *infra* Part III.B (detailing federal requirements for the use of "voting machines" in state elections).

12. See *Burson v. Freeman*, 504 U.S. 191, 206 (1992) (summarizing state statutes as of 1989; holding that a state statute prohibiting electioneering within 100 feet of the entrance to a polling place is valid under the First Amendment).

13. See *infra* Part IV.B (reviewing current proposals for new electronic voting systems).

14. See *infra* Part II.A (describing the Internet and its current uses).

reconnect citizens with the democratic process.¹⁵ In fact, according to a recent survey in *MacWorld*, the service most Internet users want is electronic voting.¹⁶

The following Comment will explore the legal obstacles to voting over the Internet and any statutory additions, or amendments to existing statutory law, necessary to implement such a system.¹⁷ After a general description of the Internet and traditional voting methods, this Comment will discuss these legal obstacles, including: limitations on the types of voting machines, assisting disabled voters, creating access to voting facilities, multilingual election requirements, links on the electronic ballot, requirements for observers at elections, and write-in votes.¹⁸ This Comment will next explore current and proposed alternatives to traditional ballot voting to determine if there are other systems currently in use which may help to decide the viability of electronic voting.¹⁹ Voting by telephone and mail are two alternatives that will be considered, and new proposals for electronic voting will also be evaluated.²⁰ Then, this Comment will evaluate the practical concerns regarding the Internet voting system, including verification of voters, secrecy of ballots, security of the Internet voting system and the possibility of system failure.²¹ Finally, this Comment will describe a hypothetical Internet ballot and voting system, and suggest a format for the ballot.²²

II. OVERVIEW

A. Description of the Internet

The Internet is a global network of computers,²³ whereby people, institutions, corporations and governments around the world may retrieve or exchange

15. See Anneliese May, *For 'None of the Above' Press 7* (last modified July 22, 1996) <<http://www.ncsl.org/programs/pubs/stvote96.htm>> (copy on file with the *McGeorge Law Review*) (noting that supporters, such as Marc Straussman of the Campaign for Digital Democracy, see electronic voting as a simple step from the already computerized voting process).

16. Charles Piller, *Dreamnet: Consumers Want More Than TV Overload from the Information Superhighway. But Will They Get It?*, *MACWORLD*, Oct. 1994, at 96 (stating that "voting in elections was the most desired on-line capability, highly coveted by fully half of our sample").

17. See *infra* Part III (reviewing federal and general state statutory and case law which might hinder the implementation of electronic voting).

18. See *infra* notes 69-71 and accompanying text (finding that the electronic ballot must be constructed so as to comply with several laws governing elections ballots).

19. See *infra* Part IV.B (covering several States' forays into the electronic voting arena).

20. See *infra* Part IV.B (exploring new proposals in Minnesota, California and Florida).

21. See *infra* Part V (reviewing briefly some concerns about the nature of the computerized medium of transmission of confidential information).

22. See *infra* Part VI (suggesting a possible format and layout of an electronic ballot).

23. See Internet Literacy Consultants, *ILC Glossary of Internet Terms* (last modified July 9, 1997) <<http://www.matisse.net/files/glossary.html>> [hereinafter *ILC Glossary*] (copy on file with the *McGeorge Law Review*) (defining commonly used Internet terms).

information.²⁴ Access to this wide variety of information is nearly instantaneous.²⁵ People may use the Internet from numerous sources, ranging from a home computer, a computer in a coffee shop available for general public use, to a home unit which attaches to a television set.²⁶ It is estimated that 200 million Internet users will exist by the year 1999.²⁷

The World Wide Web, which most people consider synonymous with the Internet, actually consists of numerous documents stored over the Internet.²⁸ Information on the Internet is commonly stored on "web pages."²⁹ Web pages are authored by individuals using a special programming language enabling them to present their thoughts and ideas in whatever arrangement they consider appropriate for the subject matter.³⁰ These pages are displayed in a variety of formats, including text, still images, sounds and video.³¹ Web pages usually allow the visitor to communicate with the web site's author through e-mail,³² or sometimes by filling out a survey-like form.³³ Common examples of web sites include personal pages, commercial web sites and public sites.³⁴ Frequently web pages contain "links" to other web sites.³⁵ Links send the user to another document or web page.³⁶ These links are generally denoted by the use of colored or underlined text, or even images.³⁷ One "click" on a link will "forward" the user to the linked web page or document, which may be authored by an entirely different individual.³⁸ Returning to the original web page is generally available through certain commands within the Internet browser.³⁹

24. See *ACLU v. Reno*, 929 F. Supp. 824, 830-31 (E.D. Pa. 1996) (detailing findings of fact presented to the Supreme Court which describe the "Nature of Cyberspace, Creation of the Internet and the Development of Cyberspace"), *prob. juris. noted*, 117 S. Ct. 554 (1996); *aff'd*, 117 S. Ct. 2329 (1997).

25. See *id.* at 831 (noting that Internet communications "can occur almost instantaneously").

26. See *id.* at 832-33 (describing different ways individuals access the Internet, including computer systems at colleges, corporations, home, community networks, libraries, coffee shops and Internet service providers).

27. *Id.* at 831.

28. *Id.* at 836.

29. See *ILC Glossary*, *supra* note 23 (defining a "home page" as "the main web page for a business, organization, person or simply the main page out of a collection of web pages"); see also *infra* note 30 and accompanying text (describing a "web page").

30. See *Reno*, 929 F. Supp. at 836 (reporting that documents contain information stored in various forms).

31. *Id.*

32. See *infra* notes 40-42 and accompanying text (describing the transmission of e-mail on the Internet).

33. See THOMAS WRONA & ELISABETH PARKER, *BUILD A WEB SITE IN A DAY* 224-25 (1997) (describing the method by which a form is created and utilized).

34. See *id.* at 155-56 (indicating that all web sites are unique, and noting that pages may range from those telling the visitor about hobbies to those describing practice areas of a private law firm).

35. See *Reno*, 929 F. Supp. at 836 (noting that "one can 'click' using a computer mouse on the description of the resource and be immediately connected to the resource itself").

36. *Id.*

37. *Id.*

38. See WRONA & PARKER, *supra* note 33, at 88-91 (noting that most web designers spend a great deal of time making links to other web designer's home pages).

39. See *Handbook: Getting Acquainted* (visited Feb. 23, 1998) <<http://dialup.pacbell.net/help/handbook/aquant.htm>> (copy on file with the *McGeorge Law Review*) [hereinafter *Handbook*] (stating that the back key displays the previous page that a user has already viewed).

The Internet also allows for transmission of electronic mail, also known as "e-mail."⁴⁰ E-mail is the electronic equivalent of sending a letter through the postal service, and is easily performed as long as the recipient, as well as the sender, has an e-mail address.⁴¹ E-mail may include text messages, images or even computer files.⁴²

Transactions normally performed in person are now being performed over the Internet.⁴³ Currently, a wide range of transactions are being performed on a daily basis. Transactions available through the Internet include: purchasing stock shares,⁴⁴ purchasing groceries,⁴⁵ paying bills,⁴⁶ accessing one's checking account,⁴⁷ selling and buying items through an auction,⁴⁸ participating in a poll regarding one's favorite celebrity,⁴⁹ and many, many more. These types of transactions are generally performed by filling out "forms" on the web site with the appropriate information.⁵⁰ A "submit" button is "clicked" in order to transmit this information to the owner of the web site.⁵¹ Current technology is making the Internet one of most interactive methods of communication available today.⁵²

B. Description of Traditional Voting Methods

Traditionally, voters must physically go to their local polling place to cast their ballots.⁵³ Generally, practices for voting in federal and state elections are largely similar among the states. First, voters must register to vote prior to election day.⁵⁴

40. See *ILC Glossary*, *supra* note 23 (defining "e-mail" as "messages, usually text, sent from one person to another via computer").

41. *Id.*

42. See *Handbook*, *supra* note 39 (noting that when sending e-mail you can include text, attachment files and graphics displays).

43. Kent D. Stuckey, *Internet and Online Law*, 1997 COM. L. SERIES xix (stating that there is a trend towards conducting commerce over the Internet, especially since there are minimal transaction charges to the providers).

44. *Lindner Funds Demonstration* (visited Jan. 5, 1998) <<http://www.lindnerfunds.com/demonstration.html>> (copy on file with the *McGeorge Law Review*).

45. *eGrocery Main Page* (visited Jan. 5, 1998) <<http://www.egrocery.com>> (copy on file with the *McGeorge Law Review*).

46. *Home Banking* (visited Jan. 5, 1998) <<http://www.bankamerica.com/p-finance/homebanking/homebanking.html>> (copy on file with the *McGeorge Law Review*).

47. *Id.*

48. *Auctions On-Line Home Page* (visited Jan. 5, 1998) <<http://www.auctions-on-line.com/aol/main.html>> (copy on file with the *McGeorge Law Review*).

49. *Entertainment Surveys* (visited Jan. 5 1998) <<http://www.jtj.net/jtj/surveys.html>> (copy on file with the *McGeorge Law Review*).

50. See *WRONA & PARKER*, *supra* note 33, at 225 (describing the creation and use of forms, and how they make web sites more interactive).

51. *Id.*

52. See *id.* at 224, 236 (noting that print, radio and television communication "only works in one direction," whereas the Internet allows people to interact with the creators of web pages).

53. See *LWV California Voter Registration FAQ's* (last modified Oct. 20, 1996) <<http://ca.lwv.org/lwvc.files/voterreg.html>> (copy on file with the *McGeorge Law Review*) [hereinafter *LWV FAQ*] (noting that voters must generally go to their assigned polling place).

54. *Id.*

Second, prior to election day, a State will often send voters a sample ballot and/or ballot pamphlet to assist voters in researching issues or candidates before voting.⁵⁵ Third, on election day, voters must go to their assigned polling place during the specified times, usually from 7 a.m. to 7 or 8 p.m.⁵⁶ Fourth, voters will be asked to state their name and sign next to their name for verification purposes.⁵⁷ Finally, a voter will be asked to enter the voting booth to cast his or her vote. Generally, there is no time limit for voting, and no limits on what materials may be taken into the voting booth.⁵⁸

Once inside the voting booth, punch cards are most commonly used to record one's vote.⁵⁹ A voter indicates his or her preference by punching out pre-scored holes.⁶⁰ The completed ballot is then placed in the ballot collection box to be tallied at a later time.⁶¹

One organization, Government by the People, is campaigning for electronic voting because traditional voting systems can be less secure, more expensive, cumbersome, time consuming and environmentally wasteful (due to the utilization of great amounts of paper) than computerized systems.⁶² Furthermore, electronic voting may assist in increasing voter participation, which is currently around 54% for November presidential elections.⁶³

55. *Id.*; see, e.g., CAL. ELEC. CODE § 13303 (West 1996) (requiring elections officials to print copies of the ballot to be mailed to each voter not less than 21 days before the election).

56. *LWV FAQ*, *supra* note 53; see, e.g., CAL. ELEC. CODE § 14212 (West 1996) (stating that the polls shall be open from 7 a.m. to 8 p.m. on election day).

57. *LWV FAQ*, *supra* note 53; see, e.g., CAL. ELEC. CODE § 14216 (West 1996) (requiring a voter to announce his or her name and address, and then write his or her name and address on the roster of voters).

58. See *LWV FAQ*, *supra* note 53 (stating that there is no time limit in the polling booth and no limit on what a voter may take with them into the booth). But see CAL. ELEC. CODE § 14224 (West 1996) (imposing no time limit for voting unless other voters are waiting, in which case a ten minute limit is imposed).

59. *California Secretary of State – Elections Division* (last modified Nov. 14, 1997) <<http://www.ss.ca.gov/elections>> (copy on file with the *McGeorge Law Review*); see *Grolier Online, The American Presidency* (visited Feb. 23, 1997) <<http://www.grolier.com/presidents/preshome.html>> (copy on file with the *McGeorge Law Review*) (describing the history of the ballot, commonly used voting machines and the punch card device).

60. *California Secretary of State – Elections Division* (last modified Nov. 14, 1997) <<http://www.ss.ca.gov/elections>>.

61. See, e.g., CAL. ELEC. CODE § 14225 (West 1996) (covering the method of depositing the ballot in the container).

62. See *Best Direct Democracy & Electronic Democracy Solutions* (visited Feb. 22, 1997) <<http://www.vote.org/v/index.html>> (copy on file with the *McGeorge Law Review*) (finding that voting by phone or Internet is at least ten times cheaper than current systems, is easier than waiting in line or visiting the polling place, and is more secure than existing systems which poorly use computers); see also BROWNING, *supra* note 6, at 86 (noting that having to vote in person is a burden on busy citizens, and that expanding voting beyond one day may be worthwhile).

63. See *Roll Call Politics: The Turnout File* (visited Feb. 23, 1998) <<http://www.rollcall.com/22f2zR8g/election/turnoutchart.html>> (copy on file with the *McGeorge Law Review*) (listing voting age population, registered voters and voter turnout).

III. LEGAL OBSTACLES TO THE IMPLEMENTATION OF INTERNET VOTING

A. Summary of Federal Requirements for Voting

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.⁶⁴ But, the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system.⁶⁵

Although the Constitution of the United States is the original authority protecting the right of all qualified citizens to vote in both state and federal elections,⁶⁶ the United States Supreme Court has held that the Constitution preserves the power of the States to establish and maintain their own separate and independent election requirements, as long as they are consistent with the Constitution.⁶⁷ Thus, the conduct of state elections has generally been left to the States.⁶⁸

The following sections will explore federal law, and any applicable state law, which may present a barrier to the successful implementation of voting on a computer via the Internet.

B. Voting Machines

Under federal law, all votes for Representatives in Congress must be cast by written or printed ballot, or by "voting machine," the use of which has been duly authorized by state law.⁶⁹ Furthermore, any votes received in violation of this statute are of no effect.⁷⁰ Thus, before implementing an electronic voting system for

64. *Burdick v. Takushi*, 504 U.S. 428, 441 (1992) (quoting *Westberry v. Sanders*, 376 U.S. 1, 17 (1964)).

65. *See id.* at 441 (summarizing prior Supreme Court cases).

66. *See* U.S. CONST. amend. XV, § 31 (stating that the "right of citizens of the United States to vote shall not be denied or abridged"); *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (finding that the Constitution of the United States protects the right of all qualified citizens to vote in all elections, noting that "all qualified voters have a constitutionally protected right to vote").

67. *See Oregon v. Mitchell*, 400 U.S. 112, 290 (1970) (quoting James Madison, stating that "the right of suffrage is certainly one of the fundamental articles of republican Government, and ought not to be left to be regulated by the Legislature") (quoting 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 203 (1911)).

68. *See id.* at 124-29 (noting that the Framers of the Constitution intended the States to keep the power to regulate elections to themselves); *see also id.* at 191 (quoting Senator Howard, in an 1866 debate on H.R. 127, the Joint Resolution proposing the Fourteenth Amendment, as saying, "We know very well that States retain the power, which they have always possessed, of regulating the right of suffrage in the States. That right has never been taken from them.").

69. *See* 2 U.S.C.A. § 9 (West 1997) (stating that "[a]ll votes for Representatives in Congress must be by written or printed ballot, or voting machine the use of which has been duly authorized by the State law; and all votes received or recorded contrary to this section shall be of no effect").

70. *Id.*

use in federal elections, States must comply with this federal voting requirement.⁷¹ In short, for votes to be valid in both state and federal elections, the voting machine on which they are cast must simply be authorized under state law.

Another obstacle facing Internet voting lies in the fact that several state constitutions require that "all elections shall be by ballot."⁷² However, in some states, the local courts have interpreted "ballot" to mean a method of conducting elections that will ensure secrecy.⁷³ In these cases, the courts have held that as long as the voting machine ensures secrecy, an election by ballot exists, and use of the voting machine has been upheld.⁷⁴ Most courts liberally construe statutes and constitutional provisions as approving voting machines, unless state statutes expressly indicate otherwise. For example, where a constitution explicitly requires an election by written votes, the use of a voting machine was held invalid.⁷⁵ Alternatively, in some states, the use of all types of voting machines is authorized by the constitution, subject to voters' approval and/or an enabling act by the legislature.⁷⁶

In order to explicitly authorize the use of the Internet as a voting machine, new state statutes should specify the types of elections to be governed. For example, a state statute authorizing the use of voting machines in all state elections may be insufficient to cover the use of voting machines in federal primary elections.⁷⁷ Statutes describing the physical attributes of a voting machine have been upheld, and this mechanism could be used to specify the Internet as an approved voting machine.⁷⁸

Therefore, before an electronic voting system may be effectively used on election day, each State must comply with federal and state laws relating to voting machines. To comply with federal law, each State must authorize the voting machine under the applicable state law.⁷⁹ Each State should ensure that its con-

71. See *id.* (describing generally the law governing voting machines for Representatives in Congress).

72. See, e.g., ALA. CONST. art. 8, § 179 (requiring that "all elections by the people shall be by ballot"); KY. CONST. § 147 (declaring that "all elections by the people shall be by secret official ballot").

73. See, e.g., *Lynch v. Malley*, 74 N.E. 723, 724-26 (Ill. 1905) (declaring that the word "ballot" is not limited to a written or printed ballot); see also *City of Louisville v. Jefferson County Fiscal Court*, 212 S.W.2d 107, 109 (Ky. 1948) (holding that recording votes on voting machines is voting by ballot as required by the state constitution).

74. See *Lynch*, 74 N.E. at 725 (stating that "it is clear that any manner of voting which preserves the secrecy of the voting is a voting by ballot").

75. See *Nichols v. Minton*, 82 N.E. 50, 51-52 (Mass. 1907) (holding that where the state constitution required "written votes," a voting machine which does not use a form of written vote is unconstitutional).

76. See, e.g., *Abrasley v. Jefferson County*, 4 So. 2d 153, 157 (Ala. 1941) (noting that the purpose of the constitutional amendment was to relieve election law of the "necessity of uniformity" throughout the state by allowing voters to enable the use of new voting machines).

77. See *Line v. Board of Election Canvassers*, 117 N.W. 730, 731-32 (Mich. 1908) (noting that although state election law authorized the use of voting machines in "elections," such provision only referred to public office elections and not primary elections).

78. See *Voorhes v. Dempsey*, 231 F. Supp. 975 (D. Conn. 1964) (finding that a State requirement that voting machines have mandatory party lever is not fundamentally unfair or unreasonably discriminatory where lever did not prevent any candidate from having a name or place on the ballot).

79. See 2 U.S.C.A. § 9 (West 1997) (stating that for votes to be valid in a federal election, voting machines must be "duly authorized by the State law").

stitution, statutes or local election laws authorize the use of the Internet for ballot voting by either express or implied validation.⁸⁰ Otherwise, any votes cast for federal officers under 2 U.S.C.A. § 9 will be invalid.⁸¹ By statutory definition, compliance with state law alone constitutes compliance with both federal and state laws regarding voting machines.⁸²

C. Assisted Voting

If a State chose to use an electronic voting system, would it be required to provide assistance to blind, disabled or illiterate persons who wish to use the Internet to cast their ballots? Federal law provides that any person who needs assistance to vote due to "blindness, disability or inability to read or write may be given assistance by a person of the voter's choice," as long as that person is not connected to the voter's employer.⁸³ A disability in the voting context is generally defined as an innate physical condition that makes a voter incapable of marking his or her ballot.⁸⁴ The person rendering assistance to the voter has one function—to assist with the mechanical act of preparing the ballot.⁸⁵

However, no federal statute requires States to provide such one-on-one assistance to disabled persons.⁸⁶ In fact, where States specify the persons who may assist voters, state elections officials are generally the last persons allowed to give assistance to voters, because a shadow of impropriety may exist when elected officials are in the voting booth with persons are casting their ballots.⁸⁷

The only requirements placed upon States under federal law is that they make available large print instructions at each polling place and that they provide information by telecommunication devices for the deaf.⁸⁸ However, the requirement

80. See Part III.B (discussing the various constitutional and statutory requirements for voting machines).

81. See 2 U.S.C.A. § 9 (West 1997) (stating that for votes to be valid in a federal election, voting machines must be "duly authorized by the State law," and that "all votes received or recorded contrary to this section shall be of no effect").

82. *Id.*

83. See 42 U.S.C.A. § 1973aa-6 (West 1994) (describing the requirement that voters who need assistance in voting be given such assistance in limited circumstances).

84. See, e.g., *O'Neal v. Simpson*, 350 So. 2d 998, 1009 (Miss. 1977) (stating that a voter receiving assistance must be either "blind, physically disabled or illiterate and [need] assistance in marking his ballot").

85. See, e.g., *Patton v. Watkins*, 31 So. 93, 94 (Ala. 1901) (noting that the person assisting the voter shall only "mark" the ballot, and not suggest or interfere with the decision making process, and that any ballot marked by a person providing assistance without any direction or suggestion from the voter shall be void as well).

86. See 42 U.S.C.A. § 1973 (West 1994) (failing to discuss any requirements for state assistance to disabled voters); see *id.* § 1973aa-6 (West 1994) (providing that they only may have assistance by "a person of the voter's choice").

87. See, e.g., KY. REV. STAT. ANN. § 117.255 (Michie 1996) (stating that only after a person has no one to assist him at the polls may an election judge assist a voter); TENN. CODE ANN. § 2-7-116 (1997) (allowing an election official to assist only where an election judge of a different political party is not available). State officials thus are not prohibited from assisting voters as long as no improper influence exists.

88. See 42 U.S.C.A. § 1973ee-3(a) (West 1994) (requiring each State to make available "instructions, printed in large type, conspicuously displayed at each permanent registration facility and each polling place; and information by telecommunications devices for the deaf").

of large print instructions is easy to meet with Internet ballots, because, at the click of a button, a user can view a large print version of the electronic ballot.⁸⁹

In sum, under federal law, a State is not required to offer assistance with the physical process of casting a ballot.⁹⁰ Therefore, States utilizing electronic voting systems should not be required to assist those voters who have trouble using a personal computer, especially since traditional polling places would still be available to disabled voters. Furthermore, there appears to be no law indicating that a State would need to coach voters on the use and operation of computer software to access Internet-voting web pages.⁹¹

D. Accessible Voting

Generally, each State must ensure that all polling places for federal elections are accessible to handicapped and elderly voters.⁹² However, an exception exists if the State provides the handicapped or elderly voters with an alternative means for casting their ballots on election day.⁹³

Does the State, thus, have any responsibility to ensure that, for example, a handicapped person has unrestricted access to a cybercafe where he or she may vote over the Internet? Case law suggests that if a reasonable alternative polling place or an ability to vote by absentee ballot exists, then the absence of handicapped accessible electronic polling places is permissible.⁹⁴ For example, in *Selph v. Council of Los Angeles*,⁹⁵ a handicapped person sued the city for locating polling places in buildings that were not easily accessible to the handicapped.⁹⁶ However, the judge held that as long as reasonable alternatives are available, specifically the absentee ballot, the Constitution does not require polling places to be handicapped accessible.⁹⁷ The court held that the absentee ballot was a "rational alternative to

89. *HTML Tutorial 2—Headers* (last modified Feb. 25, 1997) <<http://www.cs.princeton.edu/courses/template/modules/computers/html/tut2.html>> (copy on file with the *McGeorge Law Review*) (noting that there are six sizes of text available when creating a web page).

90. See Part III.C (discussing applicable federal statutes regarding assisted voting and the scope of those statutes).

91. See 42 U.S.C.A. § 1973 (West 1994) (requiring that there be a viable alternative for voters in the cases of illiteracy or handicap; however, this statute fails to require that a State instruct voters on basic skills).

92. See *id.* (requiring each State to "assure that all polling places for Federal elections are accessible to handicapped and elderly voters").

93. See *id.* (noting an exception to the general rule requiring access for handicapped or disabled voters if: (1) no accessible place is available; and (2) the handicapped or elderly voter has an alternative means for casting his or her ballot on election day).

94. See *Selph v. Council of L.A.*, 390 F. Supp. 58, 62 (C.D. Cal. 1975) (stating that the right to vote by absentee ballot constitutes a reasonable alternative for a handicapped person who finds his polling place inaccessible).

95. 390 F. Supp. 58 (C.D. Cal. 1975).

96. *Id.* at 59.

97. *Id.* at 61-62.

the legitimate state purpose of minimizing the high cost and substantial administrative effort involved in providing . . . accessible polling places.”⁹⁸

As long as the voter retains some sort of voting alternative, then state conduct which merely burdens access to voting, such as a failure to provide a handicapped ramp at a coffee shop with Internet access, will likely be upheld.⁹⁹ It has never been suggested that electronic voting would replace polling places entirely. Therefore, it is unlikely that a court would find the failure to provide handicapped access to an electronic voting facility invalid, as long as the handicapped person is provided with reasonable alternatives such as voting by absentee ballot or at a traditional handicapped accessible polling place.

Voting over the Internet may, in fact, benefit those voters who have trouble making it to the polling place, and want a more interactive feel when casting their ballot. As long as a handicapped voter has access to and can use a computer, he or she will be able to mark boxes, submit his or her ballot, and perhaps even have visual and audio media to make the voting experience more complete.

The Americans with Disabilities Act (ADA)¹⁰⁰ has also provided a legal basis for pursuing litigation in the area of handicapped access to polling places.¹⁰¹ The Fifth Circuit Court of Appeals recently held that where a state, specifically the Secretary of State, does not receive federal funds, he or she is not required to make the polling place and/or voting machines comply with the ADA.¹⁰² The court held that in order for a plaintiff to bring a claim under the ADA, he or she must specifically allege that the “program or activity with which he or she was involved receives or directly benefits from federal financial assistance.”¹⁰³ In this case, the plaintiff only presented evidence that the state itself received federal funds, but produced no evidence that the Secretary of State received federal financial assistance.¹⁰⁴ The road is paved for a lawsuit against a State whose Secretary of State receives or directly benefits from Federal financial assistance, and fails to comply with the ADA.¹⁰⁵

98. *Id.* at 61.

99. *See id.* (noting that, although the Equal Protection Clause permits some burdens upon the right to vote, it forbids conduct which completely denies the right to vote to a particular class of voters. However, the court found the option of voting by absentee ballot does not constitute a complete denial of the handicapped voters' right to vote).

100. 42 U.S.C.A. §§ 12131-12134 (West 1995).

101. *See* *Lighbourn v. County of El Paso*, 118 F.3d 421, 423-26 (5th Cir. 1997) (reporting that plaintiffs alleged that assistance provided to blind voters discriminated against them in violation of the Americans with Disabilities Act because the plaintiffs could not vote with complete secrecy).

102. *Id.* at 426-27.

103. *Id.* at 427 (citation omitted).

104. *Id.*

105. *See id.* (indicating that plaintiffs may have presented a valid claim had they argued that the Secretary of State receives federal financial assistance for the activity of voting).

E. Multilingual Election Requirements

Congress has enacted legislation which requires that no State shall provide voting materials exclusively in the English language when certain conditions exist.¹⁰⁶ For certain political subdivisions within a state, this multilingual requirement applies if:

(i)(I) more than five percent of the citizens of voting age of such State or political subdivision are members of a single language minority and are limited-English proficient; (II) more than 10,000 of the citizens of voting age of such political subdivision are members of a single language minority and are limited-English proficient; or (III) in the case of a political subdivision that contains all or any part of an Indian reservation, more than five percent of the . . . citizens of voting age within the Indian reservation are members of a single language minority and are limited-English proficient; and (ii) the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate.¹⁰⁷

The law requires that when this provision applies, all "voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots[,] be provided in the language of the applicable minority group as well as the English language."¹⁰⁸

In fact, when States presented ballots in English only, courts found such practices to be a prohibited condition on the right to vote.¹⁰⁹ Thus, by analogy, for the electronic ballot, not only would the ballot potentially have to be produced in a non-English language, but the adjoining web pages with instructions and other relevant information would have to be available in one or more non-English languages as well. The cost of producing such a non-English ballot electronically could conceivably be lower than that of printing them on paper, and they could be produced at the same time that the entire web site is designed.

106. See 42 U.S.C.A. § 1973aa-1a(a) (West 1994) (restating findings by Congress that were codified in order to combat the denial of the right to vote for minority citizens).

107. *Id.* § 1973aa-1a(b)(2)(A) (West 1994).

108. *Id.* § 1973aa-1a(c) (West 1994). This section requires:

Whenever any State or political subdivision subject to the prohibition of subsection (b) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language.

Id.

109. See *Torres v. Sachs*, 381 F. Supp. 309, 311-12 (S.D.N.Y. 1974) (finding that many Puerto Rican American citizens living in the election district who had extreme difficulty in speaking and writing English were deprived of their constitutional right to vote where English-only ballots were provided); see also *Arroyo v. Tucker*, 372 F. Supp. 764, 767-68 (E.D. Pa. 1974) (ordering Philadelphia Secretary of Commonwealth and county commissioners to implement bilingual electoral process for voters with difficulty comprehending English).

It should be noted that there exists a recent movement to repeal the bilingual election requirements statute, through the Bilingual Voting Requirements Repeal Act of 1995.¹¹⁰ This bill seeks to amend the Voting Rights Act of 1965¹¹¹ to eliminate the provisions requiring bilingual ballots.¹¹² Currently, under the Voting Rights Act of 1965, as previously noted, States may not abridge an individual's right to vote because he or she is a member of a language minority group, and must therefore produce ballots in minority languages if the previously mentioned conditions are met.¹¹³ If this bill is passed, then States may no longer be required to produce ballots in any language other than English.¹¹⁴

F. Links to Relevant Political Information

The First Amendment provides that neither the freedom of speech nor of the press shall be abridged.¹¹⁵ Although no federal statute defines the extent of this freedom in regards to polling places, today all fifty states restrict activities both in and around polling places.¹¹⁶ For example, Louisiana prohibits campaign activity within a 600-foot radius of polling places, including the wearing of politically oriented buttons and T-shirts.¹¹⁷ The Supreme Court recently validated a Tennessee statute which prohibits solicitation of votes and display or distribution of campaign materials within 100 feet of the entrance to polling places.¹¹⁸ These statutes recognize that the function of the voting process is for the selection of public officials and not to provide a forum for general political expression.¹¹⁹

110. See Bilingual Voting Requirements Repeal Act of 1995, H.R. 2356, 105th Cong. (1997) (proposing to eliminate current provisions relating to bilingual voting requirements by amending the Voting Rights Act of 1965).

111. 42 U.S.C.A. § 1973 (West 1994).

112. See *supra* notes 106-09 and accompanying text (detailing current requirements for bilingual ballots).

113. See *supra* notes 106-07 and accompanying text (discussing the federal requirement that qualified groups of non-English speakers be provided a ballot in his or her native language).

114. See *supra* notes 110-11 and accompanying text (describing the bill proposing to end bilingual election requirements).

115. See U.S. CONST. amend. I (stating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press").

116. See *Burson v. Freeman*, 504 U.S. 191, 206 (1992) (referencing 77 GEO. L.J. 2137 (1989) and finding that the 50 States have all found that a "restricted zone around polling places is necessary to serve the interest in protecting the right to vote freely and effectively"). See, e.g., CAL. ELEC. CODE § 18370 (West 1996) (prohibiting electioneering within 100 feet of a polling place); HAW. REV. STAT. § 11-132 & 19-6(7) (1993 & Supp. 1997) (restricting electioneering within 200 feet of a polling place).

117. See *Schirmer v. Edwards*, 2 F.3d 117, 118 (5th Cir. 1993) (citing LA. REV. STAT. ANN. § 18:1462 (West 1979 & Supp. 1998), which prohibits distributing, placing, or displaying any campaign literature or political advertising on election day and within 600 feet of a polling place).

118. See *Burson*, 504 U.S. at 211 (upholding a Tennessee statute prohibiting solicitation of votes and display or distribution of campaign materials within 100 feet of a polling place, because such action was necessary to prevent voter intimidation and election fraud).

119. See *Cotham v. Garza*, 905 F. Supp. 389, 396 (S.D. Tex. 1995) (stating that "the function of the voting process is to select public officials and not to provide a general forum for political expression"); see also *Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (noting that "[a]tributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently").

However, there are some restrictions on a State's power to limit a candidate's physical access to voters at the polling place and on election day.¹²⁰ The Supreme Court held that a law prohibiting newspaper editorials on election day that urged people to vote a certain way violated the constitutional freedom of speech and press.¹²¹ Furthermore, States cannot forbid a voter from bringing written materials into the voting booth.¹²² Thus, laws restricting "electioneering"¹²³ are usually found unconstitutional only where they are too broad, or where they impermissibly infringe on First Amendment rights.¹²⁴

Historically, the First Amendment was developed to protect the "free discussion of governmental affairs," including "discussions of candidates, structures and forms of government . . . and all such matters relating to political processes."¹²⁵ The informed vote and free electoral process were of utmost importance in the Framers' minds, as well as in this country's early political life.¹²⁶ However, widespread corrupt practices at the polling place forced the States to re-examine their policies in this area in order to protect another constitutionally based right, the right to vote.¹²⁷

Through pressure from political parties and the candidates themselves, two compelling interests were violated at the polling place: the right to vote freely for the candidate of one's choice, and the right to vote in a reliable election.¹²⁸ Therefore, the Court held that the "government may regulate the time, place and manner of the expressive activity, so long as such restrictions are content

120. See, e.g., *Gore Newspapers Co. v. Shevin*, 397 F. Supp. 1253, 1258 (S.D. Fla. 1975) (holding that a Florida statute prohibiting any candidate or other person from distributing election literature on an election day was unconstitutional because it violated the First Amendment).

121. See *Mills v. Alabama*, 384 U.S. 214, 220 (1966) (striking down a statute that provided criminal penalties for the publication of a newspaper editorial on election day which urged voters to cast their ballots in a particular manner, as violating the constitutional right to freedom of speech and press).

122. See *Cotham*, 905 F. Supp. at 397-98 (holding that limits on written materials in the voting booth impermissibly infringe First and Fourteenth Amendment rights of voters and was, thus, unconstitutional, and that such limitations were necessary to achieve and protect the integrity of elections).

123. *Fish v. Redeker*, 411 P.2d 40, 42 (Ariz. Ct. App. 1966) (defining "electioneering" as "an attempt on the part of an individual or candidate to persuade or influence eligible voters to vote for a particular candidate, party or proposition").

124. See Part III.F (describing limits placed upon restrictions at the polling place).

125. U.S. CONST. amend. I; see *Mills*, 384 U.S. at 218-19 (finding that free discussion of all matters relating to political processes was a major purpose of the First Amendment).

126. *Mills*, 384 U.S. at 218.

127. See *Burson v. Freeman*, 504 U.S. 191, 199-202 (1992) (describing disfavored historical practices which improperly influenced voters and led to bribery, such as ballot production by political parties themselves and battles at the polling place to persuade uncommitted voters); *id.* (holding that forbidding electioneering was not a violation of the First Amendment).

128. See *Burson*, 504 U.S. at 199 (concluding that a State "has a compelling interest in protecting voters from confusion and undue influence" and "in preserving the integrity of its election process").

neutral,"¹²⁹ and "are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication."¹³⁰

A state law prohibiting all links on an electronic ballot would apply to all candidates and propositions, regardless of political or ideological viewpoints. This restriction thus would likely be a justified exercise of state power in regulating elections, because it is a content-neutral restriction on all types of speech.¹³¹ This law would still allow for alternative means of communicating campaign information, as long as such information is located in a place other than the ballot itself. Furthermore, allowing links to a web page with candidate-supplied information may violate states' laws against campaigning at or near the polling sites.¹³² The Court has validated these statutes because they protect a compelling state interest against confusion and undue influence.¹³³

By allowing links on the ballot that would connect the voter to a web site providing information on the candidates, the risks of unreliability and inappropriate persuasion become a real possibility; voters may be misled by information they are unable to independently verify because they are engaged in the process of casting their ballots. It is the government's intent that the time and place of voting be separate from that of campaigning.¹³⁴ The rationale behind the Court's rulings in this area has been to reduce the likelihood of voter coercion, pressure and fraud.¹³⁵ However, it is hard to see how such coercion would come into play when an individual chooses to click on a link and confidentially review a candidate's statement. Restrictions on the format and type of web site links would make any potential for coercion less likely to occur. For example, requiring a standardized web page for all candidates, with only the text-based content being different, would reduce the risk that any voter would be swayed by a more expensive or elaborately designed web page. The desire to keep electioneering and voting separate is still

129. *Id.* at 197; see *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (stating that "expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech,'" and "services purposes unrelated to the content of expression") (quoting *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976)).

130. *Burson*, 504 U.S. at 197; see *United States v. Grace*, 461 U.S. 171, 177, 181 (1983) (holding that a statute prohibiting the display of banners or flags on the sidewalk outside the Supreme Court unconstitutional as an unreasonable restriction on free speech); see also *Ward*, 491 U.S. at 791 (making clear that,

[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.").

131. See *Ward*, 491 U.S. at 791 (reiterating standards for governmental regulation on expressive activity).

132. See *supra* notes 116-23 and accompanying text (describing electioneering laws in general).

133. See *Burson*, 504 U.S. at 199, 211 (concluding that a State maintains a "compelling interest in protecting voters from confusion and undue influence," and validating the Tennessee statute prohibiting electioneering within 100 feet of a polling place).

134. See *Cotham v. Garza*, 905 F. Supp. 389, 396 (S.D. Tex. 1995) (noting that voting booths are not traditionally public forums, but places where voters communicate their choices of candidates).

135. See *Burson*, 504 U.S. at 199 (recognizing that a "State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process").

compelling, but may eventually be outweighed by the voter's desire for informed ballot casting.

A major purpose of the First Amendment is to protect the free discussion of governmental affairs.¹³⁶ If candidate information could be distributed in a neutral and non-coercive environment, it is likely that the Court would not find such an act (in this case, electronic links) objectionable.¹³⁷ Heavy governmental restriction of the time, place and format of the linked web sites would be necessary to reduce the potential for fraud, misinformation and undue influence.¹³⁸ However, even with such restrictions, the dissemination of relevant information to voters, especially to voters who may know nothing about a candidate, could be seen as a definite advantage of electronic voting.¹³⁹ Furthermore, ensuring that each candidate has an equal opportunity to provide information through this type of link would lessen the likelihood that one party or candidate could exert undue influence over a voter. The low cost involved in preparing a written statement to be placed on the state's election web site may help to equalize the playing field between competing political candidates and groups. A voter's desire and ability to obtain relevant political information could prove crucial in guaranteeing that the voting system appeals to citizens who may feel far removed from the political processes.¹⁴⁰

G. Requirements for Observers at Elections

Under the Voting Rights Act, States must allow certain federal observers to enter and attend any place used for holding an election "for the purpose of observing whether persons who are entitled to vote are being permitted to vote."¹⁴¹ Federal law also requires States to permit federal observers to enter and attend any place used for counting the votes to ensure proper tabulation.¹⁴² The policies behind these provisions of the Voting Rights Act are to provide illiterate voters with an observer to make sure that any assistance is properly given, and to confirm that minorities are not excluded from exercising their right to vote.¹⁴³ Observers cannot

136. *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

137. *See supra* notes 119, 128 and accompanying text (indicating that the prohibition against dissemination of information at polling places has a purpose limited to the protection against fraud and promotion of reliable election results).

138. *See supra* note 128 and accompanying text (describing the purposes behind restrictions on election day expression).

139. *See Mills v. Alabama*, 384 U.S. 214, 219 (1966) (noting that the "press serves . . . as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve").

140. *See id.* (noting that the press plays an important role in society's discussion of public affairs).

141. 42 U.S.C.A. § 1973f (West 1994).

142. *Id.*

143. *See Hamer v. Ely*, 410 F.2d 152, 156 (5th Cir. 1969) (noting that voters may request a federal observer to be with them in the voting booth to monitor the quality of assistance being provided); *see also United States v. Executive Comm. of the Democratic Party*, 254 F. Supp. 543, 546 (N.D. Ala. 1966) (finding that the purpose of a federal observer is "to observe and report back any corrupt practices which prevent persons certified as eligible voters from casting a ballot and having their votes counted").

attend polling places on their own; the Attorney General must assign them to particular polling places. Additionally, federal observers have no inherent right to be present at a given polling place.¹⁴⁴ State statutes may further restrict the persons permitted at polling places in order to prevent interference with the voting process through delay, intimidation or any other method.¹⁴⁵

It would be difficult for an observer to visit the many sites where casting ballots over the Internet may occur, such as inside a voter's home. However, the observer statute only authorizes observers for a "place for holding an election,"¹⁴⁶ so perhaps the statute only applies to polling places set up and run by the government. Furthermore, the policy behind allowing observers may not require such an action.¹⁴⁷ First, as to the need for an observer to offer unbiased assistance to the illiterate, it would be extremely difficult for an illiterate person to utilize a computer keyboard and read the ballot on a computer monitor. The illiterate voter would always have the option of using the observers and assistance available to him or her at the traditional polling facility. Second, regarding the issue of disenfranchisement, the electronic voting system may be treated like absentee ballots, which are valid in a majority of states,¹⁴⁸ and no observer is required to observe the marking of an absentee ballot.¹⁴⁹ Third, the observer could monitor the computer's main terminal, where the web pages and voting programs are stored. This would likely satisfy the proper tabulation requirement. These further policy considerations may not be necessary because the observer statute¹⁵⁰ could be narrowly construed to only apply to traditional walk-in polling places. Thus, observer statutes would not apply to a privately owned computer center, or an individual's computer at work.

H. Write-In Votes

Many jurisdictions make provisions allowing voters to write in names of their preferred candidates when those candidates' names are not currently on the

144. 42 U.S.C.A. § 1973f (West 1994); cf. *Executive Comm. of the Democratic Party*, 254 F. Supp. at 546-47 (noting that an illiterate voter may request the presence of a federal observer while he casts his ballot, and such request must be granted only if an observer is available).

145. See, e.g., ARIZ. CONST. art. 7, § 12 (stating that "there shall be enacted registration and other laws to secure the purity of elections and guard against abuses of the elective franchise"); *Phoenix v. Superior Court*, 419 P.2d 49, 50 (Ariz. 1966) (noting that the purpose of the statute is to prevent interference with officials who are handling voters and to prevent delay or intimidation of voters).

146. 42 U.S.C.A. § 1973f (West 1994).

147. See *supra* note 143 and accompanying text (describing the purposes behind observer statutes).

148. See, e.g., CAL. ELEC. CODE § 3021 (West 1996) (describing absentee voting procedures); MICH. COMP. LAWS. ANN. §§ 168.7580168.769a (West Supp. 1998) (focusing on the casting of absentee votes).

149. See 42 U.S.C.A. § 1973ff-2e (West 1994) (failing to set forth a requirement for observers for absentee ballots); 42 U.S.C.A. § 1973f (West 1994) (providing only for observers at "any place for holding an election" or "any place for tabulating votes").

150. 42 U.S.C.A. § 1973f (West 1994).

ballot.¹⁵¹ Blank spaces are usually left on the ballot so that a voter may write in the name of the candidate of his or her choice.¹⁵² Conversely, some jurisdictions forbid write-in votes altogether.¹⁵³ The Supreme Court has validated this second option, holding that a prohibition on write-in votes does not unconstitutionally burden the right to vote when there is sufficient access to the ballot otherwise.¹⁵⁴ Overriding concerns, such as avoiding unrestrained factionalism and "party raiding"¹⁵⁵ outweigh the voters' interest in the right to write in his or her candidate of choice.¹⁵⁶

It seems clear, therefore, that a ballot need not necessarily make provisions for write-in votes, unless a State mandates that write-in votes be provided.¹⁵⁷ Where state statutes direct that voters be allowed to write in their candidate of choice, the Internet ballot would have to include a box for the users to type in the name of their preferred candidate, allowing this information to be transmitted along with the voter's other selections. The on-line ballot would likely make compilation of write-in votes easier, since a software program may be able to tabulate the number and content of write-in votes with less turnaround time than traditional hand-written responses.

151. See, e.g., CAL. ELEC. CODE § 14321 (West 1996) (stating that "[a] vote for a candidate or person whose name is not printed on the ballot may be cast by writing in a name for that office in the blank space left for that purpose"); see also MICH. COMP. LAWS ANN. § 168.782a (West 1989) (covering the procedure for write-in votes, for any candidate in any election).

152. E.g., CAL. ELEC. CODE § 14321 (West 1996); MICH. COMP. LAWS ANN. § 168.782a (West 1989).

153. See, e.g., Board of Supervisors v. Blunt, 87 A.2d 580, 581 (Md. 1952) (holding that under Maryland election law, there is no right to write in votes at a primary election).

154. See *Burdick v. Takushi*, 504 U.S. 428, 436-37 (1992) (holding that Hawaii's prohibition on write-in voting presented no unconstitutional burden on the right to vote under the First and Fourteenth Amendments since the State provided three alternative mechanisms by which a voter's candidate of choice may appear on the ballot).

155. See *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973) (defining party raiding as a situation where voters "in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary").

156. See *Burdick*, 504 U.S. at 439-40 (finding that a state's legitimate interest in avoiding party raiding and factionalism are sufficient to outweigh the burden that a ban on write-in voting imposes).

157. See *supra* notes 154-56 and accompanying text (describing constitutionally permissible limitations upon write-in votes).

IV. CURRENT AND PROPOSED ALTERNATIVES TO TRADITIONAL BALLOT BOX VOTING

A. Current Alternative Voting Systems

1. All-Mail Ballot Elections

Several states currently offer an all-mail election alternative, whereby ballots are automatically sent to every registered voter in the jurisdiction.¹⁵⁸ Mail ballots are then returned either by mail or in person.¹⁵⁹ The rationale behind the mail-in elections is to increase voter accessibility and participation, and to decrease costs¹⁶⁰ associated with running the traditional polling place.¹⁶¹

Many of the advantages of all-mail voting would also apply to Internet voting. An electronic ballot would eliminate the need to find accessible polling places and to recruit and train poll workers. It is likely that an Internet voting system would increase voter turnout.¹⁶² Computerized vote counting would increase accuracy and efficiency.¹⁶³ However, many of the concerns regarding all-mail voting apply to the Internet system as well, including fears over a lack of secrecy,¹⁶⁴ voter fraud, intimidation, and the loss of a sense of community that is created when voters meet at their polling place.¹⁶⁵

2. Voting by Telephone

Phone-in voting has distinct advantages, most of which are economic. A regular election costs almost \$13 per vote, whereas phone-in voting is estimated to cost 25

158. See Letter from Mary M. Janicki, Principal Analyst, *Connecticut General Assembly Office of Legislative Research* (Dec. 4, 1995) (copy on file with the *McGeorge Law Review*) (noting that Oregon is the first state to have offered an all-mail election for a U.S. Senate seat, and that "since 1977, local jurisdictions in Alaska, California, Colorado, Florida, Kansas, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Oregon, Utah and Washington have conducted all-mail elections"); see, e.g., CAL. ELEC. CODE § 4108 (West 1997) (stating that "a district may . . . conduct any election by all-mailed ballots"); FLA. STAT. ANN. § 101.6102 (West Supp. 1998) (describing the conditions under which an all-mail ballot election may be conducted).

159. Letter from Mary M. Janicki, *supra* note 158.

160. See *id.* (stating that Washington found a 10% decrease in costs when utilizing all-mail elections).

161. *Id.*

162. See *id.* (noting that Oregon found a 10% increase in voter turnout with all-mail voting, but in Colorado, when school issues or candidates were on the ballot, all-mail and in-person voting turnouts were equal). Washington, in fact, found a 53.2% response with all-mail ballots as opposed to 38.3% for traditional ballot methods. *Id.* California doubled their voter turnout when using an all-mail ballot. *Id.*

163. See *id.* (noting that uniform, centralized ballot counting could be performed without the need for individual precinct counts).

164. See *id.* (quoting the Federal Election Commission as saying "all-mail ballot procedures are 'at least as fraud-free as polling place and absentee ballot procedures'").

165. *Id.*; see also *supra* note 164 and accompanying text (discussing the problems with all-mail voting).

to 75 cents per vote, and perhaps even less in the future.¹⁶⁶ The registered voters of Boulder, Colorado recently decided whether to allow themselves the right to vote by telephone in future elections.¹⁶⁷ This petition would have amended the City Charter's definition of "voting machines" to include the telephone.¹⁶⁸ However, the petition was defeated, 59% to 41%.¹⁶⁹ The voters were apparently deterred by fears over technical and security issues relating to the telephone system, possibly due to a lack of adequate voter education about the new system.¹⁷⁰

Several problems and subsequent solutions to the voting-by-phone system also apply to the Internet voting system. The issue of voter fraud still exists. How does one ensure that the person voting over the Internet is who they claim to be?¹⁷¹ By analogy, an examination of current absentee ballot procedures is helpful. Absentee ballots have been used for years, and one study indicates almost no fraud or abuse exists in this all-mail system of voting.¹⁷² Furthermore, secondary security systems such as passwords or user identification systems may be used to ensure the reduction of voter fraud.¹⁷³ If a password access system is used, how would a voter be informed of his or her code? One author has suggested that the voter be required to retrieve the code in person at the office of elections, thereby verifying that the person receiving the code is the one using the code, perhaps with special exceptions for the handicapped or disabled.¹⁷⁴

Phone voting, compared to Internet voting, is less appealing because it is much less interactive in nature. There are no graphics which could help guide a user through the process; instead there are only handwritten or audible instructions which guide the voter through the appropriate buttons to push on a telephone.¹⁷⁵ With the Internet system, detailed pictures and text could accompany the ballot, perhaps making it easier to use than traditional punch cards. Voting by phone does

166. See Letter from Kevin Murray, Assemblyman, 47th District, *Fact Sheet AB 44 (K. Murray) "Digital Electoral System: Electronic Voting"* (copy on file with the *McGeorge Law Review*) (describing the purposes behind a bill proposing a digital electoral system).

167. *Voting by Phone Petition* (visited July 2, 1998) <<http://www.vote.org/v/petition.htm>> (copy on file with the *McGeorge Law Review*); see Mary George, *Vote-by-Phone Measure on City's November Ballot*, DENV. POST, Oct. 13, 1993, at 3B (discussing Question D on the November 2, 1993 Boulder City Ballot, the "Voting by Phone Initiative").

168. *Voting by Phone Petition* (visited May 29, 1998) <<http://www.vote.org/v/petition.htm>> (copy on file with the *McGeorge Law Review*).

169. *1993 Voting By Phone Ballot Issue* (visited Jan. 9, 1998) <<http://www.vote.org/v/93elect.htm>> (copy on file with the *McGeorge Law Review*).

170. *Id.*

171. See *infra* Part V.A.1-2 (discussing possible solutions to the security issues presented by voting that is not performed in person).

172. *Answers to the Boulder County Clerk's Concerns on Phone Voting* (visited Jan. 9, 1998) <<http://www.vote.org/v/clerkcon.htm>> (copy on file with the *McGeorge Law Review*).

173. See *infra* notes 222-25 and accompanying text (noting potential security issues from an electronic voting system).

174. *Answers to the Boulder County Clerk's Concerns on Phone Voting* (visited Jan. 9, 1998) <<http://www.vote.org/v/clerkcon.htm>>.

175. See *id.* (stating that a sample ballot is provided with a phone voting system, along with written instructions).

have the advantage of accessibility because most individuals have a phone, and not everyone has a computer. However, with computer use on the rise, and Internet access via television, this may not hold true for long.

B. Proposals for New Voting Systems

1. Minnesota

Minnesota has recently proposed legislation to study computerized voting.¹⁷⁶ This bill states in part that,

[T]he Secretary of State shall study the feasibility of voting by means of the Internet or some other computerized system. Outside consultants may be used in completing the study. Among issues that must be addressed in the study are: (1) security; (2) voter registration; (3) maintenance of voter databases; (4) implementation cost; and (5) cost of elections after implementation.¹⁷⁷

Although the bill is still under consideration by the Election Laws Committee, this study could be the first of its kind, and would be a significant step towards a computerized voting system.¹⁷⁸

2. California

In 1997, California legislator Kevin Murray introduced legislation to create a task force to study a "Digital Electoral System," also known as "Electronic Voting."¹⁷⁹ This bill reads in part that the "digital electoral system may include the collection, storage, and processing of electronically generated and transmitted digital messages to permit any eligible person to register to vote, sign any petition, and vote in any election, including applying for and casting an absentee ballot."¹⁸⁰ The following factors are to be considered by the task force: (1) the cost of developing a digital electoral system, including "hardware, software, network resources, and training for . . . staff;" (2) the legal changes necessary to implement

176. S.B. 350, 80th Leg., 1st Spec. Sess. (Minn. 1997).

177. *Id.*

178. *Id.*; *Minnesota State Legislature, Status of S.B. No. 350 in Senate: 80th Legislative Session (1997-1998)* (visited Jan. 8, 1998) <<http://www.revisor.leg.State.mn.us>> (copy on file with the *McGeorge Law Review*).

179. AB 44, 1997-98 Leg. (Cal. 1997); see *Wilson Vetoes Tech Voting: Bill Would Have Allowed Internet Ballots*, SACRAMENTO OBSERVER, Oct. 29, 1997, at G6 (reporting that Governor Wilson vetoed AB 44, but directed the Secretary of State to study the possibilities of voting via the Internet or other available technology).

180. AB 44, *supra* note 179.

the system; (3) the digital electoral system's impact on voter participation rates and accessibility; and (4) the concerns about undue influence and coercion.¹⁸¹

This measure would in effect create a task force for the purpose of determining whether it is socially, economically and technologically feasible for voters to cast their ballots via the Internet.¹⁸² However, this bill was vetoed by California Governor Pete Wilson on October 13, 1997.¹⁸³ The Governor commented that "the use of such a system will compromise voter confidentiality and generate significant opportunities for fraud," and that "the use of two systems would complicate voter verification procedures, further compromising the electoral process."¹⁸⁴ He went on to note that without a guarantee of a "completely safe, tamper-proof system," such a study is premature.¹⁸⁵ Although these concerns are legitimate, further research, such as the proposed task force, may indeed show that an electronic voting system is an idea whose time has come. Especially with the advent of banking and other secure on-line transactions, security concerns continue to diminish. The Governor's veto is under consideration by the legislature for a possible override.¹⁸⁶ The bill received a fair amount of support prior to being vetoed, and although the veto was not overridden, someday California may find itself again on the frontier of digital voting.¹⁸⁷

3. Florida

The Florida Secretary of State, in conjunction with the Florida Department of Elections, plans to provide voting via the Internet for the 1998 elections.¹⁸⁸ Initially, only absentee ballot voting will be available over the Internet, and only for overseas military and civilian voters.¹⁸⁹ If successful, Florida will be the first state in the country to allow Internet voting.

181. *Id.*

182. Letter from Kevin Murray, Assemblyman, *supra* note 166.

183. *See supra* note 179 and accompanying text (noting that Governor Wilson vetoed AB 44, but left open the possibility that an electronic voting system would be studied pending advances in encryption technology).

184. AB 44 Veto, 1997-98 Leg. (Cal. 1997).

185. *Id.*

186. *See* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 44, at 1 (June 24, 1997) (stating that the Assembly has taken the Governor's veto under consideration).

187. *See id.* (stating that the Assembly vote on AB 44 was 48 in favor and 24 in opposition, and that the Senate support was 21 to 14); *see also* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 44, at 1 (Jan. 5, 1998) (indicating that the veto "must be considered on or before March 5, 1998, pursuant to Joint Rule 58.5" in order to be overridden, and that this deadline was not met).

188. Division of Elections, Fla. Dept. of State, *Mortham Announces Pilot Program for Voting on the Internet* (last modified Oct. 30, 1997) <<http://election.dos.state.fl.us/whatsnew/netvotpr.htm>> (copy on file with the *McGeorge Law Review*) [hereinafter *Pilot Program*]; *see* Margaret Talev, *Test Will Hurl Florida Into Realm of Cyber-Voting*, TAMPA TRIB., Oct. 31, 1997, at 1 (noting that Secretary of State Mortham is confident that new technology will allow secure and fraud-free voting, and thus is proposing Internet voting for overseas residents in next year's general election).

189. *Pilot Program*, *supra* note 188.

The new plan was described as follows:

Under Mortham's new voting initiative, an overseas voter will request an authorization to vote via the Internet. Upon receipt of this authorization, the voter will complete a virtual ballot on their computer terminal. The virtual ballot will accurately reflect only those candidates that made the second primary, thereby eliminating the possibility that these voters will cast incorrect votes. The vote will be registered instantly with the supervisor of elections without the present fear of loss in overseas mail.¹⁹⁰

Only certain counties will initially participate in this new project, but this development is sure to be watched by many elections supervisors around the nation.¹⁹¹

4. Military Vote

Currently, the Department of Defense is attempting to develop a voting system that would allow troops to vote in general elections via computer over the Internet.¹⁹² The plan is to have the system ready for use in November of 1998.¹⁹³ As to security, a non-profit public policy organization studying the problem concluded that PIN numbers, electronic signatures and encryption of all voting transmissions could all help to protect voters' privacy and to prevent fraud.¹⁹⁴ With successful use of Internet voting by the military, transition into general civilian use may be the next step.

C. Computerized Voting Systems In Use Today

Universities are currently experimenting with student government elections via school computer networks.¹⁹⁵ In a recent election at the University of Virginia, election turnout for student government positions nearly doubled over last year's

190. See *id.* (noting overseas voters' special needs and utilizing the Internet as a solution).

191. See *id.* (noting that counties and their elections supervisors will be selected to participate in this initiative in late Spring, 1998).

192. See *New System Might Net Military Vote*, GREENSBORO NEWS & REC., Dec. 28, 1997, at A2 (detailing the Defense Department's plan to develop a system whereby military personnel could vote in the November, 1998 elections via the Internet); Scott Thomsen, *Mobile Soldiers May Soon Be on the Front Lines of Computer Voting*, HOUSTON CHRON., Dec. 28, 1997, at A6 (reporting that a soldier could log onto the Internet to cast his or her vote).

193. See *Pilot Program*, *supra* note 188 and accompanying text (stating that a soldier could log onto the voting system and cast a vote).

194. *New System Might Net Military Vote*, *supra* note 192, at A2.

195. See, e.g., J.C. Luckey, *The Cavalier Daily*, March 5, 1997 News (visited Nov. 6, 1997) <<http://www.cavalierdaily.com/Archives/1997/March/5/nselect.html>> (copy on file with the *McGeorge Law Review*) (describing a new on-line voting system at the University of Virginia).

elections in only one day's time.¹⁹⁶ Students reported that they enjoy using the computerized system for a variety of reasons, including convenience, simplicity and the fact that they could check a candidate's position while on-line.¹⁹⁷ Although campus-wide elections do not necessarily require the stringent security procedures that a governmental election would, experimentation and acceptance of electronic voting could nonetheless prove to be the new training ground for computerized voting.

V. PRACTICAL CONSIDERATIONS FOR THE INTERNET VOTING SYSTEM

A. Verification of Votes

1. Electronic Signatures

In the event the reader begins to ponder the likelihood of America embracing the use of such "high technology" in the voting process, consider that people were once afraid of conducting serious business with a typewriter.¹⁹⁸ The Internal Revenue Service has recently begun accepting electronic signatures,¹⁹⁹ autographed using a digital pen,²⁰⁰ for tax returns filed electronically.²⁰¹ In fact, many federal offices, such as the Food and Drug Administration, allow for the use of electronic signatures.²⁰²

New companies such as PenOp²⁰³ and ApproveIT²⁰⁴ have designed systems which allow the user to sign any document electronically by using a digitizer and a special pen.²⁰⁵ Generally, an electronic signature is generated when a user picks up a special pen and signs her autograph on a digitizer pad that is attached to the

196. See *id.* (noting that with Internet voting, 2,744 students cast ballots in two days of voting, while with three days of in-person voting last year, 2,339 students voted).

197. *Id.*

198. See *Electronic Signatures: Are They Worth The Paper They Aren't Printed On?* (visited Jan. 4, 1998) <<http://www.fipsco.com/fipscowp/electron.htm>> (copy on file with the *McGeorge Law Review*) [hereinafter *Electronic Signatures*] (commenting that people were once afraid that one could no longer identify who really wrote a typewritten document versus a handwritten document).

199. See *infra* notes 205-09 and accompanying text (describing electronic signatures).

200. See *infra* notes 209-10 and accompanying text (discussing digital pens).

201. *Electronic Signatures*, *supra* note 198.

202. See *Silanis Technology: Press Releases* (last modified Dec. 3, 1997) <http://www.silanis.com/press1.htm#ApproveIT_3.5> (copy on file with the *McGeorge Law Review*) (stating that many Federal organizations allow for electronic submission of documentation, including the FDA).

203. See *PenOp Product Info* (visited Jan. 4, 1998) <<http://www.penop.com/product.htm>> (copy on file with the *McGeorge Law Review*) [hereinafter *PenOp*] (describing new product software and hardware which captures electronic signatures).

204. See *Silanis Technology: Welcome* (last modified Dec. 3, 1997) <<http://www.silanis.com/silint.htm>> [hereinafter *Silanis*] (calling the company a developer of "secure, electronic handwritten signatures").

205. For a description of the act of capturing and storing electronic signatures, see generally *PenOp*, *supra* note 203; *Silanis*, *supra* note 204; Benjamin Wright, *Signing Tax Returns With a Digital Pen* (last modified May 30, 1996) <http://www.infohaus.com/access/by-seller/Benjamin_Wright/HIDDEN.IRS.free.html>.

user's computer.²⁰⁶ Computer software, such as PenOp or ApproveIt, captures a bitmap²⁰⁷ image of the digital signature, and records measurements such as the speed, angle and loops made when the user signs her name.²⁰⁸ These electronic signatures can be verified with a signature on file, ensuring that the signature of the person on-line matches the signature of the person who registered to vote.²⁰⁹

Each personal computer must be equipped with a digitizer and a special pen in order to use the electronic signature system, a requirement that would possibly delay or limit the implementation of electronic voting.²¹⁰ However, as more and more transactions are performed over the Internet, the common use of digital pens and scanners may not be as far-fetched as one might think.

2. Other Technology

As technology moves forward, new software can make the Internet a safer place to transact even the most personal of business.²¹¹ For example, a new software program developed by Visionics scans the user's facial features as a "visual password for computer access."²¹² A video camera and computer software are used to scan a user's face, matching it to a pre-recorded face, and allow access only to authorized users.²¹³ The selling price for "FaceIt" is \$150.²¹⁴ However, new fingerprint logon methods may be even more secure than such face-recognition software.²¹⁵

B. Secrecy

As one court has noted, "[S]ecrecy of the ballot is one of the fundamental civil liberties upon which a democracy must rely most heavily in order for it to survive.

206. See *supra* note 205 and accompanying text (describing the process by which an electronic signature is created).

207. See THOMAS WRONA & ELISABETH PARKER, BUILD A WEB SITE IN A DAY 313 (1997) (defining "bitmap" as a representation of an image as an array of digital information).

208. *PenOp*, *supra* note 203; *Silinas*, *supra* note 204.

209. See Wright, *supra* note 205 (describing the "Signature Authentication Code" which "authenticates a captured signature as the true and genuine online signature of its owner and guarantees it has not been imitated"); *id.* (noting that most signatures will only be captured, and not verified, as most traditionally handwritten signatures are only kept on file and not verified against an original).

210. See *PenOp*, *supra* note 203 (noting that each client PC must be equipped with a digitizer and an electronic pen); *Silinas*, *supra* note 204 (stating that a pen-based digitizer pad or scanner is necessary to input the signature into digital format).

211. See *supra* Part V.A.1 (describing electronic pens and other technology which assists in making the Internet a more secure place to engage in transactions).

212. David Brindley, *Logging on? Say "Cheese,"* U.S. NEWS & WORLD REP., Oct. 20, 1997, at 59.

213. See *id.* (describing the process of "logging on" using this system).

214. *Id.*

215. See *id.* (stating that "[f]or top-secret files . . . analysts say fingerprint logon methods win hands down").

The compulsory compromise of that secrecy will not be tolerated. . . .”²¹⁶ Beyond legal regulation, voters may be hesitant to cast their ballots if they know their choices can be monitored. In most jurisdictions, a voting machine that fails to preserve the secrecy of the ballot may not be used, and in fact many states’ constitutions provide that the secrecy of voting shall be preserved.²¹⁷ For example, California’s Constitution requires that “[v]oting shall be secret.”²¹⁸ Thus, any new electronic voting system must be sufficiently secure and secret to comply with these types of statutes and constitutional provisions.²¹⁹

Furthermore, if the private market is any indication, security and secrecy via computer may not be as far off as one might think. In fact, on-line banking transmits billions of dollars around the world every day, even without written signatures.²²⁰ As one author has noted, “When you need it, security happens.”²²¹

C. Security

Evan Ravitz, director of the Voting by Phone Foundation, has proposed a method of securing electronic voting systems.²²² Those who vote electronically will be notified of the order in which they voted (for example, “you were voter number 267”). Then the results of each choice in the election will be printed in the newspaper along with the number, so that everyone’s vote is confirmed, while secrecy is maintained.²²³

Many advocates of electronic voting note that there are no perfect voting systems. In fact, our current system of voting is open to fraud as well.²²⁴ In May of 1995, a Denver television station reporter easily registered a dog, a cat and a dead person to vote.²²⁵ One telecommunications expert has stated that “[t]here is absolutely no doubt in my mind that electronic voting would be as safe as electronic banking and at least as safe as the voting system we now use.”²²⁶ Furthermore, Roy Saltman, an elections systems expert for the National Institute for Science and

216. *United States v. Executive Comm. of Democratic Party*, 254 F. Supp. 543, 546 (N. & S.D. Ala. 1966).

217. *See, e.g.*, CAL. CONST. art. 2, § 7 (stating simply that “[v]oting shall be secret”); FLA. STAT. ANN. §101.041 (West 1982) (mandating that “voting shall be by secret, official ballot”).

218. CAL. CONST. art. 2, § 7.

219. *See supra* notes 217-18 and accompanying text (identifying examples of state laws and constitutional requirements that the election ballot remains secret).

220. Lindsey McWilliams, *Online Voting is Around the Corner*, J. OF THE CAL. ST. ASSEMBLY OF COUNTIES, Jan.-Feb. 1995, at 22.

221. *Id.*

222. Evan Ravitz, *Voting by Phone Security* (last modified July 22, 1993) <<http://www.vote.org/v/secure.htm>> (copy on file with the *McGeorge Law Review*).

223. *Id.*

224. *Id.*

225. *Id.*; *see* Mark Eddy, *Vote Chief Furious Over TV Story*, DENV. POST, May 2, 1995, at B2 (noting that the reporter and her crew falsely registered at least 15 times, including registering a dog, a cat, a dead person and a 3 year old child).

226. *See* Ravitz, *supra* note 222 (quoting Dr. Joseph Pelton, Director of Interdisciplinary Telecommunications, University of Colorado).

Technology, says that we should at least give electronic voting methods a try, and see just what problems occur, if any.²²⁷

D. System Failure

When using any type of voting machine, equipment failure is always a concern. However, when using a computer, the possibility of either the main computer terminal malfunctioning or the web site not running properly is of notable concern, particularly because extensive technical knowledge is often required to fix such problems. Will a possible system breakdown during voting prohibit the election from occurring altogether, or will contingent plans save the electronic election?

For traditional polling methods, courts have been hesitant to extend polling hours because of mechanical failure.²²⁸ However, most election statutes provide for emergency hours or other alternatives in the event of serious problems of gaining access to the polls.²²⁹ With Internet voting, since it would be merely a supplementary system, in the unlikely event of a system failure, the traditional polling places would still be available. Additionally, backup computers and web sites could be made available to ensure that problems would not affect voter access to the web site. Furthermore, web voting could be open for a week, instead of one day, thereby ensuring the voters access even if the system were to fail during a portion of that time.

VI. DESCRIPTION OF THE PROPOSED INTERNET BALLOT²³⁰

The electronic ballot would be similar in structure to a traditional ballot in most regards. However, instead of using punch cards to indicate an affirmative vote for a candidate, an electronic check box would likely be used. This would allow a voter to indicate an affirmative vote for a candidate by clicking on the box next to that candidate's name. The vote would then be confirmed with a computer generated question such as "Are you sure you want to vote for candidate X?" Then the voter could either confirm or cancel his or her vote.

227. See *id.* (quoting Roy Saltman regarding voting by phone as saying, "I don't see any problem with trying it.").

228. See, e.g., *Southerland v. Fritz*, 955 F. Supp. 760, 761-62 (E.D. Mich. 1996) (denying plaintiff's request for an injunction where malfunctioning of new polling machines caused excessive delays at polling places). In *Southerland*, delays were caused at polling places due to the malfunctioning of new polling machines. *Id.* at 761. Plaintiffs then sought an injunction to allow the polls to remain open for three hours longer. *Id.* at 760-61. However, the court did not grant plaintiff the injunction, especially since there was an emergency procedure the municipality is specifically required to follow in the event of a machine breakdown. *Id.* at 762.

229. See, e.g., FLA. STAT. ANN. § 101.40 (West 1982) (requiring, in the event of a breakdown of a voting machine, additional voting machines to be brought in, or if no additional machines are available, for unofficial paper ballots to be utilized instead); N.Y. ELEC. LAW § 7-120 (Michie 1998) (requiring emergency ballots to be used for the taking of votes in the event of voting machine breakdown); S.D. CODIFIED LAWS § 12-2-4 (Michie Supp. 1998) (stating that in case of mechanical failure of a voting machine, the polling hours may be extended).

230. *Infra* app.

Links could also be placed upon the candidates' names or the referendum numbers in order to send the voter to a page with information about the candidates or the proposed legislation, thereby increasing the likelihood of educated votes.

VII. CONCLUSION

As Internet voting grows in appeal, specific proposals for new web sites will emerge. Many revisions are likely to occur, but in the end, a new, improved, easier to access and more intelligent ballot may prevail. Federal and state elections laws, not tailored or constructed with an electronic voting system in mind, currently pose legal obstacles to the implementation of Internet voting.²³¹ However, these laws are not so inflexible as to bar the use of the electronic ballot.²³² Careful scrutiny and revision of state as well as federal election law will ensure that a State attempting to implement the electronic voting system will face as few legal impediments as possible.²³³ As far as links on the ballot are concerned, States may find that they should keep the voting ballot separate from sources of political information for policy reasons.²³⁴ Users of the Internet are likely savvy enough to locate one of the many web sites containing candidate information before they cast their ballots. It has never been seen as a State's role to provide political propaganda to voters, especially at the time they are casting their votes.²³⁵

As the Internet becomes less of an exclusive club, and more of a means of transacting business and interacting with persons and corporations, performing tasks such as voting will become more and more likely.²³⁶ Critics may wonder what the lack of community interaction at the polling places will do to society, but the broader social issue stems from the use of the computer in general, and not just in the voting arena. Banking transactions, product purchases and communicating with loved ones are all being performed over a computer.²³⁷ If society accepts these as viable options, then electronic voting, with the benefit of increased voter turnout and convenient accessibility, will be the next trip on the information superhighway.²³⁸

231. See *supra* Part III.B.4 (discussing current state statutes and their effect on the implementation of an Internet ballot).

232. See *supra* Part III.B.4 (noting that the Internet ballot may be structured so as to permit its use as an electronic voting system).

233. See *supra* Part III.B.4 (discussing potential pitfalls and solutions in the creation of an electronic ballot box).

234. See *supra* Part III.F (discussing links and the potential concerns they may present).

235. See *supra* note 119 and accompanying text (discussing the role of elections in the political process).

236. See *supra* notes 44-49 and accompanying text (describing current transactions being performed over the Internet).

237. See *supra* notes 43-49 and accompanying text (detailing the many types of transactions currently being performed over the Internet).

238. See *supra* notes 162-63, 195-97 and accompanying text (noting potential advantages from the computerization of ballot voting).

APPENDIX

The November 1996 Election Ballot

ESPAÑOL

FRANÇAIS

DEUTSCH



District 5 Candidates

Please select one candidate from each category
by clicking in the circle next to the candidate's name.

President

<u>Bill Clinton</u> (Democrat)	<input type="radio"/>
<u>Bob Dole</u> (Republican)	<input type="radio"/>
<u>Ralph Nader</u> (Green)	<input type="radio"/>
<u>Ross Perot</u> (Reform)	<input type="radio"/>

Congress

<u>Robert Matra</u> (Democrat)	<input type="radio"/>
<u>Robert Plamondon</u> (Republican)	<input type="radio"/>
<u>Joseph Miller</u> (Libertarian)	<input type="radio"/>

State Senate

<u>Patrick Johnston</u> (Democrat)	<input type="radio"/>
<u>Kurt Pearce</u> (Republican)	<input type="radio"/>

State Assembly

<u>Eileen Burke-Trent</u> (Democrat)	<input type="radio"/>
<u>Thomas Oller</u> (Republican)	<input type="radio"/>

Ballot Propositions

	Yes	No
<u>207 Frivolous Lawsuits</u>	<input type="radio"/>	<input type="radio"/>
<u>210 Minimum Wage</u>	<input type="radio"/>	<input type="radio"/>

Start Over

Submit Your Ballot



The November 1996 Election Ballot

District 5 Candidates

Please confirm your choices below.
You have chosen to vote for:

President

Ralph Nader (Green)

Congress

Joseph Miller (Libertarian)

State Senate

Kurt Boese (Republican)

State Assembly

Eileen Burke-Trent (Democrat)

Ballot Propositions

207 Frivolous Lawsuits Yes

210 Minimum Wage No

Start Over

Submit Your Ballot

