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PERJURY, CONTEMPT AND PRIVILEGE –OH MY!
Coercive Powers of Parliamentary Committees

Charles Robert and Blair Armitage*

This paper explores the history and issues surrounding privilege and the swearing in witnesses. In summary, it argues that:

Contempt powers available to committees are not always enough to compel the appearance or testimony of witnesses;

- That by legislating the power to administer oaths; by exempting sworn testimony from the usual protections of privilege when it is used in the case of perjury; and by giving the responsibility for prosecuting perjury cases to the courts, Canada has created a more effective mechanism for punishing those who lie to a parliamentary committee;

- That the Charter's provisions guaranteeing the rule of law and due process may conflict with Parliament's coercive powers; that other claimed powers, such as the ability to fine offenders, may also be questionable; and that the power to punish for contempt and to fine can no longer be asserted with certainty until they are tested in the courts.

- In remedy, the paper suggests a comprehensive review of the privileges and powers of Parliament with respect to its committees and that consideration be given to ensuring that they are properly equipped to function in the legal and human rights constructs that comprise the Charter era.

Introduction

The Canadian Parliament, as the principal representative assembly of the nation, necessarily possesses certain privileges and powers in order to support its two fundamental roles: to make laws for the welfare of the country and to hold the government of the day to account. These privileges and powers are part of the Constitution and are derived from British parliamentary practices and traditions. Most of these powers have remained fundamentally unchanged since they were established following Confederation.

Some of Parliament's privileges and coercive powers apply to non-members when they participate in the work of Parliament as witnesses testifying before committees.[1] As witnesses, non-members are entitled to the same protection of freedom of speech as members. At the same time, they are subject to the discipline of the Senate or the House of Commons through the exercise of the contempt power if they do not cooperate to the committee's satisfaction. Like members, they can be admonished or reprimanded

and, if necessary, they can also be imprisoned.

When committees function in an investigative manner, they can profit from the use of Parliament's contempt power, and more specifically the oath power. Inquiries that are fact-based investigations need to establish the truth or sequence of events. Such investigations are in many ways akin to a judicial inquiry, but they operate in a parliamentary (political) setting. However, fact-based inquiries are not the common fare of committees. Most committees spend the majority of their time hearing the opinions of witnesses, seeking their advice on bills or policies. This may explain why witnesses are not often heard under oath or affirmation. Nonetheless, if the powers are thought to be important still, it would be worthwhile to consider the current "environment" to determine if they should be retained, discarded or updated.

The use of coercive powers by Parliament has two identifiable functions, to compel or to punish. Compulsion can be used with witnesses who may be hesitant or reluctant to cooperate; it deals with the immediate situation. Punishment is used after the fact against witnesses whose behaviour has been found to offend the dignity of the committee. The option to use either remains entirely at the discretion of the committee, subject to confirmation by the House.

The history of these coercive powers and their effectiveness has not been the focus of much study or comment. Joseph Maingot's *Parliamentary Privilege in Canada* is one of the few to have reviewed the subject, but this analysis does not pretend to be comprehensive; nor does Maingot really consider whether these coercive powers are still appropriate today, even though he was sensitive to the altered legal environment brought about by the incorporation of the Charter into the Constitution.[2] Should these coercive powers be retooled to maximize their usefulness in the contemporary context? Has there been any impact on them as a result of the proclamation of the Charter with the guarantee of individual rights, including due process and the protection of self incrimination? This paper seeks to address some of these questions through an explanation of the purpose, origin and application of the contempt power and the administration of oaths in today's parliamentary and constitutional environment.

The British Experience

The House of Commons in England has exercised contempt powers for centuries.[3] As a constituent part of the High Court of Parliament, it had an inherent right to insist on the complete cooperation of witnesses called before the bar of the House or before one of its committees. Failure to comply with its demands for information could lead to various punishments including admonishment, reprimand and, not infrequently, imprisonment.

As it happened, Parliament's successful assertion of its supremacy in the late 17th century confirmed these powers, and also contributed to their excessive use. The judgment of *Stockdale v. Hansard* includes a list of some of these abuses spanning a century.[4] Among the more egregious examples were violations of members'

private property, such as poaching and trespass, and even eviction of tenants for non-payment of rents. These abuses were completely unrelated to the strict understanding of contempt because they did not involve interference in the actual workings of the House or the participation of its members. Such outrageous practices were eventually curbed and the contempt power was more properly limited to enforcing compliance with orders of the House in pursuit of its work.

In addition to the contempt power, the House of Commons sought the right to administer oaths to witnesses, which was fully achieved by statute in 1871. Unlike the House of Lords, the power to swear witnesses was not inherent to the House of Commons because it did not exercise judicial functions. The Commons did, however, deal with quasi-judicial matters such as disputed elections and petitions for divorce. Early attempts to hear witnesses under oath included some irregular practices. At a time when some MPs were also magistrates, they might be called upon to administer an oath.[5] On other occasions, witnesses were sent to be sworn at the bar of the House of Lords.[6] These practices, not authorized in law, were used sporadically over the course of about 100 years until they were abandoned mid 18th century.

The preference to hear witnesses under oath was motivated by at least two factors. One was to impress upon members and witnesses alike the serious nature of some of the committee proceedings. Second, the growing number of private bills highlighted the need to hear petitioners under oath to ensure that Parliament did not enact statutes based on false information.

The 1770 "Grenville Act" was the first statute to replace this *ad hoc* approach with a more systematic one.[7] It was done to allow committees looking into disputed elections to conduct themselves more like a trial. This same Act also empowered the House of Commons to administer oaths at the bar in certain cases. Various amendments were made to this Act, and other similar Acts from 1770 onwards to extend the range of committees and subject-matter where oaths could be administered.[8] The issues being examined primarily dealt with controverted elections and divorce cases.

The Parliamentary Witnesses Oaths Act of 1871 finally granted the House of Commons and its committees the right to administer oaths without restriction. By its terms, "Any person examined as aforesaid who willfully gives false evidence shall be liable to the penalties of perjury."[9] Before the passage of such statutes, article 9 of the *Bill of Rights* barred the courts from using any aspect of parliamentary proceedings as evidence for any purpose. Laws permitting the swearing of witnesses, and particularly the 1871 Act, removed this impediment by creating a statutory exception to article 9. This interpretation is confirmed by the 1999 UK Joint Committee on Parliamentary Privilege[10](hereinafter cited as the UK Report on Privilege) and by Maingot[11]. Until the adoption of the *Defamation Act 1996*,[12] permitting the limited use of *Hansard* by MPs as evidence in defamation proceedings, perjury was the only exception to article 9.

These exceptions to article 9 have not impaired Parliament's coercive powers. On the contrary, with the incorporation of the oath power, witnesses became liable to two distinct charges – contempt and perjury. Either or both could be pursued, depending on the circumstances. This was acknowledged as early as 1844 in the first edition of Erskine May's *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*.[13] The UK Report on Privilege also noted the dual liability and was not particularly troubled by it, though one British Justice recently expressed some concern about the possibility of conflicting results if both charges were actually followed. In fact, this has yet to happen and seems quite unlikely.[14]

Only three examples have been identified of perjury charges being recommended by the House of Commons in the nineteenth century. All three predate the 1871 Act, and all involve false testimony in relation to a committee examination of a disputed election.[15]

These examples have led to the perception that a perjury prosecution can take place only on the recommendation of the House, or that a prosecution must take place if the House calls for one. This presumption does not appear to be well founded. In an 1869 appearance before a House of Commons select committee, Erskine May suggested an alternative understanding. Asked whether an indictment for perjury could proceed only with the permission of the House, May answered in the negative, saying:

> … the House of Commons would be in the same position as any other court which administers oaths; and the Act of Parliament would state, as was done in the Act of 1858, that "Any person examined as aforesaid who shall willfully give false evidence, shall be liable to the penalty of perjury." That is the case now with regard to Committees on private bills, and it is the case with regard to the Committees of the House of Lords; and I can see no reason for treating the House of Commons in a different way.[16]

May used the example of the courts to demonstrate that the decision to pursue a charge of perjury would ultimately be made at the discretion of a prosecuting authority. It need not depend on an authorization, or indeed a complaint, of the House of Commons. This view was supported as recently as July 2007 in a report of the House of Lords Constitution Committee on the role of the Attorney General.[17]

Coercive powers have remained a feature of the UK Parliament. They continue to be regarded as useful, but the 1999 UK Report on Privilege recommended that they be updated. Far from suggesting that these powers be compromised or diminished, the Committee suggested means to make them more effective, including the enactment of a power to impose fines as an option for punishing contempts.[18]

Canadian experience following Confederation

The privileges of the Westminster House of Commons were entrenched in section 18 of the *Constitution Act, 1867*. This included article 9 of the *Bill of Rights* by inference and all the inherent powers to punish for contempt. The ability to administer oaths was not included. The need for this power, however, was soon evident, and steps were quickly taken to provide for it.[19]

The inability to administer an oath was seen as an obstacle in dealing with applications for divorce, which were then obtained through private bills. Within months of its establishment, the Senate was confronted with a divorce bill that gave rise to some serious difficulties, notably the inability of the Senate to examine witnesses under oath.[20] The UK Parliament had passed an act in 1858 to give committees of the Imperial House of Commons a power to swear witnesses. This power was limited to the examination of private bills. But such a power had not yet been enacted in Canada, and so the Senate committee chose to be guided by the evidence sworn before a Superior Court in Montreal.[21]

To avoid relying on this awkward precedent, and to avoid difficulty in future cases, Parliament immediately proceeded to pass an *Oaths Act* in 1868. The power to administer oaths was limited to witnesses appearing at the bar of the Senate, and extended only to select committees on private bills of either House.[22]

In 1873, the Pacific scandal added to the sense that a more general power to swear witnesses was needed.[23] The government was embroiled in allegations of a kickback scheme involving contracts for the Pacific Railway. Parliamentary scrutiny was limited by the lack of a power to swear witnesses. A new *Oaths Act* was passed to grant a more general power to swear witnesses along the lines of the British example of two years earlier.[24]

The British government disallowed the *Oaths Act* on the grounds that it was *ultra vires* since it exceeded the limitations of section 18. In 1875, the UK amended the original *British North America* Act which enabled the Canadian Parliament to update its privileges from time to time, so long as they stayed in line with the UK House of Commons.[25] In its next session, in 1876, the Canadian Parliament adopted a new Act to give both Houses the general power to swear witnesses.[26] Initially, committees could only exercise this power if authorized by the whole House on a case-by-case basis. In 1894, witnesses could be examined at the bar of the House of Commons. This last Act also introduced the possibility of making an affirmation as an alternative to an oath.[27] These provisions remain largely unchanged today.

There are few instances of controversy flowing from the use of the contempt power in Canada. Two exceptions reveal its limitations and show it to be weaker than supposed. Conversely, examples of *Criminal Code* show that punishment of perjury appear to be more effective.

The McGreevy Case

In 1891 the House of Commons Privileges and Elections Committee inquired into allegations of wrongdoing in connection with numerous government contracts worth millions of dollars. Central to the allegations was the conduct of a Member of Parliament, Thomas McGreevy.[28]

The Committee took an approach similar to an inquisitorial process. Its report contained reference to more than 400 exhibits and some 1200 of pages testimony from 80 sworn witnesses. The focus was almost exclusively on documenting the criminal case. The Committee made little effort to deal with the administrative issues arising from the episode, such as ministerial accountability and improvements to policy that would prevent the recurrence of such a scandal.[29]

For the most part, McGreevy cooperated with the Committee, appearing voluntarily and agreeing to testify under oath. However, he steadfastly refused to cooperate in one respect. The Committee asked him repeatedly to identify the person to whom he had paid $20,000. In particular, the Committee members wanted him to answer the allegation that he had, directly or indirectly, paid some of this money to the Minister of Public Works. Despite the Committee's insistance, McGreevy refused to answer.[30]

The Committee reported to the House, which in turn ordered McGreevy to attend in his place.[31] When he failed to appear, the Speaker issued a warrant for McGreevy's arrest, and ordered the Sergeant-at-Arms to take him into custody.[32] The Sergeant-at-Arms subsequently reported that he was unable to locate McGreevy, and the House expelled him a month later.[33]

The McGreevy case was among the first examples of a committee examining allegations of serious wrongdoing in government contracts. Whatever other value it might have, the case serves as an example of the limitations of the contempt power as a means of securing witness cooperation, even under oath. The House used its powers to their full extent, first ordering the committal of the witness, and ultimately expelling him as a member. Nonetheless, the Committee never obtained answers to all of its questions.

The House of Commons was clearly frustrated with the limitations of its contempt power. Their frustration was aggravated by the behaviour of McGreevy, and by their belief that several witnesses before the Committee had perjured themselves.[34] The House subsequently adopted a resolution authorizing the use of its committee transcripts, exhibits and other documents as evidence in the prosecution of a range of offences including conspiracy, misappropriation of funds and perjury.[35]

The House was fully aware that this resolution was a direct violation of its privileges. This understanding is revealed by the text of the resolution because it includes an explicit disclaimer against its use as a precedent. The resolution reads in part:

> … this House, while waiving its privileges in these particular

> cases … does not in any sense give up its well established and undoubted rights …[36]

The decision to make committee documents available to assist in prosecutions probably had little or no practical effect; it was largely an empty gesture. The bulk of the material was subject to ordinary court orders for the production of documents.[37] Those who testified before the committee (other than the accused) could easily be called to give evidence in court. The only criminal charges that would have relied on parliamentary documents for evidence were those for perjury, for which committee transcripts were already admissible under the *Oaths Act*.

The R. C. Miller Case

In the spring of 1912, the House of Commons Public Accounts Committee inquired into government contracts involving the Diamond Light and Heating Company.[38] They summoned its former president, R. C. Miller, to appear as a witness. He ignored the summons.[39]

A year later, in February 1913, he finally appeared with counsel, was sworn in, but refused to answer any questions because his answers might prejudice ongoing litigation.[40] The Committee reported this failure to cooperate, and the House ordered Miller to appear at the bar. He appeared with counsel, was sworn, but again refused to answer questions.[41]

The House then ordered Miller's committal until such time as he agreed to answer questions, or until the House ordered his release. He was taken to the Carleton County jail.[42] There is no entry in the *Journals* of any order for his release, and he did not reappear at any time to answer questions. It is assumed that he remained in jail until the House was prorogued on June 6, about three and a half months later.

Faced with an obstinate and determined witness, the House was once again unable to secure his cooperation using the traditional contempt powers. If he or his lawyer knew of the McGreevy case, he may have feared that Parliament would turn over his testimony before the committee for use as evidence in his civil trial. If this were so, Parliament's decision to violate its own privileges in the McGreevy case resulted in the impairment of its capacity to persuade future witnesses to cooperate.

The possibility of such a perverse result was at the heart of a recent court judgment involving the Commission of Inquiry into the Sponsorship Program and Advertising Activities. The Commission had refused to allow cross-examination of witnesses before it based on statements they had previously made in the Public Accounts Committee of the House of Commons. In reasons for rejecting an application for judicial review, Tremblay-Lamer J. wrote in part:

> … it is important to Canadian democracy that a witness be able to speak openly before a Parliamentary committee. This objective will be

> accomplished if the witness does not fear, while he is testifying before this committee, that his words may subsequently be used to discredit him in another proceeding…
> Uncertainty as to the scope of the privilege that is granted to him may accentuate a witness's feeling of vulnerability and prevent him from speaking openly, which would obviously reduce the effectiveness of hearings before Parliamentary committees.[43]

Mme Justice Tremblay-Lamer identified the danger of varying the protection afforded by parliamentary privilege, after the fact, to witnesses. Once they become aware of this possibility, witnesses, being apprehensive of the scope of this privilege, would be less inclined to provide truthful and complete answers. With the credibility of the parliamentary process in doubt, its effectiveness would be seriously jeopardized. By analogy, the *Canada Evidence Act*, first adopted in 1893, prohibits the use, under certain conditions, of incriminating testimony that was given under compulsion from being used or admissible in any subsequent legal proceeding, either criminal or civil.[44] The underlying principle of natural justice behind this Act may also explain why authorities such as Maingot and the UK Joint Committee on Parliamentary Privilege reject the idea of *ex post facto* waiver.[45] Both maintain that any regime to allow a waiver of privilege can only be accomplished before the fact by the enactment of an explicit statute which suggest that a waiver of a parliamentary privilege, a part of the law, could not be subsequently done by a resolution. Their assertion is supported by precedents like the *Oaths Act*. Prosecution for perjury for statements made by a witness must, by definition, rely on the evidence provided to Parliament or one of its committees and necessarily involves the impeachment or questioning of a debate or proceeding in a court or place outside of Parliament.

Divorce Committees

In its first 15 years, Parliament considered 18 applications for divorce.[46] At that time, a request for divorce was managed through legislation and treated like any other private bill. Once the preliminary stages had been completed, including publication of notice and a statement of proof of service made at the bar of the Senate, the petition was referred to a special committee. The subsequent report was extensively debated in the Senate.

It was soon recognized that this time-consuming procedure was impractical. In 1888 a simplified process was put in place, together with a Senate standing committee on divorce.[47] The House of Commons also had a divorce committee, but its review almost always followed that of the Senate. The Senate committee operated for over eighty years; it was dissolved in 1969 after the *Divorce Act* established uniform judicial divorces across the country, including Quebec and Newfoundland, the last

jurisdictions to rely upon parliamentary divorces.[48]

Witnesses appearing before the Senate divorce committee were always sworn in. Their examination on oath was a critical feature in determining whether the petition was well founded and whether the divorce should be granted. In remarks made in the Senate in 1962, the long-time Chair of the Divorce Committee, Senator Arthur Roebuck, took note of the importance of the oath by stating that the Committee had had some difficulty with perjured evidence, and that there were currently three people convicted and imprisoned, with more cases pending.[49] Each suspected case of perjury had been reported to the provincial Attorney General.[50]

The divorce process was a genuine strain on the members of the committee and by the 1960s they were dealing with hundreds of petitions each session.[51] By leaving the allegations of perjury in the hands of the Ontario prosecutor,[52] the Committee members were better able to focus on the petitions before them, and not be further encumbered with the onus of punishing those witnesses who were deemed to be lying to the Committee. Furthermore, the Crown was able to press for greater punishments than could be imposed under contempt.[53] This was viewed as desirable since the perjury had led to the passing of an ill-founded Act of Parliament.[54] When the accused were brought before the magistrate, all pled guilty, with one receiving five years imprisonment, a term far beyond any allowed through contempt. This criminal process would not have precluded the Senate from pursuing the witnesses for contempt as well, though this does not appear to have happened.

Current environment

The contempt power has remained largely static since Confederation. The last substantial change to the power to swear witnesses occurred 113 years ago, in 1894.[55] Since then, the context in which the privilege and related powers are used has changed dramatically. The privileges and in particular the coercive powers have been infrequently used. Their adaptation to a modern context is hindered by a lack of practical understanding and real-world application. Parliament's access to information may be compromised if these powers, particularly the coercive ones, are not optimized for the current context.

The population has become more educated and diverse; similarly, the demographic and occupational profile of parliamentarians has changed over the last 140 years. At one time both Chambers were primarily composed of white men with professional backgrounds, particularly law. Today, parliamentarians come from a wide range of backgrounds. The prevalence of lawyers has ceased to be a defining characteristic of the membership.[56] This, in turn, may mean when a committee is confronted with a challenge to its powers, it may not be certain how to deal with it.

Parliament now operates in a public domain that is radically different from a century ago. Parliamentary proceedings are disseminated broadly and instantly through every electronic means. Mass media, 24-hour news, and

widespread internet access subject the use of powers to broader and more critical scrutiny than was possible a century ago. Suspicion about the possible commission of perjury may now come from sources outside Parliament.

Government has grown exponentially in the last 60 years. In the early years of Confederation, there were fewer than a dozen cabinet ministers, and the role of government was limited. Today, cabinet typically has up to 40 members. Parliament superintends nearly 100 departments, boards, agencies, commissions, "special operating agencies" and Crown corporations.

There is an ever-increasing need for ready access to reliable information to facilitate the difficult task of scrutinizing an organization as complex as the Government of Canada. In turn, there is an ever-increasing imperative to ensure complete, truthful and accurate testimony from cooperative witnesses.

The coercive powers of Parliament were developed long before human rights were constitutionally entrenched in the Charter. The Supreme Court decision in *Vaid* demonstrates that old assumptions about the powers and privileges of Parliament cannot be taken for granted.[57] The lesson drawn, (in the context of this paper), is that coercive powers need to be reviewed and immunized against potential challenge. In particular, the power to imprison, when exercised for punitive purposes, is vulnerable to challenge under the Charter.

The entrenchment of rights has also led to a change in attitudes towards public institutions. In an era of constitutionally enforceable rights, people are less deferential towards authority generally. This is evident in the number of recent court cases challenging some parliamentary privileges and practices.[58] The incidence of reluctant or uncooperative witnesses is likely to increase as a result.

As government departments and programs have multiplied, so have the number of parliamentary committees scrutinizing them. To deal with this workload, Parliament has been forced to rationalize its role and internal procedures. It has streamlined the work of the respective Chambers by establishing time limits on debate, by simplifying the supply process and by adopting rules for time allocation. Each Chamber has delegated much of its work to standing committees and to important parliamentary officers such as the Auditor General.

There were a mere handful of witnesses per session in the years following Confederation. Now, thousands of witnesses appear and written submissions are received every session. As a result, the hours spent in committee have increased dramatically as has the number of reports produced.[59] It should be noted that this work comprises the vast majority of a committee's time. The need for examining witnesses under oath has become minimal, given that most witnesses appear voluntarily before committees to provide their opinions and advice on policies and bills. Oaths are now almost exclusively used for fact based investigations that seek to

determine the truth or establish a sequence of events.[60]

Parliament has done a lot to accommodate the expansion of its responsibilities, yet it has done very little to review – much less update – its coercive powers.

Options

After more than a century of evolving context, there is a need to review the tools at Parliament's disposal for ensuring access to information. The best time to conduct such a review is before those powers are put to the test. The quality of information and the effectiveness of the tools that make it available are the measure of a robust democratic government and a healthy public policy process.

A stronger *status quo*

A cursory examination could conclude that contempt powers and the right to swear in witnesses are adequate. Developments in the political and communications context may not indicate a need to make any significant changes. Even so, there may be room to improve understanding and to make the application of these powers more consistent and more effective through the development of procedural tests for chairs to determine under what circumstances it would be appropriate to hear witnesses under oath. Moreover, the materials that have been developed for the information of witnesses provide considerable detail on how to make an effective presentation to a committee. They also give an explanation of the protection that privilege affords witnesses. However, the materials are not really comprehensive and contain no explicit information whatsoever about the potential consequences to witnesses who fail to cooperate or who deliberately mislead a committee, whether under oath or not.

Coercive powers are well established, and they have been exercised successfully in the past. This "inertia" is the main advantage of maintaining the *status quo*. Nonetheless, a review would present an opportunity to draw on best practices, to strengthen these powers in the Charter era, and to be realistic about the powers that can actually be exercised in a given context. The risk of successful legal or political challenges to the use of these powers might be reduced if a review leads to a principled and coherent procedure for using them in the interest of public policy and democratic accountability.

The disadvantage of maintaining the *status quo* is that it eschews the chance to innovate in this area. It would mean missing an opportunity to develop tools that more effectively guarantee information for the parliamentary process. In addition, there is the significant risk of legal challenges, especially to aspects of these powers that conflict squarely with Charter protections.

Abolish disused powers

Another possible outcome of a review would be a decision to simply abandon powers that have largely gone unused, and whose utility is cast in doubt by an examination of past experience. In a recent Congressional Research Service report, the inherent contempt powers of

the United States Congress were characterized as "unseemly, cumbersome, time-consuming and relatively ineffective".[61] A similar assessment might be made in Canada.

The advantage of doing away with the power generally to imprison, as the UK Report on Privilege recommended,[62] is the abolition of a feature of privilege that many regard as anachronistic and even detrimental to the dignity of Parliament. It would also avoid the clear potential for a conflict with Charter rights.

The risk of taking this approach is that Parliament might discover a need for these powers after they have been abolished. In the midst of a conflict with a problematic witness, it would not be possible to re-establish a power that has been eliminated by statute. Such a repeal would also be a simplistic approach that does not consider the complexity of the issues that gave rise to the contempt power.

Review and update for the modern context

Finally, there is the option to undertake a review to consider possibilities for updating the existing powers or even developing new means to address the requirement for quality information in the parliamentary process. Such possibilities are wide-ranging, and the experience of other jurisdictions points to innovations that could be adapted to Canadian needs. The means of implementation can range from a change in practices, the adoption of new rules or standing orders, or to the enactment of a statute in certain cases.

For example, Australia has established the power to fine for contempt, as a middle ground between admonishment and imprisonment.[63] The UK Joint Committee has recommended that its Parliament follow suit, but such fines would be imposed by the House in the case of members, and by the courts in the case of non-members.[64]

The United States Congress has built upon the 19th century British model of criminalized false testimony through the inherent contempt power. They have gone further by externalizing the means of dealing with uncooperative witnesses more generally, and subjected uncooperative behaviour to criminal sanction.[65] Moreover, in respect of contempt power, the United States Senate has established a "third way": the legal device of civil contempt has been added to its arsenal of inherent and criminal contempts. Civil contempt, granting to a court the jurisdiction to deal with any action based on a contempt suit brought by the Senate Legal Counsel, has significantly reduced the burden associated with exercising contempt powers, and helped find a middle ground between the almost meaningless punishment of admonishment and the extreme alternative of imprisonment.

Canada has used the American model of criminalizing non-cooperation when it has established certain boards, agencies and commissions.[66] Yet they have never considered using this approach to augment the investigative powers of parliamentary committees. Harnessing the criminal process, which has been Charter-proofed, has the distinct advantage of minimizing legal uncertainties.

In recent years, the House of Commons has twice considered the possibility of waiving its privileges in connection with the testimony of some witnesses.[67] As mentioned above, several authorities question the legal implications of using a resolution to this end. If waivers are to become a weapon in Parliament's arsenal, the review would help identify and implement a legally sound basis for them, a set of criteria for determining when to use them, and an appropriate procedure for exercising them.

Innovation in the field of parliamentary privileges and powers is not free from risk. Exchanging ancient and well-established powers for new procedures also carries with it the possibility of other legal challenges. However, a comprehensive review that takes into account the modern political, legal, constitutional and social context would help to craft innovative approaches that anticipate and mitigate such risks.

Conclusion

The contempt power and the use of oaths are still useful tools that can be used to maintain the capacity of committees to have access to witnesses and information that parliamentarians need to do their job properly. Today, more than ever, access to reliable information is essential if Parliament is to be effective in its lawmaking and accountability functions. At the same time, there is an equal need to recognize the evolving legal and social climate in which Parliament operates. The Charter has profoundly changed attitudes towards personal rights. All the more reason, then, to seriously reconsider the manner in which Parliament uses its coercive powers.

The traditional forms of admonition and reprimand may not be the most effective means of persuading reluctant or stubborn witnesses to co-operate. The cases of Thomas McGreevy and R. C. Miller, despite the fact that they occurred many years ago, remain useful reminders that Parliament's coercive powers are limited. And now, imprisonment, the most extreme coercive power, is a problematic option, both politically and legally. It is open to question whether any prison sentence imposed by the House of Commons or the Senate could survive a court challenge absent guarantees of procedural fairness. Equally important, any inconsistent application of privileges through a waiver, as occurred in the McGreevy case, can also serve to undermine the ability of Parliament to obtain the necessary information or evidence needed to properly form its decisions.

While the use of oaths is allowed in committees of both Houses, punishment for perjury has been rare; all identified cases have related to petitions for divorce, before that process was relegated to the courts in 1969. Nonetheless, experience suggests that the use of the oath power has generally been sufficient in itself to impress upon witnesses the importance of giving truthful answers. This experience may be a useful consideration to the review of Parliament's coercive powers. The strength of its power lies in the fact that all negative consequences for an untruthful witness accused of perjury are achieved through the criminal justice

system, which over the years has developed systems and procedures that accord with legal and constitutional norms.

If there is to be a review of Parliament's coercive powers, there are really three basic options: retain the current powers; abolish all or some of them; or update and develop new ones. In the end, the result could lead to a preference for one of these options or, just as likely, some combination of the three. Whatever the final choice, a review should ensure that Parliament will be ready to deal with future obstacles to obtaining the information that is essential to its proper functioning.

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*Both authors are Principal Clerks in the Senate. The views and opinions presented are their own. The authors acknowledge with appreciation the research and editorial assistance of Stephen Dunbar and Vincent MacNeil.

[1] J.P. Joseph Maingot, Q.C., Parliamentary Privilege in Canada, 2nd ed., House of Commons and McGill-Queen's University Press, 1997, pp.160-161

[2] Maingot, p. 344 and
The Charter of Rights and Freedoms, especially sections 7, 11, 13 &24

[3] Thomas Erskine May, Treatise on the Law, Privileges, Proceedings and Usage of Parliament, 23rd ed., LexisNexis UK, 2004, pp.156-157

[4] *Stockdale v. Hansard*, (1839), 112 E.R. 1112, p.1117

[5] As stated in the testimony of Erskine May before the Select Committee on Witnesses (House of Commons), minutes of evidence from 21 June, 1869, questions 31 & 33.

[6], Ibid. question 15.

[7] 10 George 3, c.16

[8] Public General Statutes, (UK) 1-2 Victoria, chap.105 (1838), 21-22 Victoria chap.78 (1858), 34-35 Victoria chap.83 (1871)

[9] Public General Statutes (UK), 34-35 Victoria, chap. 83, 1871

[10] Joint Committee on Parliamentary Privilege, Parliament of the United Kingdom, Report and Proceedings, §318, p.82

[11] Maingot pp. 144-145 and p. 192 n.71

[12] Defamation Act 1996 (UK), s.13

[13] Erskine May, 1st edition, p. 246, (Rothman Reprint)

[14] Pepper v. Hart, [1993] A.C. 593 and Prebble v. Television New Zealand, [1995] 1 A.C. 321 (P.C.)

[15] See UK House of Commons Journals: December 8, 1857, p.10, Attorney General is directed to prosecute Edward Auchmuty Glover for presenting false evidence in the Beverley election hearing. January 24, 1860 p.38, Attorney General is directed to prosecute William McGall for giving perjured evidence to the Committee of Elections investigating the Berwick-Upon-Tweed election. April 23, 1866, p. 239, Henry Chambers presented perjured evidence in the Maidstone Election investigation, and the Attorney General was directed to prosecute.

[16] Erskine May testimony, question 89

[17] United Kingdom House of Commons Constitutional Affairs Committee, "Constitutional Role of the Attorney General", 5th Report of Session 2006-07

[18] Joint Committee on Parliamentary Privilege, Parliament of the United Kingdom, Report and Proceedings, §301-303, see also, §324 (1-10)

[19] The Whiteaves divorce case was the impetus for allowing select committees to examine witnesses under oath.

[20] Nova Scotia and New Brunswick had existing divorce courts prior to Confederation, which continued unchanged after 1867. As the Province of Canada had no equivalent court, divorce petitions from Ontario and Quebec were referred to the Senate. For further discussion on the need to examine witnesses under oath, see Senate Debates, March 31, 1868; April 30, 1868 and May 4, 1868.

[21] See Senate Debates, April 30, 1868 pp.232-234 and House of Commons Journals, May 4, 1868, p.275

[22] *Publication of Parliamentary Papers*, Chap. XXIV, 1868. This Act was declared *ultra vires* in 1873, and then retroactively re-instated in 1875 by the Imperial Parliament's 'Parliament of Canada Act', which amended s. 18 of the Constitution.
[23] See House of Commons Debates, April 18, 1873
[24] This act extended the right to examine witnesses under oath to any committee of either House.
[25] Parliament of Canada Act, 1875, s.2
[26] This act was a reenactment of the one that had been disallowed in 1873.
[27] The affirmation took the following form: I, A.B., do solemnly, sincerely and truly affirm and declare that the taking of any oath is according to my religious belief unlawful, and I do also solemnly, sincerely and truly affirm and declare, etc.
[28] McGreevy was an MP from 1867-1891, a member of MacDonald's Liberal-Conservative Party. During the 1880s, he accepted vast sums of money in exchange for using his influence as a Quebec Harbour Commissioner, as well as other corrupt schemes, which netted him almost $250,000. For a detailed biography, see his entry in the Dictionary of Canadian Biography.
[29] See the: Reports of the Select Standing Committee on Privileges and Elections relative to Certain Statements and Charges Made in Connection with the Tenders and Contracts Respecting the Quebec Harbour Works and the Esquimalt Graving Dock, bound in volume as *Tarte vs. McGreevy, 1891*, Library of Parliament. See Report 7 in that volume for the detailed charges against McGreevy.
[30] House of Commons Debates, 12 August 1891, p.402
[31] House of Commons Debates, 13 August 1891, p.407
[32] House of Commons Debates, 18 August 1891, p.414
[33] He was later re-elected to the House in a by-election in 1895. See House of Commons Debates, 20 August 1891, p.422 and 29 September 1891, p.561
[34] See House of Commons Journals, September 24, 1891, p.529
[35] See House of Commons Debates, April 12, 1892, pp.234-235
[36] Ibid.
[37] See *The Queen v. Connolly and McGreevy*, 1 C.C.C. 468, [1894] O.J. No. 119, 25 O.R. 151, esp. pp.473-475
[38] The House Public Accounts Committee was investigating whether government contracts had been awarded to Diamond Light and Heating Co. due to bribes paid out by Miller in his capacity as company president.
[39] See Evidence Taken by the Public Accounts Committee in Connection with Diamond Light and Heating Co. of Canada, Ltd. Montreal. No.1, February 14, 1913, p.184
[40] Ibid. pp. 183-192
[41] House of Commons Debates, February 18, 1913
[42] Journals of the House of Commons, February 20, 1913, p.278
[43] Gagliano v. Canada (Attorney General) (F.C.) [2005] 3 F.C. 555, paras. 77 and 78
[44] Canada Evidence Act, s.5(2)
[45] Q – Would it not be dangerous for Canadians and anyone testifying before a committee if we change the whole political context in the Parliament of Canada by removing privilege? A – (Maingot) Privilege cannot be withdrawn. If someone is required to appear before a committee, he or she cannot be told in advance that privilege will not apply.
Q – If the testimony has already been heard, can privilege be removed two years later? A – No. The only way to change the law is to enact a new law.
Testimony of J.P. Joseph Maingot to the Subcommittee on Parliamentary Privilege of the Standing Committee on Procedure and House Affairs, Nov. 16, 2004, p.39
[46] F.A. Kunz, The Modern Senate of Canada, 1925-1963: A Re-Appraisal, University of Toronto Press, 1965, p.214 n.85
[47] Ibid.
[48] Thomas J. Abernathy, Jr. and Margaret E. Arcus, "The Law and Divorce in Canada", *The Family Coordinator*, Vol. 26, No. 4, October 1977, pp.409-413
[49] Journals of the Senate, December 11, 1962, pp.410-11
[50] Journals of the Senate, June 1, 1954, p.519

[51] In the first (and only) session of the 25th Parliament (Sept. 27, 1962-Feb. 6, 1963), by mid-December, 898 petitions for divorce were either passed or pending in the Senate. Senate Debates, Dec. 11, 1962, p. 410

[52] The Attorney General of the province is the chief law enforcement officer for any crimes committed within that jurisdiction.

[53] The men could only have been held in prison for contempt until the end of session, on Feb. 6, 1963, a term of less than 3 months. The maximum penalty for perjury is up to fourteen years imprisonment, whereas for a contempt of Parliament, one can only be imprisoned until the end of that session.

[54] A divorce was granted using the perjured testimony of a private investigator, who, as it was later revealed, had never served the respondent with the divorce papers.

[55] When the Oath Act was amended to allow committees of either House to administer oaths and to allow affirmations in place of oaths.

[56] The percentage of MPs who were lawyers prior to being elected has fallen from average 35% of MPs in the first 50 years since Confederation to an average of 17% in the past 25 years. Website of the Parliament of Canada.

[57] Canada (House of Commons) v. Vaid, [2005] S.C.R. 667, 2005 SCC 30

[58] Notably in Knopf v. Canada (House of Commons), 2006 FC 808, 3430901 Canada Inc. v. Canada (Minister of Industry), (1999), 177 F.T.R. 161 and Ainsworth Lumber Co. v. Canada (Attorney General) and Paul Martin, (2003), 15 B.C.L.R. (4th) 255

[59] During the first Session of the thirty-eighth Parliament over 175 committee reports were presented in the Senate and over 250 reports were presented in the House of Commons.

[60] Such as the McGreevy investigation.

[61] Congressional Research Service, Report for Congress, "Congress's Contempt Power: Law, History, Practice and Procedure", July 2007, p.15

[62] Joint Committee on Parliamentary Privilege, Parliament of the United Kingdom, Report and Proceedings, §324(2), p.83

[63] Parliamentary Privileges Act, 1987 (Australia) s.7(5)

[64] Joint Committee on Parliamentary Privilege, Parliament of the United Kingdom, Report and Proceedings, §303, p.80

[65] Congressional Research Service, Report for Congress

[66] Inquiries Act, s. 10, R.S.C. 1985 c. I-11

[67] See especially the 14th Report of the Standing Committee on Procedure and House Affairs, 2004 and the Report of the Standing Committee on Public Accounts of June, 2007

Silencing the Blogosphere: A First Amendment Caution to Legislators Considering Using Blogs to Communicate Directly with Constituents

By D. Wes Sullenger[1]

I. INTRODUCTION

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]."[2] The changes wrought by the growth of Internet use reaffirms 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,[,]'[3] the internet now allows anyone with a phone line to 'become a town crier with a voice that resonates farther than it could from any soapbox.'"[4]

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[5] and make decisions.[6] The Internet's growth into a mainstream medium[7] has even effected a change in the government's interaction with citizens as well as the way politicians campaign.[8]

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."[9] The ever-increasing number of Internet users in America[10] 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.[11] The recent development of "blogs" has made this prediction increasingly viable.[12] Through the use of blogs, speakers can 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.[13]

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.[14] 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.[15] This article will then consider the modern calls for direct

democracy,[16] including a discussion of the nature of direct democracy[17] and modern experiments in direct democracy.[18] 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.[19] 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.[20] This examination includes a discussion of the contemporary formation of blogs and the effect of their invasion into America's democratic system.[21]

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 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.

This article considers the constitutionality of these possible reactions from the legislator. The article applies a traditional First Amendment analysis to the issue.[22] After defining the contours of the modern public forum doctrine,[23] the article considers the status of blogs, concluding the public forum doctrine should apply to them.[24] 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.[25]

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

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.

A. Colonial Town Meeting Governments

Colonial American society, particularly in New England, was based on townships.[26] As such, government was addressed at the town level through town meetings.[27] The town meeting

system provided a political life that was both truly democratic and republican.[28]

Town meetings were assemblies of a town's residents for purposes of settling matters of common concern.[29] 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.[30] The residents discussed and deliberated public matters at these assemblies.[31] Through the meetings, the residents enacted local ordinances[32] and handled other matters such as watching over any Frenchmen, Dutchmen, Scots, blacks, or transients in the town and providing for the local livestock.[33]

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.[34] Other residents could attend and speak but could not vote.[35] Other colonies had similar requirements.[36]

The town meeting system worked well in providing a voice to those impacted by the decisions of the governing bodies. Still, towns needed individuals who could administer town affairs between meetings.[37] 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.[38] These officials included the town clerk, constable, and other officers found necessary.[39]

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.[40] Thus, "the town meeting was the sounding board of public opinion on all important local, and sometimes colonial, problems."[41]

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. <u>The Framers Reject Direct Democracy</u>

Their experience being governed from overseas left the Founding generation distrustful of centralized power because of its detachment from those affected by legislators' actions.[42] Representatives to a large central government could not know most of their constituents.[43] 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 elbows with English aristocrats and haughty diplomats."[44] Thus, after independence, the Founders set out to create a reliable and stable but decentralized system of government.

Although they were revolutionaries, the Founders distrusted democracy.[45] 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.[46] The Founders minimized this possibility by virtually removing from the People the ability to vote directly on important matters.[47] 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.[48]

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.[49] 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 many than of a few."[50] 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.[51]

Nevertheless, despite this criticism, in the 1790s, Madison joined with Thomas Jefferson's Republican faction opposed to the Federalist agenda.[52] Jefferson and Madison believed the Federalists had taken the government from the American people.[53] 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.[54] 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."[55] For Jefferson, however, this distrust of centralized power meant ultimate power should be diffused into smaller governments.

Jefferson believed the citizens of each state had a natural right to control their own domestic affairs.[56] However, his states' rights perspective extended beyond merely those domestic matters. Jefferson 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.[57] Jefferson's draft further allowed states to secede if Congress or the federal courts did not adhere to their rejection of the federal law.[58]

The Kentucky legislature did not adopt the portions of the Resolution permitting secession. Madison, always

the shrewder political thinker in the collaboration with Jefferson,[59] 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.[60] 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.[61]

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.[62] Yet, the People, Jefferson wrote, had to play an active role in their government.[63] 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.[64] Each layer of government would be responsible for its immediate concerns and would delegate responsibilities for which it was not competent to a different level.[65]

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."[66] 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."[67] 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.[68] 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."[69]

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.[70] Progressive activists and political scientists organized public deliberative bodies.[71] In Cleveland, for example, Mayor Tom Johnson held large picnics at which citizens discussed political matters with the leadership.[72] These picnics, however, led to no large-scale reforms, because Johnson often acted adversely to public opinion.[73]

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.[74] 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.[75]

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

Americans have actively practiced "direct democracy" for more than 100 years.[76] Today, seventy percent of the United States population lives in a state or city where direct democracy is available.[77] 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.

Direct democracy is a broad label encompassing such decision-making processes as town meetings, recall elections, initiatives, and referenda.[78] The most important and most common forms of direct democracy in the United States are the initiative and referendum.[79] Most 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.[80]

Nevertheless, direct democracy is controversial. Like in colonial times, many journalists and political elites are suspicious of direct decision-making by citizens.[81] 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.[82] Additionally, many critics claim citizens are incompetent to make political decisions due to the limited facts they have on which to base their decisions.[83]

These weaknesses, however, give voters an incentive to seek guidance from more informed, credible sources.[84] 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

The high cost of publishing in traditional print and broadcast media limits the number of voices that can be

heard.[85] Technology, however, has led increasingly to the obsolescence of those outlets as the sole arbiters of the information essential to democracy.[86] The change has come because, contrary to the closed ranks of newspaper publishers, the World Wide Web[87] is open as a publication forum for anyone with an Internet connection.[88] Thus, "the Internet has brought democracy to your doorstep and to your desktop."[89] 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.

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

The Internet has been described as allowing measurements of public opinion, providing a public forum, and facilitating citizen access to government.[96] Because of these varied functions, some scholars argue computers and communications technology spawned a "third industrial revolution."[97] 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.[98]

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."[99] 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.[100] 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.[101]

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.[102] Thus, one writer has argued we must create a fourth branch of government – the Popular Branch – using "civil juries" to make laws.[103] More mainstream arguments, however, simply call for direct democracy by electronic town hall meetings.[104]

a. <u>The Constitutional Bar to a Direct Democracy System</u>

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 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.

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.

Nevertheless, Professor Akhil Reed Amar claims we must "unlearn[]" the purportedly incorrect lesson that the Founders opposed direct democracy.[105] 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.[106]

The historical record, however, rejects the argument.[107] Nothing in the language of the Constitution permits direct action by the People either in legislating or amending the Constitution.[108] 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.[109] Thus, Professor Amar gives the 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."[110] Professor Amar's view simply "cannot be reconciled with the founding generation's abiding fear of the excesses of democracy."[111]

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.[112] Indeed, the Founders likely would have been horrified even by the now accepted initiative and referendum process.[113] 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."[114] They feared disastrous consequences if lawmakers felt bound to follow the whims of their constituents.[115] The Founders avoided those consequences by drafting a Constitution that kept the People out of lawmaking and preserved the structure of government.[116]

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.[117] This had resulted, he explained, from individuals putting adherence to political factions over the public good.[118]

Madison warned that, where unchecked by legal means, majorities often become oppressive.[119] 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.[120]

Madison continued that a representative republic "promises the cure for which we are seeking."[121] 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.[122] 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 majority, and particularly, in computing the proportion by *States*, not by *citizens*, it departs from the *National* and advances toward the *Federal* character . . .[123]

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. <u>The Change Made Possible By the Internet</u>

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.[124] 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.[125] 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.[126]

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.[127] 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.

Political participation and voting could be made easier thanks to the newly cheap and abundant access to information technology.[128] Moreover, the costs of participating – both as citizen and legislator – could be reduced by allowing cheap methods for constituents to contact their legislators.[129] Citizens could exert direct influence over willing legislators by meeting for online discussions.[130] 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.[131] 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.[132]

3. The Adaptation of Politics to the Internet

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.

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.[133] After this simple beginning, calls came quickly from some quarters to use new technologies to change the nature of governance.

Also in 1992, presidential candidate Ross Perot called for direct democracy through an "electronic town hall."[134] 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.[135]

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.[136] Two Foundation representatives moderated a panel discussion among eight citizens concerning seven options for cutting health care costs.[137] Also in the 1990s, the Community Service Foundation formed the Electronic Congress ("EC").[138] The EC let citizens call a toll-free number to enter their opinions on national issues.[139] 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.[140] Finally, in 1995, residents of Reading, Pennsylvania used video-conferencing software and cable call-in shows to debate local and national issues.[141]

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

Until at least 2000, much of Internet politics was limited to websites that were "little more than electronic yard signs."[144] During the early era of Internet campaigning, campaigns simply maintained passive websites as repositories for biographies, press releases, and other traditional campaign material.[145] 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.[146]

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."[147] 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.[148] 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."[149]

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.[150] 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.[151] This technology let politicians tailor their messages to specific voters so they could, through technology, establish a "personal, one-on-one relationship" with citizens.[152]

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.[153] John McCain, another Republican candidate, held an online fundraiser showing a live video feed of his wife reading questions and him answering the questions.[154] Democrat Al Gore and Republican George W. Bush also had an online debate which received little viewer interest.[155]

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.[156] 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.[157] As a result, the Internet was ready to play a critical role in political campaigning.

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.[158] By the time Dean lost the Democratic nomination for the presidency, he had compiled an e-mail list of 600,000 people.[159] 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.[160] Yet, despite the fundraising disadvantage, Bush still won because Republicans increased their turnout at the polls more than the Democrats.[161] 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.[162]

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.[163] 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.[164]

Accordingly, while it may have been premature in 1992, many believe the Internet is now ripe for "deliberative democracy."[165] 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-meeting style of government will become a national reality."[166] 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.[167]

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.[168] 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.[169]

Despite the reservations, some observers still describe grass roots communication with candidates and officials via Internet as a coming revolution of electronic democracy.[170] 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."[171] As discussed in the 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.[172] 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

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."[173]

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

Only a handful of blogs existed in 1997 and 1998.[177] At that time, only people well versed in HTML[178] and with the free time to build and maintain a site requiring daily updates had blogs.[179] Early blogs were organized around links to other sites.[180] Bloggers acted as human filters for the Internet by providing links, coupled with their own commentary, to people, information, or sites they found interesting.[181] 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.[182]

The style of blogs soon began to change, however. Beginning in 1999, software developers began releasing various do-it-yourself tools for building blogs.[183] Thus, blogs are now easy to set up and require no knowledge of computer programming.[184] 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.[185] Bloggers record their personal thoughts and relate important events on their blogs for all the world to see.[186] 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.[187]

Thus, modern bloggers are primarily concerned with posting their thoughts on specific topics.[188] The postings are then organized in chronological order, making each blog a sort of archived opinion page.[189] Blogs also allow readers to post responses or comments.[190] The ability for readers to leave comments about materials on a blog fosters a dialogue between bloggers.[191] 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.[192]

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.[193] One report had the number of bloggers reaching eleven million by August 2005.[194] Further, by the end of 2004, twenty-seven percent of Internet users, or thirty-two million Americans, reported reading blogs.[195] This marked a seventeen percent increase over those admitting blog readership in February of that year.[196] 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.[197] Additionally, twelve percent of Internet users have posted comments or other material on a blog.[198]

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.[199] As a result, "blogs are an emerging form of legitimate and widespread communication of both fact and opinion . . . ."[200] Blogs democratize journalism by letting the People speak. This results in dissemination of expert opinions the public otherwise would not hear.[201] For example, the "Baghdad Blogger," Salam Pax, maintained an online diary of life in wartime Iraq.[202] 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.[203]

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.[204] These companies, slowly and often hesitantly, have recognized the value of

blogs as a marketing tool.[205] Companies such as Sun Microsystems, Inc. and Google have encouraged employees to blog on a corporate site.[206] These companies see their blogs as a way to enhance communication with customers and to build a type of community.[207] Companies may also use blogs to facilitate communication between management and employees.[208]

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

Blogs are unlike traditional websites in the corporate or political realm. Not just information conduits, blogs reflect the personalities of their individual authors.[213] 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."[214] 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.[215] Google, for example, has disciplined an employee for "improper" postings.[216]

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."[217] One with knowledge of the content in a blog posting potentially could be liable for discrimination, harassment, or defamation of others.[218] While this risk can be minimized in the employment setting with a blogging policy,[219] a legislator faces special constraints in applying an equivalent blog-posting policy.[220]

Nevertheless, politicians cannot ignore blogs. Blogs have gained favor because they combine the tone of a personal conversation with the accessibility of a website.[221] Blogs are attractive and powerful, no matter what the topic, because of their authenticity.[222] 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.[223] 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.[224]

i. Blogs Enter Politics

Lawrence Lessig has described blogging as "one of the most important opportunities" citizens have to create an alternative to existing media.[225] 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 immediately challenged them as modern forgeries.[226] 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.[227]

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 segregationalist presidential campaign.[228] 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.[229]

Thus, speech on blogs already has become a tool for influencing political tides – "the modern equivalent of political pamphleteering."[230] 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.[231] 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."[232] The blogs were, therefore, exempt from campaign finance limits and regulation pursuant to the statutory press exception.[233]

Blogs have become powerful tools in many sectors of society, including politics and the shaping of public opinion. They allow people to create a close-knit community from remote locations.[234] 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

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.[235] The same study also found people typically reluctant to speak in personal meetings were more comfortable speaking in a networked setting.[236]

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.[237] Candidates do not want to spend their time with anonymous citizens who may not be able to vote for them.[238] This problem, however, can be resolved with relatively little trouble.[239] 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.[240] They are able to "post commentary, news, rumor and ruminations online . . . ."[241] 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.[242] People also tend to express more extreme opinions over the Internet than in personal conversations.[243]

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."[244] Such great reach means that, unless the forum were tightly censored, participants could write anything and leave it on the legislator's blog for all others to see.[245] 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."[246] 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

Of course, the right to engage in political speech is the central component of the First Amendment's speech clause.[247] The First Amendment demonstrates our "'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open . . . .'"[248] 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.[249] The doctrine also provides "a metaphorical reference point" for protecting speech in all locations.[250]

By granting a right to speak on public property, the government has ensured all speakers have a forum for distributing their messages.[251] 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.[252] Thus, the public forum doctrine acts as a "First Amendment easement"[253] ensuring access regardless of the preferences of the government owners or the private users of the property.[254]

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.[255] This approach is reflected in the Court's "forum based" approach to reviewing speech restrictions on government property.[256]

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."[257] As discussed below, this remains the heart of the public forum doctrine.

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.[258] Moreover, the *Hague* plurality did not refute the prevailing view, expressed by Oliver Wendell Holmes as a state judge,[259] that government had the right to control its property to the same extent as private property owners.[260]

The Court, however, soon removed any confusion by expressly adopting the *Hague* dicta and rejecting the early Holmes view.[261] 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.[262] Forty years after creating the public forum concept in *Hague*, the Court set the restrictive modern public forum analysis.[263]

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.[264] 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.[265]

1. Traditional Public Fora

The classic description of the traditional public forum remains *Hague's* reference to streets, sidewalks, and parks immemorially held in trust for the public.[266] The Supreme Court, however, has provided some additional contour to its description. The traditional public forum is property that has as "a principal purpose . . . the free exchange of ideas."[267] 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."[268]

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 . . ."[269] All such fora share a common trait in that open access and viewpoint neutrality are "compatible with the intended purposes of the property."[270] The requirements of openness and neutrality mean content-

based restrictions in these fora are subject to strict scrutiny.[271]

2. Designated Public Fora

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."[272] 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."[273] Thus, government bodies may meet in executive session without public access.[274]

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

Aside from the traditional public forum, the government must act intentionally to create a public forum.[278] To do so, the government must "intentionally open[] a nontraditional forum for public discourse."[279] Governmental inaction does not create a public forum.[280] 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.[281]

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.[282] 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.[283] 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.[284]

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 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,[285] was not a public forum.[286] 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.'"[287] As such, an airport terminal is not a public forum.[288]

When the government opens a designated public forum, however, it is stuck with the consequences of its action.[289] Restrictions on speech in designated public fora are treated with

the same skepticism as restrictions in traditional public fora.[290] Although the government was not required to open the forum and can close a designated public forum,[291] restrictions imposed in a designated public forum are subject to strict scrutiny so long as the government leaves the forum open for expression.[292]

a. Limited Public Fora

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.[293] When the government opens a limited public forum, it limits the forum to communications by certain groups[294] or addressing certain subjects.[295]

As with a designated public forum, the government must affirmatively open a limited public forum.[296] When it does so, it may choose the types of speakers and/or subjects that will be permitted in the forum.[297] 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."[298]

Still, although a state is not required to permit all manners of speech or speakers when it opens a limited public forum,[299] 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.'"[300] Thus, the government may not selectively deny access for speech or activities of the genre for which it opened the forum.[301] 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.[302]

3. Non-Public Fora

The last category encompasses government property that is neither by tradition nor by designation a public forum.[303] 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."[304] "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."[305]

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.[306] 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."[307] 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."[308]

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,"[309] and must be "consistent with the [government's] legitimate interest in preserving the property for the use to which it is lawfully dedicated."[310] A speech restriction in a non-public 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."[311]

4. Impact of the Modern Public Forum Analysis

The public forum doctrine protects access to those locations most important to fulfill the goal of the First Amendment.[312] 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.[313] 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.[314]

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."[315] 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.[316] 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 intends.[317] 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.[318]

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

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.[319] 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.[320] Such arguments are misguided.

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."[321] In fact, the Court has already, in *Reno v. ACLU*,[322] applied a typical First Amendment analysis in the Internet context.[323]

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.[324] 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.[325]

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.[326] 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.[327]

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.[328] 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.[329]

1. The Legislator's Blog Is a Public Forum

If the courts have had little time to contemplate application of traditional principles to the Internet as a whole, they have had virtually no occasion to consider applying legal doctrines to blogs.[330] The one court to consider the matter held postings on a blog are entitled to First Amendment protection.[331] 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

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

government supplies or subsidizes the network.[335]

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.[336]

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[337] because the government action element is met where the discussion originates from a government-owned computer.[338] 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.[339] 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.[340] Therefore, a politician attempting to censor a public forum meets the state action requirement.[341]

b. Classifying the Legislator's Blog

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?[342]

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.[343] Unfortunately, the Supreme Court seems to have barred the recognition of new traditional public fora and limited the category to parks, streets, and sidewalks.[344]

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."[345] 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.[346]

The physical characteristics of the blog alone, however, are not dispositive of the traditional public forum analysis.[347] One must also consider its location and purpose.[348] 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.[349] The blog is not like a park where one can loiter and spread his or her message.[350] Instead, the blog is like a bulletin board where one can leave a message and hope it gains attention.[351] 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.[352]

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.[353] According to Goldstone, the site fits this category if it is government owned or controlled, offers unlimited access to recipients of information, and gives viewpoint-neutral access to a large number of information senders.[354] 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.

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.[355] So long as they addressed their speech to one of the political topics posed or permitted for discussion by the legislator,[356] speakers in the forum would be entitled to First Amendment protection.[357]

2. Why Constitutional Protection of the Blog Should Concern the Legislator

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.[358] This desire to limit speech conflicts with constitutional protections for speakers in the forum.[359]

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.[360] Thus, the government is not permitted to censor the content of speech.[361] Accordingly, the government may neither exclude participants from a forum because of the content of their speech[362] nor delete a viewpoint from a

discussion in the forum without violating the First Amendment.[363]

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.[364]

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.

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.[365] Such discrimination based on the content of the speech is impermissible under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.[366] The legislator could have allowed limited discourse on her blog without opening a public forum.[367] Once she has invited citizen comments on political issues, however, she cannot constitutionally limit the forum to those with whom she agrees.[368]

The legislator, therefore, will be hard pressed to claim a right to limit or prohibit speech or speakers with whose views she takes issue.[369] Our firm constitutional protections for the content of speech virtually eliminate any ability for the legislator to censor or remove postings.[370] 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.[371]

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.

The government may not restrict or punish protected speech in a public forum because some of the words are unpleasant.[372] Similarly, the government cannot regulate speech simply because it proves embarrassing to some who hear or see it.[373] A restriction on speech is not content neutral when it is based on another's reaction to the speech.[374] 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 protection.[375] In public fora, individuals are expected to avoid or ignore speech they do not want to hear or see.[376] 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

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.[377] Because of the statutory protection afforded to computer service providers, the legislator cannot meet this test.

Congress has recognized the Internet as "a forum for a true diversity of political discourse…."[378] In order to protect the forum, in the Communications Decency Act ("CDA"),[379] "Congress granted most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party."[380] In the CDA, Congress provided: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[381]

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 . . . ."[382] 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."[383]

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."[384] Such postings on a blog appear to constitute information provided by a third party for which the blogger is immune.[385]

As such, § 230(c) gives the legislator-blogger full immunity so long as a third party voluntarily provides "the essential published content."[386] 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 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).[387]

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.[388]

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."[389]

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

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 functions related to the traditional role of a publisher,[391] 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."[392] According to the Ninth Circuit, the issue for immunity purposes is one of degree in altering the material.[393] 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.[394]

Whatever merit those approaches might have when dealing with the private sector, they cannot allow the legislator as government agent to censor messages.[395] 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.[396]

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.[397]

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.[398] 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.[399] 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.[400]

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.[401]

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.[402] As such, once the 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

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.

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.

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.

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

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.

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.

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[2] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 4 (J.P. Mayer & Max Lerner, eds., George Lawrence, trans., 1999).

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

[4] 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.

[5] *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 1, 2006) (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).

[6] *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/
(last visited June 1, 2006) (on file with author) (explaining that over fifty-seven percent of Internet users say the Internet is their primary source of information about products and services they buy).

[7] *See infra* Part II.C.2.b.

[8] *See also infra* Part II.C.3.

[9] 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)).

[10] *See infra* Part C.3.

[11] LAWRENCE GROSSMAN, THE ELECTRONIC REPUBLIC 149 (1995).

[12] *See infra* Part II.C.3.

[13] Doe v. Cahill, 884 A.2d 451, 456 (2005).

[14] *See infra* Part II.A.

[15] *See infra* Part II.A-B.

[16] *See infra* Part II.C.

[17] *See infra* Part II.C.1.

[18] *See infra* Part II.C.

[19] *See infra* Part II.C.2.b.

[20] *See infra* Part II.C.3.

[21] *See infra* Part II.C.3.a.i.

[22] *See infra* Part III.

[23] *See infra* Part III.A.

[24] *See infra* Part III.B.1.

[25] *See infra* Part III.B.2.-3.

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

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

[28] *See* DE TOCQUEVILLE, *supra* note 2, at 56.

[29] CRAVEN, *supra* note 26, at 24.

[30] DE TOCQUEVILLE, *supra* note 2, at 3.

[31] *See id.*

[32] *See* BARCK & LEFLER, *supra* note 27, at 80.

[33] 2 CHARLES M. ANDREWS, COLONIAL PERIOD OF AMERICAN HISTORY 178 (1964).

[34] BARCK & LEFLER, *supra* note 27, at 94-95.

[35] *Id.* at 95.

[36] 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.

[37] In some colonies, town meetings occurred no more than once each year. *See* CRAVEN, *supra* note 26, at 24.

[38] *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.

[39] *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).

[40] *See* CRAVEN, *supra* note 26, at 25-26; *see also* BARCK & LEFLER, *supra* note 27, at 90.

[41] *See* BARCK & LEFLER, *supra* note 27, at 262.

[42] *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 40 (2005).

[43] *Id.*

[44] *Id.*

[45] *See* BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 16 (2005).

[46] *See id.* at 18.

[47] *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.).

[48] *See* AMAR, *supra* note 42, at 184-85.

[49] *See generally* ACKERMAN, *supra* note 45, at 19-26 (detailing development of Federalist and Republican parties).

[50] 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").

[51] MADISON, *supra* note 50, at 371.

[52] *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).

[53] *Id*. at 198.

[54] *Id.* at 140, 198-99.

[55] THOMAS JEFFERSON, Letter to Joseph C. Cabell (Feb. 2, 1816), *in* XIV WRITINGS 417, 421 (Andrew A. Lipscomb ed., 1903).

[56] *See* ELLIS, *supra* note 52, at 199.

[57] *Id.* at 199-200.

[58] *Id.* at 200.

[59] *Id.* at 53-54.

[60] *Id.* at 200.

[61] *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.

[62] JEFFERSON, *supra* note 55, at 423.

[63] *See id.* at 422.

[64] *Id.* at 421.

[65] *Id.* at 422.

[66] *Id.* at 419-20.

[67] *Id.* at 422.

[68] ETHAN J. LEIB, DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT 47-48 (2004).

[69] JEFFERSON, *supra* note 55, at 422.

[70] *See* LEIB, *supra* note 68, at 51-52.

[71] *Id.* at 52-56.

[72] *Id.* at 53-54.

[73] *Id.* at 54.

[74] *Id.* at 55.

[75] *Id.* at 56.

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

[77] *Id.*

[78] *Id.* at 465.

[79] *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).

[80] Arthur Lupia & John G. Matsusaka, *Direct Democracy: New Approaches to Old Questions*, 7 ANN. REV. POL. SCI. 463, 475 (2004) (citing studies).

[81] *Id.* at 464.

[82] *Id.* These concerns are bolstered by studies demonstrating that strong investments of money can defeat referenda. *Id.* at 470-71.

[83] *Id.* at 467.

[84] *Id.* at 469.

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

[86] Charles Krauthammer, *Ross Perot and the Call-in Presidency*, TIME, July 13, 1992, at 84.

[87] 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).

[88] Tessler, *supra* note 85.

[89] *Id.* (quoting online advertising executive Michael Bassik).

[90] *Reno*, 521 U.S. at 849.

[91] *Id.* at 850.

[92] *Id.*

[93] *Id.* at 863.

[94] *Id.* at 870.

[95] *Id.* (citation omitted).

[96] RICHARD DAVIS, THE WEB OF POLITICS: THE INTERNET'S IMPACT ON THE AMERICAN POLITICAL SYSTEM 20-21 (1999).

[97] 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"].

[98] *Id.*

[99] 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.

[100] IAN BUDGE, THE NEW CHALLENGE OF DIRECT DEMOCRACY 1-17 (1996).

[101] *Id.* at 74-75.

[102] LEIB, *supra* note 68, at 4.

[103] *Id.*

[104] Goldstone, *supra* note 9, at 341 n.28.

[105] AMAR, *supra* note 42, at 276.

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

[107] *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).

[108] *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.'").

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

[110] *Id.* at 165.

[111] *Id.* at 139.

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

[113] *Id.* at 1523.

[114] *Id.*

[115] *Id.*

[116] *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.").

[117] *See* THE FEDERALIST NO. 10 at 55 (James Madison) (Henry B. Dawson ed., 1888).

[118] *Id.*

[119] *Id.* at 60.

[120] *Id.* at 60-61.

[121] *Id.* at 61.

[122] *See* THE FEDERALIST NO. 38 at 265 (James Madison) (Henry B. Dawson ed., 1888).

[123] *Id.* (italics in original).

[124] THE FEDERALIST NO. 10, *supra* note 117, at 53.

[125] *See* BUDGE, *supra* note 100, at 1 & 24.

[126] *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.").

[127] *See*, *e.g.*, DAVIS, *supra* note 96, at 22-23.

[128] *See* Nye, *supra* note 97, at 12.

[129] *Id.*

[130] Arthur Isak Applbaum, *Failure in the Cybermarket-place of Ideas*, *in* GOVERNANCE.COM: DEMOCRACY IN THE INFORMATION AGE, 19-20 (Elaine Ciulla Kamarck & Joseph S. Nye, Jr. eds, 2002).

[131] *See id.* at 22-23; *see also* Dennis Thompson, *James Madison on Cyber-Democracy*, *in* GOVERNANCE.COM DEMOCRACY IN THE INFORMATION AGE, 35 (Elaine Ciulla Kamarck & Joseph S. Nye, Jr. eds, 2002).

[132] 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.*

[133] DAVIS, *supra* note 96, at 22-23.

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

[135] *Id.*; *see also* Krauthammer, *supra* note 86, at 84 (discussing Perot's alternative plans to use television call-in shows to address the public).

[136] *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.

[137] *Id.*

[138] *Id.*

[139] *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 2, 2006).

[140] *See* Vote Link, http://www.votelink.com/ (last visited June 2, 2006).

[141] *See* Schwartz, *supra* note 136.

[142] *See* DAVIS, *supra* note 96, at 22-23.

[143] *Id.* at 87.

[144] Dana Milbank, *Virtual Politics*, THE NEW REPUBLIC, July 5, 1999 at 22, 27.

[145] *See* Pippa Norris, *The Internet and U.S. Elections 1992-2000* in GOVERNANCE.COM, DEMOCRACY IN THE INFORMATION AGE, 69 (Elaine Ciulla Kamarck & Joseph S. Nye, Jr. eds, 2002) (comparing "passive websites" to "conventional political leaflets"); *see also* Elaine Ciulla Kamarck, *Political Campaigning on the Internet* in GOVERNANCE.COM, DEMOCRACY IN THE INFORMATION AGE, 89 (Elaine Ciulla Kamarck & Joseph S. Nye, Jr. eds, 2002).

[146] Sussman, *supra* note 99, at 58.

[147] *Id.* (emphasis in original).

[148] ALVAREZ & HALL, *supra* note 134, at 2.

[149] Sussman, *supra* note 99, at 58.

[150] ALVAREZ & HALL, *supra* note 134, at 3.

[151] *See* Milbank, *supra* note 144, at 22.

[152] *Id.* at 24.

[153] *Id.* at 22.

[154] Kamarck, *supra* note 145, at 99.

[155] *Id.*

[156] ALVAREZ & HALL, *supra* note 134, at 3.

[157] *See* Computer and Internet Use in the United States: 2003, http://www.census.gov/prod/2005pubs/p23-208.pdf (last visited Feb. 2, 2006).

[158] Michael Barone, *Blogosphere Politics*, U.S. NEWS & WORLD REPORT, Feb. 21, 2005, at 42.

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *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.

[164] *See* ALVAREZ & HALL, *supra* note 134, at 3.

[165] *Id.* at 54.

[166] DICK MORRIS, VOTE.COM 28 (2001).

[167] *See* Kamarck, *supra* note 145, at 97-98.

[168] *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)).

[169] *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.

[170] *See* Sussman, *supra* note 99, at 58.

[171] 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 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.

[172] Thompson, *supra* note 131, at 38.

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

[174] *Id.* at 3.

[175] *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 (last visited May 22, 2006).

[176] Swaya & Eisenstein, *supra* note 173, at 2-3.

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

[178] 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.

[179] *See* Blood, *supra* note 177.
[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *See* Peterson, *supra* note 175, at 8.

[185] *See* Blood, *supra* note 177.

[186] *Id.*

[187] *Id.*

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

[189] *Id.*

[190] *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.

[191] *See* Dave Taylor, *The Intuitive Life Business Blog* http://www.intuitive.com/blog/whats_the_difference_between_a_blog_and_a_web_site.html (last visited May 22, 2006).

[192] *Id.*

[193] *See* Lee Rainie, The State of Blogging, http://www.pewinternet.org/pdfs/PIP_blogging_data.pdf at 1 [hereinafter "Pew Project"] (last visited Feb. 3, 2006).

[194] Tessler, *supra* note 85.

[195] *See* Pew Project, *supra* note 193, at 1.

[196] *Id.*

[197] *Id.*

[198] *Id.*

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

[200] *Id.* at 44.

[201] Mortimer B. Zuckerman, *The Wild, Wild Web*, U.S. NEWS & WORLD REPORT, Dec. 5, 2005, at 76.

[202] *Id.* The blog, not updated since August 18, 2004, can be found at http://dear_raed.blogspot.com.

[203] *Id.* Professor Cole's blog is located at http://www.juancole.com.

[204] *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.

[205] *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.

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

[207] *See* Joyce, *supra* note 205, at A01.

[208] *See* Peterson, *supra* note 175, at 10.

[209] *See* Rubel, *supra* note 188.

[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] *Id.*

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

[215] *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.

[216] Joyce, *supra* note 205, at A01.

[217] Peterson, *supra* note 175, at 8.

[218] *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).

[219] *See* Swaya & Eisenstein, *supra* note 173, at 5.

[220] *See infra* Parts III.B.2-3.

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

[222] *See* Rubel, *supra* note 188.

[223] *Id.*

[224] *See* Julie China, *Blogger's Anonymous*, FEDERAL LAWYER, Mar./Apr. 2006, at 6.

[225] *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/ (last visited May 22, 2006).

[226] *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).

[227] *See* Barone, *supra* note 158, at 42.

[228] *See* Tessler, *supra* note 85.

[229] *Id.*

[230] Doe v. Cahill, 884 A.2d 451, 456 (Del. 2005).

[231] Rubel, *supra* note 188.

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

[233] *Id.* at 4.

[234] 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*.

[235] *See* Lee Sproull & Sara Kiesler, *Computers, Networks, and Work*, 265 SCIENTIFIC AMERICAN 3, Sept. 1991, at 116, 119.

[236] *Id.* at 120.

[237] *See* DAVIS, *supra* note 96, at 91.

[238] *See* Kamarck, *supra* note 145, at 98.

[239] 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) (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.

[240] *See* Sussman, *supra* note 99, at 62.

[241] Tessler, *supra* note 85.

[242] *See* Zuckerman, *supra* note 201, at 76.

[243] *See* Sproull & Kiesler, *supra* note 235, at 120-21.

[244] Tessler, *supra* note 85.

[245] Kamarck, *supra* note 145, at 98.

[246] 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.

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

[248] Boos v. Barry, 485 U.S. 312, 318 (1988) (plurality opinion) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

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

[250] *Id.*

[251] *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).

[252] *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).

[253] Harry Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 13.

[254] *See* Zatz, *supra* note 251, at 172.

[255] *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992).

[256] *Id.*

[257] 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).

[258] Gey, *supra* note 249, at 1539.

[259] *See* Commonwealth v. Davis, 39 N.E. 113, 113 (Mass. 1895).

[260] *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).

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

[262] *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).

[263] *See* Gey, *supra* note 249, at 1547.

[264] 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.").

[265] Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[266] *See* Hague v. Comm. For Indus. Org., 307 U.S. 496, 515-16 (1939).

[267] *Cornelius*, 473 U.S. at 800.

[268] Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 651 (1981).

[269] Warren v. Fairfax County, 196 F.3d 186, 191 (4th Cir. 1999).

[270] Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 673 (1988).

[271] 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).

[272] 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)).

[273] *Id.* at 178 (Brennan, J., concurring) (quoting Adderley v. Florida, 385 U.S. 39, 48 (1966)).

[274] *Id.*

[275] *Id.* at 178-79.

[276] *Id.* at 179.

[277] *See* Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[278] *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679-80 (1992).

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

[280] *Lee*, 505 U.S. at 680.

[281] *Id.*

[282] *See* Hotel Employees & Restaurant Employees Union v. City of New York Dep't of Parks & Recreation, 311 F.3d 534, 545 (2d Cir. 2002).

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

[284] *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680-81 (1992).

[285] *See* Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 39 (1983).

[286] *Id.* at 46.

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

[288] *Lee*, 505 U.S. at 682.

[289] *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.").

[290] *See Lee*, 505 U.S. at 678.

[291] *See Perry*, 460 U.S. at 46.

[292] *Id.*

[293] *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 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.

[294] *See Perry*, 460 U.S. at 46 n.7 (citing generally Widmar v. Vincent, 454 U.S. 263 (1981)).

[295] *See id.* (citing generally City of Madison Sch. Dist. v. Wis. Employment Relations Comm'n, 429 U.S. 167 (1976)).

[296] *See* Hotel Emples. & Rest. Emples. Union v. City of New York Dep't of Parks & Rec., 311 F.3d 534, 545 (2d Cir. 2002).

[297] *Id.*

[298] Ark. Educ. TV Comm'n v. Forbes, 523 U.S. 666, 679 (1998).

[299] *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001).
[300] *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.

[301] *See Hotel Emples.& Rest. Emples.*, 311 F.3d at 545-46.

[302] *Id.* at 546.

[303] *See* Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 46 (1983).

[304] Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

[305] *See Perry*, 460 U.S. at 53.

[306] *See id.* at 46.

[307] United States v. Kokinda, 497 U.S. 720, 730 (1990) (internal quotation marks and citation omitted).

[308] Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 683 (1992) (quoting *Kokinda*, 497 U.S. at 730).

[309] Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 809 (1985).

[310] 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.

[311] *Id.* (quoting Postal Serv. v. Council of Greenburgh Civic Assn's, 453 U.S. 114, 129-30 (1981) (internal quotation marks omitted)).

[312] *See* Zatz, *supra* note 251, at 160-61.

[313] *See* Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 696 (1992) (Kennedy, J., concurring).

[314] *Id.*

[315] *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).

[316] *See* Gey, *supra* note 249, at 1547-48.

[317] *See id.* at 1548.

[318] *Id.*

[319] 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.").

[320] *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).

[321] Rosenberger v. Rector Visitors of the Univ. of Va., 515 U.S. 819, 830 (1995).

[322] *See* Reno v. ACLU, 521 U.S. 844, 870 (1997).
[323] *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).

[324] *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).

[325] *See* Gey, *supra* note 249, at 1548.

[326] *See Bowman*, 444 F.3d at 974-75.

[327] *Id.* at 977.

[328] *See* Goldstone, *supra* note 9, at 337 (arguing the Internet should be viewed as a city).

[329] *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?'").

[330] *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).

[331] *See* Doe v. Cahill, 884 A.2d 451, 456 (Del. 2005).

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

[333] *See* Goldstone, *supra* note 9, at 350.

[334] *See id.* at 350-51.

[335] *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 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.

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

[337] *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).

[338] *See* Goldstone, *supra* note 9, at 385.

[339] *See* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 16.1 (3d ed. 1999).

[340] *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 CHEMERINSKY, 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).

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

[342] *See id.* at 360.

[343] *See* Brogan, *supra* note 320, at *7.

[344] *See* Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 680 (1992).

[345] *Id.* (ellipsis in original).

[346] 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.").

[347] United States v. Kokinda, 497 U.S. 720, 727 (1990).

[348] *Id.* at 728-29.

[349] *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).

[350] 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.

[351] *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).

[352] *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.

[353] *See* Goldstone, *supra* note 9, at 368-69.

[354] *Id.*

[355] 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).

[356] 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.

[357] *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.")

[358] *See* DAVIS, *supra* note 96 at 115.

[359] *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).

[360] "[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).

[361] *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.").

[362] City of Madison Sch. Dist. v. Wis. Employ. Relations Comm'n, 429 U.S. 167, 179 (1976) (Brennan, J., concurring).

[363] *See* Goldstone, *supra* note 9, at 396.

[364] *See id.*

[365] *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).

[366] *See Mosley*, 408 U.S. at 100.
[367] *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).

[368] *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).

[369] *See* Goldstone, *supra* note 323, at 30-31.

[370] *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).

[371] *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).

[372] *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).

[373] *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)).

[374] *See id.* at 754-55 (Brennan, J., dissenting).

[375] *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).

[376] *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.

[377] *See* Widmar v. Vincent, 454 U.S. 263, 269-70 (1981).

[378] 47 U.S.C. § 230(a)(3) (1998).

[379] 47 U.S.C. § 223 (2006).

[380] Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1122 (9th Cir. 2003).

[381] 47 U.S.C. § 230(c)(1) (1998).

[382] 47 U.S.C.S. § 230(f)(2) (LexisNexis 2002).

[383] 47 U.S.C.S. § 230(f)(3) (LexisNexis 2002).

[384] *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)).

[385] *See* Peterson, *supra* note 175, at 44.

[386] *Carafano*, 339 F.3d at 1124.

[387] *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).

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

[389] Batzel v. Smith, 333 F.3d 1018, 1034 (9th Cir. 2003).

[390] *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).

[391] *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.").

[392] *See Batzel*, 333 F.3d at 1031.

[393] *Id.* at 1032.

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

[395] *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).

[396] *See Zeran*, 129 F.3d at 330-31; *see also Batzel*, 333 F.3d at 1027-28.

[397] 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.

[398] *See* Goldstone, *supra* note 323, at 32.

[399] *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.")

[400] *See* Doe v. Cahill, 884 A.2d 451, 465-66 (Del. 2005) (collecting cases).

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

[402] 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 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).

Government by Consensus
Restrictions on Formal Business in the Massachusetts Legislature Inspire Innovative Ways to Govern.

By Steven T. James, Clerk of the Massachusetts House
(edited by Massachusetts House Counsel Louis Rizoli and former House Clerk Robert E. MacQueen. Technical assistance provided by Matthew Landry).

Most legislators and legislative staff will probably agree that it was back around the beginning of time that cynicism about government became widespread among taxpaying citizens. Since the middle of the 1950's citizen efforts to reform the General Court (the official name for the Massachusetts Legislature) have been fashionable, and frequently successful. In 1979 the size of the House was reduced from 240 members to 160 members. This reduction in size came about as a result of an initiative petition circulated by the League of Women Voters of Massachusetts. On numerous occasions over the span of approximately 30 years, laws passed by legislators to increase their own salaries were repeatedly repealed by voters, after being placed on the ballot via the referendum provisions of the Constitution[1].

Two attempts were made by citizens to institute term limits for legislators. The first attempt, an initiative petition to amend the Constitution, was placed on the calendar of a constitutional convention consisting of a joint session of the members of the House and Senate. Prior to its consideration, however, the joint session was "forced" to adjourn in order to avoid a violation of little known special Rule "I" contained in the Rules of the Joint Session. Special Rule "I" is designed to avoid a conflict with the convening of a session of either the House or Senate if a joint session is in progress. It requires that the presiding officer (President of the Senate) declare a *final* adjournment of the joint session ten minutes before the hour of a meeting of either branch. It just so happened that the Senate had scheduled a meeting two hours subsequent to the time of the convening of the joint session. It also just so happened that the first item to be debated prior to consideration of the term limits issue, was a Constitutional amendment that would have defined "life" as beginning at the moment of conception. Some critics speculated that the Senate President, who abhorred the concept of term limits, may have scheduled the convening of the Senate shortly after the time of the convening of the joint session, so that Special Rule "I" would assure the demise of the term limits initiative amendment.

The second attempt of citizens to limit the terms of legislators was in the form of an initiative petition for a change in law. This initiative petition made it to the ballot, and was approved by the voters of Massachusetts at the biennial state election of 1994. Prior to its implementation, however, term limits for public officials was declared to be unconstitutional by the Massachusetts Supreme Judicial Court[2].

During the 1980s and 1990s support for limiting the length of legislative sessions grew, as with each passing year the General Court repeatedly failed to end its sessions. There was much talk about limiting the legislative session to 6 or 7 months. One initiative petition, calling for a change in law that would have stopped legislators from receiving pay after the first 6 months of each year, was determined to be ineligible for consideration because it failed to pass the legal muster of the Attorney General. Faced with unprecedented unpopularity, and a desire to improve their image, legislators, in the year 1995, adopted a change in rules placing certain restrictions on legislative sessions[3]. It is upon the dynamic of governing by unanimous consent, brought by this rules change, to which this article is focused.

Unlike most states, there are no restrictions on the length of the annual legislative sessions contained in the Massachusetts Constitution, General Laws, or legislative rules. The Massachusetts Legislature has not ended its session in many years, but when it did, unlike other states, the method used to end its annual session was not via the adoption of "sine die" resolutions. Instead, like the British and Canadian parliaments, sessions in Massachusetts are brought to closure by permission granted by the Governor to "prorogue." Back in the years when they did prorogue, upon the completion of business both branches would adopt an order requesting the Governor to "prorogue them to the Tuesday next preceding the first Wednesday of January next." "Prorogue" is defined by Webster as a verb meaning "to terminate a session of (as a British parliament) by royal prerogative." The use of the term may be one of the last bastions of British phraseology left over from Colonial times. Now the term has become even more obscure and archaic, as the last time the Massachusetts Legislature prorogued was in November of 1988. Since that time sessions have been continuous, with the maximum interruption of not more than 2 non-session days (Sundays and holidays excluded) sandwiched between sittings.

Prior to 1965 the General Court had prorogued each and every annual session without exception. In 1965, however, challenged by then Governor John Volpe's pledge to lower property taxes through the institution of a state-wide sales tax, and their own failure to place the annual budget on the Governor's desk until December (nearly 6 months late), the Legislature did not end its session via prorogation. Instead the daily meetings continued for the entire year, concluding at midnight on the day preceding the convening of the 1966 Annual Session.

In 1966 the Legislature prorogued on September 7; but the 1967 Legislature, like the 1965 session, failed to complete its work. Therefore it did not prorogue, but alternatively, under the Constitution, dissolved at midnight on January 2, 1968.

During the next seven years the Legislature returned to the tradition of completing its annual sessions before the end of the calendar year, although two of those sessions extended into the month of November. Efforts to complete the people's business were unsuccessful in both 1975 and 1977, when those legislatures failed to prorogue, but

instead continued to meet until the end of the year and then dissolved. Legislators successfully completed their business in the years 1976, 1978, 1979 and 1980, with extraordinary circumstances having forced special sessions in both 1978 and 1980.

A newly elected General Court convened on January 7, 1981. Since that date, except for a 30 day recess in August of that year and for a little over a month in 1988, when the Legislature prorogued on November 23rd [delaying for the remaining 38 days of 1988 a voter mandated pay cut], the Massachusetts Legislature has remained in session continuously.

The following is a list of the length of legislative sessions since 1965 showing the date of convening, the date the session ended and the total number of calendar days for the entire session[4]. The list is followed by a graphic display of that data.

YEAR	CONVENED	SESSION END	DAYS
1965	JAN. 6, 1965	JAN. 4, 1966	364
1966	JAN. 5, 1966	SEPT. 7, 1966	246
1967	JAN. 4, 1967	JAN. 2, 1968	364
1968	JAN. 3, 1968	JULY 20, 1968	200
1969	JAN. 1, 1969	AUG. 25, 1969	237
1970	JAN. 7, 1970	AUG. 25, 1970	237
1971	JAN. 6, 1971	NOV. 10, 1971	309
1972	JAN. 5, 1972	JULY 9, 1972	187
1973	JAN. 3, 1973	NOV. 30, 1973	331
1974	JAN. 2, 1974	AUG. 2, 1974	213
1975	JAN. 1, 1975	JAN. 6, 1976	371
1976	JAN. 7, 1976	OCT. 14, 1976	282
1977	JAN. 5, 1977	JAN. 3, 1978	364
1978	JAN. 4, 1978	JULY 12, 1978	190
1979	JAN. 3, 1979	NOV. 4, 1979	306
1980	JAN. 2, 1980	JULY 5, 1980	186
1981	JAN. 7, 1981	JAN. 5, 1982	334
1982	JAN. 6, 1982	JAN. 2, 1983	364
1983	JAN. 5, 1983	JAN. 3, 1984	363
1984	JAN. 4, 1984	JAN. 1, 1985	362
1985	JAN. 2, 1985	DEC. 31, 1985	364
1986	JAN. 1, 1986	JAN. 6, 1987	371
1987	JAN. 7, 1987	JAN. 5, 1988	364
1988	JAN. 6, 1988	NOV. 23, 1988	322
1989	JAN. 4, 1989	JAN. 2. 1990	364
1990	JAN. 3, 1990	JAN. 1, 1991	364
1991	JAN. 2, 1991	DEC. 31, 1991	364
1992	JAN. 1, 1992	JAN. 5, 1993	371
1993	JAN. 6, 1993	JAN. 4, 1994	364
1994	JAN. 5, 1994	JAN. 3, 1995	364
1995	JAN. 4, 1995	JAN. 2, 1996	364
1996	JAN. 3, 1996	DEC. 31, 1996	364
1997	JAN. 1, 1997	JAN. 6, 1998	371
1998	JAN. 7, 1998	JAN. 5, 1999	364
1999	JAN. 6, 1999	JAN. 4, 2000	364
2000	JAN. 5, 2000	JAN. 2, 2001	364
2001	JAN. 3, 2001	JAN. 1, 2002	363
2002	JAN. 2, 2002	DEC. 31, 2002	363
2003	JAN. 1, 2003	JAN. 6, 2004	371
2004	JAN. 7, 2004	JAN. 4, 2005	363
2005	JAN. 6, 2005	JAN. 3, 2006	363
2006	JAN. 4, 2006	JAN. 2, 2007	364

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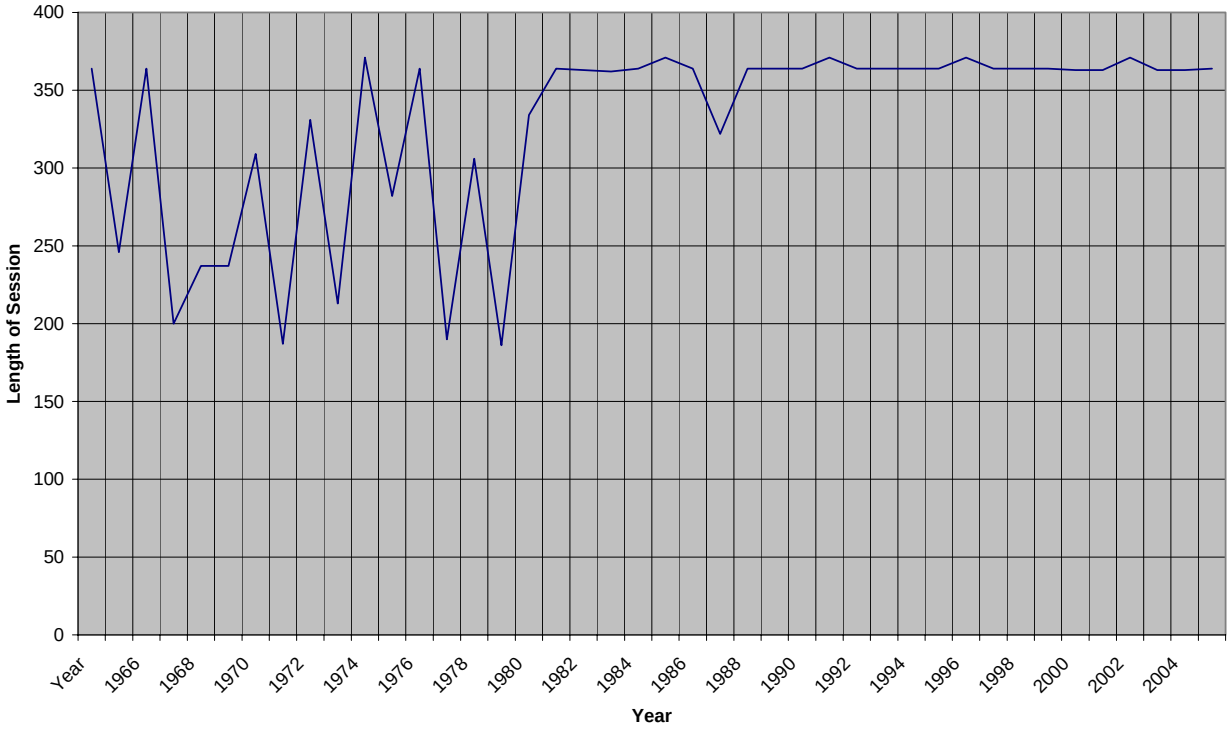

Many state constitutions prohibit one branch from adjourning for more than a couple of days without receiving the permission of the other branch. The Constitution of the Commonwealth, however, makes no reference to permission of the other branch in its mandate that neither the House nor the Senate may adjourn themselves for more than 2 days[5]. A recess or recesses amounting to not more than thirty days is authorized under the Constitution[6], but legislators have been extremely reluctant to take advantage of this provision, having used it just once, in August of 1981. Consequently (except as noted above), sessions of both the House and Senate have been held at least twice weekly since January of 1981.

By the late 1980s, the failure of the Legislature to end its sessions in a timely manner raised the anger level of many citizens who called for a limit to session length. They particularly feared the potential harm that could be caused by a lame-duck Legislature. These folks sincerely felt that the longer the Legislature stayed in session, the more chance that taxes would be raised, or that taxpayer money would be squandered. They believed, as had New York State Judge Gideon J. Tucker in 1866, that, "No man's life, liberty, or property are safe when the Legislature is in session."

The rules change that, in effect, defused citizen wrath, and arguably somewhat improved the image of the General Court called for the conclusion of all "formal" legislative business not later than the third Wednesday in November of the first session of the biennium and, in the second year, the last day of July. These restrictions on "formal" business would allow the legislature to meet after those dates, but only in "informal" session, at which measures advance exclusively by grant of unanimous consent of the membership.

When meeting in formal sessions the House and Senate may conduct any

and all business. They may engage in debate, and they may take roll call votes on bills and other measures presented to their chambers. Under the 1995 adopted rules, however, the General Court is prohibited from conducting *any* formal business during the last several weeks of the first annual session and the last five months of the second annual session. During those periods the Legislature, not having prorogued, is forced under the Constitution to meet and conduct business at least two days a week in informal sessions. During these informal sessions business may still be conducted, including the passage or rejection of legislation. The House rules specify that no roll call votes may be taken, and no formal debate is allowed during such informal sessions. So all votes taken during informal sessions are voice votes, but, in actuality, all business is conducted by unanimous consent. A quorum is always assumed, unless doubted, so members are not required to attend the informal sessions. Many members use this opportunity to spend time in their districts or elsewhere, or, if in the State House, address other legislative business; and therefore most do not attend the sessions. During an informal session a single rank and file member may unilaterally stop the passage of a bill by simply objecting to its advancement, with the threat of doubting the presence of a quorum his or her ammunition. This creates many interesting scenarios, especially when important legislation crucial to the operation of the state and advocated by leadership is held hostage by the lone objection of a rank and file member. Frequently the rank and file members who use this tactic are not actually opposed to the legislation to which they have registered the objection, but instead use the empowerment provided to them under this unique situation to leverage free and advance legislation that they support.

Leadership on the other hand, has found ways to empower themselves during these informal sessions, which often times are interspersed with many recesses and long periods of waiting on the rostrum for compromise language to be finalized, or for a committee to make a report, or for a meeting in the presiding officer's office to conclude, or for the other branch to take action on a bill. Informal days for clerks and other legislative staff therefore can be very painful, sometimes extending long into the evening and occasionally earning the dubious label, "Informal from Hell."

The days preceding the deadline for conducting formal business, and especially the final day, are typically very busy, as anxious members push for passage of legislation that they think might be too controversial to leave for chance at informal sessions, or that may require roll call votes, under the Constitution. These rush periods are somewhat analogous to a push to sine die, but then, after all of craziness ends, the session continues. In many instances, the anxiety of the members is not really necessary, as large numbers of bills, some of which have been major pieces of legislation, have made it through the legislative process during these blocks on the calendar that prohibit "formal" sessions. In the year 2000, for example, forty-one percent of the bills that became law during that session were passed by the General Court and put on the Governor's desk subsequent to the July 31 deadline for formal sessions. This supposed "down-time", therefore,

can be a very busy time for legislative staff.

Incidentally, due to this change in the legislative calendar, the Governor now has a 5 month opportunity to pocket veto measures during the second session of the General Court. Under the Constitution, a vote upon a vetoed bill must be taken by a call of the yeas and nays[7], and seeing that no roll calls may be taken during informal sessions, any bill that the Governor is opposed to is veto proof.

It should also be noted that the restrictions on House and Senate sessions do not apply to meetings of both branches sitting in joint constitutional convention. Therefore there was no violation of rules when the joint session by roll call vote gave initial approval to the initiative amendment to the Constitution relative to the definition of marriage, on the last day of the 2005-2006 General Court[8].

Additionally, there is a precedent for suspension of the rule, to allow the House and Senate to conduct formal business after the deadlines for formal sessions identified in the rule. On November 21, 2001, the final day allowed for formal sessions during the 2001 Session of the General Court, both the House and Senate adopted an order (by a yea vote of more than 2/3rds of both branches), which suspended Joint Rule 12A so that they could meet on December 5, 2001, for the purpose of overriding Gubernatorial vetoes of items and sections contained in the General Appropriation Bill, and also take roll call actions on Congressional redistricting legislation. The trick here is that, in order to avoid a Catch-22 situation, suspension of the rule to allow for the conducting of formal business subsequent to the deadline for formal sessions needs to be taken before that deadline. After the deadline, the motion would have to be placed before the body at an informal session, at which the objection of one lone rank and file member could stop it dead in its tracks.

It is unlikely that any other legislative body in the world operates under constraints and restrictions such as those faced by the Massachusetts Legislature due to the rules change adopted in 1995. That laws continue to pass and legislative authority is not diminished under such constraints is a testament to the adaptability and flexibility of the legislative process, the willingness of legislators to reach compromise and the genius of the American political system.

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[1] Mass. Const. Art. XLVIII.
[2] League of Women Voters of Massachusetts & others vs. Secretary of the Commonwealth, 425 Mass. 424 681 NE2d 842.
[3] Mass. Gen. Ct. Joint Rule 12A.
[4] Manual for the General Court.
[5] Mass. Const. Pt. 2, C.1, § 3, Art. 8 (House); Pt. 2, C.1, § 2, Art. 6 (Senate).
[6] Mass. Const., Amendments, Art. CII.
[7] Mass. Const. Pt. 2, C.1, § 1, Art. 2.
[8] Journal of the Joint Session, Jan. 2, 2007 (note, this proposal was defeated when voted upon by the next General Court, see Journal of the Joint Session, June 14, 2007. For a complete chronology of the events on this issue, see Legislative Administrators, Summer 2005, Summer 2006, Winter 2007, Spring 2007, Summer 2007, States at a Glance, Massachusetts).

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Fall	1997	Boulter, David E.	*Strategic Planning and Performance Budgeting: A New Approach to Managing Maine State Government*
Spring	2001	Carey, Patti B.	*Understanding the Four Generations in Today's Workplace*
Spring	2006	Hedrick, JoAnn	*Passage of Bills and Budgets in the United States System – A Small State's Perspective*
Spring	2001	Henderson, Dave	*Personnel Policies in the Legislative Environment*
Summer	2000	Jones, Janet E.	*RFP: A Mission Not Impossible*
Spring	1998	Larson, David	*Legislative Oversight of Information Systems*
Fall	1995	Rudnicki, Barbara	*Criticism*

ASLCS

Summer	2000	Burdick, Edward A.	*A History of ASLCS*

Case Studies

Fall	2003	Bailey, Mathew S.	*The Will of the People: Arizona's Legislative Process*
Summer	2000	Clemens and Schuler	*The Ohio Joint Select Committee Process*
Fall	2006	Clemens, Laura	*Ohio Case Regarding Open Meetings and Legislative Committees*
Fall	2003	Cosgrove, Thomas J.	*First-Term Speakers in a Divided Government*
Fall	2005	Garrett, John	*The Balance Between Video Conferencing by The Virginia General Assembly and Requirements of Virginia's Freedom of Information Act*
Spring	1996	Dwyer, John F.	*Iowa Senate's Management of Its Telephone Records Is Upheld by State Supreme Court*
Fall	2003	Gray, LaToya	*Virginia's Judicial Selection Process*
Spring	2003	Howe, Jerry	*Judicial Selection: An Important Process*
Fall	2002	Jamerson, Bruce F.	*Interpreting the Rules: Speaker's Resignation Challenges*
Fall	2007	James, Steven T.	*Government by Consensus- Restrictions on Formal Business in the Massachusetts Legislature Inspire Innovative Ways to Govern*
Fall	2003	Morales, Michelle	*I Will Survive: One Bill's Journey Through the Arizona Legislature*
Fall	1995	Phelps, John B.	*Publishing Procedural Rulings in the Florida House of Representatives*
Fall	2006	Phelps, John B.	*Florida Association of Professional Lobbyists, Inc. et. al. v. Division of Legislative Information Services of the Florida Office of Legislative Services et. al*
Fall	2006	Speer, Alfred W.	*The Establishment Clause & Legislative Session Prayer*

Fall	2001	Tedcastle, Ted	*High Noon at the Tallahassee Corral*
Spring	1998	Todd, Tom	*Nebraska's Unicameral Legislature: A Description and Some Comparisons with Minnesota's Bicameral Legislature*
Fall	2006	Wattson, Peter S.	*Judging Qualifications of a Legislator*

Historic Preservation

Fall	1995	Mauzy, David B.	*Restoration of the Texas Capitol*
Fall	2001	Wooton, James E.	*Preservation and Progress at the Virginia State Capitol*

International

Fall	2000	Grove, Russell D.	*The Role of the Clerk in an Australian State Legislature*
Fall	2000	Law, K.S.	*The Role of the Clerk to the Legislative Council of the Hong Kong Special Administrative Region of the People's Republic of China*
Spring	2004	MacMinn, E. George	*The Westminster System – Does It Work in Canada?*
Spring	2006	Phelps, John B.	*A Consultancy in Iraq*
Fall	2000	Pretorius, Pieter	*The Role of the Secretary of a South African Provincial Legislature*
Spring	2002	Schneider, Donald J.	*Emerging Democracies*

Miscellaneous

Summer	1999	Arinder, Max K.	*Planning and Designing Legislatures of the Future*
Fall	2000	Arinder, Max K.	*Back to the Future: Final Report on Planning and Designing Legislatures of the Future*
Winter	2000	Drage, Jennifer	*Initiative, Referendum, and Recall: The Process*
Fall	2005	Hodson, Tim	*Judging Legislatures*
Spring	1996	O'Donnell, Patrick J.	*A Unicameral Legislature*
Fall	2006	Miller, Steve	*Where is the Avant-Garde in Parliamentary Procedure?*
Spring	1998	Pound, William T.	*The Evolution of Legislative Institutions: An Examination of Recent Developments in State Legislatures and NCSL*
Fall	2000	Rosenthal, Alan	*A New Perspective on Representative Democracy: What Legislatures Have to Do*
Fall	1995	Snow, Willis P.	*Democracy as a Decision-Making Process: A Historical Perspective*

Process

Fall	1996	Burdick, Edward A.	*Committee of the Whole: What Role Does It Play in Today's State Legislatures?*
Fall	2006	Clift, Claire J.	*Reflections on the Impeachment of a State Officer*
Spring	2003	Clapper, Thomas	*How State Legislatures Communicate with the Federal Government*
Spring	2004	Dunlap, Matthew	*My Roommate Has a Mohawk and a Spike Collar: Legislative Procedure in the Age of Term Limits*
Winter	2000	Edwards, Virginia A.	*A History of Prefiling in Virginia*
Spring	2002	Erickson and Barilla	*Legislative Powers to Amend a State Constitution*

Spring	2001	Erickson and Brown	*Sources of Parliamentary Procedure: A New Precedence for Legislatures*
Summer	1999	Erickson, Brenda	*Remote Voting in Legislatures*
Spring	2004	James, Steven T.	*The Power of the Executive vs. Legislature – Court Cases and Parliamentary Procedure*
Spring	1997	Jones, Jerry G.	*Legislative Powers and Rules of Procedure: Brinkhaus v. Senate of the State of Louisiana*
Spring	1998	King, Betty	*Making Tradition Relevant: A History of the Mason's Manual of Legislative Procedure Revision Commission*
Fall	2002	Maddrea, B. Scott	*Committee Restructuring Brings Positive Changes to the Virginia House*
Fall	1997	Mayo, Joseph W.	*Rules Reform*
Spring	2002	Mina, Eli	*Rules of Order versus Principles*
Fall	2007	Robert and Armitage	*Perjury, Contempt and Privilege –Oh My! Coercive Powers of Parliamentary Committees*
Spring	2003	Tucker, Harvey J.	*Legislative Logjams Reconsidered*
Fall	2005	Tucker, Harvey J.	*The Use of Consent Calendars In American State Legislatures*
Summer	2000	Vaive, Robert	*Comparing the Parliamentary System and the Congressional System*
Fall	2001	Whelan, John T.	*A New Majority Takes Its Turn At Improving the Process*

Staff

Spring	2001	Barish, Larry	*LSMI: A Unique Resource for State Legislatures*
Fall	2001	Best, Judi	*Legislative Internships: A Partnership with Higher Education*
Spring	1996	Brown, Douglas G.	*The Attorney-Client Relationship and Legislative Lawyers: The State Legislature as Organizational Client*
Fall	2002	Gallagher and Aro	*Avoiding Employment-Related Liabilities: Ten Tips from the Front Lines*
Spring	2003	Geiger, Andrew	*Performance Evaluations for Legislative Staff*
Spring	1997	Gumm, Jay Paul	*Tap Dancing in a Minefield: Legislative Staff and the Press*
Fall	1997	Miller, Stephen R.	*Lexicon of Reporting Objectives for Legislative Oversight*
Winter	2000	Phelps, John B.	*Legislative Staff: Toward a New Professional Role*
Spring	2004	Phelps, John B.	*Notes on the Early History of the Office of Legislative Clerk*
Winter	2000	Swords, Susan	*NCSL's Newest Staff Section: "LINCS" Communications Professionals*
Fall	1996	Turcotte, John	*Effective Legislative Presentations*
Fall	2005	VanLandingham, Gary R.	*When The Equilibrium Breaks, The Staffing Will Fall – Effects of Changes In Party Control of State Legislatures and Imposition of Term Limits on Legislative Staffing*

Technology

Spring	1996	Behnk, William E.	*California Assembly Installs Laptops for Floor Sessions*
Spring	1997	Brown and Ziems	*Chamber Automation in the Nebraska Legislature*
Spring	2002	Crouch, Sharon	*NCSL Technology Projects Working to Help States Share Resources*

Spring	1997	Finch, Jeff	*Planning for Chamber Automation*
Summer	1999	Galligan, Mary	*Computer Technology in the Redistricting Process*
Summer	1999	Hanson, Linda	*Automating the Wisconsin State Assembly*
Fall	1995	Larson, David	*Emerging Technology*
Fall	1996	Pearson, Herman (et al)	*Reengineering for Legislative Document Management*
Fall	1995	Schneider, Donald J.	*Full Automation of the Legislative Process: The Printing Issue*
Spring	2006	Steidel, Sharon Crouch	*E-Democracy – How Are Legislatures Doing?*
Fall	2007	Sullenger, D. Wes	*Silencing the Blogosphere: A First Amendment Caution to Legislators Considering Using Blogs to Communicate Directly with Constituents*
Fall	1997	Tinkle, Carolyn J.	*Chamber Automation Update in the Indiana Senate*