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Allison A. Stacker

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**Comment: Cyber-Elections and the Minority Voter's
Response**

*Allison A. Stacker*¹

I. Introduction

At first thought, Internet voting seems like an inexpensive, convenient and accurate platform for the election process. Given the current inadequacies in access to the Internet, however, remote Internet voting could potentially disenfranchise minorities. Internet voting makes voting more convenient for predominantly white voters and creates a bias that hinders minorities' full participation in the election process.

Many argue that Internet voting would not result in inequalities because it would only be supplemental to traditional voting methods.² Some also suggest that any device that improves overall voter turnout generally, necessarily improves voter turnout of minorities.³ Statistical data of racially disparate Internet access, however, proves that the digital divide is real and that the use of remote Internet voting, even as a supplement, will actually deny minorities full participation in the political process.⁴

The response to Internet voting presents a difficult dilemma for the civil rights community. Given the benefits of e-voting, namely convenience and efficiency, "litigating to stop such technological progress seems Paul Bunyan-esque."⁵ Litigation, however, may be the only effective short-term strategy.

¹ J.D. Candidate, University of North Carolina School of Law, 2004.

² See generally James P. Nevin, Jr., *Obstacles To Internet Voting: Perceived Problems With Security and "Digital Divide" Vote Dilution*, 6 W.V.A. J. L. & TECH. 2.1 (May 10, 2002).

³ See *id.* at IV. C.

⁴ See *infra* notes 41-64 and accompanying text.

⁵ Jerry Kang, *Symposium: E-Racing E-Lectons*, 34 LOY. L.A. L. REV. 1155, 1157 (2001).

Internet voting could be challenged under section 2 of the Voting Rights Act, which prohibits election procedures that (i) dilute minority votes or (ii) that impede full participation in the election process.⁶ While claims of vote dilution are used more often to challenge voting procedures, the legal argument against Internet voting might be better framed as impeding minorities' participation in elections. Internet voting, or e-voting, could do this by making voting more convenient and accessible to the predominately white, Internet-privileged, at the expense of minorities.

While the civil rights community should consider bringing a claim under the Voting Rights Act, the most important strategies for combating vote dilution are long-term.⁷ The use of information technologies to counter numerical disadvantages must be considered.⁸ Specifically, strategies such as assisted voting sites, Internet campaigns, and Internet language translation present the possibility of using cyberspace to gain greater minority representation.

This article presents an overview of Internet voting in Section II, including the types, methods, benefits and risks of e-voting. Section III focuses on defining and analyzing the current digital divide, including the statistical aspects of e-voting and the digital divide, and then provides the basis for a claim under the Voting Rights Act. Section VI examines how such a claim could be brought under the Voting Rights Act and whether section 2 provides a framework for challenging Internet voting. Finally, this

⁶ See *infra* notes 82-88 and accompanying text.

⁷ RANETA LAWSON MACK, *THE DIGITAL DIVIDE: STANDING AT THE INTERSECTION OF RACE AND TECHNOLOGY* (Carolina Academic Press 2001).

⁸ See Kang, *supra* note 5, at 1158. As Kang explains:

Long term-strategies must focus on why it is that people generally and racial minorities specifically do not vote; they must also explore what to do about the fact that numerical minorities lose big in simple majoritarian 'winner take all' election schemes. These questions and their answers are not uniquely or even especially Internet-specific. Still, the Internet raises the possibility of weakening various linguistic, informational, and attitudinal barriers to voting and making those votes count.

article examines other more effective methods by which minorities could overcome the challenges presented by Internet voting.

II. Overview of Internet Voting

A. Types of Internet Voting

Three types of Internet voting are possible. The first method is Internet voting at traditional polling sites.⁹ At the sites, computer voting machines are connected to the Internet and election officials authenticate voter identifications before casting ballots.¹⁰ The second method is kiosk voting. In this model, voting terminals are located in convenient areas like malls or schools but remain under the control of election officials.¹¹ The third method is remote Internet voting, the casting of ballots in private places such as homes and offices.¹² Remote Internet voting has attracted the most attention and is often considered synonymous with Internet voting. This article focuses strictly on remote Internet voting.

B. Experiments in Internet Voting

During the 2000 elections, a number of states experimented with Internet voting. Arizona held its Democratic primary election over the Internet. Election.com, a New York-based company, conducted the Arizona election in which voters cast ballots from their homes, offices or polling locations.¹³ Voters who used the

⁹ Internet Policy Institute, *Report of the National Workshop on Internet Voting* (March 2001), at <http://www.Internetpolicy.org/research/results.html> (on file with the North Carolina Journal of Law & Technology) [hereinafter Report].

¹⁰ *Id.* at 6.

¹¹ *Id.* at 7.

¹² *Id.* at 6.

¹³ James Ledbetter, *Net Out the Vote: Arizona's Democratic Primary Has Been Hailed as the First Successful Online Election. Will Net Voting Boost Turnout—Or Exacerbate the Digital Divide?* *The Industry Standard* (March 27, 2000), available at

http://www.thestandard.com/article/0,1902,13004,00html?body_page=1 (on file

polls could also cast their vote by paper ballot.¹⁴ Out of 85,970 votes cast in the primary, about half were cast via the Internet from remote locations.¹⁵

Prior to the primary, however, the Voting Integrity Project (“VIP”) challenged Arizona’s Internet election.¹⁶ VIP’s complaint alleged unequal access and discrimination against voters without Internet access.¹⁷ The case was eventually dismissed. The court held that the plaintiffs had “failed to demonstrate that online voting would have a discriminatory effect.”¹⁸

Also during the 2000 presidential primaries, voters in three remote districts in Alaska voted via the Internet in the Republican Party’s straw poll.¹⁹ In the past, it had been difficult for voters in these areas to participate in a straw poll. VoteHere.Net provided the voting technology and sent eligible voters software for installation on their home computers.²⁰ Of the 3,100 voters eligible to participate, only 35 cast votes via the Internet.²¹ The low turnout is attributed to the fact that VoteHere.Net required would be e-voters to download separate software onto their computers.²²

C. Potential Benefits

Internet voting could bring many benefits to the current election process. Primarily, remote e-voting is convenient. People with Internet access, including the disabled and those overseas, can

with the North Carolina Journal of Law & Technology) [hereinafter Net Out the Vote].

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See Nevin, *supra* note 2, at IV. D. (citing William C. Pao, *Are You Voting Online?* (March 22, 2000), at

<http://www.georgetown.edu/users/karolyia/032200wp.html> (on file with the North Carolina Journal of Law & Technology)).

¹⁹ See Net Out the Vote, *supra* note 13.

²⁰ See *id.*

²¹ See *id.*

²² See *id.*

cast votes without leaving home.²³ But the greatest potential benefit of Internet voting would be an increase in voter turnout. With only half of the eligible population voting in the last election,²⁴ voter turnout is an issue of great interest to policymakers. In December 1999, the White House commissioned the National Science Foundation to conduct a study on Internet voting.²⁵ The National Science Foundation, in turn, funded the Internet Policy Institute ("IPI") to conduct a workshop and produce a report on the effects of Internet voting.²⁶ IPI's report reveals that Internet voting would address two perceived causes of low voter turnout: inconvenience and lack of mobility.²⁷ The convenience and mobility that e-voting would bring to the election process could particularly increase participation in some underrepresented groups such as youth, elderly and persons abroad.²⁸

IPI's report further revealed that, to date, in elections conducted over the Internet, there have been signs of increased voter turnout. For example, the 2000 Arizona Democratic primary saw an increase in voter turnout after allowing votes to be cast remotely over the Internet.²⁹

IPI's report, however, also revealed that there are no assurances that Internet voting will increase overall voter turnout.³⁰ Previous changes designed to make voting more convenient, such as voting-by-mail, simpler registration procedures, and extending voting times, had little effect on the numbers of total voters.³¹ The report suggests that other social causes, such as apathy or the

²³ Kristen E. Larson, *Electronic Commerce in the 21st Century: Article Cast Your Ballot.Com: Fulfill Your Civic Duty over the Internet*, 27 WM. MITCHELL L. REV. 1797 (2001) (citing *Voter Registration and Turnout*, Federal Election Commission, at <http://www.fec.gov/pages/96to.htm>).

²⁴ Report, *supra* note 9, at 24.

²⁵ *Id.* at 1.

²⁶ *Id.*

²⁷ *Id.* at 24.

²⁸ *Id.*

²⁹ There was, however, substantial publicity about the Internet election. *Id.*

³⁰ Report, *supra* note 9.

³¹ *Id.*

feeling that voting has little real effect, may contribute more to the decrease in voting than convenience.³²

D. Security and Privacy Issues

Although not the focus of this article, it is important to be aware that Internet voting poses a variety of security and privacy risks. The potential security dangers include hackers, viruses, and denial of service attacks.³³ Poll site and kiosk Internet voting, however, are much less susceptible than remote voting to these attacks because³⁴ election officials can control and supervise on-site use of voting machine software at poll sites and kiosks.³⁵

In addition to potential attacks, opponents of Internet voting are also concerned with voter privacy. Political scientist Rick Valelly believes that "e-voting will transform voting, an inherently public activity[,] into a private one."³⁶ Because remote Internet voting will no longer be publicly monitored, it could lead to the possibility of vote selling and coercion.³⁷ Thus, absent a controlled environment, security and privacy risks associated with remote Internet voting are significant.

³² *Id.* at 24.

³³ *See id.* at 14.

³⁴ *See id.*

³⁵ *See id.*

³⁶ *See* Richard L. Hasen, *Symposium: Internet Voting and Democracy: Introduction*, 34 LOY. L.A. L. REV. 979, 983 (2001) (citing Rick Valelly, *Voting Alone: The Case Against Virtual Ballot Boxes*, NEW REPUBLIC (Sept. 13 & 20, 1999), 21). Valelly also points out that voters will no longer be aware, as they are when they go to the local voting booth, that "we are all equal members of a political community." *Id.* Thus, another drawback of remote Internet voting is the sense of isolation voters may feel stemming from an unawareness of the larger voting community.

³⁷ Valelly, *supra* note 36, at 22.

III. The Digital Divide

A. Introduction

As the Arizona Democratic primary demonstrates, the technology for Internet voting is in place. It will not be long before this technology is readily available as a method of casting ballots.³⁸ When considering the current statistics on the digital divide, however, it is arguable that minority voters will be disenfranchised simply because they do not have access to the technology needed to cast an e-vote. Thus, Internet voting's potential to bring maximum and convenient participation to the election process is limited to the already Internet-connected segment of the population.

If Internet voting were confined to poll sites and kiosks, then the equal access question would be largely resolved. Remote Internet voting could manipulate election outcomes, however, by favoring those already connected to the Internet.

B. Defining the Digital Divide

The phrase "digital divide" has come to represent "any measured difference between the Internet-connected population and the general population at large."³⁹ According to the U.S. Census Bureau, affluent and highly educated adults were more likely to have Internet access at home.⁴⁰ Two-thirds of adults living in the wealthiest households used the Internet at home compared with only fourteen percent living in low-income households.⁴¹ Moreover, race was a significant factor in determining who had Internet access. The proportion of Asians

³⁸ See Mack, *supra* note 7, at 143 (arguing that Internet voting will soon be a viable and secure voting system).

³⁹ R. Michael Alvarez & Jonathan Nagler, *Symposium: The Likely Consequences of Internet Voting for Political Representation*, 34 LOY L.A. L. REV. 1115, 1128 (2001).

⁴⁰ Eric C. Newburger, *Home Computers and Internet Use in the United States: August 2000*, CURRENT POPULATION REPORTS (on file with the North Carolina Journal of Law & Technology) [hereinafter Census].

⁴¹ *Id.* at 7.

and Whites using the Internet at home is more than double that of African American adults.⁴² Latinos had even lower home Internet access.⁴³

Though simple economics helped determine which segments of the population have Internet access, race seems to be a greater indicator.⁴⁴ Combining the factors of economics and race provides an even greater disparity, for among those with incomes of \$20,000 or less, Whites are five times more likely to have Internet access at home than Latinos and African Americans.⁴⁵

Presently, the disparities in Internet access are palpable and real, with African Americans and Latinos on the losing side of the digital divide. Proponents of Internet voting, however, present some evidence that the digital divide is narrowing.⁴⁶ As one scholar points out, "[M]inorities without Internet access at home can increasingly access the Internet at public libraries, cyber-café's, schools, shopping malls, and other public places."⁴⁷

Although the Internet is becoming more accessible in *public places*, this does little to lessen the dilutive effect of *remote* Internet voting. There seems to be little difference between driving to a public polling site to cast an e-vote and driving to a public polling place to cast a paper ballot. Internet voting threatens minority voting rights because voting becomes so much more convenient for those with access in their homes and offices.

Furthermore, many scholars suggest that the digital divide has been defined too narrowly.⁴⁸ Using the term to simply

⁴² *Id.* at 8.

⁴³ *Id.*

⁴⁴ See Deborah Phillips, *Is Internet Voting Fair?*, NETWORK WORLD, June 26, 2000, at <http://www.hwfusion.com/columnists/2000/0626faceno.html> (on file with the North Carolina Journal of Law & Technology).

⁴⁵ See *id.*

⁴⁶ Jerry Kang sets forth the following evidence to illustrate the narrowing of the digital divide: In August 2000, 51% of American households owned a computer, and 41.5% had access to the Internet. Just two years earlier, 42.1% of American households owned a computer and 26.2% had access to the Internet. See Kang, *supra* note 5, (citing USIC's Report on Use & Threats in 1999, at 5, available at <http://www.usic.org/papers/stateoftheinternet99.htm>).

⁴⁷ See Nevin, *supra* note 2, at IV. B.

⁴⁸ See LISA J. SERVON, BRIDGING THE DIGITAL DIVIDE, TECHNOLOGY, COMMUNITY, AND PUBLIC POLICY (Blackwell Publishing 2002).

describe the haves and have-nots of Internet access may not really describe the problem.⁴⁹ The digital divide is, in reality, much more complex than a mere lack of computers.⁵⁰ The divide remains between those who have the resources, education and skills to reap the benefits of computer access and those who do not.⁵¹ Thus, full participation in an Internet election may take more than simply providing access to computers. It would require the training necessary for people to become fully functioning members of the digital community.

C. Internet Voting and the Racial Composition of the Electorate

Just because America is a digitally divided nation does not necessarily mean that Internet voting would change the racial composition of the electorate. Perhaps the same segments of the population that presently vote in traditional elections would continue to do so at their current rates in Internet elections. If current voting patterns remained stable after the introduction of Internet voting, then issues of access and disenfranchisement would become moot.

To determine whether Internet voting would change the racial composition of the electorate, more sophisticated analysis is needed. Michael Alvarez and Jonathan Nagler examined the differences between (1) the population of American adults; (2) the Internet-using population; (3) the voting population; and (4) the Internet-using voting population.⁵² Alvarez and Nagler obtained their results by using a 1999 CBS News / CBS Marketwatch.com Internet Poll in which 1,782 telephone respondents were asked a

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ *Id.* Servon defines the three dimensions of the digital divide as follows: (1) access (2) training and computer literacy and (3) content.

⁵² See Alvarez & Nagler, *supra* note 39, at 1129. Alvarez and Nagler categorized a survey respondent as "voting" if the respondent (i) was registered to vote and (ii) actually voted in the 1996 presidential election.

number of questions about Internet use along with background demographic and political questions.⁵³

Of the populations surveyed, 85.7% were white and 8.6% were African American. Most importantly, of the politically active population *with Internet access*, 89.4 percent were white and 4.4 percent were African American.⁵⁴ The increase in the number of Whites and the decrease in the number of African Americans show that the likely audience for Internet voting is skewed toward Whites and away from African Americans.

The turnout statistics of the 2000 Arizona Democratic primary confirm these results. Overall, turnout was low in that primary for both Whites and minorities. The average rate of decrease for minority turnout, however, was five times greater than the average rate of decrease for white turnout.⁵⁵ Alvarez and Nagler thus conclude, "if Internet voting were widely used in American politics, it would change the character of political representation, with some specific groups behind the digital divide . . . losing further political power."⁵⁶

Others believe, however, that the introduction of Internet voting over time will increase minority turnout.⁵⁷ The theory is that since minorities are less likely to vote, any reform that increases voter turnout by making voting more convenient will increase voting among minorities.⁵⁸ Alvarez and Nagler, however, found that those who were already more likely to vote will be the ones who take advantage of easier, cost-efficient methods.⁵⁹ They compare Internet voting to the National Voter Registration Act of 1993 ("Motor Voter"). Motor Voter required every state to give its citizens an opportunity to register to vote when applying for a

⁵³ See *id.*

⁵⁴ See *id.* at 1134. Latinos showed little difference across the four populations. Alvarez and Nagler attribute this to the fact that all four populations are virtually non-Latino.

⁵⁵ See *id.* at 1143. Alvarez and Nagler arrived at this conclusion by comparing the 2000 Democratic Primary with the 1998 statewide Democratic Primary.

⁵⁶ See *id.* at 1148.

⁵⁷ See Nevin, *supra* note 2, at IV. C.

⁵⁸ See *id.*

⁵⁹ See Alvarez & Nagler, *supra* note 39, at 1128.

driver's license.⁶⁰ After analyzing the results of Motor Voter, Alvarez and Nagler note that the "rate at which persons take advantage of the easier voting is higher among the better educated."⁶¹

In addition, failure rates in voting methods will likely affect voter racial composition. Many favor Internet voting because it is predicted to have a lower rate of failure than other voting systems. If Internet voting results in a virtually error-free method, then it will make voting not only more accessible and convenient but more reliable for the Internet-connected.⁶² This result will further exacerbate the already racially disparate situation.⁶³

The evidence presented suggests that remote Internet voting will only aggravate the existing class-bias in American elections. Given the magnitude of the current digital divide, Internet voting "is a reform ripe to be taken advantage of" by the predominantly white Internet-connected population.⁶⁴

IV. Short-Term Strategies and Legal Claims: Internet Voting as a Violation of the Voting Rights Act

A. Introduction

By significantly increasing the convenience of voting for those with Internet access, Internet voting could violate section 2 of the Voting Rights Act by denying groups without Internet access equal participation in the election process.

⁶⁰ See *id.* at 1122.

⁶¹ See *id.* at 1126.

⁶² See Stephen B. Pershing, *Symposium: The Voting Rights Act in the Internet Age: An Equal Access Theory for Interesting Times*, 34 LOY. L.A. L. REV. 1171, 1206 (2001).

⁶³ See *id.*

⁶⁴ See Alvarez & Nagler, *supra* note 39, at 1128.

B. The Voting Rights Act

The Voting Rights Act of 1965⁶⁵ ("the Act") was considered one of the greatest triumphs of civil rights legislation.⁶⁶ The Act bolstered the 15th Amendment's⁶⁷ guarantee that no person shall be denied the right to vote on account of race or color. In particular, section 2 allowed an individual or minority group to bring suit against a jurisdiction that adopted voting laws or practices with the intention of preventing or hindering the right to vote because of race.

Initially, Congress designed section 2 to protect the *physical* opportunity to cast a vote.⁶⁸ In *Allen v. State Bd. of Elections*,⁶⁹ however, the Supreme Court held that dilution of minority votes by an election system is equally as unconstitutional as the traditional physical exclusion of African Americans from polling places.⁷⁰ Thus *Allen* confirmed that section 2 allows a vote dilution claim. Vote dilution is "a claim that votes cast by racial minority voters as a group are mathematically diluted or rendered less effective than the votes of Whites, i.e., that minority voters are deprived of the same chance as Whites to elect their preferred candidates even when every other aspect of the system is 'working,' or delivering to all voters an essentially equal opportunity to participate."⁷¹

In 1982, Congress revised section 2, further extending the Act's coverage. Most importantly, the 1982 amendment removed the requirement that a section 2 claimant prove *discriminatory intent*.⁷² The revised Act provided that *discriminatory effects* of

⁶⁵ Voting Rights Act of 1965, 42 U.S.C. § 1973 (1994).

⁶⁶ See United States Department of Justice Civil Rights Division, *Introduction to Federal Voting Rights Laws*, at <http://www.usdoj.gov/crt/voting/intro/intro.htm> (last revised Feb. 11, 2000) (on file with the North Carolina Journal of Law & Technology) [hereinafter *Introduction to Federal Voting Rights Laws*].

⁶⁷ U.S. CONST. amend. XV.

⁶⁸ See *Introduction to Federal Voting Rights Laws*, *supra* note 66.

⁶⁹ 393 U.S. 544 (1969), *limited by* *Ryder v. United States*, 515 U.S. 177 (1995).

⁷⁰ *Id.* at 569.

⁷¹ See Pershing, *supra* note 62, at 1176-77.

⁷² See *id.* at 1178.

elections are sufficient to sustain a section 2 claim.⁷³ Thus, the Act was revised and expanded to prevent the disenfranchisement of minority voters. Since its inception, the Act has evolved to prohibit many different types of discriminatory tactics, whether subtle or overt.

C. Types of Section 2 Claims

Section 2 defines prohibited acts as any "qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote."⁷⁴ A violation can be proven by showing that minorities "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."⁷⁵

While the statute allows consideration of "the extent to which members of the protected class have been elected to office," it maintains, "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."⁷⁶ Thus, section 2 does not mandate proportional representation and is applied only in those electoral arrangements that substantially impair the ability of minority voters to elect candidates of their choice.

Since the 1982 amendment, the vast majority of cases brought under section 2 have claimed minority vote dilution.⁷⁷ But, as Stephen B. Pershing points out, minority vote dilution is not the only wrong that section 2 prohibits.⁷⁸ Section 2 prohibits denial of equal access to *any aspect* of the election process.

Some section 2 prohibitions other than vote dilution include the following: (1) making polling sites more accessible to white

⁷³ See *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (holding that vote dilution could not be redressed under existing section 2 without proof of discriminatory intent).

⁷⁴ 42 U.S.C. § 1973(a).

⁷⁵ 42 U.S.C. § 1973(b)(a).

⁷⁶ *Id.*

⁷⁷ See Pershing, *supra* note 62, at 1179.

⁷⁸ *Id.*

voters; (2) a jurisdiction's failure to educate minority voters of new voting procedures; (3) failure to provide absentee ballots to minority voters; (4) pollworker harassment of minority voters for spending too long in the voting booth; and (5) failure to help minority voters read or complete a ballot.⁷⁹ What these claims have in common is that they all place unreasonable burdens on the opportunity to participate in the election process.

It is important to understand the difference between the "burden" claims and vote dilution claims. In a burden claim, such as the examples provided above, the procedure *actually interfered* with the voter's ability to participate in the election process.⁸⁰ In a vote dilution claim, however, the procedure does not interfere with the actual casting of the ballot, but rather makes the vote cast less effective than it should have been.⁸¹ Understanding this difference is essential because the burden of proof differs for the two types of section 2 claims.⁸²

D. Burden of Proof for Vote Dilution Claims

The Supreme Court's 1986 decision in *Thornburg v. Gingles*⁸³ is the current legal interpretation for most vote dilution cases.⁸⁴ Before 1986, a plaintiff had to show that the totality of the circumstances in the election process resulted in minority vote dilution.⁸⁵ In *Thornburg*, the Supreme Court established a more rigorous three-part test. First, the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district."⁸⁶ Second, the minority group must be "politically cohesive" so that they are able elect a candidate in the single-member district.⁸⁷ Third, the plaintiff

⁷⁹ See *id.* at 1180-81.

⁸⁰ See *id.* at 1186.

⁸¹ See *id.*

⁸² See *id.*

⁸³ 478 U.S. 30 (1986).

⁸⁴ See Pershing, *supra* note 62, at 1187.

⁸⁵ See *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff'd*, 424 U.S. 636 (1976).

⁸⁶ *Thornburg*, 478 U.S. at 50.

⁸⁷ *Id.* at 51.

minority group must demonstrate that the white majority votes as a block, thus often defeating the minority's preferred candidate.⁸⁸ Given *Thornburg*, the plaintiff minority group claiming vote dilution now has a difficult burden of proof. Section 2 would require proof that minority voters would have had the ability to *affect the election results* if not for Internet voting. Meeting such a difficult threshold of proof, however, is not the only method of challenging Internet voting.

E. Burden of Proof for Burden Claims

It is possible that the plaintiff minority group might be able to effectively challenge Internet voting as a section 2 burden claim. *Chisom v. Roemer*⁸⁹ articulates the standards for both vote dilution and burden claims.⁹⁰ The *Chisom* Court considered whether a section 2 plaintiff must always prove an effect on the ability to elect the chosen candidate.⁹¹ The Court held that section 2 redresses one single harm—inequality of “opportunity to participate in the political process [and] to elect representatives of one’s choice.”⁹² *Chisom* thus held that “whenever the opportunity to *participate* is diminished by race, a diminution in opportunity to *elect* necessarily follows.”⁹³

Applying this rule to vote dilution claims and burden claims demonstrates that these claims have two different standards of proof. Since a vote dilution claim alleges unequal opportunity to elect *without* alleging unequal opportunity to participate, the plaintiff must prove that the challenged voting procedure affected her ability to elect her choice representative.⁹⁴

A burden claim, however, alleges unequal opportunity to participate right from the start. Thus, the alleged burden

⁸⁸ *Id.*

⁸⁹ 501 U.S. 380 (1991).

⁹⁰ Pershing, *supra* note 62, at 1183 (citing *Chisom*, 501 U.S. at 397).

⁹¹ *Id.*

⁹² *Id.*

⁹³ Pershing, *supra* note 62, at 1184.

⁹⁴ *Id.*

necessarily diminishes the voter's capacity to affect election results.⁹⁵ Pershing offers the following analogy:

Keeping someone from buying a lottery ticket by definition hurts that person's chance to win. Only where the voter has cast her ballot, and claims that her vote was diluted, that is, made less effective than it should have been once cast—a challenge to the lottery's method of selecting a winner, as it were—does section 2 require proof of what the challenged voting procedure does to the ability of a group of minority votes to affect election results.⁹⁶

Under *Chisom*, Internet voting may violate section 2 even if it does not affect the minority group's ability to control the outcome of the election.

F. Benefits of Pursuing a Burden Claim

An election procedure that imposes a burden on minority voters' ability to participate in the election process violates section 2 even without proof of effect on election results. The difference with Internet voting is that it unequally distributes a *benefit*. But, arguably, a benefit to voting that is racially distributed is no different than a burden.⁹⁷

*James v. Humphreys County Bd. of Election Commissioners*⁹⁸ demonstrates how the distinction between racially maldistributed benefits and burdens collapses. In *James*, it was discretionary under state law to offer assistance to voters with certain disabilities, including illiteracy and visual and mobile impairments.⁹⁹ When pollworkers chose to assist only those voters with visual or mobile impairments, the court held that this practice violated section 2.¹⁰⁰ It reasoned that by assisting only a certain segment of the population—a segment that was predominantly

⁹⁵ *Id.*

⁹⁶ *Id.* at 1186.

⁹⁷ *Id.* at 1174.

⁹⁸ 384 F. Supp. 114 (N.D. Miss. 1974).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

white—the officials inequitably disadvantaged those they failed to help.¹⁰¹ Though Internet voting would lack the discriminatory intent present in *James*, it would inequitably disadvantage the “have-nots” by making voting ultra-convenient for the “haves.”

Also, in *Brown v. Dean*,¹⁰² the city violated section 2 when it located the polling sites in areas with no public transportation and lower rates of African American automobile ownership.¹⁰³ The court held that the city’s action deterred minority voting and amounted to “constructive disenfranchisement.”¹⁰⁴ Thus, *Brown* implies that the lack of convenient polling sites for African Americans denied them the full opportunity to participate. *Brown* would seem no less egregious if the city had instead tripled the polling sites in white neighborhoods only. Placing the polling sites in locations much more convenient for Whites, as opposed to inconvenient to African Americans, would appear to result in the same inequality.

Thus, for purposes of determining equality of access under section 2, a convenience or benefit to one group with regards to voting is no different than a burden or imposition on another group.

G. “Offsets”

The next legal hurdle facing those in opposition to Internet voting is whether offsets can effectively remedy any disparity created, thereby complying with section 2.¹⁰⁵ An offset, in this context, would be a voting method designed to minimize the racial gap in availability to the Internet.¹⁰⁶ The results of the Arizona Democratic primary help answer this question. In the primary, Arizona election officials significantly increased the number of conventional polling stations in minority neighborhoods in an

¹⁰¹ *Id.* at 1472.

¹⁰² 555 F. Supp. 502 (D.R.I. 1982).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 506.

¹⁰⁵ See Pershing, *supra* note 62, at 1201.

¹⁰⁶ See *id.* at 1201-02.

attempt to offset the impact of remote Internet voting.¹⁰⁷ Yet Nagler and Alvarez's data confirmed that turnout in these neighborhoods showed no improvement while turnout in white neighborhoods actually increased.¹⁰⁸ It follows that remote Internet voting is not a benefit that can be offset by increasing the number of kiosks or polling sites. Such an offset is a weak justification for allowing certain groups to vote in their homes and offices while others must endure the hassle and crowds at the public polling sites.

V. Long-Term Strategies

Though a voting rights challenge could be viable, minorities must consider tactics beyond legal claims in order to counter the effects of technological disparities. Some methods could include . . .

A. Electronically Guided Voting

Assisted voting sites or electronically guided voting (EGV) refer to the electronic version of the paper voter guides mailed to voters before the day of an election.¹⁰⁹ EGV would allow people to download the voting suggestions from the websites of their favorite public interest groups and politicians.¹¹⁰ The program would then place its recommended votes into electronic ballot form.¹¹¹ The website would frame the ballot issues and all voters would have to do is to "check off" their choice recommendations and click "submit."¹¹²

¹⁰⁷ See Report, *supra* note 9, at 14.

¹⁰⁸ See Alvarez & Nagler, *supra* note 39, at 1143.

¹⁰⁹ See Kang, *supra* note 5, at 1168.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Kang, *supra* note 5, at 1168. Kang also predicts that political organizations will send to their constituents or target audiences an e-mail with the appropriate URL for electronic voting guide.

This presents the opportunity for voters to fill in their ballots in a few seconds. It also allows voters to rely¹¹³ on the organizations and politicians they trust to make some decisions for them.¹¹⁴ Essentially, organizations could provide electronic voting guides "that do everything—within the confines of the law—but submit the actual ballot."¹¹⁵

Most likely, electronic voting systems would spring up quickly after Internet voting is introduced.¹¹⁶ Well-known groups such as NOW,¹¹⁷ the NAACP,¹¹⁸ and the NRA¹¹⁹ would likely take advantage of this opportunity to influence a greater number of voters. In turn, this could potentially give such groups greater leverage with politicians.

As Eugene Volokh points out, politicians know how many members a certain group has, but they do not know how many people act upon the group's recommendations.¹²⁰ By downloading such recommendations via the Internet, however, each use of the

¹¹³ It is questionable whether this reliance would be beneficial. However, reliance on politicians and organizations is no new thing. The only difference with EGV and other forms of assisted voting is that EGV may become more convenient for voters.

¹¹⁴ Eugene Volokh explains why EGV might appeal to most voters.

Most people have little idea about which way they should vote on many matters, especially as to nonpartisan races and many initiatives and referenda. Being rational consumers of political information, voters don't spend the many hours needed to educate themselves on every race; rather, they rely on proxies, such as party affiliation, endorsements, or the identities of the people signing the arguments for or against an initiative. But often even this limited data isn't easy to gather, and if you forget your cheat sheet at home, you might just not vote on some issues, or make a very rough guess.

See Eugene Volokh, *Symposium: How Might Cyberspace Change American Elections*, 34 LOY. L.A. L. REV. 1213, 1213 (2001).

¹¹⁵ Kang, *supra* note 5, at 1168.

¹¹⁶ See Volokh, *supra* note 114, at 1216.

¹¹⁷ National Organization for Women

¹¹⁸ National Association for the Advancement of Colored People

¹¹⁹ National Rifle Association

¹²⁰ See Volokh, *supra* note 114, at 1215.

group's recommendations could be easily counted.¹²¹ "If the NRA or the ACLU can go to a legislator and say, 'Last election, thirty thousand voters in your district downloaded and acted on our recommendations,' the legislator will be more likely to do what it takes to get the group's endorsement."¹²²

The leverage that EGV could give public interest groups brings both good news and bad news for minorities. Most interest groups whose power would be increased by electronically guided voting are those who are already powerful and those with the greatest number of Internet-connected members.¹²³ As Jerry Kang notes, however, EGV also presents an opportunity for the civil rights community.¹²⁴ Considering the cost-savings of the Internet, versus paper communication, smaller organizations could take advantage of EGV. Thus, EGV could also create the possibility of "new breeds of political intermediaries that do not need huge amounts of cash to function."¹²⁵ All varieties of political groups, from conservative to liberal, will undoubtedly utilize EGV. As such, progressive civil rights organizations have little choice but to use this strategy.

B. Internet Campaigning

The enormous cost of running a political campaign is largely due to increased spending on television advertising.¹²⁶ "[A]s the Internet is growing, the television audience is shrinking."¹²⁷ The Internet now offers the opportunity for

¹²¹ *Id.* at 1215. "The count will be most reliable if the recommendation program (1) fills in the ballot with the requested recommendations, (2) asks the voter whether he wants to submit the e-ballot, (3) triggers the sending of the ballot to the elections board, and (4) only then updates the count for those organizations whose recommendations have been used." *Id.* at 1215 n.4.

¹²² *Id.* at 1216.

¹²³ *Id.* at 1217.

¹²⁴ See Kang, *supra* note 5, at 1168.

¹²⁵ See *id.*

¹²⁶ See Dick Morris, *Symposium: Direct Democracy and the Internet*, 34 LOY. L.A. L. REV. 1033, 1033 (2001).

¹²⁷ "Between 1978 and 1998, the percentage of American households who watch prime time television has shrunk from 90% to 45%." *Id.*

candidates to reach a large sector of the population at a relatively inexpensive cost. For example, for six hundred dollars, Jesse Ventura set up an Internet website that contributed significantly to his successful campaign for governor.¹²⁸

As Dick Morris notes, the Internet is a unique political medium because Internet advertising will likely never become too expensive.¹²⁹

In an environment where it takes capital or government approval to open a newspaper or run a television or radio station, there is an artificial scarcity of supply that forces up advertising costs. But when anyone can start a website—and millions have—it will be difficult to command top dollar for Internet advertising.¹³⁰

Thus, the Internet may become the medium of choice for political campaign advertising and is a relatively inexpensive way of reaching a large sector of voters. The civil rights community should seize this opportunity.

C. Language Barriers

If e-voting were to become a reality, minorities should also take advantage of the opportunity to use information technology in order to decrease linguistic barriers. For many Asian Americans and Latinos, language is a substantial barrier to voting.¹³¹ Large numbers of these groups have limited English proficiency.¹³² Voting becomes a particularly daunting task when the vote concerns complicated policy and referenda.¹³³

Thus, through Internet voting, minorities can take advantage of language translation services. Moreover, e-ballots

¹²⁸ Elizabeth Garrett, *Symposium: Political Intermediaries and the Internet "Revolution,"* 34 LOY. L.A. L. REV. 1055, 1057 (2001) (citing Dana Milbank, *Virtual Politics*, NEW REPUBLIC, July 5, 1999, at 22).

¹²⁹ See Morris, *supra* note 126, at 1045.

¹³⁰ *Id.*

¹³¹ See generally Kang, *supra* note 5, at 1167.

¹³² *Id.*

¹³³ *Id.*

can be prepared in multiple languages.¹³⁴ Voting officials generally do not translate paper ballots due to the costs involved in printing.¹³⁵ Whereas printing paper ballots in a small number of widely spoken Asian languages—Hindi, Tagalog, Mandarin, Korean and Vietnamese—is not economically feasible, producing e-ballots in these languages is not only possible, but can be accomplished inexpensively.¹³⁶

VI. Conclusion

By creating “personal polling places”¹³⁷ for the disproportionately white, remote Internet voting exacerbates the already existing digital divide and denies minority voters equal access to the election process. Arguably, Internet voting could be challenged under section 2 as denying full participation in the election process to minority voters. A strong argument can be made that a maldistributed benefit to Whites, as opposed to burden to African Americans, should not be treated differently under section 2.

Concededly, the digital divide may be narrowing, and future Internet voting may not pose the threat to equality that it does now. Considering that Internet voting may increase voter turnout and present an error-free election method, research in this area should continue. Policymakers should stay abreast of statistics concerning racial disparities in access and should explore methods that could lessen the digital divide.

It is probable that Internet voting will be a viable option in the near future. But for now, confining it to use at poll sites and kiosks would be the most fair and practical solution. This would not only resolve the majority of access problems, but it would also provide a controlled environment where security risks would be minimized.

Because the introduction of Internet voting appears inevitable, minorities and others without Internet access currently

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Kang, *supra* note 5.

should actively seek out ways to take advantage of its uses and lessen the effects of the digital divide. Most importantly, the civil rights community should focus on long-term goals. The methods listed here—Internet campaigning, Electronically Guided Voting, and multi-language e-ballots—are not exhaustive. Rather, these represent just some of the ways the Internet can be utilized. As Jerry Kang notes:

In the end, what would be the impact? It is hard to know. That said, progressive civil rights organizations should recognize that these strategies will undoubtedly be used by the other side, which aggressively and efficaciously seeks contrary political ends. So, there is little choice: We must fight on the digital battlefield or risk irrelevancy.¹³⁸

¹³⁸ *Id.* at 1168.

