

**SILENCING THE BLOGOSPHERE: A FIRST AMENDMENT  
CAUTION TO LEGISLATORS CONSIDERING USING BLOGS TO  
COMMUNICATE DIRECTLY WITH CONSTITUENTS**

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Cite as D. Wes Sullenger, *Silencing the Blogosphere: A First Amendment Caution to Legislators Considering Using Blogs to Communicate Directly with Constituents*, 13 RICH. J.L. & TECH. 15 (2007) <http://law.richmond.edu/jolt/v13i4/article15.pdf>

I. INTRODUCTION

[1] Alexis de Tocqueville wrote that “every new invention, every new want which it occasioned, and every new desire which craved satisfaction were steps toward a general leveling [of society].”<sup>2</sup> The changes wrought by the growth of Internet use reaffirm the truth of the statement. The Internet has created new opportunities for communication and expanded the reach of speakers more than any medium yet conceived.

“Unlike thirty years ago, when ‘many citizens [were] barred from meaningful participation in public discourse by financial or status inequalities, and a relatively small number of powerful speakers [could] dominate the marketplace of ideas,[.]’<sup>3</sup> the internet now allows anyone

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<sup>2</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 4 (J.P. Mayer & Max Lerner, eds., George Lawrence, trans., 1999).

<sup>3</sup> *Doe v. Cahill*, 884 A.2d 451, 455 (Del. 2005) (quoting Lyriisa Barnet Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 894 (2000)).

with a phone line to ‘become a town crier with a voice that resonates farther than it could from any soapbox.’”<sup>4</sup>

[2] This vast expansion in communication capabilities has wrought notable changes in society. As one might expect, the Internet has changed the way people receive news<sup>5</sup> and make decisions.<sup>6</sup> The Internet’s growth into a mainstream medium<sup>7</sup> has even effected a change in the government’s interaction with citizens as well as the way politicians campaign.<sup>8</sup>

[3] The Internet promises to “enhance an ‘uninhibited, robust, and wide-open’ debate on public issues by improving our ability to become informed about public issues and to discuss those issues actively.”<sup>9</sup> The ever-increasing number of Internet users in America<sup>10</sup> has led some academics to assert that citizens will directly affect policy by voicing their concerns to legislators directly, via the Internet, when they believe action should be taken.<sup>11</sup> The recent development of “blogs” has made this prediction increasingly viable.<sup>12</sup> Through the use of blogs, speakers can

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<sup>4</sup> Doe, 884 A.2d at 455 (quoting *Reno v. ACLU*, 521 U.S. 844, 896-97 (1997)). One should note that the *Doe* court cites to the wrong pages of the *Reno* opinion. The quoted portion is actually located at 521 U.S. at 870.

<sup>5</sup> See The Pew Research Center For the People and the Press, *News Audiences Increasingly Politicized: Online News Audience Larger, More Diverse*, <http://people-press.org/reports/display.php3?PageID=834> (last visited June 7, 2007) (noting the number of people who receive news from traditional sources has declined while the number of people receiving their news from the Internet increased from two percent in 1995 to twenty-nine percent by 2004).

<sup>6</sup> See Burst: Online Ads Make Impression; Internet Primary Source for Purchase Info, [http://marketingvox.com/archives/2006/04/20/burst\\_online\\_ads\\_make\\_impression\\_internet\\_primary\\_source\\_for\\_purchase\\_info/](http://marketingvox.com/archives/2006/04/20/burst_online_ads_make_impression_internet_primary_source_for_purchase_info/) (last visited June 1, 2006) (explaining that over fifty-seven percent of Internet users say the Internet is their primary source of information about products and services they buy).

<sup>7</sup> See *infra* Part II.C.2.b.

<sup>8</sup> See also *infra* Part II.C.3.

<sup>9</sup> David J. Goldstone, *The Public Forum Doctrine in the Age of the Information Superhighway (Where Are the Public Forums on the Information Superhighway?)*, 46 HASTINGS L.J. 335, 341 (1995) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

<sup>10</sup> See *infra* Part C.3.

<sup>11</sup> LAWRENCE GROSSMAN, *THE ELECTRONIC REPUBLIC* 149 (1995).

<sup>12</sup> See *infra* Part II.C.3.

address Internet users half-way around the world or narrow the reach of their speech down to an individual conversation with another Internet user on the same street.<sup>13</sup>

[4] This article considers the First Amendment implications of employing this technological growth in the political arena. Analyzing the initial experiments with direct democracy in colonial America provides a framework to explain the effect the Internet could have on the democratic system.<sup>14</sup> Direct democracy started with the town meeting style of government in New England. A brief examination of the Founders' reaction to that system, however, shows they created a representative democracy as a buffer to direct citizen control.<sup>15</sup> This article will then consider the modern calls for direct democracy,<sup>16</sup> including a discussion of the nature of direct democracy<sup>17</sup> and modern experiments in direct democracy.<sup>18</sup> This article also analyzes the societal changes forged by the Internet, as well as the belief by some that these changes justify a contemporary transformation to a direct democracy.<sup>19</sup> Lastly, the evolution of the political system, in an effort to adapt to the development of the Internet, must be evaluated in order to complete the roadmap for the discussion.<sup>20</sup> This examination includes a discussion of the contemporary formation of blogs and the effect of their invasion into America's democratic system.<sup>21</sup>

[5] The substantive constitutional discussion is based on a hypothetical. This article assumes a hypothetical member of Congress, seeing the power of the Internet to connect with constituents, chooses to maintain a blog on his or her official website. The legislator uses the blog to post topics of current political interest and to solicit opinions from constituents on the position the legislator should take on the issues. While this arrangement likely would have some political benefits in terms of making constituents

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<sup>13</sup> Doe v. Cahill, 884 A.2d 451, 456 (2005).

<sup>14</sup> See *infra* Part II.A.

<sup>15</sup> See *infra* Part II.A-B.

<sup>16</sup> See *infra* Part II.C.

<sup>17</sup> See *infra* Part II.C.1.

<sup>18</sup> See *infra* Part II.C.

<sup>19</sup> See *infra* Part II.C.2.b.

<sup>20</sup> See *infra* Part II.C.3.

<sup>21</sup> See *infra* Part II.C.3.a.i.

feel empowered and important, it would also raise concerns from the legislator's perspective. The legislator, for example, would be concerned that some constituents would post statements that other constituents would find degrading, offensive, or profane. To combat the potential harm to the legislator's reputation from such statements, the legislator might want to take precautions, such as screening messages, altering some content, or removing certain messages.

[6] This article considers the constitutionality of these possible reactions from the legislator. The article applies a traditional First Amendment analysis to the issue.<sup>22</sup> After defining the contours of the modern public forum doctrine,<sup>23</sup> the article considers the status of blogs, concluding the public forum doctrine should apply to them.<sup>24</sup> Finally, the article discusses why the application of the public forum doctrine to blogs should be problematic to legislators. This discussion demonstrates that the hypothetical legislator's blog should be classified as a limited public forum in which the remedies the legislator seeks to use to control the blog will be deemed unconstitutional.<sup>25</sup>

## II. DIRECT DEMOCRACY IN AMERICA: FROM TOWN MEETING TO THE INTERNET

[7] America's government has undergone dramatic changes. During the colonial period in America, colonists in various locales in the New England colonies governed themselves through town meetings. The massive shift, of course, came after independence when the Framers of the Constitution adopted a representative form of government. As technology has changed society, though, some people have begun calling for a return to direct democracy. This section explores the contours of the debate.

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<sup>22</sup> See *infra* Part III.

<sup>23</sup> See *infra* Part III.A.

<sup>24</sup> See *infra* Part III.B.1.

<sup>25</sup> See *infra* Part III.B.2.-3.

## A. COLONIAL TOWN MEETING GOVERNMENTS

[8] Colonial American society, particularly in New England, was based on townships.<sup>26</sup> As such, government was addressed at the town level through town meetings.<sup>27</sup> The town meeting system provided a political life that was both truly democratic and republican.<sup>28</sup>

[9] Town meetings were assemblies of a town's residents for purposes of settling matters of common concern.<sup>29</sup> While each town meeting differed somewhat in form, the general equality of condition among the people in the townships let every resident influence the laws.<sup>30</sup> The residents discussed and deliberated public matters at these assemblies.<sup>31</sup> Through the meetings, the residents enacted local ordinances<sup>32</sup> and handled other matters such as watching over any Frenchmen, Dutchmen, Scots, blacks, or transients in the town and providing for the local livestock.<sup>33</sup>

[10] Eligibility to participate in town meetings varied, however. In Massachusetts, one had to be a member of the Puritan church and granted citizenship by a vote of the town in order to vote in the meeting.<sup>34</sup> Other residents could attend and speak but could not vote.<sup>35</sup> Other colonies had similar requirements.<sup>36</sup>

[11] The town meeting system worked well in providing a voice to those impacted by the decisions of the governing bodies. Still, towns needed

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<sup>26</sup> See WESLEY FRANK CRAVEN, *THE COLONIES IN TRANSITION: 1660-1713*, 17 (1968); see also DE TOCQUEVILLE, *supra* note 2, at 57-58.

<sup>27</sup> OSCAR THEODORE BARCK, JR. & HUGH TALMAGE LEFLER, *COLONIAL AMERICA*, 80 (1958); see also CRAVEN, *supra* note 26, at 24.

<sup>28</sup> See DE TOCQUEVILLE, *supra* note 2, at 56.

<sup>29</sup> CRAVEN, *supra* note 26, at 24.

<sup>30</sup> DE TOCQUEVILLE, *supra* note 2, at 3.

<sup>31</sup> See *id.*

<sup>32</sup> See BARCK & LEFLER, *supra* note 27, at 80.

<sup>33</sup> 2 CHARLES M. ANDREWS, *COLONIAL PERIOD OF AMERICAN HISTORY* 178 (1964).

<sup>34</sup> BARCK & LEFLER, *supra* note 27, at 94-95.

<sup>35</sup> *Id.* at 95.

<sup>36</sup> In New Haven, for example, voting was limited to those who were church members, had been admitted by the general court as "free burgesses," and had taken a "freeman's charge." See ANDREWS, *supra* note 33, at 165.

individuals who could administer town affairs between meetings.<sup>37</sup> To provide for consistent governance, residents elected a group of “selectmen” at an annual town meeting. The selectmen were the officers who oversaw local matters between meetings.<sup>38</sup> These officials included the town clerk, constable, and other officers found necessary.<sup>39</sup>

[12] In addition to performing their role as administrators of the township, selectmen also played a role in the colonial government. The town selectmen met with the royal governor and his assistants to lobby for the political desires of the colonists.<sup>40</sup> Thus, “the town meeting was the sounding board of public opinion on all important local, and sometimes colonial, problems.”<sup>41</sup>

[13] This system of government worked well in the New England colonies. After independence, though, the Framers removed the direct democracy component from American governance. As we will see, though, the People never lost their yearning for a direct say in government.

#### B. THE FRAMERS REJECT DIRECT DEMOCRACY

[14] Their experience being governed from overseas left the Founding generation distrustful of centralized power because of its detachment from those affected by legislators’ actions.<sup>42</sup> Representatives to a large central government could not know most of their constituents.<sup>43</sup> Had they been given representation in Parliament, the colonists feared their representatives would “easily lose a sense of connection with their constituents when living in a grand imperial city an ocean away, rubbing

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<sup>37</sup> In some colonies, town meetings occurred no more than once each year. See CRAVEN, *supra* note 26, at 24.

<sup>38</sup> *Id.*; see also BARCK & LEFLER, *supra* note 27, at 80 (describing how in Plymouth colony, residents elected local officials at town meetings). In Massachusetts Bay, residents elected seven “select men” who administered town matters. *Id.* at 95.

<sup>39</sup> See CRAVEN, *supra* note 26, at 24; see also BARCK & LEFLER, *supra* note 27, at 95 (explaining that in Massachusetts, selectmen also elected additional officials not chosen by the residents).

<sup>40</sup> See CRAVEN, *supra* note 26, at 25-26; see also BARCK & LEFLER, *supra* note 27, at 90.

<sup>41</sup> See BARCK & LEFLER, *supra* note 27, at 262.

<sup>42</sup> See AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 40 (2005).

<sup>43</sup> *Id.*

elbows with English aristocrats and haughty diplomats.”<sup>44</sup> Thus, after independence, the Founders set out to create a reliable and stable but decentralized system of government.

[15] Although they were revolutionaries, the Founders distrusted democracy.<sup>45</sup> They feared common people with true power would give political control to ambitious politicians rather than the elites capable of putting the public interest above factional desires.<sup>46</sup> The Founders minimized this possibility by virtually removing from the People the ability to vote directly on important matters.<sup>47</sup> To ensure all citizens could look after their own interests, however, the Founders separated the national government from state and local governments. Citizens participated directly in the latter through their influence over the politicians and political bodies that resided close to them.<sup>48</sup>

[16] The extent to which the People should be involved in political decisions, however, divided even the Framers. Not long after the founding, ideological parties began forming.<sup>49</sup> These parties arose in response, among other things, to differing views on the role of the common people. James Madison defended the rise of political parties in 1792. He described Federalists, without using the term, as “more partial to the opulent than to the other classes of society” and, therefore, “wish[ing] to point the measures of government less to the interest of the

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<sup>44</sup> *Id.*

<sup>45</sup> See BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 16 (2005).

<sup>46</sup> See *id.* at 18.

<sup>47</sup> See, e.g., *THE FEDERALIST NO. 27*, at 177 (Alexander Hamilton) (Henry B. Dawson ed., 1888) (arguing that election of senators by state legislatures instead of citizens would result in senators

less apt to be tainted by the spirit of faction, and more out of the reach of those occasional ill humors, or temporary prejudices and propensities, which, in smaller societies, frequently contaminate the public councils, beget injustice and oppression of a part of the community, and engender schemes, which, though they gratify a momentary inclination or desire, terminate in general distress, dissatisfaction, and disgust.).

<sup>48</sup> See AMAR, *supra* note 42, at 184-85.

<sup>49</sup> See generally ACKERMAN, *supra* note 45, at 19-26 (detailing development of Federalist and Republican parties).

many than of a few.”<sup>50</sup> On the other side, Madison said without referring to the Republicans by name, were

those who believing in the doctrine that mankind are capable of governing themselves, and hating hereditary power as an insult to the reason and outrage to the rights of man, are naturally offended at every public measure that does not appeal to the understanding and to the general interest of the community.<sup>51</sup>

[17] Nevertheless, despite this criticism, in the 1790s, Madison joined with Thomas Jefferson’s Republican faction opposed to the Federalist agenda.<sup>52</sup> Jefferson and Madison believed the Federalists had taken the government from the American people.<sup>53</sup> Jefferson felt the Federalists, though duly elected, were betraying the spirit of the Revolution by expanding the federal government, aligning the nation more with England than France, passing the Alien and Sedition Acts limiting speech, and creating a new army.<sup>54</sup> Like the Federalists, Jefferson feared the concentration of political power. He viewed the concentration of power into a single body as the cause of the destruction of “liberty and the rights of man in every government which has ever existed under the sun.”<sup>55</sup> For Jefferson, however, this distrust of centralized power meant ultimate power should be diffused into smaller governments.

[18] Jefferson believed the citizens of each state had a natural right to control their own domestic affairs.<sup>56</sup> However, his states’ rights perspective extended beyond merely those domestic matters. Jefferson

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<sup>50</sup> 14 JAMES MADISON, *A Candid State of the Parties*, in THE PAPERS OF JAMES MADISON 370, 371 (Robert A. Rutland et al. eds., 1983); see also ACKERMAN, *supra* note 45, at 25 (quoting same and discussing Madison “demonizing his opponents as covert monarchists”).

<sup>51</sup> MADISON, *supra* note 50, at 371.

<sup>52</sup> See JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 52-55 (2001) (describing Madison’s Federalist push for the Constitution in the 1780s and his conversion in the 1790s to Jefferson’s Republican party).

<sup>53</sup> *Id.* at 198.

<sup>54</sup> *Id.* at 140, 198-99.

<sup>55</sup> THOMAS JEFFERSON, Letter to Joseph C. Cabell (Feb. 2, 1816), in XIV WRITINGS 417, 421 (Andrew A. Lipscomb ed., 1903).

<sup>56</sup> See ELLIS, *supra* note 52, at 199.



drafted a version of what became the Kentucky Resolution that allowed states to nullify any law not arising under federal jurisdiction set out in the Constitution.<sup>57</sup> Jefferson's draft further allowed states to secede if Congress or the federal courts did not adhere to their rejection of the federal law.<sup>58</sup>

[19] The Kentucky legislature did not adopt the portions of the Resolution permitting secession. Madison, always the shrewder political thinker in the collaboration with Jefferson,<sup>59</sup> contemporaneously proposed the moderate Virginia Resolution, which rejected Jefferson's "compact" theory of the Union in favor of judicial review with protections for free speech and press.<sup>60</sup> Although Jefferson disagreed with Madison's rejection of nullification and secession, he softened his position to maintain unity with his chief collaborator against the Federalists.<sup>61</sup>

[20] Jefferson's preference for small governments was significant. His fear of concentrated power also extended to the People. Thus, he criticized the town meeting style of government used in parts of New England. Jefferson commented that expansion of that form to other parts of the Union would permit "the drunken loungers at and about the court houses" to control political affairs.<sup>62</sup> Yet, the People, Jefferson wrote, had to play an active role in their government.<sup>63</sup> He felt citizen involvement was important to the decentralization of power. Accordingly, Jefferson proposed concentric levels of government, each drawing from the lower levels. He suggested a national government limited to defending the nation and conducting foreign and interstate relations. State governments would be responsible for civil rights, policing, and administering day-to-day matters of concern to their citizens. County governments would attend to local concerns.<sup>64</sup> Each layer of government would be responsible

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<sup>57</sup> *Id.* at 199-200.

<sup>58</sup> *Id.* at 200.

<sup>59</sup> *Id.* at 53-54.

<sup>60</sup> *Id.* at 200.

<sup>61</sup> *Id.* at 200-01. Jefferson also, after presenting the idea to Madison, abandoned his belief that each generation is sovereign and, therefore, laws should expire after approximately twenty years. *Id.* at 54-55.

<sup>62</sup> JEFFERSON, *supra* note 55, at 423.

<sup>63</sup> *See id.* at 422.

<sup>64</sup> *Id.* at 421.

for its immediate concerns and would delegate responsibilities for which it was not competent to a different level.<sup>65</sup>

[21] To this basic governmental structure, however, Jefferson counseled a system in which the People would directly impact the government by controlling it at the lowest, most diffuse level. Thus, he called for “divid[ing] the counties into wards.”<sup>66</sup> Jefferson saw the wards as small political debating assemblies. These groups would allow each citizen to educate himself in political matters and “be a sharer in the direction of his ward-republic . . . [as] a participator in the government of affairs, not merely at an election one day in the year, but every day.”<sup>67</sup> Jefferson viewed such direct citizen input as essential to the functioning of the republic, in which the true power comes from the People, and as a measure for enhancing citizenship.<sup>68</sup> Jefferson believed the citizen-controlled wards would commingle with the republican governments at the county, state, and national levels to form “a gradition [sic] of authorities, standing each on the basis of law, holding every one of its delegated share of powers, and constituting truly a system of fundamental balances and checks for the government.”<sup>69</sup>

[22] Jefferson, of course, never succeeded in adding citizen wards to American government. The idea, though, proved hard to shake. The Progressive Movement of the late-nineteenth and early-twentieth centuries attempted to make Jefferson’s ward system a reality.<sup>70</sup> Progressive activists and political scientists organized public deliberative bodies.<sup>71</sup> In Cleveland, for example, Mayor Tom Johnson held large picnics at which citizens discussed political matters with the leadership.<sup>72</sup> These picnics, however, led to no large-scale reforms, because Johnson often acted adversely to public opinion.<sup>73</sup>

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<sup>65</sup> *Id.* at 422.

<sup>66</sup> *Id.* at 419-20.

<sup>67</sup> *Id.* at 422.

<sup>68</sup> ETHAN J. LEIB, *DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT* 47-48 (2004).

<sup>69</sup> JEFFERSON, *supra* note 55, at 422.

<sup>70</sup> *See* LEIB, *supra* note 68, at 51-52.

<sup>71</sup> *Id.* at 52-56.

<sup>72</sup> *Id.* at 53-54.

<sup>73</sup> *Id.* at 54.

[23] Social debate clubs also opened in, among other places, Rochester, New York. These clubs allowed all people – even women and immigrants – to debate politics with professors and other attendees.<sup>74</sup> These clubs, however, were more concerned with helping people become articulate political debaters than with exerting real political influence, which they lacked because they were only voluntary organizations which few, if any, politicians chose to attend.<sup>75</sup>

[24] The Progressives' experiments with direct democracy along the Jeffersonian model failed to make any meaningful change in our political system. They abandoned their efforts to allow citizens to debate on public issues. The People, however, never lost their hunger for direct democracy.

### C. CALLS FOR DIRECT DEMOCRACY

#### 1. THE NATURE OF DIRECT DEMOCRACY

[25] Americans have actively practiced “direct democracy” for more than 100 years.<sup>76</sup> Today, seventy percent of the United States population lives in a state or city where direct democracy is available.<sup>77</sup> As such, a basic understanding of direct democracy in its modern form, as opposed to the colonial and Jeffersonian forms, is important in order to understand the potential changes available due to the Internet.

[26] Direct democracy is a broad label encompassing such decision-making processes as town meetings, recall elections, initiatives, and referenda.<sup>78</sup> The most important and most common forms of direct democracy in the United States are the initiative and referendum.<sup>79</sup> Most

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<sup>74</sup> *Id.* at 55.

<sup>75</sup> *Id.* at 56.

<sup>76</sup> Arthur Lupia & John G. Matsusaka, *Direct Democracy: New Approaches to Old Questions*, 7 ANN. REV. POL. SCI. 463, 463 (2004).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 465.

<sup>79</sup> *Id.* The initiative and the referendum are both devices that allow the voters to engage in legislative action without the approval or involvement of their elected officials. The devices, however, work in different ways. Through an initiative, voters can propose new legislation. The referendum, in contrast, allows voters to repeal laws already enacted. *See also* Jahr v. Casebeer, 83 Cal. Rptr. 2d 172, 177 (Cal. Ct. App. 1999) (discussing differences between initiatives and referenda).

Americans favor direct democracy. Studies show people living in direct democracy markets are happier and more likely to vote, give money to interest groups, and generally pay more attention to the media and other sources to enhance their political knowledge.<sup>80</sup>

[27] Nevertheless, direct democracy is controversial. Like in colonial times, many journalists and political elites are suspicious of direct decision-making by citizens.<sup>81</sup> These skeptics fear voters are incompetent to make policy decisions. Further, they argue the process is too subject to manipulation by special interests and moneyed parties or persons.<sup>82</sup> Additionally, many critics claim citizens are incompetent to make political decisions due to the limited facts they have on which to base their decisions.<sup>83</sup>

[28] These weaknesses, however, give voters an incentive to seek guidance from more informed, credible sources.<sup>84</sup> A legislator's blog would be ideal. Voters could inform themselves about the issues and related arguments from materials posted on the blog or located elsewhere on the Internet. Then, without the need to change to a direct democracy system of government, the People could directly impact the political process by communicating their desires to their legislator(s).

## 2. THE INTERNET LEADS TO CALLS FOR TOTAL DIRECT DEMOCRACY

[29] The high cost of publishing in traditional print and broadcast media limits the number of voices that can be heard.<sup>85</sup> Technology, however, has led increasingly to the obsolescence of those outlets as the sole arbiters of the information essential to democracy.<sup>86</sup> The change has come because, contrary to the closed ranks of newspaper publishers, the World Wide

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<sup>80</sup> Lupia & Matsusaka, *supra* note 76 at 475 (citing studies).

<sup>81</sup> *Id.* at 464.

<sup>82</sup> *Id.* These concerns are bolstered by studies demonstrating that strong investments of money can defeat referenda. *Id.* at 470-71.

<sup>83</sup> *Id.* at 467.

<sup>84</sup> *Id.* at 469.

<sup>85</sup> Joelle Tessler, *Web Pundits May Find It's Not So Free Speech*, CQ WEEKLY, Aug. 6, 2005, available at 2005 WLNR 13638278.

<sup>86</sup> Charles Krauthammer, *Ross Perot and the Call-in Presidency*, TIME, July 13, 1992, at 84.

Web<sup>87</sup> is open as a publication forum for anyone with an Internet connection.<sup>88</sup> Thus, “the Internet has brought democracy to your doorstep and to your desktop.”<sup>89</sup> This expansion in the reach of the voices of average citizens has led to calls from some quarters for changes in how we conduct our democracy. Pushing the Jeffersonian theme even further, these advocates seek various forms of direct democracy.

[30] By now, it is well known that “[t]he Internet is an international network of interconnected computers.”<sup>90</sup> The network allows millions of people to communicate with each other and to access vast caches of information from around the world.<sup>91</sup> This “unique and wholly new medium of worldwide communication”<sup>92</sup> is “the most participatory form of mass speech yet developed.”<sup>93</sup> Because individuals, by using web pages, can become pamphleteers,<sup>94</sup> “the content on the Internet is as diverse as human thought.”<sup>95</sup>

[31] The Internet has been described as allowing measurements of public opinion, providing a public forum, and facilitating citizen access to government.<sup>96</sup> Because of these varied functions, some scholars argue computers and communications technology spawned a “third industrial

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<sup>87</sup> When people speak of the Internet, they generally are referring to the World Wide Web. “The Web” is the part of the Internet on which people use Internet browsers to view information, pictures, movies, etc. See JOHN LEVINE ET AL., *THE INTERNET FOR DUMMIES* 11 (2005). However, the Internet offers several other methods for viewing or exchanging information. Electronic mail (“e-mail”) is the most used feature of the Internet. Users can also “chat” with other users by entering online chat rooms or exchange instant messages with other users through special software. *Id.* at 261. Thousands of “newsgroups” are also available where users can post their thoughts and read other users’ thoughts on topics of interest. See *Reno v. ACLU*, 521 U.S. 844, 849-51 (1997).

<sup>88</sup> Tessler, *supra* note 85.

<sup>89</sup> *Id.* (quoting online advertising executive Michael Bassik).

<sup>90</sup> *Reno*, 521 U.S. at 849.

<sup>91</sup> *Id.* at 850.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 863.

<sup>94</sup> *Id.* at 870.

<sup>95</sup> *Id.* (citation omitted).

<sup>96</sup> RICHARD DAVIS, *THE WEB OF POLITICS: THE INTERNET’S IMPACT ON THE AMERICAN POLITICAL SYSTEM* 20-21 (1999).

revolution.”<sup>97</sup> Like the steam power of the first industrial revolution and the electricity and internal combustion engine of the second industrial revolution, these scholars believe the technology revolution should forge changes in government.<sup>98</sup>

[32] Comparing the Internet to the printing presses that fueled the revolutionary spirit in the eighteenth century, one writer has proclaimed: “[T]he founding fathers would have loved the Internet.”<sup>99</sup> Because citizens are the best judges of what is in their best interests, some argue, they should be allowed to debate and vote directly on important issues.<sup>100</sup> Allowing direct participation in government, these critics assert, will include in policy deliberation the most highly educated and informed citizens – those who, unlike in the eighteenth century, now generally reside in business, universities, or the media rather than in Congress.<sup>101</sup>

[33] Even further, some commentators argue citizens have become so remote from the decision makers that decisions, though made in their name, cannot be attributed to them.<sup>102</sup> Thus, one writer has argued we must create a fourth branch of government – the Popular Branch – using “civil juries” to make laws.<sup>103</sup> More mainstream arguments, however, simply call for direct democracy by electronic town hall meetings.<sup>104</sup>

#### A. THE CONSTITUTIONAL BAR TO A DIRECT DEMOCRACY SYSTEM

[34] Any proposal for a shift to direct democracy faces a major constitutional impediment. While the Framers might in fact have loved the Internet as a tool for communications and advocacy, one must doubt that its existence would have changed their minds about the desirability of

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<sup>97</sup> Joseph S. Nye, Jr., *Information Technology and Democratic Governance*, in GOVERNANCE.COM: DEMOCRACY IN THE INFORMATION AGE, 1-2 (Elaine Ciulla Kamarck & Joseph S. Nye, Jr. eds., 2002) [hereinafter “GOVERNANCE.COM”].

<sup>98</sup> *Id.*

<sup>99</sup> Vic Sussman, *A New Precinct: Cyberspace; Many Activists and Organizers Already Exploit the Internet; You Can Too*, U.S. NEWS & WORLD REPORT, Feb. 19, 1996, at 58.

<sup>100</sup> IAN BUDGE, THE NEW CHALLENGE OF DIRECT DEMOCRACY 1-17 (1996).

<sup>101</sup> *Id.* at 74-75.

<sup>102</sup> LEIB, *supra* note 68, at 4.

<sup>103</sup> *Id.*

<sup>104</sup> Goldstone, *supra* note 9, at 341 n.28.

direct citizen involvement in law making. The Framers drafted the Constitution to ensure the perpetuation of the balance they struck in which citizens were involved with some parts of their government but were removed from its lawmaking aspect.

[35] Article IV § 4 of the Constitution requires that “the United States shall guarantee to every State in this Union a Republican Form of Government.” Consistent with this, Article V requires action by Congress or by two-thirds of the state legislatures to propose constitutional amendments and ratification by three-fourths of the state legislatures or conventions. The Framers made no provision for direct control by citizens.

[36] Nevertheless, Professor Akhil Reed Amar claims we must “unlearn[.]” the purportedly incorrect lesson that the Founders opposed direct democracy.<sup>105</sup> Professor Amar has argued that, because the People are sovereign, a majority of the People can always exert their sovereign control over government. Thus, Amar has argued that the People can amend the Constitution or presumably enact any legislation they desire simply by majority vote.<sup>106</sup>

[37] The historical record, however, rejects the argument.<sup>107</sup> Nothing in the language of the Constitution permits direct action by the People either in legislating or amending the Constitution.<sup>108</sup> While “the People” are involved in the operation of government as voters and through the jury system, the Constitution does not provide for direct participation by the People in ordinary lawmaking.<sup>109</sup> Thus, Professor Amar gives the

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<sup>105</sup> AMAR, *supra* note 42, at 276.

<sup>106</sup> See generally Akil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988).

<sup>107</sup> See generally Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996); Brett W. King, *Wild Political Dreaming: Historical Context, Popular Sovereignty, and Supermajority Rules*, 2 U. PA. J. CONST. L. 609 (2000) (rejecting Amar’s theory that the People can amend the Constitution by a majority vote).

<sup>108</sup> See Monaghan, *supra* note 107, at 121-22 (“[T]he Constitution nowhere contemplates any form of direct, unmediated lawmaking or constitution-making by ‘the People.’”).

<sup>109</sup> *Id.* at 167 n.289 (“[T]he true distinction between these [Greek and other ancient governments] and the American Governments lies in the total exclusion of the people . . .

Constitution a “democratic quality” the Framers did not intend for it in order to avoid the fact that “the Constitution was designed to prevent all unmediated lawmaking by the people.”<sup>110</sup> Professor Amar’s view simply “cannot be reconciled with the founding generation’s abiding fear of the excesses of democracy.”<sup>111</sup>

[38] The historical record amply demonstrates the Founders’ fears of the passions of the People. The Framers viewed direct citizen participation in lawmaking as the biggest threat to stable government.<sup>112</sup> Indeed, the Founders likely would have been horrified even by the now accepted initiative and referendum process.<sup>113</sup> Madison and the Federalists he was then aiding defeated a proposal to add to the First Amendment a right for the People to “instruct their representatives.”<sup>114</sup> They feared disastrous consequences if lawmakers felt bound to follow the whims of their constituents.<sup>115</sup> The Founders avoided those consequences by drafting a Constitution that kept the People out of lawmaking and preserved the structure of government.<sup>116</sup>

[39] This distrust of the masses was not merely classism. To the contrary, the Founders’ experience with the colonial form of direct democracy led them to control majoritarian tendencies. Madison lamented that colonial governments had too often allowed majorities to ignore the rights of minor parties.<sup>117</sup> This had resulted, he explained, from individuals putting adherence to political factions over the public good.<sup>118</sup>

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from any share in the [ordinary lawmaking functions.]” (quoting THE FEDERALIST NO. 63, 386-87 (James Madison) (Clinton Rossiter ed., 1961)).

<sup>110</sup> *Id.* at 165.

<sup>111</sup> *Id.* at 139.

<sup>112</sup> See Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1522-26 (1990).

<sup>113</sup> *Id.* at 1523.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> See Monaghan, *supra* note 107, at 173 n.321 (“The Constitution of 1789 rejected direct lawmaking by the people, both in enacting ordinary legislation and in changing the frame of government.”).

<sup>117</sup> See THE FEDERALIST NO. 10 at 55 (James Madison) (Henry B. Dawson ed., 1888).

<sup>118</sup> *Id.*



[40] Madison warned that, where unchecked by legal means, majorities often become oppressive.<sup>119</sup> He cautioned that such oppression is greatest in a pure democracy, which:

can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual. Hence it is, that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives, as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed, that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.<sup>120</sup>

[41] Madison continued that a representative republic “promises the cure for which we are seeking.”<sup>121</sup> The Framers set up a federal republic form of government to limit the majoritarian passions to which a truly national, democratic government would be susceptible.<sup>122</sup> Madison explained:

[The Constitution is] neither wholly *National* nor wholly *Federal*. Were it wholly *National*, the supreme and ultimate authority would reside in the *majority* of the People of the Union; and this authority would be competent at all times, like that of a majority of every *National* society to alter or abolish its established Government . . . The mode provided by the Plan of the Convention is not founded on either of these principles. In requiring more than a

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<sup>119</sup> *Id.* at 60.

<sup>120</sup> *Id.* at 60-61.

<sup>121</sup> *Id.* at 61.

<sup>122</sup> *See* THE FEDERALIST NO. 38 at 265 (James Madison) (Henry B. Dawson ed., 1888).

majority, and particularly, in computing the proportion by *States*, not by *citizens*, it departs from the *National* and advances toward the *Federal* character . . .<sup>123</sup>

[42] The Framers, Madison in particular, gave a great deal of thought to citizen involvement in government. Their choice to create a republican government recognized the limitations of citizens as legislators. Many now argue the Internet has eliminated those limitations.

#### B. THE CHANGE MADE POSSIBLE BY THE INTERNET

[43] The Internet has certainly alleviated some of the problems the Founders saw with direct democracy. Madison, for example, pointed out that a republican government could be maintained over a greater geographic area than a pure democracy.<sup>124</sup> However, the rise of electronic communications media, and of the Internet in particular, has destroyed the argument that it is impractical in a mass society to bring citizens together in a town hall to debate policy matters.<sup>125</sup> The ability to bring people together, though, does not address the Framers' concern, reflected in the structure of the Constitution, that the People are too liable to act from passion and for personal interest without regard for the greater good.<sup>126</sup>

[44] This article takes no position on the criticisms that direct participation in government by citizens is a recipe for disaster because citizens are incapable of preparing themselves for such a role.<sup>127</sup> Our Constitution simply does not allow the types of direct democracy advocated by the various writers. This bar to the drastic changes sought by those advocates does not mean, however, that the Constitution bars all methods of increasing citizen participation in governance.

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<sup>123</sup> *Id.* (italics in original).

<sup>124</sup> THE FEDERALIST NO. 10, *supra* note 117, at 53.

<sup>125</sup> See BUDGE, *supra* note 100, at 1 & 24.

<sup>126</sup> See, e.g., THE FEDERALIST NO. 10, *supra* note 117, at 52 (arguing elected representatives “will best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations . . . [and] will be more consonant to the public good, than if pronounced by the people themselves convened for the purpose.”).

<sup>127</sup> See, e.g., DAVIS, *supra* note 96, at 22-23.

[45] Political participation and voting could be made easier thanks to the newly cheap and abundant access to information technology.<sup>128</sup> Moreover, the costs of participating – both as citizen and legislator – could be reduced by allowing cheap methods for constituents to contact their legislators.<sup>129</sup> Citizens could exert direct influence over willing legislators by meeting for online discussions.<sup>130</sup> Retaining our representative democracy, enhanced by direct contact between citizens and legislators, could maximize participation while avoiding the tyranny of the majority likely to result from total direct democracy.<sup>131</sup> This system, which might be effected by the legislator’s blog on which this article is based, would provide citizens a greater say in governance without running afoul of the Constitution.<sup>132</sup>

### 3. THE ADAPTATION OF POLITICS TO THE INTERNET

[46] As the Internet has changed the way society interacts, it has also changed how politicians campaign and interact with voters. Slowly at first, the Internet has infused politics. After starting as an after-thought appealing to small segments of the populace, the Internet has become a crucial tool in the political arsenal.

[47] The World Wide Web made its political campaign debut in 1992. The Clinton-Gore campaign initiated use of the Web in presidential campaigns by posting speeches, position papers, and biographical information on a website.<sup>133</sup> After this simple beginning, calls came quickly from some quarters to use new technologies to change the nature of governance.

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<sup>128</sup> See Nye, *supra* note 97, at 12.

<sup>129</sup> *Id.*

<sup>130</sup> Arthur Isak Applbaum, *Failure in the Cybermarket-place of Ideas*, in GOVERNANCE.COM, *supra* note 97 at 19-20.

<sup>131</sup> See *id.* at 22-23; see also Dennis Thompson, *James Madison on Cyber-Democracy*, in GOVERNANCE.COM, *supra* note 97 at 35.

<sup>132</sup> While the blog approach is constitutional, it still suffers from the Framers’ fear that legislators would feel bound to adhere to their constituents’ whims, thereby renewing the majoritarianism problem inherent in pure democracy the Constitution avoids. See *supra* text accompanying notes 114-15. This problem, however, seems less likely to arise with an Internet solicitation for opinions at a legislator’s discretion than with a right of citizens to “instruct their representatives” enshrined in the Constitution. See *id.*

<sup>133</sup> DAVIS, *supra* note 96, at 22-23.

[48] Also in 1992, presidential candidate Ross Perot called for direct democracy through an “electronic town hall.”<sup>134</sup> Perot’s idea was to present policy issues to the People along with the costs and benefits of proposals for resolution then let the public comment about the proposals online. Perot argued this would remove interest groups from politics.<sup>135</sup>

[49] While his vision obviously has not been fulfilled, some action did follow Perot’s call for direct democracy through electronic town meetings. In September 1993, the Public Agenda Foundation held a two-hour electronic town meeting in San Antonio, Texas using the city’s interactive cable television system.<sup>136</sup> Two Foundation representatives moderated a panel discussion among eight citizens concerning seven options for cutting health care costs.<sup>137</sup> Also in the 1990s, the Community Service Foundation formed the Electronic Congress (“EC”).<sup>138</sup> The EC let citizens call a toll-free number to enter their opinions on national issues.<sup>139</sup> Additionally, in the mid-1990s, a commercial company known as Vote Link set up a website providing fora for online public meetings at which participants can debate public issues.<sup>140</sup> Finally, in 1995, residents of Reading, Pennsylvania used video-conferencing software and cable call-in shows to debate local and national issues.<sup>141</sup>

[50] Despite these private sector experiments, neither society nor politicians in 1992 seemed ready for a marked shift in the nature of politics or governance. Still, the Internet slowly expanded its importance. In 1996, for the first time, candidates for office at all levels of government

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<sup>134</sup> R. MICHAEL ALVAREZ & THAD E. HALL, POINT, CLICK, AND VOTE: THE FUTURE OF INTERNET VOTING 54 (Brookings Institution Press 2004).

<sup>135</sup> *Id.*; see also Krauthammer, *supra* note 86, at 84 (discussing Perot’s alternative plans to use television call-in shows to address the public).

<sup>136</sup> See Evan I. Schwartz, *Direct Democracy: Are You Ready for the Democracy Channel?* (Jan. 1994) available at

[http://www.wired.com/wired/archive/2.01/e.dem\\_pr.html](http://www.wired.com/wired/archive/2.01/e.dem_pr.html).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* During the few years of its existence, the EC let participants vote on matters including United States immigration policy, ending the embargo against Cuba, and whether Congress should cut Medicare. See The Teledemocracy Action News + Network, <https://fp.auburn.edu/tann/tann2/projecta.html> (last visited June 7, 2007).

<sup>140</sup> See Vote Link, <http://www.votelink.com/> (last visited June 7, 2007).

<sup>141</sup> See Schwartz, *supra* note 136.

had websites to communicate information to citizens.<sup>142</sup> Also in 1996, Lamar Alexander became the first political candidate to engage in an interactive chat session as part of his campaign.<sup>143</sup> Alexander's foray into interactivity, however, was the high point for using the Internet's potential in campaigning in the 1990s.

[51] Until at least 2000, much of Internet politics was limited to websites that were "little more than electronic yard signs."<sup>144</sup> During the early era of Internet campaigning, campaigns simply maintained passive websites as repositories for biographies, press releases, and other traditional campaign material.<sup>145</sup> Mainstream politicians, while they perhaps saw the Internet as a means to supplement their campaign, seemed not to see the potential for truly connecting with citizens electronically. Indeed, a computer columnist in 1996 noted most contenders for the presidency refused his request that they participate in a week-long online debate in which the candidates would take questions from the media, citizens, and their fellow candidates.<sup>146</sup>

[52] Despite the scant attention it received from politicians during the 1990s, early online political activists expected the Internet to be "*the* dominant political medium by the year 2000."<sup>147</sup> While their timetable for dominance may have been a bit optimistic, the massive growth in Internet use during the last few years of the twentieth century began the push in that direction. In 1997, only eighteen percent of households had an Internet connection. By 2000, that number had grown to forty-two percent.<sup>148</sup> During this period, "thousands of citizens [became] high-tech colonial pamphleteers in a planetary public square, using computers and modems to recruit and organize without leaving their keyboards."<sup>149</sup>

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<sup>142</sup> See DAVIS, *supra* note 96, at 22-23.

<sup>143</sup> *Id.* at 87.

<sup>144</sup> Dana Milbank, *Virtual Politics*, THE NEW REPUBLIC, July 5, 1999 at 22, 27.

<sup>145</sup> See Pippa Norris, *The Internet and U.S. Elections 1992-2000* in GOVERNANCE.COM, *supra* note 97 at 69 (comparing "passive websites" to "conventional political leaflets"); see also Elaine Ciulla Kamarck, *Political Campaigning on the Internet* in GOVERNANCE.COM *supra* note 97 at 89.

<sup>146</sup> Sussman, *supra* note 99, at 58.

<sup>147</sup> *Id.* (emphasis in original).

<sup>148</sup> ALVAREZ & HALL, *supra* note 134, at 2.

<sup>149</sup> Sussman, *supra* note 99, at 58.

[53] Thanks to increased accessibility, by the 2000 election, presidential candidates viewed the Internet as an ally. Candidates used the Internet to raise money, to make announcements, and to post their policy positions, speeches, and criticisms of their adversaries.<sup>150</sup> Also by the 2000 election cycle, candidates had begun coupling these less-passive websites with database technology to identify likely voters who might be receptive to their messages.<sup>151</sup> This technology let politicians tailor their messages to specific voters so they could, through technology, establish a “personal, one-on-one relationship” with citizens.<sup>152</sup>

[54] The next step in cultivating a direct relationship with voters online logically would seem to be personal appearances online. Some politicians sought to follow Lamar Alexander’s lead by using the Internet to expand their personal reach. During the 2000 presidential race, Republican candidate Malcolm S. Forbes, Jr. took part in a town hall meeting by appearing at the meeting over the Internet.<sup>153</sup> John McCain, another Republican candidate, held an online fundraiser showing a live video feed of his wife reading questions and him answering the questions.<sup>154</sup> Democrat Al Gore and Republican George W. Bush also had an online debate which received little viewer interest.<sup>155</sup>

[55] As candidates used the Internet more effectively, other groups did as well. Activists and protesters used the Internet to spread their messages and organize their activities.<sup>156</sup> These higher levels of online activities again reflected the increasing use of the Internet in everyday life. By 2003, 54.7 percent of American households had Internet access.<sup>157</sup> As a result, the Internet was ready to play a critical role in political campaigning.

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<sup>150</sup> ALVAREZ & HALL, *supra* note 134, at 3.

<sup>151</sup> See Milbank, *supra* note 144, at 22.

<sup>152</sup> *Id.* at 24.

<sup>153</sup> *Id.* at 22.

<sup>154</sup> Kamarck, *supra* note 145, at 99.

<sup>155</sup> *Id.*

<sup>156</sup> ALVAREZ & HALL, *supra* note 134, at 3.

<sup>157</sup> See Computer and Internet Use in the United States: 2003, <http://www.census.gov/prod/2005pubs/p23-208.pdf> (last visited June 7, 2007).

[56] In the 2004 election cycle, Democrats used the Internet to fuel their political machines. Candidate Howard Dean used the Internet to attract supporters and raise money.<sup>158</sup> By the time Dean lost the Democratic nomination for the presidency, he had compiled an e-mail list of 600,000 people.<sup>159</sup> Democratic nominee John Kerry inherited the list, allowing his campaign to raise more campaign money than the campaign of his opponent, incumbent President George W. Bush.<sup>160</sup> Yet, despite the fundraising disadvantage, Bush still won because Republicans increased their turnout at the polls more than the Democrats.<sup>161</sup> This surely resulted at least in part from Bush's Internet efforts, which included a total e-mail list of 7.5 million names and 1.4 million volunteers.<sup>162</sup>

[57] In addition, by 2004, the Internet already had a place on the fringes of governance. Governments throughout the United States had begun trying to connect the public to the government through "e-government" initiatives. These programs allow citizens to e-mail government staff directly and to access public services online.<sup>163</sup> These initiatives are essential. With Internet usage pervasive in the Nation's schools, the coming generation of adults will have no memory of an off-line world.<sup>164</sup>

[58] Accordingly, while it may have been premature in 1992, many believe the Internet is now ripe for "deliberative democracy."<sup>165</sup> Former presidential adviser Dick Morris has argued that "[t]he incredible speed and interactivity of the Internet will inevitably return our country to a de facto system of direct democracy by popular referendum. The town-

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<sup>158</sup> Michael Barone, *Blogosphere Politics*, U.S. NEWS & WORLD REPORT, Feb. 21, 2005, at 42.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> See ALVAREZ & HALL, *supra* note 134, at 3-4. For example, <http://www.tennessee.gov> is the official website for the State of Tennessee. This well constructed website is easy to use and allows one to learn basic facts about the state, obtain tourist information, identify and apply for state jobs, obtain demographic information, pay professional licensing fees, and connect to state departments and agencies that manage various aspects of the government. Most states now have an official website, though not all are as functional as the Tennessee site.

<sup>164</sup> See ALVAREZ & HALL, *supra* note 134, at 3.

<sup>165</sup> *Id.* at 54.

meeting style of government will become a national reality.”<sup>166</sup> Already candidates for Congress and governorships have, in a few cases, allowed for electronic-town-hall style interactions between candidate and citizens. A few candidates have, for example, invited citizens to post questions to which the candidate would respond directly and taken part in regularly-scheduled “chats” on their websites.<sup>167</sup>

[59] With so many developments in the last ten years leading to the infiltration of the Internet in politics, a policy debate has begun regarding the wisdom of taking the next step in Internet utilization. Some commentators argue the principles of democracy are best served by engaging in direct democracy via the Internet because of the multitude of background materials available for review online. Others, however, claim democracy would be disserved by online direct democracy because citizens would ignore opinions inconsistent with their own.<sup>168</sup> Additionally, some assert that lawmakers should not engage in web-based discussions because the “digital divide” – the fact Web users are disproportionately white and well-to-do – will result in a skewed view of their constituents’ opinions.<sup>169</sup>

[60] Despite the reservations, some observers still describe grass roots communication with candidates and officials via Internet as a coming revolution of electronic democracy.<sup>170</sup> In light of the massive changes already effected by the proliferation of Internet use, one can hardly question that the Internet is a “revolutionary force.”<sup>171</sup> As discussed in the

<sup>166</sup> DICK MORRIS, *VOTE.COM* 28 (2001).

<sup>167</sup> See Kamarck, *supra* note 145, at 97-98.

<sup>168</sup> See ALVAREZ & HALL, *supra* note 134, at 55-56 (contrasting pro-Internet views of Ross Perot and Dick Morris with concern expressed by Professor Sunstein. See CASS SUNSTEIN, *REPUBLIC.COM* 16 (2001)).

<sup>169</sup> See David C. King, *Catching Voters in the Web*, in *GOVERNANCE.COM*, *supra* note 97, at 106; see also LEIB, *supra* note 68, at 4.

<sup>170</sup> See Sussman, *supra* note 99, at 58.

<sup>171</sup> ALVAREZ & HALL, *supra* note 134, at 2 (noting “the Internet has been touted as a revolutionary force in American society.”). Seeking a true revolution, a group called Unity08.com is seeking to change the way presidential candidates are selected. The group, consisting of former politicians and political aides, hopes to get enough citizens to nominate a third-party presidential candidate online to get the candidate on the ballot in all fifty states. The group is planning an online third-party convention in mid-2008 following the early primaries. Any registered voter could be a delegate able to help select



next section, new Internet technology has simplified direct communication between groups of people and the formation of online communities to the extent that politicians could readily interact with their constituents. In order to allow online citizen participation in a representative democracy, however, the legislator would have to open the forum to all interested citizens.<sup>172</sup> For the reasons set out in Section III, detailing the applicable First Amendment constraints, the risk of opening such a forum would carry too much political risk for legislators.

#### A. THE NEW TECHNOLOGY OF BLOGS ENTERS SOCIETY

[61] Communication over the Internet has always been relatively easy. Recently, however, engaging in true personal conversations has become as easy as posting materials to a website. This generally occurs via web logs, also known as “blogs.”<sup>173</sup>

[62] Blogs are usually written and maintained by individuals or small groups known as “bloggers.”<sup>174</sup> Their content, however, is accessible to anyone with an Internet connection.<sup>175</sup> Blogs are online diaries or journals discussing a variety of topics.<sup>176</sup> Both the nature and prevalence of blogs have changed dramatically in the past decade.

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the candidate. The group believes this will let the People, instead of a narrow segment of extremists in a couple of states, choose their own presidential candidate. See Jonathan Alter, *A New Open-Source Politics*, NEWSWEEK, June 5, 2006 at 35, 35.

<sup>172</sup> Thompson, *supra* note 131, at 38.

<sup>173</sup> Matthew E. Swaya & Stacey R. Eisenstein, *Emerging Technology in the Workplace*, 21 THE LAB. LAWYER 1, 2-3 (Summer 2005).

<sup>174</sup> *Id.* at 3.

<sup>175</sup> *Id.* at 2-3; see also Jennifer L. Peterson, *The Shifting Legal Landscape of Blogging*, WISCONSIN LAWYER 8, 8 (Mar. 2006). One should distinguish blogs from the bulletin board systems (“BBSs”) popular during the ascendancy of the Internet in the 1980s and 1990s. Both are fora for interaction and discussion. Once connected, BBS users, like readers of blogs, could engage in discussions by leaving messages on message boards. One accessed a BBS, however, by directly dialing into it using a modem and phone line rather than over the Internet. This made the vast majority of BBSs, unlike blogs, local in character. See *Reference.Com*, [http://www.reference.com/browse/wiki/Bulletin\\_board\\_system](http://www.reference.com/browse/wiki/Bulletin_board_system) (last visited June 7, 2007).

<sup>176</sup> Swaya & Eisenstein, *supra* note 173, at 2-3.

[63] Only a handful of blogs existed in 1997 and 1998.<sup>177</sup> At that time, only people well versed in HTML<sup>178</sup> and with the free time to build and maintain a site requiring daily updates had blogs.<sup>179</sup> Early blogs were organized around links to other sites.<sup>180</sup> Bloggers acted as human filters for the Internet by providing links, coupled with their own commentary, to people, information, or sites they found interesting.<sup>181</sup> While not always sophisticated, these sites marked the beginning of a movement to include the public in the media, letting individuals praise, criticize, or correct content posted on other sites or blogs.<sup>182</sup>

[64] The style of blogs soon began to change, however. Beginning in 1999, software developers began releasing various do-it-yourself tools for building blogs.<sup>183</sup> Thus, blogs are now easy to set up and require no knowledge of computer programming.<sup>184</sup> While the link-driven-style blogs still exist, most new bloggers use their blogs as online personal journals instead of guides to the content of the web.<sup>185</sup> Bloggers record their personal thoughts and relate important events on their blogs for all the world to see.<sup>186</sup> This style of blogging soon led to full-blown conversations between blogs in which one blogger would respond to postings on another blog while providing a link to the responded-to blog.<sup>187</sup>

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<sup>177</sup> See Rebecca Blood, *Weblogs: A History and Perspective*, [http://www.rebeccablood.net/essays/weblog\\_history.html](http://www.rebeccablood.net/essays/weblog_history.html) (last modified Sept. 7, 2000).

<sup>178</sup> HTML is the acronym for Hypertext Markup Language, which is the computer language used to design web pages. HTML allows the web page author to structure the information on and, to some extent, the appearance of a web page. See LEVINE, *supra* note 87, at 296.

<sup>179</sup> See Blood, *supra* note 177.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> See Peterson, *supra* note 175, at 8.

<sup>185</sup> See Blood, *supra* note 177.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

[65] Thus, modern bloggers are primarily concerned with posting their thoughts on specific topics.<sup>188</sup> The postings are then organized in chronological order, making each blog a sort of archived opinion page.<sup>189</sup> Blogs also allow readers to post responses or comments.<sup>190</sup> The ability for readers to leave comments about materials on a blog fosters a dialogue between bloggers.<sup>191</sup> Instead of posting static information, the comment feature makes blogs interactive as readers respond to the initial comment posted on the blog and then to each other's responses.<sup>192</sup>

[66] These unique features have resulted in mammoth growth in blogging. In a January 2005 report, the Pew Internet & American Life Project reported that seven percent of the 120 million Internet users in the United States had created a blog. That amounts to more than eight million bloggers.<sup>193</sup> One report had the number of bloggers reaching eleven million by August 2005.<sup>194</sup> Further, by the end of 2004, twenty-seven percent of Internet users, or thirty-two million Americans, reported reading blogs.<sup>195</sup> This marked a seventeen percent increase over those admitting blog readership in February of that year.<sup>196</sup> This increase was likely traceable to coverage of the 2004 presidential election. Nine percent of Internet users said they "frequently" or "sometimes" read political blogs during the campaign.<sup>197</sup> Additionally, twelve percent of Internet users have posted comments or other material on a blog.<sup>198</sup>

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<sup>188</sup> See Steve Rubel, *The Rise of Business Blogging*, <http://www.webpronews.com/news/ebusinessnews/wpn-45-20050131TheRiseofBusinessBlogging.html> (last modified Jan. 31, 2005).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* Further differentiating blogs from the older BBSs, most BBSs allowed any user to start a new discussion on a new topic. Blogs, on the other hand, generally limit readers to commenting on discussion topics presented by the owner or owners of the blog.

<sup>191</sup> See Dave Taylor, *The Intuitive Life Business Blog*, [http://www.intuitive.com/blog/whats\\_the\\_difference\\_between\\_a\\_blog\\_and\\_a\\_web\\_site.html](http://www.intuitive.com/blog/whats_the_difference_between_a_blog_and_a_web_site.html) (last visited June 7, 2007).

<sup>192</sup> *Id.*

<sup>193</sup> See Lee Rainie, *The State of Blogging*, [http://www.pewinternet.org/pdfs/PIP\\_blogging\\_data.pdf](http://www.pewinternet.org/pdfs/PIP_blogging_data.pdf) at 1 [hereinafter "Pew Project"] (last visited June 7, 2007).

<sup>194</sup> Tessler, *supra* note 85.

<sup>195</sup> See Pew Project, *supra* note 193, at 1.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

[67] The ease and speed of blogging distinguishes it from other modes of speech. Posting material immediately makes it available to all the world's Internet users.<sup>199</sup> As a result, "blogs are an emerging form of legitimate and widespread communication of both fact and opinion . . . ."<sup>200</sup> Blogs democratize journalism by letting the People speak. This results in dissemination of expert opinions the public otherwise would not hear.<sup>201</sup> For example, the "Baghdad Blogger," Salam Pax, maintained an online diary of life in wartime Iraq.<sup>202</sup> Professor Juan Cole's blog provides scholarly discussion of Shiite Arabs and how Sunni Arabs are using the current American military presence in Iraq as a major recruiting tool.<sup>203</sup>

[68] Business has even begun to recognize the value of apparently honest, unpolished communications. Though still relatively rare, some major corporations have created blogs for use by both employees and customers.<sup>204</sup> These companies, slowly and often hesitantly, have recognized the value of blogs as a marketing tool.<sup>205</sup> Companies such as Sun Microsystems, Inc. and Google have encouraged employees to blog on a corporate site.<sup>206</sup> These companies see their blogs as a way to enhance communication with customers and to build a type of community.<sup>207</sup> Companies may also use blogs to facilitate communication between management and employees.<sup>208</sup>

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<sup>199</sup> See Peterson, *supra* note 175, at 10 ("[A] click of the mouse potentially will publish the writer's thoughts to millions of readers.")

<sup>200</sup> *Id.* at 44.

<sup>201</sup> Mortimer B. Zuckerman, *The Wild, Wild Web*, U.S. NEWS & WORLD REPORT, Dec. 5, 2005, at 76.

<sup>202</sup> *Id.* The blog, not updated since August 18, 2004, can be found at [http://dear\\_raed.blogspot.com](http://dear_raed.blogspot.com).

<sup>203</sup> *Id.* Professor Cole's blog is located at <http://www.juancole.com>.

<sup>204</sup> See Patricia Kitchen, *Change At Work: Blogging Bluepoint: Keys to Writing a Web Journal that Can Help Your Career, Not Harm It*, NEWSDAY, Dec. 3, 2004, at E40.

<sup>205</sup> See Amy Joyce, *Free Expression Can Be Costly When Bloggers Bad-Mouth Jobs*, THE WASHINGTON POST, Feb. 11, 2005, at A01; see also Peterson, *supra* note 175, at 10.

<sup>206</sup> See Joyce, *supra* note 205, at A01. Other companies with corporate blogs include Yahoo!, Nike, GM, and Intuit. See Rubel, *supra* note 188.

<sup>207</sup> See Joyce, *supra* note 205, at A01.

<sup>208</sup> See Peterson, *supra* note 175, at 10.

[69] Software giant Microsoft successfully used blogs to restore its image in the wake of the United States' antitrust suit against the company.<sup>209</sup> Beginning in 2001, Microsoft encouraged employees to blog about the company and its products.<sup>210</sup> The employees' passionate musings added an authentic voice that put a human face on the giant company.<sup>211</sup> The program was so successful that, between 2001 and 2005, Microsoft's blogging corps grew to more than 1,200 bloggers.<sup>212</sup>

[70] Blogs are unlike traditional websites in the corporate or political realm. Not just information conduits, blogs reflect the personalities of their individual authors.<sup>213</sup> Because of this, though, all is not roses in the blogging world. Bloggers view blogs as a place to vent and to speak frankly. "[T]he ethos of the blogosphere is to be chatty and sometimes catty and crude."<sup>214</sup> The unrestricted nature of blog postings has proven problematic in the business world, with several known instances – readily discussed on various blogs – of employees being fired for blog postings critical of their employer or co-workers.<sup>215</sup> Google, for example, has disciplined an employee for "improper" postings.<sup>216</sup>

[71] Accordingly, blogs may be just as harmful as they may be helpful. "At their best, blogs provide a civil, usually lucid, and running debate about subjects of public interest and concern. At their worst, blogs are potentially defamatory, profane, and rife with rumor and misstatements of fact."<sup>217</sup> One with knowledge of the content in a blog posting potentially

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<sup>209</sup> See Rubel, *supra* note 188.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> Joyce, *supra* note 205, at A01 (quoting interview with Lee Rainie, director of the Pew Internet & American Life Project).

<sup>215</sup> See *id.* at A01; see also Charles Duhigg, *World Wide Water Cooler: Can You Be Fired for Complaining About Your Boss Online?*, LEGAL AFFAIRS, Mar./Apr. 2004, at 8, available at [http://www.legalaffairs.org/issues/March-April-2004/scene\\_duhigg\\_marapr04.msp](http://www.legalaffairs.org/issues/March-April-2004/scene_duhigg_marapr04.msp).

<sup>216</sup> Joyce, *supra* note 205, at A01.

<sup>217</sup> Peterson, *supra* note 175, at 8.

could be liable for discrimination, harassment, or defamation of others.<sup>218</sup> While this risk can be minimized in the employment setting with a blogging policy,<sup>219</sup> a legislator faces special constraints in applying an equivalent blog-posting policy.<sup>220</sup>

[72] Nevertheless, politicians cannot ignore blogs. Blogs have gained favor because they combine the tone of a personal conversation with the accessibility of a website.<sup>221</sup> Blogs are attractive and powerful, no matter what the topic, because of their authenticity.<sup>222</sup> They are authored by individuals with a passion for the topics discussed and, by using feedback to create a dialogue, they create an ongoing, honest conversation.<sup>223</sup> Creating or contributing to a blog allows citizens not only to join in the public debate, but also to make a meaningful contribution by fostering critical thinking skills essential to an informed electorate.<sup>224</sup>

#### I. BLOGS ENTER POLITICS

[73] Lawrence Lessig has described blogging as “one of the most important opportunities” citizens have to create an alternative to existing media.<sup>225</sup> No longer just using campaign bulletin boards, volunteers and activists have begun spreading their own perspectives on blogs. The power of blogs already showed itself in the 2004 election cycle as Republican bloggers took on the “mainstream media” and won. On September 8, 2004, CBS’s Dan Rather reported on documents allegedly showing President Bush had been absent during much of his National Guard service in the early 1970s. When CBS posted the documents, allegedly created in 1972, on its website, Republican bloggers

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<sup>218</sup> See Swaya & Eisenstein, *supra* note 173, at 5; *see, e.g.*, *Blakey v. Cont’l Airlines, Inc.*, 751 A.2d 538, 543 (N.J. 2000) (ruling an airline could be held liable for a pilot describing a female pilot as a “feminazi” on the employer’s electronic bulletin board).

<sup>219</sup> See Swaya & Eisenstein, *supra* note 173, at 5.

<sup>220</sup> See *infra* Parts III.B.2-3.

<sup>221</sup> See Tessler, *supra* note 85 (quoting interview with Michael Cornfield of the Pew Internet & American Life Project).

<sup>222</sup> See Rubel, *supra* note 188.

<sup>223</sup> *Id.*

<sup>224</sup> See Julie China, *Blogger’s Anonymous*, FEDERAL LAWYER, Mar./Apr. 2006, at 6.

<sup>225</sup> See Eric Hellweg, Lawrence Lessig Talks Copyright and the Supreme Court, South by Southwest, [http://www.sxsw.com/interactive/tech\\_report/recent\\_interviews/l\\_lessig/](http://www.sxsw.com/interactive/tech_report/recent_interviews/l_lessig/) (last visited May 22, 2006).

immediately challenged them as modern forgeries.<sup>226</sup> After eleven days of defending the documents, the evidence of forgery became overwhelming, leading CBS to admit an error in airing the story and to Rather's resignation as news anchor.<sup>227</sup>

[74] Republicans have not, however, been alone in taking advantage of the power of blogs. In 2005, Democratic bloggers railed against comments by Republican Senate Majority Leader Trent Lott praising Strom Thurmond's 1948 segregationist presidential campaign.<sup>228</sup> True to Lessig's prediction, the bloggers' efforts forced the mainstream media to give the story more attention and ultimately led to Lott's resignation of his leadership post.<sup>229</sup>

[75] Thus, speech on blogs already has become a tool for influencing political tides – “the modern equivalent of political pamphleteering.”<sup>230</sup> Having already gained influence and demonstrated successes, blogs took another leap toward mainstream credibility in 2004 when the Democratic National Committee let some political bloggers, many with no journalistic training, attend and blog about its convention.<sup>231</sup> Finally, on November 18, 2005, the Federal Election Commission stated in an advisory opinion that blogs operated by Fired Up! LLC were “the online equivalent of a newspaper, magazine, or other periodical publication.”<sup>232</sup> The blogs were, therefore, exempt from campaign finance limits and regulation pursuant to the statutory press exception.<sup>233</sup>

[76] Blogs have become powerful tools in many sectors of society, including politics and the shaping of public opinion. They allow people to

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<sup>226</sup> See Barone, *supra* note 158, at 42; see also Tessler, *supra* note 85 (noting bloggers first expressed doubts regarding the authenticity of the documents); Rubel, *supra* note 188 (same).

<sup>227</sup> See Barone, *supra* note 158, at 42.

<sup>228</sup> See Tessler, *supra* note 85.

<sup>229</sup> *Id.*

<sup>230</sup> Doe v. Cahill, 884 A.2d 451, 456 (Del. 2005).

<sup>231</sup> Rubel, *supra* note 188.

<sup>232</sup> Fed. Election Comm'n Advisory Op. 2005-16 at 5, *available at* <http://www.fec.gov/aos/2005/ao2005-16final.pdf>.

<sup>233</sup> *Id.* at 4.

create a close-knit community from remote locations.<sup>234</sup> This tool, then, seems tailor made for politicians – either because they genuinely want to interact with and hear the opinions of their constituents or because they want to give the appearance that they are interested in what their constituents have to say. The upside for a legislator blogging with constituents seems great. Unfortunately, as we shall see, the downside is probably greater.

### III. WHY POLITICIANS SHOULD FEAR BLOGGING WITH CONSTITUENTS

[77] The chance for full and frank discussion between legislator and constituent is a benefit of interactive communication via the Internet. One study concluded conversations occurring over a network resulted in all participants having a roughly equal say in the discussion, unlike many in-person meetings that are dominated by one or two people.<sup>235</sup> The same study also found people typically reluctant to speak in personal meetings were more comfortable speaking in a networked setting.<sup>236</sup>

[78] The problem with interactivity, though, is lack of control over the respondent. This may manifest itself in many ways. Most obviously is the potential lack of control over who chooses to join the conversation. A survey of candidates for office in 1996 showed those with websites allowing users to e-mail the candidate received many messages from non-constituents.<sup>237</sup> Candidates do not want to spend their time with anonymous citizens who may not be able to vote for them.<sup>238</sup> This problem, however, can be resolved with relatively little trouble.<sup>239</sup>

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<sup>234</sup> In probably the most powerful show of the Internet's power as a political tool to date, a soldier serving in the war in Iraq won a seat on the city council of Grand Forks, North Dakota. With support from family members who handed out fliers, held a campaign rally, and put up signs around the town, the soldier appealed directly to voters by answering questions via e-mail. *See Internet Campaign From Iraq Wins Dakota Election*, CNN.COM, June 15, 2006, available at [http://www.smartmobs.com/archive/2006/06/19/elected\\_to\\_the\\_.html](http://www.smartmobs.com/archive/2006/06/19/elected_to_the_.html).

<sup>235</sup> *See* Lee Sproull & Sara Kiesler, *Computers, Networks, and Work*, 265 SCIENTIFIC AMERICAN 3, Sept. 1991, at 116, 119.

<sup>236</sup> *Id.* at 120.

<sup>237</sup> *See* DAVIS, *supra* note 96, at 91.

<sup>238</sup> *See* Kamarck, *supra* note 145, at 98.

<sup>239</sup> This form of direct connection between legislator and constituent is core political speech. *See* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587-588 (1980)



[79] More important from the legislator's perspective is the loss of control over his or her message. While the Internet has many attributes, it also has a "dark side," in that people can publish what they want on the Internet without fact checking.<sup>240</sup> They are able to "post commentary, news, rumor and ruminations online . . . ."<sup>241</sup> In order to attract attention in a diffuse and saturated media world, bloggers often seek attention by posting inflammatory or scurrilous matters without concern for fact checking.<sup>242</sup> People also tend to express more extreme opinions over the Internet than in personal conversations.<sup>243</sup>

[80] It is true that "[b]logging empowers average citizens to be able to speak to mass audiences" even if they cannot "afford a printing press or a radio station."<sup>244</sup> Such great reach means that, unless the forum were tightly censored, participants could write anything and leave it on the

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(Brennan, J., concurring). *See also id.* at 575 (plurality opinion) (the "expressly guaranteed freedoms" of the First Amendment "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government"). In order to make such communication feasible, however, the legislator would have to apportion time and/or access equitably. *See BUDGE, supra* note 100, at 115 (stating efficiency in a direct democracy would require government to apportion time equitably). The legislator would need, for example, to ensure she does not spend all her time responding to messages from non-constituents to the exclusion of those whose opinions should shape her actions. Similarly, the legislator would have to ensure her server space was not consumed by non-constituent postings to the exclusion of constituent communications. To maintain the viability of the communication method, the First Amendment would permit a time, place, or manner restriction on those who could use the blog. *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (reasonable time, place, or manner restrictions on speech are permitted so long as they "are justified without reference to the content of the regulated speech, . . . they are narrowly tailored to serve a significant governmental interest, and . . . they leave open ample alternative channels for communication of the information") (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). One might imagine many permissible technological solutions to these problems. Most obviously, the First Amendment should permit the legislator to require constituents to register for the site by providing a name and address, which could be checked either manually or electronically against the voter registry. Similarly, the server could be programmed to delete all messages after they had been posted for a pre-determined, reasonable period of time.

<sup>240</sup> *See Sussman, supra* note 99, at 62.

<sup>241</sup> Tessler, *supra* note 85.

<sup>242</sup> *See Zuckerman, supra* note 201, at 76.

<sup>243</sup> *See Sproull & Kiesler, supra* note 235, at 120-21.

<sup>244</sup> Tessler, *supra* note 85.

legislator's blog for all others to see.<sup>245</sup> In the context of the modern debate over how to deal with illegal immigrants from Mexico, many legislators would be unwilling to have posted on their blogs a statement such as "send the dirty Mexicans back home."<sup>246</sup> As demonstrated in the remainder of this article, however, the First Amendment would not permit a legislator to censor his or her blog.

#### A. THE FIRST AMENDMENT PUBLIC FORUM DOCTRINE

[81] Of course, the right to engage in political speech is the central component of the First Amendment's speech clause.<sup>247</sup> The First Amendment demonstrates our "'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open . . . .'"<sup>248</sup> The Supreme Court has developed the public forum doctrine to further this commitment by permitting free speech at times and locations at which the speech is likely to be meaningful.<sup>249</sup> The doctrine also provides "a metaphorical reference point" for protecting speech in all locations.<sup>250</sup>

[82] By granting a right to speak on public property, the government has ensured all speakers have a forum for distributing their messages.<sup>251</sup> Further, the government subsidizes speech in these fora by not enforcing trespass or theft laws against those who use the fora for speech without paying for upkeep, security, etc.<sup>252</sup> Thus, the public forum doctrine acts as

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<sup>245</sup> Kamarck, *supra* note 145, at 98.

<sup>246</sup> This is, of course, a very mild form of racial attack. The author will leave to the reader's imagination the types of statements people might post regarding immigration or any other controversial issue.

<sup>247</sup> See, e.g., *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 597 (1998).

<sup>248</sup> *Boos v. Barry*, 485 U.S. 312, 318 (1988) (plurality opinion) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

<sup>249</sup> Steven G. Gey, *Reopening the Public Forum – From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1535 (1998).

<sup>250</sup> *Id.*

<sup>251</sup> See Noah D. Zatz, Note, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J.L. & TECH. 149, 161-62 (Fall 1998).

<sup>252</sup> *Id.* at 161-62 & 164 (noting taxpayers must bear costs of cleaning up litter from leafleters and providing police protection to unpopular speakers while members of the public must endure increased congestion, uninvited solicitation, and expression of repugnant views as they use the public property).

a “First Amendment easement”<sup>253</sup> ensuring access regardless of the preferences of the government owners or the private users of the property.<sup>254</sup>

[83] Yet, government is not required to permit all forms of speech on its property. Where the government acts as manager over its internal operations instead of as a lawmaker with regulatory power, its acts are not subject to heightened review.<sup>255</sup> This approach is reflected in the Court’s “forum based” approach to reviewing speech restrictions on government property.<sup>256</sup>

[84] The Supreme Court first referred to a public forum analysis in 1939. It said then that citizens had speech rights on streets and in parks because those locations had “immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”<sup>257</sup> As discussed below, this remains the heart of the public forum doctrine.

[85] As Professor Gey has pointed out, the *Hague* case is a weak foundation for a free speech doctrine. The famous language giving rise to the public forum doctrine is merely dicta in a plurality opinion.<sup>258</sup> Moreover, the *Hague* plurality did not refute the prevailing view, expressed by Oliver Wendell Holmes as a state judge,<sup>259</sup> that government

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<sup>253</sup> Harry Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 13.

<sup>254</sup> See Zatz, *supra* note 251, at 172.

<sup>255</sup> See Int’l Soc’y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992).

<sup>256</sup> *Id.*

<sup>257</sup> *Hague v. Comm. For Indus. Org.*, 307 U.S. 496, 515 (1939) (plurality opinion).

Although *Hague* only identified streets and parks as having been held immemorially in trust for the public, the Supreme Court, citing *Hague*, has recognized sidewalks as a third type of traditional public forum property. See *Boos v. Barry*, 485 U.S. 312, 318 (1988) (citing *Hague*, 307 U.S. at 515).

<sup>258</sup> Gey, *supra* note 249, at 1539.

<sup>259</sup> See *Commonwealth v. Davis*, 39 N.E. 113, 113 (Mass. 1895).

had the right to control its property to the same extent as private property owners.<sup>260</sup>

[86] The Court, however, soon removed any confusion by expressly adopting the *Hague* dicta and rejecting the early Holmes view.<sup>261</sup> The Court then slowly narrowed the scope of the public forum doctrine by focusing on the three specific types of property identified in *Hague* and carving out exceptions even for those “traditional” public fora.<sup>262</sup> Forty years after creating the public forum concept in *Hague*, the Court set the restrictive modern public forum analysis.<sup>263</sup>

[87] In this analytical framework, the extent to which the First Amendment allows a government to restrict speech on the government’s own property depends on the character of the forum.<sup>264</sup> The Supreme Court has identified three categories of analysis for public forum purposes. First are those places that, by tradition or government declaration, have been devoted to assembly and debate.<sup>265</sup>

#### 1. TRADITIONAL PUBLIC FORA

[88] The classic description of the traditional public forum remains *Hague’s* reference to streets, sidewalks, and parks immemorially held in trust for the public.<sup>266</sup> The Supreme Court, however, has provided some

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<sup>260</sup> See Gey, *supra* note 249, at 1539-40 (citing Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 238 and Kalven, *supra* note 253, at 13).

<sup>261</sup> See *Jamison v. Texas*, 318 U.S. 413, 415-16 (1943); see also Gey, *supra* note 249, at 1540 & n.24 (discussing *Jamison*).

<sup>262</sup> See Gey, *supra* note 249, at 1542-47. For example, several courts have ruled that sidewalks were non-public fora under varying circumstances. See, e.g., *United States v. Kokinda*, 497 U.S. 720, 727 (1990) (sidewalk that runs only from Post Office entrance to parking lot); *Jacobsen v. Dep’t of Transp.*, No. 04-3716, 2006 WL 1312184, at \* 1 (8th Cir. May 15, 2006) (explaining that perimeter sidewalks at Iowa highway rest stops are non-public fora); *Jacobsen v. Bonine*, 123 F.3d 1272, 1273-74 (9th Cir. 1997) (same for Arizona rest stop sidewalks); *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1203 (11th Cir. 1991) (same for Florida rest stop sidewalks).

<sup>263</sup> See Gey, *supra* note 249, at 1547.

<sup>264</sup> *Cornelius v. NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788, 799-800 (1985) (“Even protected speech is not equally permissible in all places and at all times.”).

<sup>265</sup> *Perry Ed. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

<sup>266</sup> See *Hague v. Comm. For Indus. Org.*, 307 U.S. 496, 515-16 (1939).

additional contour to its description. The traditional public forum is property that has as “a principal purpose . . . the free exchange of ideas.”<sup>267</sup> Such property is “continually open, often uncongested, and constitutes not only a necessary conduit in the daily affairs of a locality’s citizens, but also a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment.”<sup>268</sup>

[89] Thus, a traditional public forum is one with “the physical characteristics of a public thoroughfare, . . . the objective use and purpose of open public access or some other objective use and purpose inherently compatible with expressive conduct, [and] historical[ly] and traditional[ly] has been used for expressive conduct . . .”<sup>269</sup> All such fora share a common trait in that open access and viewpoint neutrality are “compatible with the intended purposes of the property.”<sup>270</sup> The requirements of openness and neutrality mean content-based restrictions in these fora are subject to strict scrutiny.<sup>271</sup>

## 2. DESIGNATED PUBLIC FORA

[90] Of course, the First Amendment is not absolute. “The Constitution does not require all public acts to be done in town meeting or an assembly of the whole.”<sup>272</sup> Nor does the First Amendment mean “that people who want to (voice) their views have a constitutional right to do so whenever and however and wherever they please.”<sup>273</sup> Thus, government bodies may meet in executive session without public access.<sup>274</sup>

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<sup>267</sup> *Cornelius*, 473 U.S. at 800.

<sup>268</sup> *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981).

<sup>269</sup> *Warren v. Fairfax County*, 196 F.3d 186, 191 (4th Cir. 1999).

<sup>270</sup> *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 673 (1988).

<sup>271</sup> *Perry Ed. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983); *see also Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (explaining that speech on government property “that has traditionally been available for public expression” faces strict scrutiny).

<sup>272</sup> *City of Madison Sch. Dist. v. Wis. Employment Relations Comm’n*, 429 U.S. 167, 179 (1976) (Brennan, J., concurring) (quoting *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915)).

<sup>273</sup> *Id.* at 178 (Brennan, J., concurring) (quoting *Adderley v. Florida*, 385 U.S. 39, 48 (1966)).

<sup>274</sup> *Id.*

[91] The First Amendment requires a different result, however, where a governmental body has chosen to open its decision-making processes to public participation.<sup>275</sup> Its action creates “a public forum dedicated to the expression of views by the general public.”<sup>276</sup> Thus, the second category recognized by the public forum doctrine consists of public property opened by the government for expressive activity by the public.<sup>277</sup>

[92] Aside from the traditional public forum, the government must act intentionally to create a public forum.<sup>278</sup> To do so, the government must “intentionally open[] a nontraditional forum for public discourse.”<sup>279</sup> Governmental inaction does not create a public forum.<sup>280</sup> The location of the property is also relevant to determining its status. A property’s separation from acknowledged public forum property may demonstrate that it is separate from and more restricted than the public forum property.<sup>281</sup>

[93] The key in determining whether government property that is not a traditional public forum has been designated as a public forum is how the property is used.<sup>282</sup> The government’s intent in constructing the space and its need to control expressive activity are also relevant. These factors can be isolated by looking to policies or regulations regarding the forum.<sup>283</sup> Similarly, the government can demonstrate it did not intend to create a forum for speech by pointing to litigation in which it sought to limit speech in the alleged forum.<sup>284</sup>

[94] The Court gave some guidance in applying these principles to determine when the government will be held to have established a designated public forum. Where the government allows occasional but

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<sup>275</sup> *Id.* at 178-79.

<sup>276</sup> *Id.* at 179.

<sup>277</sup> *See* *Perry Ed. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

<sup>278</sup> *See* *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679-80 (1992).

<sup>279</sup> *Id.* at 680 (quoting *Cornelius v. NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788, 802 (1985)).

<sup>280</sup> *Lee*, 505 U.S. at 680.

<sup>281</sup> *Id.*

<sup>282</sup> *See* *Hotel Employees & Restaurant Employees Union v. City of New York Dep’t of Parks & Recreation*, 311 F.3d 534, 545 (2d Cir. 2002).

<sup>283</sup> *See id.* at 547; *see also* *Bowman v. White*, 444 F.3d 967, 974-75 (8th Cir. 2006).

<sup>284</sup> *See* *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680-81 (1992).

only limited use of a property that is otherwise specifically reserved for its employees, it does not create a public forum. Thus, a school's internal mail system, used for transmitting official messages between teachers and administration, exchange of personal messages among teachers, and occasionally for transmission of messages from civic organizations,<sup>285</sup> was not a public forum.<sup>286</sup> Similarly, no public forum exists where the property serves a commercial function and must remain attractive to the marketplace. A property's commercial nature suggests the property's purpose is something other than "promoting 'the free exchange of ideas.'"<sup>287</sup> As such, an airport terminal is not a public forum.<sup>288</sup>

[95] When the government opens a designated public forum, however, it is stuck with the consequences of its action.<sup>289</sup> Restrictions on speech in designated public fora are treated with the same skepticism as restrictions in traditional public fora.<sup>290</sup> Although the government was not required to open the forum and can close a designated public forum,<sup>291</sup> restrictions imposed in a designated public forum are subject to strict scrutiny so long as the government leaves the forum open for expression.<sup>292</sup>

#### A. LIMITED PUBLIC FORA

[96] Nonetheless, because the designated public forum is a creature of government action, the government can exercise more control over the forum by setting limits when it creates the forum. *Perry* recognized, in addition to the designated public forum, the limited public forum.<sup>293</sup>

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<sup>285</sup> See *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 39 (1983).

<sup>286</sup> *Id.* at 46.

<sup>287</sup> *Lee*, 505 U.S. at 682 (quoting *Cornelius v. NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985)).

<sup>288</sup> *Lee*, 505 U.S. at 682.

<sup>289</sup> See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (explaining that, after the government opens a forum, it "must respect the lawful boundaries it has itself set.").

<sup>290</sup> See *Lee*, 505 U.S. at 678.

<sup>291</sup> See *Perry*, 460 U.S. at 46.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 46 n.7. Some confusion exists in the circuit courts regarding the limited public forum category. Some circuits treat the terms designated public forum and limited public forum as synonymous while others regard the limited public forum as a sub-category of a designated public forum where the designated forum is open only to certain speakers or

When the government opens a limited public forum, it limits the forum to communications by certain groups<sup>294</sup> or addressing certain subjects.<sup>295</sup>

[97] As with a designated public forum, the government must affirmatively open a limited public forum.<sup>296</sup> When it does so, it may choose the types of speakers and/or subjects that will be permitted in the forum.<sup>297</sup> The government, however, does not create a limited public forum when it grants “selective access for individual speakers rather than general access for a class of speakers.”<sup>298</sup>

[98] Still, although a state is not required to permit all manners of speech or speakers when it opens a limited public forum,<sup>299</sup> the government’s authority in this forum is not boundless. The government may not discriminate based on viewpoint, and any restrictions imposed “must be ‘reasonable in light of the purpose served by the forum.’”<sup>300</sup> Thus, the government may not selectively deny access for speech or activities of the genre for which it opened the forum.<sup>301</sup> The government may, however, exclude expression beyond the genre for which it opened the limited public forum so long as its actions are viewpoint neutral and reasonable.<sup>302</sup>

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for certain subjects. *See* *Bowman v. White*, 444 F.3d 967, 975-76 (8th Cir. 2006) (collecting cases and describing split). The distinction is significant because governmental restrictions on speech of a type not allowed in a limited public forum must only be reasonable and viewpoint neutral. *Id.* at 976.

<sup>294</sup> *See Perry*, 460 U.S. at 46 n.7 (citing generally *Widmar v. Vincent*, 454 U.S. 263 (1981)).

<sup>295</sup> *See id.* (citing generally *City of Madison Sch. Dist. v. Wis. Employment Relations Comm’n*, 429 U.S. 167 (1976)).

<sup>296</sup> *See Hotel Emples. & Rest. Emples. Union v. City of New York Dep’t of Parks & Rec.*, 311 F.3d 534, 545 (2d Cir. 2002).

<sup>297</sup> *Id.*

<sup>298</sup> *Ark. Educ. TV Comm’n v. Forbes*, 523 U.S. 666, 679 (1998).

<sup>299</sup> *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001).

<sup>300</sup> *Id.* at 106-07 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985)). *See also infra* discussion of reasonableness in the following section on non-public fora.

<sup>301</sup> *See Hotel Emples. & Rest. Emples.*, 311 F.3d at 545-46.

<sup>302</sup> *Id.* at 546.



## 3. NON-PUBLIC FORA

[99] The last category encompasses government property that is neither by tradition nor by designation a public forum.<sup>303</sup> When determining whether a property is a non-public forum, “[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.”<sup>304</sup> “When government property is not dedicated to open communication[,] the government may – without further justification – restrict use to those who participate in the forum’s official business.”<sup>305</sup>

[100] The government’s power as property owner is at its zenith in this class of property. Government may preserve the intended purposes of the forum – whether communicative or not – so long as its regulations on speech are reasonable and not an effort to suppress a speaker’s viewpoint.<sup>306</sup> The government’s actions “can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.”<sup>307</sup> Further, its actions need only be reasonable. The government’s chosen restrictions do not have to “be the most reasonable or the only reasonable limitation.”<sup>308</sup>

[101] The reasonableness of the restrictions imposed in a non-public forum are viewed “in the light of the purpose of the forum and all surrounding circumstances,”<sup>309</sup> and must be “consistent with the [government’s] legitimate interest in preserving the property for the use to which it is lawfully dedicated.”<sup>310</sup> A speech restriction in a non-public

<sup>303</sup> See *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 46 (1983).

<sup>304</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

<sup>305</sup> See *Perry*, 460 U.S. at 53.

<sup>306</sup> See *id.* at 46.

<sup>307</sup> *United States v. Kokinda*, 497 U.S. 720, 730 (1990) (internal quotation marks and citation omitted).

<sup>308</sup> *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 683 (1992) (quoting *Kokinda*, 497 U.S. at 730).

<sup>309</sup> *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 809 (1985).

<sup>310</sup> *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 50-51. The same analysis applies to exclusions from limited public fora based on a speaker’s alleged noncompliance with the limitations on expression in the forum. See *supra* text accompanying note 300.

forum, therefore, is “reasonable” when it is “consistent with the [government’s] legitimate interest in preserving the property . . . for the use to which it is lawfully dedicated.”<sup>311</sup>

#### 4. IMPACT OF THE MODERN PUBLIC FORUM ANALYSIS

[102] The public forum doctrine protects access to those locations most important to fulfill the goal of the First Amendment.<sup>312</sup> The protection of speech on certain government property reinforces “the idea that we are a free people” by giving citizens notice that they may exercise their freedoms on such property without fear of government censorship.<sup>313</sup> Because government authority to limit speech in this realm is premised on the government’s ownership of the property, the public forum doctrine furthers our concept of limited government by focusing on the physical characteristics of the property to curtail regulation where the property is appropriate for speech.<sup>314</sup>

[103] The tri-partite public forum analysis is protective of speech in traditional public fora and designated public fora. However, these classes are quite narrow. Because the government must declare a designated (or limited) public forum and it is able to set the parameters of its designation, the designated public forum category “provides little, if any, additional protection to speech.”<sup>315</sup> Moreover, in a nonpublic forum, the analysis revives the pre-*Hague* property owner analysis allowing the government to exclude speakers so long as they are not excluded on the basis of viewpoint.<sup>316</sup> The sharp limitation on access to non-public fora is also significant given the Court’s focus on governmental intent as to how a forum should be used. This analysis has two sides. First, a forum is only converted from non-public forum to public forum if the government so

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<sup>311</sup> *Id.* (quoting *Postal Serv. v. Council of Greenburgh Civic Assn’s*, 453 U.S. 114, 129-30 (1981) (internal quotation marks omitted)).

<sup>312</sup> *See Zatz, supra* note 251, at 160-61.

<sup>313</sup> *See Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 696 (1992) (Kennedy, J., concurring).

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 699 (Kennedy, J., concurring); *see also Gey, supra* note 249, at 1569-71 (criticizing Justice Kennedy’s approach to public forum analysis for continuing to recognize the designated public forum category).

<sup>316</sup> *See Gey, supra* note 249, at 1547-48.

intends.<sup>317</sup> Second, even if the government allows conversion to a public forum, the government is able to limit the forum to the type of speech it prefers.<sup>318</sup>

[104] As we set about to classify our legislator's blog in the next section, we will see the legislator both protected and undermined by these First Amendment principles. Ultimately, the burden of First Amendment protections for speakers on the blog will likely prove too great for the legislator to tolerate.

#### B. BLOGS AND THE FIRST AMENDMENT

[105] Because the Internet is still quite new, the courts have given only limited guidance in how to apply traditional legal rules in the electronic setting.<sup>319</sup> In fact, some scholars assert current First Amendment analysis, and the history- and tradition-based public forum doctrine in particular, are unworkable in this new age of technology.<sup>320</sup> Such arguments are misguided.

[106] No reason exists for treating the Internet differently than the off-line world in analyzing speech rights. Speech serves the same purpose whether it is shouted across a park or streamed (or typed) over the Internet. The Supreme Court has even recognized that "the same principles are applicable" to fora existing "more in a metaphysical than in a spatial or geographic sense."<sup>321</sup> In fact, the Court has already, in *Reno v. ACLU*,<sup>322</sup> applied a typical First Amendment analysis in the Internet context.<sup>323</sup>

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<sup>317</sup> See *id.* at 1548.

<sup>318</sup> *Id.*

<sup>319</sup> Nat'l A-1 Adver., Inc. v. Network Solutions, Inc., 121 F.Supp.2d 156, 167 (D.N.H. 2000) ("Because of the relative novelty of the Internet, there is very little precedent applying traditional or familiar legal principles to its operation.").

<sup>320</sup> See, e.g., John J. Brogan, *Speak & Space: How the Internet Is Going to Kill the First Amendment As We Know It*, 8 VA. J.L. & TECH. 8, at \* 3 (Summer 2003).

<sup>321</sup> *Rosenberger v. Rector Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995).

<sup>322</sup> See *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

<sup>323</sup> See David J. Goldstone, *A Funny Thing Happened on the Way to the Cyber Forum: Public vs. Private In Cyberspace Speech*, 69 U. COLO. L. REV. 1, 9 (Winter 1998).

[107] As in any case, the first step in evaluating speech restrictions on government property is to determine the type of forum – traditional public forum, designated public forum, or non-public forum – involved.<sup>324</sup> Under the *Perry* analysis, classification is key. Because the government almost always wins fights over access to non-public fora, the war is usually won on the classification battlefield.<sup>325</sup>

[108] When considering the proper classification for First Amendment purposes, one must first identify the proper venue to be classified. In the offline world, some government properties, like a university campus, may consist of multiple types of fora.<sup>326</sup> Some parts of a campus, like classrooms and administrative offices, are non-public fora. Other parts, like auditoriums, may be open to certain speech on certain topics, making them designated (or perhaps limited) public fora. Finally, the campus is likely surrounded by and perhaps even traversed by public streets and sidewalks, which are traditional public fora.<sup>327</sup>

[109] The Internet should be viewed as a similarly dynamic entity with some parts that are public fora and some parts that are non-public fora.<sup>328</sup> Because of its open architecture, the Internet clearly has areas that are public fora. This does not mean, however, that every site on the Net is a public forum. The question in any case is whether the one specific site with which we are concerned is a public forum.<sup>329</sup>

#### 1. THE LEGISLATOR’S BLOG IS A PUBLIC FORUM

[110] If the courts have had little time to contemplate application of traditional principles to the Internet as a whole, they have had virtually no

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<sup>324</sup> See, e.g., *Bowman v. White*, 444 F.3d 967, 974-75 (8th Cir. 2006); see also *United States v. Kokinda*, 497 U.S. 720, 732 (1990) (explaining that in considering a speech restriction, one must consider the significance of the government interest in light of the nature and function of the forum at issue).

<sup>325</sup> See *Gey*, *supra* note 249, at 1548.

<sup>326</sup> See *Bowman*, 444 F.3d at 974-75.

<sup>327</sup> *Id.* at 977.

<sup>328</sup> See *Goldstone*, *supra* note 9, at 337 (arguing the Internet should be viewed as a city).

<sup>329</sup> See *id.* at note 323, at 10 (Because the Internet is composed of parts marked by varying degrees of public access, “the important question will not be ‘Whether cyberspace is a public forum,’ but ‘Where are the public forums in cyberspace?’”).

occasion to consider applying legal doctrines to blogs.<sup>330</sup> The one court to consider the matter held postings on a blog are entitled to First Amendment protection.<sup>331</sup> The conclusion that the First Amendment can apply to blogs, however, far from resolves the inquiry. We must determine whether a legislator's blog, in particular, is subject to the First Amendment and, if so, to what level of First Amendment protection blog postings are entitled.

A. THE LEGISLATOR, AS A STATE ACTOR, MUST COMPLY WITH THE FIRST AMENDMENT

[111] It is axiomatic that the First Amendment only restricts government conduct.<sup>332</sup> The structure of the Internet, however, is primarily owned and operated by private companies.<sup>333</sup> Communications over private networks like that owned by America Online may face state action bars.<sup>334</sup> This problem is overcome, however, where the government supplies or subsidizes the network.<sup>335</sup>

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<sup>330</sup> See Peterson, *supra* note 175, at 8 (noting, given the recent rise of blogs, courts have not dealt with how to apply traditional legal rules).

<sup>331</sup> See *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005).

<sup>332</sup> See, e.g., *Public Utils. Comm'n of D.C. v. Pollak*, 343 U.S. 451, 461 (1952).

<sup>333</sup> See Goldstone, *supra* note 9, at 350.

<sup>334</sup> See *id.* at 350-51.

<sup>335</sup> *Id.* at 348. One could conceive of a legislator trying to avoid the First Amendment pitfalls detailed in this article by using his private Internet account to host the blog on which he solicits constituent opinions. While an exhaustive discussion of the implications of such an act is beyond the scope of this paper, the private actor barrier likely would not protect the legislator in that instance. A private actor is deemed to be a state actor when it has a "symbiotic relationship" with the state. See *Perkins v. Londonberry Basketball Club*, 196 F.3d 13, 18 (1st Cir. 1999). The symbiotic test is satisfied where the government is so intertwined with the actor as to be a joint participant with him. *Id.* at 21. A politician using his personal blog to solicit opinions from constituents to guide his official actions seems to be acting in conjunction with the government. Moreover, even if a politician could be considered a private person under such circumstances, "state action may be found if . . . there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (internal quotation marks omitted). Even an unequivocally private actor like an Internet service provider would be subject to the First Amendment if it undertook clearly governmental functions, such as hosting an election. See Goldstone, *supra* note 323 at 21-22. The politician as private person soliciting political opinions he

[112] Most obviously, when the government supplies the network, no state action problem exists. When the legislator is sued for violating the First Amendment by, for example, censoring the blog hosted on a government-owned network server, the actor being challenged is unquestionably a government agent.<sup>336</sup>

[113] The same result is obtained even if the government only subsidizes the network. In the Internet context, no state action concerns arise where a governmental entity acts as a censor<sup>337</sup> because the government action element is met where the discussion originates from a government-owned computer.<sup>338</sup> State action simply is not a problem when the government is alleged to have committed the challenged action since the Constitution, Bill of Rights, and Amendments restrict governmental actions.<sup>339</sup> Maintenance of her blog on a government server for purposes of assisting her in performing her official duties indicates the legislator is acting in her governmental capacity, thus satisfying the state action test.<sup>340</sup> Therefore, a politician attempting to censor a public forum meets the state action requirement.<sup>341</sup>

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intends to use in his official acts seems to be acting in a way so closely related to his governmental function as to be considered a part of his state action.

<sup>336</sup> See *cf.* Goldstone, *supra* note 9, at 354-57 (arguing the state action doctrine bars application of the First Amendment to private network operators).

<sup>337</sup> See, e.g., *Loving v. Boren*, 956 F. Supp. 953 (W.D. Okla. 1997) (no discussion of state action as an issue where professor at a state university sued the university for blocking access to Internet newsgroups).

<sup>338</sup> See Goldstone, *supra* note 9, at 385.

<sup>339</sup> See 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 16.1 (3d ed. 1999).

<sup>340</sup> See, e.g., *Minshew v. Smith*, 380 F. Supp. 918, 922 (W.D. Miss. 1974) (elected representative acting in his or her official capacity is a state actor); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 151 (1970) (involvement of a sheriff, a state actor, in unconstitutional conduct meets the state action test); *Illinois v. Krull*, 480 U.S. 340, 364 (1987) (legislator is a state actor for Fourth Amendment purposes); ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 494 (2d ed. 2002) (state action exists when the actor undertaking the challenged act is a government employee acting as a government officer).

<sup>341</sup> See, e.g., Goldstone, *supra* note 9, at 379-80 (stating state action exists where hypothetical president attempts to silence a hypothetical conference).

## B. CLASSIFYING THE LEGISLATOR'S BLOG

[114] Having determined that the legislator's blog is subject to First Amendment strictures, the next issue is the nature of the applicable limitations. Because the *Perry* forum-based analysis provides different levels of protection depending on the type of forum at issue, we must determine into which category the legislator's blog fits. As demonstrated above, the public forum analysis is a two-step inquiry. First, does a long tradition of public debate exist on the property? If not, has the government opened the property as a place for expression?<sup>342</sup>

[115] The public forum doctrine's focus on the pedigree of property in deciding whether speech protection attaches leaves many unanswered questions. Most crucial for a blog – or any speech on the Internet – is whether any particular duration of existence for a particular forum can meet the requirements of a traditional public forum.<sup>343</sup> Unfortunately, the Supreme Court seems to have barred the recognition of new traditional public fora and limited the category to parks, streets, and sidewalks.<sup>344</sup>

[116] In *Lee*, the Court rejected calls to recognize airport terminals as traditional public fora. The majority reasoned that, “given the lateness with which the modern air terminal has made its appearance, it hardly qualifies for the description of having ‘immemorially . . . time out of mind’ been held in the public trust and used for purposes of expressive activity.”<sup>345</sup> If airport terminals in 1992 could not claim traditional public forum status, it seems unlikely the Internet would earn the title in 2007, and unfathomable that a blog would earn the distinction.<sup>346</sup>

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<sup>342</sup> See *id.* at 360.

<sup>343</sup> See Brogan, *supra* note 320, at \*7.

<sup>344</sup> See *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 680 (1992).

<sup>345</sup> *Id.* (ellipsis in original).

<sup>346</sup> Individuals and groups increasingly use expressions and exchange of ideas in mass and electronic media to share opinions in the way they used expressions in streets and parks in the past. See Zatz, *supra* note 251 at 151. The Supreme Court, however, has given little heed to such concerns in the traditional public forum analysis. See *Lee*, 505 U.S. at 696-97 (Kennedy, J., concurring) (criticizing the Court for focusing on historical pedigree and concluding “open, public spaces and thoroughfares that are suitable for discourse may be public forums, whatever their historical pedigree and without concern for a precise classification of the property.”).

[117] The physical characteristics of the blog alone, however, are not dispositive of the traditional public forum analysis.<sup>347</sup> One must also consider its location and purpose.<sup>348</sup> While the legislator's blog is hosted on a government server and is within a government Internet domain, it is set apart as individual space attributed to the particular legislator.<sup>349</sup> The blog is not like a park where one can loiter and spread his or her message.<sup>350</sup> Instead, the blog is like a bulletin board where one can leave a message and hope it gains attention.<sup>351</sup> This indicates that a blog and probably the entire Internet cannot be considered traditional public fora – even if the category were still open to new types of properties – because their uses are not consistent with those attributed to traditional public fora.<sup>352</sup>

[118] Since that door seems closed, the inquiry must proceed to the other categories. One commentator has offered a test for determining when a site on the Internet is a designated public forum.<sup>353</sup> According to Goldstone, the site fits this category if it is government owned or

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<sup>347</sup> *United States v. Kokinda*, 497 U.S. 720, 727 (1990).

<sup>348</sup> *Id.* at 728-29.

<sup>349</sup> *See Hotel Emples. & Rest. Emples. v. N.Y. Dep't of Parks & Rec.*, 311 F.3d 534, 550 (2002) (Lincoln Center is separate from nearby public forum property; accessibility to local streets is incidental to its design).

<sup>350</sup> Navigation in cyberspace is different from navigating the offline world in a way that is significant for speech. In the offline world, locations are separated by the distance between them with intervening properties giving each location context. Thus, a government property physically separated from a public forum property with characteristics not amenable to speech may be a non-public forum. *See Kokinda*, 497 U.S. at 727 (holding sidewalk to Post Office entrance non-public forum though municipal sidewalk located across the parking lot was public forum). Because the “distance” between two locations on the Internet is simply a different Uniform Resource Locator, cyberspace eliminates the distance between any two locations and the corresponding time of travel. Similarly, links on one site may lead directly to another site of which the user was not aware – making the two sites “close” in the sense that the user need not search for the second site. “Cyberspace, by contrast [to the offline world], disaggregates internal features of the place from its spatial characteristics.” *See Zatz, supra* note 251, at 183-87.

<sup>351</sup> *See Hotel Emples.*, 311 F. 3d at 551-52 (though design of the Lincoln Center plaza allowed pedestrians to pass through, restrictions on expression indicated the government's purpose was to conserve it as an extension of the performing arts complex).

<sup>352</sup> *Reno* notably did not apply a public forum analysis. Such analysis would not have aided the Court's analysis because history and tradition would not require protecting speech in such a new forum. *See Brogan, supra* note 320, at \*58.

<sup>353</sup> *See Goldstone, supra* note 9, at 368-69.



controlled, offers unlimited access to recipients of information, and gives viewpoint-neutral access to a large number of information senders.<sup>354</sup> The legislator in our hypothetical opened the blog in her governmental capacity, ostensibly for the purpose of allowing any and all of her constituents to visit the blog and contribute their opinions. This seems to satisfy Goldstone's sensible designated public forum test. To classify the blog as such, however, would provide too much speech protection.

[119] To maintain the efficiency necessary to make this method of soliciting constituent opinions useful, the legislator would need to place some limits on blog postings. If the legislator was primarily concerned with how she should vote on a pending immigration bill, wading through thousands of comments, for example, about whether to seek funds to repair a road in Kentucky would undermine the blog's usefulness to her. The blog, therefore, should be classified as a limited public forum.<sup>355</sup> So long as they addressed their speech to one of the political topics posed or permitted for discussion by the legislator,<sup>356</sup> speakers in the forum would be entitled to First Amendment protection.<sup>357</sup>

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<sup>354</sup> *Id.*

<sup>355</sup> The forum should be considered a limited public forum instead of a broader designated public forum because the legislator, as controller of the forum, can choose the topics for discussion. *See Hotel Emples.*, 311 F.3d at 545 (government may choose the speakers and/or subjects permitted in a limited public forum).

<sup>356</sup> The legislator could prohibit any speech dealing with other issues with an appropriate time, place, or manner regulation. *See supra* note 239. Professor Brogan argues time, place, or manner regulations are appropriate in parks where they maximize speech by preventing simultaneous conflicting uses but are unnecessary in the online world where multiple users can use the same space at the same time. *See Brogan, supra* note 320, at \*7. His analysis, though generally correct, does not recognize the particular efficiency concerns needed to make the speech useful and to prevent some posters from overtaking the blog in the present context.

<sup>357</sup> *See cf. U.S. Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 137 (1981) ("Only where the exercise of First Amendment rights is incompatible with the normal activity occurring on public property have we held the property is not a public forum.")

## 2. WHY CONSTITUTIONAL PROTECTION OF THE BLOG SHOULD CONCERN THE LEGISLATOR

[120] A legislator advised that constitutional speech protection will attach to postings on his blog would ask himself whether he was willing to open a protected forum for constituents. A legislator whose immediate concern is an immigration bill should immediately recognize that some constituents would post messages with incendiary and derogatory language for all the world to see. The politician would want a moderator to prevent dissemination of such “harmful” messages.<sup>358</sup> This desire to limit speech conflicts with constitutional protections for speakers in the forum.<sup>359</sup>

[121] The constitutional safeguards for speech would prohibit the legislator from controlling speech on the blog. Our society values a diversity of opinions, even those most people find odious, to build a stronger culture.<sup>360</sup> Thus, the government is not permitted to censor the content of speech.<sup>361</sup> Accordingly, the government may neither exclude participants from a forum because of the content of their speech<sup>362</sup> nor delete a viewpoint from a discussion in the forum without violating the First Amendment.<sup>363</sup>

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<sup>358</sup> See DAVIS, *supra* note 96 at 115.

<sup>359</sup> See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (once the government voluntarily opens a forum, the government is subject to applicable constitutional standards for any attempts to exclude speakers).

<sup>360</sup> “[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is nevertheless protected against censorship or punishment. . . .” *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

<sup>361</sup> See *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95-96 (1972) (“To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control.”).

<sup>362</sup> *City of Madison Sch. Dist. v. Wis. Employ. Relations Comm’n*, 429 U.S. 167, 179 (1976) (Brennan, J., concurring).

<sup>363</sup> See Goldstone, *supra* note 9, at 396.

[122] The easiest case for application of the First Amendment involves comments critical of the legislator's performance. While the legislator might want to censor such comments, he cannot do so. Such criticism is the essence of our political culture. The government may not exclude from a forum critical comments addressed to the government acting in its governmental capacity.<sup>364</sup>

[123] The criticism example is easy because politicians are expected to endure public criticism. The harder case involves the desire to censor speech that is likely to offend some of the legislator's constituents. Regardless of the legislator's purportedly altruistic motive for desiring to censor such speech, the First Amendment will not permit him to do so.

[124] Government may not permit some speech but deny other speech of the same nature because the subject of the latter speech is more likely to produce unpleasant effects.<sup>365</sup> Such discrimination based on the content of the speech is impermissible under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.<sup>366</sup> The legislator could have allowed limited discourse on her blog without opening a public forum.<sup>367</sup> Once she has invited citizen comments on political issues, however, she cannot constitutionally limit the forum to those with whom she agrees.<sup>368</sup>

[125] The legislator, therefore, will be hard pressed to claim a right to limit or prohibit speech or speakers with whose views she takes issue.<sup>369</sup> Our firm constitutional protections for the content of speech virtually

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<sup>364</sup> *See id.*

<sup>365</sup> *See, e.g., Mosley*, 408 U.S. at 100 (stating that picketing only regarding labor disputes is not allowed); *see also Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 508 (1969) (banning the wearing of arm bands only when done as a silent protest of Vietnam war is not allowed).

<sup>366</sup> *See Mosley*, 408 U.S. at 100.

<sup>367</sup> *See United States v. Kokinda*, 497 U.S. 720, 730 (1990) (stating the government does not open a public forum by permitting only limited discourse on its property).

<sup>368</sup> *See Mosley*, 400 U.S. at 96 ("Selective exclusions from a public forum may not be based on content alone . . ."); *see also City of Madison Sch. Dist. v. Wis. Employment Relations Comm'n*, 429 U.S. 167, 175 (1976) ("[w]here the State has opened a forum for direct citizen involvement," it cannot exclude a group of citizens from participating).

<sup>369</sup> *See Goldstone, supra* note 323, at 30-31.

eliminate any ability for the legislator to censor or remove postings.<sup>370</sup> No claimed need to limit the forum will protect the legislator because the reasonableness of a regulation is irrelevant when the government discriminates on the basis of viewpoint or content.<sup>371</sup>

[126] The desperate legislator, however, might claim she has a duty to protect her constituents. Some posters, she will correctly point out, state their messages in ways highly likely to offend others. The legislator will claim she must screen messages to ensure they are appropriate for the bulk of her constituents and remove those that are likely to offend or inflame. This assertion, however, also fails.

[127] The government may not restrict or punish protected speech in a public forum because some of the words are unpleasant.<sup>372</sup> Similarly, the government cannot regulate speech simply because it proves embarrassing to some who hear or see it.<sup>373</sup> A restriction on speech is not content neutral when it is based on another's reaction to the speech.<sup>374</sup> As such, the fact many might consider the posting or part of it vulgar, crass, or personally offensive does not deprive the posting of First Amendment

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<sup>370</sup> See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) (“It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.”); see generally *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (stating that content-based regulations raise special First Amendment concerns because of the chilling effect they have on speech). The discussion of “censoring” speech, while generally addressed to removal or alteration of posted material, would also extend to prohibiting speech from being posted at all. Such censorship is unconstitutional whether done manually or through computer software screening out certain words or phrases. The First Amendment does not permit prior restraints prohibiting speech merely because the government objects to the planned message. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

<sup>371</sup> See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001) (viewpoint); see also *Reno*, 521 U.S. at 879 (content).

<sup>372</sup> See, e.g., *Street v. New York*, 394 U.S. 576, 590 (1969) (involving the public burning of the flag while shouting: “We don’t need no damn flag . . . [I]f they let that happen to [civil rights activist James] Meredith, we don’t need an American flag.”); *Cohen v. California*, 403 U.S. 15, 17 (1971) (involving the wearing of a jacket with the words “Fuck the draft” on back in courthouse).

<sup>373</sup> See *United States v. Kokinda*, 497 U.S. 720, 754 (Brennan, J., dissenting) (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (involving a parody ad suggesting minister lost his virginity to his mother in a fly-infested outhouse)).

<sup>374</sup> See *id.* at 754-55 (Brennan, J., dissenting).

protection.<sup>375</sup> In public fora, individuals are expected to avoid or ignore speech they do not want to hear or see.<sup>376</sup> The legislator, therefore, cannot censor comments on her blog.

### 3. STATUTORY PROTECTIONS FOR COMPUTER SERVICE PROVIDERS UNDERMINE ANY CLAIMED NEED FOR THE LEGISLATOR TO CENSOR HER BLOG

[128] The legislator may assert, though, that the worldwide visibility of blog postings makes removal or alteration of postings appropriate to protect her against potential legal liability for assertions made on the blog. When applying such a content-based restriction on speech, the legislator must satisfy the strict scrutiny standard by demonstrating her action is necessary to serve a compelling interest and is narrowly drawn to achieve that end.<sup>377</sup> Because of the statutory protection afforded to computer service providers, the legislator cannot meet this test.

[129] Congress has recognized the Internet as “a forum for a true diversity of political discourse....”<sup>378</sup> In order to protect the forum, in the Communications Decency Act (“CDA”),<sup>379</sup> “Congress granted most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party.”<sup>380</sup> In the CDA, Congress provided: “No provider or user of an

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<sup>375</sup> See *Cohen*, 403 U.S. at 24-25 (“[I]t is nevertheless often true that one man’s vulgarity is another’s lyric.”); see also *Reno*, 521 U.S. at 875 (“Indeed, [the Supreme Court has previously] admonished that ‘the fact that society may find speech offensive is not a sufficient reason for suppressing it.’”) (citations omitted).

<sup>376</sup> See *Kokinda*, 497 U.S. at 749 (Brennan, J., dissenting). Of course, the Supreme Court has held certain language cannot be broadcast over the airwaves during times when children were likely to be listening. See *FCC v. Pacifica Found*, 438 U.S. 726, 749-50 (1978), *reh’g denied*, 439 U.S. 883 (1978) (George Carlin’s “seven words you can never say on television” routine). The Court, however, based its ruling on the fact the airwaves are “invasive,” in that one could unintentionally encounter the profanity by just scanning radio stations. *Id.* No such concerns exist in the present context. The Internet user must have the URL for the legislator’s blog and intentionally choose to visit the site.

<sup>377</sup> See *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981).

<sup>378</sup> 47 U.S.C. § 230(a)(3) (1998).

<sup>379</sup> 47 U.S.C. § 223 (2006).

<sup>380</sup> *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003).

interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>381</sup>

[130] An “interactive computer service,” the service one must provide or use in order to receive the CDA’s protection, is defined as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet . . . .”<sup>382</sup> An “information content provider” is “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”<sup>383</sup>

[131] Courts have not yet addressed the applicability of § 230 to blogs. The statute, though, likely protects bloggers. By setting up an electronic location where multiple users may converge, a blogger becomes a “provider of an interactive computer service.”<sup>384</sup> Such postings on a blog appear to constitute information provided by a third party for which the blogger is immune.<sup>385</sup>

[132] As such, § 230(c) gives the legislator-blogger full immunity so long as a third party voluntarily provides “the essential published content.”<sup>386</sup> The legislator, by controlling the topics for discussion, does not become a content provider and thereby lose the benefit of statutory protection. Such a claim was rejected in *Carafano v. Matchmaker.com, Inc.* Carafano claimed Matchmaker.com, a dating website, was an information content provider because it created a survey, including the possible responses to multiple choice questions, an individual completed to post a profile falsely using Carafano’s identity. The court, however, ruled Matchmaker.com

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<sup>381</sup> 47 U.S.C. § 230(c)(1) (1998).

<sup>382</sup> 47 U.S.C.S. § 230(f)(2) (LexisNexis 2002).

<sup>383</sup> 47 U.S.C.S. § 230(f)(3) (LexisNexis 2002).

<sup>384</sup> See *Donato v. Moldow*, 865 A.2d 711, 718 (N.J. Super. Ct. App. Div. 2005) (one who provides a website that other computer users can access is a “provider or user of an interactive computer service”). Similarly, where a website is hosted by a commercial Internet service provider, the site creator is a “user.” See *id.* (citing *Ben Ezra, Weinstein, & Co. v. America Online*, 206 F.3d 980, 985 (10th Cir. 2000)).

<sup>385</sup> See Peterson, *supra* note 175, at 44.

<sup>386</sup> *Carafano*, 339 F.3d at 1124.

did not provide any content because the third party, not the website, made the selections and wrote the essays that constituted the profile. As such, Matchmaker.com was not an information content provider and, therefore, was immune from liability under § 230(c).<sup>387</sup>

[133] Section 230 immunity from liability destroys the legislator's claimed compelling interest in censoring postings on his blog. Because the legislator will not face liability for the content of the postings, he has no reason acceptable under modern First Amendment jurisprudence for exercising censorship. The politician seeking to use the Internet to reach out to constituents simply has no concerns to balance against citizens' speech rights.<sup>388</sup>

[134] To the contrary, a legislator who attempts to censor or alter postings *may* face legal liability. The Ninth Circuit has held that:

[A] service provider or user is immune from liability under § 230(c)(1) when a third person or entity that created or developed the information in question furnished it to the provider or user under circumstances in which a reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet or other "interactive computer service."<sup>389</sup>

This suggests bloggers who edit third-party postings become speakers and, at least in some courts, lose their protection against liability.<sup>390</sup>

[135] Still, the legislator might point to courts that reached a contrary conclusion, holding a service provider could edit messages without losing his immunity. Because § 230 protects against liability for editorial

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<sup>387</sup> *Id.*; see also *Gentry v. Ebay, Inc.*, 121 Cal. Rptr.2d 703, 717-18 (Cal. Ct. App. 2002) (online auction site immune where it simply compiled ratings information provided by customers).

<sup>388</sup> *Cf. Widmar v. Vincent*, 454 U.S. 263, 278 (1989) (noting university has right to make academic judgments on how to allocate scarce resources).

<sup>389</sup> *Batzel v. Smith*, 333 F.3d 1018, 1034 (9th Cir. 2003).

<sup>390</sup> See *Peterson*, *supra* note 175, at 45-46; see also *Optinrealbig.com, LLC v. Ironport Sys., Inc.*, 323 F.Supp.2d 1037, 1045 (N.D. Cal. 2004).

functions related to the traditional role of a publisher,<sup>391</sup> the Ninth Circuit ruled that one who makes only “minor alterations” to a posting did not “develop” the content so as to become the “information content provider.”<sup>392</sup> According to the Ninth Circuit, the issue for immunity purposes is one of degree in altering the material.<sup>393</sup> A New Jersey state court went so far as to ignore any consideration of degree in affording immunity. That court held the operator of a bulletin board system immune under § 230 even though he edited a message to remove profanity and shaped the content of other messages.<sup>394</sup>

[136] Whatever merit those approaches might have when dealing with the private sector, they cannot allow the legislator as government agent to censor messages.<sup>395</sup> Congress intended § 230 to reflect its desire to protect computer service providers from tort liability in order to avoid the chilling effect such liability would have on speech. Thus, Congress intended § 230 to permit more speech on the Internet with minimal government interference consistent with the goals of the First Amendment rather than to allow service providers to limit speech.<sup>396</sup>

[137] Permitting a legislator to control the content of postings would not serve the purposes of either § 230 or the First Amendment. Such control would allow the legislator to remove speech – core political speech – from the marketplace of ideas. This limitation would serve no compelling purpose. As set out above, the legislator faces no liability for any of the content third parties posted on her blog.<sup>397</sup>

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<sup>391</sup> See *Green v. America Online*, 318 F.3d 465, 471 (3d Cir. 2003); see also *Zeran v. America Online*, 129 F.3d 327, 330 (4th Cir. 1997) (Section 230 “precludes courts from entertaining claims that would place a computer service provider in a publisher’s role.”).

<sup>392</sup> See *Batzel*, 333 F.3d at 1031.

<sup>393</sup> *Id.* at 1032.

<sup>394</sup> See *Donato v. Moldow*, 865 A.2d 711, 719-20 (N.J. Super. Ct. App. Div. 2005).

<sup>395</sup> Cf. *Green*, 318 F.3d at 472 (rejecting First Amendment challenge to § 230 because America Online is a private company with no First Amendment obligations).

<sup>396</sup> See *Zeran*, 129 F.3d at 330-31; see also *Batzel*, 333 F.3d at 1027-28.

<sup>397</sup> Significantly, § 230 still allows the government to punish the provider of offending material. See *Zeran*, 129 F.3d at 330. Thus, while the legislator would be immune from liability for a defamatory posting, the actual poster could be held liable.



[138] Further, no other legitimate, much less compelling, reason exists for censoring the postings. When the politician creates an open forum where constituents can come, go, and speak as they please, readers are unlikely to view comments posted on the blog as being those of or reflecting the opinions of the legislator.<sup>398</sup> Instead, viewers of expression made up of many individual parts generally understand that each component of the whole offers its own perspective on the overall theme.<sup>399</sup> Moreover, one might question whether any harm results from negative postings on a blog. Blogs are fora for opinion whose typical messages – often filled with poor grammar and spelling and often vulgar and offensive content – lack the indicia of facts or reliability on which reasonable persons rely when evaluating information sources.<sup>400</sup>

[139] Finally, and most importantly, no need exists for censorship in the blog context. The Internet allows any politician or other viewer who wishes to distance himself or herself from another's posting to respond instantly in the same forum and to the same audience. Rather than needing to censor potentially unpopular views, a politician and any readers of his blog have the ability to “set the record straight” by declaring his or her position on statements made in constituent postings.<sup>401</sup>

[140] The legislator simply cannot demonstrate a compelling interest in censoring constituent postings on her blog. The postings are unlikely to be attributed to the legislator and, even if they were, she would be immune from liability for their content. Further, she has the option of responding directly to the viewing audience, allowing the legislator to protect her reputation by disavowing unwanted speech.<sup>402</sup> As such, once the

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<sup>398</sup> See Goldstone, *supra* note 323, at 32.

<sup>399</sup> See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 577 (1995) (“Without deciding on the precise significance of the likelihood of misattribution, it nonetheless becomes clear that in the context of an expressive parade, as with a protest march, the parade’s overall message is distilled from the individual presentations along the way, and each unit’s expression is perceived by spectators as part of the whole.”)

<sup>400</sup> See *Doe v. Cahill*, 884 A.2d 451, 465-66 (Del. 2005) (collecting cases).

<sup>401</sup> *Id.* at 464 (noting one allegedly defamed by blog postings has powerful remedy in ability to respond to defamatory comments).

<sup>402</sup> Significantly, even if the blog were held to be a non-public forum such that a speech restriction must only be reasonable, the legislator probably still could not censor postings. Posting on a blog is much like leafletting in a public place, as one simply leaves a

legislator opens the forum for political discussion, the First Amendment will prohibit her from exercising any control over the content of postings addressed to the topics she raises or permits for discussion.

#### IV. CONCLUSION

[141] The Internet has become a powerful tool for spreading messages around town and around the world. Blogs have made it possible for this communication to be truly interactive, letting people express their opinions on issues raised by someone else in the same forum where the issue was initially presented. This has created a revolution in how information is disseminated, already challenging the established media. The revolution is not, however, likely to alter our political processes.

[142] Blogs could make direct communication between legislator and constituent simple and efficient. A legislator could ask constituents whether he should, for example, support spending tax dollars to construct a fence along the border with Mexico to keep out illegal immigrants. This has facial appeal. Many citizens would perceive the legislator who allowed such interaction as truly concerned about the desires of the People. Still, the large downside probably will keep any legislator from setting up such a blog.

[143] At a theoretical level, engaging in such direct communication may be objectionable because it is subject to some of the same concerns that led the Framers to avoid direct democracy. The legislator who solicits opinions might feel he or she has to abide by the wishes of the majority. By doing so, the legislator would facilitate the tyranny of the majority the Framers sought to avoid.

[144] Most important for present purposes are the First Amendment implications of setting up the blog. Though it exists only in a digital

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message for others to see and hopes it draws attention. Even in a non-public forum, a ban on distributing leaflets may be unreasonable and invalid. *See Int'l Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 689-90 (1992) (ban on leaflets not reasonably related to preserving mall-like atmosphere of airport terminal). Further, government regulation of speech simply because some members of the public might disagree with it is invalid even in non-public fora. *See United States v. Kokinda*, 497 U.S. 720, 760 n.13 (1990) (Brennan, J., dissenting).

realm, the blog still would be treated under the typical public forum analysis. This would result in classifying the blog as a limited public forum at which the legislator's constituents could post their feelings regarding the topics posed by the legislator – no matter how offensive, virulent, or crass – for all the world to see. Because the postings are political speech, they would be protected by the First Amendment.

[145] The legislator, because of the First Amendment protection, would be unable to remove or alter the offensive postings. He could not demonstrate any compelling need to remove the postings, particularly since he is protected by the Communications Decency Act from any liability for statements posted on his blog. The First Amendment would require the legislator to permit all postings relevant to topics permitted for discussion on the blog to remain visible to the entire world.

[146] This loss of control over their messages will cause politicians to avoid blogging with constituents. Only the rarest politician would be willing to become associated with comments some will view as offensive or incendiary. In this context, application of First Amendment principles will have the perverse effect of reducing speech permitted in the marketplace. Whatever the potential of blogs, then, their impact is unlikely to alter the relationship between legislator and constituent.